# NORTH CAROLINA REPORTS

VOLUME 198

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# NORTH CAROLINA REPORTS

## VOL. 198

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

FALL TERM, 1929

SPRING TERM, 1930

REPORTED BY

ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1930

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| 1 " Eq. | " | 16 | " |
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| 2 " " | " | 19 | " |
| 3 & 4 " " | " | 20 | " |
| 1 Dev. & Bat. Eq. | " | 21 | " |
| 2 " " | " | 22 | " |
| 1 Iredell Law | " | 23 | " |
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| 9 Iredell Law | as | 31 | N. C. |
| 10 " " | " | 32 | " |
| 11 " " | " | 33 | " |
| 12 " " | " | 34 | " |
| 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, 1929
SPRING TERM, 1930

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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. |
| Zeb. V. Long | Fifteenth | Statesville. |
| 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

SPRING TERM, 1930.

Successful applicants for license to practice law at examination conducted by the Supreme Court at the Spring Term, 1930.

ASHBY, JAMES FOSTER.....Mount Airy.
ATKINSON, JAMES OSCAR, JR.....Elon College.
BANE, HENRY.....Durham.
BICKETT, MRS. FANNIE YARBOROUGH.....Raleigh.
BLACKSTOCK, HAL WEAVER.....Asheville.
BOSTICK, WADE HUNTSMAN.....Raleigh.
BRADLEY, VESTER CLEOPHAS.....Greensboro.
BRECKENRIDGE, MILLARD.....Chapel Hill.
BRIGHT, HARRY ORLO.....Winston-Salem.
BROWN, WADE EDWARD.....Blowing Rock.
CANADY, WALTER JACK.....Wilmington.
CARTER, ERNEST EDGAR.....Asheville.
CHAPPELL, LOUIS VERNON.....Elizabeth City.
COBB, ROBERT GLENN.....Lumber Bridge.
CROW, EARL PICKETT.....Wilmington.
DOUGLASS, WILLIAM CAMPBELL.....Kinston.
DOWTIN, ALFRED ANTHONY.....West Asheville.
ELMORE, HUBERT LYNWOOD.....Rocky Mount.
FAGGE, JAMES BUCHANAN, JR.....Leaksville.
FARMER, ISAAC WEISNER.....Clayton.
FARRELL, HENRY DARROCH.....Raleigh.
FOLGER, HENRY.....Mount Airy.
FOUST, RALPH LEO.....High Point.
FREEMAN, JAMES NEWTON.....Raleigh.
GARRETT, GLENN TERREL.....Rockingham.
GARRISS, GARLAND SMITH.....Durham.
GATLING, WILLARD ILLINGWORTH.....Durham.
GHOLSON, ALFRED WADDELL, JR.....Henderson.
GLENN, JOHN FRAZIER, JR.....Asheville.
GOODWYN, LEE WITTEN.....Charlotte.
GUTHRIE, MERCER WALL.....Durham.
HAMPTON, WILLIAM CHARLES.....Asheville.
HARRIS, HENRY RUSSELL, JR.....Seaboard.
HARWARD, HARVEY.....East Durham.
HAWKINS, CHARLES JACKSON.....Asheville.
HAYES, RAYMOND KYLE.....North Wilkesboro.
HEPLER, WILLIAM LEE, JR.....Greensboro.
HOYLE, WALTER.....Lincolnton.
HUGHES, LEROY WORTH.....Thomasville.
JOHNSON, CHARLES EDWARD.....Hertford.
JOHNSON, JAMES EDWIN.....Benson.
JONES, VERNIE OKLE.....Weaverville.
KITCHIN, ALVIN PAUL.....Scotland Neck.
LARKINS, JOHN DAVIS, JR.....Wilmington.
LEAKE, HARRY HENDERSON.....King.
LEVINESS, CHARLES THABOR.....Greensboro.
LEWIS, JOHN BAKER.....Farmville.
LINN, JAMES BIRNEY.....Chapel Hill.
LIVERMON, JAMES SHIELDS.....Scotland Neck.

LIPSCOMB, RAYMOND.....Asheville.
LIPSCOMB, THOMAS WALKER, JR.....Asheville.
LORD, BALFOUR THORN.....Asheville.
MCBRYDE, DONALD LACY.....Linden.
MCNIEL, THOMAS JEFFERSON.....Asheville.
MARTIN, LEROY BROWN.....Raleigh.
MEADS, GLENWOOD CROWDER.....Weeksville.
MOOREFIELD, JAMES FRANK.....Reidsville.
MORETZ, WILLIAM EMORY.....Argura.
NORRIS, JESSE ALLEN.....Durham.
O'MAHONEY, WILLIAM BENEDICT.....Charlotte.
PAGE, HUGH ALEXANDER.....Clayton.
PARKER, FRANCIS OGDEN.....Goldsboro.
PARSONS, DENNIS DEWEY.....High Point.
PFAFF, WALTER LOUIS.....Asheville.
POE, THOMAS WATSON.....Durham.
POWELL, HENRY THURMAN, JR.....Henderson.
PRIVOTT, WILLIAM SCOTT, JR.....Edenton.
RAINES, JOHN ARCHIE.....Raleigh.
REAP, CHARLES AUGUSTUS.....Albemarle.
REVELLE, JOHN CRAIG.....Conway.
RICHARDSON, BYRON PHILLIP.....Greensboro.
RIDAUGHT, MAURICE THEDFORD.....Wilmington.
ROCKWELL, HARRY.....Greensboro.
ROLAND, PARKER.....Chapel Hill.
RORER, WILLIAM ASBURY.....Charlotte.
ROYAL, MISS BEADIE ATRICE.....Salemburg.
SANDERS, EMERSON THOMPSON.....Durham.
SCOTT, RALPH JAMES.....Wake Forest.
SHARPE, WILLIAM DAVID POPE, JR.....Wilson.
SHORT, EUGENE HARVEY.....Rocky Mount.
SIMMONS, MISS MARGARET.....Asheville.
SMITH, LESTER AUDREY.....Durham.
SMITH, YOUNG MERRITT.....Chapel Hill.
SOWERS, NEIL SHARPE.....Statesville.
SPRATT, MISS DAPHNE IRENE.....Marion.
SPEIGHT, ELIAS CARR.....Rocky Mount.
STANLEY, EDWIN MONROE.....Kernersville.
STUDDERT, CLAY CARTER.....Washington.
UPCHURCH, TRUBY KENDALL.....Neuse.
VOLIVA, JAMES FREDERICK.....Belhaven.
WALLACE, LAWRENCE HENRY.....Smithfield.
WEBB, AMMIE ALDEN.....Rockingham.
WEBB, EDGAR GREEN.....Mount Airy.
WEINSTEIN, ROBERT.....Lumberton.
WELLS, KIRBY HUNT.....Charlotte.
WHITAKER, EDWIN BURCH.....Andrews.
WILLARD, CARL GARBER.....Raleigh.
WILLIAMS, ALFRED, JR.....Raleigh.
WILLIAMS, DAVID D'ARCY SHIVERS.....Asheville.
WILSON, MAX CLYDE.....Weaverville.
WINN, CHARLES BAXTER.....Liberty.
WOODLEY, GEORGE DALLAS.....Creswell.
YOUNG, ZEB VANCE.....Raleigh.
ZIMMERMAN, CHARLES TUCKER.....West Asheville.

# CALL OF CALENDAR IN SUPREME COURT.

## FALL TERM, 1930

*(Showing when records and briefs must be filed)*

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law takes place one week before the first Monday in each term.

FIRST DISTRICT appeals will be called Tuesday, 26 August, 1930.
Appeals must be docketed by 10 A. M. Tuesday, 12 August.
Appellant's brief must be filed by noon of 19 August.
Appellee's brief must be filed by noon of 23 August.

SECOND DISTRICT appeals will be called Tuesday, 2 September.
Appeals must be docketed by 10 A. M. Tuesday, 19 August.
Appellant's brief must be filed by noon of 26 August.
Appellee's brief must be filed by noon of 30 August.

THIRD-FOURTH DISTRICTS will be called Tuesday, 9 September.
Appeals must be docketed by 10 A. M. Tuesday, 26 August.
Appellant's brief must be filed by noon of 2 September.
Appellee's brief must be filed by noon of 6 September.

FIFTH DISTRICT appeals will be called Tuesday, 16 September.
Appeals must be docketed by 10 A. M. Tuesday, 2 September.
Appellant's brief must be filed by noon of 9 September.
Appellee's brief must be filed by noon of 13 September.

SIXTH DISTRICT appeals will be called Tuesday, 23 September.
Appeals must be docketed by 10 A. M. Tuesday, 9 September.
Appellant's brief must be filed by noon of 16 September.
Appellee's brief must be filed by noon of 20 September.

SEVENTH DISTRICT appeals will be called Tuesday, 30 September.
Appeals must be docketed by 10 A. M. Tuesday, 16 September.
Appellant's brief must be filed by noon of 23 September.
Appellee's brief must be filed by noon of 27 September.

EIGHTH-NINTH DISTRICTS appeals will be called Tuesday, 7 October.
Appeals must be docketed by 10 A. M. Tuesday, 23 September.
Appellant's brief must be filed by noon of 30 September.
Appellee's brief must be filed by noon of 4 October.

TENTH DISTRICT appeals will be called Tuesday, 14 October.
Appeals must be docketed by 10 A. M. Tuesday, 30 September.
Appellant's brief must be filed by noon of 7 October.
Appellee's brief must be filed by noon of 11 October.

ELEVENTH DISTRICT appeals will be called Tuesday, 21 October.
Appeals must be docketed by 10 A. M. Tuesday, 7 October.
Appellant's brief must be filed by noon of 14 October.
Appellee's brief must be filed by noon of 18 October.

TWELFTH DISTRICT appeals will be called Tuesday, 28 October.
Appeals must be docketed by 10 A. M. Tuesday, 14 October.
Appellant's brief must be filed by noon of 21 October.
Appellee's brief must be filed by noon of 25 October.

THIRTEENTH DISTRICT appeals will be called Tuesday, 4 November.
Appeals must be docketed by 10 A. M. Tuesday, 21 October.
Appellant's brief must be filed by noon of 28 October.
Appellee's brief must be filed by noon of 1 November.

FOURTEENTH DISTRICT appeals will be called Tuesday, 11 November.
Appeals must be docketed by 10 A. M. Tuesday, 28 October.
Appellant's brief must be filed by noon 4 November.
Appellee's brief must be filed by noon 8 November.

FIFTEENTH-SIXTEENTH DISTRICTS will be called Tuesday, 18 November.
Appeals must be docketed by 10 A. M. Tuesday, 4 November.
Appellant's brief must be filed by noon 11 November.
Appellee's brief must be filed by noon 15 November.

SEVENTEENTH-EIGHTEENTH DISTRICTS will be called Tuesday, 25 November.
Appeals must be docketed by 10 A. M. Tuesday, 11 November.
Appellant's brief must be filed by noon 18 November.
Appellee's brief must be filed by noon 22 November.

NINETEENTH DISTRICT appeals will be called Tuesday, 2 December.
Appeals must be docketed by 10 A. M. Tuesday, 18 November.
Appellant's brief must be filed by noon 25 November.
Appellee's brief must be filed by noon 29 November.

TWENTIETH DISTRICT appeals will be called Tuesday, 9 December.
Appeals must be docketed by 10 A. M. Tuesday, 25 November.
Appellant's brief must be filed by noon of 2 December.
Appellee's brief must be filed by noon of 6 December.

# SUPERIOR COURTS, FALL TERM, 1930

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

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

THIS CALENDAR IS UNOFFICIAL

## EASTERN DIVISION

### FIRST JUDICIAL DISTRICT

**Fall Term, 1930—Judge Harris.**

Beaufort—July 21‡; Sept. 29† (2); Nov. 17; Dec. 15†.
Gates—July 28; Dec. 8.
Currituck—Sept. 1.
Chowan—Sept. 8; Dec. 1.
Pasquotank—Sept. 15†; Oct. 6† (A) (2); Nov. 3 (2).
Camden—Sept. 22.
Hyde—Oct. 13.
Dare—Oct. 20.
Perquimans—Oct. 27.
Tyrrell—Nov. 24.

### SECOND JUDICIAL DISTRICT

**Fall Term, 1930—Judge Cranmer.**

Washington—July 7; Oct. 20†.
Nash—Aug. 18*; Oct. 6†; Nov. 24*; Dec. 1†.
Wilson—Sept. 1; Sept. 29†; Oct. 27† (2); Dec. 15.
Edgecombe—Sept. 8; Oct. 13†; Nov. 10† (2).
Martin—Sept. 15 (2); Nov. 17† (A) (2); Dec. 8.

### THIRD JUDICIAL DISTRICT

**Fall Term, 1930—Judge Sinclair.**

Hertford—July 28*; Oct. 13*; Oct. 20†; Nov. 24† (A).
Northampton—Aug. 4; Sept. 1† (A); Oct. 27 (2).
Halifax—Aug. 11 (2); Sept. 29† (A) (2); Oct. 20* (A); Nov. 24* (2).
Bertie—Aug. 25; Sept. 8†; Nov. 10 (2).
Warren—Sept. 15 (2).
Vance—Sept. 29*; Oct. 6†.

### FOURTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Devin.**

Lee—July 14 (2); Sept. 15†; Oct. 27; Oct. 3†.
Chatham—July 28† (2); Oct. 20.
Johnston—Aug. 11*; Sept. 22† (2); Dec. 8 (2).
Wayne—Aug. 18; Aug. 25†; Oct. 6† (2); Nov. 24 (2).
Harnett—Sept. 1; Sept 29† (A) (2); Nov. 10† (2).

### FIFTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Small.**

Pitt—Aug. 18†; Aug. 25; Sept. 8†; Sept. 22†; Oct. 20†; Oct. 27; Nov. 17†(A).
Craven—Sept. 1*; Sept. 29† (2); Nov. 17† (2).
Jones—Sept. 15.
Carteret—Oct. 13; Dec. 1†.
Pamlico—Nov. 3 (2).
Greene—Dec. 8 (2).

### SIXTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Barnhill.**

Duplin—July 7*; Aug. 25† (2); Sept. 29*; Dec. 1; Dec. 8†.
Onslow—July 14†; Oct. 6; Oct. 27†; Nov. 17† (2).
Sampson—Aug. 4 (2); Sept. 8† (2); Oct. 20*; Dec. 1† (A).
Lenoir—Aug. 18*; Oct. 13; Nov. 3† (2); Dec. 8* (A).

### SEVENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Midyette.**

Wake—July 7*; Sept. 8*; Sept. 15 (2); Sept. 29†; Oct. 6*; Oct. 20† (2); Nov. 3*; Nov. 24† (2); Dec. 8* (2).
Franklin—Aug. 25† (2); Oct. 13*; Nov. 10† (2).

### EIGHTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Daniels.**

New Hanover—July 21*; Sept. 8*; Sept. 15†; Oct. 13† (2); Nov. 10*; Dec. 1† (2).
Columbus—Aug. 18 (2); Nov. 17† (2).
Brunswick—Sept. 1†; Sept. 29.
Pender—Sept. 22; Oct. 27† (2).

### NINTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Nunn.**

Robeson—July 7*; July 14; Sept. 1† (2); Sept. 29 (2); Nov. 3*; Dec. 1† (2).
Bladen—Aug. 4†; Oct. 13*.
Hoke—Aug. 18; Nov. 10.
Cumberland—Aug. 25*; Sept. 15† (2); Oct. 20† (2); Nov. 17*.

### TENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Grady.**

Durham—July 14*; Sept. 8† (A); Sept. 15† (2); Oct. 6*; Oct. 27† (2); Dec. 1*.
Granville—July 21; Oct. 20†; Nov. 10 (2).
Person—Aug. 4; Oct. 13.
Alamance—Aug. 11*; Sept. 1† (2); Nov. 24*.
Orange—Aug. 18; Aug. 25; Sept. 29† Dec. 8.

## WESTERN DIVISION

### ELEVENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Finley.**

Ashe—July 7† (2); Oct. 13*.
Forsyth—July 21* (2); Sept. 8† (2); Sept. 29 (2); Nov. 3* (2); Nov. 17† (A) (2); Dec. 1* (A); Dec. 8*.
Rockingham—Aug. 4* (2); Nov. 17† (2).
Caswell—Aug. 18; Oct. 13† (A); Dec. 1.
Surry—Aug. 25 (2); Oct. 20 (2).
Alleghany—Sept. 22.

### TWELFTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Schenck.**

Stokes—June 30*; July 7†; Oct. 13*; Oct. 20†.
Guilford—July 7* (A); July 28*; Aug. 4† (2); Aug. 25† (2); Sept. 15* (2); Sept. 29† (2); Oct. 20* (A); Oct. 27† (2); Nov. 10*; Nov. 17† (A) (2); Dec. 1† (2); Dec. 15*.
Davidson—July 14† (2); Aug. 18*; Sept. 8†; Nov. 17 (2).

### THIRTEENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge McElroy.**

Stanly—July 7; Oct. 6†; Nov. 17.
Richmond—July 14†; July 21*; Sept. 1†; Sept. 29*; Nov. 3†.
Union—July 28*; Aug. 18† (2); Oct. 13; Oct. 20†.
Moore—Aug. 11*; Sept. 15†; Sept. 22† (A); Dec. 8†.
Anson—Sept. 8†; Sept. 22*; Nov. 10†.
Scotland—Oct. 27†; Nov. 24 (2).

### FOURTEENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Moore.**

Mecklenburg—July 7* (2); Aug. 25*; Sept. 1† (2); Sept. 29*; Oct. 6† (2); Oct. 27† (2); Nov. 10*; Nov. 17† (2).
Gaston—Aug. 11†; Aug. 18*; Sept. 15† (2); Oct. 20*; Dec. 1† (2).

### FIFTEENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Clement.**

Montgomery—July 7; Sept. 22†; Sept. 29; Oct. 27†.
Randolph—July 14† (2); Sept. 1*; Dec. 1 (2).
Iredell—July 28 (2); Nov. 3 (2).
Cabarrus—Aug. 11 (3); Oct. 13 (2).
Rowan—Sept. 8 (2); Oct. 6†; Nov. 17 (2).

### SIXTEENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Shaw.**

Catawba—June 30 (2); Sept. 1† (2); Nov. 10*; Dec. 1† (A).
Lincoln—July 14; Oct. 13; Oct. 20†.
Cleveland—July 21 (2); Oct. 27 (2).
Burke—Aug. 4 (2); Sept. 22† (3); Dec. 8* (2).
Caldwell—Aug. 18 (2); Nov. 24 (2).

### SEVENTEENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Stack.**

Avery—June 30† (3); Oct. 13 (2).
Mitchell—July 21†; Oct. 27 (2).
Wilkes—Aug. 4 (2); Sept. 29† (2).
Yadkin—Aug. 18*; Dec. 8† (2).
Davie—Aug. 25; Dec. 1†.
Watauga—Sept. 1 (2).
Alexander—Sept. 15 (2).

### EIGHTEENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Harding.**

McDowell—July 7† (3); Sept. 8 (2).
Transylvania—July 28 (2); Dec. 1 (2).
Yancey—Aug. 11† (2); Oct. 20 (2).
Rutherford—Aug. 25† (2); Nov. 3 (2).
Polk—Sept. 22 (2).
Henderson—Oct. 6 (2); Nov. 17† (2).

### NINETEENTH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Oglesby.**

(1) Buncombe—June 30; July 7† (2); July 28; Aug. 4† (2); Aug. 18; Sept. 1† (2); Sept. 15; Sept. 29† (2); Oct. 20; Nov. 3† (2); Nov. 17; Dec. 1† (2); Dec. 15.
Madison—Aug. 25; Sept. 22; Oct. 27; Nov. 24.

### TWENTIETH JUDICIAL DISTRICT

**Fall Term, 1930—Judge Webb.**

Haywood—July 7 (2); Sept. 15† (2); Nov. 24 (2).
Swain—July 21 (2); Oct. 20 (2).
Cherokee—Aug. 4 (2); Nov. 3 (2).
Macon—Aug. 18 (2); Nov. 17; Nov. 24 (A).
Graham—Sept. 1 (2).
Clay—Sept. 22 (A); Sept. 29.
Jackson—Oct. 6 (2).

*For criminal cases only.
†For civil cases only.
‡For jail and civil cases.
(A) Special Judge to be assigned.
(1) Special civil term three weeks each month except May and December.

# 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 September. ELSIE MCM. CAMERON, 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.
E. C. GEDDIE, 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.

#### OFFICERS

E. L. GAVIN, United States District Attorney, Greensboro.
T. C. CARTER, Assistant United States Attorney, Greensboro.
A. E. TILLEY, Assistant United States Attorney, Greensboro.
G. H. MORTON, 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.

### OFFICERS

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

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# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

## RALEIGH

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## FALL TERM, 1929

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THOMAS M. HURT v. SAVONA MANUFACTURING COMPANY, A CORPORATION, LUM BRUTON AND WILL FOX.

(Filed 27 November, 1929.)

**1. Removal of Causes C b—Allegations of complaint are controlling as to whether cause is joint or separable.**

Upon a petition for removal of a cause from the State to the Federal Court on the ground of separable controversy the allegations of the complaint are controlling upon the question as to whether the cause is joint or separable, and where the facts alleged in the complaint set forth the duty and breach of duty by each of the defendants, and that such breach proximately caused the injury in suit, the complaint alleges a joint tort and the petition will be denied.

**2. Same—Petition for removal must allege facts compelling the conclusion that joinder was fraudulent as matter of law.**

A petition for removal of a cause from the State to the Federal Court on the ground of fraudulent joinder must allege facts which lead unerringly to, or rightly engender and compel the conclusion that the joinder is fraudulent as a matter of law, and a mere traverse of the facts alleged in the complaint is insufficient, and such fraudulent joinder cannot be established where by the settled law of the State in which the action is brought, and in which it arose, both defendants are jointly liable.

APPEAL by plaintiff from *Shaw, J.*, at October Term, 1929, of MECKLENBURG, from order of removal to United States Court. Reversed.

The complaint sets forth, in substance, the following allegations of fact: That plaintiff was a loom-fixer in weave-room of Savona Manufacturing Company. That Will Fox was overseer and Lum Bruton was second hand of said weave-room; that plaintiff, in his employment, was subject to the orders and directions of the said Will Fox and Lum Bruton; that Will Fox, overseer, and Lum Bruton, second hand, had charge of said weave-room and of the machinery therein, and were responsible for keeping and operating the same in a safe and proper condition; that in said weave-room the pulley on the overhead shaft was not in line with the loom pulley; that the connecting belt would not run on the face of the two pulleys, but would slip over and frequently slip off the overhead pulley and become wrapped around the shaft; that several times before 2 April, 1929, said belt had slipped off while the machinery was in operation, and plaintiff called the attention of Will Fox, overseer, and Lum Bruton, second hand, to this condition; that each of them saw the said condition, acknowledged the danger thereof and promised to have the pulleys put in line, and eliminate the danger; that on the Saturday before plaintiff was injured the dangerous condition of the machinery was called to the attention of Will Fox, overseer, at which time the plaintiff suggested that he be allowed to make the necessary changes, and thereupon said Will Fox, overseer, told the plaintiff to do his own work, which did not involve any work on the overhead shafting and machinery, and that he, the said Will Fox, overseer, would see that the position of the overhead pulley was changed so that it would be in line with the loom pulley; that was on Saturday afternoon, and that the said change was not made and the same condition was allowed to exist up to the time (Tuesday) the plaintiff was injured; that the connecting belt was thrown off the pulley with such force as to knock off the belt guide, which struck and injured the plaintiff, who was standing nearby, the machinery at the time being in operation and making 350 revolutions per minute or thereabout; that at the time plaintiff was injured he was engaged, or about to engage, in fixing a loom, and was under the directions of Will Fox, overseer, and Lum Bruton, second hand.

There is no dispute about the fact that the defendant filed its petition and bond in due time, and that all formalities of law were complied with. The petition of defendant for removal to the United States Court alleges, in substance: That the plaintiff, for five years prior to his injury, had been a loom-fixer in the employment of the defendant, petitioner. At the time of his injury the plaintiff was attempting to correct a belt which ran from a pulley to a loom. Instead of stopping the machinery, the plaintiff took a quill about 7 inches long and began working with the moving belt. He was doing this in his own way, free from the

supervision or instruction of any one, and while thus engaged, received the injury. The work in which the plaintiff was engaged at the time of his injury was that of plaintiff alone, and it was no part of Bruton's or Fox's duties, and no part of their duties to furnish plaintiff a reasonably safe place to work. Neither of the individual defendants were present at the time of the plaintiff's injury and neither of them were in any way, either directly or indirectly, connected with said injury.

The court below rendered the following judgment: "Upon hearing the petition and the appeal from the clerk, and, upon the argument of this motion, the court is of the opinion that this is a proper case for removal, and the petition of the defendant, Savona Manufacturing Company, and the bond filed therewith, are hereby accepted, and this case is ordered removed to the United States District Court for the Western District of North Carolina, at Charlotte, and the order of the clerk is reversed. It is further ordered that this court proceed no further in this action." Plaintiff assigned error and appealed to the Supreme Court.

*Stewart, MacRae & Bobbitt for plaintiff.*
*John M. Robinson for defendant.*

CLARKSON, J. The question involved: Is the nonresident defendant, Savona Manufacturing Company, legally entitled under its removal petition to have this action transferred to the United States District Court for the Western District of North Carolina for trial by reason of the allegations of its petition that Lum Bruton and Will Fox, resident defendants, were joined as defendants fraudulently and for the purpose of depriving petitioner of its alleged right of removal? We think not.

This action is for actionable negligence. All the defendants are charged with a duty they owed to plaintiff and for the nonperformance of that duty, which was the proximate cause of plaintiff's injury, they are sued as joint *tort-feasors.* The facts alleged in the complaint of plaintiff sets forth the duty and breach in detail. Under the facts in this action, as alleged in the complaint, the allegations are controlling, upon the question as to whether the cause of action is joint or separable.

In *Crisp v. Fibre Co.,* 193 N. C., at p. 85, it is said: "The facts alleged in the petition for removal neither compel nor point unerringly to the conclusion that the joinder in the instant case is a fraudulent one and made without right. We hold, therefore: (1) That when a motion to remove a suit or action from the State court to the District Court of the United States for trial is made on the ground of an alleged separable controversy, the question of separability is to be determined by the manner in which the plaintiff has elected to state his cause of action,

whether separately or jointly, and, for this purpose, the allegations of the complaint are controlling. *Morganton v. Hutton,* 137 N. C., 736. (2) That when the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State Court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true. To warrant a removal in such case, however, the facts alleged in the petition must lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right. *Fore v. Tanning Co.,* 175 N. C., 584." *Swain v. Cooperage Co.,* 189 N. C., 528; *Fenner v. Cedar Works,* 191 N. C., 208; *Givens v. Savona Mfg. Co.,* 196 N. C., 377; *Chicago, etc., R. Co. v. McWhirt,* 243 U. S., 426, 61 L. Ed., 830, 37 Sup. Ct., 392; *Johnston v. Utility Co.,* 197 N. C., 393; *Slaughter v. Lumber Co.,* 197 N. C., 395.

Fraudulent joinder of a resident with a nonresident defendant, for the purpose of defeating the removal of the cause to a Federal Court, cannot be established, where, by the settled law of the State in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit. *Chicago B. & Q. R. Co. v. Willard,* 220 U. S., 413, 31 Sup. Ct. Rep., 460.

In the present action the defendant traversed the facts in the complaint. The case of *R. R. v. Lloyd,* 166 N. C., 24, was affirmed by the Supreme Court of the United States. See 239 U. S., 496, 60 Law Ed., 402. In that case, speaking to the subject, the Court said: "In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of the cause of action, good upon its face. *Chesapeake & O. R. Co. v. Cockrell,* 232 U. S., 146, 58 L. Ed., 544, 34 Sup. Ct. Rep., 278. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud that the State court is required to surrender its jurisdiction."

Viewed in the light of the above principles set forth in the authorities cited, the record in the instant case fails to disclose a right of removal.

Reversed.

W. J. SHUFORD, RECEIVER OF THE Y. & B. CORPORATION, v. J. YARBROUGH ET AL.

(Filed 27 November, 1929.)

**1. Pleadings D b—Action will be dismissed for misjoinder of parties and causes, but will be divided where there is misjoinder of causes.**

Upon demurrer, when it appears from the complaint that there is a misjoinder of both parties and causes of action, the action will be dismissed, C. S., 511, but where it only appears that there is a misjoinder of causes, the case will be retained and the several causes divided into as many actions as may be necessary for the proper disposition of the case. C. S., 516.

**2. Pleadings D e—Upon overruling of demurrer and appeal taken therefrom it is error for court to set time for filing answer.**

Where a demurrer to an action upon the ground of misjoinder of parties and causes of action has been overruled in the Superior Court and the judgment of the Superior Court is affirmed in the Supreme Court, the demurring party has the statutory right to file an answer at any time within ten days after the Superior Court has received the certificate of the opinion of the Supreme Court, of which statutory right the Superior Court cannot deprive him, C. S., 515, and it is error for the trial court in overruling the demurrer to require the defendant to file an answer at a fixed time, there being no finding that the demurrer was frivolous. C. S., 599.

APPEAL by defendants from *Stack, J.*, at April Term, 1929, of MECKLENBURG.

The plaintiff brought suit against the defendants as directors of the Y. & B. Corporation to recover a large sum of money for the benefit of the creditors and the stockholders of the corporation on account of the alleged misapplication of its assets. The defendants demurred to the complaint on the ground that it shows a misjoinder of parties and causes of action. The demurrer was overruled; judgment by default was given for want of an answer; and the cause was then referred to a referee who was to hear the evidence, ascertain the liability, if any, of the defendants, and to make his report to the court. The judgment contains this provision: "If the defendants shall file their answer to the complaint in the office of the Superior Court of Mecklenburg County on or before 10 o'clock a.m., 13 April, 1929, then and in that event the part of this judgment which is by default for want of an answer shall stand stricken out and the referee will hear the case on all the pleadings on file and report his findings and conclusions as required above." The defendants excepted and appealed.

*Preston & Ross and E. B. Cline for receiver.*

*Tillett, Tillett & Kennedy for unsecured creditors.*

*Fred B. Helms, F. W. Orr, Jake F. Newell, Wade H. Williams, John Newitt, Fred Hunter and Pharr & Currie for appellants.*

ADAMS, J. A defendant may demur to the complaint when it appears upon the face thereof that . . . there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united. C. S., 511. If it appears from the complaint that there is a misjoinder both of parties and of causes of action and a demurrer is interposed, not only will the demurrer be sustained, but the action will be dismissed. *Bank v. Angelo,* 193 N. C., 576. But if the demurrer is sustained for the reason that several causes of action have been improperly united, the several causes may be divided into as many actions as may be necessary for their proper determination. C. S., 516; *Gattis v. Kilgo,* 125 N. C., 133.

The defendants demurred to the complaint for an alleged defect of parties plaintiff and defendant, for an alleged misjoinder of causes of action, and for the alleged insufficiency of the complaint to state a cause of action. We need not discuss each of these phases in its relation to the allegations in the complaint; the demurrer admits the allegation that in order to pay the creditors it is necessary to sue the directors. There is no misjoinder of parties, and there being no fatal misjoinder of causes of action the demurrer was properly overruled. *Trust Co. v. Peirce,* 195 N. C., 717. Even if two causes of action are to some extent inconsistent, the complaint is not always on that account demurrable. *Worth v. Trust Co.,* 152 N. C., 242.

The judgment, however, is not free from error. If a judgment overruling a demurrer is affirmed on appeal to the Supreme Court the demurring party may file an answer at any time within ten days after the lower court receives the certificate of the Supreme Court. C. S., 515. This is a statutory right of which the trial court cannot deprive him. There is no finding that the demurrer was frivolous. C. S., 599. The judgment is affirmed to the extent of overruling the demurrer; the remainder of it is stricken out, and as thus modified the judgment is affirmed.

Modified and affirmed.

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F. M. YOUNGBLOOD, CHAS. P. MOODY, G. D. MOODY, H. B. ASBURY, AND W. F. MOODY, PARTNERS, TRADING AS F. M. YOUNGBLOOD & COMPANY, v. HUGH E. TAYLOR.

(Filed 27 November, 1929.)

**1. Accord and Satisfaction A a—Where there are two accounts a check for account in full for amount of one is not satisfaction of the other.**

Where the defendant maintains two accounts with the plaintiff, one for dry goods and one for groceries, his check cashed, purporting upon its face for account in full, drawn for an amount corresponding with one

account then due, cannot be successfully set up as an accord and satisfaction for them both, the other account not being due when the check so stated and given and received.

**2. Interest A a—Where judgment is recovered on an account the interest runs from the time amount was due.**

Where a judgment has been correctly rendered as to the amount of an account due by the defendant to the plaintiff, but the interest according to the judgment appears to have been awarded from the wrong date, upon consent of the parties as to the correct amount of the interest, the judgment will be accordingly modified and affirmed on appeal.

APPEAL by defendant from *Stack, J.*, at September Term, 1929, of ROWAN.

Civil action to recover $183.10, with interest from 30 December, 1927, alleged balance due on "dry goods" store account.

From a verdict and judgment in favor of plaintiffs for $183.10, with interest from 21 June, 1927, the defendant appeals, assigning errors.

*Armfield, Sherrin & Barnhardt for plaintiffs.*
*George R. Uzzell for defendant.*

STACY, C. J. It is in evidence that on 1 August, 1927, defendant gave plaintiffs a check for $379.81, with notation, "For Acct. in full," appearing thereon, which was cashed by plaintiffs. Defendant pleads this check in bar of plaintiff's claim, under the principle of accord and satisfaction as announced in *Hardware Co. v. Farmers Federation,* 195 N. C., 702, 143 S. E., 471, and cases there cited.

It appears, however, that the check of 1 August, 1927, was for the exact amount of defendant's "grocery account," and that his "dry goods account" of $183.10 was not then due. Plaintiffs' right to recover for the undisputed "dry goods account" is supported by the decisions in *Oil Co. v. Moore,* 195 N. C., 305, 141 S. E., 926, *Refining Corp. v. Sanders,* 190 N. C., 203, 129 S. E., 607, and *Bogert v. Manufacturing Co.,* 172 N. C., 248, 90 S. E., 208.

But as the dry goods account was not due until 30 December, 1927, it was error to allow interest from 21 June, 1927. This was an inadvertence, and plaintiffs consent to a modification of the judgment. As thus modified, the verdict and judgment will be upheld.

Modified and Affirmed.

WM. A. BURKE, ADMINISTRATOR OF THE ESTATE OF WM. A. BURKE, JR., v. CAROLINA COACH COMPANY AND DR. L. B. CAPEHEART.

(Filed 27 November, 1929.)

**1. Highways B c—Parking on highway in violation of C. S., 2621(66) must be proximate cause to be actionable.**

Negligence in parking an automobile on a public highway in violation of C. S., 2621(66)), to be actionable must be a proximate cause of the injury in suit, and where the plaintiff fails to show by his evidence that such violation was a proximate cause of his injury, a judgment as of nonsuit is properly allowed.

**2. Highways B c—Speed on highway must be proximate cause of injury to be actionable.**

Where in an action to recover damages for the killing of plaintiff's intestate alleged to have been negligently caused by the driver of defendant's bus in exceeding the statutory speed limit, C. S., 2618, it is required that the negligence complained of must have been a proximate cause of the injury, and where the evidence discloses that the accident occurred when the driver of the car in which the plaintiff's intestate was riding as a guest attempted to pass a car parked on the highway, and that it was struck by the bus on the side of the road properly and lawfully occupied by the bus, with conflicting evidence as to the speed of the bus, and that when the bus stopped it was almost entirely off the hard surface, and that it stopped within its length, and that after the accident the parked car was about the rear of the bus: *Held*, the sole proximate cause of the accident was the improvident attempt of the driver of the car in which the intestate was riding to pass the parked car, and a judgment as of nonsuit was properly entered.

**3. Highways B a—In this case held: contention of plaintiff that defendant was on wrong side of road not supported by allegations or evidence.**

Where there is no allegation in the complaint in an action to recover damages for the negligent killing of plaintiff's intestate that the defendant's bus which collided with an automobile in which the intestate was riding as a passenger was on the wrong side of the road in violation of statute, the testimony of a witness upon this point is insufficient to deny defendant's motion as of nonsuit when taken in its related parts it tends to show to the contrary.

CIVIL ACTION, before *McElroy, J.*, at September Term, 1929, of FORSYTH.

The plaintiff is the duly appointed administrator of W. A. Burke, Jr., a boy fourteen years of age, who was killed on 16 July, 1928, as the result of a collision between a bus owned and operated by defendant, Carolina Coach Company, and an automobile driven by Mrs. A. B. Pritchard. Plaintiff's intestate was a guest in said automobile, sitting on the back seat at the time of the collision.

Plaintiff alleged that the car driven by Mrs. Pritchard was traveling along highway No. 10 toward Winston-Salem, and had reached a point between Mebane and Graham, approaching a car owned by the defendant, L. B. Capeheart, which was also headed west and parked on the highway. Plaintiff further alleged that the defendant, Capeheart, had parked his car in violation of the law, and that "said Mrs. A. B. Pritchard, necessarily in proceeding along the highway, had to attempt to pass to the left of defendant's (Dr. L. B. Capeheart's) automobile; that while she was attempting to do so, in the exercise of due care, the motor bus of the defendant, Carolina Coach Company, being operated at an unlawful and excessive rate of speed, as above set forth, collided with the automobile in which plaintiff's intestate was riding; that as a result of said collision plaintiff's intestate received injuries, from which he died in less than two hours thereafter." The bus was proceeding from Greensboro toward Durham, and, therefore, in an opposite direction from that in which the car driven by Mrs. Pritchard was traveling.

Plaintiff further alleged that the death of his intestate was proximately caused by the negligence of defendant, Capeheart, "in unlawfully parking his automobile in the public highway," and also as a result "of negligence of defendant, Carolina Coach Company, in operating its motor bus at an unlawful rate of speed and in failing to keep a proper lookout."

The defendants offered no evidence.

The only negligence alleged against the defendant Capeheart was that he had unlawfully parked his car upon the highway.

A witness for plaintiff testified with respect to the Capeheart car as follows: "When I heard the collision I went to the window and looked out, and then hurried up there. When I looked out the window I just saw there was a wreck, and I hurried up there. I saw a car stopped on the highway before the wreck. As well as I remember, it was something between an orange and a yellow car. As well as I remember, the driver of that car had his left arm out of the window, doing something to his windshield. That car was stationary, about half way on and half way off the hard surface of the road. There is room enough there for a car to park off the hard surface road on both sides of the hard surface. I didn't pay much attention to the car that I had seen parked there when I got out to the wreck, but it was to the right, facing my house, on its right, across the hard surface from the bus, about even with the bus, slightly back of it, headed toward Burlington, or Winston-Salem. . . When I got to the scene of the wreck the bus and the car (in which plaintiff's intestate was riding) were together on the bus' right side of the road. Only the left-hand back wheel of the bus was on the hard surface. . . . The road is straight in each direction from the point of

the collision for about three-quarters of a mile. . . . The dark portion of the hard surface road there is about sixteen feet wide. . . The paved portion of the highway, including the border, is about eighteen feet wide. . . . The right-hand front wheel of the bus was slightly off the shoulder, toward the ditch. The bus had started down the slope. . . . If the grade had been steep enough it would have turned over if it had gone any further down. . . . When I got there the bus was entirely off the black portion of the highway and the front wheels were entirely off the light concrete border. . . . When I got there the cars were hooked up, the left front corner of the bus was about the center and nearer to the rear of the Essex. The Essex showed that the impact was made just about the center of the Essex car with the front corner of the bus on the left-hand side. Everything that I saw was on the extreme right side of the highway going toward Mebane and as near the ditch as a car could be driven. . . . The orange or yellow car (Capeheart's car) . . . was about opposite or a little past the center of the bus when I got up there. . . . At least half of it was on the dirt road. . . . The marks of the bus tire were on the hard surface, the asphalt, out in the road, for about the length of the bus, straight from the back tire. I couldn't say whether the bus ran more than its length after the application of the brakes. If there was more than one line of marks I didn't see them. . . . The line I saw was leading from the back wheel of the bus out toward the center of the road. It did lead more than three feet from the edge of the cement toward the center. It led to about where the bus wheel ought to have been if it had been on the hard surface, if it was traveling along in the usual and ordinary way."

Another witness for plaintiff, who was traveling in the same direction with the bus, that is, east toward Durham, testified that it was raining, and that she stopped her car to put up the windows in order to keep out the rain. While parked for this purpose a bus passed her. She testified: "My car was parked about 300 yards from the scene of the collision. I have an opinion as to how fast the bus was going when it passed me. In my opinion it was going between 45 and 50 miles an hour. It was going up grade at that time. After the bus passed me I heard the impact and collision, and I started toward the collision. . . . The road is practically straight at the scene of the wreck. My car was parked in a kind of a dip. . . . I couldn't see the collision from where I had parked my car because of the incline just in front of my car. I had to go over that incline before I could see. . . . From where I had stopped my car up to the straight-away there is right much grade. . . . I was down in the dip. There is considerable grade going up from where my car was parked going east. After you get to the top of the incline the

road is straight for something like a mile. I don't know how fast it (bus) was going, but I think it was going 45 or 50 miles an hour." Another witness for plaintiff testified: "The bus hit the Pritchard car about the back of the front seat, about half way back of the body, and the motor is in front of that. The bus was tilted on account of being driven off the road." Another witness for plaintiff testified: "I saw some skid marks there in the road from this bus. I couldn't tell you how far back of the bus, exactly, but it was at least the bus' length. They started about in the center of the road, but didn't stay in the center. It skidded over to the side. . . . It led off on the right-hand side going toward Mebane. I don't know where the mark ended. It ended under the bus. . . . There were lines from both wheels to the bus, both sets. The one on the right went off in the dirt; there were two sets of lines where it started. It started in the middle of the road, and the right-hand wheels went clear off the asphalt. I saw one line for the left wheels and one for the right. The one for the right wheels started in the center and went clear off the asphalt. The left one started in the center and followed this wheel."

At the conclusion of plaintiff's evidence the judge of the county court nonsuited the case as to both defendants. An appeal was taken to the Superior Court upon assignments of error, and the judge of the Superior Court overruled the assignments of error and entered judgment of nonsuit, from which judgment the plaintiff appealed.

*John D. Slawter and Parrish & Deal for plaintiff.*
*Hastings & Booe and Manly, Hendren & Womble for defendant.*

BROGDEN, J. The only allegation of negligence against the defendant, Capeheart, was that his car, referred to in the evidence as the Buick or orange colored car, was parked on the highway in violation of C. S., 2621 (66). There was evidence to the effect that rain was falling and that the defendant, Capeheart, had stopped his car to wipe off the windshield. There was evidence also to the effect that his car was entirely on the pavement, and there was also evidence that his car was partially on the dirt shoulder and partially on the pavement. Assuming, but not deciding, that it is a negligent act to thus stop a car on the highway to wipe off the windshield, there is no evidence that such violation of the statute was the proximate cause of the death of plaintiff's intestate. The car in which plaintiff's intestate was riding did not collide with the Capeheart car, and all the evidence was to the effect that sufficient space was left to enable the driver of the Essex car, in which plaintiff's intestate was riding, to pass the car of defendant Capeheart without injury or inconvenience. The plaintiff relies upon the case of *Dickey v. R. R.*,

196 N. C., 726, 147 S. E., 15. It must be observed, however, that in the *Dickey case* the car in which the injured party was riding actually collided with the train standing across the street in violation of an ordinance. So that, the principle of law declared by the Court has no application to the facts disclosed in the present record, and the judgment of nonsuit as to defendant Capeheart must be sustained.

However, the plaintiff insists that there is sufficient evidence of negligence against the defendant, Coach Company, to carry the case to the jury. The only allegations in the pleadings with respect to the negligence of this defendant are to the effect that the bus was being driven at an excessive speed in violation of C. S., 2618, 2621 (46)a, and C. S., 2621 (51); and further, that the driver thereof did not keep a proper lookout. The evidence discloses that Mrs. A. B. Pritchard was driving an Essex car toward Winston-Salem, and that plaintiff's intestate was riding as a guest therein. Plaintiff alleged as the cause of the collision that "said Mrs. A. B. Pritchard, necessarily in proceeding along the highway, had to attempt to pass to the left of defendant's, Dr. L. B. Capeheart's, automobile; that while she was attempting to do so in the exercise of due care the motor bus of defendant, Carolina Coach Company, being operated at an unlawful and excessive rate of speed, as above set forth, collided with the automobile in which plaintiff's intestate was riding; that as a result of said collision plaintiff's intestate received injury, from which he died in less than two hours thereafter." The evidence discloses that the Essex car in which plaintiff's intestate was riding was struck by the bus about the center thereof and on the left-hand side thereof. In other words, the left-hand side of the bus struck the center of the left-hand side of the Essex car. The evidence further disclosed that the Essex car was struck on the right-hand side of the road, traveling east toward Durham; that is to say, the collision took place on the side of the road properly and lawfully occupied by the bus and on the side that the bus is required by law to travel. When the bus stopped it was almost entirely off the hard surface, and there was testimony to the effect that if it had rolled any further it would have gone into the ditch on its right side. The evidence also disclosed that the bus stopped within its length, and that when the bus stopped the Essex car was hooked up to its front, and the car of defendant Capeheart was standing about the rear of the bus.

There was evidence that in a dip about 300 yards from the point of the collision the bus was running between 45 and 50 miles an hour. There is no evidence as to the speed of the bus immediately preceding the collision. Furthermore, the fact that a heavy bus stopped on a slick surface within its own length must require a stretch of the imagination in order to support a theory that it was running 50 miles an hour at the

time of the impact. If it be conceded that the bus was violating the speed limit at the time of the injury, still the vital question involved is whether the speed was the proximate cause of the injury under the facts disclosed in the record. The theory of the collision alleged in the complaint is that the car in which plaintiff's intestate was riding was attempting to pass the Capeheart car. If so, it was struck by the bus before it completed the act of passing. Therefore, it must be manifest that the bus was perilously near the Capeheart car when Mrs. Pritchard attempted to pass. This is clearly demonstrated by the fact that after the bus stopped the Capeheart car was located slightly beyond the center of the bus.

There is no evidence as to how the injury occurred, and the mere fact of the injury is in itself ordinarily no evidence of negligence. "The breach of a statute is negligence *per se,* but there must be a causal connection between the disregard of the statute and the injury inflicted." *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066. Again it has been held in *Chancey v. R. R.,* 174 N. C., 351, 93 S. E., 834, that "the rule was recently stated to be, that however negligent a party is, if his act stands in no causal relation to the injury, it is not actionable." The rule was further stated in *Austin v. R. R.,* 197 N. C., 321, as follows: "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." In *McNeill v. R. R.,* 167 N. C., 390, 83 S. E., 704, the plaintiff's intestate was killed by a train running without a headlight in violation of the law. The Court wrote: "It is not the absence of the headlight, nor the impact of the train, which determines liability, but the impact of the train brought about by or as the proximate result of the absence of a headlight. To illustrate: Suppose one is at work on an overhead bridge, and without fault on his part he falls on the track 5 feet in front of a rapidly moving train, which is running at night without a headlight, and is killed? Here we have negligence in the failure to have a headlight; but there can be no recovery, because the same result would have followed if there had been a headlight, and its absence has had nothing to do with the injury." *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298.

In the oral argument plaintiff took the position that there was evidence that the bus was traveling on the wrong side of the road. This position was based upon the testimony of Mrs. Holland, who testified in regard to certain skid marks on the road. She said: "It started in the middle of the road, and the right-hand wheels went clear off the asphalt. I saw one line for the left wheels and one for the right. The one for the right wheel started in the center and went clear off the asphalt. The left one started in the center and followed this wheel." From these

statements it is argued that if the skid mark made by the bus, for the right wheel, started in the center and went clear off the asphalt, or that if the right-hand wheels of the bus were in the center of the road, then of necessity the left-hand wheels were beyond the center in violation of the law. This theory overlooks the next statement of witness, which is: "The left one started in the center and followed this wheel." So that, as a matter of fact, the testimony of witness clearly discloses that the skid marks for all wheels started in the center of the road. Moreover, there was no allegation in the complaint that the bus was traveling on the wrong side of the road.

Upon all the evidence we are of the opinion that the judgment of nonsuit as to both defendants was correct.

Affirmed.

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PEOPLES BUILDING AND LOAN ASSOCIATION v. ODESSA RICE SWAIM.

(Filed 27 November, 1929.)

**1. Executors and Administrators B a—Money received by widow as beneficiary of life insurance is not liable for debts of husband.**

Money received by the widow as beneficiary under the life insurance policy of her deceased husband is not available to the creditors of his estate. Article X, section 7.

**2. Bills and Notes A a—In this case held: nonnegotiable note of widow given for debt of husband was without consideration.**

Allegation in the complaint that the widow, according to the request of her husband since deceased, has given a written promise to pay his defalcations to the promisee out of the moneys to be derived by her as beneficiary under a policy of life insurance of the husband, without agreement on the part of the promisee not to make claim against the husband's estate, or without other advantage to the promisor or disadvantage to the promisee, both the estate and the widow being insolvent, the written instrument not being a negotiable instrument, there is no prima facie case alleged that will import a consideration for the writing and the other allegations tending only to show a *nudum pactum*, the defendant's demurrer thereto is good.

**3. Same—Preexisting debt of husband is not consideration for nonnegotiable note of his widow.**

The provisions of C. S., 3005, that a preëxisting debt is sufficient consideration for a promissory note does not apply when the note in question is not negotiable within the meaning of the negotiable instrument law, and the debt was not contracted by the maker, and where the nonnegotiable note is given by a widow for the defalcation of her husband without consideration, it must be alleged and shown that she knowingly accepted profit, advantage or benefit from the transaction.

**4. Same—New consideration must be shown to hold widow liable on her nonnegotiable note given for debt of her husband.**

In order to hold the widow personally liable for the preëxisting debts of her deceased husband on her nonnegotiable note given by her for their payment, there must be a new consideration given her or forbearance to proceed against his estate, etc.

APPEAL by plaintiff from *Moore, J.*, at September Term, 1929, of DAVIDSON. Affirmed.

The pleadings show substantially the following facts:

1. The defendant Odessa Rice Swaim was married to A. R. Swaim on 10 January, 1924, and on 11 November, 1926, their only child was born, and is now living with its mother.

2. The defendant was the beneficiary of an insurance policy on the life of her husband, issued by the Columbian National Life Insurance Company of Boston, on which after the death of the assured there was paid to the defendant $7,817.75.

3. For about four years before his death A. R. Swaim had been employed by the plaintiff as its assistant secretary; and in June, 1928, it was discovered that in his account with the plaintiff he had defaulted in the sum of $5,918.50. He admitted his default and his making false entries on the plaintiff's books for the purpose of concealing the shortage.

4. On or about 28 June, 1928, A. R. Swaim placed the above-named policy and other papers in a pocket of his automobile, drove into the country, and shot and killed himself while seated in the car. It is alleged by the plaintiff on information and belief that he requested his wife and his brother to see that his deficiency was paid out of his insurance.

5. It is alleged by the plaintiff that the defendant, after the death of her husband, went to the home of A. H. Ragan, secretary and treasurer of the plaintiff, to make some arrangement for paying the deficiency, and returned without consenting or agreeing to any plan; but on the next day it was agreed by her and A. H. Ragan that the defendant would make a note to the plaintiff covering the deficiency, and that it should be paid out of funds to be derived from the insurance policy. It was agreed that the note should be held by the plaintiff without publicity and not be turned over to any bank.

6. On 6 July, 1928, the defendant gave to the plaintiff her promissory note for $5,918.51, payable one day after date, to be paid out of her insurance money. The plaintiff alleged that the defendant had profited by her husband's use of the plaintiff's funds.

7. Defendant alleged that the note in suit had been procured by the plaintiff's fraud and deceit and was not supported by a valuable consideration.

The defendant moved that the action be dismissed for the reason that it appears upon the face of the pleadings that the note was not executed for a valuable consideration. The motion was allowed and judgment was rendered dismissing the action. The plaintiff excepted and appealed.

*McCrary & DeLapp and H. R. Kyser for plaintiff.*
*King, Sapp & King and Spruill & Olive for defendant.*

ADAMS, J. It is not suggested that the estate of A. R. Swaim is not liable for the alleged deficiency in his account with the plaintiff; but the money paid Mrs. Swaim as the beneficiary of the policy issued by the Columbian National Life Insurance Company is her individual property and is not subject to the payment of the debts of the deceased or to distribution as a part of the assets of his estate. Constitution, Art. X, sec. 7; *Burwell v. Snow,* 107 N. C., 82; *Cutchin v. Johnston,* 120 N. C., 51. The only question for decision is whether the defendant's note is supported by a valuable consideration or whether it is a *nude pact.*

We find in the pleadings no averment raising a presumption of fact which requires the submission of an issue to the jury. There is no allegation either that the note was under seal or that it was negotiable, and for this reason deemed prima facie to have been issued for a valuable consideration. C. S., 2982, 3004. A nonnegotiable note does not import a consideration. 3 R. C. L., 926, sec. 122. It was incumbent upon the plaintiff to set forth facts sufficient to show that the note was given for value. *Hunt v. Eure,* 188 N. C., 716. The plaintiff's allegations, instead of doing this, tend rather to negative the material fact which should have been stated.

By virtue of a statutory provision an antecedent or preëxisting debt constitutes value. C. S., 3005. The preëxisting debt of the maker, drawer, or acceptor of negotiable paper is undoubtedly a valid consideration for his making, drawing, or accepting a negotiable note or bill of exchange; and the preëxisting indebtedness of the holder to a third party is a sufficient consideration for the endorsement and transfer of the paper to such creditor. 1 Daniel on Negotiable Instruments (6 ed.), sec. 184; *Smathers v. Hotel Co.,* 168 N. C., 69, 72; *Bank v. Seagroves,* 166 N. C., 608. This provision is inapplicable here for the reason that, as we have said, it does not appear from the record that the note sued on is negotiable or that the debt for which it was given was contracted by the defendant. It is not alleged that she knowingly accepted any profit, advantage, or benefit from her husband's wrongdoing. A note given by one person in payment or extinguishment of the debt of a third person

will constitute a valuable consideration; but without discharge, or forbearance, or a new consideration, the mere debt of one person will not support the note of a stranger to the debt. 8 C. J., 219, sec. 354. The pleadings contain no allegation of any agreement by the plaintiff to discharge the estate of the deceased, or to forbear proceedings against his estate to collect the amount of the alleged deficiency. The husband's request that his debt be paid out of his wife's property was not binding on her. A mere moral obligation, though coupled with an express promise, will not constitute a valuable consideration. 1 Daniel on Negotiable Instruments (6 ed.), sec. 182.

While the discharge of a debt due by a third person will as a general rule be deemed a valuable consideration for a bill or note, the debt of a deceased person is not of itself a sufficient consideration to support the personal liability of the widow, or a distributee, or of a personal representative of the deceased. 8 C. J., 222, sec. 358. This doctrine has often been maintained and applied. In *Paxson v. Nields,* 187 Pa. St., 385, 21 A. S. R., 888, it was held that a note given by a widow for the payment of a debt due by her husband, who was insolvent at the time of his death, without a new consideration to support it, was void and, of course, not enforceable. Substantially the same conclusion was reached in *Gilbert v. Brown,* 97 S. W. (Ky.), 40, 7 L. R. A. (N. S.), 1053, and in *Maul v. Vaughn,* 45 Ala., 134. It was shown in the latter case that a judgment debtor, who owned a plow and saddle horse, died insolvent, leaving a widow and an infant child. The widow used the horse without taking out letters of administration on the estate. She executed a note in settlement of the judgment, the creditor's agent telling her that because she had used the horse she was liable for the debt. Without her request he receipted the judgment. The Supreme Court of Alabama held that the note was without consideration, though it would have been supported by value if the judgment had been receipted by request of the widow. The principle was adhered to in *Watson v. Reynolds,* 54 Ala., 191. There the note was given by the widow of a deceased debtor to his creditor; but the creditor did not cancel the debt, or lose, or suspend any remedy he had against the estate. The Court decided that the note was without consideration. See *Felton v. Reid,* 52 N. C., 269; *Long v. Rankin,* 108 N. C., 333; *Wilcox v. Arnold,* 116 N. C., 709.

The principles underlying these decisions must control in the case before us. There was no new consideration for the defendant's note. The initial debt was not canceled and the plaintiff is not precluded from proceeding against the debtor's estate. The widow by executing the note has received no benefit; she has acquired nothing from her husband's estate that she would not have been entitled to if she had not given the note. The estate of A. R. Swaim is insolvent, and so is the

defendant. The transaction in question, as was said in *Paxson v. Nields, supra,* was "a one-sided affair, and exclusively for the benefit" of the plaintiff. The alleged promise to keep it secret was sentimental rather than valuable; and in any event there is no allegation of the plaintiff's compliance with such promise. The judgment is

Affirmed.

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AMERICAN EXCHANGE NATIONAL BANK v. HELEN M. WINDER, JOHN C. WINDER AND WILLIAM T. WINDER.

(Filed 27 November, 1929.)

**1. Estoppel C a—Distinction between equitable and legal estoppels in pais.**

Equitable and legal estoppels agree in that they preclude a person from showing the truth in an individual case; but legal estoppel shuts out the equity and justice of the individual case in its operation, while equitable estoppel prevents a person from asserting his rights under a technical rule of law when his conduct has been such as in good conscience should prevent him from alleging and proving the truth.

**2. Same—Intent to mislead is not essential to equitable estoppel.**

The intent to mislead is not an essential element in the doctrine of equitable estoppel *in pais,* nor is fraud and representation in all cases requisite, and the acts, conduct, and even silence of the party sought to be estopped may be adequate.

**3. Same—Where one clothes another with indicia of title to personalty he is estopped as against innocent third person.**

Where the owner of personal property clothes another with the *indicia* of title, or allows him to appear as the owner, or as having the power of disposition, an innocent third person dealing with the apparent owner, and who has been deprived of his rights thereby, will be protected under the equitable doctrine of estoppel *in pais.*

**4. Same—In this case held: doctrine of equitable estoppel applies.**

Where one having an inherited interest in diamonds gives the possession of the diamonds to his brother, and permits the wife of the latter to wear them as her own for years without claiming them, and after a separation from her husband she hypothecates them at a bank for the security of her personal note given for borrowed money, the evidence is sufficient to be submitted to the jury as to whether the bank in lending her the money was reasonable in relying upon or inferring the fact that all the diamonds were her own, and estop her brother-in-law from showing to the contrary in an action by the bank to subject the diamonds to the payment of her note.

CONNOR, J., dissents.

BANK *v.* WINDER.

APPEAL by William T. Winder from *Clement, J.,* at April Term, 1929, of GUILFORD. No error.

The plaintiff brought suit on two promissory notes under seal, payable to its order, executed by the defendant, Helen M. Winder. The first was in the sum of $3,335.05, was dated 16 October, 1927, and was payable 28 November, 1927; the second was given for $690, was dated 26 December, 1927, and was payable thirty days after date. The maker of the notes authorized the payee to hold all securities put up for payment as security for all her indebtedness to the payee whether incurred before or after the execution of the notes. She filed an answer to the complaint, alleging that the original debt of $5,000, contracted in 1920, was that of her husband, John C. Winder, and that he procured her endorsement of a note in this amount and obtained from her four diamonds which he deposited with the plaintiff as collateral security. She alleged that her husband had given her one of the diamonds as an engagement ring and had given her the others some time after the death of his mother; also that in May, 1926, her husband executed a deed of separation admitting her title to the diamonds and agreeing to pay the amount of the note, but upon his failure or refusal to make payment she was forced to renew the note. When the diamonds were pledged there was due the bank $1,800, but an additional loan was made increasing the debt to $5,000, which was subsequently reduced to $3,335. Mrs. Winder admits that as collateral security for the note of $690, which was given for her individual debt, she deposited with the plaintiff her diamond pendant. The answer to the first issue is made up of these two sums. She asks that all the stones be sold under an order of court, that the proceeds be applied to the payment of her notes, and that the surplus, if any, be paid to her.

John C. Winder filed no pleading. William T. Winder filed an answer admitting the execution of the notes and the deposit of the diamonds with the plaintiff; but he alleged that he owns a one-half interest in the pendant and in all the other diamonds except Mrs. Winder's wedding ring, and that his title is not and cannot be affected by her disposition of them.

The issues were answered as follows:

1. What amount, if any, is the plaintiff entitled to recover of the defendant, Helen M. Winder? Answer: $4,025.05, with interest on $3,335.05 from 28 December, 1927, and interest on $690 from 25 January, 1928.

2. Did the defendants, Helen Winder and John Winder pledge with the plaintiff as collateral security for the debt sued on, the property described in the complaint? Answer: Yes.

3. Is the defendant, William T. Winder, the half owner of any of said property, and if so, which? Answer: Yes, all diamonds except Helen Winder's engagement diamond.

4. If so, is the said William T. Winder estopped as against the plaintiff in this cause from asserting any claim thereto? Answer: Yes.

Judgment was rendered for the plaintiff, and William T. Winder appealed.

*Brooks, Parker, Smith & Wharton for plaintiff.*
*King, Sapp & King for William T. Winder.*

ADAMS, J. The fundamental question is whether there is enough evidence to sustain the jury's answer to the fourth issue; for if the appellant is estopped as against the plaintiff to assert title to the property in controversy only a few of the exceptions need be considered. The answer may be found in the doctrine of estoppel.

We are not concerned with estoppel by record or by writing, but with estoppel *in pais—i. e.*, equitable estoppel. While equitable estoppels arise from facts which are matters *in pais,* there is an essential and marked distinction between them and legal estoppels *in pais.* The two agree in that they preclude a person from showing the truth in an individual case; but while legal estoppel, in shutting out the truth, shuts out also the equity and justice of the individual case, equitable estoppel, which is available in an action at law, is admitted on the opposite ground of preventing a person from asserting his rights under a technical rule of law when his conduct has been such as in good conscience should prevent him from alleging and proving the truth. Eaton's Equity, 2 ed., 147, sec. 60; *Dickerson v. Colgrove,* 100 U. S., 578, 25 Law Ed., 618.

Equitable estoppel is defined as "the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." 21 C. J., 1113, sec. 116; *Boddie v. Bond,* 154 N. C., 359. Neither fraud nor representation in express words is in all cases a requisite. Conduct, acts, or even silence may be adequate. Nor is it necessary that the conduct

of the person estopped be prompted or characterized by an intention or expectation that it will be acted upon by the other party. His conduct will be effective as an estoppel if the circumstances are such as may lead to the natural and probable conclusion that it will be acted upon as implying an existing fact. Pomeroy says there are conditions in which it is impossible to ascribe to the party estopped any intention or even expectation that his conduct will be acted upon by one who afterwards claims and is entitled to the benefit of the estoppel; that it would be misleading to say there must always be an intention that any particular conduct should be acted upon; and that while such intention must sometimes exist there are estoppels in which no intention can exist. If representations, whether by words, conduct, or silence, are such that all persons interested in the subject have a right to rely upon them, their truth cannot be denied by the party making them against any one who trusted to them and in good faith acted upon them. Pomeroy's 2 Equity Jurisprudence, secs. 805, 811. In *Armfield v. Moore,* 44 N. C., 158, *Pearson, J.,* remarked that this principle lies at the foundation of all fair dealing between man and man, and that without it, it would be impossible to administer the law as a system. The three requisites are that the defendant knows his title, that the plaintiff does not know it, and that, relying upon the defendant's representations or silence, the plaintiff is thereby deceived. *Holmes v. Crowell,* 73 N. C., 613; *Exum v. Cogdell,* 74 N. C., 139.

It is important to remember that the owner of personal property will not be estopped merely by entrusting its possession to another. Possession or control of the property is not of itself sufficient for this purpose. If it were, as was said in *Forristal v. McDonald,* 9 Cam., S. C., 9, no man could safely leave his watch with a watchmaker for repairs. See 7 A. L. R., 676 N. But an estoppel will arise against the real owner when he clothes the person assuming to dispose of the property with the apparent title to it, and the person setting up the estoppel, relying upon the fact, parts with something of value or extends credit on the faith of such apparent ownership. 10 R. C. L., 777, sec. 91. The controlling principle is this: Where the owner of personal property clothes another with the *indicia* of title, or allows him to appear as the owner, or as having the power of disposition, an innocent third party dealing with the apparent owner will be protected. *Drew v. Kimball,* 80 A. D., 163; *Guffey v. O'Reilley,* 57 A. R., 424; *Velsian v. Lewis,* 3 A. S. R., 184; *Hill v. Wand,* 27 A. S. R., 288; *First Nat. Bank v. Kissaire,* 132 A. S. R., 644; *O'Connor v. Clark,* 29 L. R. A., 607.

Let us apply these principles to the evidence. The appellant, William Winder, claims to be the owner of a one-half interest in all the diamonds

except the one in the wedding ring. He and John C. Winder are brothers, the only children of Florence Tucker Winder, who died 2 May, 1916. They did not divide the jewelry received from her estate. The appellant testified: "I agreed to let John and Helen use the jewelry until such time as I desired to have my part. I say use it, wear it, in other words, take care of the jewelry until I wanted my portion. I did not authorize them to pledge it in any way as security." John C. Winder and his wife then lived in Raleigh; afterwards they moved to Greensboro. William was in "another part of the country." From time to time he came to North Carolina, and in 1923 and 1924 lived in Greensboro. He knew Mrs. Winder wore the jewels, and he made no objection to her "wearing and using them." Again he went away. "On a stretch," he said, "I never heard from my brother in six years. We have never been very close together because there was so much difference in our ages, and we never had a home." He did not demand the jewels or request a division of them for about twelve years, and then only after hearing that John C. Winder and his wife had separated. The uncontradicted evidence is that Mrs. Winder wore the diamonds "all the time," "as if they were hers," and that the officers of the bank knew she had worn them for several years.

The evidence unquestionably tends to show that John and William Winder had clothed Mrs. Winder with the *indicia* of title to the diamonds and had allowed her to appear as the owner with full power of disposition. Upon this theory it was of sufficient probative force to be considered by the jury on the question of estoppel, although the rule generally applied in transactions of this character is that which declares that when one of two innocent persons must suffer for the wrong of another, he who has armed the wrongdoer must suffer the loss. 25 L. R. A. (N. S.), 770 N.

Several exceptions related to the trial court's alleged disregard of the mandate (C. S., 564) that the judge shall state the evidence and apply the law; but we do not regard the charge as subject to this criticism. The remaining exceptions, which have been examined in their relation to the whole record, point out no error which requires another trial.

No error.

CONNOR, J., dissents.

RAYMOND K. RHODES v. MARVIN COLLINS, ZEB O'CONNELL AND CHAS. O'CONNELL, AND O. H. JOHNSON v. MARVIN COLLINS, ZEB O'CONNELL AND CHAS. O'CONNELL.

(Filed 27 November, 1929.)

**1. False Imprisonment A a—False imprisonment is depriving person of liberty without legal process—Malicious Prosecution.**

False imprisonment is depriving one of his liberty without legal process, and malicious prosecution is a prosecution founded upon legal process, but maintained maliciously and without probable cause.

**2. False Imprisonment A b—In this case held arrest was made.**

Where the uncontroverted evidence in an action for false arrest or imprisonment is to the effect that the defendants procured from a justice of the peace a warrant for the arrest of the plaintiff and accompanied the process officer who made the arrest and took the plaintiff before the magistrate, and that the plaintiff was required to and gave bond for his appearance, it is not error for the court to instruct the jury that if they believed the evidence to answer the issue as to the false arrest in the affirmative.

**3. False Imprisonment A c—Warrant for slander is void and arrest made thereunder is without legal process.**

Slander of a man is not a criminal offense under our law, and where a warrant for arrest has been procured from a justice of the peace who erroneously issues it, and the parties charged have been arrested and have given bond for their appearance, the warrant under which the arrest was made is void and the plaintiff in a civil action for false arrest thereunder may recover such actual damages as he may have sustained, and the question of good faith in the procurance of the warrant may bear upon the measure of damages, but is not a defense to the action.

APPEAL by defendant, Chas. O'Connell, from *Grady, J.*, and a jury, at January Civil Term, 1929, of WAKE. No error.

We gather from the record that this is an action for false arrest or false imprisonment and malicious prosecution, brought by plaintiff against defendants. The record discloses that summons was served only on Marvin Collins and Chas. O'Connell, and the action was tried out against them. The evidence on the part of plaintiffs was to the effect that some time prior to the institution of this action, they were arrested at their several homes in Wake County, on the night of 26 October, 1926, about nine or half past nine o'clock, and after the families had retired, upon a warrant issued by R. H. Templeton, justice of the peace, sworn to and signed by the defendants, Collins and Charles O'Connell and Zeb O'Connell, a son of Charles O'Connell, charging plaintiffs with slander. That the warrant was given to Mack Page, a deputy sheriff, who was accompanied by the defendant, Marvin Collins, and plaintiffs were notified of the charge, and they went with the deputy sheriff several miles, at night, to the home of the justice of the peace that issued the

warrant and were made to give bond for their appearances at a subsequent time. It was contended by defendants that they went voluntarily to the justice of the peace, but the record discloses that they gave bond for their appearance.

The warrant sued out and signed by defendants and Zeb O'Connell was to the effect that plaintiffs had charged "that Zeb O'Connell and Marvin Collins, one of the defendants employed by Charles O'Connell, had stolen and were stealing seed cotton off the wagons of the patrons of the Charles O'Connell gin."

The justice of the peace testified: "That he was the justice of the peace who issued the warrant; that the defendants in this case came to him and told him what reports had been circulated by the plaintiffs, and that he prepared an affidavit for them to sign, which was introduced in evidence; that he prepared a warrant upon his own understanding that the matters set up in the affidavit constituted a criminal offense against the laws of North Carolina, and issued the same to the deputy sheriff; that at the trial he was informed by the attorney for the prosecution that it was not an offense, and at his request dismissed the warrant; that the plaintiffs, not being under custody at the time, went off and secured bondsmen for their appearance at the trial."

By consent the actions were consolidated and tried together.

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

"1. Did the defendants wrongfully cause the plaintiffs to be arrested under a void warrant? Answer: Yes.

2. If so, what actual damages is the plaintiff, Johnson, entitled to recover of the defendants? Answer: $200.

3. If so, what actual damages is the plaintiff, Rhodes, entitled to recover of the defendants? Answer: $100.

4. Was the arrest of the plaintiffs procured by malice, as alleged in the complaint? Answer: No.

5. If so, what punitive damages is the plaintiff, Johnson, entitled to recover of the defendants? Answer: .....

6. If so, what punitive damages is the plaintiff, Rhodes, entitled to recover of the defendant? Answer: ....."

*B. C. Beckwith and W. F. Evans for plaintiffs.*

*A. A. F. Seawell for defendant, Chas. O'Connell.*

CLARKSON, J. We have read with care the record. The allegations of the complaint appear to set out a double-barrel action permissible under our liberal practice, "Wrongful and malicious prosecution, false arrest and wrongful detention," and tried out on false arrest and imprisonment.

"False imprisonment" is based upon the deprivation of one's liberty without legal process, while malicious prosecution is for a prosecution founded upon legal process, but maintained maliciously and without probable cause. *Rosendale v. Market Square Dry Goods Co.* (Mo.), 213 S. W., 169, 171. *Allen v. Greenlee,* 13 N. C., 370.

The assignment of error by defendant to the effect that the court below assumed and charged as a fact that plaintiffs had been arrested cannot be sustained.

We think from the undisputed evidence there was an arrest. The parties charged went with the officer and one of the prosecutors, at night, to the justice of the peace who issued the warrant and gave bond for their appearance. They were *in durance vile.*

In *S. v. Lunsford,* 81 N. C., at p. 530, speaking to the subject, we find: "Where a constable showed a magistrate's warrant to the prosecutor and desired him to go before the magistrate, which he did without further compulsion. This was held to be a sufficient imprisonment, because the officer solicited a warrant for his arrest, and in going with him, he yielded to what he supposed to be a legal necessity. But there must be a detention, and the detention must be unlawful. 3 Bl. Com., 127." *Mead v. Young,* 19 N. C., 522; *Haskins v. Young,* 19 N. C., 527; *Riley v. Stone,* 174 N. C., 588; *Stancill v. Underwood,* 188 N. C., 475; 25 C. J., 455-6.

The defendant assigned error to the following part of the charge made by the court below: "There is no law making it a criminal offense for a man to slander another man; I hold, therefore, this warrant was absolutely void, and of no effect whatever, and it did not justify the arrest of these parties; and, therefore, upon the admission of the parties made in their pleadings and upon the stand, I direct you gentlemen to answer the first issue Yes, if you find as a fact the facts to be as testified to, by all the witnesses who have gone upon the stand in this case, and it would make no difference whether they were actuated by good faith or not, slander not being an indictable offense; the arrest of these defendants under this warrant was an invasion of their rights, and, therefore, on the admission of the parties, it would be your duty to answer the first issue Yes, that it was an unlawful arrest, and the arrest being an unlawful act, procured by these two defendants, it being an invasion of the rights of the plaintiffs, they would be entitled, as a matter of law, to what we call actual or compensatory damages, for such as they naturally suffered by reason of such unlawful arrest."

The serious question arises on the record: The warrant does not charge a crime under the laws of this State. The evidence was all to the effect that it was taken out in good faith by the prosecutors. In such a case,

can the prosecutors justify their act on the ground that the warrant was procured in good faith? We cannot so hold.

We find the authorities in woeful conflict in other states, but not in this jurisdiction. The common law, which we have adopted in this State, was ever jealous of the personal liberty of the citizens. C. S., 970. Our Constitution condemns general warrants. Const. of N. C., Art. I, sec. 15.

"If the imprisonment is under legal authority it may be malicious, but it cannot be false. This is true where legal authority is shown by valid process, even if irregular or voidable. Void process will not constitute legal authority within this rule." 25 C. J., *supra,* 445-6.

"Where defendant complainant caused plaintiff's arrest and detention under a warrant in the issuance of which defendant actively participated and which was illegal because not fulfilling certain statutory requirements, it was held in reversing a judgment for plaintiff in malicious prosecution that the warrant under which plaintiff was arrested being void, the proper remedy was false imprisonment, and not malicious prosecution. *McCaskey v. Garrett,* 91 Mo., A., 354.

*Ruffin, J.,* in *Allen v. Greenlee,* 13 N. C., p. 370-1, said: "If one person cause another to be arrested without process, it is trespass and false imprisonment. So if he arrest him upon process that is void in itself, or is issued by a court or magistrate having no jurisdiction. An action for malicious prosecution, on the other hand, is a special action on the case, for the abuse of the process of law, from malicious motives. It presupposes valid process, and case is given because trespass will not lie. It is given against the party suing it out, because the hand which executes the process is justified by it and is not guilty of a trespass. There being no other remedy, this special action is provided. In the case before us, the propriety of this rule is made very manifest. The charge in the warrant is for a mere civil injury, of which a justice of the peace has no jurisdiction. It constitutes no crime. But every fact alleged in the warrant is fully proved. That did not justify Greenlee in taking it out; because admitting the facts to be true, the magistrate could not take cognizance of the case, since it was not an indictable offense, nor a private wrong which he could redress." This principle is approved in *Zachary v. Holden,* 47 N. C., 453. *S. v. DeHerrodora,* 192 N. C., 749.

In *Bryan v. Stewart,* 123 N. C., at p. 96, the law as stated: "At common law there were two actions for an illegal arrest—one was where there was no legal excuse or justification for making the arrest, as where it was made without legal process, or, if made under the form of legal process, where the same was absolutely void. This was an action of trespass *vi et armis.* The other was where the process was erroneous,

but not absolutely void. This was an action of trespass on the case, and was subject to the rules and requirements, as if it were an action for malicious prosecution. Bishop on Contract Law, sec. 211; Corman Emerson, 71 Fed. Rep., 264; Pollock on Torts, 148."

The principle above is laid down in the *Bryan case,* but that case is distinguishable from the case at bar. The *Bryan case* was an order of arrest in a civil action, and the clerk was acting in his judicial capacity.

In *Wingate v. Causey,* 196 N. C., p. 72, the observation is made: "Three things must be alleged and proved in an action for malicious prosecution: (1) malice, (2) want of probable cause, and (3) termination of proceedings upon which the action is based. *R. R. v. Hardware Co.,* 138 N. C., 174, 50 S. E., 571." In false arrest or imprisonment all that need be shown is deprivation of one's liberty without legal process.

The present action was properly tried out as false arrest or imprisonment, and not malicious prosecution—which premises that the process is not void but irregular, erroneous or voidable. From the authorities in this jurisdiction, the charge of the court below was correct. The action was one for false arrest or imprisonment, and the warrant was void; it charged no criminal offense known to the law. The question of good faith has nothing to do with the charge of false arrest or imprisonment; it is presumed that the law is known to all, but good faith is very material on the question of damages. The charge on the measure of damages was correct. *Waters v. Tel. Co.,* 194 N. C., 188. A leading case contrary to the principle herein set forth is *Whaley v. Lawton,* 62 S. C., 91, 56 L. R. A., 649, but in that case there was a strong dissenting opinion.

As a rule, as in the present action, where defendants act in good faith, the jury give small actual or compensatory damages. We can see no reason in law for disturbing the judgment. There is

No error.

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JOHN L. SHORTER v. MOORESVILLE COTTON MILLS.

(Filed 27 November, 1929.)

**1. Master and Servant C e—There is presumption of law that master has properly performed duty in employing his workers.**

In an action by an employee to recover damages from his employer for a personal injury caused solely by the negligence of another employee, the presumption of law is that the employer has properly performed his duty in employing his workers and is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant.

**2. Same—Where master has notice of incompetence of servant he is liable for injury caused by such servant to another.**

An employer impliedly contracts that he will engage the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and where the master has had express notice of the unfitness of an employee to safely perform the duties intrusted to him, the master is culpably negligent in continuing to employ such servant, and is responsible in damages to another employee who has been injured as a result of the unfitness of the servant.

**3. Same—In this case held: evidence of notice to the master of the incompetency of servant was sufficient to be submitted to the jury.**

Where the evidence in an action against the master for injuries inflicted by a fellow-servant shows that on the morning of the day the plaintiff, an employee of the defendant, was injured he complained to his overseer of the carelessness and incompetency of a fellow-servant, he had done all that he was required to do under the circumstances, and viewing the evidence in the light most favorable to the plaintiff, it must be assumed that his complaints were made in good faith, and it is sufficient evidence of express notice to the master to be submitted to the jury.

**4. Master and Servant C f—Assumption of risk is ordinarily question for jury.**

In an action against the master for a personal injury negligently inflicted on a servant through the negligence of a fellow-servant, the question as to whether the servant inflicting the injury was so obviously reckless and incompetent that no person of ordinary prudence would continue to work with him, is ordinarily one of fact for jury upon the issue of assumption of risk.

CIVIL ACTION, before *Sink, Special Judge,* 10 June, 1929, Special Term of MECKLENBURG.

The defendant is engaged in the manufacture of cotton, and the plaintiff brought this suit alleging that he was injured by the negligence of defendant on 16 April, 1928. The particular negligence alleged was that the defendant furnished to the plaintiff an incompetent fellow-servant whose carelessness and incompetency was known to the defendant or should have been known by the exercise of ordinary care.

The evidence tended to show that on 16 April, 1928, the plaintiff was adjusting or grinding cards in the mill of defendant. A card, according to the evidence, is a machine with a cylinder thirty-six inches in diameter. Over the cylinder one hundred and ten flats revolve, and when a flat is taken out that leaves the cylinder exposed, "and in order to make this gauge one-twelve-thousandths of an inch, you gauge it and see if you can feel the flats in that small amount of gauge, and that is what I was doing when I got hurt. I was standing there with my hand up to the flats and setting the gauge between the flats and the cylinder. . . . I was supposed to adjust it if it was not setting properly. While I was

doing this, I don't know what happened; my hand was caught and I could not imagine what was holding to it. I saw the belt was off, and I did not know how in the world that could start with no belt on. The machine started while I was doing that. . . . When the machine started up my hand was in between the flats exposed to the cylinder. . . . The machine is driven, when in operation, by a belt, from the main shaft. The belt was off and tied up. . . . I don't know how it started. I know it caught my hand. I am positive that it was not started by the belt. It grabbed my hand and I could not pull it out, and the cylinder turning was just biting the meat off and tore all the meat off the top of my hand."

Another witness testified in behalf of plaintiff, as follows: "He got hurt on the card machine, after I gave him the gauge. I just turned around and walked off and got out in the front alley and heard him holler, and I turned around and he was pulling, trying to get out. When I got back to the card the cylinder was still pulling. He told me to stop it, and I took hold of it to stop it, and it was hard to stop, and I noticed that boy over there ahold of it pulling it—he was pulling it the wrong way. When I saw Pruitt he was pulling at the cylinder, turning it. He was pulling at the pulley on the cylinder. . . . Pruitt said he was backing the cylinder off the man's hand, but he was pulling it the wrong way."

Plaintiff further offered evidence tending to show that he was injured in the afternoon, but that on the morning of the day he was injured at about 7:30 or 8 o'clock he complained to Mr. Wilson, his overseer, that Pruitt was dangerous and incompetent. Plaintiff testified that he told Mr. Wilson: "You ought to put somebody else over here; that man is dangerous; he is going to hurt somebody or hurt himself before the day is gone." Plaintiff further testified that previously he had seen Pruitt playing with the pulleys and shafting in the mill, meddling around the machinery. Plaintiff further testified that he had complained to his overseer, Mr. Wilson, twice on the day he was injured about the carelessness and incompetency of Pruitt, his fellow-workman.

The defendant offered strong evidence contradicting the evidence of plaintiff. Pruitt testified for the defendant that he did not injure the plaintiff by turning the pulley, but that plaintiff started up the machine and was the author of his own injury. The agents of defendant denied that the plaintiff had made complaint as to the incompetency of Pruitt, or that they had any knowledge of his carelessness.

Issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $2,250.

From judgment upon the verdict the defendant appealed.

*Jake F. Newell and Stewart, MacRae & Bobbitt for plaintiff.*
*Z. V. Turlington and Pharr & Currie for defendant.*

BROGDEN, J. The right of plaintiff to recover damages in this action is based upon the theory that Pruitt, a fellow-servant, was incompetent, reckless and dangerous, and that Pruitt carelessly turned the pulley when the hand of plaintiff was exposed in a dangerous machine, and thereby inflicted serious and permanent injury.

The law presumes that an employer has properly performed his duty in employing his workers, and, therefore, he is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant. This principle was declared in *Walters v. Lumber Co.,* 163 N. C., 536, 80 S. E., 49, as follows: "The presumption is that the employer has properly performed his duty in the respect suggested, and before responsibility can be fixed on him it must be established by the greater weight of the testimony that the employee has been injured by reason of the carelessness or negligence due to the incompetency of a fellow-servant; that the master has been negligent in employing or retaining an incompetent employee after knowledge of the fact, either actual or constructive." The principle thus announced is fully supported by the decisions of the appellate courts and by all the leading textwriters.

In the case at bar, there is no evidence that the defendant was negligent in employing Pruitt. So that the liability of the defendant must rest upon either actual or constructive notice of the incompetency and carelessness of the servant complained of. The evidence shows that on the morning of the day he was injured plaintiff complained to his overseer of the carelessness and incompetency of Pruitt. Therefore, the plaintiff had done all that he could be required to do under the circumstances. He had no power to discharge Pruitt, and viewing his evidence in its most favorable light, it must be assumed that his complaints were made in good faith. These complaints were sufficient evidence of express notice to be submitted to the jury.

Nor in view of the facts disclosed by the record can the plaintiff be denied recovery as a matter of law by the application of the principle of assumption of risk. Upon this aspect of the case the law was settled in *Walters v. Lumber Co.,* 165 N. C., 388. The Court quoted with approval the following: "The hiring or retention of a servant whose unfitness for his duties, whether it arises from his want of skill, his physical and mental qualities, or his bad habits, if known, actually or constructively, to the master, is culpable negligence, for which the master must respond in damages to any other servants who may suffer injury through that unfitness. The essential ground upon which the liability thus predicated is based is that 'the master impliedly contracts that he will use due

care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service.'" The Court adding: "It therefore makes no difference that Milton Carden, whose negligence caused the injury, was a fellow-servant of the plaintiff, as the jury must have found that he was incompetent and that the master knew it before the plaintiff was hurt in the operation of the machine."

The question as to whether the recklessness of Pruitt was so obvious and injury therefrom so imminent that no person of ordinary prudence would continue to work with him, was a question of fact for the jury. *Maulden v. Chair Co.*, 196 N. C., 122, 144 S. E., 557.

Upon a consideration of the entire case we find no reversible error.

No error.

MAMIE G. FEASTER v. McLELLAND STORES COMPANY AND C. H. ANDERSON.

(Filed 4 December, 1929.)

1. **Removal of Causes C b—In this case held: joint tort was alleged and petition for removal should have been denied.**

   Where the plaintiff in her complaint alleges that she was injured by the negligence of the nonresident defendant in failing to provide a reasonably safe entrance to its store and the negligence of the resident manager in failing to maintain the same in a reasonably safe condition, over which the resident manager had control for his employer, a joint and not a severable tort is alleged as to both defendants, and the petition of the nonresident defendant for removal from the State to the Federal Court upon the ground of separable controversy should be denied.

2. **Same—In this case held: petition for removal on ground of fraudulent joinder should have been denied.**

   Where the complaint alleges that the negligence of the resident and nonresident defendants concurred in causing the injury in suit, a joint tort is alleged, and it will not be considered as separable because in some respects the allegations of negligence alleged against the nonresident defendant may be of matters of which the resident defendant was only partially responsible, and it will not be held a fraudulent joinder to prevent the removal of the cause from the State to the Federal Court.

APPEAL by plaintiff from order of *Sink, Special Judge,* at September Term, 1929, of MECKLENBURG. Reversed.

This action was heard upon the petition of the McLelland Stores Company, a corporation organized under the laws of the State of Delaware, and doing business in this State, for the removal of the action from the Superior Court of Mecklenburg County, North Carolina, to the

District Court of the United States for the Western District of North Carolina, for trial, upon the ground that the cause of action alleged in the complaint is separable as between the defendants, and also upon the ground that its codefendant, C. H. Anderson, a resident of this State, was joined by plaintiff as a defendant in the action for the fraudulent purpose of depriving the petitioner of the right to its removal from the State Court to the Federal Court, under the act of Congress.

From the order removing the action in accordance with the prayer of the petitioner, plaintiff appealed to the Supreme Court.

*John M. Robinson and Frank R. McNinch for plaintiff.*
*Stewart, MacRae & Bobbitt for defendant.*

CONNOR, J. The defendant, McLelland Stores Company, is a corporation, organized under the laws of the State of Delaware; on and for some time prior to 25 February, 1927, the said company was engaged in the business of operating and conducting a store for the sale of merchandise, by retail, at Gastonia, N. C. The defendant, C. H. Anderson, a resident of this State, was the manager of said store, and as such manager had charge and supervision of said store.

Plaintiff, in her complaint, alleges "that at the times mentioned in this complaint, it was the duty of the defendant, C. H. Anderson, to supervise and inspect the store referred to in paragraph 4 hereof, and to exercise reasonable care to see that said store was placed and kept in a reasonably safe condition for the protection of the vast number of people who passed in and out of said store upon the invitation of the said Anderson and his codefendant."

"7. That on or about 25 February, 1927, the plaintiff, upon the invitation of defendants, went into the store referred to in paragraph 4 hereof; that as plaintiff was attempting to leave the store through one of the front doors thereof, she was knocked off her balance, and slipped down by reason of the negligence of the defendants as hereinafter more specifically set forth, and was thereby injured and damaged as hereinafter described."

Plaintiff alleges that she was injured by the joint and concurrent negligence of defendants, in that

"(a) They failed in the exercise of reasonable care to keep the said store, including the entrance and exits thereof, in a reasonably safe condition;

(b) They constructed and maintained the entrance to said store of tile placed upon an incline and allowed said entrance to become and remain in a slick, slippery and dangerous condition;

(c) Although they invited and encouraged vast numbers of people to use said entrance, they failed to adopt and employ suitable means to place and keep said entrance in a reasonably safe condition;

(d) They installed in said entrance dangerous and unsafe doors, and failed to equip said doors with safety appliances which were known, approved and in general use;

(e) They failed to equip said doors with devices which would check the speed thereof and prevent them from swinging with force and violence against persons using or attempting to use said entrance;

(f) They equipped said doors with springs of such strength and power as to cause said doors to swing back and forth with great force and violence and in such a manner as to jeopardize the safety of persons attempting to use said entrance;

(g) Although they knew or ought to have known that said doors swung back and forth with great force and violence, in such a way and manner as to endanger the safety of persons using or attempting to use said entrance, they failed to install on said doors any device, and failed to take any means to check the speed of said doors;

(h) They failed to warn patrons of said store in reference to the dangers arising from the conditions at said entrance hereinbefore more fully described."

Plaintiff alleges that as the result of the injuries which she sustained by reason of the negligence of defendants, she was damaged in the sum of $20,000.

The allegations of the complaint are sufficient to constitute a cause of action upon which both defendants are liable. It may be that the resident defendant cannot be held liable for some of the acts of negligence alleged in the complaint; if he is not liable for damages caused by the defective construction of the door and entrance to the store, he is liable for damages caused by his negligence in failing to exercise reasonable care to keep the said entrance in a reasonably safe condition for the use of customers and patrons of the store, and also in failing to exercise reasonable care to warn such customers and patrons of the dangers incident to the use of the door and entrance, which plaintiff alleges were negligently constructed by his codefendant and employer. Plaintiff has elected to allege in her complaint a cause of action upon which defendants are liable as joint *tort-feasors*. In such case, it is well settled that the cause of action is not separable for the purpose of removal from the State Court to the Federal Court, upon the petition of a defendant, who is a nonresident of the State in which the plaintiff resides and in which the action is brought. *Crisp v. Fibre Co.*, 193 N. C., 77, 136 S. E., 238, and cases cited in the opinion by *Stacy, C. J.*

Nor is this action removable from the State Court to the Federal Court, for trial, upon the ground of a fraudulent joinder of the resident defendant. It appears upon the record that the resident defendant was the manager of the nonresident corporation, and had control and supervision of the store, including the door and entrance. If, as alleged in the complaint, he failed to exercise reasonable care to maintain both the door and the entrance to the store in a reasonably safe condition, for the use of its customers and patrons, and such failure was the cause of plaintiff's injury, or contributed to such injury, both he and his codefendant are liable for the damages resulting from her injuries. Upon the facts appearing on the record, it cannot be held that the joinder of the resident defendant in this action was for the fraudulent purpose of depriving the nonresident defendant of its right of removal under the act of Congress. *Givens v. Manufacturing Co.*, 196 N. C., 377, 145 S. E., 681; *Swain v. Cooperage Co.*, 189 N. C., 528, 127 S. E., 538.

There was error in the order for the removal of the action from the State Court to the Federal Court. The order is

Reversed.

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E. L. ANDREWS, ADMINISTRATOR OF J. ANDERSON SMITH, DECEASED, v. B. C. SMITH AND WIFE, ROXIE SMITH, AND THE BANK OF GIBSONVILLE.

(Filed 4 December, 1929.)

**1. Evidence D b—Provisions of C. S., 1795 may be waived.**

The provisions of C. S., 1795, prohibiting testimony of transactions and communications with a deceased person, by a party in interest, may be waived by the adversary party.

**2. Same—Party asking for examination of adverse party waives right to object to evidence so taken as communication with decedent.**

Where an administrator brings proceedings under the provisions of C. S., 900, *et seq.*, to examine a defendant to discover assets of the estate of the deceased, the administrator waives the provisions of C. S., 1795, prohibiting testimony of transactions or communications with decedent, and the testimony thus taken may be introduced by the defendant in his own behalf.

CIVIL ACTION, before *Clement, J.*, at June Term, 1929, of GUILFORD.

The plaintiff alleged that J. Anderson Smith died intestate on 8 November, 1927, and that on 28 May, 1927, said intestate had on deposit in the defendant bank the sum of $2,425.04, for which a certificate of deposit had been issued. Plaintiff further alleged that on 30 August, 1927, the defendants, B. C. Smith and Roxie Smith, his wife, obtained

the certificate of deposit and had the funds represented by said certificate transferred to their own individual account, and that at the time of such transfer the intestate, J. Anderson Smith, was so weak in body and mind as to be incapable of understanding a business transaction. Plaintiff further alleged that some time prior to his death the deceased, J. Anderson Smith, had loaned to the defendant, B. C. Smith, the sum of $1,200; that said defendant, B. C. Smith, had executed and delivered to J. Anderson Smith a note for said sum and secured same by a mortgage on real estate owned by said defendants, which said mortgage had never been recorded, and that upon the death of J. Anderson Smith the said defendants took possession of all his personal property and wrongfully withheld the same from the plaintiff, administrator.

The defendants, Smith and wife, filed an answer alleging that they had paid the note secured by the mortgage on the land; that J. Anderson Smith, for several years prior to his death, had lived in the home of said defendants, and that said intestate had agreed to pay said defendants for support, and that the transfer of said certificate of deposit was made by the intestate as a payment to the defendants for care and maintenance.

The defendant, Bank of Gibsonville, filed an answer alleging that the transfer and assignment of said funds was valid and legal.

The evidence tended to show that the defendant, B. C. Smith, was the step-son of the intestate, J. Anderson Smith, and that said step-son, after his marriage, lived in the home of the intestate until the death of the mother of said defendant on 11 July, 1922. After the death of defendant's mother his step-father, J. Anderson Smith, lived in the home of B. C. Smith; that while the intestate was 74 years of age and feeble for some time prior to his death, his mental condition was good until a short time before his death.

It appeared that the defendant, B. C. Smith, had been examined before a commissioner appointed by the clerk at the instance of plaintiff on 9 July, 1928. The affidavit filed by the plaintiff to procure the examination alleged that "J. Anderson Smith died intestate, leaving personal property of value and a considerable sum of money, but at the time of his death he resided with the defendants and had been residing with them for several years. . . . That the defendants were familiar with his business and knew the whereabouts of his property and where his money was deposited and where his valuable papers were kept, . . . and that there is money and property either in the hands of defendants or in their possession, or the whereabouts of which is well known to them. . . . That affiant demands the right to examine the defendants before the trial of the above action to the end that he may elicit relevant testimony with reference to the matters and things referred to

herein; . . . that the affiant is informed and believes that the deceased had on deposit in the bank or banks certain moneys belonging to him, and that said defendant, without the authority of deceased, withdrew said funds from said bank or banks, and either has the said funds or has disposed of same without making any account or report to this affiant with respect to the same, but the facts in connection with said matter are peculiarly within the knowledge of the defendants."

Upon the affidavit, an order was duly made to examine said defendant, B. C. Smith, in accordance with C. S., sec. 900 *et seq.* At the trial, the defendant offered in evidence, in his own behalf, his testimony so taken by the plaintiff. This testimony disclosed that the intestate had endorsed the certificate of deposit in controversy and delivered it to the defendant in payment of support, and that the mortgage indebtedness had been paid by the defendant to J. Anderson Smith and the mortgage burned.

Upon issues submitted the jury found that the deceased, J. Anderson Smith, had assigned to the defendants the certificate of deposit; that he had sufficient mental capacity to know and understand the effect of said act, and that the defendants were not indebted to the plaintiff administrator by virtue of the execution of the mortgage referred to in the evidence.

From judgment upon the verdict plaintiff appealed.

*F. Eugene Hester and Frazier & Frazier for plaintiff.*
*Hines, Kelly & Boren and R. M. Robinson for defendants.*

BROGDEN, J. The question of law is this: In a suit brought by an administrator of a deceased person, to recover assets of deceased, alleged to be in the custody of defendant, is the testimony of defendant to a transaction with deceased, taken before a commissioner under the provisions of C. S., 901, at the instance of plaintiff, competent, in behalf of defendant upon the trial of the cause, or should the same have been excluded by reason of the inhibition contained in C. S., 1795?

C. S., sections 900 to 908, not only prescribe the method by which an adverse party may be examined, but they also clearly disclose that testimony taken in accordance with the methods prescribed "may be read by either party on the trial." It is contended, however, that testimony taken under C. S., section 900, *et seq.*, is not competent in cases where such testimony would invade the boundary of C. S., 1795. It must be observed, however, that the wise protection established by C. S., 1795, may be waived. *Meroney v. Avery*, 64 N. C., 312; *Norris v. Stewart*, 105 N. C., 455, 10 S. E., 912; therefore, when an administrator examines the defendant upon oath as provided by C. S., section 900, he

does so with full knowledge of the fact that the statute makes such evidence competent at the trial and is thus equivalent to a waiver of the provisions of C. S., 1795. The case of *Phillips v. Land Co.*, 174 N. C., 542, 94 S. E., 12, while not directly in point because of a fact setting different from the case at bar, tends to establish the competency of such evidence, irrespective of the inhibition of C. S., 1795.

We are of the opinion that the evidence was competent.

There was no objection to the issues submitted by the court, and hence the essential merits of the case have been established by the verdict of the jury.

We find no reversible error, and the judgment, as rendered, is approved.

No error.

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G. FRANK HONEYCUTT v. L. N. BURLESON AND C. L. SPEARS, EXECUTORS OF R. B. HARTWICK.

(Filed 4 December, 1929.)

**1. Evidence D b—C. S., 1795 applies to persons interested in event whether parties or not.**

The provisions of C. S., 1795, excluding testimony of transactions and communications with a deceased person by a party in interest, are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action.

**2. Same—Inchoate right of dower is interest in event within purview of C. S., 1795.**

The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of C. S., 1795, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased.

APPEAL by defendants from *Stack, J.*, at August Term, 1929, of CABARRUS.

On 31 March, 1923, the plaintiff mortgaged a tract of land to R. B. Hartwick, testator of the defendants, to secure $1,900, due 31 March, 1924. The title was encumbered by a prior mortgage in the sum of $2,800. The plaintiff made certain payments on his mortgage, the last on or about 19 January, 1924. He alleges that in the summer of 1925 a contract was made by him and the defendants' testator, by which the testator agreed to remit the remainder due on his mortgage, except the interest due in the fall of 1925, and to cancel the papers if the plaintiff

and his wife would look after, nurse, and care for the testator during his natural life and see that he was not committed to a hospital or to the county home; and that the plaintiff has in all respects performed his part of the contract. The action was brought to restrain a sale of the land under the terms of the mortgage. The material allegations of the complaint were denied and the following verdict was returned:

1. Did the testator, R. Baxter Hartwick, in 1925, contract and agree with the plaintiff, G. Frank Honeycutt, that he would give the plaintiff the balance due by him to the said Hartwick on a note and mortgage for $1,900 if the plaintiff's wife would look after, nurse, and see that said Hartwick was cared for during his life, and never allow him to go to the hospital or to the county home, as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff perform his part of said agreement? Answer: Yes.

Judgment for plaintiff; appeal by defendants.

*Hartsell & Hartsell for plaintiff.*
*H. S. Williams and Palmer & Blackwelder for defendants.*

ADAMS, J. The plaintiff's wife was permitted to testify concerning the execution and the terms of the alleged contract between the plaintiff and the testator of the defendants, who was the mortgagee. An exception of the appellants contests the competency of her testimony on these points.

Upon the trial of an action a party or a person interested in the event shall not be examined as a witness in his own behalf or interest against the executor, administrator, or survivor of a deceased person concerning a personal transaction or communication between the witness and the deceased, except in certain instances which are not material in this case. C. S., 1795. The two immediate questions are whether the plaintiff was interested in the event of the action and whether she testified in her own behalf or interest to a personal transaction with the deceased mortgagee. That she testified to a personal transaction is beyond controversy.

A married woman upon the death of her husband intestate, or she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements, and hereditaments whereof her husband was seized and possessed at any time during coverture, and in like manner to such an estate in all legal rights of redemption, equities of redemption, or other equitable estates in land whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during the coverture with her free consent lawfully appearing. C. S., 4100.

The plaintiff was not married at the time he executed the mortgage to R. B. Hartwick; the mortgagee, therefore, held the legal title to the mortgaged land subject to the right of redemption. *Lewis v. Nunn,* 180 N. C., 159; *Hogan v. Utter,* 175 N. C., 332; *Lumber Co. v. Hudson,* 153 N. C., 96. Upon her marriage his wife became dowable of an equity of redemption in the mortgaged property. If the land had been sold and the purchase price had not exceeded the debt there would have been no proceeds subject to her claim; if there had been an excess the value of her interest would have been much less than if the mortgage had been canceled, for in the latter event she would be dowable of the entire unencumbered tract. The cancellation of the mortgage was a matter in which she had a direct pecuniary interest. Section 1795 applies, not only to a party, but to any person having a pecuniary or legal interest in the event of the action. *Jones v. Emory,* 115 N. C., 158. Upon this principle it was held in *Linebarger v. Linebarger,* 143 N. C., 229, that upon an issue of *devisavit vel non* the wife of a caveator, who was also an heir at law of the testator, was prohibited from testifying to declarations of the testator tending to show undue influence. If her husband had acquired an interest in the land the wife would at once have been entitled to an inchoate right of dower. In *Helsabeck v. Doub,* 167 N. C., 205, the wife's testimony was held to be competent for the reason that if her husband recovered the value of his services to the deceased she would have no right growing out of the marriage relation which would attach to the money recovered. Indeed, the distinction between the two is pointed out in the latter case.

The wife's testimony concerning a personal transaction with the testator should have been excluded, and its admission entitles the defendants to a

New trial.

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WILBER ALLEN, BY HIS NEXT FRIEND, M. D. HOLDERBY, v. EDNA COTTON MILL, INC.

(Filed 4 December, 1929.)

**Trial C d—Instruction which ignores elements of negligence disclosed by the evidence will be held for reversible error.**

An instruction which ignores elements of negligence arising upon the evidence in a personal injury case, as an independent, complete and positive rule of law, is reversible error, and the principle of contextual interpretation, as where a correct instruction has been given on the material elements omitted, is not available to make the instruction complained of harmless error.

ALLEN *v.* COTTON MILL.

CIVIL ACTION, before *MacRae, Special Judge,* at February Term, 1929, of ROCKINGHAM.

The plaintiff, through his next friend, alleged that he was a minor about seventeen years of age, and was employed by the defendant to operate a brake machine in its factory; that said machine is used to manufacture cotton batting. Raw cotton is blown into the machine and passes through rollers at the front of the machine. The evidence tended to show that at times the rollers became stiff or did not operate smoothly, and powder or graphite was put on the rollers by the operator in order to procure a successful operation. There was evidence that oil dripped from oil cups upon the floor where the operator stood, and that powder used to powder the rollers fell on the floor, rendering the floor slick and slippery at the place where the operator was required to stand in the performance of his duties. There was further evidence to the effect that in operating the machine plaintiff slipped upon the powder, oil and grease, and fell into the machine, having his hand caught by the rollers and thereby permanently injured. There was further evidence to the effect that the plaintiff had been instructed as to the proper manner of operating the machine, and at the time of his injury he was operating it in accordance with the instructions given by the agents of the defendant.

The defendant offered strong evidence contradicting the evidence of plaintiff.

Three issues were submitted to the jury:

1. "Was the plaintiff injured by the negligence of the defendant as alleged?"

2. "Did the defendant by his own negligence contribute to his injury as alleged in the answer?"

3. "What damage, if any, is the plaintiff entitled to recover of defendant?"

The jury answered the first issue "No."

From judgment upon the verdict the plaintiff appealed.

*P. T. Stiers for plaintiff.*
*Glidewell, Dunn & Gwynn for defendant.*

BROGDEN, J. The elements of negligence involved were the presence of powder and grease upon the floor where the operator of the machine was required to stand in the performance of his duty and in failing to give plaintiff proper instructions for handling the machine.

The judge charged the jury as follows: "The plaintiff contends that he was a minor seventeen years of age at the time of his injury and that the

defendant was negligent in failing to give him proper warning and instructions as to the method and manner of performing his work, and such failure on the part of the defendant was a proximate cause of his injury. If you find from the evidence and by its greater weight, the burden being on the plaintiff, that the defendant failed to exercise ordinary care to give reasonable and proper instructions to the plaintiff, and that such failure was the proximate cause of his injury, you should answer the first issue, Yes; if you do not so find, it would be your duty to answer it, No."

This instruction ignores other elements of negligence disclosed by the evidence offered by the plaintiff. It is true that in other portions of the charge the rule of liability was correctly declared, but the foregoing instruction was the statement of an independent and positive rule of law. In such instances, if the charge complained of was erroneous and prejudicial, this Court has held that the principle of contextual interpretation of the charge does not avail. *Patterson v. Nichols,* 157 N. C., 406, 73 S. E., 202; *Champion v. Daniel,* 170 N. C., 331, 87 S. E., 214; *Construction Co. v. Wright,* 189 N. C., 456, 127 S. E., 580; *Hall v. Rhinehart,* 191 N. C., 685, 132 S. E., 787; *McCall v. Lumber Co.,* 196 N. C., 597, 146 S. E., 579.

There are many other exceptions noted in the record, but as the plaintiff is entitled to a new trial for the error specified, we deem it unnecessary and inadvisable to discuss them.

New trial.

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STATE v. E. A. BROWN, R. L. SETZER AND CLEVE SETZER.

(Filed 4 December, 1929.)

**Receiving Stolen Goods D a—Verdict of guilty of receiving stolen goods and acquittal of breaking and larceny is not contradictory.**

Where the defendant is tried on three separate counts: (1) with feloniously breaking into a railroad car in violation of C. S., 4237, (2) with larceny of certain goods therefrom, (3) with receiving stolen goods with knowledge that they had been stolen, C. S., 4250: *Held,* an acquittal on the first two counts and conviction on the third is not a contradictory verdict as a matter of law, or objectionable on the ground that the doctrine of recent possession applied equally to all counts, there being sufficient evidence to sustain the verdict of guilty on the third count.

APPEAL by defendant, E. A. Brown, from *Oglesby, J.,* at March Term, 1929, of BURKE.

STATE *v.* BROWN.

Criminal prosecution tried upon an indictment charging the defendant, and others, (1) with feloniously breaking into a railroad car in violation of C. S., 4237, (2) with the larceny of certain automobile tires and a number of shotguns, describing them, valued at $100, in the possession of the Southern Railway Company, as bailee, and (3) with receiving said properties, describing them, knowing the same to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: Guilty on the third count of receiving.

Judgment: Eight months on the roads.

The defendant, E. A. Brown, appeals, assigning errors.

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

*Avery & Patton and C. E. Cowan for defendant.*

STACY, C. J. There is evidence on behalf of the State tending to show that on 8 September, 1928, the tires and guns in question were checked into car No. 115311 for shipment over the Southern Railway to Morganton and Swannanoa. The car was sealed and remained sealed until it reached Connelly Springs, where the seal was broken, and the articles found missing. Soon thereafter, the defendants were discovered in possession of the guns and tires in question, with the numbers on the tires obliterated. They offered to sell the tires for less than half their value, and wanted to pawn or sell the guns.

It is the contention of the defendant that he cannot be convicted on the third count in the bill of indictment in the face of an acquittal on the first two counts; that the evidence of recent possession applies alike to all counts; and that as he was not convicted on the first two, he must necessarily be acquitted on the third.

The defendant's logic is better than his law. *S. v. Sisk,* 185 N. C., 696, 116 S. E., 721. Notwithstanding his acquittal on the first two counts, on which the jury may have pardoned him, there was evidence tending to support the third, and we cannot say, as a matter of law, that the verdict is contradictory. *S. v. Record,* 151 N. C., 695, 65 S. E., 1010.

We find no reversible error on the record, hence the verdict and judgment will be upheld.

No error.

M. V. CLEMENT v. CANNON MILLS COMPANY.

(Filed 4 December, 1929.)

**Master and Servant C b—Evidence of master's negligence in failing to provide safe tools and place to work held insufficient.**

Where there is evidence in a personal injury suit that the plaintiff was ordered to tighten certain nuts on a piece of power-driven machinery operated by pulley belts, and was given a wrench for the purpose, and that the wrench slipped from a nut, throwing the plaintiff's arm against the belt and injuring him: *Held*, in the absence of evidence tending to show a defect either in the wrench or the nut or that the plaintiff had not been furnished a reasonably safe place to work, the doctrine of "simple tools and appliances" applies, and the evidence is insufficient to take the case to the jury, it being required that the plaintiff under the circumstances use due care for his own safety, and a judgment as of nonsuit should have been entered.

APPEAL by defendant from *Finley, J.*, at May Term, 1929, of DAVIE. Reversed.

Action to recover damages for personal injuries sustained by plaintiff while at work as an employee of defendant.

The jury found in response to the issues submitted to them that plaintiff was injured by the negligence of defendant as alleged in the complaint, and that plaintiff did not contribute to his injuries by his own negligence.

From judgment that plaintiff recover of the defendant the sum assessed by the jury as his damages, defendant appealed to the Supreme Court.

*Walter E. Brock and B. C. Brock for plaintiff.*
*A. T. Grant and W. H. Beckerdite for defendant.*

CONNOR, J. Plaintiff was ordered by his foreman to tighten the nuts on the loom frames in defendant's mill. He undertook to do this work with a wrench furnished him by his foreman for that purpose. The wrench slipped off one of the nuts. Plaintiff's hand was caught by a belt and was injured. His arm was also injured. He alleges in his complaint that his injuries were caused by the negligence of defendant in failing to furnish him a safe place to work and proper tools with which to do the work required of him.

There was no evidence tending to show that the wrench or the nut from which the wrench slipped was defective, or that the place at which plaintiff was at work was not reasonably safe. Plaintiff testified that the wrench slipped because the nut was not a standard nut. This, however,

was his conclusion from the fact that the wrench slipped from this nut, and had not slipped from the other nuts which he had tightened. He did not see the nuts on the looms. He testified that the wrench fitted the other nuts, but did not fit the nut from which it slipped. This testimony was not sufficient to show that defendant was negligent as alleged in the complaint. The wrench was a simple tool, and the operation of tightening the nuts on the looms was a simple operation. By the exercise of reasonable care, plaintiff could have ascertained before he pulled or pushed the wrench, whether or not it had caught the nut. In the absence of evidence from which the jury could have found that there was some defect in the wrench or in the nut, or that the place at which plaintiff was ordered to work was not reasonably safe, defendant is not liable for damages resulting from his injuries. *Martin v. Manufacturing Co.*, 128 N. C., 264, 38 S. E., 876. There was error in the refusal of defendant's motion, at the close of all the evidence, for judgment as of nonsuit. The judgment is

Reversed.

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LEE A. FOLGER v. RUSSELL CLARK, J. MARKS, A. H. SHATFORD, JOSEPH A. MEYERS, JOHN F. CLARK, JR., AND JAMES COKER, PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF JOHN F. CLARK & COMPANY, AND T. H. PARRIS.

(Filed 4 December, 1929.)

**Brokers C a—In this case no damage was shown to have resulted from failure to receive stock cum-dividend and plaintiff could not recover.**

Where, in an action for damages for failure to receive stock purchased by the plaintiff through the defendant brokers cum-dividend, the evidence tends only to show that the agent of the local brokers represented that the stock bought then would be cum-dividend when in fact it was ex-dividend, and there is no allegation of fraud and the plaintiff had not offered to rescind the contract of purchase: *Held*, in the absence of evidence that the price of the stock purchased had not been reduced by the amount of the dividend, a judgment as of nonsuit should have been allowed, the plaintiff having failed to show any damage arising from the negligence of the local brokers.

APPEAL by defendants from *Stack, J.*, at May Term, 1929, of MECKLENBURG.

Civil action to recover damages of defendants, as brokers, in buying stock for plaintiff on the New York Stock Exchange, ex-dividend, when it had been reported by defendants' agent as selling cum-dividend on the day of purchase.

On 23 February, 1926, the plaintiff placed with the defendants, brokers in the city of Charlotte, an order to buy at the market 500 shares of the common stock of the General Motors Corporation. Defendants' agent represented to plaintiff that orders executed on that day would entitle the purchasers of said stock to a dividend of 1¾%, which had been previously declared, but was not payable until 12 March following. In this, the agent was in error, for said stock sold ex-dividend on that day.

From a verdict and judgment in favor of plaintiff for $875, the amount of the dividend in question, the defendants appeal, assigning errors.

*C. H. Gover for plaintiff.*
*Alfred S. Wyllie and Cansler & Cansler for defendants.*

STACY, C. J. The plaintiff has failed to show any loss due to the defendants' negligence. True, he did not get the dividend in question, but there is no evidence that the price of the stock was not thereby reduced. The testimony of defendants' agent would seem to indicate that it was. At any rate, we have discovered no evidence on the record of loss suffered by the plaintiff which may reasonably be said to be proximately attributable to the negligence of the defendants. Plaintiff took the stock and never offered to rescind the contract of purchase. There is no allegation of fraud in the transaction. *McNair v. Finance Co.*, 191 N. C., 710, 133 S. E., 85; *Pritchard v. Dailey*, 168 N. C., 330, 84 S. E., 392.

Of course, a broker is liable in damages for fraud or negligence which results in injury to his customer, but no measurable tort liability has been shown on the present record. 4 R. C. L., 285.

Reversed.

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STATE v. W. H. HICKEY.

(Filed 4 December, 1929.)

**1. Constitutional Law J a—Federal provisions as to searches and seizures are not restrictive on states.**

The provisions of the Federal Constitutional Amendment, Art. IV, securing to the people the right of safety and protection of their persons and property against unreasonable searches and seizures, and providing that no warrant should be issued except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized, are not restrictive of the powers of the State, and apply solely to the Federal Government.

**2. Intoxicating Liquor A d—Arrest and search of person reasonably suspected of carrying intoxicants is lawful.**

Where an officer sees a person leave his automobile with his appearance indicating that he had something concealed on his person and reasonably giving the impression that the person was carrying intoxicating liquor, the officer may immediately arrest and search such person, and where a half-gallon of liquor is found on the person of the defendant the action of the officer does not violate the provisions of Article I, section 11, of the State Constitution.

**3. Constitutional Law F a—Provision that defendant may not be compelled to give evidence against self does not apply to physical facts.**

Upon the trial of the defendant for violating the prohibition law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions.

**4. Intoxicating Liquor A b—Turlington Act will be liberally construed.**

Our prohibition act was passed in pursuance of Article I, section 2, of the State Constitution providing that all political power is vested in and derived from the people, and the approval of the people of this statute as expressed in the elections requires a liberal construction of the statute to carry out its intention as gathered from its related parts and clearly expressed.

**5. Intoxicating Liquor A a—Turlington Act is valid.**

An act by our Legislature to make the State law conform to the "Volstead Act" passed by Congress, is valid, and in some respects more stringent than the Congressional act.

**6. Intoxicating Liquor A c—"Liquor" will be deemed "intoxicating liquor" in the absence of proof to the contrary.**

Where a defendant is indicted for violating our State prohibition law, evidence that he had in his possession one-half gallon of "liquor" is interpreted as being an intoxicating beverage having the prohibited quantity of intoxicant, or containing more than one-half of one per centum of alcohol by volume, when there is no evidence to the contrary.

**7. Intoxicating Liquor B a—Evidence of possession of intoxicating liquor is sufficient for directed verdict for possession and transportation.**

Where upon the trial of the defendant for the violation of the Conformity Act there is testimony of an officer that he took from defendant, after he left his automobile and was entering a building, a half-gallon jar of liquor, the defendant introducing no evidence: *Held*, the evidence was sufficient to support a charge that if the evidence satisfied the jury beyond a reasonable doubt of the defendant's guilt of possession and transporting, the jury should answer those issues in the affirmative.

APPEAL from *Harwood, J.*, and a jury, at April Term, 1929, of MITCHELL. No error.

A. S. Burleson, an officer, testified to the effect that "I saw him (defendant) get out of the car. He had on a light sweater, and I saw a bulk

of something under his arm, and started to go in the door in the Glenn Building in Spruce Pine, and I ran in before he could get into the door and caught him and took one-half gallon of liquor from under his sweater."

The court below charged the jury: "If this evidence satisfies you beyond a reasonable doubt that the defendant had in his possession liquor, then you would return a verdict of guilty against him for the possession of intoxicating liquor. If this evidence satisfies you beyond a reasonable doubt that the defendant transported liquor—that is, carried it from one place to another and had it in his custody and control, and moved it from one place to another, you would return a verdict of guilty of transporting. The defendant did not introduce evidence in this case. That is not to be considered by you to his prejudice. The burden is on the State to satisfy you beyond a reasonable doubt of his guilt. You may retire and make up your verdict."

There was a verdict of guilty. The court below fined the defendant $100 and costs. The defendant excepted and assigned as error the admission of the testimony of the officer, A. S. Burleson. At the close of the State's evidence, defendant made a motion to dismiss the action or for judgment of nonsuit. C. S., 4643.

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

*Charles Hutchins for defendant.*

CLARKSON, J. The defendant cited the following amendments to the Constitution of the United States, claiming that he is protected under them:

Art. IV. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Art. V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the malitia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

We cannot so hold.

In *S. v. Godette,* 188 N. C., at p. 502, speaking to the subject, it is said: "The United States Court, in *Brown v. New Jersey,* 175 U. S., 175, citing numerous authorities, says: 'The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government.' *Ensign v. Pennsylvania,* 227 U. S., p. 592; *S. v. Campbell,* 182 N. C., p. 911. This case was taken to the Supreme Court of the United States on writ of error and affirmed. 262 U. S., p. 728; *S. v. Simmons,* 183 N. C., p. 684."

The defendant contends: "The illegal search and seizure of the defendant and the result thereof, the conviction of the defendant, violates said Fifth Amendment to the Constitution of the United States, as well as Article I, section 11 of the Constitution of North Carolina, both of which provide in effect that a defendant shall not be required to give evidence against himself. If the State had been required to proceed against the defendant with such legal evidence as it had, no conviction could have been had. The State did not proceed to convict the defendant by any such evidence, but proceeded to convict him by evidence obtained by the seizure of the person, and a search of his person without a process, and without evidence. The defendant was in effect placed on the stand, examined, and such examination used against him to convict him. The defendant insists that the upholding of these provisions of Federal Constitution and the State Constitution are of far greater importance to the dignity of the law than the conviction of a defendant for a mere misdemeanor."

Article I, sec. 11, of the Constitution of North Carolina, invoked, is as follows: "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty."

"In North Carolina it has long been the law that a physical fact or condition which was brought out by the illegal action of an officer may be given in evidence against the defendant. *S. v. Graham,* 74 N. C., 646 (prisoner compelled by officer to put shoe in track). This case has been approved in many decisions since, including *S. v. Mallette,* 125 N. C., 725, which case was affirmed in the United States Supreme Court on writ of error in *Mallett v. N. C.,* 181 U. S., 589; *S. v. Thompson,* 161 N. C., 238 and *S. v. Neville,* 175 N. C., 731. There are quite a number of courts that disagree with the principle established by *S. v. Graham, supra.* Some of these decisions are cited by the defendant in his brief. We do not think the action of the officers illegal in the present case." *S. v. Godette, supra,* at p. 503.

We find this in the Constitution of North Carolina, not cited by defendant, Article I, section 2: "That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

The will of the people of North Carolina has been expressed on the very question presented on this appeal. On 27 May, 1908, the matter was submitted to the people of the State. The vote "For the manufacture and sale of intoxicating liquor" was 69,416, "Against the manufacture and sale of intoxicating liquor" was 113,612—total vote 183,028, majority against the manufacture and sale of intoxicating liquor was 44,196.

The Eighteenth Amendment to the Constitution of the United States is as follows: "After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited." Forty-five States ratified the amendment—North Carolina on 16 January, 1919. The "Volstead Act" was an Act of Congress, 28 October, 1919. An act supplemental to the National prohibition act was approved 23 November, 1921. These acts were passed to carry into effect the Eighteenth Amendment to the Constitution.

The General Assembly of North Carolina, Public Laws of N. C., 1923, ch. 1, C. S., 3411, passed "An act to make the State law conform to the National law in relation to intoxicating liquors," and is to some extent more stringent than the "Volstead Act." This act has been frequently upheld and construed by this Court. *S. v. McAllister,* 187 N. C., 400; *S. v. Beavers,* 188 N. C., 595; *S. v. Knight, ibid.,* 630; *S. v. Jarrett,* 189 N. C., 516; *S. v. Sigmon,* 190 N. C., 684; *S. v. Pierce,* 192 N. C., 766; *S. v. Mull,* 193 N. C., 668; *S. v. Hege,* 194 N. C., 526; *S. v. Dowell,* 195 N. C., 523.

The General Assembly of this State has recently passed an act to teach the children in the schools of the State the danger of intoxicating liquors and narcotics on the human system. Public Laws 1929, chapter 96, "An act to require the public schools of the State to furnish adequate and scientific instruction in the subject of alcoholism and narcotism." This is a wise preventive measure.

In *S. v. Campbell,* 182 N. C., at p. 914-5, the law is stated by *Clark, C. J.,* as follows: "In 3 Cyc., 886, it is said that where 'An offense is committed in the presence or view of an officer, within the meaning of the rule, authorizing an arrest without a warrant, when the officer sees it, although at a distance, or hears the disturbance created thereby and

proceeds at once to the scene thereof, or the offense is continuing, or has not been consummated at the time the arrest is made.' In the case at bar the officers had information, which proved to be correct, that the defendant was carrying on his person, concealed, a quantity of liquor in violation of the provisions of the Consolidated Statutes above quoted. The offense was continuing, and the sale had not been consummated at the time the arrest was made. In many cases, unless an arrest is made under these circumstances, the criminal would escape or the crime be committed before the officer could make affidavit and obtain a warrant. For instance, if the officers had information, which was reliable, that one was carrying a concealed weapon, or was on his way to commit an assault with it, surely it would be their duty to arrest the offender though our statute and our decisions require that in such case they should at once take him before a judicial officer and procure a warrant and institute a judicial investigation." *S. v. Fowler,* 172 N. C., 905; *S. v. Neville,* 175 N. C., 731; *S. v. Simmons,* 183 N. C., 684; *S. v. Jenkins,* 195 N. C., 747.

The witness for the State, officer Burleson, testified "took one-half gallon of liquor off of him."

The defendant, in his brief says: "Is evidence by an officer that he obtained one-half gallon of liquor sufficient to sustain a conviction, without further proof as to the kind, quality and strength of the liquor sufficient to show the same intoxicating?"

The Conformity Act, Public Laws 1923, chapter 1, section 1 (3 C. S., 3411(a), says "(1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one percentum or more of alcohol by volume, which are fit for use for beverage purposes," etc. *S. v. Sigmon, supra,* p. 690.

"Liquor," as the word is commonly used, means intoxicating liquor. *S. v. Gulcznski,* 120 A 88, 89 (Del.); *Shahan v. Hardwick,* 118 S. E., 575, 30 Ga. App., 526; *Clay v. State,* 102 S. E., 367, 24 Ga. App., 811; *Armstrong v. State,* 265, S. W., 672, 673, 150 Tenn., 416.

Generally the word "liquor" implies intoxicating liquor, and therefore proof that a defendant sold "liquor" is sufficient to show, in the absence of adverse testimony, that he sold intoxicating liquor. *Smith v. State,* 86 S. E., 283, 17 Ga. App., 118.

Every contention made by defendant has been frequently decided contrary to the position taken by him on this appeal.

In *S. v. McAllister,* 187 N. C., at p. 404, the following observation is made: "It is well said by *Clark, C. J.,* in the concurring opinion in *S. v.*

*Coleman,* 178 N. C., 762: 'The intention of the act may be tersely expressed in the phrase, "Taste not, touch not, handle not" the forbidden article (for beverage purposes). It is outlawed by the statute, just as dynamite or any poisonous drug, and for the same reason that the popular will has deemed this necessary for the public welfare, and made the violation of that will a crime.' "

In *S. v. Sigmon,* 190 N. C., at p. 692, we find: "The Legislature of North Carolina, part 3 C. S., 3411(b), has said: 'And all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.' This provision is the wisdom of ages. Solomon, the wisest man (Prov., ch. 23, v. 29, 32), said: 'Who hath woe? who hath sorrow? who hath contentions? who hath babbling? who hath wounds without cause? who hath redness of eyes? They that tarry long at the wine; . . . At the last it biteth like a serpent, and stingeth like an adder.' "

We fully set forth the law on this subject and again "write the vision and make it plain upon tables, that he may run that readeth." Hab. 2:2. We find

No error.

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CHARLES B. MACRAE v. CITY OF FAYETTEVILLE AND W. F. CAMPBELL, BUILDING INSPECTOR.

(Filed 4 December, 1929.)

**1. Municipal Corporation H b—Ordinance regulating erection of filling stations held invalid under facts of this case.**

In proceedings for mandamus to compel a city, through its building inspector, to issue a permit for the erection of a gasoline filling station, an ordinance making it unlawful to erect such a station nearer than 250 feet to any residence within the corporate limits provided that the ordinance shall not apply to such stations already erected, is held void, it appearing that many stations had been erected and that the effect of the enforcement of the ordinance would be to give a monopoly to the stations already erected, and that the ordinance was not uniform in its application, and that to prohibit the building of the station in suit would be to deprive the owner of his property rights.

**2. Same—Filling stations are not nuisances per se, and ordinance regulating their erection is void when not uniform and impartial.**

Gasoline filling stations built and maintained under the provisions of law are not nuisances *per se,* but are of public necessity, and they may not be prohibited for purely aesthetic reasons, and where an ordinance is not uniform, fair and impartial in its application, it will be held void.

**3. Same—Ordinances regulating erection of filling stations which amount to taking private property without compensation are void.**

Private property cannot be taken for private purposes, but only for those purposes which are public in their nature upon the payment of just compensation, and an ordinance regulating the erection of gasoline filling stations within the limits of a city that has the effect of confiscating the property of an owner is void.

**4. Municipal Corporations H a—Validity of ordinance will not be decided in absence of information as to its reasonableness.**

Where subsequent to and pending proceedings in mandamus to compel a city to issue a permit for a filling station under an existing ordinance, the city has passed a general zoning ordinance, the latter will not be considered in the absence of information upon which the courts may determine as to whether the later ordinance was reasonable under the facts presented for determination.

**5. Same—Whether ordinance is a valid exercise of the police power is subject to determination by the courts.**

An ordinance passed under provision of statute, purporting to fall within the police powers as to health, safety, etc., is subject to judicial review by the courts, and the expressed purpose of the ordinance in this respect is not controlling on the courts.

STACY, C. J., dissents.

APPEAL by defendants from *Sinclair, J.*, at Chambers, 13 July, 1929, Fayetteville, N. C. From CUMBERLAND. Affirmed.

This is an application for a writ of mandamus, under C. S., 866, against the city of Fayetteville and its building inspector, to issue a permit to plaintiff authorizing him to construct a filling station upon a certain lot of plaintiff's in the city of Fayetteville, at the intersection of Hay Street and Hinsdale Avenue, being a lot 153 feet on Hay Street and 100 feet on Hinsdale Avenue. The summons was issued 22 June, 1929, and duly served on defendants and complaint and amended complaint duly filed setting forth certain ordinances which plaintiff prayed to be declared void, and that defendant building inspector grant permit. The material part of answers of defendants is to the effect that the ordinances are valid under the police power given the city of Fayetteville, and that the action be dismissed.

The judgment rendered by the court below is as follows: "This cause coming on to be heard before his Honor, N. A. Sinclair, Judge, at Chambers, and being heard upon the verified complaint, and answers, and upon affidavits filed by plaintiff and defendants, and upon argument of counsel, and the court being of the opinion that the ordinances set out in the complaint and the amended complaint are invalid: It is therefore, upon motion of Rose & Lyon and James MacRae, attorneys for plaintiff, considered and adjudged that the building inspector of the

city of Fayetteville be, and he is hereby ordered and directed to issue a permit to the plaintiff for the construction of a filling station, upon the land described in the complaint, subject to the conformance by the plaintiff with the building laws of the State of North Carolina. Done at Fayetteville, N. C., this 13 July, 1929."

The defendants excepted to the judgment as signed and assigned error and appealed to the Supreme Court. The other necessary facts will be set forth in the opinion.

*Rose & Lyon for plaintiff.*
*Robinson, Downing & Downing for defendants.*

CLARKSON, J. The question for our determination is the validity of the following ordinance:

"SECTION 1. That it shall be unlawful for any person, firm or corporation to install, build, construct or erect, alter or repair any building, place or structure to be used as what is commonly known as a gasoline service station where gasoline and oils are kept and sold, nearer to any dwelling than 250 feet, within the corporate limits of the city of Fayetteville, provided that this ordinance shall not apply to service stations already established, and to the erection of any stations where a permit has already been issued by the city.

SECTION 2. Any person, firm or corporation violating the provisions of this ordinance shall, upon conviction before the mayor, be fined $25.

SECTION 3. That this ordinance shall be in force and effect from and after its ratification." This ordinance was adopted 24 June, 1929.

The ordinance which was first sought by plaintiff to be declared invalid, defendants in their brief say "To be perfectly frank with this Court, we do not contend for the validity of the ordinance." We do not consider that ordinance.

After this application for the writ of mandamus was instituted, the defendant, city of Fayetteville, passed the above ordinance mentioned on 24 June, 1929. The facts undisputed on the record are to the effect that the lot upon which it is sought to erect a gasoline station is on Hay Street, one of the longest in the city, and a portion runs through the business section and a large portion runs through the residential section, and the lot is near the center of the oldest residential section, and that the nearest filling station to the lot is more than 1,700 feet. The affidavit of James MacRae, made 13 July, 1929, was to the effect that the property has an encumbrance on it of approximately $15,000, and a heavy and substantial payment will be due in August, 1929. That diligent efforts have been made to rent the property for residential purposes, but the efforts have been in vain; that the property has been vacant for approximately twelve months and no revenue has been derived there-

from; that unless the contract for sale be consummated with the Standard Oil Company, that it is highly probable that plaintiff will be unable to discharge encumbrances against the same, resulting in the loss of the property. It was also in evidence that property in that vicinity was growing less valuable and desirable for residential purposes, as the tendency of business was to travel westwardly, and the property was becoming more valuable and desirable for business purposes. It was in evidence that the Standard Oil Company will erect upon the premises a thoroughly modern and up-to-date filling station constructed from the best material, equipped with every safety device, under a general scheme, plan and type of architecture in keeping with the cleanliness and beauty of that portion of the city of Fayetteville in which the property is located and that the cost of said building and improvements will be between eight and ten thousand dollars. In the event a permit is granted the same would be so constructed as to comply with the building laws of the State of North Carolina, and the regulations of the city of Fayetteville.

There was evidence to the effect that the erection of the filling station would constitute "a hazard and eye sore," and would materially affect the desirability of the entire vicinity for residential purposes.

It was in evidence that a survey of the filling stations now operating in the city of Fayetteville has been made, and that as a result thereof it appears that there are twenty-four of such stations within the corporate limits of said city, and that twenty-three of them are located within 250 feet of residences used and occupied as such. That the total number of such filling stations operated within the corporate limits of the city of Fayetteville, only one is serviced by the Standard Oil Company, the others being serviced by its competitors. Building a filling station on plaintiff's lot would be within 250 feet of a dwelling or residence.

Automobiles are here to stay, and are now generally used for business and pleasure, and it is necessary for the convenience of the public that filling stations and garages be established and even in residential sections of cities and towns they are held not to be nuisances *per se*. *Hanes v. Carolina Cadillac Co.*, 176 N. C., p. 351; *Bizzell v. Goldsboro*, 192 N. C., 348; *Clinton v. Oil Co.*, 193 N. C., 432.

In every civilized country it is well-settled, with rare exceptions, that private property cannot be taken for private purposes and private property can only be taken for public purposes upon the payment of just compensation. A gasoline station is not, under the law, *per se* "a hazard." It might be to some an "eye-sore," but the law does not allow aesthetic taste to control private property, under the guise of police power. Speaking to the subject, we find in *City of Sturgeon v. Wabash Ry. Co.*, 17 S. W. Rep., 2 ser. (Mo.), at p. 618, the following: "The city

has no power to declare that to be a nuisance which is not so at common law or by statute." *Allison v. City of Richmond,* 51 Mo. App., 133; *Carpenter v. Reliance Realty Co.,* 103 Mo. App., 480, 77 S. W., 1004; *St. Louis v. Heitzeberg Packing & Provision Co.,* 141 Mo., 375, 42 S. W., 954, 39 L. R. A., 551, 64 Am. St. Rep., 516; *Crossman v. Galveston,* 112 Tex., 303, 247 S. W., 810, 26 A. L. R., 1210. Even where the general power exists to declare a nuisance, a city cannot declare the place of a single individual to be a nuisance in the absence of a general regulation applicable to all others of the same class. 19 R. C. L., sec. 117. Neither can a city by virtue of the police power alone, for purely aesthetic purposes, limit the use which a person may make of his property. 19 R. C. L., 140.

Ordinances of towns and cities where private property is involved must be uniform, fair and impartial in their operation. The present record discloses that there are now twenty-three filling stations within 250 feet of residences—the ordinance limit. As to these residences, we do not know whether they belong to the rich or the poor, but they are near filling stations perhaps for all time. The ordinance upon consideration prohibits the building of a filling station on plaintiff's lot within 250 feet from residences, which would prohibit plaintiff erecting a filling station on his lot. Is this ordinance in its operation uniform, fair and impartial? The statement of the facts is a sufficient answer that it is not. Then, again, 250 feet from any residence in the cities and towns where lots are generally 50 to 100 feet frontage, would practically limit in the future gasoline stations to small area and tend to allow a monopoly of those already in existence. The vice of the ordinance is apparent. We have no doubt of the good intentions of the governing body of defendant, city of Fayetteville, but the operation of such an ordinance, under the facts disclosed in this action, is destructive of property rights. The facts of record disclose that to keep plaintiff from selling his property, heavily encumbered, vacant for over twelve months, unable to rent for residential purposes, paying no doubt heavy taxes on vacant property, the ordinance was enacted. The ordinance reaches out to practically confiscate plaintiff's property and places a 250 feet limit, which gives a monopoly to twenty-three gasoline stations near homes and excludes plaintiff. The facts in reference to the reasonableness of ordinances of this kind are subjects of inquiry by the courts to determine the validity. *Board of Health v. Lewis,* 196 N. C., 641; *Standard Oil Co. et al. v. Marysville Adv.,* op. 445, Sup. Ct. Rep., Vol. 49, p. 430. We cannot hold the ordinance valid. *Bizzell v. Goldsboro,* 192 N. C., 348; *Clinton v. Oil Co.,* 193 N. C., 432; *Burden v. Town of Ahoskie, post,* 92.

In *Hardin v. City of Raleigh,* 192 N. C., 395, even in zoning ordinances, it is held that there must be uniformity and a tribunal is estab-

lished and charged with duties and the matter subject to review. On 12 August, 1929, a zoning ordinance was adopted by the city and defendants request this Court to now allow it to be set up as a defense, citing *Refining Co. v. McKernan*, 179 N. C., 314. In that case the action was pending, and 1 October, 1919, the ordinance was passed and the application for mandamus was heard at October Term, 1919, of the court after the ordinance was passed. The Court was able on the record to determine the reasonableness of the ordinance. In the present action judgment was rendered in favor of plaintiff and after appeal to this Court the zoning ordinance was adopted. We are not inclined to allow the ordinance to be pleaded. There is no way to consider the reasonableness of the zoning ordinance.

"A determination by the Legislature to what is a proper exercise of the police power is not final and conclusive, however, but is subject to the supervision of the courts. For, as has already been stated, the mere assertion by the Legislature that a statute relates to the public health, safety and welfare, does not of itself bring such statute within the police power of the State. It is clear that legislative bodies, under the guise of police regulations protecting the public welfare, cannot arbitrarily pass laws which have no relation to that subject. Whether the police power has been exercised within the proper limitations, whether or not a law is reasonable, whether a particular measure is designed to further some governmental function or to further private gain, and whether an act bears any reasonable relation to the public purpose sought to be accomplished, are all judicial questions. In like manner the question as to what are subjects of the lawful exercise of the police power is a question for judicial determination. Therefore, in its last analysis, the question of the validity of measures enacted under the police power is one for the court." 6 R. C. L., at p. 241-2. The judgment of the court below is

Affirmed.

STACY, C. J., dissents.

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S. O. PEEBLES AND WIFE, JEANETTE PEEBLES, *v.* W. C. IDOL, TRUSTEE, AND THE PIEDMONT BUILDING AND LOAN ASSOCIATION.

(Filed 4 December, 1929.)

**1. Evidence D c; I b—Where bank ledger has no probative value as evidence tending to establish fact in issue it is properly excluded.**

In proceedings to enjoin a sale under foreclosure of a deed of trust where the plaintiff introduces evidence tending to show that he had not received the loan for which the deed of trust was given, the ledger of the

bank, identified as a record of the lender, with the bank showing two items for the same amount of the loan charged against the lender on the day that the borrower deposited a like amount with the bank: *Held*, the ledger sheet was properly excluded in the absence of evidence from which the jury could find that one of the items charged to account of the lender was paid to the borrower, it having no probative force upon the fact of payment in issue, and being irrelevant and immaterial.

**2. Trial E g—In the charge to the jury the use of the word "testimony" instead of "evidence" held not prejudicial error in this case.**

*Held*, in this case that the use by the judge in his charge to the jury of the word "testimony," instead of the word "evidence," upon the quantity of proof required of the plaintiff, was not prejudicial to the defendant.

APPEAL by defendants from *Clement, J.*, at June Term, 1929, of GUILFORD. No error.

Action to enjoin the sale of land under the power of sale contained in a mortgage from plaintiffs to the defendant, W. C. Idol, trustee, and for the cancellation of said mortgage, and of the note secured thereby, payable to the defendant, the Piedmont Building and Loan Association.

The allegation in the complaint that plaintiffs have received no consideration for said note was denied in the answer. The issue thereby raised was submitted to the jury and answered as follows:

"Was the note secured by a mortgage, which mortgage is recorded in Book 444, page 300, in the office of the register of deeds of Guilford County, executed without consideration, as alleged in the complaint? Answer: Yes."

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

*King, Sapp & King for plaintiffs.*
*Roberson, Haworth & Reese for defendants.*

CONNOR, J. Some time prior to 13 October, 1924, the plaintiff, S. O. Peebles, the owner of a certificate for ten shares of its stock, issued to him on 15 January, 1924, applied to the defendant, the Piedmont Building and Loan Association of High Point, N. C., for a loan of $1,000, to be secured by said certificate, and by a mortgage on certain land described in said application. The application for the loan was approved by the directors of said association. Thereupon, on 13 October, 1924, plaintiffs executed a mortgage by which they conveyed to the defendant, W. C. Idol, trustee, the land described in the application. A note for $1,000, executed by the plaintiff, S. O. Peebles, and payable to the defendant association, the mortgage securing said note, executed and acknowledged by the plaintiffs, and the certificate for ten shares of its stock, owned by the plaintiff, S. O. Peebles, were delivered to the de-

fendant association and are now in its possession. Default has been made in the payment of said note, according to its tenor, and at the request of the defendant association, the defendant, W. C. Idol, trustee, has advertised the land conveyed to him by the mortgage for sale.

Plaintiffs allege in the complaint in this action that they have received no consideration for the note secured by the mortgage; they pray judgment that the defendants be enjoined from selling the land described in the mortgage, under the power of sale contained therein, and that the note and mortgage be canceled and delivered to them.

Defendants deny the allegation in the complaint that plaintiffs have received no consideration for said note; they allege that a check for $1,000, payable to S. O. Peebles, and drawn by W. C. Idol, secretary of the Piedmont Building and Loan Association, on the Wachovia Bank and Trust Company, was delivered to the plaintiff, S. O. Peebles, on or about 17 November, 1924, for said note, and that said check was deposited by the said S. O. Peebles with the Wachovia Bank and Trust Company of High Point, N. C., to his credit, on 19 November, 1924, and that on said day the said check was charged to the account of the Piedmont Building and Loan Association with said Bank and Trust Company.

Evidence for the plaintiffs tended to show that within a few days after the note, mortgage and certificate were delivered by him to the defendant association, and before its attorneys had reported to it the result of their investigation as to plaintiffs' title to the land described in the mortgage, the plaintiff, S. O. Peebles, notified W. C. Idol, secretary of the defendant association, that he would not need the loan for which he had applied, and that he had requested the said W. C. Idol to return his papers to him, and that the said W. C. Idol advised the said plaintiff that the said papers would be returned to him by mail, as soon as they were received from the attorneys of the association. The report of the attorneys was received by the association on 28 October, 1924. Neither the note, the mortgage nor the certificate was returned to plaintiffs. S. O. Peebles testified that when he subsequently called on W. C. Idol, secretary of defendant association, and again requested him to return his papers to him, the said W. C. Idol, after failing to find the papers in his office, insisted that they had been returned to plaintiff by mail. Under the rules governing the defendant association, interest on loans to its stockholders was payable monthly, with the monthly payments on the shares of stock owned by them. No demand was made on plaintiff, S. O. Peebles, for interest on his note until some time in October, 1927, when defendant association demanded of the said S. O. Peebles payment of interest for thirty-four months, contending that he was in arrears on

these payments. Plaintiff denied that he owed the defendant association any sum on account of said note, and demanded the return of the note and mortgage to him.

Evidence for the defendants tended to show that on 17 November, 1924, the defendant, W. C. Idol, as secretary of the defendant association, drew a check for $1,000, payable to S. O. Peebles, on the Wachovia Bank and Trust Company, for the loan which said association had agreed to make to the plaintiff. The note, mortgage and stock certificate were then in the possession of the defendant association, having been received from its attorneys, with their approval of plaintiffs' title to the land described in the mortgage, on 28 October, 1924. The mortgage which had been duly acknowledged by plaintiffs on 13 October, 1924, was recorded in the office of the register of deeds of Guilford County, on 29 October, 1924. W. C. Idol testified that he had no recollection that plaintiff had notified him that he did not want the loan, and had requested him to return the papers to him, as soon as they were received from the attorneys of the association. He testified that as secretary of the defendant association, on 17 November, 1924, he drew a check for $1,000, payable to S. O. Peebles, and that he filled in the blanks on the stub of his check book, showing date, the amount and the payee of the check. He did not testify that he delivered the check to S. O. Peebles, in person or otherwise. Neither the check nor the stub was offered in evidence. Witnesses for defendants testified that the checks of the defendant association and the stubs for the month of November, 1924, had been destroyed. Defendants accounted for the failure to demand of the plaintiff the monthly payments of the interest on the note, in accordance with its terms, by evidence tending to show that the bookkeeper in the employment of the defendant association failed to make the proper entries on the records of the association, and did not discover his error until after the lapse of thirty-four months.

In order to show that plaintiff, S. O. Peebles, received and collected the check for $1,000, which defendants' evidence tended to show was drawn by W. C. Idol, as secretary of defendant association, payable to him, defendants offered in evidence, without objection from plaintiffs, the account of S. O. Peebles with the Wachovia Bank and Trust Company. This account showed that on 19 November, 1924, S. O. Peebles deposited to his credit with said Bank and Trust Company the sum of $1,000. There was no evidence tending to identify this deposit with the check for $1,000, drawn by W. C. Idol, secretary of the Piedmont Building and Loan Association, bearing date 17 November, 1924. There was evidence tending to show that from November, 1924, to September, 1925, S. O. Peebles, who was actively engaged in business during said period made 340 deposits with the Wachovia Bank and Trust Company

at High Point, N. C., aggregating the sum of $142,951.50. Three of these deposits were for $1,000 each, to wit, on 19 November, 1924, 14 April, 1925, and 24 September, 1925. Plaintiff testified that he was unable, at the date of the trial in June, 1929, to identify the source of any of these deposits. W. C. Idol, who is the cashier of the Wachovia Bank and Trust Company at High Point, and also secretary of the Piedmont Building and Loan Association, testified that he had, upon investigation, ascertained that one of the deposits for $1,000, shown on the account of S. O. Peebles, was a loan made to him by the said Bank and Trust Company, and that the other deposit was a loan made to him by the defendant association, subsequent to the date of the note in controversy. The witness was unable to identify the deposit of 19 November, 1924, with the check which he had testified that he drew as secretary of the defendant association, payable to S. O. Peebles on 17 November, 1924.

Defendants further offered in evidence the account of the Piedmont Building and Loan Association with the Wachovia Bank and Trust Company, for the month of November, 1924, as shown on a ledger sheet identified as a record of said Bank and Trust Company made in the due course of its business. Plaintiffs objected to the introduction of this ledger sheet which showed that on 19 November, 1924, the Piedmont Building and Loan Association was charged with three items, two of $1,000 each, and one of $700. There was no evidence tending to show to whom these sums were paid, or tending to show that either of the items for $1,000 had any relation to the deposit of $1,000 on the same day to the credit of S. O. Peebles. Plaintiffs' objection to the introduction of the ledger sheet showing the account of the Piedmont Building and Loan Association with the Wachovia Bank and Trust Company was sustained. On their appeal to this Court, defendants rely chiefly upon their assignment of error based upon this exception.

In the absence of evidence from which the jury could find that one of the items of $1,000, shown on the ledger sheet, as charged to the account of the defendant association, on 19 November, 1924, was paid to the plaintiff, S. O. Peebles, on the check drawn by W. C. Idol, secretary of said association, on 17 November, 1924, payable to him, the said ledger sheet was properly excluded as evidence upon the issue submitted to the jury in this case. It has been held that the books of a bank when they are proved to have come from the proper depository, are admissible in evidence. 10 R. C. L., p. 1175, sec. 373. However, they are not admissible, when they are not competent, for the reason that they have no probative value as evidence tending to establish a fact involved in the issue to be determined by the jury. In the instant case, the fact that the account of the defendant association with the Wachovia Bank and

Trust Company was charged on 19 November, 1924, with two items of $1,000 each, does not tend to show that the deposit on the same day with said Bank and Trust Company of $1,000, to the credit of S. O. Peebles, was made from the proceeds of either of said items. The fact which the excluded evidence tends to show is not relevant to the facts sought to be proved, to wit: that S. O. Peebles deposited the check of the defendant association with the said Bank and Trust Company, on 19 November, 1924, and that said check was paid by the said Bank and Trust Company to him on said day. Evidence, although admissible, should be excluded when it is irrelevant, and therefore incompetent. In *Martin v. Knight,* 147 N. C., 564, 61 S. E., 447, it is said, on page 582: "It is clear that a paper-writing or record containing no information upon which an inference could be drawn in regard to the matter in controversy, is irrelevant and inadmissible for any purpose." The entry on the ledger sheet which was excluded by the court showed only that two items, each for $1,000, were charged to the defendant association by the Wachovia Bank and Trust Company, on 19 November, 1924; there was no evidence from which the jury could find that there was any relation between either of the items charged on the account of defendant association and the deposit credited on the account of S. O. Peebles; or that there was any relation between either the charge or the credit, and the check, which was drawn by W. C. Idol, as secretary of the defendant association, on 17 November, 1924, payable to S. O. Peebles. There was no error in the exclusion of the ledger sheet as evidence in this case.

Other assignments of error on this appeal based upon exceptions to the rulings of the court upon matters of evidence cannot be sustained. The use of the word "testimony," by the judge in his charge to the jury, instead of the word "evidence" in the instruction as the quantity of proof required of plaintiffs, was manifestly not prejudicial to the defendants. The judgment is affirmed. We find

No error.

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STATE v. RAEFORD BURLESON, RADFORD DENNIS AND JIM JOLLY.

(Filed 4 December, 1929.)

**1. Criminal Law G d—Testimony of telephone conversation held competent under the facts of this case.**

Where a defendant in a criminal action depends upon proving an alibi by showing by his witness that at the time the offense was committed that he was at her house in a different place, and, in contradiction of the testimony of such witness, an officer arresting the defendant testifies that on the night of the arrest he called up the telephone number of the residence

of this witness and that a female voice answered and said that she was in the residence called for, but was not the person asked for, but that she would call her sister, who was such person, and then another female voice answered, identified herself, and said the defendant had not been in her house: *Held*, sufficient evidence that the witness herself had answered the phone and was competent as evidence tending to contradict her testimony to the contrary.

**2. Evidence D d—Where identity of other person is established testimony as to phone conversation is competent.**

Testimony of a witness that he had had a conversation with another person over the telephone is admissible, if otherwise competent, where the identity of the other person is established by evidence.

**3. Criminal Law L e—In this case held there was no error in respect to rulings on admission of evidence.**

Exceptions in a criminal action to the rulings of the court with respect to the admission of evidence as to an alibi relied on will not be held for error when all defendant's evidence tending to establish the alibi was submitted to the jury.

**4. Burglary C d—In this case held: evidence of breaking and entering otherwise than burglariously was sufficient to overrule nonsuit.**

In this case *held:* evidence of defendant's guilt of unlawfully and feloniously breaking and entering a barber shop and repair shop, with intent to steal, and with the larceny of certain articles of personal property, was sufficient to be submitted to the jury, and defendant's motion as of nonsuit was properly overruled. C. S., 4643.

APPEAL by defendants from *Clement, J.*, at July Term, 1929, of STANLY. No error.

The defendants were tried upon six several indictments pending in the Superior Court of Stanly County. These indictments were consolidated for the trial of the issues raised by pleas of not guilty by each of the defendants to said indictments.

Each defendant was charged with unlawfully and feloniously breaking and entering the barber shop of Arlie Morris in Stanly County, on the night of 10 August, 1928, with intent to steal, take and carry away certain articles of personal property therein; and, also, with the larceny of said articles of personal property, of the goods and chattels of the said Arlie Morris, with a count in the indictment for receiving said stolen property, knowing the same to have been stolen.

Each defendant was also charged with unlawfully and feloniously breaking and entering the general repair shop of T. J. Austin, in Stanly County, on the night of 10 August, 1928, with intent to steal, take and carry away certain articles of personal property therein; and, also, with the larceny of said articles of personal property, of the goods and chattels of the said T. J. Austin, with a count in the indictment for receiving said stolen property, knowing the same to have been stolen.

There was a verdict of guilty as to each defendant as charged in each indictment.

From the judgment on each of said verdicts, defendants appealed to the Supreme Court.

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

*G. Hobart Morton, J. R. Burleson, O. J. Sikes and R. L. Brown for defendants.*

CONNOR, J. All the evidence offered at the trial in the Superior Court tended to show that the crimes charged in the indictments, upon which the defendants were tried, were committed, as alleged in said indictments. There was a conflict in the evidence as to whether the defendants are the persons who committed said crimes. The evidence was submitted to the jury under a charge by the court to which there was no exception. On their appeal to this Court defendants contend that there was error in the refusal of the court to allow their motion, made at the close of all the evidence under C. S., 4643, that the actions be dismissed, and in the rulings of the court upon their objections to certain evidence offered by the State.

There was ample evidence tending to show that defendants are the persons who broke and entered the barber shop of Arlie Morris, between eleven-thirty and twelve o'clock, on the night of 10 August, 1928, and took and carried away certain articles of personal property, then in said barber shop, and owned by the said Arlie Morris. There was evidence tending to show that the persons who broke and entered the general repair shop of T. J. Austin, are the same persons who broke and entered the barber shop. The repair shop is located at a short distance from the barber shop. It was entered on the same night, and a short time after the barber shop was entered. The persons who entered both shops rode away in a Chevrolet coupe, which was identified by witnesses as the same coupe as that in which the defendants were riding that night, both before and after the commission of the crimes. If the defendants are the persons who broke and entered the barber shop and took and carried away the property of Arlie Morris, as the evidence for the State tended to show, there was also evidence sufficient to show that the defendants are the persons who broke and entered the repair shop and took and carried away the property of T. J. Austin. There was no error in the refusal of the court to allow the motion that the actions be dismissed.

Evidence offered by defendants tended to show that they left Albemarle, on the night of 10 August, 1928, at about ten-thirty o'clock, in a Chevrolet coupe, driven by the defendant, Radford Dennis; that they

drove said coupe to Salisbury, arriving there at about eleven o'clock; that they went to the home of Miss Minnie Loyd Scales in Salisbury, and that the defendant, Raeford Burleson, remained there, while the other defendants drove about the city; that these defendants, after about an hour, returned to the home of Miss Scales; that the defendant, Raeford Burleson, left said home with the other defendants, at about twelve-twenty o'clock; that some time thereafter they returned to Albemarle. The defendants were in Albemarle at two-thirty o'clock, when they were arrested, upon the charge that they had broken and entered the barber shop of Arlie Morris, and the repair shop of T. J. Austin, in Albemarle, at some time between eleven-thirty and twelve o'clock that night.

Miss Minnie Loyd Scales, as a witness for the defendants, testified that she lives in Salisbury; that on the night of 10 August, 1928, the defendants came to her home in Salisbury, arriving there at about eleven-fifteen o'clock; that the defendant, Raeford Burleson, remained there for about an hour; that the other defendants left him there, and in about an hour returned for him; that all three defendants left her home at about twelve-twenty o'clock, and that the defendants were riding in a Chevrolet coupe.

She testified that after defendants left her home, she went to bed; that her sister, Elizabeth Scales, returned home that night from Charlotte, after she had gone to bed. Her sister did not call her to the telephone, and she had no conversation that night with any one at Albemarle.

Miss Elizabeth Scales, as a witness for the defendants, testified that she returned to her home in Salisbury from Charlotte, about one-thirty o'clock on the night of 10 August, 1928; that she did not know that defendants had been at her home that night; that she answered a telephone call from Albemarle after she came home and told the person who had called that the defendants had not been at her home that night. She testified that she did not call her sister, Minnie Loyd Scales, who was at the time in bed, to the telephone, and that her sister did not talk over the telephone to the person who had called from Albemarle, and asked about the defendants.

Raeford Burleson, one of the defendants, testified that after the defendants were arrested in Albemarle on the night of 10 August, 1928, he told the officers who had arrested them that the defendants were in Salisbury at the time it was alleged that the barber shop and the repair shop in Albemarle had been entered; that he told officer Burleson to call Miss Minnie Loyd Scales on the telephone, at 784-W in Salisbury, and that she would corroborate his statement.

After these witnesses had testified, the State offered the testimony of officer Burleson to contradict the testimony of Miss Minnie Loyd Scales

and Miss Elizabeth Scales, with respect to the telephone conversation. Officer Burleson testified that when he called 784-W, Salisbury, a girl came to the telephone and said that she was Elizabeth Scales; that he told her that he wanted to speak to Miss Minnie Loyd Scales, and that the girl told him to hold the telephone, and that she would call Minnie Loyd Scales; that in a few minutes another girl came to the telephone and said that she was Minnie Loyd Scales; that he told her that he was an officer at Albemarle and wished to know whether or not she had seen Raeford Burleson, Radford Dennis and Jim Jolly at her home that night, and that this girl told him over the telephone, in response to his inquiry, that she had not seen them.

In apt time the defendants objected to this testimony on the ground that the witness had not identified the girl who he testified had talked with him over the telephone as Miss Minnie Loyd Scales. The objection was overruled, and the defendants excepted. The assignment of error based on this exception cannot be sustained.

There was evidence from which the jury could find that the girl who talked with the officer over the telephone was Minnie Loyd Scales. It is admitted that the officer talked with some girl who was in Salisbury at number 784-W; that Minnie Loyd Scales was in the house in which the telephone bearing this number was located, and that Elizabeth Scales, who was also in the house, talked with the officer. All the evidence shows that the officer had a telephone conversation with a person who was talking to him, at Salisbury, through the telephone in the home of Minnie Loyd Scales, and that the officer wished to speak to her and not to Elizabeth Scales. The testimony of a witness that he had a conversation with another person over the telephone, is admissible where the identity of the other person is established by evidence. The conversation, if otherwise competent, should not be excluded as evidence, because it was had over the telephone, when the identity of the person talking to the witness is established. In the absence of evidence tending to identify the person with whom the witness had the telephone conversation, evidence as to the conversation should be excluded.

It has been generally held that a person talking at one end of the telephone line may be identified by his or her voice. *Manufacturing Co. v. Bray,* 193 N. C., 350, 137 S. E., 151. It is said that "by the weight of authority evidence is admissible as to conversations over the telephone, when the witness has called for a designated person at his place of business, and the one answering the telephone, and carrying on the conversation claims to be the person called for." See note L. R. A., 1918D, p. 720. Whether this rule, founded upon modern business practice, shall be adopted in this jurisdiction or not, we do not now decide. In the instant case, while there was no evidence tending to show that

the officer recognized the voice of the person who talked with him over the telephone, there was evidence tending to show that such person was Miss Minnie Loyd Scales. The conversation which the officer testified that he had on the night of 10 August, 1928, with the person who claimed to be Minnie Loyd Scales, was competent as evidence tending to contradict both Miss Minnie Loyd and Miss Elizabeth Scales.

We have considered other assignments of error, all of which are based upon exceptions to the rulings of the court with respect to the admission of evidence. These assignments of error cannot be sustained. All of defendants' evidence tending to show that they were in Salisbury and not in Albemarle, when the crimes with which they are charged were committed in Albemarle, was submitted to the jury. In the absence of error in decisions of the trial court as to matters of law or legal inference, the verdict of the jury cannot be disturbed by this Court. The judgments must be affirmed. We find

No error.

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GRIFFITH PROFITT COMPANY, A PARTNERSHIP COMPOSED OF W. O. GRIFFITH, FRED PROFFITT, WM. I. PARNELL, AND TRADING UNDER THE FIRM NAME OF GRIFFITH PROFFITT COMPANY, v. S. L. ENGLISH.

(Filed 4 December, 1929.)

**1. Quasi-Contracts A a—In this case held: plaintiff's remedy was upon implied contract.**

Where a clerk in a store without authority from his employer, sells certain of his employer's goods for a debt personally owed by him to the purchaser or his agent, and the employer refuses to ratify the transaction and seeks to hold the purchaser liable for the purchase price: *Held*, there was no "meeting of the minds" between the purchaser and the employer, and the employer's right to recover is on an implied contract for their reasonable worth, *quantum meruit*, on the day he got the goods.

**2. Limitation of Actions E c—Where there is conflicting evidence as to time goods were gotten under implied contract the question is for jury.**

Where in an action on an implied contract for the reasonable worth of articles received, the three-year statute of limitations will bar recovery, and where the statute is pleaded and there is conflicting evidence as to the time the articles were gotten by the defendant, the question as to whether the claim is barred by the statute is a question for the jury, and a directed verdict thereon will be held for reversible error.

APPEAL by defendant from *MacRae, J.*, at August Term, 1929, of YANCEY. New trial.

This was a civil action for the recovery of an account of $110, the price of a wagon. The action was commenced by the issuance of a summons by S. T. Bennett, justice of the peace, on 31 May, 1928, and served on defendant 9 June, 1928. An appeal was taken from the justice of the peace to the Superior Court. The defendant, S. L. English, set up the defense that the account was barred by the statute of limitations. Defendant also denied that he contracted the debt sued on, and alleged that one Roy Horton, to whom the plaintiff's clerk, Arcemus Higgins, was indebted, made the debt with the clerk, who was the agent of the plaintiff, and that it was the debt of Roy Horton, and not of this defendant; that he got the wagon from plaintiff's store under the following circumstances: Roy Horton was building a house for Arcemus Higgins, who was clerking in plaintiff's store; that Roy Horton owed defendant for some framing that went into Arcemus Higgins' house. Defendant wanted to purchase a wagon from plaintiff, and Horton told him that he could make arrangements with Higgins to get the wagon on what Higgins owed him, Horton, and he went to the store and got the wagon under these circumstances.

Horton testified: "I am the one that was building the house for Arcemus Higgins. I bought the framing to go into this house from Mr. English. Mr. English wanted some money to buy a wagon with, and I didn't have it, and he told me he was going to get it over here at Griffith Proffitt's place, and I told him I could make arrangements for him to get it from Cem (Arcemus Higgins), and give Cem credit for the amount of the wagon on the amount he was due me for building his house and let it go on this material. So he saw me again and told me he went in and spoke to Cem about getting the wagon, and he told him it would be all right if I would come in and make arrangements about it with him. So, I went into the store, and he was busy with a customer, and I just passed by him and said, 'You know what you were talking about to Louis English about that wagon; it is all right with me for you to go ahead and let him have it.' He said, 'All right,' that he would. I come back out the door and told Mr. English he could get the wagon. I remember the young man, Walter Barnes, who I was holding the team for. I spoke to Cem Higgins about this wagon again a day or two after this. I told him it was all right for him to let Mr. English have the wagon that way; that he could take credit for it on what he was due me, and that Mr. English would give me credit for it. When I told him that he said it was all right."

Plaintiffs contended that their clerk, Arcemus Higgins, had no authority to sell the wagon and pay a debt which he owed to Roy Horton on account of his building contract with him, and that the delivery of

the wagon to defendant under the circumstances was without authority, and plaintiffs have never ratified the clerk's conduct in the matter.

The first time plaintiffs gave defendant a statement of his account, with the wagon on it, for $110, was on 2 August, 1925. Defendant sent plaintiffs check for $18.70, amount of bill other than the wagon, on 17 November, 1925. Plaintiff kept the check until 13 August, 1926, and defendant paid it off with cash.

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

"1. Is the account sued on barred by the statute of limitations? Answer: No.

2. What amount, if any, is the plaintiffs entitled to recover of the defendant? Answer: $110 and interest."

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

*R. W. Wilson for plaintiffs.*
*Watson & Fouts for defendant.*

PER CURIAM. The record discloses that the statute of limitations was plead by the defendant. The charge of the court below was as follows: "Gentlemen of the jury, there are two issues in this case for you to answer: The first is: Is the amount set out barred by the statute of limitations? The court charges you that if you believe all the evidence you will answer that issue No. The second issue is: What amount, if anything, is the plaintiff entitled to recover of the defendant? The court charges you that if you believe all the evidence you will answer that issue $110 and interest." The defendant excepted and assigned error.

The testimony of S. L. English was, in part: "Mr. Proffitt says I got the wagon the 3d of June (1925), but it was the 19th day of May (1925). I know I got it the 19th of May, for my record here on my book shows it, and Roy Horton credited on the 19th of May for $110. I got the wagon before I finished putting the lumber down. I finished on the 23d of May. I hauled part of the lumber with the new wagon. Walter Barnes went into the store with me when I went in to see Higgins about letting me have the wagon."

The action was commenced on 31 May, 1928. The defendant, English, testified that he got the wagon on 19 May, 1925. According to his testimony the account for the wagon, $110, would be barred by the statute of limitations, as the suit was brought after three years. C. S., 441. There was no "meeting of the minds" between plaintiffs and defendant, hence no express contract. The plaintiffs did not authorize and refused to ratify the transaction between their clerk, Arcemus Higgins, Roy

Horton and defendant, therefore defendant having gotten plaintiff's wagon and kept it and used it, there was an implied contract for money had and received, and he owed what it was reasonably worth, *quantum meruit,* on the day he got it. Defendant is liable from the day of his enrichment—getting the wagon—from his testimony 19 May, 1925. *Cole v. Wagner,* 197 N. C., 692.

This is a matter for the jury, the probative force was for them. For the reasons given, there must be a

New trial.

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A. B. DRAFTS v. JAMES SUMMEY AND HIS WIFE, CAROLINE SUMMEY.

(Filed 4 December, 1929.)

**Justices of the Peace E a—Where appeal from justice's court has not been docketed according to C. S., 660, dismissal is proper.**

Where an appeal from the justice of the peace has been dismissed in the Superior Court for failure to docket the appeal therein as required by C. S., 660, the judgment of the Superior Court will be sustained by the Supreme Court on further appeal thereto. As to whether the magistrate's judgment is void on its face is not presented or decided on this appeal.

APPEAL by defendants from *Finley, J.,* at April Term, 1929, of HENDERSON. Affirmed.

This action for the summary ejectment of defendants from land described in the affidavit filed by plaintiff, was begun in a court of a justice of the peace of Henderson County on 15 December, 1928.

Plaintiff alleged that defendants went into possession of said land as his tenants at will, and that their term had expired. Defendants denied the tenancy. They alleged that the court was without jurisdiction of the action, for that the title to the land was involved therein. The court found, as appears from its judgment, that this allegation is not bona fide, and that plaintiff is entitled to the possession of the land.

From judgment for the plaintiff rendered on 22 December, 1928, defendants gave notice of their appeal to the Superior Court of Henderson County. They failed to docket said appeal at the next term of said court, which convened on 14 January, 1929. Upon the docketing of the appeal at the term of said court which began on 29 January, 1929, plaintiff moved that same be dismissed. This motion was allowed.

From judgment dismissing the appeal, defendants appealed to the Supreme Court.

*Ewbanks, Whitmire & Weeks for plaintiff.*

*Geo. M. Pritchard, McKinley Pritchard and Reynolds G. Florance for defendants.*

PER CURIAM. The judgment dismissing defendants' appeal from the judgment of the court of the justice of the peace to the Superior Court of Henderson County is affirmed. C. S., 660. *Barnes v. Saleeby,* 177 N. C., 256, 98 S. E., 708. Defendants having failed to docket their appeal as required by statute, plaintiff's motion to dismiss said appeal was properly allowed. Whether or not the judgment of the justice of the peace in favor of plaintiff and against the defendants, is void on its face, is not presented or decided on this appeal. We decide only that there was no error in the judgment dismissing the appeal from the justice of the peace. The judgment is

Affirmed.

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STATE v. WILLIE ROBERSON.

(Filed 11 December, 1929.)

**1. Municipal Corporations H c—Zoning ordinance cannot be collaterally attacked in prosecution for violation.**

Where the building inspector of a city, under authority of a zoning ordinance, refuses to issue a permit for the erection of a building to be used for a store and filling station, and the owner appeals to the board of adjustment, which affirms the decision of the building inspector, the remedy of the owner to test the validity of the ordinance is by proceedings in the nature of a *certiorari* to have the question decided by the Superior Court, with right of appeal to the Supreme Court, and he may not erect a building without a permit and in violation of the ordinance and collaterally attack the validity of the ordinance in a prosecution against him for its violation, and evidence relating to the reasonableness of the ordinance is properly excluded in the prosecution for its violation. 3 C. S., 2776 (r) *et seq.*

**2. Same—Decision of Board of Adjustment is not subject to collateral attack.**

The board of adjustment of a city having power to hear and decide appeals from any order or decision of an administrative official charged with the enforcement of any zoning ordinance passed under the provisions of 3 C. S., 2776 (r) is a *quasi*-judicial body, and its decisions are subject to review by the Superior Courts by proceedings in the nature of *certiorari,* 3 C. S., 2776 (x), and a decision of the board is not subject to collateral attack.

STATE *v.* ROBERSON.

APPEAL by the defendant from *Sinclair, J.*, at March Criminal Term, 1929, of DURHAM. No error.

*S. C. Chambers for City of Durham.*
*Victor S. Bryant for defendant.*

ADAMS, J. Certain zoning ordinances were enacted by the city council of the city of Durham and became effective on 18 May, 1926. Under these ordinances certain residence zones, business zones, and industrial zones were designated and set apart for the purposes therein set forth. The following is a part of section 1: "No building or premises shall be erected, altered or used for any other purpose than a purpose permitted in the zone in which such building shall be erected, except in conformity with the regulations herein prescribed for the zone in which such building is located." Section 2 permits in the residence zones the erection of certain buildings therein described and in effect prohibits the erection therein of buildings of any other class. The building erected by the defendant is not one of those permitted by this section. Section 5 of the Building Code, which went into effect 1 November, 1925, provides that the erection, construction or alteration of any building, structure or part thereof shall not be commenced until a written permit is issued, and that the work shall strictly conform to the application and plans; also that the inspector of buildings shall have power to revoke any permit in case of a false statement or misrepresentation of any material fact relating to the erection, alteration or removal of a building. Section 10 is as follows: "Upon completion of any new building, structure or alteration to any building or structure, provided no violation of this code exist, the inspector of buildings shall issue to the owner a certificate of occupancy of the building or part thereof, showing that the provisions of this code have been complied with, and no building can be occupied until such certificate has been issued."

The defendant erected a store and automobile service station near the eastern corporate limits of the city in one of the B residence zones. Before doing so he applied to the building inspector for a permit, which was refused. He then appealed from the building inspector's decision to the board of adjustment, and the board sustained the inspector's ruling and denied the defendant's application. The defendant thereafter completed and operated his store and filling station without having a permit. A warrant was issued from the recorder's court charging the defendant with a breach of the zoning ordinances and the building code. The defendant assailed the ordinance on the ground that it is unreasonable and unconstitutional. He offered to show that within the radius of a quarter of a mile from his premises there is only one store and no filling

station; that with the exception of another building there is neither a store nor a filling station within a radius of a half-mile; and that there are only three other business places within three-quarters of a mile from his property. This evidence was excluded, and the jury were instructed to return a verdict of guilty if they found the facts to be as shown by all the evidence. The question is whether there is error in this instruction.

The exclusion of the evidence must be approved for the reason that the defendant by failing to pursue his statutory remedy is precluded from attacking the ordinance collaterally upon the ground which he assigns.

Zoning ordinances are of comparatively recent origin. Only a few years ago it would generally have been conceded that the courts would not sustain an ordinance excluding all business buildings from a residence district, but in more recent decisions the zoning power of municipal corporations is recognized and upheld. Such ordinances are usually enacted in pursuance of legislative power conferred upon cities and towns on the theory of promoting the public health, the public safety and the public welfare, when they are reasonable and free from discrimination. *Berger v. Smith,* 160 N. C., 205; *S. c.,* 156 N. C., 323; *Small v. Edenton,* 146 N. C., 527; Annotation, 19 A. L. R., 1395; *State ex rel. Civello v. New Orleans,* 33 A. L. R., 260; *Biller v. Board of Public Works,* 38 A. L. R., 1479; Annotation, 43 A. L. R., 668; *Gorieb v. Fox,* 274 U. S., 603, 71 Law Ed., 1228; *Nectow v. Cambridge,* 277 U. S., 183, 72 Law Ed., 842.

Our statute law with respect to zoning regulations is embraced in C. S., 2776(r) *et seq.* Section 2776(x) provides for the appointment of a board of adjustment, who shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to the act. It further provides that every decision of the board shall be subject to review by proceedings in the nature of *certiorari.* The statute thus confers upon the board the right to exercise the functions and powers of a *quasi*-judicial body. This is the Court's conclusion as stated in *Harden v. Raleigh,* 192 N. C., 395, and in *Little v. Raleigh,* 195 N. C., 793.

When in the case before us the building inspector's decision was affirmed by the board of adjustment the defendant should have sought a remedy by proceedings in the nature of *certiorari* for the purpose of having the validity of the ordinances finally determined in the Superior Court, and if necessary by appeal to the Supreme Court. This he failed to do and left effective the adjudication of the board of adjustment. The board's judgment is not subject to collateral attack. As was said in *S. v. Kirkpatrick,* 179 N. C., 747, 750, "He (the defendant) has taken

the law in his own hands and adjudged that the ordinance is invalid, or that for some reason, which is not stated, he is exempt from its authority." Of similar import is the decision in *Manufacturing Co. v. Commissioners of Pender,* 196 N. C., 744.

No error.

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WILLIAM TINKER v. RICE MOTORS, INC.

(Filed 11 December, 1929.)

**1. Appeal and Error J c—Findings of fact supported by evidence are not subject to review.**

Upon a motion to set aside a purported service of process and to dismiss the action, the findings of fact of the trial court in relation thereto, supported by the evidence, are not subject to review on appeal.

**2. Process B d—Local bookkeeper of foreign corporation is not agent on whom valid service of corporation can be made.**

The local bookkeeper of a nonresident corporation, whose sole duty is to collect the defendant's account here, who is not an officer or director of the corporation, and who is without managing or supervisory authority and not clothed with discretion by his principal, is not an agent of the corporation on whom valid service of process on the corporation can be made.

APPEAL by plaintiff from *Johnson, Special Judge.* From BUNCOMBE. Affirmed.

*Pegram & Thornton and James E. Rector for plaintiff.*
*Lee, Ford & Coxe for defendant.*

ADAMS, J. This is a motion to set aside the purported service of process and to dismiss the action. The motion was allowed upon the following facts, which were found by the trial judge.

The plaintiff was indebted to the defendant on certain notes; also on agreements for the conditional sale of personal property. In January, 1929, J. E. Pierce, upon whom process in the present action was served, came to Buncombe County and made an effort to collect the amount due by the plaintiff to the defendant. Failing to make the collection he caused warrants to be issued charging the plaintiff with the felonious trading in Tennessee of property he did not own and with feloniously removing from Tennessee personal property the title to which had been retained, in violation of the laws of that State, and with being a fugitive from justice. After his arrest under these warrants the plaintiff sued

out a writ of *habeas corpus* and was released from custody. He then brought an action against the defendant for false imprisonment, abuse of process, and malicious prosecution, and caused process to be served on J. E. Pierce, who was the bookkeeper of the nonresident defendant, but not an officer or a stockholder or a general agent of the defendant or clothed with authority generally to make collections for the defendant. Pierce's sole authority in North Carolina and his sole business here were to collect the defendant's claim against the plaintiff and to take such legal action as was necessary to achieve this purpose. He was a witness neither in the trial before the justice of the peace nor upon the return of the writ of *habeas corpus*. The findings are not subject to review in this Court. *Higgs v. Sperry*, 139 N. C., 299.

Upon these facts it was adjudged that Pierce was not an agent upon whom process could be served in an action against the defendant, and that the action be dismissed.

It will be observed that the question is not whether the defendant, while in North Carolina, was immune from the service of process in an action against him personally, but whether service upon him subjected the defendant to the jurisdiction of the court in which the plaintiff instituted his action.

The first paragraph of C. S., 483, is as follows: "If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this State for a corporation of this or any other State or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this State, or when it can be made personally within the State upon the president, treasurer or secretary thereof."

Pierce, as the trial court found, was not a general and superintending agent of the defendant; he was therefore not a managing agent. *Cunningham v. Express Co.*, 67 N. C., 425. He did not have exclusive supervision and control of any department of the defendant's business, the management of which required the exercise of independent judgment and discretion. 21 R. C. L., 1353; *Furniture Co. v. Furniture Co.*, 180 N. C., 531. It is equally obvious that he was not a local agent. "The term local pertains to place, and a local agent to receive and collect money, *ex vi termini*, means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent. The mischief chiefly intended to be provided against, no doubt, was to give a remedy in our courts against corporations chartered in other States who make contracts in this State

and appoint special agents or attorneys in fact to make collections." *Moore v. Bank,* 92 N. C., 590. The scope of the word "agent" is given in *Whitehurst v. Kerr,* 153 N. C., 76: "While there is some apparent conflict of decision in construing these statutes providing for service of process on corporations arising chiefly from the difference in the terms used in the various statutes on the subject, the cases will be found in general agreement on the position that in defining the term agent it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him." In accord with this are the preceding cases of *Kelly v. LeFaiver,* 144 N. C., 5, and *Higgs v. Sperry, supra.* The case of *R. R. v. Cobb,* 190 N. C., 375, may easily be distinguished. In view of the foregoing decisions the plaintiff's assignments of error must be resolved in favor of the appellee. The judgment is

Affirmed.

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LACY E. ROBBINS v. AMERICAN UPHOLSTERY COMPANY, INC.

(Filed 11 December, 1929.)

**1. Master and Servant C b—Evidence of master's negligence held sufficient to be submitted to the jury.**

Where there is evidence tending to show that the plaintiff was ordered by the general manager of the defendant to operate a power-driven circular saw, in which work the employee was inexperienced, and that there were no guards to the saw and that it imperfectly revolved or wobbled when running, and that obstruction on the floor prevented the employee from standing in front of the saw while operating it, and that he was not warned of the danger: *Held,* the evidence of the employer's negligence in failing to furnish the employee reasonably safe and suitable tools and appliances and a reasonably safe place to work, and in failing to warn and instruct the employee, was sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit.

**2. Master and Servant C f, C g—Contributory negligence and assumption of risk are ordinarily questions for the jury.**

Contributory negligence of the servant and assumption of risk by him are ordinarily questions for the determination of the jury, and in this case *held:* defendant's motion as of nonsuit should have been overruled.

APPEAL by plaintiff from *MacRae, Special Judge,* at April Special Term, 1929, of DAVIDSON. Reversed.

The plaintiff alleged that while in the service of the defendant he was ordered by the defendant's general manager to leave the work he was doing and operate a rip-saw for the purpose of ripping or sawing boards; that his right hand was drawn into the saw; that one finger was severed from the hand and the others were badly injured; and that this injury was proximately caused by the defendant's negligent failure to provide for the plaintiff suitable tools and appliances and a safe place in which to work, and its negligent failure properly to instruct him as to the danger to which he was exposed. The defendant denied the plaintiff's material allegations and pleaded contributory negligence. At the conclusion of the plaintiff's evidence the action was dismissed as in case of nonsuit and the plaintiff excepted and appealed.

*Spruill & Olive for plaintiff.*
*Phillips & Bower and McCrary & DeLapp for defendant.*

ADAMS, J. The evidence construed most favorably for the plaintiff tends to show that he was employed, not to run the saw, but to crate furniture; that he was inexperienced in the use of the saw and was injured in a few minutes after beginning his work; that the defendant's general manager ordered him to rip the boards and Reedy Leonard "to tail the saw"; that the machinery was run by a motor; that the saw was not properly set; that it had no guard; that the teeth were dull and uneven; that it "wabbled and did not run true"; and that the plaintiff could not stand in front of the saw on account of obstructions on the floor.

The plaintiff testified he knew the work was dangerous because the saw had no guard, and that he worked there because he was ordered to do so, and he "was trying to do his duty."

It does not appear from the record whether the nonsuit was based upon a want of sufficient evidence to prove the defendant's negligence or upon contributory negligence established by the plaintiff's testimony. There is some evidence of negligence on the part of the defendant which should be submitted to the jury; and the testimony in regard to contributory negligence is not such as to show that the probability of danger in the use of the saw was so obvious that we should conclude as a matter of law that a person of reasonable prudence would not under the circumstances have continued in the work. Both questions involve matters for determination by the jury. The judgment is

Reversed.

FARMERS FEDERATION, INC., v. W. S. LOCKMAN, JR.

(Filed 11 December, 1929.)

**1. Attachment A b—Attachment will lie against property of nonresident defendant in action on contract.**

In an action to recover a judgment for breach of contract attachment against the defendant's property situated in this State may be issued when it is made to appear that the defendant is a nonresident of this State.

**2. Same—In this case held: finding that defendant was nonresident was supported by the evidence.**

Where the complaint and affidavit in attachment in an action allege that the defendant is a nonresident of this State, which the defendant does not deny either in his answer or affidavit, it is sufficient to support a finding of fact by the trial court that the defendant was a nonresident of this State, and the fact that the defendant owned a home here in which he and his family spent a part of their time is not inconsistent therewith. C. S., 798, 799.

APPEAL by defendant from *Schenck, J.*, at August Special Term, 1929, of HENDERSON. Affirmed.

*Ray, Redden & Redden for plaintiff.*
*Joseph W. Little for defendant.*

ADAMS, J. The plaintiff brought suit to recover a judgment for $490.09, and on 24 July, 1929, caused a warrant of attachment to be levied on personal property owned by the defendant. On 29 August, 1929, the defendant filed an affidavit and made a motion to vacate the warrant of attachment. The motion was denied first by the clerk and afterwards, on the defendant's appeal, by Judge Schenck, who found the following facts:

1. The defendant is a nonresident of the State of North Carolina, it being admitted that the defendant is a resident of the State of Florida, and was at the time of the issuing of the summons and warrant of attachment in this cause, and is now, a resident of the State of Florida.

2. The defendant is the owner of both real and personal property located in Henderson County, some personal property of the defendant being attached in this cause, but no real estate is attached.

3. At the time of the issuing of the summons in this cause and the warrant of attachment the defendant was occupying his house upon his property in Henderson County, as well as since the 10th day of July, 1929, and that summons and warrant of attachment were personally served upon the defendant while so occupying his house on said property,

on 24 July, 1929, and that said defendant is now occupying his house on said property with his family.

4. Defendant has filed answer in this cause, entering a special appearance as to the warrant of attachment.

A warrant of attachment against the property of a defendant may be granted when the action is instituted to recover a judgment for breach of contract and the defendant is a nonresident of the State. C. S., 798, 799. The defendant excepted to the finding that he is a nonresident of North Carolina on the ground that it is not supported by the evidence. We think the finding is supported by the evidence. The warrant recites as appearing by the plaintiff's affidavit that the defendant is a nonresident of the State of North Carolina, and in the complaint it is alleged that the defendant is a resident of the State of Florida and the city of West Palm Beach. These allegations are not denied either in the answer or in the affidavit of the defendant. The statement that he owns a farm in Henderson County and lives there a part of the time is not inconsistent with the fact that he is not a resident of the State. The judge finds upon sufficient evidence that the defendant is a nonresident of this State and that it is admitted that he is a resident of the State of Florida. Authority need not be cited to sustain the proposition that this finding is conclusive. Judgment

Affirmed.

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JAMES LINK v. CAROLINA & NORTHWESTERN RAILWAY COMPANY.

(Filed 11 December, 1929.)

**Master and Servant E d—Action under Federal Employers' Liability Act must be brought within two years regardless of infancy.**

The Federal Employer's Liability Act, providing that no action should be brought thereunder unless commenced within two years from the day from which the cause of action accrued, does not permit an extension of time specified by reason of infancy or other disability, and an action not brought within the time prescribed will be dismissed.

APPEAL by plaintiff from *Sink, Special Judge,* at June Special Term, 1929, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury.

Plaintiff alleges that the defendant is a common carrier by railroad, engaged in interstate commerce; that on 4 March, 1926, he was a minor 19 years of age, employed by the defendant in such commerce, and that on said date he was injured through the negligence of defendant's servants or agents.

This action was commenced 18 September, 1928, more than two years after the date of the injury.

From a judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

*Ural R. Murphy and Stewart, MacRae & Bobbitt for plaintiff.*
*John A. Marion and John M. Robinson for defendant.*

STACY, C. J. The action was properly dismissed on authority of *Murray v. R. R.*, 196 N. C., 695, 146 S. E., 801, and *Belch v. R. R.*, 176 N. C., 22, 96 S. E., 640.

The Federal Employers' Liability Act (45 U. S. C. A., sec. 56) provides: "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

There is no provision in this statute extending or tolling the time for filing suit by reason of infancy or other disability. *Gillette v. Del. L. & W. Ry.*, 102 Atl. (N. J.), 673 (minority of plaintiff); *Bement v. Grand Rapids Ry. Co.*, 160 N. W. (Mich.), 424 (fraudulent representations of defendant's agent which caused plaintiff to delay); *Alvarado v. So. Pac. Ry. Co.*, 193 S. W. (Tex.), 1108 (insanity resulting from the injury).

Indeed, it has been held with us that a provision in a contract of insurance, limiting the time for instituting suit to recover under the policy, is not affected by the minority of the plaintiff. *Beard v. Sovereign Lodge*, 184 N. C., 154, 113 S. E., 661; *Heilig v. Ins. Co.*, 152 N. C., 358, 67 S. E., 927.

Affirmed.

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STATE v. WILLIAM J. GLENN.

(Filed 11 December, 1929.)

**1. Homicide E a—Under the facts of this case instruction on defendant's duty to retreat held erroneous.**

Upon evidence tending to show that the defendant was in a room 12 x 14 feet at the back of a store with only one door as an entrance, through which the deceased came and angrily said to the defendant that he was tired of him, and added while reaching for his pistol, "Damn you, I will kill you," resulting in a struggle in which the deceased was shot and killed: *Held*, reversible error for the judge to charge the jury that if the assault on the defendant was not felonious the defendant would be required to retreat before he would be justified in taking the life of the other, there being no avenue open to the defendant.

**2. Same—General law of self-defense.**

One may kill in defense of himself or his family when he believes it to be necessary to prevent death or great bodily harm, and has a reasonable ground for the belief under the facts and circumstances as they appear to him, the jury to determine the reasonableness of the belief upon which he acts.

**3. Same—Right to use force to repel assault.**

In the exercise of the right of self-defense more force must not be used than is reasonably necessary under the circumstances, and if excessive force is used the party charged is guilty of manslaughter at least, but the law does not require juries to measure with exactness and nicety the amount of force used if one is really acting in self-defense.

APPEAL by defendant from *Harwood, Special Judge,* at April Term, 1929, of MITCHELL.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one T. C. Robinson.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a term of not less than three nor more than five years.

The defendant appeals, assigning errors.

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

*McBee & Berry, S. J. Black and Watson & Fouts for defendant.*

STACY, C. J. When the case was called for trial, the solicitor announced that the State would not insist upon a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter as the evidence might disclose. Whereupon counsel for the prisoner stated that the defendant would admit the killing with a deadly weapon, but no more, and assume the burden of mitigation or self-defense.

The evidence discloses that on 8 November, 1928, the defendant, William J. Glenn, slew the deceased, T. C. Robinson, with a deadly weapon, to wit, a pistol. It appears that the defendant, and two others, were in a small room in the back of a store about 12 by 14 feet, which had but a single door or entrance; that the deceased came into the room and closed the door behind him, thus placing himself between the defendant and the only means of exit; that the deceased asked the defendant what he had said to his wife, as he came through the store, to which the defendant answered, "Not a thing, Till." In reply, the deceased remarked in an angry tone: "Well, I am damn tired of you Glenns," and further added, while reaching for his pistol, which was in a holster under his left arm:

"Damn you, I will kill you." Whereupon the defendant whipped out his pistol and began firing. The two men clinched, and it was soon discovered that the deceased was mortally wounded.

The following excerpt, taken from the charge, forms the basis of one of defendant's exceptive assignments of error:

"If the deceased was making a felonious assault upon the defendant at the time he fired, the defendant would not be required to retreat, but if you should find that he was making an ordinary assault upon him, even though you should find that it was an assault with a deadly weapon, but not a felonious assault as I have defined to you, then the defendant would not be permitted to stand his ground and take the life of the deceased, but would be required to retreat."

The vice of this instruction lies in the fact that it required the defendant to retreat, even though the deceased was assaulting him with a deadly weapon, when there was no avenue of retreat open to the defendant. *S. v. Dills,* 196 N. C., 457, 146 S. E., 1. The instruction is misleading when applied to the facts of the present case. *S. v. Lee,* 193 N. C., 321, 136 S. E., 877; *S. v. Waldroop,* 193 N. C., 12, 135 S. E., 165. The defendant's back was already to the wall, and the law does not require one to retreat in the face of an assault, felonious or other, when there is no way of escape open to him. *S. v. Bost,* 192 N. C., 1, 133 S. E., 176.

With respect to the right of self-defense, the decisions are to the effect:

1. That one may kill in defense of himself or his family, when necessary to prevent death or great bodily harm. *S. v. Gray,* 162 N. C., 608, 77 S. E., 833.

2. That one may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. *S. v. Barrett,* 132 N. C., 1005, 43 S. E., 832.

3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. *S. v. Blackwell,* 162 N. C., 672, 78 S. E., 316.

4. That the jury and not the party charged, is to determine the reasonableness of the belief or apprehension upon which he acted. *S. v. Nash,* 88 N. C., 618.

There is a distinction made by the text-writers on criminal law, which seems to be reasonable and supported by authority, between assaults with felonious intent and assaults without such intent. "In the latter, the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow. In the former class, where the

attack is made with murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be." 2 Bishop's Criminal Law, sec. 6333, and cases cited. It is said in 1 East Pleas of the Crown, 271: "A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence to commit a felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense." The American doctrine is to the same effect. See *S. v. Hough,* 138 N. C., 665, 50 S. E., 709, and *S. v. Dixon,* 75 N. C., 275.

In the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be used, the party charged will be guilty of manslaughter, at least *(S. v. Robinson,* 188 N. C., 784, 125 S. E., 617), but the law does not require juries to measure with exactness and nicety the amount of force used, if one is really acting in self-defense. *S. v. Pugh,* 101 N. C., 737, 7 S. E., 757.

There are other exceptions appearing on the record, worthy of consideration, but as they may not arise on another hearing, we shall not consider them now.

For the error, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

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STATE v. RAY EVANS.

(Filed 11 December, 1929.)

**1. Homicide B a—In this case held: evidence of premeditation and deliberation sufficient for verdict of murder in first degree.**

The premeditation and deliberation preceding the killing of another necessary to constitute murder in the first degree does not depend upon the length of time between the formation of intent to kill and the execution of that intent, and where the evidence tends to show that the prisoner was violating the prohibition law, had armed himself with a concealed weapon, and, when apprehended by an officer, tried to hide his liquor and get away, and when notified of the purpose of his arrest, whipped out his pistol with his right hand, which had been under his overalls for quite a while, and shot and killed the officer: *Held,* the evidence of premeditation and deliberation was sufficient to warrant a verdict of murder in the first degree. C. S., 4200.

**2. Same—If fixed design to kill is formed and subsequently executed there is sufficient premeditation and deliberation.**

If the prisoner kills simultaneously with the formation of the intent to kill there is no premeditation, but if he weighs the purpose to kill long enough to form a fixed design which he executes at a subsequent time, however soon or remote, there is sufficient premeditation and deliberation, and in determining the question of premeditation and deliberation it is proper for the jury to consider the conduct of the prisoner before and after, as well as at the time of, the homicide.

**3. Same—Flight is not evidence of premeditation.**

Flight is not evidence of premeditation and deliberation.

APPEAL by defendant from *Clement, J.*, at July Term, 1929, of RICHMOND.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one W. D. Smith.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

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

*W. R. Jones and J. C. Sedberry for defendant.*

STACY, C. J. There is evidence on behalf of the State tending to show that on the afternoon of 12 June, 1929, the prisoner, Ray Evans, a colored man, shot and killed W. D. Smith, a township constable of Richmond County, while the latter was attempting to arrest the former or to prevent his forcible escape from custody. The officer had a warrant for one Lander Ingram, and, in looking for him, stopped at the home of Lula Belle Mitchell to inquire as to where Ingram lived. While obtaining this information, the deceased saw the defendant run out of the back door of Lula Belle Mitchell's house with some fruit jars of liquor which he dropped in a dewberry patch not far away. The officer and his son picked up the liquor and came back to the front of the house, where the deceased met the prisoner, caught him by his left arm, and said: "You are under arrest." The prisoner inquired, "What for?" The deceased replied: "For liquor." Whereupon the prisoner said: "I am not going," and he jerked loose from the officer, drew a pistol from his overalls with his right hand, which had been in his pocket all the while, and shot the deceased three times, one of which proved fatal. The prisoner later told the sheriff, while in jail, that the reason he shot three times, or more than once, was because the deceased did not turn him loose. The officer never drew his pistol; he had a jar of liquor in one

hand and was holding the prisoner with the other. The prisoner had been to South Carolina earlier in the day and returned with a gallon and a quart of liquor, which he carried to the home of Lula Belle Mitchell. The shooting took place about first dark. The defendant ran away, but was apprehended in Roanoke, Va., and returned to Richmond County jail, ten or twelve days after the homicide.

The prisoner testified that he thought the deceased was reaching for his pistol at the time he shot, but the jury did not accept this version of the matter. It is the contention of the defendant, however, that, in no view of the case, can he be guilty of more than murder in the second degree, and, in support of this position, he relies upon *S. v. Rhyne,* 124 N. C., 847, 33 S. E., 128, and cases there cited. The crucial point, therefore, is 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. Miller,* 197 N. C., 445; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257; *S. v. Cameron,* 166 N. C., 379, 81 S. E., 748; *S. v. McClure,* 166 N. C., 321, 81 S. E., 458; *S. v. Daniels,* 164 N. C., 464, 79 S. E., 953; *S. v. Exum,* 138 N. C., 599, 50 S. E., 283; *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431; *S. v. Norwood,* 115 N. C., 789, 20 S. E., 712.

The prisoner was violating the prohibition laws; he had armed himself with a concealed weapon; he tried to hide his liquor and to get away from the officer; he was notified of the purpose of his arrest; he whipped out his pistol with his right hand, which had been under his overalls for quite a while, and shot the deceased three times without cause. The jury found that the homicide was the culmination of a preconceived plan or design, executed deliberately and with malice. The evidence warrants the finding, and this is murder in the first degree. C. S., 4200; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869.

In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the prisoner, before and after, as well as at the time of, the homicide, and all the attendant circumstances. If the killing took place simultaneously with the formation of the intent to kill, there would be no premeditation. Nor would flight be evidence of it. *S. v. Steele, supra,* But if the prisoner weighed the purpose of killing long enough to form a fixed design, and at a subsequent time, no matter how soon or how remote, put it into execution, there would be sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree. *S. v. Teachey,* 138 N. C., 587, 50 S. E., 232; *S. v. Dowden,* 118 N. C., 1145, 24 S. E., 722. It is immaterial, in determining the degree of murder, how soon after resolving to kill, the prisoner carried his purpose into execution. *S. v. Covington,* 117 N. C., 834, 23 S. E., 337. Pre-

meditation means "thought of before hand" for some length of time, however short, but no particular time is required for the mental process of premeditation. *S. v. Benson, supra.* Deliberation means that the act is done in a cool state of the blood, in furtherance of some fixed design. *S. v. Walker,* 173 N. C., 780, 92 S. E., 327.

The following charge was approved in *S. v. Roberson,* 150 N. C., 837, 64 S. E., 182: "By premeditation and deliberation is meant that the reason and judgment is exercised, that the fact of the killing is weighed and considered, and that as a result there is in the mind the fixed purpose to kill. The fixed purpose to kill must precede the act of killing, although the length of time between the time it is formed and carried into effect is not material. This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining there was such the jury may consider evidence of absence of provocation, absence of a quarrel at the time of the killing, and threats, if there is such evidence. Not that you are compelled to find premeditation and deliberation from such evidence, but that if there is such evidence you may consider it in determining whether there was such premeditation and deliberation as I have indicated."

Speaking to the question in *S. v. McCormac,* 116 N. C., 1033, 21 S. E., 693, *Avery, J.,* delivering the opinion of the Court, said: "While premeditation and deliberation are not to be inferred as a matter of course from the want either of legal provocation or of proof of the use of provoking language, yet all such circumstances may be considered by the jury in determining whether the testimony is inconsistent with any other hypothesis than that the prisoner acted upon a deliberately formed purpose. *S. v. Fuller,* 114 N. C., 885. Kerr on Homicide, sec. 72, says: 'The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense.' The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment. The conduct of the accused just before or immediately after the killing would tend at least to show the state of mind at the moment of inflicting the fatal wound. In passing upon the question whether the facts in a given case are sufficient to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, while sudden passion aroused by provocation that would neither excuse nor mitigate to manslaughter the killing with a deadly weapon, is sufficient, if the homicide is committed under its immediate influence, yet the want of provocation, the preparation of a

weapon, proof that there was no quarreling just before the killing, may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design."

The foregoing statement has been approved in a number of cases, notably, *S. v. Cameron, supra, S. v. Daniels, supra, S. v. Stackhouse,* 152 N. C., 808, 67 S. E., 764, and *S. v. Lipscomb,* 134 N. C., 689, 47 S. E., 44.

The remaining exceptions are not of sufficient merit to warrant a new trial. The verdict and judgment will be upheld.

No error.

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J. H. KING v. W. S. LEE AND TALLASSEE POWER COMPANY.

(Filed 11 December, 1929.)

**Master and Servant C a—In this case held: there was no evidence of master's negligence and nonsuit was proper.**

Where the evidence of the plaintiff discloses the mere fact of injury resulting from falling while elevated in a "boister saddle" operated by a fellow-servant by means of block and tackle, a nonsuit is properly entered, negligence not being ordinarily presumed from the mere fact of injury.

CIVIL ACTION, before *Sink, Special Judge,* at February Special Term, 1929, of MECKLENBURG.

Plaintiff alleged that on 7 December, 1927, he was in the employ of the Power Company, helping to erect a power house near High Rock, N. C., and that he was seriously and permanently injured by reason of negligence of defendant.

The plaintiff's narrative of his injury is substantially as follows; "I was putting in a window frame at the top of the power house, at about forty feet above the ground. I was in a boister saddle, supported with a block and tackle. Two men pulled me and the boister saddle up with their hands to the place where I was to work. They pulled me up by the fall line; I was kept up there by a man holding the rope. . . . Frank Lawrence was the person to hold the rope. He did not hold the rope, but pulled me up and tied me. I found that out when I looked back down. I looked at my watch and it was five minutes until twelve, and I told him to let me down, and I looked out of the saddle, and he was propped up on the hand rail of the stairway on one elbow; when I told him to let me down, he turned around, and I reached around to get my pliers

out of the window to put them in my pocket before I came down, and that is the last thing I remember. When I looked down Frank Lawrence did not have hold of the rope. I do not know what happened after I looked around to get my pliers out of the window. I do not remember starting to fall. Beneath where I was working, there were iron steps which lead from the switchboard floor down to the basement. It was about thirty feet from where I was in the air to the top of the iron steps and about forty feet to the ground. . . . Mr. Vickery and Mr. Lawrence and I were working on the window at the time I had the fall. I was pulled up that morning. I was in what is called a boister seat, which means a seat with a rope fastened to each end. As I worked over different points of this window, I was pulled up and lowered, so as to reach the point on the window where I had to work, by Mr. Lawrence, and Mr. Lawrence was on the ground handling the rope. That was the customary way of doing that kind of work. When I got ready to come down I called Mr. Lawrence to let me down, which he did. Mr. Lawrence did not have hold of the rope when I looked down to ask him to let me down. He was standing close to the rope, but he did not have his hand on it. I did not see Mr. Lawrence just immediately before I started to fall because, in the meantime, I reached over to get my pliers out of the window. After I reached over to get my pliers I fell. And from the time I told him to let me down until I started to fall, I did not look down at him, and don't know whether he had the rope tied to the railing or not. I didn't notice whether he had it around the railing. I had been up there at that time about a half hour or an hour. I turned around to get my pliers and then fell."

There was evidence tending to show that the plaintiff stayed in the hospital until 22 December, when he went to his home, remaining there until about 6 January, 1928, when he returned to the hospital and remained there about ten days.

There was evidence that on 19 December the defendant had paid to the plaintiff the sum of $240 in cash, in full settlement of his injury, and that plaintiff had duly executed a release. The release was pleaded as a defense, but the plaintiff offered evidence tending to show that at the time the money was paid, he did not have sufficient mental capacity to understand the nature of the transaction.

The defendant offered no evidence. Hence the plaintiff's narrative of the injury is the only evidence thereof in the record. Plaintiff took a voluntary nonsuit as to the defendant, W. S. Lee. There is evidence that the plaintiff had sustained serious injury.

At the conclusion of plaintiff's evidence the defendant moved for judgment of nonsuit, which motion was allowed, and the plaintiff excepted and appealed.

*G. T. Carswell and Joe W. Ervin for plaintiff.*

*R. L. Smith & Sons and W. S. O'B. Robinson, Jr., for Power Company.*

BROGDEN, J. There is no evidence tending to show that the boister saddle was defective or that it was not an appliance approved and in general use or in any particular an unsafe appliance; neither was there evidence that any negligent order had been given with respect to the operation thereof.

The evidence does not disclose whether the boister saddle fell or whether the plaintiff fell out of the saddle. Plaintiff testified that his fellow-servant, Lawrence, did not have hold of the rope "when I looked down to ask him to let me down. He was standing close to the rope, but he did not have his hands on it." The evidence discloses the injury and no more. It has been consistently held by this Court that the mere fact of injury is in itself ordinarily no evidence of negligence. *Fore v. Geary,* 191 N. C., 90, 131 S. E., 387; *Burke v. Carolina Coach Co., ante,* 8.

The facts presented bring the case squarely within the principle declared in *Michaux v. Lassiter,* 188 N. C., 132, 123 S. E., 310. The Court said: "Considering the record in view of these authorities and the principles they approve and establish, there has, as stated, been no breach of duty shown on the part of defendant company, the proof and admissions showing that the machine was of standard make, newly purchased and installed, and as a mechanical proposition, operating properly at the time. Nor is there anywhere evidence of default in reference to selecting the operator, and on the facts offered by the plaintiff the injury is necessarily attributable and attributable only to an exceptionally negligent act of the operator of the machine, who either failed to fasten the pan or released it in breach of his duty to his fellows. There is no testimony or suggestion that the operator had any authority over the intestate, or tending to show that he stood towards the latter in the place of his principal, being only a fellow-servant. The injury was due solely to his default, and the court has correctly ruled that no cause of action has been shown."

A careful scrutiny of the record leads us to the conclusion that the judgment of nonsuit was properly entered.

Affirmed.

H. E. WRENN, SUCCESSOR TO KELLY & WRENN, v. LAWRENCE COTTON MILLS, INC., C. I. JONES, H. N. FAIRLY AND H. S. BLACKMER.

(Filed 11 December, 1929.)

**1. Bills and Notes D b—Where parties sign note as endorsers holder may not show different liability by parol.**

Where the directors of a corporation sign a negotiable instrument on the back thereof as endorsers, C. S., 3044, the holder may not show by parol that they signed as comakers, or guarantors, or sureties.

**2. Bills and Notes D c—Extension of time for payment of note must be to a time definite and certain.**

Where endorsers on a note waive defenses based upon an extension of time for payment, the waiver imports a legal extension, or an agreement which fixes a definite time when payment is to be made, and where no legal extension is shown by the evidence the waiver will not operate to prevent the endorsers from pleading the statute of limitations in the holders' action to recover against them on the note.

**3. Limitations of Actions B a—Where there is no legal extension of time for payment of note the statute runs from its maturity.**

Where the endorsers of a note waive notice of dishonor and defenses based on an extension of time for payment, and there is no agreement for an extension to a definite time, there is no legal extension of time, and where more than five years elapse from the time of the last payment on, and maturity of the notes, the three-year statute of limitations, C. S., 441, will bar the holders' action to recover against the endorsers on the note.

APPEAL by plaintiff from *Stack, J.*, at September Term, 1929, of ROWAN. No error.

The following verdict was returned:

1. Did the defendants execute and deliver to Kelly & Wrenn the five promissory notes, as alleged in the complaint? Answer: Yes (by consent).

2. Is the plaintiff the owner of said notes, as alleged in the complaint? Answer: Yes (by consent).

3. Is the plaintiff's alleged cause of action barred by the statute of limitations, as alleged in the answer? Answer: Yes.

4. What amount, if anything, is plaintiff entitled to recover? Answer: Nothing.

*R. Lee Wright for plaintiff.*
*John C. Busby and W. T. Shuford for defendants.*

ADAMS, J. On 29 November, 1920, the Lawrence Cotton Mills, Inc., executed and delivered to the firm of Kelly & Wrenn, of Waco, Texas, five promissory notes each in the sum of $5,000, payable respectively six,

nine, twelve, fifteen, and twenty-four months after date, with interest at 6 per cent from date until paid. Each note was endorsed by the defendants C. I. Jones, H. N. Fairley, and H. S. Blackmer, and was duly assigned to the plaintiff by Kelly & Wrenn, who dissolved copartnership in June, 1921. On the back of the first note the following payments are endorsed: $538.70 on 1 November, 1921; $500 on 22 December, 1922; $250 on 10 March, 1923; $250 on 10 June, 1923. No other payments were made on any of the notes. In 1921 Lawrence Cotton Mills, Inc., became and has since been insolvent. The present action, which is prosecuted against the endorsers, was commenced 4 September, 1928. The defendants pleaded the three-year statute of limitations. Each note contains the following stipulation: "The drawers and endorsers and all sureties hereto severally waive presentment for payment, protest, and notice of protest, and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them. Witness our hands and seals."

The jury were instructed if they believed all the evidence to answer the third issue "Yes" and the fourth "Nothing." The plaintiff excepted. Judgment was given for the defendants and the plaintiff appealed upon error assigned.

The plaintiff's evidence (none was introduced by the defendants) consists of the notes, certain admissions in the pleadings, and the depositions of three nonresident witnesses. It is not denied that the plaintiff is the owner and holder of the notes.

The plaintiff offered evidence tending to prove that the defendants orally agreed when the notes were executed to "remain liable and responsible until the notes were paid." The proposed testimony was properly excluded. The notes constitute the written contract of the parties, and the plaintiff sought to vary the written terms by parol.

The Negotiable Instrument Law was ratified on 8 March, 1899. P. L., 1899, ch. 733. Before this date our decisions were generally to the effect that when third persons wrote their names on the back of a negotiable instrument before delivery to the payee, the original parties as between themselves could show their intent and the nature of their obligation—whether they had affixed their signatures as joint promisors, as guarantors, or as endorsers. *Lilly v. Baker,* 88 N. C., 151; *Barden v. Hornthal,* 151 N. C., 8. But a complete change was wrought by the enactment of the new law, which provides that a person who writes his name upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an endorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. C. S., 3044. See, also, section 3045. These sections supersede the former law. Daniel on Negotiable

Instruments, 6 ed., 806; Brannan's Neg. Instruments Law, 4 ed., 588. In *Bank v. Wilson,* 168 N. C., 557, the Court, after pointing out the change referred to, remarked that the purpose of these sections is to fix the status of the defendants as endorsers.

The plaintiff proposed to change this status by oral testimony that the defendants endorsed the notes as comakers, or guarantors, or sureties; but in the case last cited the Court said that one of the objects of the statute is to exclude parol evidence to the effect that the status of the parties is otherwise than as fixed by the law. We are not at liberty to give the endorsement an effect which in terms the statutes reject. The principle is restated and sustained in *Meyers v. Battle,* 170 N. C., 168; *Busbee v. Creech,* 192 N. C., 499; and it is clearly sustained by the weight of authority elsewhere. Brannan's Neg. Instruments Law, 4 ed., 578, 589; 5 Uniform Laws, Annotated, 307. It is not the purpose of the statutes to prevent the defendants from showing that they are accommodation endorsers or the relation they sustain to one another. *Meyers v. Battle, supra.* The logical result is that the liability of the Lawrence Cotton Mills, Inc., is primary and that of the defendants, secondary. *Houser v. Fayssoux,* 168 N. C., 1; *Horton v. Wilson,* 175 N. C., 533; *Barber v. Absher Co., ibid.,* 602; *Dillard v. Mercantile Co.,* 190 N. C., 225.

The corporation became insolvent in 1921; the defendants became accommodation endorsers in 1920. As such they were entitled to the rights and immunities which attach to the status of endorsers, although they may have been directors of the corporation. *Houser v. Fayssoux, supra;* Brannan's Neg. Instruments Law, 580. See, also, *Barber v. Absher Co., supra.*

An endorser is, of course, entitled to notice of dishonor; and it may be conceded that by the terms of this contract the defendants waived such notice; also that they waived defenses based upon an extension of the time of payment. The latter waiver, however, imports a legal extension of time which would be effective against the defendants. Granting that the time of payment may be extended by a definite and binding oral agreement *(Oliver v. Fidelity Co.,* 176 N. C., 598), we are confronted by the general rule that such an agreement must fix a definite time when payment is to be made. The time thus agreed on should be as definite as that which is required when the note is originally executed, the elements of the agreement being certainty, mutuality, and consideration. *McInturff v. Gahagan,* 193 N. C., 147; 8 C. J., 425, sec. 626, *et seq.* No evidence received or offered in regard to the extension of time purported to designate a definite period. In fact, if the excluded evidence had been admitted it would have shown affirmatively that no such time was agreed on and that the asserted extension was altogether indefinite. In contemplation of law there was no binding agreement for an extension of time.

The plaintiff's cause of action is therefore barred. Three years is the period prescribed for the commencement of an action upon a contract, obligation, or liability arising out of a contract, express or implied. C. S., 441. More than five years elapsed between the date of the last payment, the maturity of the last note, and the commencement of the action.

It follows from what we have said that no error was made in declining the plaintiff's prayers or in giving a directed instruction to the jury upon the last two issues.

No error.

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H. M. BURDEN v. TOWN OF AHOSKIE ET AL.

(Filed 11 December, 1929.)

**Municipal Corporations H b—In this case held: ordinance in respect to erection of filling stations was not uniform, and was void.**

A town ordinance which attempts to prohibit the erection of gasoline filling stations within three hundred feet of the public schools of a town is void when there are already filling stations therein within the restricted area, the ordinance not being uniform in its application, and having the effect of giving the filling stations already erected a monoply, and the plaintiff is entitled to mandamus to compel the issuance of a permit for a filling station on his land within the area, and his right to this relief is not affected by a third ordinance requiring that the filling stations already erected be removed by a certain date in the future, the owners of the existing filling stations not being parties to the action and their right to operate said filling stations after the date fixed not being before the Court.

CIVIL ACTION, before *Midyette, J.* From HERTFORD.

On 30 August, 1926, the board of commissioners of Ahoskie adopted the following ordinance: "No building or construction shall be begun or enlarged within the corporated limits of Ahoskie unless a general description, location and approximate cost of same are submitted to and approved by the mayor and a majority of the commissioners," etc.

Thereafter on 20 May, 1929, the town of Ahoskie adopted the following ordinance: "It shall be unlawful for any person, firm or corporation, to build, erect or maintain any dance hall, gasoline filling station, carnival or tent show, or pool room within three hundred feet of the property of the Ahoskie Graded School," etc.

The plaintiff, in April, 1929, purchased a lot at the intersection of the west margin of West Main Street with the northern margin of the State highway, which said lot is 166.5 feet from the school building. On 13 May, 1929, the plaintiff duly applied to the mayor and board of com-

missioners of the town of Ahoskie for a building permit to construct and operate on said lot an automobile service station commonly known as a "filling station," agreeing if the permit were issued to conform to all building laws and regulations. On 20 May, 1929, after adopting the second ordinance above referred to, the board of commissioners and mayor declined to grant the permit. Thereupon on 29 May, plaintiff instituted a civil action against the town of Ahoskie and the commissioners of said town for the purpose of compelling said defendants by mandamus to issue a building permit for the construction of said filling station.

After suit was instituted a third ordinance was adopted by the town, reading as follows: "It shall be unlawful for any person, firm or corporation, to build, erect or maintain any dance hall, gasoline filling station, carnival or tent show, or pool room within three hundred feet of the property of the Ahoskie Graded School; . . . and any person, firm or corporation violating this ordinance shall incur a penalty of $50 for each offense: . . . *Provided* that any dance hall, gasoline filling station, carnival or tent show which may now be in operation or process of construction within 300 feet of said school property shall have until 1 January, 1930, to be removed therefrom."

It appears from the record that at the time the plaintiff applied for a permit there were two filling stations in operation within 300 feet of the school building. One, known as Moore's filling station, is situated 194 feet from the school property, and the other, known as Brewer's Filling Station, is situated 268 feet from the school building. The location of the filling stations in operation and the location of plaintiff's lot is shown on the map hereto attached.

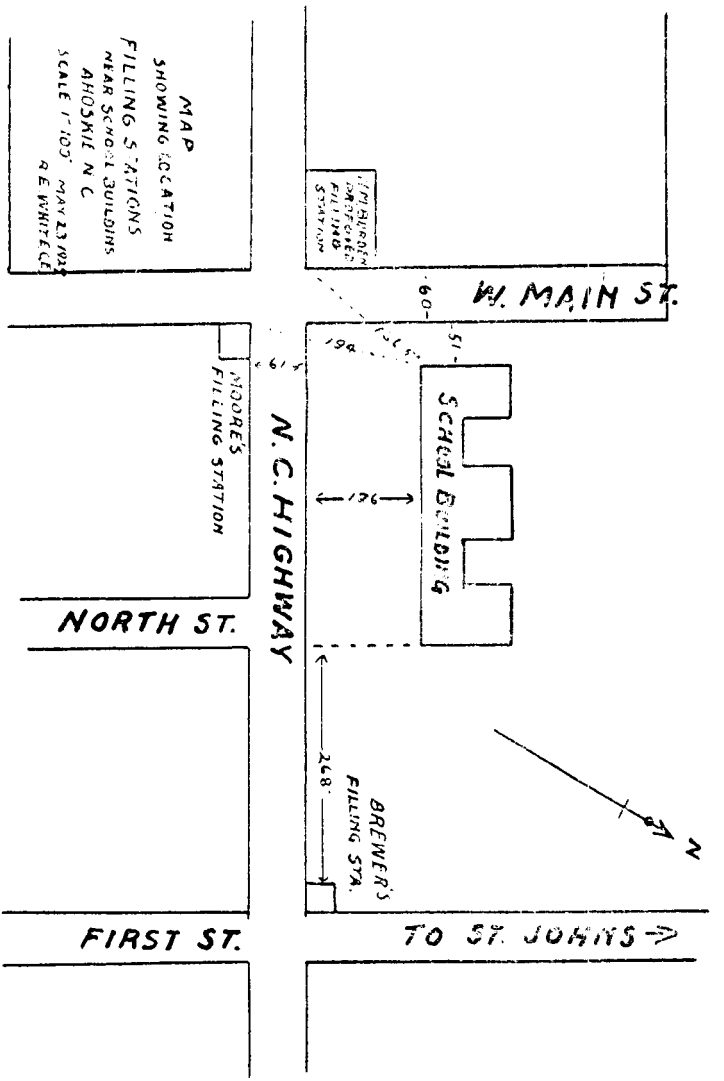
The judge of the Superior Court denied the writ of mandamus and the plaintiff appealed.

*A. T. Castelloe for plaintiff.*

*Travis & Travis and Alvah Early for defendants.*

BROGDEN, J. Are ordinances of a municipality valid, which prohibit the erection of a filling station within 300 feet of a school building, when there are now two other filling stations of similar kind constructed and in operation within a distance of 300 feet from said building?

In *Bizzell v. Goldsboro,* 192 N. C., 348, 135 S. E., 50, it was written: "The law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, however well-meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike."




In substance and effect the ordinances under consideration in the case at bar are similar to the ordinances involved in the case of *Clinton v. Oil Co.*, 193 N. C., 432, 137 S. E., 183. In that case the Court said: "The principle is well settled that ordinances must be uniform, fair, and impartial in their operation. . . . There can be no discrimination against those of the same class. The regulation must apply to all of a

class. An ordinance that grants rights—the enjoyment must be to all, upon the same terms and conditions. An ordinance cannot penalize one and for the same act, done under similar circumstances, impose no penalty. No ordinance is enforceable in matters of this kind, a lawful business, that does not make a general or uniform rule of equal rights to all and applicable to all alike—then there can be no special privilege or favoritism." The Court further said: "The present ordinance does not regulate, but keeps alive the six gasoline places inside the fire limits where gasoline is sold, and prohibits defendant from carrying on a like legitimate business in the same limits. It discriminates against defendant and gives a monopoly to those now carrying on the business in the district. It is no regulation; it is a prohibition."

Applying these announced principles of law to the facts appearing in the record, it is manifest that the ordinances give life to the two filling stations now in operation within a distance of 300 feet, but pronounce the sentence of death upon any other filling station of like kind and character within the identical area. In the terse language of the *Clinton case, supra,* "this is not regulation, but prohibition."

It is strenuously argued that the effect of the third ordinance, passed after the action was instituted, is to remove the filling stations now in said area by 1 January, 1930, and that therefore on that date no filling station will be permitted within the area. Hence there would be no monopoly or discrimination. The fact that the ordinance was passed after the suit was instituted has no bearing upon the question at issue. *Refining Co. v. McKernan,* 179 N. C., 314, 102 S. E., 505. However, the plaintiff is entitled to have his case considered upon the record as it now appears. Certainly it is not unlawful for these filling stations now in the area to operate until 1 January. The ordinance expressly recognizes such right. The owners of these operating filling stations are not parties to this action, and hence the right to operate said filling stations after 1 January, 1930, is not now before this Court.

The sole question for determination is whether the plaintiff is entitled to the relief requested upon the record as now presented. A consideration of the case, in such aspect, leads to the conclusion, under the circumstances, that the plaintiff was entitled to the relief sought for, and the judgment is reversed.

A discussion of the principles of law involved in the action may be found in 18 A. L. R., 93; 29 A. L. R., 450; 34 A. L. R., 507; 42 A. L. R., 978; 49 A. L. R., 767, and 55 A. L. R., 252.

Reversed.

E. S. DELANEY v. R. H. HART.

(Filed 11 December, 1929.)

**Deeds and Conveyances C g—Where development is not made according to general scheme, owners therein may not enforce restrictions.**

Where the Court finds upon facts agreed that restrictions in deeds in a development were not enforceable by the owners of other lots therein for the reason that the subdivision was not developed or mapped by the developing company in accordance with a general plan or scheme, and that the restrictions were not enforceable by the developing company or any one claiming under it, for the reason that the developing company, a corporation, had been dissolved, his judgment that the owner in the subdivision could transfer his lot to another free from the restrictions, except as to one applicable to all the lots, will be upheld on appeal.

APPEAL by defendant from *Sink, Special Judge,* at September Special Term, 1929, of MECKLENBURG. Affirmed.

This is a controversy without action heard upon a statement of facts agreed. C. S., 626.

Plaintiff contends that upon the facts agreed he is entitled to a decree for the specific performance of a contract in writing by which (1) plaintiff agreed to sell and convey to defendant a certain described lot of land, in fee simple, without restrictions, except as to its occupancy or ownership by persons of the colored race, and (2) defendant agreed to purchase from plaintiff the said lot of land, and to pay to plaintiff for the same the agreed purchase price upon the conveyance to him by plaintiff of the said lot of land in accordance with said contract.

Plaintiff has tendered to defendant a deed properly executed, with the usual covenants of warranty, sufficient in form to convey to defendant the said lot of land in fee simple, without restrictions, except as to its occupancy or ownership by persons of the colored race.

Defendant has declined to accept said deed, and has refused to pay to plaintiff the purchase price for said lot of land, in accordance with the terms of the contract.

Defendant contends that plaintiff cannot perform his contract with respect to the conveyance to him of said lot of land, for the reason that plaintiff holds his title to said lot of land subject to certain restrictions set out in the deed by which said lot of land was conveyed to plaintiff, and that plaintiff cannot convey the same free from said restrictions.

Upon the facts agreed, the court was of opinion, and so held, that plaintiff can convey to defendant said lot of land, free from restrictions, as to its use or otherwise, except as to its occupancy or ownership by persons of the colored race.

From judgment in accordance with the opinion of the court that defendant specifically perform his contract with plaintiff, defendant appealed to the Supreme Court.

*J. L. DeLaney for plaintiff.*
*Cansler & Cansler for defendant.*

PER CURIAM. Plaintiff's title to the lot of land which he has contracted to sell and convey to defendant, without restrictions, except as to its occupancy or ownership by persons of the colored race, is held by him under deeds which contain other restrictions as to its use upon the grantee, his heirs, and assigns in each of said deeds.

The vital question involved in this controversy is whether or not these restrictions are enforceable against plaintiff, his heirs or assigns (1) by the Highland Parks Company which first imposed said restrictions upon the title to said lot, or (2) by the owners of other lots of land, who hold title to the same under the Highland Parks Company and its grantees.

The court was of opinion, and so held, that upon the facts agreed, these restrictions are not enforceable by the owners, present or future, of the other lots formerly owned by the Highland Parks Company, for the reason that the tract of land which was divided into blocks, and subdivided into lots was not planned, developed or mapped by the said company in accordance with a general plan or scheme, and that therefore the owners of said other lots have no right to enforce the restrictions contained in the deeds under which plaintiff holds title to the lot which he has contracted to sell and convey to defendant.

The court was further of opinion, and so held, that upon the facts agreed, these restrictions are not now enforceable by the Highland Parks Company, or by any person or corporation claiming under said company, for the reason that said Highland Parks Company, a corporation organized under the laws of this State, has been dissolved.

We concur in the opinion of the court. The judgment is affirmed. *Thomas v. Rogers,* 191 N. C., 736, 133 S. E., 18; *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697; *Snyder v. Heath,* 185 N. C., 362, 117 S. E., 294. The instant case is distinguishable from *Johnston v. Garrett,* 190 N. C., 835, 130 S. E., 835. The lot involved in that case was included in a tract of land which was planned, developed and mapped under a general scheme or plan. It was held that the owners of lots included in the development and conveyed with restrictions applicable to all the lots, could enforce as against the owner of any one of the lots, the restrictions for the reason that the restrictions were for the mutual protection of the owners of all the lots.

Affirmed.

RAY BENNETT v. WHIPPETT-KNIGHT COMPANY.

(Filed 11 December, 1929.)

**Fraud A b—Purchaser having equal means of information and opportunity to inspect car may not maintain action for fraud.**

Where the evidence discloses that the purchaser of a second-hand automobile had equal means of information with the seller as to the age and running condition of the car, and that the purchaser was not prevented from making a full and thorough examination of the car before the contract of purchase was entered into: *Held*, the purchaser may not successfully maintain an action for fraud for representation as to its age or running condition.

CIVIL ACTION, before *MacRae, Special Judge,* at August Term, 1929, of YANCEY.

Plaintiff alleged that on 16 April, 1929, he exchanged his Overland car with the defendant in return for "one 1926 model Oldsmobile." Plaintiff further alleged that at the time of the exchange the defendant represented that the Oldsmobile "was a 1926 model, was in good condition, and in good running order." The plaintiff further alleged that in truth and in fact said car was a 1925 model, and not in good running condition; that his Overland was worth $125 at the time of the exchange, and that he had paid $30 in cash and $9.30 for repairs, making a total of $164.30, which he sought to recover in this action.

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

*Watson & Fouts for plaintiff.*
*McBee & McBee and Chas. Hutchins for defendant.*

PER CURIAM. The record discloses that the plaintiff was a graduate of a junior college and engaged in teaching school. On 16 April, 1929, at the time of exchanging cars, plaintiff signed an affidavit which contained a statement that the Oldsmobile he received from the defendant was a 1925 model. He testified that he signed this paper-writing upon the representation of the bookkeeper of defendant that a controversy had arisen between "the Oldsmobile people and the State of North Carolina; that it was sold as a 1925 model, and the State of North Carolina gave title for the year the car was sold and not for the model of the car." Plaintiff further testified: "I drove the car some before I traded for it. . . . After I had tried it out I told them to go ahead and fix up the papers, and I signed the papers at Spruce Pine with an explanation which the bookkeeper gave to me. . . . I had every opportunity to

look into the car and investigate it, but Mr. Shuford said it was in good condition, and I took his word for it."

We do not think the evidence of fraud was sufficient to be submitted to the jury. It is obvious from the evidence that the parties had equal means of information, and that the plaintiff was not prevented from making a full and thorough examination and test of the property before the contract was entered into. *Peyton v. Griffin,* 195 N. C., 685, 143 S. E., 525; *Cromwell v. Logan et al.,* 196 N. C., 588, 146 S. E., 233.

Affirmed.

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ETHEL COLLINS AND HUSBAND, BRIGHT COLLINS, v. GORDON BASS.

(Filed 18 December, 1929.)

**1. Mortgages H m—Purchaser at foreclosure sale is entitled to immediate possession and to crops as against tenant of mortgagor.**

Where the mortgagee has not entered upon the mortgaged lands after the maturity of the note secured by the mortgage, or where the crops are severed before entry, he is not entitled to the crops; but otherwise where there is no reservation of the growing crops by the mortgagor, and the mortgagee has entered upon the land; and where the mortgagor under a prior registered mortgage has leased the lands, and the mortgage has been foreclosed, the purchaser at the foreclosure sale is entitled to the growing crops and the immediate possession of the mortgaged premises, the lessee being regarded as having only acquired the rights of the mortgagor, and as tenant-at-will of the mortgagee after the maturity of the debt.

**2. Landlord and Tenant D g—Lessee of mortgagor is not entitled to emblements as against purchaser at foreclosure sale.**

The right of the lessee of the mortgagor to the crops for the year in which they are planted as against the purchaser at the foreclosure sale of a prior registered mortgage rests at common law unaffected by statute, and the doctrine of emblements as against a remainderman and the statutes passed in regard to those furnishing money or material for the growing crops are not applicable. C. S., 2347, 2480, 2481.

APPEAL by defendant from *Clement, J.,* at August Term, 1929, of UNION. Affirmed.

Action brought by plaintiffs against the defendant to recover a certain tract of land. The court below found as facts and rendered judgment as follows:

"The defendant, Gordan Bass, rented the said lands for the year 1929, in the fall of 1928, from J. N. Davis (mortgagor), the holder of the legal title, and had begun a crop upon said lands at the time of the foreclosure

of the mortgage deed. The court being of the opinion that the plaintiff, as a matter of law, was entitled to recover, declined to submit any issues to the jury, but signed judgment, said judgment being as follows:

The above-entitled action coming on to be heard before the undersigned judge, and the jury having been empaneled to try the issues joined between the plaintiffs and the defendants, and the court, after hearing the pleadings read and the defendant admitting that J. N. Davis and wife executed a mortgage deed to Bettie J. Collins on 17 December, 1927, and that the same was registered on the same day in Book AV, at page 138, in the office of the register of deeds of Union County, North Carolina, covering the lands in controversy, and that a note was secured by the mortgage, maturing on 19 December, 1927, and that thereafter, to wit, on 30 March, 1929, the said Bettie J. Collins, mortgagee, foreclosed said mortgage and sold the same at public auction on said date, and that Ethel Collins became the last and highest bidder for said lands and that deed was made to her on 10 April, 1929, and registered on the same day in Book 69, at page 248;

And it further appearing to the court that the defendants agreed that the date of mortgage, as above set forth, and the date of the foreclosure proceeding as is herein stated, and also the date of the note secured by said mortgage, had matured, and it further appearing to the court that the defendant, Gordon Bass, claims to have rented said lands in the fall of the year 1928, and while said mortgage appeared there of record, and the court being of the opinion that as a matter of law the plaintiffs are entitled to the relief sought in said complaint, it is now, therefore, ordered, adjudged and decreed that the plaintiffs are the owners of, and entitled to the immediate possession of the lands described in the complaint, and that a writ of ejectment issue ejecting the defendant, Gordon Bass, from the land and placing the plaintiffs in possession of said lands and also that the plaintiffs recover of the defendant, Gordon Bass, the costs of this action.

And it further appearing to the court that the defendant, J. N. Davis, having disclaimed any interest in the matters involved in this action, as shown by his answer filed, he is permitted to go without day and recover of the plaintiffs any costs he may have expended."

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

*Vann & Milliken for plaintiffs.*
*W. O. Lemmond and John C. Sikes for defendant.*

CLARKSON, J. The question involved: Is the purchaser at a foreclosure sale under a mortgage entitled to recover possession of the prop-

erty from a lessee or tenant of mortgagor, claiming to hold under a lease made after maturity of the mortgage indebtedness? We think so.

In *Jones v. Hill,* 64 N. C., 199-200, citing numerous authorities, the law is thus stated: "If a mortgagor remains in possession after the forfeiture of the property, he remains only by permission of the mortgagee. In such case the mortgagor has been sometimes called a tenant at will or sufferance, and sometimes a trespasser; but he is properly neither; his position cannot be more accurately defined than by calling him a mortgagor in possession, but he may be ejected at any time by the mortgagee, without notice. . . . That is no injustice in this, because the land, including all its products, is a security for the mortgage debt, and to that extent the property of the mortgagee. The mortgagor has no right to make a lease, to the prejudice of the mortgagee; the lease is void if the mortgagee elects to hold it so. . . . If the mortgagor could lease, he might altogether defeat the claim of the mortgagee." *Keathly v. Branch,* 84 N. C., 202; *Brewer v. Chappell,* 101 N. C., 251; *Killebrew v. Hines,* 104 N. C., 182; *Cooper v. Kimball,* 123 N. C., 120; *Montague v. Thorpe,* 196 N. C., 163.

Where the mortgagee has not entered, or where the crops are severed before entry, he has no right to them. *Killebrew's case, supra.*

In *Killebrew v. Hines, supra,* at p. 193, we find: "The case of *Brewer v. Chappell,* and *Coor v. Smith, supra* (101 N. C., 261), in so far as they are inconsistent with the principle declared in this opinion, are overruled."

The following principle is now well settled in this jurisdiction: 19 R. C. L., part sec. 444, p. 628: "It is generally held that if the sale is completed and title is vested in the purchaser while a crop is still unsevered and growing, and there has been no reservation or waiver of the right to the crop, the title and right to same will pass to the purchaser with the land. And this is true as against the mortgagor, as against his execution creditors, and as against a tenant or lessee holding under him by a lease subsequent to the mortgage."

In *Hayes v. Wrenn,* 167 N. C., at p. 230, we find the following: "Under the common law, 'the tenant for life, or his representative, shall not be prejudiced by any sudden determination of his estate because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executor shall have the *emblements* or profits of the crop, for the estate was determined by the act of God, and it is a maxim in the law that *actus die nemini facit injuriam.* The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense for tilling, manuring, and sowing the lands, and also for the encouragement of husbandry, which being a public benefit, tending to the increase and

plenty of provisions, ought to have the utmost security and privilege the law can give it.' 2 Bl. Com., 122; Taylor on L. and T., 355; *Gee v. Young,* 1 Hay., 17; *Poindexter v. Blackburn,* 36 N. C., 286." The common law being in force in this jurisdiction and the representatives of the life tenant upon his uncertain tenure from death being entitled to the emblements, C. S., 2347 (Revisal, sec. 1990) was passed. This was done to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. Under the statute the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate to the surrendering of possession to the remainderman. *King v. Foscue,* 91 N. C., 116.

C. S., 2480 (N. C. Code, 1927, Anno.), is as follows: "If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advance is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except the laborer's and landlord's liens, to the extent of such advances. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county where the person advanced resides: *Provided,* that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year."

C. S., 2481: "The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not."

C. S., 2481, *supra,* was passed by the General Assembly of 1889, ch. 476. This was an amendment to 1799 of the Code, which with certain other amendments is C. S., 2480 (N. C. Code, 1927, Anno.), *supra.* This act of 1889 was passed, no doubt, to meet the decision in *Brewer v. Chappell,* 101 N. C., 251, decided September Term, 1888, and it will be noted that C. S., 2481, distinctly says, "Either in case the debt secured in said mortgage or deed of trust *be due or not.*"

In *Nichols v. Speller,* 120 N. C., at p. 78, it is held: "Section 1799 of the Code (C. S., 2480, *supra)* was not intended simply to permit a person to give a lien upon his crop for advances; but also to give such a

lien for *'preference to all other liens existing or otherwise* to the extent of such advance.' (Since changed, see 2480, *supra,* but the change does not affect the principle the case is cited to apply.) Therefore, it should be strictly construed when the rights of other creditors intervene. Even where such claims do exist, it has been held that the mortgagor must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and that the plaintiff was not bound to see that the property was used on the farm—his duty being discharged by furnishing it. *Womble v. Leach,* 83 N. C., 84." *Wooten v. Hill,* 98 N. C., 48; *Killebrew v. Hines, supra; Tob. Asso. v. Patterson,* 187 N. C., 252.

Under the law now existing in this jurisdiction, whenever one takes a mortgage or deed in trust on farm lands, he does it with notice of this statute giving an agricultural lien for advances within one year from the date of the agreement if the statute is complied with. The mortgage or deed in trust, *whether due or not,* is subject to the provisions of this statute. It is a wise statute to enable mortgagors and trustors to obtain advances to make the crop, and made for the benefit of agriculture.

In *Wooten v. Hill, supra,* at p. 53, it is said: "All laws relating to the subject-matter of a contract enter into and form a part of it, as if they were 'expressly referred to or incorporated in its terms.' *O'Kelly v. Williams,* 84 N. C., 281; *Lehigh Water Co. v. Easton,* 121 U. S., 391. It impairs the obligation of no contract." *Ryan v. Reynolds,* 190 N. C., 563; *Steele v. Ins. Co.,* 196 N. C., 408.

There is no statute in this State giving the lessee or tenant of a mortgagor or trustor after default *any right to the crop for the year in which it is planted.* It might be wise to have such legislation, but this is for the General Assembly and not for us.

The cases of *Ford v. Green,* 121 N. C., 70; *Leach v. Curtin,* 123 N. C., 85, and *Warrington v. Hardison,* 185 N. C., 76, do not conflict with the position taken in this case. Nor is C. S., 2347, applicable to the facts here disclosed. But compare *Warrington v. Hardison, supra,* with *Ford v. Green* and *Montague v. Thorpe, supra,* and see, also, *Stevens v. Turlington,* 186 N. C., 192. For the reasons given, the judgment below is

Affirmed.

J. A. GREEN v. FORSYTH FURNITURE LINES, INC., AND W. A. BLAIR.

(Filed 18 December, 1929.)

**Corporations D d—Endorser of stock in blank may not recover of bona fide purchaser or corporation for fraud of another in procuring his endorsement.**

Where the owner of certificates of stock in a corporation endorses them in blank, and they are purchased by a third person, the purchaser has the right to have the shares he has thus purchased canceled on the books of the corporation and new certificates issued to him, and where it appears that such purchaser paid the reasonable value of the shares at the time, in good faith, without knowledge or notice of fraud in the procurement of the seller's endorsement in blank, it is immaterial whether the corporation issuing the new shares had notice of the fraud, or mistakenly advised the seller that the shares had not been transferred at the time the seller advised the corporation not to transfer them, and the seller may not recover of the corporation for so transferring the shares, or against the purchaser.

APPEAL by defendant, Forsyth Furniture Lines, Inc., from *Cowper, Special Judge,* at April Term, 1929, of MONTGOMERY. Reversed.

Action to compel the defendant corporation to issue to plaintiff its certificate showing that plaintiff is the owner of ten shares of its stock, or in lieu thereof to recover of said defendant damages for the wrongful transfer by said defendant of said shares of stock on its books from plaintiff to the defendant, W. A. Blair, and another.

The defendant, Forsyth Furniture Lines, Inc., is a corporation organized under the laws of this State, with its office in the city of Winston-Salem, N. C. On 29 August, 1922, the said defendant issued to plaintiff its certificate No. 88 for ten shares of its stock showing that plaintiff was the owner of said shares of stock. The said shares of stock were transferable on the books of the corporation, and upon the presentation to it of said certificate No. 88, properly endorsed by the plaintiff, it was the duty of said corporation to transfer said shares of stock to the holder of said certificate.

On 3 May, 1926, at his home in Montgomery County, N. C., plaintiff endorsed his said certificate in blank and delivered same to one Dorsey Brockett; the said Dorsey Brockett procured the delivery of said certificate, properly endorsed by plaintiff, to him, by means of false and fraudulent representations. The said Dorsey Brockett falsely and fraudulently represented to the plaintiff that he was the agent of the defendant corporation, and that said corporation had an offer for the purchase of said shares of stock from plaintiff; that he would remit to plaintiff for the proceeds of the sale of his stock, or would return the

certificate to plaintiff within thirty days. Relying upon these false and fraudulent representations, plaintiff endorsed his certificate in blank, and delivered same to the said Dorsey Brockett.

On 4 May, 1926, the said Dorsey Brockett sold and delivered the said certificate to the defendant, W. A. Blair, at his office in Winston-Salem, N. C. The said W. A. Blair paid to the said Dorsey Brockett for said certificate the sum of $600. This sum was the fair market value of ten shares of the stock of the defendant corporation on said date. At the time of the sale and delivery to him of the said certificate of stock, the said W. A. Blair had no notice of the false and fraudulent representations, by means of which the said Dorsey Brockett had procured the said certificate from plaintiff. Dorsey Brockett has not paid to plaintiff the sum of money received by him from the said W. A. Blair for said certificate, nor has he accounted with plaintiff for said sum of money.

On 5 May, 1926, the said W. A. Blair, as the owner of said certificate for ten shares of its stock, presented the same to the defendant corporation, at its office in Winston-Salem, N. C., and requested said corporation to cancel said certificate, and to issue in lieu thereof two new certificates, each for five shares of its stock, one to him, and one to Mrs. W. A. Blair. In accordance with this request, certificate No. 88, issued to plaintiff, and delivered by him to Dorsey Brockett, properly endorsed by plaintiff, was canceled by the defendant corporation, and thereafter two new certificates, each for five shares of stock, one in the name of W. A. Blair, and one in the name of Mrs. W. A. Blair, were issued by said corporation, and delivered by it to the defendant, W. A. Blair. That said W. A. Blair and Mrs. W. A. Blair are now the holders of said certificates, and by virtue thereof each is the owner of five shares of the stock of the defendant corporation.

In response to issues submitted by the court, the jury found that defendant corporation had notice of the false and fraudulent representations by means of which Dorsey Brockett procured the delivery to him by plaintiff of the certificate in plaintiff's name at or prior to the date of the transfer of said stock by defendant corporation from plaintiff to W. A. Blair and Mrs. W. A. Blair; that prior to the date of such transfer, plaintiff had requested the said defendant corporation not to cancel his certificate, or to transfer his stock on its books to the holder of said certificate, for the reason that said certificate had been obtained from the plaintiff by Dorsey Brockett, by means of false and fraudulent representations; and that said defendant corporation had wrongfully transferred said stock on its books from plaintiff to defendant, W. A. Blair, and Mrs. W. A. Blair.

From judgment on the verdict, ordering and directing the defendant corporation to issue to plaintiff its certificate showing that plaintiff is

the owner of ten shares of its stock, or in lieu thereof, that plaintiff recover of said defendant the sum of six hundred dollars, the fair market value of ten shares of its stock, as found by the jury, the defendant, Forsyth Furniture Lines, Inc., appealed to the Supreme Court.

*Armstrong & Armstrong for plaintiff.*
*Fred S. Hutchins for defendant.*

CONNOR, J. The weight of the evidence offered at the trial of this action by the plaintiff does not, we think, sustain the allegations of the complaint, which are denied in the answer, to the effect that at or prior to the transfer of the stock on its books, the defendant corporation had notice of the false and fraudulent representations by means of which Dorsey Brockett had procured from plaintiff his certificate of stock, properly endorsed by him; that prior to such transfer, plaintiff had requested said corporation not to cancel said certificate or to transfer his stock, upon presentation of said certificate by the holder thereof, for the reason that the same had been obtained from him by means of false and fraudulent representations made to plaintiff by Dorsey Brockett, and that by reason of such notice and such request, the transfer of said stock on its books by the defendant corporation was wrongful. The evidence tends strongly to show that said stock was transferred on its books by the defendant corporation on 5 May, 1926, and that plaintiff did not notify said defendant of the circumstances under which he endorsed his certificate and delivered same to Dorsey Brockett, until 8 June, 1926. On 11 June, 1926, the treasurer of the defendant corporation, in reply to a letter from plaintiff dated 8 June, 1926, advised plaintiff that the stock had not been transferred at the date of his letter. There was evidence tending to show that at the date of his letter to plaintiff, the treasurer did not know that prior to 8 June, 1926, the stock had been transferred by another officer of the corporation. It is immaterial whether or not the treasurer of the corporation was negligent in failing to examine the stock book of the corporation before writing the letter to plaintiff, advising him that the stock had not been transferred, at the date of said letter, for the reason that all the evidence offered by plaintiff shows that the certificate, properly endorsed by plaintiff, had been sold and delivered by Dorsey Brockett to W. A. Blair, an innocent purchaser for value, on 4 May, 1926.

It is said in Cook on Corporations, 8 ed., Vol. 2, sec. 438, that "Shares of stock are the same as other kinds of property, in that a person who has been deprived of his stock by fraud cannot follow the stock and take it from the hands of a bona fide purchaser for value. The remedy of the defrauded person is for damages against the person defrauding him, or

for a retransfer of the stock, if the latter still holds it, together with an injunction against the transfer of the latter. But if the person obtaining the stock by fraud sells it, even in violation of an injunction, the bona fide purchaser for value and without notice, is protected."

The evidence offered by plaintiff tends to show that the defendant, W. A. Blair, was an innocent purchaser of the certificate, properly endorsed by plaintiff, for value; there was no evidence to the contrary. By his purchase of said certificate, although from Dorsey Brockett, who had procured it from plaintiff by fraud, and who therefore had no title to the certificate as against the plaintiff, the said W. A. Blair became the owner of the ten shares of stock, for which the certificate had been issued to plaintiff by the defendant corporation. As such owner, the said W. A. Blair had the right to require the defendant corporation to cancel said certificate, and to issue in lieu thereof new certificates, thus transferring the stock on the books of the corporation. Upon the presentation of said certificate, properly endorsed by plaintiff, to it by the said W. A. Blair, with the request that same be canceled, and that new certificates be issued in lieu thereof, it was the duty of the defendant corporation to comply with said requests, notwithstanding it had notice of the false and fraudulent representations by means of which Dorsey Brockett had procured the certificate from plaintiff, if the said W. A. Blair was an innocent purchaser for value, of said certificate. Defendant corporation cannot be held liable to plaintiff in this action when all the evidence was to the effect that W. A. Blair was an innocent purchaser, for value, of the certificate and therefore the owner of the stock.

Defendants' motion at the close of the evidence for judgment dismissing the action as of nonsuit should have been sustained. The judgment must be

Reversed.

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GEORGE A. LANCASTER v. B. & H. COACH LINE, INC.

(Filed 18 December, 1929.)

**Highways B c—Where there is evidence that unlawful rate of speed was proximate cause of injury nonsuit is properly denied.**

Where a passenger in a bus operated by a coach line has been injured in a collision between the bus and an automobile going in the opposite direction, driven negligently from one side of the road to the other, and there is evidence that the bus was exceeding the statutory speed limit, or was operated at such a speed as to endanger life, limb and property, and that the injury to the plaintiff would not have occurred except for the excessive speed of the bus: *Held*, the violation of the legal speed limit is negligence, and not merely evidence of negligence, and when the proximate

cause of the injury is actionable, and the coach line may not escape liability therefor on the ground that the car with which the bus collided was also negligently driven, and a judgment as of nonsuit is properly denied.

APPEAL by defendant from *Sink, Special Judge,* at May Term, 1929, of MECKLENBURG. No error.

This is an action for the recovery of damages for personal injury alleged to have been caused by the defendant's negligence in operating its bus at the time of its collision with an automobile driven by J. W. Register. The defense was the alleged sole negligence of Register. The jury answered the two issues submitted in favor of the plaintiff, who was given a judgment upon the verdict. The defendant excepted and appealed.

*D. E. Henderson and Stancill & Davis for plaintiff.*
*John W. Hester for defendant.*

ADAMS, J. The defendant's motion for nonsuit raises the question whether there is sufficient evidence to support the verdict, for it must be conceded that the defendant's contentions, if accepted by the jury, would have warranted a verdict against the plaintiff.

The collision occurred on 30 March, 1928, between Newton and Conover, the bus moving to the west and Register's car to the east. The plaintiff, a passenger on the bus, occupied the second seat behind the driver. According to his testimony the highway was eighteen or twenty feet wide and was straight for half a mile. A quarter of a mile in front of the bus the approaching car was seen to be running from one side of the road to the other; and the plaintiff called this to the driver's attention. When first seen it was on the wrong side of the road; it passed two or three times to the right and two or three times to the left. Again it went to the right and finally to the left; and soon thereafter the collision occurred. A few seconds before the impact the bus was moving at a rate in excess of fifty-five miles an hour, and at the moment of the clash, which took place near the center of the road, the car was turning to its right and the bus to its left.

The driver of the bus testified that its speed was about thirty-five miles an hour; that he could have stopped the bus within forty feet; that Register, when about eighty feet distant from the bus, turned again to the wrong side of the road and stayed there; and that the bus then slowed down to twenty or twenty-five miles an hour.

In these circumstances we cannot hold as a matter of law that there was no evidence of negligence on the part of the defendant. It is provided by statute that no person shall drive a vehicle on a highway at a greater

rate of speed than forty-five miles an hour, or at such a speed as to endanger the life, limb, or property of any person. Not only is it made prima facie unlawful for any person to exceed the speed limit; the violation of any of these provisions is made a misdemeanor. C. S., 2621 (46), 2621 (100).

The failure, without legal excuse, to obey the provisions of a statute is negligence, and such negligence when the proximate cause of an injury is actionable. *Ledbetter v. English,* 166 N. C., 125; *Clark v. Wright,* 167 N. C., 646. Whether the negligence complained of is the proximate cause of the injury suffered is ordinarily a question for the jury. *Byrd v. Express Co.,* 139 N. C., 273; *Saunders v. R. R.,* 167 N. C., 375; *Lea v. Utilities Co.,* 175 N. C., 459; *Ridge v. High Point,* 176 N. C., 421.

It was the contention of the plaintiff that the defendant disregarded two express inhibitions of the statute in driving fifty-five miles an hour and at such speed as to endanger life, limb, and property; that the car was light and the weight of the bus was 9,000 pounds; and that if the bus had been stopped before the collision, as it could have been, or its speed had been materially reduced, the injury would probably have been averted.

These contentions were submitted to the jury under instructions which are free from error. The defendant's position that a breach of the provisions above set forth is only evidence of negligence is distinctly disapproved in *Ledbetter v. English, supra.*

The instruction which is pointed out in the fourth exception is not unfavorable to the appellant; at any rate we find nothing in it of which the appellant can justly complain.

No error.

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SAMMAX INVESTMENT COMPANY v. M. K. ZINDEL AND ZINDEL BAKING COMPANY.

(Filed 18 December, 1929.)

**Frauds, Statute of, B a—A lease for three years to take effect in the future comes within the provisions of the Statute.**

Where the owner of land agrees to erect a certain kind of building thereon for a proposed lessee, and makes a parol lease for the rental of the property for three years to take effect upon the completion of the building: *Held,* the lease for three years to take effect in the future comes within the provisions of the Statute of Frauds, and where in an action thereon the lessee denies the contract of lease and pleads the statute, he may not be held liable unless it was executed in writing, or some memorandum thereof made and signed by the party to be charged therewith or by some other person by him duly authorized.

APPEAL by defendants from *Johnson, Special Judge,* at June Special Term, 1929, of BUNCOMBE.

Civil action to recover damages for an alleged breach of a rental contract.

Plaintiff alleges that on 15 April, 1928, the defendants verbally agreed to lease a bakery and baking shop, to be built by the plaintiff at Black Mountain, N. C., said lease to be "for a term of three years, at a monthly rental of $100, payable in advance, the defendants agreeing to take possession of said building upon its completion"; that though completed and possession tendered 1 July, 1928, the defendants failed to take possession of said premises; and that rent has accrued since said completion and tender, none of which has been paid; wherefore plaintiff brings this action 5 September, 1928, to recover rent for three months, July, August and September, 1928, and demands in addition thereto damages for the breach of said rental contract.

The defendants denied that any contract or lease of any nature whatsoever existed between the parties; and, upon the issues thus joined, there was a verdict and judgment for the plaintiff, from which the defendants appeal, assigning errors.

*Weaver & Patla for plaintiff.*
*J. L. Deadwyler for defendants.*

STACY, C. J. The lease of the building resting, as it does, in parol and being for a term of three years, to commence in the future, and not from the making of the contract, is void under our statute of frauds. *Mauney v. Norvell,* 179 N. C., 628, 103 S. E., 372.

It is provided by C. S., 988, that all leases and contracts for leasing lands "exceeding in duration three years from the making thereof," shall be void, unless said leases or contracts, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. Thus it would seem that a parol lease of lands for the full term of three years, to take effect in the future, and not from the making of the contract, necessarily falls within the purview of the statute, or else such a lease would be valid no matter at what time in the future it took effect, and if one such lease could be made, a succession of them might be made, and the protection of the statute would thus be lost, so far as purchasers and others are concerned. This was the holding in *Mauney's case, supra.*

The defendants having denied the lease as alleged, or that any contract whatsoever existed between the parties, were entitled to the benefit of the statute, and it was error to deny them this right. *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439.

New trial.

CHAPMAN-HUNT COMPANY, INC., v. HAYWOOD COUNTY BOARD OF EDUCATION.

(Filed 18 December, 1929.)

**1. Schools and School Districts C d—Issue of acceptance of school building by county superintendent should be submitted in action on contract for construction.**

Where the county board of education is sued by a contractor for balance due under contract for the construction of a school building, it is required by C. S., 5415, that the building be inspected, received and approved by the county superintendent of public instruction, and when it appears that the jury has not had an appropriate issue on this question submitted to them a new trial will be granted so that this fact may be determined.

**2. Trial F a—Issues should establish facts sufficient for rendition of judgment.**

Issues submitted to the jury and their answers thereto should establish facts sufficient to enable the court to proceed to judgment.

APPEAL by defendant from *Grady, J.*, at August Special Term, 1929, of HAYWOOD.

Civil action to recover the balance alleged to be due on a building contract.

Plaintiff alleges that on 21 April, 1924, it entered into a contract with the defendant whereby it agreed to erect a new school building and gymnasium at Waynesville, N. C., for the sum of $73,000; that said buildings have been completed, according to plans and specifications furnished by the architect, inspected and approved by the architect, and accepted by the defendant, and that a balance of $900 remains unpaid on said work.

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

"1. Was the school building in question inspected, approved and received by the architect in charge, as alleged in the complaint? Answer: Yes.

"2. What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: $900, with interest."

From a judgment on the verdict in favor of the plaintiff, with the following clause inserted therein, "It was admitted that the county superintendent did not inspect, receive and approve said schoolhouse, as provided by section 5468, N. C. Code of 1927," the defendant appeals, assigning errors.

*T. Lanier and J. W. Ferguson for plaintiff.*

*T. A. Clark and Alley & Alley for defendant.*

STACY, C. J. Plaintiff alleges that the buildings in question have been completed and accepted by the defendant. This is denied. It is provided by C. S., 5415, among other things, that all new school buildings "shall be inspected, received and approved by the county superintendent of public instruction before full payment is made therefor." The issues submitted to the jury, therefore, are insufficient to support the judgment, as they are not determinative of the controversy. The crucial fact of liability is yet undecided. For this reason, a new trial must be awarded. *Bank v. Broom Co.*, 188 N. C., 508, 125 S. E., 12; *Holler v. Tel. Co.*, 149 N. C., 336, 63 S. E., 92; *Strauss v. Wilmington*, 129 N. C., 99, 39 S. E., 772; *Tucker v. Satterthwaite*, 120 N. C., 118, 27 S. E., 45.

A verdict, whether upon one or many issues, should establish facts sufficient to enable the court to proceed to judgment. *McAdoo v. R. R.*, 105 N. C., 140, 11 S. E., 316; *Emery v. R. R.*, 102 N. C., 209, 9 S. E., 139.

New trial.

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W. H. WESTALL v. ATLAS SUPPLY COMPANY, INC.

(Filed 18 December, 1929.)

**Landlord and Tenant D e—Acceptance of surrender of leased premises should have been determined by jury in this case.**

Under the evidence tending to show that a lessee of a store tendered the keys to the lessor, who refused them, and later mailed the keys to the lessor with a letter to the effect that the lessee had given up the leased premises and hoped the lessor would then accept the keys, and the lessor kept the keys without further comment or communication: *Held*, the question of whether the lessor had accepted the surrender of the leased premises is determinable by the jury alone, and an instruction that the lessor might recover as a matter of law for the unexpired term of the lease less any sum he might have realized by the exercise of ordinary diligence in leasing or renting the property to others, is error entitling the defendant to a new trial.

APPEAL by defendant from *Johnson, Special Judge*, at October Special Term, 1929, of BUNCOMBE.

Civil action to recover damages for breach of a rental contract.

Plaintiff's building, located on Spruce Street in the city of Asheville, was leased to Whitman-Douglas Company for $150 per month, which lease expired 31 October, 1927. On 12 February, 1927, the defendant took from Whitman-Douglas Company an assignment of the unexpired term of the lease, and procured the following consent and agreement from the plaintiff:

"I hereby consent to the aforegoing assignment of lease and hereby release the said Whitman-Douglas Company from any obligation arising out of said lease between the dates of 1 March, 1927, and the termination of the said lease, and hereby agree to execute a lease to the Atlas Supply Company running from the termination of the Whitman-Douglas lease to 1 January, 1929, the terms of the said lease to be three hundred dollars per month payable in the same manner as prescribed in the Whitman-Douglas lease herein mentioned.

W. H. WESTALL.

Accepted by:
Atlas Supply Company, Inc.,
E. T. NANCE."

The defendant thereupon went into possession of the premises, and paid to the plaintiff the stipulated rent of $150 per month accruing under the Whitman-Douglas lease up to the date of its expiration.

Without further negotiations between the parties, the defendant remained in possession and paid to the plaintiff for the months of November, December, 1927, and January, 1928, the increased rental of $300 per month.

On 1 February, 1928, the defendant vacated the premises, and through its agent offered the keys to the plaintiff, which he refused to accept. Later, on 9 February, 1928, the defendant mailed to plaintiff the keys to said building, accompanied by the following letter:

"We are enclosing herewith the keys to the building which we formerly had rented from you in Asheville. As we wrote you a week or so ago, we have given up this building and are therefore discontinuing the rent.

"Our Mr. Northup advises that he offered you these keys, and you would not accept them, and we trust that they will be accepted at this time."

On 30 March, 1929, plaintiff instituted this action to recover for eleven months rent at $300 per month from 1 February, 1928, to 1 January, 1929.

From a verdict and judgment in favor of plaintiff for the full amount demanded, the defendant appeals, assigning errors.

*Merrimon, Adams & Adams for plaintiff.*
*Joseph W. Little and W. T. Wilson for defendant.*

STACY, C. J., after stating the case: The trial court held, as a matter of law, that the plaintiff was entitled to recover the balance due under the contract, *i. e.*, $300 per month for eleven months, "less any sum that the plaintiff might have realized by the exercise of ordinary diligence in

renting or leasing the property to some one else." *Monger v. Lutterloh*, 195 N. C., 274, 142 S. E., 12. In this, we think there was error.

As to whether there was a surrender and acceptance of the tenement when the plaintiff received the keys through the mails, accompanied by defendant's letter of 9 February, 1928, and kept them without further comment, is a question presented by the evidence, determinable alone by the jury. 16 R. C. L., 1154; Note, 18 A. L. R., 957.

New trial.

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C. H. B. LEONARD, COUNTY MANAGER AND ACCOUNTANT FOR DAVIDSON COUNTY, AND DAVIDSON COUNTY BY THE BOARD OF COUNTY COMMISSIONERS, C. M. HOOVER, CHAIRMAN; L. W. DELAPP, C. A. HOOVER, M. R. HARRIS AND R. S. OWEN, v. FRED C. SINK, SHERIFF OF DAVIDSON COUNTY (ORIGINAL DEFENDANT), AND THE CITY OF LEXINGTON, CITY OF THOMASVILLE, AND THE TOWN OF DENTON (LATER MADE PARTIES DEFENDANT).

(Filed 18 December, 1929.)

**1. Statutes C b—Repeal of statute by implication is not favored.**

A later act of the Legislature will not be construed to repeal a former act thereof by implication where, construing the two *in pari materia*, there is no repugnancy between the two, and when repugnant in part, then only to the extent of those parts that are clearly repugnant when construed with the view to make them reconcilable by reasonable interpretation.

**2. Counties E d—Statute giving municipalities of Davidson control of part of road funds not repealed by later act in respect thereto.**

Where by authority of statute a board of road commissioners for a county has been created with full charge of the roads of a county and by later act the sheriff of the county is directed to pay to the cities and towns of the county fifty per cent of all taxes levied and collected for road purposes in such towns, to be held by their respective treasurers and expended upon their own streets and roads, and by a later act the board of county road commissioners is abolished and their duties fixed upon the county commissioners, with provision that "all taxes and other funds applicable to the roads of the county that may be collected in the future shall be deposited with the county treasurer": *Held*, construing the various acts *in pari materia*, there is no repugnancy between the act abolishing the county road commissioners and the act providing that the municipalities receive a part of the revenue for road purposes, and it is the duty of the county treasurer to pay to the municipalities the fifty per cent of such revenue according to the terms of the statute.

**3. Taxation A c—Where tax levy is uniform and ad valorem objection to expenditure under valid legislative authority is untenable.**

Where the tax of a county upon its property for road purposes is uniform and *ad valorem*, Art. V, sec. 3; Art. VII, sec. 9, an act that segregates

fifty per cent of such taxes collected from the cities and towns of the county to be repaid to them and used by them for street purposes, limiting their expenditure therefor to the amount so received, is not in contravention to the organic law, the municipalities being local agencies of the State for such purposes and the distribution of the funds being reasonable and within the legislative discretion with which the courts will not interfere.

**4. Statutes A e—Statutes will not be held unconstitutional unless clearly so.**

An act of the General Assembly will not be held unconstitutional unless clearly so.

STACY, C. J., dissents.

APPEAL by defendants from *Clement, J.*, at Chambers, in Winston-Salem, 11 April, 1928, from DAVIDSON County. Reversed.

This is an application for writ of mandamus, under C. S., 866, brought by plaintiffs against defendant Fred C. Sink, sheriff of Davidson County.

The court below found the following allegations in the complaint to be true:

"1. That C. H. B. Leonard is the duly elected county manager and county accountant for Davidson County with such powers and duties as are prescribed for county managers as set forth in chapter 91 of the Public Laws of North Carolina of 1927.

2. That C. M. Hoover is chairman, L. W. DeLapp, C. A. Hoover, M. R. Harris and R. S. Owen are the duly elected board of commissioners of Davidson County, and as such has the powers and duties as conferred upon county commissioners as set forth in Article 2, chapter 24 of the Consolidated Statutes of North Carolina.

3. That Fred C. Sink is the duly elected sheriff of Davidson County and as such has the duty of collecting the taxes and paying the same to the county treasurer.

4. That under chapter 246 of the Public-Local Laws of North Carolina of 1919 the sheriff of Davidson County was required under section 1 to perform certain duties, which section is in words and figures as follows: 'Section 1. That the sheriff of Davidson County shall turn over and pay to the governing bodies of any incorporated cities or towns in Davidson County fifty per cent of all taxes levied and collected for road purposes from the property and polls within such incorporated cities and towns respectively.' That under and by virtue of said act, among other things it was directed that the amount so collected should be paid to the treasurer of the said incorporated cities and towns in Davidson County.

5. That Public-Local Laws of North Carolina of 1925, chapter 299, was duly passed by said Legislature, and among other things and specifically section 6 of said act provides in words and figures as follows: 'Sec. 6. That all sums of money paid to the board of county commis-

sioners by the board of road commissioners on and after 31 March, 1925, and all taxes and all other funds applicable to the road fund of Davidson County that may be collected in the future, shall be deposited with the county treasurer, which fund shall be handled in the same manner and form provided for other county funds: *Provided,* that all funds collected for road purposes shall be kept separate and apart from the county funds.' That section 7 of said act provides in part that the said board of county commissioners shall use the funds arising from taxation and from every source to construct, improve and maintain the public highways of said county.

That the entire chapter 299 of the Public-Local Laws of North Carolina of 1925 is hereby pleaded in this action in as full and ample manner as if the same were written herein.

6. That on 21 March, 1929, C. H. B. Leonard, county manager and county accountant, under and by virtue of his duties as set forth in chapter 91 of the Public Laws of North Carolina of 1927, and for the county commissioners of Davidson County, addressed the following letter to Fred C. Sink, sheriff of Davidson County:

'MR. FRED C. SINK,
Sheriff of Davidson County,
Lexington, N. C.

SIR: Please advise me whether or not you are going to continue to pay into the county treasury, as you have been doing, all the funds collected for road purposes in this county.

Yours very truly,
C. H. B. LEONARD,
*County Manager and County Accountant.*'

That on the same day as above set forth, C. H. B. Leonard, as county manager and county accountant, received the following reply from Fred C. Sink, sheriff of Davidson County:

'MR. C. H. B. LEONARD,
County Manager and Accountant.

DEAR SIR: Replying to the above, beg to advise that I am not going to continue to pay all funds collected for road purposes into the county treasury. Yours very truly,
FRED C. SINK, *Sheriff.*' "

The court below further found: "That the defendant Fred C. Sink, sheriff of Davidson County, as admitted in the answers, is now keeping in his possession 50% of the said road funds collected in the said cities and towns for the use and benefit of said cities and towns respectively,

and to be paid over to their respective treasurers, and has refused to pay the same over to the treasurer of Davidson County as provided in chapter 299, Public-Local Laws of North Carolina, 1925."

The court below rendered the following judgment: "It is hereby ordered, adjudged and decreed that the defendant, Fred C. Sink, sheriff of Davidson County, be and he is hereby ordered and directed by this court to pay and turn over to the treasurer of Davidson County all taxes and funds applicable and belonging to the road funds of Davidson County, which he has collected or may in the future collect, and specifically including any and all taxes and funds in dispute in this action, and that the plaintiff recover their costs expended in this action to be taxed by the clerk."

The city of Lexington, city of Thomasville and town of Denton have not received 50% of the tax collected out of their respective municipalities for street improvement, and were made parties to the action.

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

*Walser & Walser, Spruill & Olive for plaintiffs.*
*Raper & Raper, H. R. Kyser and Phillips & Bower for defendants.*

CLARKSON, J. For a decision of this controversy, we have to consider the local road law applicable to Davidson County:

(1) The first local law of county-wide application is chapter 334, Public-Local Laws, 1915. This act created "The Board of Road Commissioners of Davidson County," and invested it with all the powers, rights and authority which was theretofore exercised and vested in the board of county commissioners of Davidson County. A general supervision and control was given the road commissioners to construct, repair and maintain the roads of the county. Authority was given to issue $300,000 of bonds. The act was a comprehensive system to construct, improve and maintain the roads of the county and a tax for this purpose to be levied each year of not more than 30 cents on the $100 valuation of real and personal property and not exceeding 90 cents on the poll, and a treasurer was to be designated by the act to handle the road funds. Under section 19 of this act, provision is made to distribute the work of improving and constructing the highways of the county in each township as equitably as practicable, having due regard to taxable property in each township. In section 24 it is provided that the road taxes shall be expended in such a way and at such times according to the needs of the roads in each township. This law was amended and additional power given, and the act made more complete, chapter 50, Public-Local Laws, 1917. Then again, Public-Local Laws, 1917, ch. 129, sec. 4, reads:

"That the board of road commissioners may work any necessary road through any incorporated towns of the county necessary to connect the main highways in the county," etc.

Chapter 233, Public-Local Laws 1919, part section 1, "And in addition to the taxes now authorized to be levied under existing laws," increased the tax 30 cents, making 60 cents on the $100 valuation, $1.80 on poll.

Chapter 246, Public-Local Laws, 1919, sec. 1: "That the sheriff of Davidson shall turn over, and pay to the governing boards of any incorporated cities or towns in Davidson County fifty per cent (50%) of all taxes levied and collected for road purposes from the property and polls within such incorporated cities or towns respectively.

Sec. 2. That the amounts so collected and paid to the governing boards of such cities and towns shall be paid to the treasurer of the same, and shall be a separate fund to be used for building and improving and maintaining the streets, of such towns and cities, or at the discretion of the governing bodies, every such cities and towns to pay interest of bonds issued for permanent streets of said cities and towns respectively.

Sec. 3. That the board of road commissioners of Davidson County shall not have authority or power to expend any further portion of the road funds of the county for work in said cities or towns."

Chapter 117, Public-Local Laws, 1923, provides that the tax to be levied shall not exceed 35 cents on the $100 valuation of taxable property. The tax was reduced from 60 cents to 35 cents.

Chapter 299, Public-Local Laws, 1925, the caption is as follows: "An act to provide for the construction and maintenance of roads and bridges in Davidson County." Sec. 2. "That it shall be the duty of the said board to take charge of the working, maintaining, altering and constructing of any and all roads and bridges in Davidson County now maintained by the county as public roads, and it is hereby vested with all powers, rights and authority now vested in the board of road commissioners of Davidson County for the general supervision of roads of said county and for the construction and repairing thereof." Sec. 6. "That all sums of money paid to the board of county commissioners by the board of road commissioners on and after the thirty-first day of March, one thousand nine hundred and twenty-five, *and all taxes and all other funds applicable to the road funds of Davidson County, that may be collected in the future, shall be deposited with the county treasurer,* which fund shall be handled in the same manner and form provided for other county funds: *Provided,* that all funds collected for road purposes shall be kept separate and apart from other county funds." Sec. 23. "That all laws and clauses of laws in conflict with this act are hereby repealed."

The *first* question involved in this controversy: Are the provisions of chapter 246 of the Public-Local Laws of 1919 in direct and irreconcilable conflict with the provisions of chapter 299, Public-Local Laws of 1925? We think not.

In 25 R. C. L. (statutes), part sec. 169, p. 918-19, we find the following: "Repeals by implication are not favored, and will not be indulged if there is any other reasonable construction. The presumption is always against the intention to repeal where express terms are not used, and the implication, in order to be operative, must be necessary. A law is not repealed by a later enactment, if the provisions of the two laws are not irreconcilable nor necessarily inconsistent, but both may stand and be operative without repugnance to each other. Nor can one act be allowed to defeat another if, by a fair and reasonable construction, the two can be made to stand together. Although two acts are seemingly contradictory or repugnant, they are, if possible by a fair and reasonable interpretation, to be given such a construction that both may have effect. If a later act not repugnant to the earlier and containing no negative words is not clearly intended to cover the whole ground of the earlier, there is no implied repeal." *S. v. Perkins,* 141 N. C., 797; *S. v. Foster,* 185 N. C., at p. 677; *Car. Discount Corp. v. Landis Motor Co.,* 190 N. C., 157; *City of Greensboro v. Guilford County,* 191 N. C., 584; *Litchfield v. Roper,* 192 N. C., 202; *Winston-Salem v. Ashby,* 194 N. C., 388; *Lumber Co. v. Welch,* 197 N. C., 249; 25 R. C. L., sec. 173 (statutes), p. 923.

It is said in *S. v. Kelly,* 186 N. C., 372: "Where two statutes are thus in conflict and cannot reasonably be reconciled, the latter one repeals the one of earlier date to the extent of repugnance. *Commissioners v. Henderson,* 163 N. C., 120; *Commissioners v. Commissioners,* 186 N. C., 202. 'Between the two acts there must be plain, unavoidable and irreconcilable repugnance, and even then the old law is repealed by implication only *pro tanta* to the extent of the repugnancy.' 36 C. L. P., 1074. Every affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary to it, for the maxim is *Leges posteriores priores contrareas abrogant* (later laws abrogate prior laws that are contrary to them). *S. v. Woodside,* 31 N. C., 500." *Carr v. Little,* 188 N. C., at p. 111.

Under the above well settled law in this jurisdiction, as to the interpretation of statutes, it cannot be said that there is a direct, irreconcilable conflict in the acts when construed *in pari materia,* taking into consideration the intent and object of the acts.

The history of road building in Davidson County in recent years is an interesting one. Great elasticity is given for local self-government in matters of this kind under our Constitution. In Davidson County we

first have a large bond issue of $300,000, in 1915, and a tax of 30 cents on the $100 valuation of property and 90 cents on the poll. The board of county commissioners had theretofore controlled the road system, but to expend so large a sum of money the authority was turned over to the board of road commissioners. Under the act a treasurer was to be designated to handle the road funds. In 1917 this act was amended and further power given, including the power to work the roads of any incorporated town that connects with the main highways of the county. In 1919 the tax was doubled to 60 cents on the $100 valuation of property and $1.80 on the poll.

In 1919 the sheriff, who collected the road tax in the county, and also from the incorporated cities and towns of the county, instead of turning what was collected from the cities and towns over to the treasurer of the board of road commissioners, to be expended by it under the act, turned 50% collected over to the incorporated cities and towns for the purpose of street improvement and maintenance and to pay interest on bonds for permanent streets, and the balance 50% to the board of road commissioners. Under the act the board of road commissioners could spend no more of the county road funds in the cities and towns. In 1923 the road tax was reduced to 35 cents on the $100 valuation of property.

After trying out the board of road commissioners for ten years, in 1925 it was abolished and the road system was put back in the hands of the board of county commissioners. There is nothing in the act of 1925 that by direct language or clear implication repeals the act of 1919, by which the sheriff turned over 50% of the taxes collected by him from the cities and towns back to the cities and towns for street improvement, etc. The tax was collected by the sheriff from these municipalities under the former acts which tax was reduced in 1923 to 35 cents on the $100 valuation of property. Nothing whatever is said in the act of 1925 in regard to any duty of the board of county commissioners, when taking over the road system of the county, in reference to incorporated cities and towns in Davidson County as set forth in other acts when the road system was under the board of road commissioners.

Again, there is no provision in the act of 1925 for the levying of any taxes whatever. The levying of the taxes, the limit upon the levy and the amount to be levied was not affected in any manner by any provision in this act.

We must bear in mind that the sheriff, as he collected the road tax from the cities and towns, under the act of 1919, turned back 50% to the municipalities and the balance over to the board of road commissioners. Then the act of 1925 was passed. Sec. 6, *supra,* says: "*And all taxes and all other funds applicable to the road funds of Davidson County that may be collected in the future shall be deposited with the county treas-*

*urer,"* etc. *All taxes* consisted solely of the 35 cents on $100 valuation of property and the poll tax. So *all other funds applicable to the road funds of Davidson County,* to give meaning to these words, would indicate that reference was had to those funds collected from the cities and towns in the county. Fifty per cent of these funds came into the hands of the sheriff that he theretofore collected from the cities and towns and paid to the board of road commissioners, and therefore were the other funds applicable to the road funds of Davidson County to be paid to its successor, the board of county commissioners—it by the act becoming the road-governing body of the county, and the act named the county treasurer the depository. The act of 1919 had by clear and explicit language segregated 50% of the tax collected in the municipalities in the county to the needs of its streets and the other 50% was applicable to the road funds of Davidson County for the general road needs of the county. There is no plain, direct or irreconcilable repugnancy in the acts. In so important change, involving the municipalities of the county, it would be a hardship to read into the act of 1925 something that the draftsmen could have easily put in it, but did not, and now take this 50% of tax collected from and segregated to the municipalities for street purposes, and put it into the general road fund of the county. In the absence of express words or clear implication, we cannot hold that these segregated funds to the municipalities should go into the general road fund of the county. The main object and intent of the act of 1925 it seems was to get rid of the board of road commissioners and put the county road system back into the hands of the board of county commissioners.

Again, the act of 1919 provides that this segregated fund could be used to pay interest on bonds for permanent street improvements. We do not know from the record if this segregated fund was so used or not, but it is mentioned to indicate how unwise it would be to allow such ambiguous language to repeal a fixed status.

The act of 1925 repeals all laws and clauses of laws in conflict. The acts of 1919 and 1925 can be construed together and reconciled, with no conflict.

The *second* question involved: Is chapter 246, Public-Local Laws of 1919, unconstitutional? This act permits 50% collected from the municipalities for road purposes to be turned back and segregated for street purposes in the municipalities. We cannot so hold.

The plaintiffs contend that the act is unconstitutional and void. We can see no unreasonableness in the act. The tax is uniform and *ad valorem.* Const. of N. C., Art. V, sec. 3; Art. VII, sec. 9. The act of 1925 does not change the amount levied, 35 cents on the $100 of property under the 1923 act, 50% collected from the municipalities is segregated under the 1919 act to the municipalities for street purposes, the

balance is put into the general road fund for county road purposes. The tax levied is uniform and *ad valorem,* and discretionary legislative distribution is reasonable.

It is said in *Lassiter v. Commissioners,* 188 N. C., at p. 382-3, citing numerous authorities: "These municipal boards, as we have uniformly held, are, in matters governmental, mere agencies of the State for the convenience of local administration in designated portions of the State territory; and in the exercise of their ordinary governmental function they are subject to almost unlimited legislative control, except when restrained by constitutional provisions. Under the Highway Act, it was perfectly competent, therefore, for the Legislature to authorize, as they have done, the acquisition of these roads, and by the same token the county board is allowed to contract with them for its purchase, maintenance and upkeep of the road for which they were then responsible. Granted the power it is fully established that its discretionary exercise is for the commissioners, and the courts are not permitted to interfere unless their action is so unreasonable as to amount to an oppressive and manifest abuse."

In matters of this kind the road-governing bodies, under legislative authority, have exercised discretion and only held for abuse of discretion. They are the creatures of the General Assembly but in the present act the General Assembly, the creator, had itself segregated the fund to the municipalities. It has been often held that an act of the General Assembly will not be held unconstitutional unless clearly so.

In *Queen v. Commissioners of Haywood,* 193 N. C., at p. 823, we find, " 'If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.' *Sutton v. Phillips,* 116 N. C., at p. 504; *Hinton v. State Treasurer, ante,* at p. 499." *S. v. Revis,* 193 N. C., 192; 50 A. L. R., 98; *Board of Commissioners of McDowell County v. Assell,* 194 N. C., 412.

In *Cabe v. Board of Aldermen,* 185 N. C., at p. 160, citing numerous authorities, it is held: "The decisions of this State have repeatedly recognized and approved the principle that counties, townships, and other like municipal corporations, and to a large extent cities and towns, are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and that in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, the position extending to the imposition and expenditure of taxes raised for ordinary governmental purposes, and where not affected by special constitutional provisions." See *Ellis v. Greene,* 191 N. C., at p. 765.

In *Clark v. Sheldon,* 106 N. Y., 104, an act was held constitutional "directing and providing for the application of taxes assessed upon any

railroad in a town, city or village towards the redemption of bonds issued by the municipality to aid in the construction of such railroad," and pointed out that this did not impose a tax upon property in other portions of the county for the benefit of any township, city or town, but simply appropriated the taxation upon such railroad for the benefit of the municipality which had incurred a burden to procure the building of such railroad. The same view is upheld in *Commissioners v. Lucas,* 93 U. S., 108. *Jones v. Commissioners,* 143 N. C., 59. See *Board of Trustees v. Webb,* 155 N. C., 379; *Commissioners v. Commissioners,* 157 N. C., 514; *Woodall v. Highway Commission,* 176 N. C., 377. An interesting discussion, where the tax is not uniform and *ad valorem,* is found in *Anderson v. Asheville,* 194 N. C., 117. For the reasons given, the judgment below is

Reversed.

STACY, C. J., dissents.

WILLIE E. PASS v. McCLAREN RUBBER COMPANY.

(Filed 18 December, 1929.)

**1. Torts C b—In this case held: evidence of fraud in procurement of release was insufficient to be submitted to jury.**

Where upon a material consideration an injured employee had signed a release of all claims he might have as a result of the injury, in order to set it aside in an action for damages subsequently brought it must be shown that the release was obtained by fraud; and where the evidence tends only to show that the plaintiff executed the release upon the advice of an attorney he had employed for the purpose, and that the representations relied on were only the opinion of the defendant's physician who attended the plaintiff, that the injury was not permanent, without evidence that the opinion was made in bad faith, and that through later developments it was discovered that the injury was permanent, the evidence of fraud is insufficient to be submitted to the jury, and the plaintiff's motion as of nonsuit should have been allowed.

**2. Same—Consideration for release as evidence of fraud in its procurement.**

The amount of consideration paid for a release from liability for a negligent injury, to be evidence of fraud in the procurement of the release, must be so grossly inadequate as to compel the conclusion that it was practically nothing, and where it is the payment of five hundred dollars for an injury to an arm with expense of treatment, etc., the fact that the jury had awarded damages in the sum of two thousand dollars will not be held sufficient evidence of fraud in the procurement of the release under the facts of this case.

PASS *v.* RUBBER COMPANY.

APPEAL by defendant from *Sink, Special Judge,* at May Special Term, 1929, of MECKLENBURG. Reversed.

Action to recover damages for personal injury sustained by plaintiff, while engaged in work as an employee of defendant.

In response to issues submitted by the court, the jury found that plaintiff was injured by the negligence of defendant as alleged in the complaint; that plaintiff did not by his own negligence contribute to his injury as alleged in the answer, and that plaintiff did not assume the risk of his injury, when he contracted with defendant for his employment, as alleged in the answer.

In bar of plaintiff's recovery, in this action, defendant set out in its answer, and relied upon a release in writing, executed by the plaintiff, prior to the commencement of this action, upon the payment to him by the defendant of the sum of $500, of any and all causes of action which plaintiff had against the defendant, at the date of the release, or which he might have thereafter, by reason of his injury.

Plaintiff admitted the execution by him of the release set out in the answer, and the payment to him by defendant of the sum of $500, as the consideration for said release. For the purpose of avoiding said release, plaintiff alleged in his reply that he was induced to execute the same by the false representations of the physician employed by defendant, who operated on his injured arm, "that said arm had sustained an ordinary break, and that the operation which had been performed on said arm by said physician, was successful, that said arm was then on the road to complete recovery, and that plaintiff would be able to perform his usual physical labors within the course of eight or ten weeks from the date of the injury."

In response to issues submitted by the court the jury found that the release was procured by fraud, or misrepresentation as alleged in the reply of plaintiff, and that plaintiff is entitled to recover of defendant as damages resulting from his injury the sum of $2,000.

From judgment on the verdict that plaintiff recover of the defendant the sum of two thousand dollars, defendant appealed to the Supreme Court.

*G. T. Carswell and Joe W. Ervin for plaintiff.*

*C. H. Gover for defendant.*

CONNOR, J. Plaintiff, who is about 22 years of age, was injured while at work for defendant, at a fabric machine, on 11 April, 1928. He was taken immediately after his injury to a hospital, where his injured arm was treated by Dr. Hipp, a physician, who was employed for that purpose by the defendant. Plaintiff remained in the hospital, under

the professional care of Dr. Hipp, from 11 April to 24 April, 1928. Dr. Hipp, in response to plaintiff's inquiry, told him that his injury was not permanent; that his arm would be all right within eight or ten weeks—well enough for plaintiff to return to his work.

After plaintiff was discharged from the hospital, but while he was still under the professional care of Dr. Hipp, he entered into negotiations with the attorney of defendant for the settlement of his claim for damages. Plaintiff declined to accept the sum offered by said attorney and employed an attorney at law, as his counsel to advise him with respect to the settlement of his claim against defendant. He made a full statement to his counsel of the circumstances under which he was injured and also as to the extent of his injury. He told his counsel that he had been advised by Dr. Hipp that his injury was not permanent and that his arm would be well enough within eight or ten weeks for him to return to his work. As a result of further negotiations between plaintiff and his counsel, and the attorney for defendant, it was agreed that defendant should pay to plaintiff, in full settlement of his claim for damages the sum of $500, and that plaintiff should execute the release, which was read to plaintiff by his counsel. During these negotiations the attorney for the defendant showed to plaintiff and his counsel a letter from Dr. Hipp to the defendant, in which Dr. Hipp advised defendant that plaintiff's injury was not permanent, and that plaintiff would be able to return to his work within eight or ten weeks from the date of the injury. Plaintiff and his counsel relied upon the opinion of Dr. Hipp, expressed both to plaintiff and to defendant, as to the extent of plaintiff's injury. On 4 May, 1928, in the presence of his counsel, and upon his advice, plaintiff executed the release set out in defendant's answer, and accepted from defendant the sum of $500, as the consideration for said release.

After the execution of the release by plaintiff, and prior to the commencement of this action, it developed that plaintiff's injury is permanent; he was not able, because of his injury, to return to his former work, or to do work equally as remunerative as his former work, at the expiration of ten weeks from the date of his injury. The bones in plaintiff's broken arm made a good union, but there was a nerve involvement which, notwithstanding several operations on plaintiff's arm, has rendered his arm practically useless to him. None of the operations was successful. Plaintiff's surgeon, as a witness in his behalf, expressed the opinion that no treatment, surgical or otherwise, could restore his arm to its former strength; that his injury is permanent. The jury found from evidence, to which there was no objection, and under instructions of the court, to which there was no exception, that plaintiff has sustained damages, as the result of his injury, in the sum of $2,000. The only question presented for decision by defendant's motion, at the close of the

evidence, for judgment as of nonsuit, was whether there was evidence tending to show that the release executed by plaintiff was procured under circumstances which render said release ineffectual as a bar to plaintiff's recovery of damages in this action. The defendant assigns as error upon its appeal to this Court the refusal of the court to allow its motion.

There was no evidence tending to sustain the contention of plaintiff that the release was procured by fraud. It is doubtful whether there are allegations in the complaint sufficient to raise an issue of fraud in the procurement of the release. But conceding that the facts alleged in the complaint are sufficient to raise such issue, we are of the opinion, and so decide, that there was a want of evidence tending to show that the release was procured by fraud. The evidence shows that the negotiations for a settlement of his claim against the defendant for damages, were begun after the plaintiff had left the hospital, and that these negotiations were initiated by the plaintiff, and not by the defendant. The facts in this case, as shown by all the evidence, with respect to the circumstances surrounding plaintiff, at the time the settlement was made and the release signed, differentiate this case from *Butler v. Fertilizer Works,* 193 N. C., 632, 137 S. E., 813. In that case the negotiations for a settlement of the injured employee's claim for damages against the defendant, were begun by its agent, and the release was procured while such employee was confined in the hospital, and before he had recovered from the shock resulting from his injury. Plaintiff did not read the release, before he signed it, and there was evidence tending to show that its contents were misrepresented to him by the agent of the defendant. At the time the release was signed, plaintiff was without the aid or advice of friends or counsel. In the instant case, the negotiations which resulted in the settlement of plaintiff's claim, and the execution by him of the release, were begun by the plaintiff, and were conducted for him by an attorney at law, retained by him for that purpose. The good character and high professional standing of this attorney at law is conceded.

Although the jury has found that plaintiff has suffered damages in the sum of $2,000, by reason of his injury, it cannot be held that the sum of $500, paid to plaintiff by defendant, in settlement of his claim, before the commencement of this action, was grossly inadequate, and that therefore this fact alone is evidence of fraud. In *Knight v. Bridge Co.,* 172 N. C., 393, 90 S. E., 412, it is said that "the controlling principle established by our authorities is that inadequacy of consideration is a circumstance to be considered on the issue of fraud, and that if it is so gross that it would cause one to say that nothing was paid, it would be sufficient to be submitted to the jury without other evidence; but we have not said that a contract could be set aside as a matter of law because of gross inadequacy." It is only when the consideration for the contract is

so grossly inadequate as to cause general comment that nothing was received by the party against whom the contract is alleged to be conclusive, that such consideration alone is sufficient evidence that the contract was procured by fraud. The payment of $500, in settlement of an unliquidated claim for damages, before liability has been established, and without the delay and expense necessarily incident to litigation, is not grossly inadequate, although the damages are thereafter assessed by a jury, in an action involving issues of liability as well as an issue of damages, at $2,000. In the instant case, the evidence shows that defendant paid to plaintiff, not only the sum of $500, but also all expenses incurred by him, both before and after the execution of the release, for hospital and surgical services, required because of his injury.

The fact as shown by the evidence that plaintiff and his attorney relied upon the representations made to both the plaintiff and the defendant, by Dr. Hipp, the physician employed by defendant to treat plaintiff's injured arm, with respect to plaintiff's recovery from his injury, was not sufficient to avoid the release. Both plaintiff and his attorney understood from the very nature of the representations that they were based upon the opinion which Dr. Hipp had formed of the extent and character of plaintiff's injury. There was no evidence tending to show that the representations were not made in good faith, upon an opinion honestly formed, after a skillful treatment of plaintiff's injured arm by Dr. Hipp. There was no evidence tending to show that the representations as to his opinion with respect to plaintiff's recovery from his injury, were made by Dr. Hipp to induce plaintiff to settle his claim against the defendant for damages. There was no evidence tending to show a misrepresentation by Dr. Hipp as to the condition of plaintiff's arm, at the date of the representation; all the representations were as to the future. All the evidence shows that Dr. Hipp is a highly reputable physician, residing in the city of Charlotte, N. C.; that as the result of his treatment of plaintiff's broken arm, there was a good union of the broken bones, and that the condition of plaintiff's arm at the time of the trial is due to a nerve involvement which was discovered after the date of the release. When plaintiff accepted the sum of $500, in settlement of his claim against defendant for damages, and executed the release, before the expiration of the time within which Dr. Hipp advised him that he would be able to return to work, he did so at his risk, that his damages might exceed the sum voluntarily paid by defendant.

In *McMahan v. Spruce Co.*, 180 N. C., 636, 105 S. E., 439, there was evidence of an actual misrepresentation of plaintiff's condition, resulting from his injury, by the physician who was employed by defendant to treat his injury. There was also evidence of fraud in procuring the

release and a want of consideration therefor. It was held that the evidence was properly submitted to the jury. The decision in that case is not authoritative in the instant case.

It has been repeatedly held by this Court that a release executed by an injured party, and based on a valuable consideration, is a complete defense to an action for damages for the injuries. It is only when it is alleged and established by evidence that the release was procured by fraud, or duress, or oppression that it can be avoided. In the instant case, we find no evidence upon which the plaintiff can be relieved from the terms of his contract with defendant, that upon the payment to him of the sum of $500, he would release defendant of any and all causes of action which he had, or which he might thereafter have, against defendant for damages by reason of his injury sustained on 11 April, 1928. Plaintiff having chosen to settle his claim before the full extent of his injury had been ascertained, thereby taking the risk that his damages might exceed the sum paid to him in settlement of his claim, must abide his contract. He has failed to show any facts upon which this Court, which has been jealous of the rights of injured employees to damages for which the employer is liable, may relieve him of the effect of his contract. The judgment must be

Reversed.

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SILAS FRIZZELL v. SOUTHERN MICA COMPANY AND ALBERT RABY.

(Filed 18 December, 1929.)

**Removal of Causes C b—Mere denial of allegations upon which action is founded is insufficient to show fraudulent joinder.**

Where it is alleged in the complaint that the resident defendant was employed by his codefendant as a foreman, and that the plaintiff's injuries were caused by the joint tort of the defendants, and the allegation that the resident defendant was an employee of his codefendant is not denied in the petition for removal, a mere denial of the allegations upon which the cause of action is founded is not sufficient to sustain the contention that the joinder of the resident defendant was fraudulent, and the petition for removal of the cause from the State to the Federal Court is properly denied.

APPEAL by defendant, Southern Mica Company, from *McElroy, J.*, at May Term, 1929, of JACKSON. Affirmed.

This action was heard upon plaintiff's appeal from the order of the clerk of the Superior Court of Jackson County, that the action be removed from said Superior Court to the District Court of the United

States for the Western District of North Carolina, for trial, in accordance with the prayer in the petition of the defendant, Southern Mica Company.

From order overruling the order of the clerk, and denying the prayer of its petition, the defendant, Southern Mica Company, appealed to the Supreme Court.

*Doyle D. Alley and Alley & Alley for plaintiff.*
*A. Hall Johnston for defendant.*

PER CURIAM. It is alleged in the complaint, and not controverted in the petition for removal that the defendant, Albert Raby, a resident of this State, at the date of plaintiff's injury, was employed by his co-defendant, a nonresident corporation, as a foreman in its mine in Macon County, North Carolina. Plaintiff alleges that his injuries were caused by the joint tort of the defendant. The allegations of the complaint upon which the cause of action is founded are controverted in the petition for removal. This is not sufficient to sustain the contention that the joinder of the resident defendant with the nonresident was fraudulent. *Hurt v. Mfg. Co., ante,* 1.

The order denying the prayer for the removal of the action from the State Court to the Federal Court is affirmed upon the authority of *Feaster v. McLelland Stores Company, ante,* 31; *Givens v. Manufacturing Company,* 196 N. C., 377, 145 S. E., 681; *Swain v. Cooperage Co.,* 189 N. C., 528, 127 S. E., 538.

Affirmed.

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LESTER MATTHEWS v. BLACKWOOD LUMBER COMPANY AND BABE FORTNER.

(Filed 18 December, 1929.)

**Removal of Causes C b—In this case held: petition sufficiently alleged severable controversy and fraudulent joinder, and should have been granted.**

Where the petition for the removal of a cause from the State to the Federal Court alleges with particularity that the resident defendant was not an employee of the nonresident defendant, and that the plaintiff knew of this fact and joined him as a defendant fraudulently for the sole purpose of preventing a removal, the petition for removal should have been granted.

APPEAL by defendant from *McElroy, J.,* at May Term, 1929, of JACKSON.

Motion by the Blackwood Lumber Company to remove cause to the District Court of the United States for the Western District of North Carolina for trial. Motion denied, and defendant appeals.

*Morgan, Ward & Stamey for plaintiff.*
*J. Hall Johnston for defendant.*

PER CURIAM. Plaintiff bases his cause of action on a joint tort alleged to have been committed by the defendant, Blackwood Lumber Company, a nonresident corporation, and its "swamp" foreman, Babe Fortner, a citizen and resident of Jackson County, North Carolina.

In the petition to remove, filed by the nonresident corporation, it is alleged with particularity that T. A. Bateman, and not Babe Fortner, was foreman in charge of the defendant's camp operations at the time of plaintiff's injury; that J. M. Price, and not Babe Fortner, was the "swamp" foreman in immediate charge of the work; that the plaintiff well knew these facts when the contrary was asserted in his complaint, and that both the allegations with respect to Fortner and his joinder as a party defendant were fraudulently made for the sole and only purpose of preventing a removal of the cause to the Federal Court for trial.

Under the principles announced in *Rea v. Mirror Co.*, 158 N. C., 24, 73 S. E., 116, and approved in later decisions, it would seem that the nonresident defendant is entitled to have the cause removed to the Federal Court for trial.

Reversed.

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MRS. JESSE WELCH v. INDEPENDENT COACH LINE, INC.

(Filed 18 December, 1929.)

**1. Evidence K b—Expert witness may testify as to what X-ray pictures revealed in respect to the injury.**

Where an expert witness testifies that he had examined X-ray pictures of the injury, taken under his supervision, and that he had later lost them, it is competent for him to testify from memory as to what the pictures disclosed in regard to the injury in corroboration of his previous testimony as to what he had discovered upon his examination of the injury, and the admission of such testimony is not an admission of the X-ray pictures as substantive evidence, and an objection thereto on this ground cannot be sustained.

**2. Highways B c—Instruction as to legal speed on highway held not erroneous under the evidence in this case.**

On appeal an instruction of the trial court to the jury will be considered with the evidence in the case, and an instruction that it is negligence as a matter of law for a person to drive a car on the highway at such rate of

speed that the car cannot be stopped within the distance which the driver is able to see an object on the highway in front of him, is not held erroneous where the evidence discloses that the driver could have seen the wagon, which he hit, at a distance of one thousand feet.

APPEAL by defendant from *Harwood, J.*, at May Term, 1929, of HAYWOOD. No error.

The plaintiff sued to recover damages for personal injuries caused by the collision of the bus in which she was traveling as a passenger with a wagon standing at a side of the highway. The wagon was loaded with poles which, as a result of the impact, broke the windshield and injured the plaintiff. The two issues of negligence and damages were answered in favor of the plaintiff, and from the judgment awarded upon the verdict the defendant appealed, assigning error.

*Morgan, Ward & Stamey for plaintiff.*
*Thomas S. Rollins, Jr., for defendant.*

PER CURIAM. The plaintiff's first witness was a dentist, who testified minutely concerning her injuries. The witness then said that under his supervision X-ray pictures had been made of the injury in her mouth, and that he had examined the pictures and had lost them. His testimony as to what the pictures revealed was admitted, subject to the defendant's exception, in corroboration of what he had previously testified to as discovered in his examination. It is contended by the appellant that this ruling was in effect the admission of the X-ray pictures as substantive evidence. We think not. If the pictures had been in the hands of the witness they would have been subject to explanation, and the fact that they had been lost and were not available would not as a matter of law exclude an explanation based upon the memory of the witness as to what the pictures disclosed. It is nowhere intimated that they were admitted as substantive evidence. *Honeycutt v. Brick Co.*, 196 N. C., 556. It is the common practice to receive maps, diagrams, photographs, and pictures for the purpose of giving a representation of objects and places which generally cannot be conveniently described by witnesses. Especially is this true of X-ray pictures which usually require an explanation by parol.

The appellant excepted to the following instruction: "It is negligence, as a matter of law, for a person to drive an automobile on a traveled public highway used by vehicles and pedestrians at such rate of speed that such automobile cannot be stopped within the distance which the operator of said car is able to see an object on the highway in front of him, and that same rule applies to persons operating a bus on the highway."

A similar instruction was approved in *Nikoleropoulos v. Ramsey,* 214 Pac., 304, which is cited in *Weston v. R. R.,* 194 N. C., 210. In the latter case the principle, while not disapproved, was not strictly applied. But the instruction given in the case before us must be considered in its application to the evidence; and when so applied it must be sustained. There is evidence tending to show that the wagon could have been seen by the driver of the bus at a distance of one thousand feet, although the rays of the sun were directly in the driver's face. The driver testified that he was familiar with the road; that it was two or three hundred yards from the curve to the place of the collision, and that he was not blinded until he "got right on the wagon." Considered in its application to the evidence, there was no error in the instruction.

No error.

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HUGH J. ROGERS v. J. R. STEPHENS ET AL.

(Filed 18 December, 1929.)

**Deeds and Conveyances F e—In this case held: owner could recover from grantees in timber deed of his tenant-at-will for removal of timber.**

Where the defendants entered upon lands of the plaintiff and committed trespass in cutting and removing trees growing thereon under an unauthorized contract made with the plaintiff's tenant-at-will, the defendants knowing of the tenancy and that their grantee did not claim the land adversely to the plaintiff, and no facts are shown to estop the plaintiff, he may maintain his action for damages, and a judgment of the trial court dismissing the action is erroneous.

APPEAL by plaintiff from *McElroy, J.,* at May Term, 1929, of JACKSON. Reversed.

Action to recover damages for trespass on the land of plaintiff, and for cutting and removing timber from said land.

From judgment dismissing the action at the close of the evidence, plaintiff appealed to the Supreme Court.

*Sutton & Stillwell for plaintiff.*
*W. R. Sherrill and Alley & Alley for defendants.*

PER CURIAM. The evidence tends to show that plaintiff is the owner of five-sixths undivided interest in the land described in the complaint; that the defendants, J. R. Stephens and W. M. Ingram, entered upon said land during the months of June, July and August, 1928, and cut

and removed from said land timber trees, worth at least several hundred dollars; and that said defendants entered upon said land and cut and removed said timber trees under a contract with the defendant, Erma Rogers.

The evidence tended further to show that the defendant, Erma Rogers, was in possession of the land as the tenant-at-will of plaintiff and those under whom he claims, and that her codefendants knew when they entered into the contract with her and paid her for said timber trees, that she did not claim the land adversely to plaintiff. There was no evidence tending to show that plaintiff or those under whom he claims authorized Mrs. Erma Rogers to sell the timber on said land, as contended by her codefendants.

There was error in allowing the motion of defendants, J. R. Stephens and W. M. Ingram, for judgment as of nonsuit. *White v. Fox,* 125 N. C., 544, 34 S. E., 645, is not an authority in support of said motion. No facts are shown by the evidence upon which plaintiff is estopped as the true owner of the land from maintaining this action to recover damages resulting from the trespass of the defendants, in wrongfully entering upon said land and without authority cutting and removing timber trees therefrom.

The defendant, Mrs. Erma Rogers, filed no answer to the complaint; plaintiff is not demanding judgment against her.

The judgment dismissing the action against the defendants, J. R. Stephens and W. M. Ingram, is

Reversed.

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W. M. HARRIS AND R. L. HARRIS v. C. COMOLLI AND B. F. COGGINS.

(Filed 30 December, 1929.)

**Contracts A g—Contract in this case held not to be founded on agreement to work fraud on receiver and court.**

Where under the terms of a contract certain creditors and stockholders of an insolvent corporation in the hands of a receiver agree to procure the sale by the receiver of the corporate property to the defendants for a sum sufficient to pay the costs of receivership and the liabilities of the corporation other than to the plaintiffs, and the defendants agree to buy in the property and to organize a corporation with a paid in capital stock in a certain amount and to issue to the plaintiffs stock in such corporation to an agreed amount, upon the procurement of the sale by the receiver and its confirmation by the court, and the release by the plaintiffs of their claims against the receiver as stockholders and creditors, and the payment of all other claims and costs by the receiver: *Held,* the contract was not founded upon an agreement to work a fraud on the receiver and the court, and the defendants may not maintain that it was void as against public policy on this ground.

HARRIS *v.* COMOLLI.

APPEAL by defendants from *McElroy, J.*, at June Term, 1929, of CHEROKEE. No error.

Action to recover damages for the breach of a contract by which defendants agreed to organize and pay in the sum of $125,000 as the capital stock of a corporation, and to issue to plaintiffs shares of stock therein of the par value of $25,000, in payment for the interest of plaintiffs, as creditors and stockholders of the Regal Marble Company, in property which plaintiffs had procured the receivers of said Regal Marble Company to sell and convey to defendants, in accordance with their contract with defendants.

In their answer, defendants denied that they entered into the contract with plaintiffs as alleged in the complaint. They also alleged that the contract as set out in the complaint is based upon an illegal or immoral consideration, and that, therefore, no cause of action in favor of plaintiffs and against the defendants can be founded upon said contract.

The issues submitted to the jury were answered as follows:

1. Did the defendants enter into the contract with the plaintiffs as alleged in the complaint? Answer: Yes.

2. Was said contract based upon an illegal or immoral consideration as alleged in the answer? Answer: No.

3. Did defendants breach said contract as alleged? Answer: Yes.

4. What damages, if any, are plaintiffs entitled to recover of the defendants? Answer: $25,000.

From judgment on the verdict that plaintiffs recover of the defendants, and the surety on the bond given by them for the release of their property from the attachment levied in this action, the sum of $25,000, defendants appealed to the Supreme Court.

*J. D. Mallonee and Moody & Moody for plaintiffs.*

*S. W. Black and F. O. Christopher for defendants.*

CONNOR, J. There was evidence at the trial of this action tending to sustain the allegation in the complaint, which was denied in the answer, that plaintiffs and defendants entered into the contract as alleged in the complaint. The performance of said contract by the plaintiffs, and its breach by the defendants are not controverted. There was evidence in support of the findings by the jury that plaintiffs are entitled to recover of the defendants, as damages for their breach of said contract the sum of $25,000.

Defendants' contention upon their appeal to this Court is that plaintiffs have no right of action upon the contract alleged in the complaint, for that said contract upon its face is illegal because it is immoral and in violation of a sound public policy. Defendants contend that the con-

tract as alleged in the complaint contemplates a fraud on the receivers of the Regal Marble Company, and on the court by which the said receivers were appointed. They rely upon the principle that any agreement which tends to work a fraud or an imposition on a court of justice is void as against public policy. 13 C. J., p. 447, section 385.

The contention of the defendants was presented to the trial court by their demurrer *ore tenus* to the complaint, and also by their motion for judgment as of nonsuit at the close of all the evidence. Defendants excepted to the refusal of the trial court to sustain their demurrer *ore tenus,* and also to its refusal to sustain their motion for judgment as of nonsuit. Defendants also excepted to the instruction of the trial court to the jury that there was no evidence from which the jury could find that the contract as alleged in the complaint is illegal or immoral, and that the jury should answer the second issue "No." In this Court, defendants rely chiefly upon assignments of error based on these exceptions.

It is alleged in the complaint, and the evidence for the plaintiffs tended to show, that plaintiffs and defendants entered into a contract by which plaintiffs agreed to procure the sale by the receivers of the Regal Marble Company to the defendants, of the property of said company, then in the hands of said receivers, for a sum sufficient in amount to satisfy the claims of all the creditors of said company, except the plaintiffs, and to pay the expenses of the receivership; that said sum was ascertained from the receivers to be $17,750; and that said property, at the date of said contract, exceeded in value the sum of $40,000. By the terms of said contract, defendants agreed that upon the sale and conveyance to them by the receivers of the Regal Marble Company of the property of said company, then in their hands, they would pay to said receivers the sum of $17,750, and would thereafter organize a corporation with a capital stock of $125,000, which they would pay in cash, to which they would convey said property; upon the organization of said corporation, defendants agreed to issue to plaintiffs shares of stock therein of the par value of $25,000 in satisfaction of the interest of plaintiffs in the property of the Regal Marble Company.

Plaintiffs were creditors of the Regal Marble Company, holding claims against said company for a large amount; they were also stockholders of said company, owning and controlling, under a power of attorney, all the capital stock of said company. They had been authorized by the receivers to secure a bid for the property of said company, then in their hands, with the assurance that if the amount of said bid was sufficient for the satisfaction of the claims of all the creditors, except the plaintiffs, and for the payment of the expenses of the receivership, the said receivers would report the same to the court, with their

recommendation that same be accepted. The receivers had assured plaintiffs that upon the acceptance of such bid by the court, and the payment of the amount of said bid to them, they would sell and convey the property of the Regal Marble Company to the plaintiffs, or to such person or persons as plaintiffs should direct, provided the plaintiffs released the receivers from all their claims upon them, as creditors or as stockholders.

After plaintiffs and defendants had entered into the contract alleged in the complaint, the plaintiffs advised the receivers that defendants would pay to them for the property of the Regal Marble Company, then in their hands, the sum of $17,750, and requested the receivers to report the bid of the defendants to the court, and ask that same be accepted. It was understood and agreed by and between plaintiffs and the receivers that plaintiffs would claim no part of said sum to be paid by the defendants for said property, as creditors of the company, but that said sum should be expended by the receivers in satisfaction of the claims of other creditors, and in payment of the expenses of the receivership. Plaintiffs did not inform the receivers of their agreement with defendants with respect to the organization of a corporation, and to the issuance to plaintiffs of shares of stock in said corporation.

The receivers reported the bid of the defendants to the Superior Court, and recommended that they be authorized by the court to accept same. Upon the assurance of the receivers that the said bid was sufficient in amount for the satisfaction of the claims of all the creditors of the Regal Marble Company, except plaintiffs, and for the payment of the expenses of the receivership, and that plaintiffs, both as creditors and as stockholders of the Regal Marble Company had requested that said bid be accepted, upon the agreement with the receivers, that they would claim no part of said sum as creditors, the court authorized the receivers to accept the bid of defendants, and upon the payment of the sum of $17,750 by defendants to sell and convey to them all the property of the Regal Marble Company, then in the hands of the receivers. The subsequent sale and conveyance by the receivers of said property to the defendants was approved and confirmed by the court. The claims of all the creditors of the Regal Marble Company, except the plaintiffs, and all the expenses of the receivership, have been paid by the receivers out of the amount paid to them by defendants. Plaintiffs have received nothing from the receivers either as creditors or as stockholders. They released the receivers of all liability to them, both as creditors and as stockholders, and consented to the sale of the property of the Regal Marble Company to defendants, in consideration of defendants' agreement to organize a corporation with a paid-in capital stock of $125,000, which should take title to the property conveyed to

them by the receivers, and to issue to them shares of stock in said corporation of the par value of $25,000.

Defendants, after obtaining title to and control of the property of the Regal Marble Company, failed and refused to perform their contract with plaintiffs, with respect to the organization of the proposed corporation and the issuance of shares of stock therein to plaintiffs. They have sold said property to a stranger, receiving therefor the sum of about $45,000. They have refused to account with plaintiffs for or to recognize the interest in said property which plaintiffs have under the contract.

It is not alleged or contended by defendants that plaintiffs induced them to enter into the contract for the purchase of the property of the Regal Marble Company by means of fraud on them. They allege only that said contract was a fraud on the receivers and on the court. Neither the receivers nor the court has made this contention, although the pleadings in the action contain a full disclosure of the terms of the contract between plaintiffs and defendants. The contention of defendants in this case cannot be sustained. The contract as alleged in the complaint is not founded upon an agreement of plaintiffs and defendants to work a fraud on the receivers of the Regal Marble Company, or on the court, under whose supervision and orders said receivers had control of the property of said company; there was no evidence from which the jury could have answered the second issue in the affirmative; in the absence of such evidence the jury was properly instructed by the court to answer the second issue "No." The judgment is affirmed. There is

No error.

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IDA McDOW RODMAN v. J. L. RODMAN, JR.

(Filed 30 December, 1929.)

**1. Evidence M a—In this case held: defendant had put his character in issue and testimony as to his general reputation was competent.**

In an action by the wife against her husband for awarding of permanent alimony under the provisions of C. S., 1667, where the defendant asks the wife's character witness questions to establish his own good character, he thereby places his own character in evidence, and a question asked a witness as to the general reputation of the defendant as being "mean to his wives" is not error when the witness has testified that he knew the general reputation of the husband.

**2. Divorce D e—Instructions as to "indignities to the person" and "intolerable condition" held not erroneous in this case.**

A statement made in the charge of the judge to the jury in an action of the wife against her husband for permanent alimony that he could not

specifically explain when the condition of the wife would become intolerable, is not error, when taken in relation to other parts of the charge it appears that he has in substance charged the jury that both parties might become angry and say and do things that they should not have said or done, but that such intermittent acts would not necessarily be sufficient to constitute a cause of action for divorce, leaving it for the jury to determine whether the "indignities" under the evidence was sufficient. As to the meaning of the word "indignities" used in the statute see *Taylor v. Taylor*, 76 N. C., 345; *Sanders v. Sanders*, 157 N. C., 229; *Page v. Page*, 167 N. C., 346.

**3. Trial E e—Where instructions requested are substantially given in the charge refusal of request is not error.**

The refusal of the trial judge to give special instructions requested will not be considered error when the essential principles of the request are given in the general charge.

CIVIL ACTION, before *Clement, J.*, at August Term, 1929, of UNION.

The plaintiff instituted an action against her husband for permanent alimony without divorce under C. S., 1667.

One issue was submitted to the jury, to wit: "Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome?" The jury answered the issue "Yes." Judgment was entered upon the verdict decreeing that the defendant pay to the plaintiff the sum of $75 per month on the 15th day of each month until further order of the court. It was further decreed that the defendant pay the sum of $500 counsel fees.

From judgment rendered the defendant appealed.

*John C. Sikes and Vann & Milliken for plaintiff.*
*Gillam Craig, R. S. Stewart and H. B. Adams for defendant.*

BROGDEN, J. The evidence tends to show that both plaintiff and defendant are persons of good character and standing in the community, and it will serve no useful purpose to recapitulate the evidence. There was sufficient evidence, based upon adequate allegation, when liberally construed, to warrant the verdict.

The first and second exceptions are based upon a question asked by counsel for plaintiff to a witness offered by the plaintiff. The question propounded on redirect examination was as follows: "Now, Mr. McDonald, I ask you if he (defendant) doesn't have the general reputation also of being mean to his wives?" The defendant objected, and the objection was overruled. The witness answered, "Yes, sir."

Standing alone, and nothing else appearing, the ruling of the court was erroneous. But it appears that plaintiff offered this witness who testified as to her good character, and thereupon the defendant, upon cross-examination, undertook to prove his character by said witness

Therefore, the defendant placed his character in issue before the jury. Furthermore, in response to questions by the court the witness testified that he knew the general character and reputation of the defendant. Moreover, the defendant was a witness in his own behalf and offered evidence of his good character. It will be observed that no effort was made to offer evidence as to particular acts of misconduct, but that the inquiry was limited to the general character of the party for particular vices or virtues. *S. v. Holly,* 155 N. C., 485, 71 S. E., 450; *S. v. Nance,* 195 N. C., 47, 141 S. E., 468.

The defendant assigned error to the following excerpt from the charge of the court: "Therefore, gentlemen, there is no rule that I can lay down to you which you can specifically consider explaining when the condition of the wife would become intolerable and life burdensome." The record discloses that the excerpt complained of was taken from a portion of the charge in which the trial judge in substance instructed the jury that both parties might become angry and say and do things that ought not to have been said and done, but that such intermittent acts would not be sufficient to constitute a cause of action for a divorce.

The defendant contends that the court was in error in omitting to define the meaning of the term "indignities" contemplated by the statute. This question was discussed by this Court in *Taylor v. Taylor,* 76 N. C., 436, in which it was declared: "The decisions of the Court in *Coble v. Coble* and *Erwin v. Erwin* have not been controverted and must be taken to have settled the meaning of the words 'indignities to the person,' as used in the statute. Insulting and disgraceful language by itself, addressed to the wife by the husband, may not be an 'indignity to the person' in a legal sense; and so, slight personal violence without injury to the body or health, of itself, will not justify a divorce. But both combined, and frequently repeated, would indicate such a degree of depravity and loss of self-command as much more readily to induce a court to believe there was danger of bodily harm, and such a just apprehension of personal injury as to render cohabitation unsafe. No undeviating rule has been as yet agreed upon by the courts, or probably can be, which will apply to all cases in determining what indignities are grounds of divorce, because they render the condition of the party injured intolerable. The station in life, the temperament, state of health, habits and feelings of different persons are so unlike that treatment which would send the broken heart of one to the grave would make no sensible impression upon another." *Sanders v. Sanders,* 157 N. C., 229, 72 S. E., 876; *Page v. Page,* 167 N. C., 346, 83 S. E., 625.

In the light of the principle so announced and adhered to, the exception to the charge cannot be sustained. The defendant submitted certain

prayers for instruction and excepts to the failure of the trial judge to give the instructions as written. However, a close examination of the charge discloses the fact that every essential principle of law requested in the instructions was contained in the general charge.

There are other exceptions in the record, but those discussed herein appear to be the only ones requiring careful examination.

No error.

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MRS. C. S. WOLFE v. INDEPENDENT COACH LINE, INC.

(Filed 30 December, 1929.)

1. **Highways B a—Violation of law in regard to passing other cars on highway is negligence per se and actionable when proximate cause.**

   Section 12 (a), ch. 148, Public Laws of 1927, was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence *per se* entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of.

2. **Same—Evidence of negligence in passing car on highway held sufficient to be submitted to the jury.**

   Where there is evidence tending to show that the plaintiff's injury was caused by the driver of the defendant's bus on the highway in failing to clear the automobile of the plaintiff after endeavoring to pass it, after signal, when going in the same direction where the road was amply wide, and to the contrary that the driver of the plaintiff's car, just as the bus was passing, turned into the bus, causing the injury, the issues of negligence, contributory negligence, and damages is properly submitted to the jury under correct instructions from the court.

3. **Highways B g—Where plaintiff is negligent and contributory negligence is a proximate cause no recovery may be had.**

   Where there is evidence tending to show that the driver of the plaintiff's car turned into the defendant's bus as the latter, after signalling, was passing the plaintiff's car, both going in the same direction, and *per contra*, an instruction to the jury to the effect that the plaintiff cannot recover if the defendant has satisfied them by the greater weight of the evidence that the plaintiff was guilty of contributory negligence and that such contributory negligence was the proximate cause or one of the proximate causes of the injury in suit, is not error.

CIVIL ACTION, before *McElroy, J.*, at March Term, 1929, of SWAIN.

The evidence tended to show that the plaintiff was riding in a Ford car on 16 March, 1928, between Sylva and Bryson City, and that her car was struck by a bus owned and operated by the defendant. The car and the bus were traveling in the same direction. Plaintiff's car was operated by her agent, Paul Conley.

The evidence further tended to show that the bus gave a signal to pass plaintiff's car, and that thereupon the driver of the car turned out of the road.

The driver of plaintiff's car narrated the collision and injury as follows: "When the bus hit me his front was toward the right, pulling in toward the right. And I was off of the right-hand side of the road. Absolutely, there was room there at this place for the bus to have passed me and to have stayed on the left-hand side of the road and prevented hitting me. . . . The whole road was about eighteen feet wide. . . . When the bus struck me I was driving the car something like fifteen or twenty miles an hour. . . . I heard the bus blow and I pulled out to let the bus pass. . . . There is a ditch right here about that wide and eighteen inches deep. Mrs. Wolfe said, 'Look out, you will run into the ditch,' and I turned my wheels out of the ditch to keep from running into it, and the bus swung around this way, and I reckon he didn't consider the length of the bus, and it swung to the right, and his rear hit the front of my car. . . . I cut to the left a little bit—toward the bus. The bus would have hit me if I had gone in the ditch."

The defendant offered strong evidence to the effect that the bus did not hit the car at all, but that the car negligently turned into the bus. There was also testimony to the effect that the driver of the car was drinking, and that the car was "wabbling" from one side of the road to the other prior to the collision.

The jury answered the issues in favor of the plaintiff, and awarded $2,050 damages for personal injury sustained by plaintiff and for property damages to the car.

From judgment upon the verdict the defendant appealed.

*Edwards & Leatherwood for plaintiff.*
*Rollins & Smathers for defendant.*

BROGDEN, J. Section 12 (a) of chapter 148, Public Laws of 1927, provides as follows: "The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle."

The evidence discloses three theories as to the cause of the collision and injury:

1. That the bus in passing the car of plaintiff passed within less than two feet thereof in violation of the foregoing statute.

2. That the driver of the bus, after passing the car of plaintiff, turned to the right side of the highway before the overtaken vehicle was safely cleared.

3. That the driver of the overtaken car negligently turned to the left while the bus was in the act of passing, thus running into the bus and causing the injury without negligence or default upon the part of the driver of said bus.

It is now familiar learning that a violation of a statute enacted for the purpose of protecting the public is negligence *per se,* although there must be a causal connection between the breach thereof and the injury complained of. *Whitaker v. Car Company,* 197 N. C., 83. There was evidence to support each theory, and there was strong evidence from disinterested witnesses in support of the third theory; but the jury accepted the testimony tending to show negligence of the defendant. The trial judge instructed the jury upon each and every phase of the case. Upon the third theory of the collision, strongly relied upon by the defendant, the court charged: "The court further charges you that if the defendant has satisfied you by the greater weight of the evidence that upon approaching the plaintiff's car the defendant's driver gave warning of his desire to pass, with his horn, and that thereupon plaintiff's car pulled to the right of the center of the road, and that while the bus was passing the plaintiff's car, plaintiff's driver cut her car sharply to the left, and into the bus, then, gentlemen of the jury, if the defendant has satisfied you, by the greater weight of these facts, the court charges you that the plaintiff would be guilty of contributory negligence, and if the defendant has further satisfied you, by the greater weight of the evidence, that such negligence on the part of the plaintiff was the proximate cause, or one of the proximate causes of her injury, then, gentlemen of the jury, the court charges you that it is your duty to answer the second issue, Yes."

The disputed issues of fact were submitted to the jury upon a charge correctly interpreting the pertinent principles of law, and the judgment cannot be disturbed.

No error.

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PRESTON HENDRIX v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 30 December, 1929.)

**1. Railroads D b—Violation of ordinance in regard to crossing must be proximate cause of injury to be actionable.**

Where in violation of a city ordinance making it a misdemeanor for a railroad company to obstruct a street of the town with its freight train for more than three minutes at a time, and a person attempting to cross the cars of the freight train was injured by his foot being caught between the bumpers of the cars when the train started, the violation of the

ordinance by the railroad company is negligence *per se*, but not actionable since not a proximate cause of the injury, and nothing else appearing in an action to recover damages, a motion for judgment as of nonsuit upon the evidence is properly allowed.

**2. Negligence D c—Where there is no evidence of causal connection between negligence and injury a nonsuit is properly granted.**

Whether the violation of an ordinance or statute is a proximate cause of the injury in suit is ordinarily a question for the jury, but where there is no evidence of causal connection between the negligence and the injury it is a question for the court, and in such cases the granting of defendant's motion for judgment as of nonsuit is proper.

**3. Same—Where evidence discloses contributory negligence barring recovery judgment as of nonsuit is proper.**

Where in an action for damages against a railroad company for a negligent personal injury the plaintiff's evidence discloses contributory negligence barring his recovery, the plaintiff has proved himself out of court, and defendant's motion as of nonsuit is properly allowed.

APPEAL by plaintiff from *Grady, J.*, at August Special Term, 1929, of HAYWOOD. Affirmed.

This is an action for actionable negligence, brought by plaintiff against defendants. The action was brought for the alleged wrongful injury to the plaintiff, Preston Hendrix, a boy nearly nineteen years old, who undertook to climb between two box cars of a train of the defendant, on a crossing in Canton, N. C. While the plaintiff was undertaking to climb between the two cars, the train started and the plaintiff got his right foot caught between the draw-head and one of the bumpers of the car and his foot was crushed so that it had to be amputated above the ankle.

Main Street is a principal street and thoroughfare in the town of Canton, N. C. The street runs north and south and the main line and seven switch tracks of the defendant company run east and west, crossing said street.

Section 476 of the Code of the town of Canton is as follows: "That any corporation, conductor, fireman, engineer or other employee of any steam railroad company having tracks running across the public streets of this town, who shall obstruct the same, or prevent the free passage of vehicles and pedestrians longer than three minutes at one time, shall be subject to a penalty of $50 for each and every offense." The defendant was violating this ordinance.

The plaintiff and defendants introduced evidence. The defendant made a motion at the close of plaintiff's evidence and at the close of all the evidence, for judgment as in case of nonsuit. C. S., 567. The court below granted the motion. Plaintiff excepted, assigned error and appealed to the Supreme Court.

*S. M. Robinson and Alley & Alley for plaintiff.*
*Thomas S. Rollins for defendants.*

CLARKSON, J. The only question presented on this appeal is the correctness of the ruling of the court below in sustaining the defendants' motion for judgment as in case of nonsuit at the close of all the evidence. Taking the evidence of plaintiff and defendants in the light most favorable to plaintiff, we see no error in the court below sustaining the motion. It is well settled in this jurisdiction that the violation of a town or city ordinance, or State statute, is negligence *per se,* but the violation must be the proximate cause of the injury. Ordinarily this is a question for the jury if there is any evidence, but, if there is no evidence that the violation of the ordinance or statute is the proximate cause of the injury, this is for the court to determine.

"What is negligence is a question of law, and when the facts are admitted or established is for the court." Burdick on Torts, 2d ed., 429; *Hinnant v. Power Co.,* 187 N. C., at p. 293; *Thompson v. R. R.,* 195 N. C., 663.

In *Elder v. R. R.,* 194 N. C., at p. 619, citing numerous authorities, it is held: "Originally, under C. S., 567, in cases calling for its application, there was some question as to whether a plea of contributory negligence (the burden of such issue being on the defendant) could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his or her own evidence, as he or she thus proves himself or herself out of court."

There is no evidence to submit an issue of last clear chance. *Buckner v. R. R.,* 194 N. C., 104; *Redmon v. R. R.,* 195 N. C., 764.

The defendant company, according to the contention of plaintiff, was guilty of a misdemeanor under the town ordinance for obstructing Main Street in the town of Canton for over three minutes. The plaintiff in attempting to cross between the two cars while standing took chances, and must bear the burden of his folly. It is a pathetic mishap, which often overtakes youth, and entails suffering sometimes for a lifetime, as in this case. The humanities are appealing, but we cannot take unjustly from one and give it to another. For the reasons given, the judgment is

Affirmed.

S. N. MILLS v. MARION MANUFACTURING COMPANY.

(Filed 30 December, 1929.)

**Master and Servant C c; C f—Questions of master's negligence and servant's assumption of risks held for the jury.**

Where the evidence tends to show that the master, through his vice-principal, ordered his experienced servant to clean hangers by standing on top of a step-ladder in close proximity to running machinery, it is sufficient to be submitted to the jury on the question of the master's negligence in an action for an injury resulting therefrom, and the question of the assumption of the risks by the servant is for the determination of the jury upon consideration of whether the danger was so open, obvious and imminent that a man of ordinary prudence would not have continued in the employment and incurred them.

CIVIL ACTION, before *Schenck, J.*, at September Term, 1929, of HAYWOOD.

The plaintiff offered evidence tending to show that on 11 October, 1928, he was employed by the defendant and charged with the duty of oiling and banding the machinery in the mill of the defendant, and that it was also the duty of plaintiff to clean the hangers. There was also evidence tending to show that there were three methods for cleaning the hangers. One was to use a pole with a brush attached to the end thereof by means of which the workman could stand on the floor and wipe off the hanger. Another method was to use a blow pipe tied to the end of a pole, which enabled the workman to stand on the floor in performing his duty. The third method was to use a step-ladder.

Plaintiff was required to use a step-ladder, and testified with respect to his injury as follows: "On 11 October, 1928, I was cleaning my hangers. . . . I had them all cleaned but one; was cleaning the last one and was up on a step-ladder, eleven feet high; I was on top of it. I wiped off between part of one of the hangers with a brush, something like a broom handle, and there were some belts running at my back, and one sawed me across the back, and that shoved me forward, and when it did that the end of the brush stick hit the pulleys, and the other end hit me in the right side, and knocked me off. When the belt sawed my back, and the brush stick hit me, it knocked me off the ladder, and broke a couple of ribs, and I didn't know about it until Ralph Styles picked me up. Where I cleaned, the belts were not over 14 or 15 inches apart; but the one at my back wasn't over 15 inches from the hanger where I was cleaning. . . . There was no other position that I could get in to climb the ladder and clean the hangers than the one I was in when the belt hit me across the back. It was the only way I could get up there to clean them at all. Prior to this time we would

slip and clean them with a pole, and they would catch us and stop us. They gave us orders all the time to climb the ladder. I have started several times to clean them with a pole, and they would stop us. That method would permit me to stand on the floor and clean them. . . . The Marion Manufacturing Company's method was to clean while it was running. All the machinery was running at the time I was injured. . . . The alley I was in was awful close."

The defendant offered no evidence.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of plaintiff. The issue of damage was answered in the sum of $1,500.

From judgment upon the verdict the defendant appealed.

*W. R. Francis and Alley & Alley for plaintiff.*

*A. Hall Johnston and J. C. Cheesbrough for defendant.*

BROGDEN, J. 1. Is it evidence of negligence to require a workman to clean machinery while in motion?

2. If so, does the act of the workman in so cleaning the machinery constitute contributory negligence or assumption of risk as a matter of law?

These propositions were considered by this Court in *Marks v. Cotton Mills,* 138 N. C., 401, 50 S. E., 769. The rule was thus declared: "To prevent misconception, we desire to say that our decision in this case, based upon the admitted facts, is simply that the allegation of negligence in ordering the machine to be cleaned while in motion should be submitted to the jury; that if they find the issue for the plaintiff, the question of assumption of risk or contributory negligence, alleged to arise out of his remaining in the service, should also be submitted to the jury." *Noble v. Lumber Co.,* 151 N. C., 76, 65 S. E., 622; *Breeden v. Mfg. Co.,* 163 N. C., 469, 79 S. E., 960; *Lynch v. R. R.,* 164 N. C., 249, 80 S. E., 173; *Ensley v. Lumber Co.,* 165 N. C., 687, 81 S. E., 1010; *Maulden v. Chair Co.,* 196 N. C., 122, 144 S. E., 557.

The evidence discloses that the plaintiff was required to place a ladder between running belts in order to clean the hanger. These belts, according to the evidence, were not more than 14 or 15 inches apart, and while he was not actually engaged in cleaning a running part of the machine, it must be apparent that the small space between the belts rendered the place of work dangerous and hazardous. Plaintiff was an experienced employee, and of course appreciated the danger, but the question as to whether the danger was so open, obvious, and imminent that no man of ordinary prudence would continue in the employment, must be submitted to the decision of a jury. *Maulden v. Chair Co., supra.*

No error.

MARY NESBITT v. J. T. DONOHO, ADMINISTRATOR, AND J. E. NESBITT v. J. T. DONOHO, ADMINISTRATOR.

(Filed 30 December, 1929.)

**Executors and Administrators D a—In this case held plaintiffs could recover upon quantum meruit for services rendered deceased.**

The value of services gratuitously rendered to a deceased person preceding his death are not recoverable against his estate, and while in certain family relationships these services are presumed to be gratuitous, this may be overcome by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended upon the one hand and expected on the other, in which case recovery may be had upon a *quantum meruit.*

APPEAL by defendant from *Finley, J.,* at July Term, 1929, of BUNCOMBE.

Civil actions, brought separately, but, by consent, consolidated and tried together, to recover for services rendered by plaintiffs to defendant's intestate during the last several years of his life.

The evidence tends to show that from 20 August, 1924, when W. J. Nesbitt, father of the male plaintiff, suffered a stroke of paralysis, until his death, 31 July, 1927, the plaintiffs, at the request of defendant's intestate, moved into the home of the said W. J. Nesbitt and ministered to his necessary wants, looked after him in his affliction, cared for him and his wife in their old age, and discharged many onerous duties of a menial nature, under such circumstances and in such manner as reasonably called for compensation, which the jury found was intended to be given and expected to be received.

Upon denial of liability, and issues joined, there was a verdict and judgment for plaintiffs, from which the defendant appeals, assigning errors.

*Zeb. F. Curtis and Harkins & Vanwinkle for plaintiffs.*
*Alfred S. Banard for defendant.*

STACY, C. J. Services rendered gratuitously to one in his lifetime may not successfully be used as the basis of an action against his estate, and, in certain family relationships, the law presumes that such services were intended to be gratuitous. *Henderson v. McLain,* 146 N. C., 329, 59 S. E., 873; *Staley v. Lowe,* 197 N. C., 243. But this is a presumption which may be overcome or rebutted by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended on the one hand and expected on the other. *Dunn v. Currie,* 141 N. C., 123, 53 S. E., 533; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233.

The present case, we think, falls within the class supporting a *quantum meruit* recovery. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540. The ruling of the court in this respect is approved.

While not material, the case elicited a bit of mountain vernacular, perhaps worthy of preservation. It was in evidence that the plaintiffs' little daughter, eight or nine years of age, was often seen "doing many chores around the house, toting in stovewood and fetching water from a spring about 200 yards away," which, in answer to the question as to whether it was uphill or downhill from the house to the spring, the witness described it as being "downhill a-going and uphill a-coming."

We have discovered no action or ruling of the trial court which, we apprehend, should be held for reversible error. Hence, the verdict and judgment will be upheld.

No error.

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J. H. STOCKTON v. H. R. LENOIR, TRUSTEE.

(Filed 30 December, 1929.)

**Evidence J a—Parol evidence as to agreement for payment of notes out of particular funds held admissible in payee's action thereon.**

Where the owner of lands receives purchase-money notes for the balance of the purchase price of lands, and gives his notes to the selling agent for his commissions for making the sale, in the agent's action upon the notes so given him it may be shown by parol that the commissions were to be paid only upon the amount of actual cash the owner received from the lands, especially when the notes themselves bear evidence of such agreement.

CONNOR, J., dissents.

APPEAL by defendant from *Harwood, Special Judge,* at October Special Term, 1929, of MACON.

Civil action to recover commissions on the sale of real estate evidenced by two notes.

On 18 September, 1925, plaintiff, a realtor, negotiated a sale of land held by the defendant, as trustee for himself and others, to W. D. Almazov and Sophie Albert for $38,000. For his commissions the plaintiff was to be paid 10 per cent of the purchase price of the land, as and when collected from the purchasers, and he has received his commissions on the cash payment made at the time of sale, as well as on all payments subsequently made by Almazov and Albert.

Purchase-money notes, secured by deed of trust on the property, were executed by the purchasers to the defendant, trustee, and corresponding

commission-notes, representing 10 per cent of the purchase-money notes, were executed by defendant to plaintiff. Each of the notes given to plaintiff for his commissions contains the following stipulation: "To be paid out of funds from corresponding note of W. D. Almazov and Sophie Albert, when collected"; and it was the understanding and agreement that the plaintiff's commission-note, representing 10 per cent of the corresponding purchase-money note, was to be paid only out of funds collected from Almazov and Albert, so the defendant alleged and offered to prove.

Upon default in the payment of the purchase-money notes, the deed of trust was foreclosed and the defendant, in his original capacity as trustee, became the highest bidder for the land at $11,000, which is less than half the amount remaining unpaid on the purchase-money notes.

The trial court held that the plaintiff was entitled to collect on his commission-notes 10 per cent of the amount bid at the sale, or $1,100, and instructed the jury to this effect. From the judgment rendered on the verdict, thus directed, the defendant appeals, assigning errors.

*R. D. Sisk, Edwards & Leatherwood and George B. Patton for plaintiff.*

*T. J. Johnston and Moody & Moody for defendant.*

STACY, C. J., after stating the case: It appears that the plaintiff and the defendant, who are presumed to know best what was intended by their agreement, have heretofore interpreted the notes in suit to mean that they should be paid only out of funds collected from Almazov and Albert. If this be a reasonable or permissible interpretation of the record, and we think it is, it follows that there was error in the court's peremptory instruction to the jury.

The defendant, it seems, was willing to pay the plaintiff a substantial sum for his services, provided the sale was completed and the full purchase price received in cash; while the plaintiff, on the other hand, apparently assented to the special arrangement that his commissions, though evidenced by notes, should be paid only as and when the purchase money was collected from Almazov and Albert. Accordingly, the plaintiff has been paid 10 per cent of what money the defendant has received out of the transaction, and no more. *Joice v. Bohanan,* 49 N. C., 364. This, the defendant says, accords with the understanding between the parties.

Notwithstanding the due dates, fixed in the notes sued upon, it is permissible to show by parol that a different mode of payment and discharge was contemplated by the parties, especially when the notes them-

selves bear evidence of such agreement. *Bank v. Winslow*, 193 N. C., 470, 137 S. E., 320; *Typewriter Co. v. Hardware Co.*, 143 N. C., 97, 55 S. E., 417.

For the error, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

CONNOR, J., dissents.

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LILA WEST, ADMINISTRATRIX OF HARLEY WEST, DECEASED, v. FONTANA MINING CORPORATION.

(Filed 30 December, 1929.)

**1. Appeal and Error E b—Where the charge of the lower court is not set out in the record it is assumed correct.**

The charge of the judge to the jury is assumed to be correct on appeal when it is not set out in the record.

**2. Master and Servant C b—Employer must use reasonable care to provide reasonably safe place to work.**

While an employer is not held to the liability of an insurer of the safety of his employees, he is required in the exercise of ordinary care to furnish them a reasonably safe place to do the work required of them, by the means and methods that are approved and in general use at places of like kind and character.

**3. Same—Evidence of negligent failure to provide reasonably safe place to work held sufficient to overrule nonsuit.**

Where in an action to recover for the negligent killing of the plaintiff's intestate there is evidence tending to show that the intestate was killed by being caught by a piece of timber at the fourth level of defendant's mine while the intestate was riding in a car from one level to another in the performance of his duties, that the timber at the fourth level was lower than the timbers at the other levels, there being only about three inches clearance between the car and the timber, that there was no means of signalling the engineer operating the hoisting machinery at the surface of the mine to stop the car, that the track was uneven and came up in a hump where the injury occurred, that defendant's *alter ego* knew that the timber was dangerous; that there was no light at the fourth level, and that other mines of like character used enclosed cars: *Held*, sufficient to be submitted to the jury on the question of whether the defendant exercised reasonable care to provide a reasonably safe place to work.

**4. Master and Servant C f—Servant is not prima facie chargeable with assumption of extraordinary risks.**

A servant is not prima facie chargeable with the assumption of an extraordinary risk, or a risk which may be obviated by the employer in the exercise of reasonable care.

**5. Same—Assumption of risks is ordinarily question for jury.**

In order to establish the defense of assumption of risk it is not sufficient to show that the employee worked on knowing the danger, but the question must be determined whether the danger was so obvious that a man of ordinary prudence would have quit the employment rather than have incurred it, and is ordinarily a question for the jury.

APPEAL from *Harwood, Special Judge,* and a jury, at July-August Term, 1929, of SWAIN. No error.

This is an action for actionable negligence, brought by plaintiff, Lila West, administratrix of Harley West, deceased, against defendant, Fontana Mining Corporation, for killing her husband, Harley West.

The defendant was engaged in mining copper ore in Swain County. Plaintiff's intestate was an employee of defendant. The allegations of the complaint as to negligence was to the effect that defendant did not use due and ordinary care to provide for plaintiff's intestate a reasonably safe place in which to do his work. The defendant denied the allegation of negligence and pleaded assumption of risk and contributory negligence.

Plaintiff's intestate was killed on 18 June, 1928, in the discharge of his duty. Defendant in its underground mining operations had several tunnels, one of which extended from the surface about 700 feet underground at an angle of about 45 degrees, or about one-half slope, being known as an incline or shaft—the tunnel was about 8 feet square. Along this tunnel was operated a narrow-gauge railroad for the purpose of bringing up ore and transporting employees into and out of the mine. A hoisting engine on the surface run by steam was the motive power, and the car or skip was let down into the mine and brought up by means of a wire cable or rope, which wound around a drum. There were about eight levels about 100 feet apart that intersected with the main shaft.

W. R. Barker testified in part: "They had about fifty men employed, I guess. The deceased was killed at the fourth level. I was on the level below. The last time I saw West immediately prior to his death, he was going up on the skip. Leonard McCoy, the conductor, was with him; it was about ten o'clock that night. *There was no light at the level* except the lights they had on their heads. West and the fellow on the skip had lights on their heads. They were miners' lamps. There were no lights on the fourth level provided by the Fontana Mining Corporation. The levels were about 100 feet apart. There was a piece of timber across the fourth level that the skip went up through under it. The dimensions of this skip was two or three feet deep. *The skip passed under the piece of timber across the fourth level just giving good clearance, something like three inches on one side, and maybe a little more on*

*the other. It was kind of bent on one side.* The timber was higher at other places in the levels, at the fifth, sixth and third levels was higher. *That was the only piece of timber there at that time that was down right near to the skip.* The conductor on the skip told the deceased it was time to take the dull steel out, and told him to get in the skip and go down and bring the steel up and take it out. I have ridden on the skip. *There is no signal device or anything on the skip where the hoisting engine at the top of the ground was operated could be signalled between the different levels to stop the skip or not,* as far as I know. I saw West hanging in between the skip and the timber and his head back behind the skip, and they backed the skip off of him and took him and put him in the skip. I don't remember that I heard him say anything. There were West and the skip conductor and the foreman on the skip. The foreman was Craig, Leonard McCoy was the conductor. *I saw the piece of timber catch him—he was between it and the skip when I saw him.* He only lived a half or three-quarters of an hour after that. They took him to the shop and he died. If the timber had not been there the men could stand up in the skip—good room to stand up. *There was no light in the shaft except the little lights that the employees had on their foreheads.* There was no other way provided for employees to go in and out of the mine except in the skip."

W. C. Sheppard testified in part: "*In putting this piece of timber across the fourth level at the time it was put there I asked Mr. Hughes to put the timber up higher. I told him it would be dangerous down there, and he said if it killed a man he would hire another one.* The incline track had waves or rolls up and down—they don't go on a certain degree at all, *and where it comes under the timber at the fourth level it comes out on a flat space, comes up a hump, and out on a flat space.* . . . (Cross-examination.) The place that we had there the skip cleared it from three to four inches, something like that. Q. And a man that got in the skip and stayed down in the skip was in absolutely no danger at all, was he? A. No, if he kept his head under the skip. Q. And in order to get hit he had to get up there in that place, didn't he? A. Yes. Q. If he was down in the skip and knew all about it—if he hadn't raised his head and got up, there was no danger of getting hit at all? A. No, not by the timber. Q. Nor anything else unless it fell from the top—that is right, isn't it? A. Yes, I would be afraid to say how many times I have ridden that shaft—several hundred times, anyway. Q. And you never got hit by this timber? A. No, for I stayed in the clear. Q. And this man knew that this timber was there? A. He ought to. I have never ridden down there with him. I couldn't say how long he had been carrying steel."

H. S. Brownfield, at one time mining inspector in the State of Ohio, testified in part: "I worked in two mines in Flushing, Ohio, that had an incline; the mines were about two hundred feet deep, *and in carrying men in and out they used man cages. Cage just like a big box—it is enclosed.* They have a fence that they put up when they hoist the men up and down. (Cross-examination.) Don't work anywhere now. I live in Asheville; been there since 1925. I have been to Fontana; I didn't go down in the mine. Over your objection I stated that in a coal mine they used a cage. *It is a cage that covers a man entirely; you can't stick your head out;* that was a coal mine about two hundred feet deep."

D. W. Byrd, who worked in mines about sixteen years, testified in part: "At the Burr mine and London mine they have shafts on an incline road to convey the men in and out of them. The Burr mine had twelve levels, and the London mine nine, I believe. There was an incline up this shaft past each of the levels; there were timbers in the shaft. *The men that worked in the Burr and London mines in Tennessee, were conveyed in and out of the mines with the man cage. A man cage is a steel cage that is fastened by bars. It is closed when the men are going in and out of the mine to keep any part of them getting out or getting caught,* and in these mines the men who convey the powder and steel use the cage that is used for the men."

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

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

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

3. What damage, if any, is plaintiff entitled to recover? Answer: $5,000."

The defendant introduced no evidence. At the close of plaintiff's evidence the defendant moved for judgment as in case of nonsuit. C. S., 567. The motion was overruled, defendant excepted, assigned error and appealed to the Supreme Court.

*B. C. Jones and Edwards & Leatherwood for plaintiff.*

*A. Hall Johnston for defendant.*

CLARKSON, J. The charge of the court below is not set forth in the record; the presumption is that the court below charged fully under the facts the law applicable to negligence, contributory negligence and damage. *Crisp v. Thread Mills,* 189 N. C., 89.

In *Street v. Coal Co.*, 196 N. C., at p. 181-2, the law is thus stated: "It is the duty of the employer, in the exercise of ordinary care, to furnish an employee with a reasonably safe place to work. This is especially so where the place is more or less dangerous. The employer is not an insurer of the employee's safety. Before directing an employee to work in a place of more or less danger, it is the duty of the employer to use due care to see that the place is reasonably safe for the employee to perform his work. To do this, it is the duty of the employer to use such means and methods that are approved and in general use at a place of like kind and character." *Deligny v. Furniture Co.*, 170 N. C., 189; *Jefferson v. Raleigh*, 194 N. C., 479; *Mauldin v. Chair Co.*, 196 N. C., 122; *Ellis v. Herald Co.*, 196 N. C., 262; *Shorter v. Cotton Mills, ante*, 27.

In the present case the plaintiff's intestate, who carried steel to the workmen and took the dull steel up, in the underground operation of defendant's copper mine, was required to ride in a car or skip when it went up and down in the narrow gauge railroad in the mine, in the performance of his duty. The underground narrow-gauge railroad extended from the surface about 700 feet down into the earth, the incline being about 45 degrees. In the mine there were about eight levels, about 100 feet apart, that intersected with the main shaft. Plaintiff's intestate was killed at the fourth level. A witness for plaintiff testified "I saw the piece of timber catch him; he was between it and the (car or) skip when I saw him." The evidence of plaintiff was to the effect: (1) That the car or skip passed under the piece of timber across the fourth level just giving clearance, something like three inches. (2) That the piece of timber that caught plaintiff's intestate at the fourth level was the only piece of timber that "was down right near to the (car or) skip." (3) There was no signal device on the car or skip to the engineer running the hoisting engine on the surface by which he could be signalled to stop or start the car or skip being operated underground at the different levels. (4) The incline track had waves or rolls up and down and at the fourth level where plaintiff's intestate was killed "it comes out on a flat space, comes up a hump and out on a flat space." (5) The *alter ego* of defendant when constructing the fourth level was asked to put the timber higher and was told it would be dangerous, and he said "If it killed a man he would hire another one." (6) There was no light at the fourth level. (7) A former mining inspector and miner of years of experience in other mines, testified that the method used in other mines of like kind and character "in carrying men in and out they used man cages, cage just like a big box; it is enclosed . . . is a cage that covers a man entirely; you can't stick your head out."

On the question of negligence of defendant, there was ample evidence to be submitted to the jury as to whether the defendant, in the exercise of due or ordinary care, provided plaintiff's intestate a reasonably safe place in which to do his work.

As to whether plaintiff's intestate was guilty of contributory negligence or assumed the risk, Labatt, Master and Servant, 3d Vol., 2d ed., part sec. 1178, p. 3143, speaking to the subject, says: "A principle which has been formulated and applied so frequently as to have become axiomatic is that a servant is prima facie not chargeable with an assumption of extraordinary risks—risks, that is to say, which may be obviated by the exercise of reasonable care on the master's part." *Hough v. Texas & P. R. Co.,* 100 U. S., 213, 25 L. Ed., 612, 615; *Lloyd v. Hanes,* 126 N. C., 359; *Wilson v. Lumber Co.,* 185 N. C., 571. The principle laid down by Mr. Labatt as axiomatic, has long been the law in this jurisdiction.

In *Hicks v. Mfg. Co.,* 138 N. C., 319, *Justice Hoke,* writing for the Court, lucidly and humanely goes into the entire subject. According to Shepard's N. C. Citations, June, 1929, that case has been cited forty-one times.

In *Hines v. R. R.,* 185 N. C., at p. 75, it is said: "Assumption of risk is also a matter of defense analogous to contributory negligence to be passed upon by the jury who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger. *Lloyd v. Hanes,* 126 N. C., 359; the numerous cases cited thereto in the Anno. Ed.; C. S., 3468."

In *Hamilton v. Lumber Co.,* 156 N. C., at p. 523-4, speaking to the subject: "It is further held, in this jurisdiction, that the doctrine of assumption of risk, in its technical acceptation, is no longer applicable *(Norris v. Cotton Mills,* 154 N. C., 475; *Tanner v. Lumber Co.,* 140 N. C., 475), but the effect of working on in the presence of conditions which are known and observed must be considered and determined on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should quit the employment rather than incur them.' *Bissell v. Lumber Co.,* 152 N. C., 123." *Ogle v. R. R.,* 195 N. C., at p. 797.

In the judgment of the court below we find

No error.

J. HYMAN MEWBORN v. THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., AND L. J. MEWBORN, ADMINISTRATOR OF N. PALMER MEWBORN, JR.

(Filed 30 December, 1929.)

**1. Insurance J d—Condition that notice of accident be given immediately to the insurer is construed to mean with reasonable promptness.**

The condition in a policy of accident insurance that notice of an accident covered by the policy be given the insurer immediately in writing will be construed to mean with reasonable promptness, or to impose upon the insured the duty to exercise reasonable diligence in giving the required notice, measured by his ability and opportunity to act in the premises, and a forfeiture of the policy for failure to comply strictly with such provision will not be declared where the notice given complies substantially with the spirit and meaning of the contract.

**2. Same — Whether insured gave notice of accident with reasonable promptness held question for the jury.**

Where notice of an accident covered by the policy of insurance is given the insurer two months and a half after the accident and a month and four days after the extent of the injury is known, and there is evidence tending to show that the mind of the insured was so affected by the accident that he was incapable of giving notice, and that the notice was given in time for the insurer to protect itself so that neither the risk nor the rights of the insurer were jeopardized by the delay: *Held*, the question of whether the notice given was a sufficient compliance with the condition of the policy requiring immediate written notice of an accident was for the determination of the jury under the facts and circumstances of the case.

BROGDEN, J., dissents.

APPEAL by defendant, Assurance Corporation, from *Nunn, J.*, at June Term, 1929, of LENOIR.

Civil action to recover on a personal-injury and property-damage contract of insurance.

By the terms of the policy in suit, the defendant agreed to indemnify the plaintiff, owner of the 1923 model Ford roadster covered by the contract of insurance, against (1) loss from legal liability for damages on account of bodily injuries, including death resulting therefrom, accidentally sustained by any person, to the extent of $5,000 for one person, and $10,000 for more than one, and (2) loss from legal liability for damages on account of the accidental injury to or destruction of property covered by the policy, including the resultant loss of use of such property, subject, among other things, to the following stipulation:

"Notice.—Condition C. Upon the occurrence of an accident covered by this policy, the assured shall give immediate written notice thereof to

the corporation or its duly authorized agent. The assured shall give like notice with full particulars of any claim made on account of any such accident. If any suit or other proceeding mentioned in Agreement III is instituted against the assured on account of any such accident, the assured shall immediately forward to the corporation or its duly authorized agent every notice, summons, or other process served upon the assured."

The policy of insurance was in force on 28 June, 1925, when plaintiff's car, operated by his adopted son and in which his nephew, N. Palmer Mewborn, Jr., was riding, collided with another car on the Kinston-Snow Hill highway, resulting in serious bodily injury to plaintiff's said nephew, from which he died 8 August, 1925.

Written notice of the accident was given to the defendant on 12 September following. Defendant denied liability because of plaintiff's delay in giving notice.

Thereafter, at the November Term, 1927, Lenoir Superior Court, the administratrix of N. Palmer Mewborn, Jr., deceased, in an action for wrongful death, recovered a judgment against the plaintiff in the sum of $10,000. The defendant had due notice of this suit, which was instituted 26 June, 1926, but declined to defend it, or to take any part in its defense, preferring to rely upon its alleged nonliability under the policy because of plaintiff's failure to give immediate notice of the injury.

In excuse of the delay, plaintiff offered the testimony of his physician, partner, and others, tending to show that he was so shocked and overcome by the act of his son-in-law, which caused his nephew to linger in a desperate condition from 28 June till his death on 8 August, as to affect his mental processes and rendered him incapable of "originating an idea or discovering an old one," and unfit to attend to business matters up to the time notice was given to the defendant by plaintiff's wife on 12 September, 1925. He was "much depressed and mentally affected, very much so. There was a very decided change in the man all during that time and for a good while afterwards."

Dr. J. M. Parrott testified in substance as follows: Mr. Mewborn is a man of unusually fine sensibility and high sense of honor. He was profoundly impressed, and during that time was not competent to originate an idea without outside suggestion, though he was entirely competent to transact his business if matters were called to his attention. I do not believe that he would have thought about a financial matter of this character under the circumstances. If his farming operations and other business were called to his attention, he could no doubt have attended to them. and did, but I do not think he was in a condition to originate an idea, or to discover an old one. "I think he is of that

unusual high type that he rather disregards money, and under those distressing circumstances I don't believe he would be liable to think about the money side or remuneration that he might obtain. I think this attitude principally came from his grief or the effects of grieving over the accident plus the natural tendency of Mr. Mewborn. To be frank, Mr. Mewborn is a very unusual man. He is not the type that thinks much of the money side. He lives in a rather high thought. That type of mind is not liable to think about money and material matters under these circumstances."

Plaintiff's partner testified: "He was very much grieved all the time, and some time after Palmer Mewborn's death; he did not seem to have his mind on his business at the store or farm. I looked after the store, but he did not seem to have his mind on the farm, but all on this boy."

The defendant, in reply, offered evidence tending to show that the plaintiff "went about his usual duties except he appeared to be sometimes thinking of things and was grieved over the accident."

Mrs. Mewborn testified: "I certainly did not consider my husband crazy at that time, nor do I now."

Upon denial of liability and issues joined, there was a verdict and judgment for the plaintiff, from which the defendant appeals, assigning errors.

*Dawson & Jones for plaintiff.*
*C. H. Gover for defendant, appellant.*

STACY, C. J., after stating the case: The accident occurred 28 June, 1925; the extent of the injury was not known until 8 August following; written notice was given to the defendant 12 September thereafter; Was this a sufficient compliance with "Condition C" of the policy, requiring immediate written notice of the accident, under all the facts and circumstances disclosed by the record? We think the evidence was such as to carry the question to the jury.

The trial court was correct in refusing to hold, as a matter of law, that the notice was not given as soon as reasonably practicable under the circumstances, or without unnecessary delay, and in submitting the question to the jury to determine whether the plaintiff had acted with reasonable promptness in the matter. The expression "immediate written notice," as used in the policy, we apprehend, was intended to impose upon the plaintiff the exercise of reasonable diligence in giving the required notice, which, under the apparent weight of authority, should be measured by his ability and opportunity to act in the premises. *Carey v. Farmers, etc., Ins. Co.*, 27 Or., 146, 40 Pac., 91; *Rhyne v. Ins. Co.*, 196 N. C., 717, 147 S. E., 6.

The following from the opinion of the Supreme Court of New Hampshire in the case of *Ward v. Md. Cas. Co.,* 41 Atl., 900, has been approved by the Supreme Court of the United States *(Fidelity & Deposit Co. v. Courtney,* 186 U. S., 342), and in many jurisdictions, as the proper construction of such a provision in a contract of insurance:

"The defendants' liability depends in part upon the answer to the question whether the plaintiffs gave them 'immediate' notice in writing of O'Connell's accident, the claim made on account of it, and the suit that was brought to enforce the claim. This involves an ascertainment of the meaning of the word 'immediate' as used in the policy. The word, when relating to time, is defined in the Century Dictionary as follows: 'Without any time intervening; without any delay; present; instant; often used, like similar absolute expressions, with less strictness than the literal meaning requires—as an immediate answer.' It is evident that the word was not used in this contract in its literal sense. It would generally be impossible to give notice in writing of a fact the instant it occurred. It cannot be presumed that the parties intended to introduce into the contract a provision that would render the contract nugatory. As 'immediate' was understood by them, it allowed the intervention of a period of time between the occurrence of the fact and the giving of notice more or less lengthy according to the circumstances. The object of the notice was one of the circumstances to be considered. If it was to enable the defendants to take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate according to the understanding of the parties than would be required if the object could be equally well attained after considerable delay. For example, a delay of weeks in giving notice of the commencement of the employee's suit might not prejudice the defendants in preparing for a defense of the action, while a much shorter delay in giving notice of the accident might prevent them from ascertaining the truth about it. The parties intended by the language used that the notice in each case should be given so soon after the fact transpired that, in view of all the circumstances, it would be reasonably immediate. If a notice is given 'with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay,' it will answer the requirements of the contract. . . . Whether the notices were reasonably immediate—like the kindred question of what is a reasonable time—are questions of fact that must be determined in the Superior Court."

Speaking to the subject in *Harden v. Ins. Co.,* 164 Mass., 382, it was said by *Morton, J.,* delivering the opinion of the Court: "Whether the

statement was 'forthwith rendered' depended on whether, taking all of these circumstances and considerations into account, the plaintiff used due and reasonable diligence. If he did, then it was 'forthwith rendered,' within the fair meaning of the policy; and whether he did or did not was a question of fact for the jury."

Again, in *Woodman Accident Assn. v. Pratt,* 62 Neb., 673, 87 N. W., 546, *Holcomb, J.,* after a full review of the authorities, says: "In respect of the rule of construing provisions in a contract of insurance for notice of accident and injury or loss or damage and proof of the same to be given 'forthwith' or 'immediately' or within a stipulated time, the authorities are not entirely harmonious, and yet from the examination we have been able to make in the limited time at our command the great weight of authority is to the effect that the exercise of due diligence and reasonable effort on the part of the insured to meet the requirements thus imposed, to be determined under all the circumstances as disclosed in each individual case, is deemed a compliance with such provisions although not within the time according to the strict letter of the terms used in defining the same."

It may be conceded that the decisions on the subject are variant, some holding that "as a man consents to bind himself, so shall he be bound" according to the literal meaning of the terms used in the contract, while others seemingly take a more liberal view of what the parties really intended, look with disfavor upon forfeitures, and sustain a recovery even in the face of a failure strictly to comply with the requirements of notice, where the notice given complies substantially with the spirit and meaning of the contract. 14 R. C. L., 1333. With this latter view, our own decisions are in full accord. *Allgood v. Ins. Co.,* 186 N. C., 415, 119 S. E., 561; *Grabbs v. Ins. Co.,* 125 N. C., 389, 34 S. E., 503.

It should be observed, perhaps, that we are not now dealing with a provision requiring something to be done before loss or injury, such as the payment of premiums at a stipulated time, or observing conditions which affect the nature and desirability of the risk. Such stipulations are usually regarded as of the essence of the contract, and on their compliance depends the life and success of the insurance company. *Clifton v. Ins. Co.,* 168 N. C., 499, 84 S. E., 817. It is also conceded that there is a reasonable basis and valid cause for inserting the present stipulation in the contract. But the risk assumed has neither been increased, nor the rights of the defendant jeopardized, by the delay of the plaintiff in giving notice of the injury. We are not, therefore, disposed to adopt a hard-and-fast rule which would relieve the defendant from liability, voluntarily assumed on its part for a consideration, and deny to the plaintiff all right of recovery.

There was nothing said in *Peeler v. Casualty Co.*, 197 N. C., 286, which, when properly interpreted, militates in any way against our present position.

While the case is not altogether free from difficulty, we have concluded that, on the whole record, the verdict and judgment should be upheld.

No error.

BROGDEN, J., dissents.

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STELLA REDMON v. DR. FRANK ROBERTS ET AL.

(Filed 30 December, 1929.)

1. **Bastards B b—Contract of father to support illegitimate child is valid and enforceable.**

   A contract made by the father of an illegitimate child with the mother thereof for support and maintenance of such child is not contrary to public policy, but is a valid and enforceable agreement supported by sufficient consideration.

2. **Wills B b—In this case held: Statute of Frauds could not be pleaded by defendant in action for breach of contract to devise.**

   Where the father of an illegitimate child contracts with its mother to devise to such child a share of his estate equal to the share of his legitimate children, and in consideration thereof the mother gives up the custody of the child and forbears to take legal action against him, in an action by such child to recover damages against the estate of the deceased father for breach of the contract to devise: *Held*, the contract was supported by sufficient consideration, and the deceased father having received the benefits of the contract his personal representative will not be allowed to plead the Statute of Frauds.

3. **Appeal and Error J g—Where plaintiff may recover on one aspect of case consideration of another is unnecessary on appeal.**

   Where by a liberal construction of the allegation of the complaint the relief sought is based on breach of an oral contract to adopt and the breach of an oral contract to give the plaintiff an equal share of the intestate's property, and the plaintiff can recover on the contract to devise, on appeal it is unnecessary to discuss the effect of the oral contract to adopt.

4. **Appeal and Error F a—Where exceptions are not taken in trial court discussion of alleged error will not be considered on appeal.**

   Where the charge of the Superior Court judge is not excepted to upon the issue of the measure of damages, the discussion in appellant's brief upon the subject will not be considered on appeal. *Semble:* Where the

consideration for an oral contract to devise lands cannot be measured by pecuniary standards, the measure of damages for its breach is ordinarily fixed by the standard adopted by the parties to the contract, or the value of the property agreed to be devised.

CIVIL ACTION, before *Johnson, Special Judge,* at May Term, 1929, of MADISON.

The plaintiff is an illegitimate daughter of J. F. Redmon, who died intestate on or about 24 April, 1928. The defendants are the administrator, widow, and heirs at law of the deceased.

The evidence tends to show that the deceased in his early manhood was intimate with the mother of plaintiff, who was then a young girl. The evidence further tends to show that the deceased made a contract with the mother "that if I wouldn't bring suit against him or have my brothers bring suit against him, that he would take Stella . . . as his child, give her his name, and just as soon as he was financially able that we would get married. I agreed to that." Thereafter the deceased informed plaintiff's mother that he was intending to marry some one else, and that thereupon the deceased agreed with the mother of plaintiff that "he would take her in his own home after he was married, and he would give her his name and leave her equal part of anything he had equal with any children he had. I agreed with Mr. Redmon if he would take her and raise her as his child, and give her a share of property, that I would not bring suit against him or allow my brothers to bring suit against him." Thereafter the mother of plaintiff married and moved away to a distant state, and the plaintiff went to the home of the deceased and lived in his home as one of this children, took the name of the deceased, and was sent to school by him and cared for by him as one of his own children. At the time of his death the deceased left a wife and seven children.

There was evidence tending to show the value of the estate of intestate.

The following issues were submitted to the jury:

1. "Is the plaintiff the illegitimate child of defendants' intestate, J. F. Redmon, as alleged in the complaint?"

2. "Is Stella Redmon the illegitimate child of her mother, Stella Kate Haynie?"

3. "Did the defendants' intestate, J. F. Redmon, in consideration of an agreement on the part of the plaintiff's mother not to take legal action against the defendants' intestate on account of seduction or bastardy, contract and agree with the mother of the plaintiff, to leave to the plaintiff at his death, a share of his estate equal in value, to that left to each of his other children, as alleged in the complaint?"

4. "Did the defendants' intestate, J. F. Redmon, in consideration of the plaintiff's mother turning over the custody and control of plaintiff to the defendants' intestate, contract and agree with the mother of the plaintiff, to leave to the plaintiff at his death, a share of his estate equal in value to that left to each of his other children, as alleged in the complaint?"

5. "If so, did the defendants' intestate breach his contract, as alleged in the complaint?"

6. "Did the defendants' intestate, during his lifetime, legally adopt the plaintiff, Stella Redmon?"

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

The jury answered the first five issues "Yes," the sixth issue, "No," and the seventh issue, "$6,000."

The record shows the following entries: "After the coming in of the verdict in the above-entitled case, the plaintiff moved for judgment on the verdict. This motion was denied for the reason, and only for the reason, that the undersigned judge was of the opinion that, as a matter of law, upon all the evidence, the plaintiff was not entitled to recover."

Thereupon judgment was entered setting aside the verdict as a matter of law and not as a matter of discretion.

From judgment rendered plaintiff appealed.

*R. R. Williams, Carl R. Stuart and C. B. Mashburn for plaintiff.*
*John A. Hendricks and G. V. Roberts for defendants.*

BROGDEN, J. Can an illegitimate child maintain an action against the estate of the deceased father, upon a contract made by the father with the mother, to the effect that the father would take the child into his own family and at his death give such child an equal share in his estate with his legitimate children?

Certain aspects of the question have been considered by this Court in *Thayer v. Thayer,* 189 N. C., 502, 127 S. E., 553. It is clearly established in this State that a contract made by the father of an illegitimate child with the mother thereof for support and maintenance of such child, is not contrary to public policy, but is a valid and enforceable agreement supported by sufficient consideration, *Hyatt v. McCoy,* 195 N. C., 762, 143 S. E., 518.

However, the defendants contend that the plaintiff cannot recover because the contract alleged and proven constituted either an agreement to adopt or to devise real property. Hence, if the contract sued on was merely an agreement to adopt, then no recovery lies for the reason

that adoption is the creature of statute and strict compliance therewith is essential to establish the relationship of parent and child. *Truelove v. Parker,* 191 N. C., 430, 132 S. E., 295. Moreover, if the cause of action be based upon an agreement to devise real property, then the contract is unenforceable by reason of the application of the statute of frauds, it being admitted that the contract between the parties was entirely oral.

The complaint sets forth two theories as a basis of the action. It is alleged: "That shortly before the said J. F. Redmon married the defendant, Virginia Lee Redmon, he came to see plaintiff's mother and assured her again that the said marriage in no way would interfere with the rights of this plaintiff, and that he would adopt this plaintiff as his own child and care for her and nourish her and educate her and leave to her the same share in the estate of said J. F. Redmon that any other child would have." Again in paragraph 10 of the complaint, it is alleged "that on several occasions thereafter the said J. F. Redmon assured the plaintiff's mother that he would leave to the plaintiff the same share in his estate that any other child of his might get, and that the plaintiff should share in his estate equally with all other children of said J. F. Redmon." The prayer for relief is to the effect that plaintiff be "adjudged to be the adopted child of said J. F. Redmon, deceased," and that "she have and recover . . . a sum of money equivalent to the value of a child's share in all of the estate . . . of which the said J. F. Redmon died seized and possessed."

A liberal construction of the allegations of the complaint discloses that the relief sought was not based entirely upon the breach of a contract to adopt plaintiff, but also upon the breach of contract to give the plaintiff an equal share of the intestate's property. Therefore, we deem it unnecessary to discuss the effect of an oral contract of adoption.

This Court and the Courts generally have upheld and enforced oral contracts to devise or convey land in consideration of services rendered. *Whetstine v. Wilson,* 104 N. C., 385, 10 S. E., 471; *Lipe v. Houck,* 128 N. C., 115, 38 S. E., 297; *Faircloth v. Kenlaw,* 165 N. C., 228, 81 S. E., 299; *McCurry v. Purgason,* 170 N. C., 463, 87 S. E., 224; *Deal v. Wilson,* 178 N. C., 600, 101 S. E., 205; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Doty v. Doty,* 2 L. R. A. (N. S.), 713; *Broughton v. Broughton,* 262 S. W., 1089; *Bowling v. Bowling's Admr.,* 300 S. W., 876. The theory upon which the reason is based, is that the party breaching the contract has received the benefit thereof, and that it would be an act of bad faith to plead the statute of frauds as a bar to recovery. This principle was declared in *Deal v. Wilson, supra,* as follows: "We there said that where the defendant has promised, in con-

sideration of services to be rendered, that he will transfer to the plaintiff certain property, which he afterwards refuses to do, and, instead of fulfilling his contract, sets up the statute of frauds as a bar to any recovery on the same, he acts in bad faith, and his conduct having deceived the plaintiff, who, relying upon the assurance that the contract would faithfully be performed, had been induced to part with his money or to render services of value to the defendant, the latter may recover compensation for the loss he has sustained."

We can perceive no logical distinction, in principle, between rendering services to a decedent and foregoing the assertion of a legal right. In the case at bar, the mother of plaintiff had a right to institute an action against the deceased for damages, and she was entitled to the custody of her minor daughter. She surrendered both of these rights to the intestate in consideration of the agreement to give the plaintiff an equal share of his property. In contemplation of the law, this was sufficient consideration to support the agreement and the consideration was received by the defendant. Plaintiff's mother instituted no action and did not attempt to withhold the custody of her minor daughter. Hence, her part of the agreement was fully and completely performed, and we are therefore of the opinion that the plaintiff is entitled to recover.

The measure of damages is discussed in the brief of defendants, but the record discloses that there was no exception to the charge of the trial judge upon the measure of damages, and hence that question is not before us. However, in the case of *Bowling v. Bowling, supra,* the facts are almost identical with those in the case at bar. The Kentucky Court says: "The general rule is that an oral agreement to devise real estate to another is within the statute of frauds and cannot be enforced, but where the benefit to intestate cannot be measured in money, there is no way to determine the amount of recovery except by the pecuniary standard fixed by the parties to the contract. The measure of damages for the breach of contract to devise is the value of the property agreed to be devised."

We hold that the plaintiff is entitled to judgment upon the verdict, and that the trial judge committed error in setting aside the verdict as a matter of law.

Error.

PITTSBURGH PLATE GLASS COMPANY, INC., v. HOTEL CORPORATION ET AL.

(Filed 30 December, 1929.)

**Insurance K b—Retention of premium until issue of fraud can be determined is not waiver of right to avoid contract for the fraud.**

The surety on the bond of a contractor for the erection of a building does not necessarily waive his right to avoid the contract for fraud by retaining the premium paid to it during the litigation until the alleged fraudulent procurement of the bond can be determined.

APPEAL by plaintiff from *Grady, J.*, at May Term, 1929, of NEW HANOVER.

Civil action to recover for materials furnished by plaintiff and used by the contractor in building the Cape Fear Hotel in the city of Wilmington.

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

"1. Was the execution of the bond of 2 November, 1923, on the part of the Fidelity and Deposit Company of Maryland, procured by false and fraudulent representations, or the fraudulent concealment of facts on the part of Walter Clark, as alleged in the answer of said Surety Company? Answer: Yes.

"2. If so, did Miller & Company have knowledge of, or participate in said fraudulent representations or concealment of facts as alleged in said answer? Answer: Yes.

"3. If there were such fraudulent representations or concealment of facts as alleged, did the Fidelity and Deposit Company of Maryland, after the discovery thereof, retain the premium, and hold and claim the benefit of the indemnity obligation of Broadfoot, as alleged by the complaint? Answer: Yes, by the court.

"4. If there were such fraudulent representations or concealment of facts, as alleged by the defendant, Surety Company, has said Surety Company, by its acts and conduct waived the same and ratified the contract or suretyship as alleged by the plaintiff? Answer: No, by the court.

"5. What amount is the plaintiff entitled to recover of the defendant, Fidelity and Deposit Company? Answer: ....."

From a judgment on the verdict, relieving the Fidelity and Deposit Company of Maryland from liability on its bond, but requiring a return of the premium paid thereon, the plaintiff appeals, assigning errors.

*Bryan & Campbell, C. D. Hogue and Marsden Bellamy for plaintiff.*

*Isaac C. Wright and Rountree & Carr for defendant, Deposit Company.*

PER CURIAM. This action was instituted 24 August, 1925. It has had many hearings in the Superior Court, and this is the third appeal here. Former appeals reported in 193 N. C., 769, and 197 N. C., 10.

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.

The trial court correctly ruled that in an action to recover on the contract it is not necessarily a waiver of the right of avoidance for a surety company, while defending said action, to retain the premium paid on the policy until its alleged fraudulent procurement can be determined. 14 R. C. L., 1193.

No error.

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STATE v. OTIS TROGDON AND DWIGHT TROGDON.

(Filed 30 December, 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.

CRIMINAL ACTION, before *MacRae, Special Judge,* at April Special Term, 1929, of RANDOLPH.

The defendants were indicted and convicted of secret assault with intent to kill. Each defendant was sentenced to serve a term of twenty years in the State prison.

From the judgment pronounced the defendants appealed.

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

*Hammer & Wilson and Moser & Barnes for defendants.*

PER CURIAM. Neither of the defendants offered evidence as to his good character. The State, however, offered evidence of the bad character of defendants.

The trial judge charged the jury as follows: "The defendants took the stand in their behalf, and you may consider any evidence tending to show their character to be bad as substantive evidence; that is tending to indicate or show that they committed the acts with which they are charged. As to Mr. Myers and Mrs. Myers, testimony showing that

their character is good may be considered by you as affecting their credibility. Because a person's character is proven to be bad it should not always lead the jury to believe that person would swear falsely. The fact that a person's character is proven to be good neither does it follow from such testimony that that person would always speak the truth; but character evidence may be taken and weighed by the jury in connection with the credibility of the witness. And in case of defendants charged with a crime, where the defendants' character has been placed in issue, where the defendants take the stand have placed their character at issue, evidence tending to show that their character is bad is to be received by the jury, not only as relating to their credibility, but as substantive evidence, tending to show whether or not they committed the offense with which they are charged."

The foregoing instruction was erroneous, and the defendants are entitled to a new trial. *S. v. Idol,* 195 N. C., 497, 142 S. E., 588; *S. v. Mike Roberson,* 197 N. C., 657.

New trial.

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STEPHEN BARNETT AND WIFE, SARAH BARNETT, v. JULIUS AMAKER ET AL.

(Filed 30 December, 1929.)

**Adverse Possession A h—Evidence of adverse possession under color of title held sufficient to be submitted to the jury.**

Where there is sufficient evidence of adverse possession under color of title, by those claiming under deeds from the grantee of the husband of lands owned by his deceased wife, the question of title is for the jury to determine, and their finding is conclusive.

CIVIL ACTION, before *Moore, J.,* at May Term, 1929, of GUILFORD.

On 16 October, 1889, Judith Mendenhall, executrix of C. P. Mendenhall, conveyed a certain tract of land in Guilford County to Aaron Barnett. Prior to 21 July, 1903, Sarah Barnett, daughter of Aaron Barnett, married William Cosby. On 21 July, 1903, Aaron Barnett conveyed the land in controversy to his daughter, Sarah Cosby. Sarah Cosby died intestate and without issue prior to 1907. In 1907 William Cosby married a widow, who had a son by a former marriage, who is designated in the record as George Cosby. After the death of Sarah Cosby, William Cosby remained in possession of the land until his second marriage in 1907, and thereafter remained in possession until the house upon the land was burned. On 25 March, 1918, William Cosby conveyed the land to his step-son, George Cosby. On 3 July,

1926, George Cosby conveyed the land to the defendant, Julius Amaker. The plaintiffs are the heirs at law of Aaron Barnett. Certain of the heirs at law of Aaron Barnett conveyed their interest in the land to Schiffman, and on 15 June, 1928, Schiffman and other heirs at law of Aaron Barnett conveyed the land to the plaintiffs, Stephen Barnett and his wife. Stephen Barnett is a son of Aaron Barnett. Suit was instituted on 25 June, 1928.

The plaintiffs claim the land in controversy as heirs at law of Aaron Barnett, deceased. The defendants claim the land under the deeds from William Cosby and George Cosby, which they allege constitute color of title, and that, while William Cosby had no right to convey the land of his deceased wife, the Cosbys acquired title by adverse possession under color of title.

The verdict of the jury established the fact that the plaintiffs are not the owners of or entitled to the possession of the land. From judgment upon the verdict in favor of defendants, plaintiffs appeal.

*Harry R. Stanley for plaintiffs.*
*Hoyle & Harris for defendants.*

PER CURIAM. The merits of the case turn upon the question of possession under color of title. There was ample evidence to support and justify the verdict, and therefore the finding of the jury is conclusive. The plaintiffs assail the charge of the court with respect to tacking and rely upon the case of *Morrison v. Craven,* 120 N. C., 327, 26 S. E., 940. However, this case is not applicable to the facts disclosed by the record. *Vanderbilt v. Chapman,* 172 N. C., 809, 90 S. E., 993.

No error.

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BANK OF CANTON AND TRUST COMPANY v. D. H. CLARK, TRADING AS CLARK CONSTRUCTION COMPANY, AND D. H. CLARK, INDIVIDUALLY.

(Filed 8 January, 1930.)

**1. Banks and Banking C b—Bank officer does not have implied authority to use bank funds for personal liability.**

The cashier of a bank has no implied authority to use the funds of the bank for his personal or private use, and an agreement between him and another that such other should give his note to the bank for an amount due him by the cashier and that the cashier would pay it upon maturity is not binding upon the bank in the absence of authorization by its board of directors. C. S., 221(n).

**2. Same—One dealing with bank officer is put upon inquiry as to his authority to use bank funds for personal liability.**

Where one enters into an agreement with an officer of a bank whereby the officer was to use the bank's funds for the payment of a personal debt, he is put upon inquiry as to the authority of such officer to make the agreement, or whether the governing body of the bank had given its sanction thereto.

**3. Same—Question of whether bank was estopped from denying authority of cashier to use bank funds for personal debt held for the jury.**

Where the contractor for the erection of a residence for the cashier of a bank has given his note to the bank for the amount due him by cashier, with the understanding that the cashier was to pay it upon maturity, and there is evidence that the contractor inquired at the bank several times and was informed that the note had been paid, when in fact it had been kept by the bank and used by it as collateral, the question is for the jury as to whether the bank in its suit on the note is estopped to set up the fact that the note had not been paid, or deny the cashier's authority to enter the agreement, there being further evidence that thus lulled into feeling secure the contractor had lost his right of statutory lien upon the residence erected for the cashier.

**4. Estoppel C a—Application of doctrine of estoppel by misrepresentation.**

Estoppel by misrepresentation differs from estoppel by record, by deed, or by contract, in that it is not mutual, but applies when the representation of a material fact is false and should have been known as such to the party making it, and was calculated to, and did deceive another, causing him to suffer loss.

**5. Principal and Agent A c—Person first reposing confidence in agent must suffer loss by his wrongful acts.**

Where one of two innocent persons must suffer by the fraud or deceit of another, he who first reposes the confidence must bear the loss.

APPEAL by defendant from *Schenck, J.*, at September Term, 1929, of HAYWOOD. New trial.

*S. M. Robinson and T. A. Clark for plaintiff.*
*Morgan, Ward & Stamey for defendant.*

ADAMS, J. The defendant Clark was a contractor doing business under the name of the Clark Construction Company. On 9 June, 1925, he executed for the Clark Construction Company a promissory note under seal in the sum of $1,700, payable on demand to his own order, with interest at the rate of six per cent per annum. Presentment, protest, notice of protest and of nonpayment, and all defenses growing out of an extension of time were waived on behalf of the maker and endorser. After writing his name on the back of it the defendant delivered the instrument to the plaintiff's cashier and was given credit on his

bank account for the face of the note. More than two years afterwards the plaintiff brought suit, and upon the trial the controversy came down to the single issue of the defendant's indebtedness: "What amount, if any, is the plaintiff entitled to recover of the defendant?" In reference to the issue the judge gave the jury this instruction: "If you find the facts to be as shown by all the evidence, your answer will be $1,700, with interest from 9 October, 1927." The jury returned a verdict and the plaintiff recovered a judgment for this amount, and the defendant appealed upon exceptions formally entered of record. The decisive question is whether there was error in the instruction.

When the transactions between the parties took place the plaintiff's cashier was W. R. Palmer. He had been cashier for the three years next preceding; he continued his service in this capacity for two years after the note was executed. During this period Frank Mease was the vice-president and had active charge of the bank; but both Mease and Palmer made loans without consulting any person connected with the institution. Palmer testified that he left the bank in November, 1927, and Mease in the preceding July, and that each of them repeatedly falsified the records intrusted to their keeping.

There is evidence that Palmer and the defendant, some time before the note was made, entered into a contract to this effect: The defendant for $4,100 was to build a house in Canton for Palmer; the defendant was to draw checks on the plaintiff from time to time to pay for building material, labor, and incidental outlays, and Palmer was to deposit in the bank to the credit of the defendant such sums as were necessary to protect these checks. Palmer made two such deposits of $500 each; but after the defendant had drawn his checks on the plaintiff, for the purposes specified, in sums aggregating $1,500 or more, Palmer found it impossible to deposit an amount sufficient to pay them, and requested the defendant to execute the note in suit. The defendant testified that the note was delivered to Palmer under an agreement between Mease, Palmer and himself that Palmer was to take up the checks and pay the note and that the defendant "was not to pay the note to the bank."

There is evidence that some time after this agreement was made the defendant demanded a return of the note; that Palmer told him "it had been taken care of," and Mease, that it had been paid; that Mease made the latter statement more than a half dozen times; and that by reason of these misrepresentations the defendant was lulled into security, led into giving Palmer credit for $1,700, and deprived of his statutory lien on Palmer's house. It was the defendant's contention that the time for filing his lien had not expired when the plaintiff's officers gave him these assurances, and that the lien would have been filed if he had not been misled by their deceit. Palmer admitted that he was due the de-

fendant $1,700, and that he had made payments of interest and had procured renewals of the note. The defendant neither paid interest nor at any time sought a renewal of the paper.

When he delivered the instrument bearing his endorsement to the plaintiff's cashier and was given a credit of $1,700 on his account, the defendant became liable to the bank, nothing else appearing, for the full amount of the obligation; and the alleged agreement between him and the cashier did not alter the situation or affect his liability. There are two phases of the evidence in which this statement may be considered. When the note was executed the defendant had on deposit with the plaintiff a balance of $2.63; he had drawn thirty-eight checks, for the protection of which, upon the cashier's failure to perform his alleged agreement, the note was requested and his credit of $1,700 was extended. These checks were overdrafts for which the defendant was liable, as he did not have the bank's permission to draw them. The bank owed him nothing above his small balance, and was under no obligation to honor his paper in excess of this amount. This is the law as declared upon similar facts in *Dowd v. Stephenson,* 105 N. C., 467. It is there held, in addition, that without the consent of the governing authority of a bank its officers have no right to appropriate any part of its funds to the payment of their personal debts. Palmer was utterly without authority to bind the plaintiff by diverting or appropriating its assets to the satisfaction of his individual wants. His official position clothed him with no implied authority to accomplish such purpose. He had no right to "absorb the funds" of the plaintiff in payment of his private debts. "No person can act as the agent of another in making a contract for himself." *Hier v. Miller,* 63 L. R. A., 952. Nor could the joint action of Mease and Palmer legally affect this result without the consent of the governing body. It was said in *Dowd v. Stephenson, supra,* that "in the absence of special authority for such purpose, neither the bank's president nor its cashier, nor these officers acting jointly, had authority or right to appropriate and devote any part of the funds of the bank to the payment of the president's personal debt due to the defendant. Such authority, ordinarily, was beyond the scope of the purpose and duties of such officers." Tiffany on Banks and Banking, 325; *Stansell v. Payne,* 189 N. C., 647; *Grady v. Bank,* 184 N. C., 158; *Bank v. West, ibid.,* 220; *Bank v. Lennon,* 170 N. C., 10; *Bank v. Wilson,* 124 N. C., 562, 568; C. S., 221(n).

The defendant knew the terms of the contract; he knew the cashier's interest in it was personal; and this knowledge charged him with the duty of inquiring into the actual extent of the cashier's authority. *Hier v. Miller, supra; Bank v. West, supra.* Under these circumstances he

cannot evade liability on his obligation by proof of "an understanding" with Mease and Palmer that he "was not to pay the note."

The trial judge no doubt had these principles in mind when he gave the peremptory instruction to which the appellant excepted. But there was material evidence which the instruction excludes. According to the testimony of the defendant he called for his note within a few days after the bank had received it and was told by the cashier and the vice-president that it had been taken care of or had been paid. The time for filing a lien on Palmer's house had not then expired. On various subsequent occasions the plaintiff's officers gave him similar assurances: the books, they said, showed no entry against the defendant or the note had been lost; at any rate, it had been paid. Paid by whom? Evidently by Palmer, not by the defendant; and if by Palmer the bank was satisfied and the defendant absolved. These assurances continued until it was too late for the defendant's lien. Meanwhile, the note had been in the service of the bank as collateral security and was next seen by the defendant in the year 1927.

These are some of the contentions of the defendant. He says the officers of the bank deceived him for the purpose of protecting the cashier, the consequence being his alleged liability on the note and his inability to file a lien or to collect anything for building the house. He insists that the governing authority of the bank cannot set up the collusion of its officers as an act *ultra vires,* because the bank as a result of the collusion retained the note as an asset and profited by its use.

There are allegations in the answer and evidence in the record upon which to rest the defendant's theory. If he can establish his contentions to the satisfaction of the jury he may thereby bar the plaintiff of a recovery on the note. He would then have a case to which the doctrine of estoppel by misrepresentation would be applicable. Estoppel of this nature differs from estoppel by record, by deed, and by contract. It is not based upon an agreement of the parties or upon a finding of fact which may not be disputed. It is not mutual, but applies to only one party. The fundamental principle is that a party may be estopped by the false representation of a material fact which he knew or should have known was calculated to deceive and which has deceived another and caused him to suffer loss. There are convincing reasons for denying the availability of the plaintiff's contention that the alleged misrepresentation was unauthorized: there is evidence that the bank derived benefit from the asserted deceit; moreover, where one of two persons must suffer by the fraud or deceit of another he who first reposes the confidence must bear the loss. *R. R. v. Kitchin,* 91 N. C., 39; *Bank v. Liles,* 197 N. C., 413. The appellant is entitled to a

New trial.

A. M. BENNETT v. PROVIDENT FIRE INSURANCE COMPANY, AND J. H. SAMPLE, TRUSTEE, v. PIEDMONT FIRE INSURANCE COMPANY OF CHARLOTTE, N. C.

(Filed 8 January, 1930.)

**1. Insurance E b—Ambiguous insurance contract will be construed in favor of insured.**

Where a policy of fire insurance is ambiguously expressed and capable of two reasonable interpretations, the interpretation more favorable to the insured will be adopted by the court.

**2. Same—Insurance contract will be construed as a whole to effectuate the intent and purpose of the parties.**

In construing a contract of fire insurance the courts are at liberty to consider the purpose of the contract in securing the interest of the mortgagee when that purpose necessarily and plainly appears from a perusal of the entire writing, and, where there are somewhat inconsistent provisions, that construction will be adopted which, while not giving effect to all provisions, will at the same time plainly tend to carry out the clear purpose and intent of the written instrument.

**3. Insurance N c—In this case held: insurer of mortgagee liable for total loss, and not entitled to pro rate with insurer of mortgagor.**

Where under the statutory standard form of a policy of fire insurance certain policies are taken out with a loss payable clause in favor of the mortgagee, with provision that no act or neglect of the owner with regard to the property shall invalidate the insurance as to the interest of the mortgagee, the evident intent of the policy is for the protection of the mortgagee, and where the owner has taken out other policies of insurance on the same property with other companies without the knowledge of the mortgagee, the company issuing the policy with the loss payable clause in favor of the mortgagee is not entitled to pro rate a loss thereunder with the other company, and is liable for the full amount of the loss.

APPEAL by defendant, Piedmont Fire Insurance Company of Charlotte, N. C., from *Finley, J.*, at August Term, 1929, of BUNCOMBE.

Civil actions by A. M. Bennett, owner, and J. H. Sample, trustee in deed of trust, to recover on different fire insurance policies issued on the same property, consolidated and tried together at the August Term, 1929, Buncombe Superior Court.

The action of J. H. Sample, trustee, is to recover on three policies of insurance, issued by the Piedmont Fire Insurance Company in the sum of $2,000 each, dated 2 April, 23 April and 21 May, 1927, respectively, and each containing a rider or New York Standard Mortgage clause, in favor of J. H. Sample, trustee, as mortgagee or trustee, as his interest may appear, the material provisions of said rider or standard mortgage clause being as follows:

"Loss or damage, if any, under this policy, shall be payable to J. H. Sample, as trustee, mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property. . . .

"In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise."

The action of A. M. Bennett is to recover on two policies of insurance, issued by the Provident Fire Insurance Company in the sums of $7,000, dated 25 May, 1927, and $2,000 dated 24 June, 1927, respectively, and neither containing a standard mortgage clause in favor of the trustee, or otherwise, but both covering only the interest of the owner. Said policies were issued without the knowledge or consent of J. H. Sample, trustee.

On 13 January, 1928, while all the policies were in force, the property, worth at that time $9,691.93, was damaged by fire to the extent, as fixed by agreement of the parties, of $2,936.95.

From a judgment against the Piedmont Fire Insurance Company in favor of J. H. Sample, trustee, for the full amount of the loss, and denying to A. M. Bennett any right of recovery as against the Provident Fire Insurance Company, the Piedmont Fire Insurance Company appeals, assigning errors.

*W. B. Miller for plaintiff, Sample, trustee.*

*Brooks, Parker, Smith & Wharton for defendant, Provident Company.*

*Bourne, Parker & Jones for defendant, Piedmont Company.*

STACY, C. J. The appeal presents, for the first time in this jurisdiction, the question as to whether the subsequent act of an owner or mortgagor in taking out additional insurance, without the knowledge or consent of the mortgagee, to protect alone his interest in mortgaged property, *ipso facto* reduces proportionately the amount of prior insurance held by a mortgagee or trustee on the same property under a New York Standard Mortgage Clause.

At least six courts have passed upon the question, two deciding it in the affirmative *(Hartford Fire Insurance Co. v. Williams,* 63 Fed., 925, *Sun Ins. Co. v. Varable,* 103 Ky., 758), and four in the negative *(Eddy*

*v. London Assurance Corp.*, 143 N. Y., 311, *Hardy v. Lancashire Ins. Co.*, 166 Mass., 210, *Germania Fire Ins. Co. v. Bailey*, 19 Ariz., 580, *Martin v. Sun Ins. of London*, 83 Fla., 325).

The question was adverted to, but not decided, in *Bank v. Ins. Co.*, 187 N. C., 97, 121 S. E., 37, where it was held that the standard or union mortgage clause, engrafted upon a policy of insurance, operates as a distinct and independent contract of insurance for the separate benefit of the mortgagee, as his interest may appear, to the extent, at least, of not being invalidated, *pro tanto* or otherwise, by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee.

It is provided by each of the standard mortgage clauses in question that the Piedmont Fire Insurance Company shall not be liable under its policies for a greater proportion of any loss or damage sustained thereunder than the amount of such insurance bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise. It is also provided in said standard mortgage clauses that the insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property.

Why these two apparently conflicting provisions should have been inserted in the same contract is not easy to perceive, but in keeping with the general rule of construction, with respect to ambiguously worded policies of insurance, where they are reasonably susceptible of two interpretations, we think the one more favorable to the assured should be adopted. *Underwood v. Ins. Co.*, 185 N. C., 538, 117 S. E., 790.

The clause in question received consideration by the New York Court of Appeals in the case of *Eddy v. London Assurance Corp., supra*, where *Peckham, J.*, delivering the opinion, said:

"It is clear that the only object of the mortgagee is to obtain a security upon which he can rely, and this object is, of course, also plain and clear to the insurer. Both parties proceed to enter into a contract with that one end in view. In order to make it plain beyond question the statement is made that no act or neglect of the owner with regard to the property shall invalidate the insurance of the mortgagee. When, in the face of such an agreement, entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the

other insurance upon the owner's interest. This may not, perhaps, give full effect to the strict language of the apportionment clause, but if full effect be given to that clause, and it should be held to call for the consequent reduction of the liability of the insurers in such a case as this, then full effect is denied to the important and material, if not the controlling, clause in the contract, which provides that the insurance of the mortgagee shall not be injuriously 'impaired or affected' by the act or neglect of the owner. As used in these mortgagee clauses, this is the meaning of the word 'invalidate.' *(Hastings v. Ins. Co.,* 73 N. Y., at page 149).

"We must strive to give effect to all the provisions of the contract and to enforce the actual meaning of the parties to it as evidenced by all the language used within the four corners of the instrument. We are also at liberty to consider the purpose for which the contract was executed, where that purpose plainly and necessarily appears from a perusal of the whole paper. That construction will be adopted, in the case of somewhat inconsistent provisions, which, while giving some effect to all of them, will at the same time plainly tend to carry out the clear purpose of the agreement; that purpose which it is obvious all the parties thereto were cognizant of and intended by the agreement to further and to consummate."

Perceiving that the judgment below accords, in principle, with our own decisions and with the majority of cases elsewhere, we are inclined to approve it. With this disposition of the appeal, the remaining questions, sought to be presented, become academic.

No error.

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ASHEVILLE SUPPLY AND FOUNDRY COMPANY v. CATAWBA CONSTRUCTION COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 8 January, 1930.)

**Principal and Surety B a—In this case held: surety was liable to materialmen and defenses against owner were not available against them.**

A surety bond given the owner for the construction of a road over his land will be construed with the contractor's bond given the owner, and where the surety expressly agrees to liability for all material used therein, and the bond expressly indemnifies them against loss for which they may recover against the surety under a contract made for their benefit, though they are not specifically named therein, and defenses of the surety which may be available against the owner are not available against such mate-

rialmen in their action to recover for material furnished by virtue of the contractual provisions in their behalf. *Peeler v. Casualty Co.*, 197 N. C., 286, cited and distinguished.

STACY, C. J., not sitting.

APPEAL by United States Fidelity and Guaranty Company from *Grady, J.*, at August Special Term, 1929, of HAYWOOD. No error.

*Morgan, Ward & Stamey for plaintiff.*
*Harkins & Van Winkle for appellant.*

ADAMS, J. On 26 April, 1926, the Catawba Construction Company, Inc., and J. D. Hood, trustee, entered into a written contract by the terms of which the Construction Company was to grade and build on Hood's property a highway or road between a designated place near Balsam and a place on Balsam Mountain known as Yellow Face Knob. The terms and specifications were set out in the contract. The Construction Company as principal and the United States Fidelity and Guaranty Company, as surety, executed a bond on 24 April, 1926, payable to Hood, trustee, in the penal sum of $20,000 to secure the company's performance of its contract. The material parts of the bond will be referred to hereafter. The Construction Company in part built, but did not complete a road five miles and a half in length; and in the course of the work it purchased from the plaintiff quantities of Euloy pipe to be used in the construction of culverts. The total purchase price was $2,884.30, but a credit of $1,078.80 for returned pipe left due the plaintiff $1,805.50; and for this amount the plaintiff brought suit against the defendants. On the trial the appellant introduced in evidence the judgment roll in the case of Catawba Construction Company *v.* J. D. Hood, trustee, and others for the purpose of showing that Hood had made default in his payments and was then indebted in the sum of $38,693.23 to the Construction Company, which for this reason had been forced to leave the work unfinished. This record was the appellant's only evidence. The Construction Company filed no answer and of course offered no testimony. The appellant's motion for nonsuit was denied and the jury gave the plaintiff a verdict for $1,805.50 with interest from 30 June, 1926. To the court's refusal to dismiss the action and to the judgment rendered for the plaintiff the appellant excepted. These are the only assignments of error.

It is necessary only to advert to the provisions of section 2445 of the Consolidated Statutes, because they relate to the construction of public buildings by counties, cities, towns, and other municipal corporations. Reference to this section as enacted in 1913 (Public Laws 1913, ch. 150, sec. 2) was made by the Court in *McCausland v. Construction Co.*, 172

N. C., 708. It was there held that the terms of the contract and bond under consideration were confined strictly to the indemnity of the owner and that the bond did not contemplate the payment of a bill for materials which were used in the construction of a building. See *Clark v. Bonsal,* 157 N. C., 270; *Peacock v. Williams,* 98 N. C., 324. But several decisions were cited in which it is held that in case of guaranty bonds or written contracts of indemnity third persons interested and having claims, though not named, may maintain an action when it appears by "express stipulation or by fair and reasonable intendment that their rights and interests were contemplated and being provided for." And these decisions are not exclusively those in which the terms of the bond are prescribed by statute. This Court has often had occasion to apply the principle that a person who is the beneficiary of a contract, though not a party or privy, is entitled to maintain an action for its breach. One who furnishes material for a building, even if not named in the contract between the owner and the builder, may bring suit on the contractor's bond and recover if the bond provides in express terms for liability to such person or for payment by the contractor of claims of this kind. *McCausland v. Construction Co., supra; Gorrell v. Water Supply Co.,* 124 N. C., 328; *Gastonia v. Engineering Co.,* 131 N. C., 363; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *Morton v. Water Co.,* 168 N. C., 582; *Plyler v. Elliott,* 191 N. C., 54; *Glass Co. v. Fidelity Co.,* 193 N. C., 769.

By an application of these principles to the contract in question it is made clear that the appellant's exceptions should be overruled. The contract and bond must be construed together. *Manufacturing Co. v. Andrews,* 165 N. C., 285. In the former the contractor agreed to pay for the materials he purchased, and in the latter he not only agreed to pay all claims of materialmen; he stipulated that "this bond shall be for the benefit of the materialmen and laborers having a just claim, as well as for J. D. Hood, trustee." By virtue of these provisions the claim of the plaintiffs is not subject to the defenses available to the surety against Hood, the promisee and owner of the property. *Peeler v. Casualty Co.,* 197 N. C., 286, is easily to be distinguished. We find

No error.

STACY, C. J., not sitting.

IDA BONAPART v. W. M. NISSEN, FRANK L. BLUM & COMPANY, AND THE CITY OF WINSTON-SALEM.

(Filed 8 January, 1930.)

**1. Municipal Corporations E e; Negligence A c—Evidence of joint negligence of city and another resulting in injury from falling wall held sufficient.**

Where there is evidence tending to show that the private owner of a building left part of the building wall standing in an unsafe condition after the building had been condemned by the city building inspector, and that the city had constructed a retaining wall contiguous thereto, but had failed to construct weep holes therein so that the waters from the lands of the private owner were ponded back on his lands and seeped through the ground and sobbed and softened the foundations on the building wall so that after a heavy rain it fell over into the city market place and injured the plaintiff: *Held*, the evidence discloses joint negligence on the part of the city and the private owner, and the injury therefrom could have been reasonably anticipated, and is sufficient to sustain the verdict of the jury against them as joint *tort-feasors*, and that there was no primary and secondary liability between them, and defendants' motion as of nonsuit was properly denied. C. S., 567.

**2. Trial E g—Error in explaining law in stating contentions of parties held not reversible, construing the charge as a whole.**

Where in an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendants, the judge in his charge to the jury states the respective contentions of the parties, and then correctly charges the law arising from the evidence in the case, construing the charge as a whole it will not be held as reversible error that in his statement of the contentions of the parties he did not refer to the element of proximate cause, having given it in his charge as to the law.

APPEAL by defendants from *Lyon, J.*, and a jury, at June Term, 1929, of FORSYTH. No error.

This is an action for actionable negligence brought by plaintiff against defendants for injuries received.

*The facts:* W. M. Nissen is the owner of a lot in the city of Winston, in the rear of Nissen's lot is the Winston-Salem market. The Nissen lot is higher than the market lot. The natural flow of water from the Nissen lot was originally on the market lot. In 1925 the city excavated its lot and constructed a concrete retaining wall about 420 feet long which runs from 4 feet in height to a maximum of 10 feet and back to 7 feet at the other end. The concrete wall is about 7 feet high at the south end and 8 feet at the north end of the *Nissen property*. The natural earth is about 12 inches above and close to the top of the concrete wall, as it extends along the rear of the Nissen lot. The concrete wall varies in thickness, in the rear of the Nissen property it is 21

inches thick. It was in evidence that the foundation of the Nissen brick wall was below, some 8 inches or a foot, the top of the concrete wall.

C. S., 2773, 2774 and 2776, make provision that the local inspector of the municipalities of over 1,000 inhabitants can, when it appears that a building is especially dangerous condemn same—"shall be held to be unsafe"—and punishment is fixed for allowing unsafe buildings to stand after certain notice. About the first of July, 1928, the inspector condemned the west wall of the Nissen building adjacent to the city market, and recommended to the owner to make it safe or tear it down. After the owner was notified, he had the defendants Frank L. Blum & Company to do the work. After it was torn down, the building inspector refused to allow it built back on the portion of wall which was left as the foundation was "too bad to build on." There was evidence to the effect that Blum & Company were agents of Nissen and not independent contractors of W. M. Nissen and had done the work with due care. The Nissen wall adjacent to the market was torn down to the level of the concrete floor and the remaining part of the wall, which was 8 or 9 feet in height, was left standing for sometime.

The retaining wall, built by the city, adjoining the Nissen property, was built without any reinforcing steel, without any tie rods, and without weep holes. Sometime after it was erected it cracked and began to lean or bulge at the top. To remedy this the city drilled weep holes in the wall for the purpose of releasing any accumulation of water from behind it and at certain points put in tie rods to keep the wall from moving or bulging any further. Into the space left between the wall after it had moved and the dirt from which it had moved the city filled with rock. During the forty-nine hours immediately preceding the time the wall fell there was a rainfall in Winston-Salem of 5.46 inches, which was the heaviest rainfall that had been recorded in Winston-Salem during 6 years. The city used the property adjacent to the Nissen property for market purposes.

After the wall was built, it was in evidence that water collected between the concrete retaining wall and the wall of the Nissen building and caused the concrete retaining wall to move westwardly a few inches immediately west of the Nissen property which it was in evidence affected the foundation of the Nissen wall. The building of the concrete wall without sufficient weep holes, it was in evidence, caused the water from the heavy rains which fell during the forty-nine hours immediately preceding the disaster to pond back of the concrete retaining wall, and it was in evidence in this way the earth was softened and the foundation under the Nissen wall was injured and damaged. The wall of the Nissen building left standing for some time, on August 11, 1928, fell over the

concrete wall into the market place, a curb market, on plaintiff when she was there for the purpose of purchasing produce and seriously injured her, for which this action is instituted.

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

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

"2. Was the plaintiff injured by reason of the negligence of the defendant, Frank L. Blum & Company, as alleged in the complaint? Answer: No.

"3. Was the plaintiff injured by reason of the negligence of the defendant, city of Winston-Salem, as alleged in the complaint? Answer: Yes.

"4. Was the negligence of W. M. Nissen primary and that of the city of Winston-Salem secondary? Answer: No.

"5. Was the negligence of Frank L. Blum & Company primary and that of the city of Winston-Salem, secondary? Answer: .....

"6. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,500."

The defendants made numerous exceptions, assignments of error and appealed to the Supreme Court.

*J. M. Wells, Jr., and John C. Wallace for plaintiff.*
*Efird & Liipfert and Manly, Hendren & Womble for W. M. Nissen.*
*Parrish & Deal for city of Winston Salem.*

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendants, W. M. Nissen and the city of Winston-Salem, made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

The jury having acquitted Blum & Company of any negligence, and there being also evidence to the effect that they were merely agents of W. M. Nissen, they are out of the picture. The jury found both W. M. Nissen and the city of Winston-Salem negligent as joint *tort-feasors* and there was evidence to sustain the finding. The jury further found that as between Nissen and the city of Winston-Salem there was no primary and secondary negligence or liability. No exception was taken to the issue. On the record, which is voluminous, we think there is ample evidence for the jury to find the joint negligence of Nissen and the city.

The natural drain from the Nissen property was on the city market property. The city dug down the bank and built a concrete retaining wall near to the building on the Nissen property.

The principle of law is stated thus in *Porter v. Durham,* 74 N. C., at p. 779. "It has been held that an owner of lower land is bound to receive upon it the surface water which falls on adjoining higher land, and which naturally flows on the lower land. Of course when the water reaches his land the lower owner can collect it in a ditch and carry it off to a proper outlet so that it will not damage him. He cannot however raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner. While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of water, or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place, or in a different manner from its natural discharge." *Winchester v. Byers,* 196 N. C., at p. 384.

In reference to the reciprocal duty that Nissen and the city of Winston-Salem owed as adjoining property owners, we find in *Davis v. Summerfield,* 131 N. C., at p. 354 (see, also, 133 N. C., 325), the following: "The true rule deducible from the authorities seems to be that, while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building superimposed upon the soil, yet he must not dig in a negligent manner to the injury of that wall or building, and it is negligence to excavate by the side of the neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention, that he may underpin or shore his wall, or relieve it of any extra weight on the floors, and the excavating party should dig out the soil in sections at a time so as to give the owner of the building opportunity to protect it and not expose the whole wall to pressure at once. The defendants did not give any notice of the nature of their proposed excavation, and the evidence justified the jury in finding them guilty of negligence."

It was the contention of plaintiff that the Nissen building after being condemned was partly torn down and a certain wall was left standing for sometime in an unsafe condition. The foundation was too bad to build on. It could be readily seen, if the standing wall fell, it would, as it did, fall over the city concrete retaining wall into the curb market where people assembled for trade. That it was the duty of the city to so build its concrete retaining wall adjoining the Nissen property that the natural drainage of water would not be thrown back on the Nissen property, the higher owner. That this was not done and that the retaining wall was defectively constructed and the water that naturally flowed from the Nissen property on the market lot had no sufficient

outlet, and owing to the heavy rains the water was ponded back of the concrete retaining wall of the city and sobbed and softened the earth and weakened the foundation of the Nissen wall, which was improperly built and made heavier by the wall being wet by the heavy rains, and these conditions caused the wall to fall. That both Nissen and the city of Winston-Salem failed to use due care under all the circumstances. That it could be reasonably anticipated that the particular injury or harm might follow the wrongful acts. *Hall v. Rinehart,* 192 N. C., 706. There was evidence to sustain these contentions and the jury found that they were jointly negligent. We think the verdict should be sustained and we find no prejudicial or reversible error in the record, as we will hereafter indicate.

There are various contentions made by both Nissen and the city of Winston-Salem, but we do not think they are material from the view we take of the case. Both Nissen and the city of Winston-Salem contend that a new trial should be granted on the following excerpt from the charge: "She contends, gentlemen of the jury, further, that each of the defendants had been guilty of actionable wrong, both collectively and separately, and that these wrongs caused the injuries she sustained. The plaintiff sets out a number of different allegations of actionable negligence. It is not necessary that they prove each of these acts of negligence for you to find that any or all of the defendants have been guilty of actionable wrong. (If you should find by the greater weight of the evidence that the plaintiff has proved a breach of duty of any one of the defendants to the plaintiff, then the proving of that one breach on behalf of any one of the defendants is sufficient for you to answer the issue as to negligence against that particular defendant Yes.)" We give the whole of this part of the charge—the exception is to the above portion of the charge in parenthesis. This excerpt was taken from that portion of the charge setting forth the contentions, and the defendants contend that this statement leaves out a fundamental principle that the negligence of the parties must be the proximate cause of the injury. This is axiomatic, but the court below was merely setting forth in the contentions the duties of the parties.

After setting forth fully the contentions of all the parties, the court said: "Gentlemen of the jury, these are the contentions of the respective parties. . . . The burden of these issues, that is the 1st, 2nd, 3rd and 6th issues, is on the plaintiff to satisfy you from the evidence and by the greater weight of the evidence that she is entitled to recover of each of these defendants. As I told you in the beginning, this action is based on the alleged negligence of the respective defendants, or any of them. Now, it is necessary for the jury to understand what negligence

is. Negligence is the failure to do that which a reasonably prudent man would ordinarily have done under the circumstances and the situation, or the omission to use means reasonably necessary to avoid or prevent injury to others. To establish actionable negligence the plaintiff is required to show by the greater weight of the evidence, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff at the time and under the circumstances in which they were placed, proper care being that degree of care which a prudent man should exercise ordinarily under like circumstances and charged with a like duty; and, second, it must appear that such negligent breach of duty was the proximate cause of the injury, the cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed."

"It is well settled that when there are conflicting instructions upon a material point, a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly." *Edwards v. R. R.,* 132 N. C., at p. 101. *May v. Grove,* 195 N. C., 235.

The excerpt from the charge complained of was in the contentions. The charge fully covered the law. The allegations of actionable negligence and the breach of duty set forth in the contentions are fully explained in the charge, what it consists of and negligence, and that it must be the proximate cause of the injury. We cannot see how the jury could have been misled and taking the contention with the charge on the law the matter is fully explained. If the contentions are strictly taken as a part of the charge and if we construe the contentions with the charge they are reasonably reconcilable. The charge should be considered as a whole. If the charge, as a whole, is correct, an expression standing alone, though technically incorrect is not reversible error. *Purnell v. R. R.,* 190 N. C., 573.

The record consists of 291 pages, which we have read with care. We have examined the assignments of error and authorities cited in the able briefs of defendants. We do not see any new or novel propositions of law. From a thorough examination of the record and authorities, we cannot find any reversible or prejudicial error.

No error.

P. L. THRELKELD AND J. B. CORY v. MALCRAGSON LAND CO., INC., BEVERLY HILLS, INC., ET AL.

(Filed 8 January, 1930.)

**1. Lis Pendens A b—Quantity of land upon which notice of lis pendens may be filed.**

One having the right to file notice of *lis pendens* upon lands of a certain acreage and description is not entitled to file *lis pendens* on a much larger acreage in which in a subsequent transaction of conveyance it has been included.

**2. Mortgages C c—Registration determines priority of deeds of trust and mortgages—Fraud.**

Where the grantor of lands claims a lien under a mortgage given for the balance of the purchase price, but has neglected to have it registered until the lands had been conveyed by registered mortgage, no notice, in the absence of fraud, can supply that of registration under our statute, C. S., 3309, and the purchase-money mortgage is subject to the prior registered incumbrance, and where the holder of the purchase-money mortgage does not allege that the subsequent mortgagee had notice of fraud and was not an innocent purchaser for value, his prayer to have his purchase-money mortgage declared a prior lien cannot be granted. C. S., 1009.

**3. Lis Pendens A a—In this case held: action was not one affecting title to realty, and judgment canceling notice of lis pendens was proper.**

Where the mortgagee of lands brings an action to recover on the note secured by the mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action is not one affecting the title to land within the meaning of C. S., 500, and the judgment of the lower court canceling and removing the notice of *lis pendens* from the records will be affirmed on appeal.

APPEAL by plaintiffs from *Sinclair, J.*, at Special August Term, 1929, of BUNCOMBE. Affirmed.

*Facts:* On 15 April, 1925, P. L. Threlkeld and wife Bell M. Threlkeld and J. B. Cory and wife Addie M. Cory, sold and conveyed to the defendant Malcragson Land Co., a corporation, a piece of land in Buncombe County, containing approximately 5 acres. The deed to this land was duly recorded in the office of the register of deeds of Buncombe County on 31 July, 1925.

(2) On the same date, 15 April, 1925, the Malcragson Land Co., Inc., conveyed the same land to Robert S. Brown, trustee, to secure certain purchase-money notes, one of which for $2,600 was due 15 October, 1928, and payable to the plaintiffs P. L. Threlkeld and J. B. Cory. Brown is not made a party to this action. The deed of trust gives the usual power of sale in default in the payment of the note. This deed of trust was duly recorded 27 April, 1929.

(3) On 2 February, 1926, the Malcragson Land Co., Inc., conveyed the said 5 acres of land (approximately) and other land and Governor Heights, Inc., certain land, to Beverly Hills, Inc. The total acreage was approximately 194 acres. This deed was duly recorded on 6 March, 1926.

(4) On 1 March, 1926, Beverly Hills, Inc., executed a deed of trust to Central Bank & Trust Co., trustee, for the 194 acres to secure an indebtedness of $325,000 to various bondholders. This deed of trust was immediately recorded.

The prayer of the complaint is "that the note and deed of trust owned by the plaintiffs and described herein be declared a first lien against all of the properties of the Malcragson Land Company, and Beverly Hills, Inc.," etc.

The prayer of the amended complaint is as follows:

"1. That on account of the matters and things alleged in the complaint and in this amended complaint, that the note of twenty-six hundred ($2,600) dollars and interest, and the deed of trust owned by the plaintiffs and fully set forth in the complaint, be declared a lien not only against the property in said deed of trust set forth in paragraph two of the complaint, but also against all properties of Beverly Hills, Inc., as is fully described in paragraph four of the complaint.

"2. That a commissioner be appointed to sell all the right, title and interest in and to all the lands described in said complaint, or so much thereof as may be necessary, to pay off said notes and interest due said plaintiffs, and execute sufficient deed in fee to the purchaser therefor, and pay the plaintiffs the sum of twenty-six hundred ($2,600) dollars, and interest at 6 per cent per annum from 15 April, 1925, and pay over the balance, if any, to the clerk of Superior Court, to be paid to the defendants herein.

"3. That said plaintiffs recover of said defendants the sum of twenty-six hundred ($2,600) dollars, and interest from 15 April, 1925."

The plaintiff filed a notice of *lis pendens* on the 194 acres of land and thereafter filed notice of amended *lis pendens* on only the 5 acres of land in the deed of trust to Robert S. Brown, trustee, for plaintiffs to secure the $2,600 balance purchase money on the land.

The other material facts will be treated in the opinion.

The court below rendered the following judgment: "This cause coming on to be heard, and being heard, upon the motion made by the defendants in the above entitled case, before his Honor, N. A. Sinclair, judge presiding over the Superior Court of Buncombe County, State of North Carolina, at the special term, August, A.D. 1929, of the Superior Court of Buncombe County, for an order canceling and removing from the records the alleged *lis pendens* which the plaintiffs have filed in

the office of the clerk of the Superior Court of Buncombe County, State of North Carolina, against the lands of the defendants in this action, and it appearing to the court from an examination of the entire record, including the complaint and amended complaint of the plaintiffs herein, that this is not an action affecting the title to real property and that the plaintiffs are not entitled to any *lis pendens* against the lands of the defendants, or any part thereof. It is, therefore, ordered and adjudged: (1) That the plaintiffs are not entitled to any *lis pendens* or notice of *lis pendens* against any part of the lands of the defendants in the above entitled action. (2) That the *lis pendens* filed by the plaintiffs in the above entitled action, which said *lis pendens* is recorded in the office of the clerk of the Superior Court of Buncombe County, State of North Carolina, in *lis pendens* Book 2, at page 182, and also the notice of an amended *lis pendens* filed in the office of the clerk of the Superior Court of Buncombe County, State of North Carolina, on 12 August, 1929, be, and they hereby are, canceled and removed from the records, and adjudged and declared to be void and of no effect. The clerk will make an entry upon the *lis pendens* Book and indexes where said notices of *lis pendens* appear that the same have been canceled in accordance with this order."

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

*Roberts, Young & Glenn for plaintiffs.*
*Bernard, Williams & Wright for defendants.*

CLARKSON, J. It goes without saying that there could be no *lis pendens* on the entire 194 acres. The record discloses that the land that the controversy is about is approximately 5 acres and was first conveyed by plaintiffs to Malcragson Land Co., Inc., and by it with other land and Governor Heights, Inc., certain land, to Beverly Hills, Inc., totaling some 194 acres. The Beverly Hills, Inc., conveyed the 194 acres to the Central Bank & Trust Co., trustee, to secure an indebtedness of $325,000, due various bondholders. The deed of trust from the Malcragson Land Co., Inc., to Robert S. Brown, trustee for plaintiffs to secure $2,600 balance purchase money on the 5 acres, dated 15 April, 1925, was not recorded until 27 April, 1929, years after the land was deeded to others, and the deed of trust made to Central Bank & Trust Co., trustee.

"If a deed is registered, a subsequent purchaser has notice; but if a deed is not registered, and a subsequent conveyance is taken with actual knowledge of the former deed, and is registered first, it will have priority over the former deed, since it is held that no notice, however direct, will take the place of registration." North Carolina Practice and Procedure

(McIntosh), part sec. 344. C. S., 3309, 3311. *Roberts v. Massey,* 185 N. C., 164; *Bank v. Smith,* 186 N. C., at p. 641; *Ellington v. Supply Co.,* 196 N. C., at p. 789.

It appears of record that the 194 acres, in which the 5 acres in controversy is included, was conveyed to the Central Bank & Trust Co., trustee, to secure an indebtedness of $325,000. Plaintiff's deed of trust is subject to this lien. Upon the foreclosure of plaintiff's deed of trust they would have certain rights not necessary to discuss, if plaintiffs could set aside the deed from Malcragson Land Co., Inc., to Beverly Hills, Inc. The Central Bank & Trust Co., trustee, is not made a party to the action, but if it was and it took in good faith for value and without notice, its lien would still be prior to plaintiffs' deed of trust as it was registered before.

"Under C. S., 1009, a purchaser for value and without notice of any fraud gets good title by conveyance or transfer from fraudulent vendor. See *Cox v. Wall,* 132 N. C., 730." *Bank v. Mackorell,* 195 N. C., at p. 745. See *Arrington v. Arrington,* 114 N. C., at p. 166; *Brown v. Sheets,* 197 N. C., 268; 63 A. L. R., 1357.

There is no allegation in the complaint that the Central Bank & Trust Co., trustee, to secure the indebtedness of $325,000 is not a purchaser for value in good faith and that it had notice of the alleged fraud of Malcragson Land Co., Inc., and Beverly Hills, Inc., without such an allegation if the action was to foreclose the deed in trust of plaintiffs, plaintiffs' prayer could not be granted, that "the note and deed of trust owned by the plaintiffs and described herein be declared a *first lien,*" etc.

C. S., 500, is as follows: "In action affecting the title to real property, the plaintiff, at or any time after the time of filing the complaint or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby."

C. S., 504, provides how the *lis pendens* notice can be canceled.

In *Arrington v. Arrington,* 114 N. C., at p. 159, it is said: "Without entering into a general discussion of the subject, it is sufficient to say that where the suit has been prosecuted with proper diligence the *lis pendens* continues until the final judgment (1 Beach Mod. Eq. Jur., 440, and Benn. Lis Pend., sec. 78), or until it has been canceled under the directions of the court. The Code, sec. 229 (C. S., 504, *supra*)."

In *Horney v. Price,* 189 N. C., at p. 824, it is said: "This *lis pendens* statute applies to 'an action affecting the title to real property.' " The subject is discussed in that case, citing authorities. It is not applicable to one seeking to recover a money judgment. *Pierce v. Mallard,* 197 N. C., 679; See *Brinson v. Lacy,* 195 N. C., 394.

In *Askew v. Hotel Co.,* 195 N. C., p. 456, we find the following principle: An existing corporation, when retaining its corporate identity and retaining assets sufficient to pay its creditors, does not effect a merger by exchanging its stock with another and similar corporation, so as to make the latter liable for its debts under the doctrine of implied assumpsit or substitution of debtors, in the absence of fraud. C. S., 1005. *Helsabeck v. Vass,* 196 N. C., 603.

The present action is not to foreclose the deed of trust made by Malcragson Land Co., Inc., to Brown, trustee, for plaintiffs, to secure the $2,600 note. On account of plaintiffs' neglect and misfortune to register their deed of trust before the $325,000 lien to the Central Bank & Trust Co., trustee, for various bondholders, plaintiffs' deed of trust became subject to the Central Bank & Trust Co., trustee, deed of trust. The action is to recover on the $2,600 note from the maker Malcragson Land Co., and certain officers of the corporations and to set aside the deed made by Malcragson Land Co., Inc., to Beverly Hills, Inc. This action is not one "effecting the title to real property." The judgment below is

Affirmed.

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T. J. JONES v. H. H. RHEA ET AL.

(Filed 22 January, 1930.)

**Judgments P a—In this case held: judgment debtor was not entitled to assignment and acquired no rights as purchaser at execution sale.**

Where a note has been reduced to judgment against its two co-makers, and one of them pays more than half thereof, and after execution is issued for the remainder the other pays the balance due and has the judgment assigned to a trustee for his benefit, and bids in the property at the execution sale on the lands of the first judgment debtor: *Held,* the judgment debtors were jointly and severally liable on the judgment, and the debtor paying less than half thereof may not maintain that he was liable as surety contrary to the record, and he was not entitled to the assignment, and his title as purchaser at the execution sale is not good as against a subsequent purchaser from the first judgment debtor, and, the amount of the purchase price at the sale being repaid to him as the assignee of the judgment creditor, he has suffered no loss, and an instruction directing a verdict in his favor in his action to be declared the owner of the lands is reversible error. C. S., 614, 618, 3309.

JONES *v.* RHEA.

APPEAL by defendants from *McElroy, J.*, at July Term, 1929, of ASHE. New trial.

*C. W. Higgins, Ira T. Johnson and T. C. Bowie for plaintiff.*
*W. R. Bauguess for defendants.*

ADAMS, J. The plaintiff brought suit to be declared the owner of a one-third undivided interest in the land described in the complaint. J. H. Gentry had formerly owned this interest in fee simple. On 1 August, 1917, Ethel Graybeal, then unmarried, and J. H. Gentry and his wife, Effie C. Gentry, executed a deed of trust to F. S. Kirkpatrick and D. H. Howard, trustees, to secure the payment of $6,000 evidenced by two notes, one in the sum of $5,000 payable to Mary D. Kirkpatrick, and the other in the sum of $1,000 payable to Sallie R. West. The property conveyed in the deed of trust consists of the land described in the complaint and another tract containing one hundred acres. The parties agreed that if default in payment were made and a sale of the property became necessary recourse should first be had to the second tract for the payment of $4,000, and that for payment of the remaining $2,000 J. H. Gentry's undivided interest in the tract described in the complaint should first be sold. On 2 August, 1920, the $4,000 was paid; the remainder of the debt was unliquidated.

On 17 April, 1922, Thomas J. Graybeal obtained and docketed a judgment for $2,371.47 with interest against J. H. Gentry and Thomas J. Jones as principals, and C. S. Goss as surety. The judgment is credited with $1,500 paid by Gentry. The clerk issued an execution on 2 August, 1926, and on 6 of September the sheriff exposed to sale Gentry's undivided interest in the land and executed and delivered to the plaintiff as purchaser a deed of conveyance which was duly registered on 25 March, 1927.

On 5 April, 1922, J. H. Gentry and his wife and Ethel Graybeal Haggaman and her husband, J. E. Haggaman, conveyed in fee the land described in the complaint to J. F. Rhea and S. L. Mock. This deed was registered on 12 May, 1922. It was admitted that the land described in the sheriff's deed is the land described in the complaint and in the deed of trust, and that the defendants were in possession of the land in controversy.

These are the material facts upon which his Honor submitted the issue, "Is the plaintiff the owner and entitled to the possession of one-third undivided interest in the land described in the complaint in this cause?" The jury returned an affirmative answer under a directed instruction to do so if they believed the evidence. Judgment was given for the plaintiff and the defendants excepted and appealed.

The lien of a judgment on real property is effective from the moment the judgment is properly docketed. C. S., 614; *Trust Co. v. Currie,* 190 N. C., 260. An unregistered deed, although valid between the parties, does not convey title as against creditors or purchasers for a valuable consideration. C. S., 3309; *Cowan v. Withrow,* 109 N. C., 636; *Hooker v. Nichols,* 116 N. C., 157. As the lien of the judgment antedates the registration of the deed executed by Gentry and his cotenants to Rhea and Mock, we should conclude, in the absence of other evidence, that the sheriff's deed conveyed the better title. But the defendants contend that the plaintiff is barred by reason of the following undisputed facts:

The Graybeal judgment was recovered on a note in which the plaintiff and J. H. Gentry were principals. The judgment creditor received from Gentry $1,500, credited the judgment with this sum, and afterwards caused an execution to be issued against all the judgment debtors. More than three weeks after the execution had been issued the judgment creditor received from the plaintiff $1,153.32 and sold and transferred the judgment to a trustee, who was to hold it for the benefit of the plaintiff.

The defendants contend that the plaintiff and Gentry were jointly and severally liable on the note and judgment (C. S., 459), and that the plaintiff after paying the remainder due on the judgment acquired no rights against them by having the judgment assigned to a trustee for his benefit. They tendered an instruction to this effect which the judge declined to give the jury.

This Court has held in a number of cases that a surety who pays a judgment may preserve the lien thereof against the principal debtor by taking an assignment of the judgment to a trustee for his benefit. *Davie v. Sprinkle,* 180 N. C., 580; *Fowle v. McLean,* 168 N. C., 537; *Bank v. Hotel Co.,* 147 N. C., 594; *Peebles v. Gay,* 115 N. C., 38; *Hodges v. Armstrong,* 14 N. C., 253. In his reply the plaintiff alleged that he had signed the note as surety for Gentry, but the record evidence he introduced shows that he and Gentry were principals in the note and in the judgment. If they were principals they were liable jointly and severally to the judgment creditor, and their liability *inter se* was determinable by section 618 of the Consolidated Statutes. The relevant provisions are as follows: "In all cases in the courts of this State wherein judgment has been, or hereafter may be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint *tort-feasors,* and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after the execution has been issued, the amount due on said

judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same."

In its application to the question under discussion the statute contemplates the payment by one of two or more joint obligors who are primarily and equally liable either of the entire debt or of more than his proportionate part of it as precedent to his right to demand of the judgment creditor a transfer of the judgment to a trustee. The evidence fails to disclose the plaintiff's payment of any sum in excess of his proportionate part of the debt; in fact it shows that he paid less than his part. When the plaintiff made his payment Gentry had already paid more than one-half the amount to which the judgment creditor was entitled.

To meet this situation the plaintiff contends that the cost of the suit and the sheriff's commissions were sufficient to sustain the sale even if the judgment creditor's title was not transferred to the trustee and that the costs were paid by the purchaser after the sale. The record, we think, indicates otherwise. The plaintiff, having previously paid the remainder actually due on the judgment, bid $500 at the sale and the sheriff, according to his return, paid this entire sum "to the assignee of the judgment creditor." The payment was made, if at all, for the benefit of the plaintiff because it was for his benefit that the trustee accepted the assignment. It is apparent from the officer's return that the plaintiff suffered no loss. Whether Gentry objected to the sale does not appear; he is not a party to the suit.

His Honor inadvertently failed to submit the defendants' contention in reference to the assignment of the judgment, and for this reason there must be a new trial. There are other exceptions which may not again be presented.

New trial.

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J. H. WILLIAMS v. FREDERICKSON MOTOR EXPRESS LINES, INC.

(Filed 22 January, 1930.)

**1. Highways B e—Evidence of defendant's negligence in parking without lights held sufficient.**

Evidence tending to show that the plaintiff's automobile collided with defendant's truck parked partly across the highway on a dark night without a tail light in violation of statute, causing personal injury to the plaintiff and damage to his car, is sufficient to sustain an affirmative answer upon the issue of defendant's actionable negligence. C. S., 2621 (77), 2621(94).

**2. Negligence D c: Highways B g—Where two inferences are permissible from evidence as to plaintiff's negligence the question is for jury.**

Contributory negligence of the plaintiff will not be held to bar recovery as a matter of law when an inference in his favor is permissible from the evidence, and in this case where the defendant had parked its car on a dark night upon the side of the highway without a tail light, and there is a reasonable inference that under the existing conditions the plaintiff could not have seen the truck in time to have avoided the injury, in the exercise of ordinary care, the question of contributory negligence upon the issue is for the determination of the jury.

CIVIL ACTION, before *Sink, Special Judge,* at March Term, 1929, of MECKLENBURG.

The evidence tended to show that on the early morning of 26 November, 1927, at about 4 o'clock in the morning, the plaintiff was driving his automobile between Charlotte and Gastonia on Highway No. 20, which is an improved highway. About ten miles from Charlotte the plaintiff, while driving on the proper side of the highway, at a speed of about twenty-five miles an hour, collided with a truck owned by the defendant, which was parked on the highway without a tail light. The body of the truck stood about fifty inches from the ground. The tail gate of the truck was projecting at an angle of about 45 degrees, and there was no light on the tail gate.

Plaintiff testified that prior to the collision he was keeping a "lookout up to the time the collision occurred." Plaintiff further testified that the lights on his car were adjusted in accordance with the requirements of the law of North Carolina.

There was further evidence that the plaintiff was going up grade when the collision occurred; that the pavement was dry, and that it was very dark. "The road was straight all the way up the hill" for at least 200 yards. The hard surface was about 22 feet wide at the point of the collision. Plaintiff testified: "I guess I was within five or ten feet of the truck before I saw it. If the truck was moving I could not tell you. When I hit it, it did not drag me one inch. I came to a dead stop as soon as I hit it. I ran my car up underneath the bottom of the truck." The truck was loaded with automobile tires and stood about twelve feet high, and was five or six feet wide.

The testimony further tended to show that plaintiff sustained property damage and serious personal injury.

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 $3,757.00.

The defendant offered no evidence.

From judgment upon the verdict the defendant appealed.

*D. B. Smith and Stewart, McRae & Bobbitt for plaintiff.*
*Thaddeus A. Adams and John M. Robinson for defendant.*

BROGDEN, J. The plaintiff was driving an automobile in the night time, up grade on a dry hard-surfaced road, with the lights on his car properly adjusted, and ran into an unlighted truck apparently parked on the hard surface on the right-hand side of the road as plaintiff was approaching. The bottom of the truck stood fifty inches from the ground, and the lights on plaintiff's car upon a level surface would have thrown a beam something like two hundred yards. There is no evidence as to how far the beam would have been thrown while traveling up grade.

The defendant was plainly guilty of negligence by reason of express violation of C. S., 2621 (77) and 2621 (94), and hence the determinative question at issue is whether the plaintiff was guilty of contributory negligence, barring recovery, as a matter of law.

The defendant relies upon *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145, and *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237. Neither of these cases is applicable to the facts disclosed in the present record. In the *Hughes case* the plaintiff saw the unlighted truck parked on the highway 75 yards away, and was therefore fully apprised of the danger, and yet, took no precaution for his own safety. In the *Weston case* there was no evidence that the defendant was guilty of any negligence at all. Furthermore, the plaintiff in that case was fully apprised of the danger because he discovered in the rain and mist an object in front of him. Notwithstanding, "he made no effort to reduce his speed until it was too late."

In the present case, the evidence tended to show that the plaintiff did not see the unlighted truck and had no notice of impending danger until he was within five or ten feet thereof. The question is: Ought he to have seen, in the exercise of ordinary care for his own safety; or to state it differently, was his failure to see, under the circumstances, contributory negligence as a matter of law?

In the case of *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598, *Stacy, C. J.,* wrote: "In its present state, the law is not able to protect one who has eyes and will not see—ears and will not hear." Furthermore, the law imposes upon the driver of a motor vehicle the duty of keeping a reasonably careful lookout, not only for other travelers, who are using the highway, but for dangers incurred along the journey. Huddy on Automobiles, 7th ed., 950. As to whether a motorist, at a given time, was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact, and hence the determination of such fact is for a jury. Moreover, the question as to whether it is contributory neg-

ligence as a matter of law to run into an unlighted truck in the night time, upon a straight road, and where there is nothing to obscure the vision of the driver, has been debated by many courts of this country. An examination of the cases dealing with the subject discloses that there is a wide difference in the judicial thinking upon the subject. For instance, the Kansas Court in *Haines v. Carroll,* 267 Pac., 986, has held that under such conditions it is contributory negligence as a matter of law and no recovery can be had. The Washington Court, in a decision rendered in September, 1927, in the case of *Millspaugh v. Alert Transfer Co.,* 259 Pac., 22, held that the driver of a motorcycle, running into an unlighted truck was guilty of negligence as a matter of law. It appeared, however, that the lights of the motorcycle were weak. Upon the other hand, the Oregon Court in *Murphy v. Hawthorne,* 244 Pac., 79, 44 A. L. R., 1397, holds that colliding with an unlighted truck in the night time raises an issue of fact for the jury. To the same effect is the holding of the Connecticut Court in *Rozycki v. Grain and Products Co.,* 122 Atlantic, 717, 37 A. L. R., 582. It is to be noted, however, that there was evidence of circumstances obscuring the vision of the driver. The Arkansas Court, in the case of *Coca-Cola Bottling Co. v. Shipp,* decided in 1927, 297 S. W., 856, held that it was contributory negligence as a matter of law to run into a truck parked on the highway at night. Upon rehearing this ruling was reversed upon the ground that such facts raised an issue for the jury. The final ruling of the court upon rehearing was by a four to three vote.

These cases from other jurisdictions are referred to, in order to show the existing difference in judicial opinion upon the subject.

However, in this State, the law with respect to nonsuit upon the ground of contributory negligence is well settled. The main difficulty consists in applying the settled rules of law to the facts of a given case. In *Battle v. Cleave,* 179 N. C., 112, 101 S. E., 555, *Hoke, J.,* expressed the principle tersely and succinctly in these words: "The burden of showing contributory negligence, however, is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense."

Applying this declaration of law to the facts disclosed in the present record, are there "opposing inferences permissible from plaintiff's proof"? The evidence for plaintiff tended to show that he was keeping a proper lookout but that he was traveling up grade at the time of the collision, and the lights of his automobile having been adjusted accord-

ing to law, threw the rays "down on the surface of the road." Hence the lights would not "pick up" the truck, the bottom of which was standing fifty inches from the ground.

We are of the opinion that "opposing inferences" are permissible from plaintiff's proof, and therefore the case was properly submitted to the jury.

No error.

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EDWIN ANDERSON METTS v. PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 22 January, 1930.)

1. **Insurance R c—In this case held: policy was not income insurance and did not cover inability to obtain work after end of disability.**

   Under the provisions of the policy of health insurance indemnifying the insured from loss resulting from such disability as would result in continuous and total loss of business time during "the continuance of disability as defined above until such time as the insured engages in a gainful occupation": *Held*, the policy is not income insurance, and the loss insured against is that which the insured should sustain from the continuous loss of business time based upon the conditions thus expressed, and does not entitle the insured to recover thereon for his inability to obtain an employment such as he may desire after the termination of disability covered by the policy.

2. **Trial D c—Where plaintiff's testimony discloses facts entitling him to recovery and facts precluding recovery question is for jury.**

   Where the insured has testified as to the facts that would, if found in his favor by the jury, entitle him to recover certain damages as indemnity against loss from sickness under the terms of the policy, and also as to a basis of fact for damages excluded by the terms of the policy, it is for the jury to determine under proper instructions upon the weight of the evidence the essential facts at issue.

3. **Trial E e—Refusal of court to give instructions requested correctly stating the law is reversible error.**

   The refusal of the trial judge to fully give instructions requested that contain the law arising from the evidence is reversible error, and the requirement is not met by his partially giving them when his omissions are of material matters.

CIVIL ACTION, before *Harwood, Special Judge,* at March Special Term, 1929, of BUNCOMBE.

The plaintiff alleged that on or about 2 May, 1921, the defendant issued to him its policy No. 4610130, and that thereafter on or about 14 January, 1924, while the policy was in force, the "plaintiff was taken

sick and became ill with a bodily disease by reason of which he was totally disabled and incapacitated to do or carry on any work or occupation."

It was further alleged "that as soon as plaintiff, acting upon the advice of his said physician, was able to engage in a gainful occupation, to wit, on or about 1 January, 1925, the plaintiff began and continued diligently to seek a gainful occupation until 15 June, 1925, when he secured employment and began to engage in what he believed to be a gainful occupation."

The evidence discloses that the plaintiff was paid a benefit of $500 a month, as provided in the policy, up to 14 December, 1924, and he brings suit to recover $3,000 benefit in accordance with the terms of said policy, covering the period from 14 January, 1925, to 14 June, 1925, aggregating $3,000. Subsequently the plaintiff filed an amended complaint alleging that the policy was an income policy and not a disability policy, and that therefore he was entitled to receive $500 per month "until such time as the plaintiff engages in a gainful occupation."

The policy was offered in evidence and is denominated upon the face thereof "Non-Cancellable Income Policy." The language of the policy out of which the controversy grows is substantially as follows: "This policy provides indemnity . . . for loss of time by sickness. . . . The Pacific Mutual Life Insurance Company of California hereby insures Edwin Anderson Metts . . . against disability commencing while this policy is in force and resulting from sickness; such disability . . . to be such as will result in continuous total loss of business time. . . . The company will pay indemnity at the rate of $500 per month during the continuance of disability as defined above until such time as the insured engages in a gainful occupation."

The plaintiff testified that he suffered a total loss of business time on account of sickness "from the first part of January, 1924, until June, 1925—about the middle of June, 1925." On cross-examination he testified that he had alleged in his original complaint that he was able to engage in a gainful occupation on 1 January, 1925, and that his physician told him he was able to resume work after 1 January, 1925, but with certain restrictions to the effect that he could not engage in any work, "where it was confining, and I could not take a position out of doors." Plaintiff further testified: "After the first of January I began a search for a job, and if I had found a job that suited me on the first of January I would have taken it. If I had found a job that paid me what the company had me insured for, I would have taken it if it complied with the doctor's instructions. I was acting under his instructions and restrictions, and if I had found a job that suited me on the first of January, of course I would have taken it, and that would have ended the

matter. That is the way I understood the contract. I found a job in March, and the doctor turned it down. If the doctor would have approved it, I would have taken it in March if it suited me and suited the doctor. I was honestly looking for a job."

The issue submitted to the jury was: In what amounts, if any, is the defendant indebted to the plaintiff? The jury answered the issue awarding $3,000 with interest at six per cent per annum.

From judgment upon the verdict the defendant appealed.

*Rollins & Smathers for plaintiff.*
*J. E. Swain for defendant.*

BROGDEN, J. From the language employed in the policy it seems apparent that disability from sickness resulting "in continuous total loss of business time" is the basis of awarding indemnity, such indemnity being payable during the "continuance of disability . . . until such time as the insured engages in a gainful occupation."

It is admitted that the defendant owes the plaintiff the sum of $266.65 for indemnity accruing prior to 1 January, 1925. The question, then, is: Did the disability from sickness cause the plaintiff to suffer a "total loss of business time" from January, 1925, until June, 1925? Thus a clear cut issue of fact was presented. The plaintiff testified that he suffered a total loss of business time, due to sickness, from January, 1924, until June, 1925. This unequivocal testimony was qualified on cross-examination, but it was the function of the jury to determine the weight of the evidence and to find the essential facts. The case was tried upon the theory that the policy was a disability policy rather than an income policy.

The defendant in apt time requested the court to give the following instructions to the jury:

1. "If the jury should find from the evidence that the defendant issued to the plaintiff the policy and contract of insurance which has been introduced in evidence, and should further find that plaintiff filed his claim for benefits thereunder, and that the same were paid by the defendant at the rate of $500 a month from the time they became due until 14 December, 1924, and if the jury should further find that on 1 January, 1925, the plaintiff had sufficiently recovered from his illness so that he was able to engage in a gainful occupation as contemplated by the contract of insurance, then the plaintiff would be entitled to recover of the defendant benefits from 14 December, 1924, to 1 January, 1925, which amount may be calculated by you, the defendant claiming that it is the sum of $266.65, but would not be entitled to recover of the defendant anything after the said 1 January, 1925."

2. "If you should find from the evidence that the plaintiff was able on and after 1 January, 1925, to engage in a gainful occupation from and after that time, but was unable to find suitable employment until 14 June, 1925, he would not be entitled to recover benefits for that period under the terms of this contract of insurance, and it will be your duty to so answer the issue."

3. "Under this contract of insurance the defendant would not be due the plaintiff anything by reason of plaintiff's inability to find a job or secure employment. This contract of insurance does not insure to the plaintiff a job, or a gainful occupation, but guarantees to him an income in the sum of $500 per month during the period which he is prevented from engaging in a gainful occupation solely on account of bodily injury received while the policy was in force, or disease contracted while the said policy was in force, which resulted in his continuous total loss of business time."

The evidence introduced warranted the special instructions requested, and the omission of the trial judge to give them, as requested, constituted error. The trial judge gave a portion of instruction number 3, but it would seem that the defendant was entitled to the instruction in its entirety. *Horne v. Power Co.*, 141 N. C., 50, 53 S. E., 658; *Marcom v. R. R.*, 165 N. C., 259, 81 S. E., 290; *Parks v. Trust Co.*, 195 N. C., 453, 142 S. E., 473; *S. v. Lee*, 196 N. C., 714, 146 S. E., 858.

New trial.

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BRYAN CLAY v. E. E. CONNOR AND ELVA CONNOR.

(Filed 22 January, 1930.)

**Evidence D f—Testimony as to statement made by witness inconsistent with his testimony is competent for purpose of impeachment.**

In impeaching a witness, testimony as to previous statements he had made material and relevant to his cause of action which were inconsistent with his testimony on the stand, is competent as tending to weaken his credibility, and the exclusion of such testimony by the trial court entitles the defendant to a new trial.

APPEAL by defendants from *Sinclair, J.*, and a jury, at August Special Term, 1929, of BUNCOMBE. New trial.

Plaintiff contends that the defendants agreed to sell him a house and lot and fourteen shares of stock in the Fairview Gravity Water Company for the sum of $1,800. They made him a deed for the house and lot and delivered possession to him and he thereafter enjoyed the privileges which accrued to him as the purchaser of the water stock for a

period of five years, and was never called upon by the Fairview Gravity Water Company for any water rents, it being in evidence that the owner of as many as fourteen shares in the Fairview Gravity Water Company had the privilege of using water from said company without paying any water rents, and only those who did own so much stock thereof were so privileged or allowed to connect to said Fairview Gravity Water Company. The defendants did not deliver the shares of stock in the Water Company to plaintiff, although he enjoyed the full use of the water rights, and this suit was for the recovery of the shares of stock, or their value, it being in evidence that the shares have in the meantime been sold to somebody else.

Plaintiff's prayer for judgment was as follows:

"1. That he have and recover a decree of this court ordering and directing the said defendants to endorse and deliver to the plaintiff the said stock in the Fairview Gravity Water Company.

2. That the plaintiff have and recover of the defendants, and each of them, judgment in the sum of $350, for the breach of said contract, and interest thereon from 20 July, 1921.

3. That the deed conveying said premises to the plaintiff be reformed and made to show the total consideration therefor, as hereinbefore alleged.

4. For the costs of this action to be taxed by the clerk.

5. For all other and further relief to which the plaintiff may be entitled in law and equity."

Defendants denied that they agreed to sell the fourteen shares of stock in the Fairview Gravity Water Company, but sold only the house and lot.

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

"1. Was the free use of the water rights by the plaintiff as a stockholder in the Fairview Gravity Water Company an appurtenance belonging to the land described in the complaint? Answer: Yes.

2. In what amount, if any, has the plaintiff been damaged by the refusal of the defendant to transfer and deliver to the plaintiff their fourteen shares of stock in said water company? Answer: $350 without interest."

Judgment was rendered by the court below on the verdict. Defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

The material facts will be set forth in the opinion.

*Ellis C. Jones for plaintiff.*

*Wells, Blackstock & Taylor for defendants.*

CLARKSON, J. The plaintiff introduced evidence to the effect that he purchased the house and lot for $1,800, "with all the appurtenances thereunto belonging or in anywise appertaining." That he purchased with the house and lot the fourteen shares of stock valued at $350, in the water company, and defendants failed and refused to deliver same. The defendants denied that they sold the stock.

The defendant, E. E. Connor, testified as follows: "In June, 1922, I went out to Fairview and had a conversation with Mr. Clay, and offered to sell him my stock for one-half of what I originally offered. I had originally offered it for $350. He asked me to give him ten days to consider. I told him I had not come out with such a proposition, but if he wanted ten days I would give it to him." This evidence was objected to by plaintiff, and the court below sustained the objection, and defendants excepted and assigned error. The court below should have admitted the testimony.

J. E. Shuford, a witness for defendants, testified: "I was present with Mr. Connor some time in 1922, when he had a conversation with Mr. Clay at Fairview concerning the stock. Q. After that, after the conversation with Mr. Connor and Mr. Clay, when you were present, did you have another conversation with Mr. Clay in regard to this stock of the Fairview Gravity Company? A. I asked Mr. Clay after this conversation between him and Mr. Connor that I was witness to, I said 'Why don't you buy that stock?' He said he didn't buy the stock; that his deed for the house and lot included all appurtenances thereto and that gave him the right to the water stock; that was all the statement I heard Mr. Clay make." This evidence was objected to by plaintiff, and the court below sustained the objection and defendants excepted and assigned error. The court below should have admitted the testimony. The evidence was material as bearing on the contract alleged on one side and denied on the other: Was the stock sold with the house and lot? A deed carrying an easement as to water rights, see *Blankenship v. Dowtin,* 191 N. C., 790.

The court below, recognizing the controversy waged over a contract, charged the jury correctly as to what was a contract: "A contract, gentlemen of the jury, is said to be the meeting of two minds. The minds must come together and understand and agree upon each and every detail of the contract before it is considered a contract. If there is some detail or condition which one party understands and the other does not, that is not a contract; both minds must meet and understand and agree upon each and every detail." This definition does not mean immaterial details. This evidence was introduced by defendants for the purpose of impeaching plaintiff's testimony, and we think the exclusion prejudicial to the defendants.

Speaking to the subject, we find in Wigmore on Evidence, Vol. 2, 2d ed., part sec. 1040, p. 491-2, the following: "In the present mode of impeachment, there must be of course a *real inconsistency* between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true. . . . Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required. Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But it must appear 'prima facie' before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs? *Clifford, J.*, in *U. S. v. Holmes*, 1 Cliff., 116: 'Directness, in the technical sense, is not necessary to give the evidence that character, nor is it necessary that the contradiction should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testimony offered should have a tendency to explain, repel, counteract, or disprove the opposite statement in order to render it admissible.'"

"There are also three other modes of impeaching the credit of a witness: (1) By disproving his statements, made in court, by the testimony of other witnesses; (2) By proving statements of the witness made out of court, inconsistent with or contradicting those made by him on the witness-stand," etc. Jones on Evidence, 2d ed., sec. 844, p. 1074.

It is well settled that it is competent to show previous inconsistent statements made by witnesses to weaken their credibility and consistent statements to strengthen their credibility. Ordinarily a party may not impeach his own witness, but may show a different state of facts by another witness.

The issues upon another trial should be reformed. For the reasons given, there must be a

New trial.

DAN WRIGHT v. PHŒNIX UTILITY COMPANY, CAROLINA POWER AND LIGHT COMPANY AND JACK FERGUSON.

(Filed 22 January, 1930.)

1. **Removal of Causes C b—Where one resident defendant is a fellow-servant and the other the letter of an independent contract removal upon petition of nonresident contractor is proper.**

Where it appears in a petition for the removal of a cause from the State to the Federal Court that one of the resident defendants was a mere fellow-servant and that the nonresident defendant was an independent contractor doing work thereunder for the other resident defendant, and that the work under the contract was not inherently dangerous: *Held*, where the amount involved was sufficient and the proper procedure followed the petition of the nonresident defendant for the removal of the cause from the State to the Federal Court for diversity of citizenship was properly allowed.

2. **Master and Servant D a—In order to liability of letter of independent contract the work to be done must be inherently dangerous.**

The delegation of a duty under contract must be inherently dangerous in order for the letter of the contract to be liable for an injury inflicted upon an employee of the independent contractor in the performance of the work thereunder, and an inherent danger is one that is inherent to the performance of the contract itself and not a danger that might result from carelessness in the performance.

CIVIL ACTION, before *Grady, J.*, at Special August Term, 1929, of HAYWOOD.

The plaintiff alleged that he was employed by the Phœnix Utility Company, a foreign corporation, and that said corporation had a contract with its codefendant, Carolina Power and Light Company, by the terms of which the said Phœnix Utility Company "was to construct certain tunnels under Cataloochee Mountain and other mountains in Haywood County."

Plaintiff further alleged that he was required "to stand immediately over and adjacent to a silo, and there to cut cement sacks and to open the same, and to cause said cement to be poured into the mouth of the silo, and thereafter to be permitted to fall through said silo down to a floor below where the same was to be used in making concrete; and that in cutting the wires from said sacks, and in opening said sacks, and thereafter permitting the same to spill and fall through said silo, large quantities of cement and dust would fly through the air so thick that the plaintiff and other employees could not see any distance; and that the plaintiff was constantly required to breathe said cement and dust into his lungs, which caused plaintiff to be injured, damaged and ruined for life as hereinafter alleged." That Jack Ferguson "was placed in charge of a

dinkey engine and cars used by the defendants for conveying cement to the plant of the defendant companies near the mouth of one of the tunnels, . . . and it was the duty of said Jack Ferguson, foreman for the defendant companies, not to cause said dinkey engine and cars to be wrecked and the sacks of cement to be thrown on and around the plaintiff, and permitted to burst, so much so that the contents of said sacks spread over the plaintiff and caused him to inhale the same, and to be overcome as a result thereof."

Plaintiff further alleged that he began work on 10 August, 1928, and continued until 23 December, 1928, when he discovered "that he was inhaling large quantities of dust and particles of cement, and that it was causing him to cough, and otherwise injuring his chest, throat, larynx, and other parts of his body."

Plaintiff further alleged that he was furnished with a mask to prevent the inhalation of dust, and that after the masks were worn out the defendants failed to furnish other suitable masks.

The defendant, Phœnix Utility Company, in apt time, filed a petition for removal, alleging that the plaintiff was an employee of said corporation, and that the Carolina Power and Light Company had made a contract with the Phœnix Utility Company, whereby the Utility Company was to construct certain tunnels as an independent contractor.

The petitioner further alleged that Jack Ferguson was only a laborer and operator of a dinkey engine, and that said Ferguson was not a foreman, vice-principal, or agent in any respect whatsoever, "but was simply an employee engaged to perform certain services for the stipulated wages agreed upon; that the said Jack Ferguson had absolutely no authority over, or control, or direction of the plaintiff in this action, or any other employee upon said works, but was himself under the orders and directions of Harvey Allen, another employee of the petitioner, Phœnix Utility Company.

Both the Carolina Power and Light Company and Jack Ferguson are residents of North Carolina, and the petitioner alleged that the joinder of Jack Ferguson and the Carolina Power and Light Company, as defendants in this action was a fraudulent joinder as contemplated by law.

The motion for removal was granted by the clerk of the Superior Court of Haywood County, and the plaintiff appealed to the trial judge, who affirmed the judgment of the clerk and decreed that the cause should be removed to the Federal court, from which judgment the plaintiff appealed.

*Morgan, Ward & Stamey for plaintiff.*
*Rollins & Smathers and Harkins & Van Winkle for defendant.*

BROGDEN, J. It is to be observed that the plaintiff was not engaged in constructing tunnels, but that his sole duty was to open sacks of cement. Necessarily cement dust would arise from such an operation.

Practically every phase of the law of removal has been discussed by this Court in a long line of opinions, and it is, therefore, unnecessary to "thresh over old straw."

The simple question is whether the record, in the case at bar, falls within the principles of law announced in *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238, and *Givens v. Mfg. Co.,* 196 N. C., 377, 145 S. E., 681, or within the principles announced in *Rea v. Mirror Co.,* 158 N. C., 24, 73 S. E., 116; *Johnson v. Lumber Co.,* 189 N. C., 81, 126 S. E., 165, and *Cox v. Lumber Co.,* 193 N. C., 28, 136 S. E., 254.

We are of the opinion that the case falls within the line represented by the *Rea, Johnson* and *Cox cases, supra.* The petition for removal clearly discloses and engenders the conclusion, by ample statement of fact, that the resident defendant, Jack Ferguson, was not a foreman, *alter ego,* or vice-principal. However, the Carolina Power and Light Company, a resident of North Carolina, was also joined, but it is clear that the real defendant, Phœnix Utility Company, was an independent contractor. The Carolina Power and Light Company would not be liable, therefore, unless the work was inherently or intrinsically dangerous. The term "intrinsically dangerous" has been defined by this Court in several decisions, notably *Scales v. Lewellyn,* 172 N. C., 494, 90 S. E., 521. "We have recently said that "The rule in regard to 'intrinsically dangerous' work is based upon the unusual danger which inheres in the performance of the contract, and not from the collateral negligence of the contractor. Mere liability to injury is not the test, as injuries may result in any kind of work where it is carelessly done, although with proper care it is not specially hazardous." *Vogh v. Geer,* 171 N. C., 672, 23 A. L. R., 1016.

Applying the principles of law to the particular facts in the case at bar, we are of opinion that the work required of plaintiff does not fall within the legal classification of "inherently dangerous." Hence it necessarily follows that the real defendant is the Phœnix Utility Company, a nonresident corporation, and the order of removal was properly made.

Affirmed.

MRS. ROSA FRADY, ADMINISTRATRIX OF A. L. FRADY, DECEASED, v. THE HARRIS GRANITE QUARRIES COMPANY.

(Filed 22 January, 1930.)

**1. Master and Servant C b—Evidence of master's negligent failure to provide reasonably safe place to work held sufficient.**

Evidence tending to show that the plaintiff's intestate was required to oil certain machinery while in motion on an uncovered platform seven by ten feet, elevated one hundred feet from the ground, and that the leg of the plaintiff's intestate was caught between the unguarded running gear and a timber of the platform, resulting in his fatal injury: *Held*, the evidence was sufficient to take the case to the jury upon the question as to whether the master had exercised due care under the circumstances to furnish his servant a reasonably safe place to work. *Honeycutt v. Brick Co.*, 196 N. C., 556, cited and applied.

**2. Trial E g—Error in instruction in this case held cured by rest of charge and was harmless.**

A charge upon the measure of damages recoverable for a wrongful death will not be held for reversible error when correct except to the use of the words "present value and pecuniary net worth of the deceased" when it appears that he had correctly charged elsewhere that it was the present value "or" pecuniary worth, etc., and it appears from the verdict that the jury did not misunderstand the law thereon.

APPEAL by defendant from *Oglesby, J.*, and a jury, at April Term, 1929, of ROCKINGHAM. No error.

This is an action for actionable negligence brought by Mrs. Rosa Frady, administratrix of A. L. Frady, deceased, against the defendant for the death of her husband. The defendant denied any negligence and set up the defense of contributory negligence and assumption of risk.

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

"1. Was the plaintiff's intestate's death due to the negligence of the defendant, as alleged in the complaint? Answer: Yes.

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

3. Did the plaintiff's intestate assume the risk incident to his employment, as alleged in the answer? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,528."

*D. F. Mayberry for plaintiff.*

*Fred S. Hutchins and Hunter K. Penn for defendant.*

CLARKSON, J. The defendant introduced no evidence, and at the conclusion of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion, and in this we can see no error.

The contention of plaintiff is to the effect that defendant owed her intestate the duty, in the exercise of ordinary care, to furnish him a reasonably safe place to work, and that this failure was the proximate cause of the death of plaintiff's intestate. That he was employed as an oiler of certain machinery of defendant; that the machinery was on a platform 7 feet wide and 10 feet long, about 100 feet from the ground; that he went up to the platform on a ladder straight up and down. There was no roof over the machinery. It was open to the elements and no walls to the platform. When the machinery was in operation, it made a great noise and there was some vibration. "It is awfully dusty around there." The machinery was used to run defendant's quarry and rock crushing plant. On the platform was located the head-gear machinery and elevator buckets used in conveying stone from the crusher located below, and the elevator buckets were driven by a large cog wheel, which was about 44 inches in diameter as same ran in mesh with another small pinion wheel that was fastened on a shaft connected with the main drive. This large cog wheel was fastened on a shaft that connected with the elevator buckets. There was an oil cup or bearing located on the shaft on which this cog wheel was fastened, and was located about four inches from said wheel. And there was a similar oil cup or bearing located on the shafting which operated the small pinion gear wheel. The oil cup or bearing on the shaft supporting the large cog wheel was about forty inches from the nearest edge of the platform, and the oil cup on the shafting operated by the small pinion wheel was about one foot from the edge of said platform. These oil cups extended from 8 to 10 inches above the shafting or bearing and contained about two pounds of cup grease, and were filled when they got empty, but usually when the machinery was standing. There was no guard rail around any of the machinery except a little slant something like three-quarters of an inch by four or five inches which was located at a point almost shoulder high.

It was the duty of plaintiff's intestate to oil the machinery when in motion; to do this he had to come very close to the unguarded machinery. In order for the plaintiff's intestate to reach the oil cups, either to refill or inspect same, it was necessary for him to come within four inches of the large cog wheel as above set out, and to come within the same distance of the small pinion wheel which worked in mesh with the large cog wheel, and he had to come in close proximity to the ex-

posed and unguarded cogs. It can be inferred there was dust that naturally got on the platform. While on the platform to oil the machinery, on 30 March, 1927, plaintiff's intestate's right leg was caught between the gear and timber and he was fatally injured before the machine could be stopped.

Under the facts in this case, we think there is sufficient evidence to be submitted to the jury. We think the facts are somewhat similar to and as strong as those in *Honeycutt v. Brick Co.,* 196 N. C., 556.

In *Brooks v. DeSoto Oil Co.,* 100 Miss., p. 849, 31 Am. & Eng. Anno. Cases, note p. 658, it is said: "A number of recent cases support the doctrine that even in the absence of a statutory requirement it is the master's duty to guard shafting, set screws, etc., or at least that the question of the master's negligence in failing to guard such appliances is one for the determination of the jury," citing numerous authorities. *Boswell v. Hosiery Mills,* 191 N. C., at p. 556. See *Tisdale v. Tanning Co.,* 185 N. C., 497; *Maulden v. Chair Co.,* 196 N. C., 122; *Street v. Coal Co.,* 196 N. C., 178; *Mills v. Mfg. Co., ante,* 145; *West v. Mining Co., ante,* 150.

The defendant excepts to the following from the charge: "If you should find by the greater weight of the evidence she is entitled to recover, the court instructs you that the measure of damages is the present value and the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living expenses from his gross income, based upon his life expectancy." The charge is correct with the exception that the court should have charged "present value *of* (instead of *and)* the net pecuniary worth of the deceased." The court later charged fully and sufficiently the basis on which to enable the jury to make their estimate. The plaintiff's intestate was 47 years old, his expectancy was some 23 years. He was making $4.40 a day, and his living expenses were about $10 a week. From the amount of the verdict rendered we do not think the error was prejudicial. *Benton v. R. R.,* 122 N. C., 1007; *Purnell v. R. R.,* 190 N. C., 573.

From a careful reading of the charge, it was exceptionally fair to the parties to the action.

We find no prejudicial or reversible error.

No error.

C. S. WALTERS v. D. S. ROGERS ET AL.

(Filed 22 January, 1930.)

1. **Bills and Notes D c—Extension of time for payment of note does not release surety when he has expressly contracted to remain bound thereon.**

While ordinarily an extension of time granted the maker of a note will discharge the sureties from liability thereon, this principle does not apply when the sureties have agreed thereto or have signed the note specifying that such extension will not operate to discharge them from liability, and when the creditor at the time of granting the extension expressly reserves his rights against the sureties.

2. **Novation A a—Taking additional security for note and granting extension of time thereon is not a novation and does not release sureties.**

Where the sureties on a note agree by the terms of the note that an extension of time granted to maker would not discharge them from liability thereon, the taking by the payee of a mortgage expressly providing that it was additional security to the note and granting an extension of time for payment cannot be construed as a novation, and the sureties are not released thereby, the word novation implying the extinguishment of an existing debt and the creation of a new one.

APPEAL by defendant Lawson from *Moore, Special Judge,* at July Term, 1929, of STOKES.

The defendants executed and delivered to the plaintiff eight notes, maturing at different dates, each in form and figures as follows:

"$1,000.00. Pilot Mountain, N. C., 3 August, 1922.

December first, 1922, after date, we promise to pay to the order of C. S. Walters, one thousand dollars for value received, secured by deed of trust of even date herewith, negotiable and payable, without offset, at Farmers' Bank, Pilot Mountain, N. C., with interest from date at six per cent per annum; and this note may be charged to the account of either maker or endorser at maturity, and the subscribers and endorsers hereby agree to continue and remain bound for the payment of this note, and all interest thereon, notwithstanding any extension of time granted to the principal and notwithstanding any failure or omission to protest this note for nonpayment or to give notice of nonpayment or dishonor or protest to make presentment or demand for payment, hereby expressly waiving any protest and any and all notice of any extension of time or of nonpayment or dishonor or protest in any form, or any notice whatsoever.

| | | |
|---|---|---|
| Witness my hand and seal. | D. S. ROGERS. | (Seal.) |
| | GEORGE ROGERS. | (Seal.) |
| | M. C. LAWSON. | (Seal.) |
| Witness: DELLA ROGERS." | ROXILLA ROGERS. | (Seal.) |

Upon the pleadings and evidence the following verdict was returned:

1. Was the defendant Christian's intestate of sufficient mental capacity at the time of the execution of the notes sued on, to understand the nature and effect of the transaction? Answer: Yes.

2. Did the defendant, M. C. Lawson, sign the notes sued on, as surety? Answer: Yes.

3. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $4,484.16, with interest on $4,000 from 3 August, 1922, and interest on $4,484.16 from 15 May, 1928.

Judgment for the plaintiff and appeal by M. C. Lawson upon error assigned.

*J. D. Humphries and Folger & Folger for appellant.*

*W. Reade Johnson and A. C. Davis for appellee.*

ADAMS, J. On 3 August, 1922, the defendants executed and delivered to the plaintiff eight notes, each in the sum of $1,000, and to secure their payment the defendants D. S. Rogers and Roxilla Rogers, his wife, executed a deed of trust to W. R. Badgett, trustee, on two tracts of land. On 9 December, 1925, the defendants, George M. Rogers and his wife, executed to W. R. Badgett, trustee, a deed of trust, without notes, conveying two other tracts, the recited consideration being the plaintiff's agreement to extend the time for the payment of the notes secured by the first deed of trust. The plaintiff is a party to this instrument. The appellant contends that by virtue of the latter deed of trust and the recitals therein he was released from liability on the notes he signed. The two questions are whether he was discharged either by novation or by an extension of the time of payment.

There can be no doubt of the general rule that a nonassenting surety in a negotiable instrument is discharged from liability when the creditor makes a valid contract with the principal debtor to postpone the day of payment and thereby puts it beyond the power of the surety to pay the debt and sue the principal. But, if at the time the extension is granted to the principal, the creditor expressly reserves his remedies against the surety, the latter will not be discharged—this on the theory that in such event the surety could pay the debt and sue the principal, although the creditor could not. *Scott v. Harris,* 76 N. C., 205, 208; *Chemical Co. v. Pegram,* 112 N. C., 614; C. S., 3102. In the second deed of trust the plaintiff reserved his rights against the sureties in these words: "It is understood that the party of the third part (the plaintiff) is taking this as additional security and that no rights under the original deed of trust or notes are hereby waived or in any way released." Besides, when the appellant signed the notes he expressly contracted to remain bound for

their payment notwithstanding any extension of time granted to the principal. This is a valid and enforceable agreement. *Bank v. Couch,* 118 N. C., 436; *Fitts v. Grocery Co.,* 144 N. C., 463.

That the acceptance of the second deed of trust did not constitute a novation is manifest. Novation implies the extinguishment of one obligation by the substitution of another; but the plaintiff, as already pointed out, instead of extinguishing the debt represented by the notes and the first deed of trust, expressly reserved all his rights and took the second deed as additional security. There is

No error.

C. A. GEORGE v. JOHN H. SMATHERS AND JOSEPHINE SMATHERS.

(Filed 22 January, 1930.)

**Party Walls B a—Party building party wall may recover half its cost from adjacent owner using same—Termination of easements therein.**

Where the owner of lands builds a party wall partly upon his own lands and partly on the lands of the adjacent owner, and the latter builds to and uses the same: *Held,* equity implies that he will pay for such use one-half the cost of constructing the wall, although no express contract has been made concerning it, and upon the accidental destruction of the wall all easements therein terminate.

APPEAL by defendant, John H. Smathers, from *Harwood, Special Judge,* and a jury, at May Term, 1929, of HAYWOOD. No error.

The action grew out of a party wall being destroyed accidentally by fire.

The issue submitted to the jury, and their answer thereto, was as follows:

"Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $513.92."

*Alley & Alley for plaintiff.*

*Jos. E. Johnson for defendant, John H. Smathers.*

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence defendant moved for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and in this we can find no error. *George v. Smathers,* 196 N. C., 514.

The court below charged the jury as follows: "The law in this State is that where one adjoining owner constructs a party wall, one-half on his own land and one-half on the land of the adjoining owner, and the

adjoining owner fails to contribute to the expense or the cost of the wall, after the wall has been built by the party in question and the adjoining property owner joins his building to the wall and uses it—makes use of it without paying the man who built the wall his half of the costs of the wall—the man who builds the wall can bring his action against the man who owns the adjoining land, and the man who is using the wall without paying for his half, and recover for half the costs of the wall. Therefore, in this case, if you are satisfied from this evidence, and by its greater weight, that the plaintiff, C. A. George, constructed a party wall on the line between himself and Dr. Smathers; and if you should find that after the wall was completed, or before the wall was begun, or during the period of its construction, the plaintiff, C. A. George, asked the defendant, J. H. Smathers, to contribute his half of the costs of the wall, and if you should further find from the evidence, after the wall was built and paid for by the plaintiff, George, that Dr. Smathers erected a building on his lot, adjoining the lot owned by the plaintiff, George, and attached his building to the wall built by the plaintiff and used the wall built by George, then George would be entitled to recover from Dr. Smathers for one-half of the costs of that wall."

The defendant excepted and assigned error to the foregoing charge. The assignment of error cannot be sustained.

We think the case of *Reid v. King,* 158 N. C., 85, is practically on all-fours with the case at bar, and fully sustains the charge of the court below.

"Contracts implied in law, or more properly *quasi* or constructive contracts, are a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action *ex contractu.* They rest solely on a legal fiction, and are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy, and the obligation arises not from consent, as in case of true contracts, but from the law or natural equity. So, when the party to be bound is under a legal obligation to perform the duty from which his promise is inferred, the law may infer a promise even as against his intention." 13 C. J., at p. 244. See *Cole v. Wagner,* 197 N. C., 692.

We do not think the court below erred in sustaining the plaintiff's motion for judgment as in case of nonsuit on the counterclaim.

The controversy arose over the accidental destruction of the original building by fire. When buildings are destroyed, with party walls, ordinarily this puts an end to any easement. The parties by operation of law are put in *status ante.*

In 20 R. C. L., sec. 9, at p. 1088, it is said: "Where a wall is erected half upon each side of the line dividing two properties, and used as a party wall, the easement of support existing in favor of the respective owners in the half of the wall on the other's land ceases at the moment of their accidental destruction, because of the termination of the necessity which gave rise to the easement. If houses having a party wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases and either owner may dispose as he pleases of the part on his ground."

In 30 Cyc., p. 779, we find: "The easement of support by means of the common party wall, which belongs to adjoining buildings, ceases with the state of things which created it, when the wall is accidentally destroyed, or is so much decayed as to require rebuilding from the foundation."

In the case of *Heartt v. Kruger,* 9 L. R. A., p. 135 (2d headnote) it is held: "The accidental destruction of a party wall, as to the maintenance of which there has been no grant of a perpetual right, will destroy all right in either party to claim an easement in the property of the other for the further support of a party wall notwithstanding some portion of the foundation of the old wall remains standing."

We think the facts in reference to the counterclaim come within the above principles of law. Looking through the entire evidence and the law of this and other jurisdictions, we see in the judgment

No error.

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FLORA REEL, ADMINISTRATRIX OF W. R. REEL, DECEASED, v. T. J. BOYD.

(Filed 22 January, 1930.)

**Limitation of Actions B a: Partnership F a—Entry on account by surviving partner is not partnership act and does not affect running of statute.**

A partnership terminates upon the death of one of the partners, C. S., 3277, and where an open, mutual and current account has existed between the partnership and another and the surviving partner continues to run the partnership and enters items on the account, which are not necessary to the winding up of the partnership affairs, such acts after the termination of the partnership are not partnership acts and the statute of limitations will run on the account due the terminated partnership from the last item entered thereon before the death of the deceased partner.

CIVIL ACTION, before *Daniels, J.,* at April Term, 1929, of PAMLICO.

Summons was issued on 12 September, 1927, and served on 1 October, 1927. W. R. Reel and E. D. Reel were partners engaged in the mercan-

tile business in Arapahoe, Pamlico County, North Carolina, under the firm name of W. R. Reel & Bro. The defendant on various dates from June, 1917, to 1 December, 1924, purchased goods, wares and merchandise from said partnership and made various payments on said account, both in cash and by delivering cotton and other commodities to said partnership. It seems to be conceded that the account between the parties was a mutual, open and current account. W. R. Reel died intestate 7 May, 1924, and the plaintiff was duly appointed administratrix of his estate on 2 June, 1924. Apparently, the business was continued by the surviving partner until 27 November, 1925, when a petition was filed in the Superior Court by the surviving partner and the plaintiff and the heirs and distributees of W. R. Reel, deceased, for the purpose of dividing and disposing of the property belonging to the partnership. An order was duly made conveying certain property of the partnership to E. D. Reel, surviving partner, as his share in the partnership assets, and certain property was conveyed and delivered to the plaintiff, including the account against the defendant. Thereafter, on 12 September, 1927, the plaintiff brought a suit against the defendant on said account, claiming that there was a balance due by the defendant amounting to $683.06. The defendant pleaded payment, and also the three-year statute of limitations.

The pertinent part of the judgment is as follows: "The court having announced that he would hold that the distributees and heirs at law of W. R. Reel having been made parties at the November Term, 1928, and having adopted the complaint filed by the administratrix as their complaint, and the statute of limitation having been pleaded by the defendants, that the claims of the said distributees are barred by the statute of limitation, to which ruling the plaintiffs except and in deference to the intimation of the court move to take a nonsuit and appeal to the Supreme Court."

*D. L. Ward and Z. V. Rawls for plaintiff.*
*F. C. Brinson for defendant.*

BROGDEN, J. The death of a partner terminates a partnership, and the surviving partner, under the statute and decisions of this Court, is charged with the duty of reducing the personal property to cash and settling the partnership affairs. C. S., 3277 *et seq.; Bank v. Hollingsworth,* 135 N. C., 556, 47 S. E., 618; *Sherrod v. Mayo,* 156 N. C., 144, 72 S. E., 216; *Irvin v. Harris,* 182 N. C., 656, 109 S. E., 871. Therefore, the surviving partner was empowered to collect the account due by the defendant to the partnership.

The plaintiff, however, contends that the business was continued by the surviving partner, and that there were mutual transactions between the surviving partner and the defendant as late as December, 1924, and that, as this action was instituted in September, 1927, the account was not barred by the statute of limitations. The principle of law applicable to such a situation was declared in *Walker v. Miller,* 139 N. C., 448, 52 S. E., 125. The Court declared: "The fact that they chose to carry on the business under the name of the old firm, does not change their rights. They could, if they had so preferred, selected any other name. Of course, the old firm, as originally constituted, was dissolved by the death of the partners. Whether the parties so intended or not, the legal effect of what they did was to create a new and original arrangement for carrying on business, the capital of which was contributed by the beneficial owners of the property. . . . It is not uncommon for a business which, by reason of the credit and reputation for integrity of the founders, possesses value to be conducted, after their death, under its original name. In such cases it is the business of the living owners, and contracts made by or with them, under the name adopted, have all the force and effect as if made in the names of the individuals to whom it belongs."

In view of this principle of law, it is obvious that the dealings between the parties after the death of W. R. Reel in May, 1924, would not have the effect of preventing the bar of the statute of limitations as to all items of the account prior to the death of the partner. Thus, in *Irvin v. Harris, supra,* it was held that "payments made on these notes by the surviving partner, after the partnership was dissolved by the death of H. C. Harris, cannot operate to keep alive or renew against the estate of a deceased partner, claims which, except for such payments, would be barred by the statute of limitations."

The decisions upon the subject rest upon the theory that independent transactions after the death of a partner constitute no part of the partnership assets, except, of course, in cases in which future dealings between the parties are necessary to complete existing contracts or as an incident of winding up partnership affairs. No such condition, however, is presented by this record. We are therefore of the opinion that the judgment was correct.

Affirmed.

STATE OF NORTH CAROLINA EX REL. H. GRADY GOODE ET AL. v. CHASE BRENIZER ET AL.

(Filed 22 January, 1930.)

**1. Schools and School Districts D a—Statutes in regard to the election and appointment of school commissioners of Charlotte construed.**

The act of the Legislature, chapter 142, Private Laws of 1929, amending chapter 78, Private Laws of 1923, providing for the election and appointment of the school commissioners of a certain city has the effect of modifying C. S., 2900, and the board of school commissioners should be elected or appointed, in case of vacancy, according to the provisions of chapter 78, Private Laws of 1923, as amended by the act of 1929.

**2. Statutes C a—Private act held to modify prior general statute.**

Ordinarily an act of the Legislature will be construed as a modification of a former general act as to the appointment and election of municipal officers when otherwise it would be meaningless.

APPEAL by defendants, Chase Brenizer, W. R. Foreman, J. A. Houston and J. W. Cole, from *Shaw, J.*, at October Term, 1929, of MECKLENBURG.

Civil action in the nature of *quo warranto* to try title to offices of school commissioners of the city of Charlotte, submitted on an agreed statement of facts.

Prior to the election held in the city of Charlotte on 12 March, 1929, at which "Plan D," as provided by the Municipal Corporation Act of 1917, C. S., 2887, *et seq.*, was duly adopted by the voters of said city, the defendants constituted the board of school commissioners of the city of Charlotte under laws previously adopted by the voters, which also provided for the election of said board by the people.

The first and second provisos of C. S., 2900, incorporated in "Plan D," are as follows: *"Provided, however,* that if any city adopting this form of government shall have, at the time of such adoption, a board of education acting under powers and regulations given it by a vote of the voters of such city, such board of education shall remain in existence and the powers and duties given it by a vote of the people shall be and remain in full force and effect, except that the appointment of the members of such board of education shall vest in the council: *Provided further,* that in all cases wherein the said board of education is now elected by the people, such board shall continue to be elected by the electors of the municipality at the same time and in the same manner as the city council is elected, as herein provided."

On the same day that "Plan D" was voted upon in the city of Charlotte, the General Assembly, then in session, enacted chapter 142, Private

Laws, 1929, as an amendment to chapter 78, Private Laws, 1923, which provides that any vacancy in the board of school commissioners for the city of Charlotte shall be filled by said board until the next general election, when a successor is to be elected for the remainder of the unexpired term, but the act was not to apply to present appointees, and all laws and clauses of laws in conflict therewith were repealed.

On Tuesday after the first Monday in May, 1929, an election was duly called in the city of Charlotte for the purpose of electing the five members of the city council, as provided by "Plan D," and the municipal board of elections ruled that there should also be elected at said election seven members of the board of school commissioners of said city.

The plaintiffs contend that they were duly elected members of the board of school commissioners for the city of Charlotte at said election, and as such they have made demand upon the defendants for the possession of all books, papers, records and property belonging to said board of school commissioners, which demand has been refused.

The defendants contend that they were not affected by said election, in which they took no part, and that they still lawfully constitute the board of school commissioners for the city of Charlotte.

From a judgment in favor of the plaintiffs, the defendants, Chase Brenizer, W. R. Foreman, J. A. Houston and J. W. Cole, appeal, assigning error.

*John M. Robinson and Hunter M. Jones for plaintiffs.*
*W. T. Shore and Cansler & Cansler for defendants.*

STACY, C. J., after stating the case: The case turns upon the question as to whether chapter 142, Private Laws, 1929, has the effect of modifying C. S., 2900 so as to provide for the election and appointment in case of vacancy, of members of the board of school commissioners of the city of Charlotte according to the provisions of chapter 78, Private Laws, 1923, as amended by said act of 1929. We think it does, else said act would be meaningless, and it is to be presumed that the Legislature intended something by its enactment. Such would seem to be its reasonable import. *Felmet v. Commissioners,* 186 N. C., 251, 119 S. E., 353. It follows, therefore, from this view of the matter, that the action of the plaintiffs should have been dismissed.

Error.

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF W. L. BLACK, DECEASED, v. AGNES MAE BLACK, WIDOW OF SAID W. L. BLACK.

(Filed 22 January, 1930.)

1. **Husband and Wife G a—Executor of husband is liable for one-half of amount of joint note given for purchase price of land held by entireties.**

   Where the husband purchases lands and takes title to himself and wife by entireties, and they execute a mortgage on the lands to secure the balance of the purchase price, and the husband dies leaving a will from which his wife dissents: *Held*, as between the wife and the executor of the husband they are liable as joint makers of the note, each for half thereof unaffected by the wife's dissent from the will, although she takes title to the whole of the lands as the survivor.

2. **Same—Husband and wife are jointly and severally liable on joint note given for purchase price of land held by the entireties.**

   Where the husband and wife are joint makers of a note secured by their mortgage for the balance of the purchase price of lands held by them by entireties, their liabilities on the note are joint and several, C. S., 458, 3041, 3166, and upon the payment of the note by one of them the other may be held liable for contribution, the incidents of the estate not being incidents of the note.

3. **Same—Execution against land held by entireties may be had on judgment on joint note given for purchase price.**

   Under judgment against a husband and wife upon their joint note given for the balance of the purchase price of lands held by them by entireties, execution may be issued against the land so held.

APPEAL by plaintiff and defendant from a judgment of *Schenck, J.*, rendered at June Term, 1929, of BUNCOMBE, upon an agreed statement of facts submitted as a controversy without action under C. S., 626. Affirmed.

*Bourne, Parker & Jones for plaintiff.*
*Fortune & Fortune for defendant.*

ADAMS, J. W. L. Black and Agnes Mae Black were husband and wife. The husband bought some land and had it conveyed to his wife and himself. Thereupon they executed a deed of trust on real property securing three notes given by them for the purchase price. W. L. Black paid the first two notes, but died leaving the third unpaid. This note was given to Fairy Owens and husband for $3,000, was dated 22 December, 1925, was payable three years after date, was under seal, and was in the usual form. It contained the recital, "For value received we promise to pay," etc.

W. L. Black made a will appointing the plaintiff his executor and trustee and his widow dissented; but the dissent, it will be seen, is not decisive of the controversy or even material to its determination.

After the plaintiff qualified as executor a question arose as to the liability of the parties to the payees of the note. The plaintiff contended that Black and his wife took an estate by the entirety and that upon the husband's death the wife, as survivor, became the sole owner of the land and is solely liable on the note; or, if not solely liable that she is liable to the extent of one-half the amount due. The defendant contended that she is not liable at all, but if liable, in no event for more than one-half the note.

Upon an agreed statement of facts the controversy was submitted to the Superior Court of Buncombe County and Judge Schenck adjudged that W. L. Black and his wife, by the execution of the note became jointly and severally liable, and that as between the parties the plaintiff is liable to the payment of one-half the note, with interest, and that the defendant is liable to the payment of one-half, with interest. Both parties excepted to the judgment and appealed.

This is an adjudication of the liability of the makers of the note as between themselves, not an adjudication of their liability to the payees. In attacking the judgment the plaintiff suggests that Mrs. Black acquired title to the land (and, indeed, to two other lots which were purchased in like manner and paid for by the husband) as the trustee of a resulting trust. But this position is not defensible. If a husband purchase land with his wife's money and take title in his own name he will usually be declared the trustee of a resulting trust, enforceable by the wife; but if he purchase land with his own money and have the title conveyed to his wife the relation between them will raise the presumption of a gift or of a provision for her support. *Tyndall v. Tyndall,* 186 N. C., 272; *Ricks v. Wilson,* 154 N. C., 282; *Arrington v. Arrington,* 114 N. C., 116.

The quality of the estate by the entirety was not affected by Mrs. Black's dissent from her husband's will. He knew that if she survived him her title could not be divested by his testament. *Todd v. Zachary,* 45 N. C., 286. As indicated, the only question is the liability of the parties *inter se.*

It is unnecessary to summarize the incidents of this anomalous estate. They are comprehensively set forth in *Davis v. Bass,* 188 N. C., 200. If the note in question had been reduced to judgment against the makers an execution could have been issued against the estate which they held by the entirety. *Johnson v. Leavitt,* 188 N. C., 682. This is so because they held the estate under the five-fold unity of interest, title, time, possession, and person. Under the common-law fiction of a unity of person

each was seized of the whole and not merely of a part of the estate. But it does not follow that the judgment could have been collected only out of the estate by the entirety. The note does not recite a special consideration; it was given "for value received" and was "secured by a deed of trust on real estate." The makers were primarily liable jointly and severally. C. S., 458, 3041, 3166; *Roberson v. Spain,* 173 N. C., 23. The unity of person is an incident of the estate created by the conveyance to Black and his wife; it is not incident to the note. As the makers were jointly and severally liable, payment of the whole amount by either would entitle the other, or his representative, to contribution—an equity which arises when one of several parties who are liable on a common debt discharges the obligation for the benefit of all. It results that as between themselves each party is liable for one-half the debt, although the whole title is vested in the defendant as the survivor. The judgment is

Affirmed.

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AREY BRICK AND LUMBER COMPANY v. F. W. WAGGONER, TRUSTEE, AND JULIA MAE WAGGONER.

(Filed 22 January, 1930.)

**1. Mortgages H p—In this case held: there was no evidence of fraud in execution of power of sale in trust deed and sale was valid.**

Where a deed of trust on land is executed to secure payment of two notes, given to different creditors, providing for the sale of the land at auction by the trustee upon default in payment of principal or interest on the notes it secured after advertisement according to law, upon the execution of the power of sale by the trustee according to the terms of the deed and the bidding in of the property by the wife of the mortgagee and daughter-in-law of the trustee: *Held,* the sale will not be set aside in a suit by one of the creditors secured by the deed, there being no evidence of fraud upon which the sale is sought to be set aside.

**2. Same—There is a presumption in favor of the regularity of the execution of the power of sale in a deed of trust.**

There is a presumption in favor of the regularity of the execution of the power of sale in a deed of trust or mortgage.

CIVIL ACTION, before *Harding, J.,* at May Term, 1929, of ROWAN.

On 21 January, 1927, S. M. Broadway and wife executed and delivered two promissory notes, one in the sum of $1,415.75, payable to J. M. Waggoner, and another for $305.17 to the plaintiff, Arey Brick and Lumber Company. Both notes were secured by a mortgage executed by Broadway and wife to F. W. Waggoner, trustee. The mortgage provided that the makers of the notes were to pay $30 per month on the indebted-

ness, and that $15 thereof was to be applied on the note of the plaintiff each month until paid in full, and then the sum of $30 was to be applied to the payment of the J. M. Waggoner note. The first installment of $30 was to be due 1 February, 1927, "and a like installment on the first of each and every month after until the whole amount of the above mentioned notes has been paid."

The mortgage further provided that if Broadway and wife "shall fail to pay the principal and interest on said indebtedness, or any installment of either, as same becomes due, . . . it shall be lawful for and the duty of said party of the second part (trustee) to sell said premises, as a whole or in subdivisions, at public auction, at the courthouse door in Salisbury, North Carolina, after due advertisement as provided by law for mortgage sales."

In the brief of defendant it is stated that the mortgage deed contains a provision as follows: "It shall be lawful for, and the duty of the said party of the second part (trustee) upon demand of the holder of the indebtedness or any part thereof, or any party interested therein to advertise as provided by law for mortgage sales," etc. However, the record before us does not disclose any such provision. The evidence tended to show that J. M. Waggoner, the holder of one of the notes, notified F. W. Waggoner, the mortgagee or trustee, that the makers of the notes "were not paying on the note and he wanted to sell the house and lot," etc. Thereupon, F. W. Waggoner, trustee, duly advertised the property and sold the same at public auction in accordance with the terms of said mortgage on 17 December, 1927, at which time Julia Mae Waggoner, wife of J. M. Waggoner, and daughter-in-law of the trustee, purchased the land for $25, assuming the payment of a first mortgage of $2,500, held by Davis and Wily Branch Atlantic Bank and Trust Company. The sale remained open for ten days and no increased bid having been placed upon the purchase price, the trustee executed and delivered a deed for the premises to the purchaser. Thereafter, the plaintiff filed a petition to set aside said deed, alleging that the property was really worth $4,000, and "that the circumstances surrounding the sale and manner in which the same was conducted caused a fraud to be perpetrated upon petitioner by respondents herein named; that the acts and conduct of respondents were intended to deceive, calculated to deceive, did deceive your petitioner, and the respondents benefited thereby, and your petitioner was damaged thereby; and that therefore the said sale and deed to Julia Mae Waggoner are null and void and of no effect."

*C. P. Barringer for plaintiff.*
*Walter H. Woodson for defendant.*

BROGDEN, J. The mortgage contained a power of sale, which power was to be exercised upon default in the payment of installments of indebtedness, and the evidence discloses default in the payment of the installments and demand made upon the mortgagee to sell the land described in the mortgage.

The plaintiff seeks to set aside the deed of the mortgagee, made pursuant to the terms of the mortgage, upon the ground of fraud. There was no evidence of fraud introduced at the hearing, and therefore the judgment of nonsuit was properly entered. Furthermore, in the absence of evidence to the contrary, there is a presumption in favor of the regularity of the execution of the power of sale in a mortgage or deed of trust. *Jenkins v. Griffin,* 175 N. C., 184, 95 S. E., 166; *Brown v. Sheets,* 197 N. C., 268.

Affirmed.

D. W. McFADDEN v. A. J. MAXWELL, COMMISSIONER OF REVENUE, ET AL.

(Filed 22 January, 1930.)

**Taxation A a—Action to recover amount paid as license tax is removable to Wake County on motion of Commissioner of Revenue.**

License taxes assessed by the Commissioner of Revenue are assessed and payable in his office in Wake County, and where a person who has paid a license tax so assessed demands its refund and brings action to recover the amount paid on the ground that the tax was wrongfully assessed against him, his cause of action arose in Wake County, and where the suit is brought in the court of another county it is removable to Wake County upon motion of the Commissioner, C. S., 464, subject to the power of the court to change the place of trial as provided by C. S., 471.

APPEAL by defendants from order of *Schenck, J.,* at May Term, 1929, of BUNCOMBE. Reversed.

This action was begun in the Superior Court of Buncombe County to recover the sum of $420, paid by the plaintiff, a resident of said county, to the defendant, the Commissioner of Revenue of North Carolina. The said sum of money was demanded of plaintiff by said Commissioner of Revenue as a license tax assessed against the plaintiff under the provisions of section 209(c) of chapter 80, Public Laws of North Carolina, 1927.

In his complaint plaintiff alleges that said license tax was wrongfully and unlawfully assessed against him and that plaintiff paid the same under protest, in writing, and immediately demanded the return of the sum of money so paid by the said Commissioner of Revenue. Upon the

refusal of said demand, this action was begun in accordance with the provisions of section 464, chapter 80, Public Laws of North Carolina, 1927.

The action was heard upon defendant's appeal from the order of the clerk of the Superior Court of Buncombe County, denying defendant's motion made in apt time, that the action be removed from the Superior Court of Buncombe County to the Superior Court of Wake County, for trial, in accordance with the provisions of C. S., 464.

From the order of Judge Schenck, affirming the order of the clerk, and denying their motion for the removal of the action for trial, defendants appealed to the Supreme Court.

*Ward & Allen for plaintiff.*

*Attorney-General Brummitt and Assistant Attorney-General Siler for defendants.*

CONNOR, J. The only question presented by this appeal is whether there was error in the refusal of defendants' motion for the removal of the action, for trial, from the Superior Court of Buncombe County, where the action was begun, to the Superior Court of Wake County, where defendants, public officers, who are sued by reason of their official acts, allege that the cause of action upon which plaintiff demands relief, arose. If there was error in the order refusing the motion, the order must be reversed; otherwise, it must be affirmed.

Ordinarily, and subject to statutory provisions not applicable to the instant case, an action begun and pending in the Superior Court of the county in which the plaintiff resides, must be tried in said county. C. S., 469. Where, however, the action is against a public officer, and the cause of action is founded upon his official acts, the action must be tried in the county where the cause of action, or some part thereof, arose, subject to the power of the court to change the place of trial, in cases as provided by law. C. S., 464. If the action against a public officer is begun in the Superior Court of a county other than that in which the cause of action arose, it may nevertheless be tried in said county, if the defendant does not, in apt time, file a motion for its removal to the proper county. By failure to file such motion, he waives the right of removal, and the action may be tried in the county in which it was begun and is pending. *Ragan v. Doughton,* 192 N. C., 500, 135 S. E., 328. Actions against State officers, authorized by statute, to recover sums paid as taxes, upon the allegation that the tax was invalid or wrongfully and unlawfully assessed, have generally been brought in Wake County. *Tea Co. v. Doughton,* 196 N. C., 145, 144 S. E., 701. The question to be decided on this appeal does not seem to have been heretofore presented to this Court.

License taxes, assessed by the Commissioner of Revenue of this State, under statutory authority, are due and payable at his office in the city of Raleigh, in Wake County. When such taxes are paid, they are paid, usually in fact, and always in contemplation of law, in Wake County. Where a person, who has paid a license tax assessed against him by the Commissioner of Revenue of the State, brings an action against said Commissioner to recover the amount paid on the ground that the tax was wrongfully and unlawfully assessed against him, he must allege as facts constituting his cause of action, payment of the tax, and demand upon the Commissioner for its refund. Both the payment of the tax and the demand are made in Wake County where, as required by statute, the Commissioner maintains his office, and where his official duties are performed. If the action, as authorized by the statute (section 464, Public Laws of N. C., 1927) is begun in the Superior Court of a county other than Wake County, the Commissioner is entitled as a matter of right to have the action removed to the Superior Court of Wake County for trial, under the provisions of C. S., 464, subject to the power of said court to change the place of trial in cases as provided by law. C. S., 471.

A sound public policy forbids that a public officer, when sued upon a cause of action founded upon his official conduct, should be required to leave his office, and attend courts in distant counties, to defend the action. McIntosh N. C. Prac. & Proc., p. 267. As said in *Cecil v. High Point,* 165 N. C., 431, 81 S. E., 616: "The private convenience must yield to the public good." If the law were otherwise, the State's business, which must be performed by its officers at their offices in the city of Raleigh, in Wake County, would suffer because of the absence of these officers from their offices, in attendance upon courts of other counties.

Defendants' motion for the removal of this action from the Superior Court of Buncombe County to the Superior Court of Wake County should have been allowed. For error in refusing the motion, the order must be

Reversed.

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J. LONDON AND SOLOMON ROBINOWITZ, EXECUTORS OF JOSEPH ARLICH, DECEASED, ET AL. v. CHAIM PELCHENAN, TRUSTEE, ET AL.

(Filed 22 January, 1930.)

**Wills E i—Executor may bring action for construction of will by the court.**

The courts of the State have jurisdiction to hear and determine an action to construe a will, and the construction of the will may be given by the court in caveat proceedings after the determination of the validity of the will in favor of the propounders.

LONDON *v.* PELCHENAN.

APPEAL by plaintiff from *Moore, J.*, at August Term, 1929, of GUILFORD. Affirmed.

This action was begun in the Superior Court of Guilford County.

Plaintiffs, upon the facts alleged in their complaint, pray for the advice of the court with respect to the performance of their duties in the administration of the estate of their testator.

From judgment approving a contract which the plaintiffs propose to enter into with the heirs at law and distributees of their testator, in settlement of their claims against said estate, and otherwise advising and approving the conduct of the plaintiffs, in the performance of their duties, plaintiffs appealed to the Supreme Court.

*D. C. MacRae, Gold & York and Frazier & Frazier for plaintiffs.*
*R. M. Robinson and S. J. Stern for defendant.*

CONNOR, J. Joseph Arlich died 15 September, 1925. A paper-writing was thereafter probated in common form as his last will and testament by the clerk of the Superior Court of Guilford County, North Carolina. By his said last will and testament the said Joseph Arlich devised and bequeathed all his property, real and personal, to the trustee named therein, to be held and disposed of by said trustee in accordance with the terms and provisions of the trust created by the said Joseph Arlich in his said last will and testament. No part of his property was devised or bequeathed in said last will and testament to persons who are his heirs at law or distributees. The executors named in said last will and testament have qualified for the performance of their duties and are now engaged in the administration of the estate of their testator.

Serious questions have been raised by persons who claim to be the heirs at law and distributees of the estate of Joseph Arlich, deceased, touching the validity of said last will and testament, and also affecting its construction. The executors and the testamentary trustee have entered into negotiations with such persons, and have agreed, subject to the approval of the court, upon a settlement of these questions. This settlement has been reduced to writing and in this action is submitted to the court for its approval. The defendants in this action are all the beneficiaries of the trust created by the will, and all the heirs at law and distributees of the testator. The court upon consideration of the facts found by it, rendered judgment approving the settlement made by the executors with the heirs at law, and distributees of their testator, and also approving the administration of the estate by the executors involved in said settlement.

The only question presented on the appeal of plaintiffs to this Court is whether the court has jurisdiction of the action. This question is

answered in the affirmative upon the authority of our decision in *Trust Co. v. Lentz,* 196 N. C., 398, 143 S. E., 776. In that case it is said: "The right of the plaintiff to bring this action and to seek the advice of the court on an existing state of facts, upon which a decree or some directions in the nature of a decree may be founded, is supported by a number of decisions, notably *Balsley v. Balsley,* 116 N. C., 472, 21 S. E., 594; *Tyson v. Tyson,* 100 N. C., 360, 6 S. E., 707; *Little v. Thorne,* 93 N. C., 69, and *Tayloe v. Bond,* 45 N. C., 5.

We have read the judgment rendered in this action. It is well considered, and is in all respects

Affirmed.

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CHARLES W. FALLS v. MONARCH COTTON MILLS COMPANY.

(Filed 22 January, 1930.)

**Master and Servant C c—Evidence that injury was caused by act of fellow-servant held sufficient to be submitted to jury and sustain their verdict in defendant's favor.**

Where in an action by an employee to recover damages for a negligent injury the evidence is conflicting as to whether the explosion of the barrel resulting in the injury in suit was caused by the negligent act of a foreman or a fellow-servant, the submission of the question to the jury is proper, and judgment upon their answer to the issue of the defendant's negligence in the negative will be sustained.

CIVIL ACTION, before *Cowper, Special Judge,* at May Special Term, 1929, of GASTON.

Plaintiff offered evidence tending to show that the defendant in the course of its business used a large iron pot for heating water to be used in scrubbing floors in its mill. This pot had a screen about it to prevent the escape of fire. The plaintiff was an ordinary laborer and a part of his duties consisted in scrubbing floors. The screen about the pot was made from "old steel drums" or barrels. These barrels were cut open and placed around the pot. There was a barrel in front to protect the legs of the workmen from being burned while dipping water from the pot. On the evening before plaintiff was injured the old screen had been taken away, and the plaintiff was directed to fix a new screen. He testified: "I split the drums open, hammered them out, and stood them around the fire." After doing this the plaintiff left and his brother Tom Falls placed another barrel or drum at the front opening in the background or screen. Tom Falls testified that Caldwell told him to place the barrel at that point. Caldwell, who was a witness for plaintiff,

denied that he was a boss or a foreman, or that he told Tom Falls to place the barrel in front of the screen. Early next morning about 4:30 a.m., plaintiff made a fire which had burned down, and he was building another around the pot when the barrel exploded, and as a result thereof, plaintiff suffered serious and permanent injury.

Issues of negligence, contributory negligence, and damages were submitted to the jury, and the jury answered the issue of negligence in the negative.

From judgment upon the verdict the plaintiff appealed.

*S. D. Dolley and A. C. Jones for plaintiff.*
*George B. Mason for defendant.*

BROGDEN, J. The plaintiff offered evidence tending to show that the barrel which caused the injury, was negligently placed near the fire by order of a foreman or boss of defendant, and that this barrel was unsafe—thus rendering the place of work unsafe and dangerous. There was evidence that the barrel was voluntarily selected and set in position by fellow-servants of plaintiff.

The defendant offered no evidence.

Both views were submitted to the jury, and the issue of negligence was answered in the negative. There is no new or novel proposition of law presented, and a careful examination of the record and briefs discloses no reversible error.

No error.

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W. D. COLWELL ET UX. v. MARTIN O'BRIEN ET UX.

(Filed 22 January, 1930.)

**Specific performance B a—Tenancy by the curtesy initiate is sufficient interest in land to support specific performance against husband.**

Where in a contract by a husband and wife to convey lands of the wife the wife's privy examination is not taken, the interest of the husband as tenant by the curtesy *initiate* is sufficient to support an action for specific performance against him so far as his interest is concerned.

PETITION by defendants to rehear this case, reported in 196 N. C., 508, 146 S. E., 142.

*Bellamy & Bellamy, John A. Stevens and I. C. Wright for plaintiffs.*
*Bryan & Campbell for defendants.*

STACY, C. J. Has a tenant by the curtesy *initiate* sufficient interest in land to support an action for specific performance, so far as his interest is concerned, under a contract of sale signed by said tenant and his wife, where the wife's privy examination is not taken? We think so.

While it is true that a husband as tenant by the curtesy *initiate,* under our present Constitution and laws, has no present estate in his wife's land which he may sell or lease, without his wife's joinder, or which may be taken under execution against him *(Cecil v. Smith,* 81 N. C., 285), nevertheless, after birth of issue alive, curtesy *initiate* is still regarded with us as a valuable interest which may ripen into an estate of freehold, or curtesy *consummate* as at common law. *Jackson v. Beard,* 162 N. C., 105, 78 S. E., 6; *Jones v. Coffey,* 109 N. C., 515, 14 S. E., 84; *Walker v. Long,* 109 N. C., 510, 14 S. E., 299. Indeed, in *Thompson v. Wiggins,* 109 N. C., 508, 14 S. E., 301, it was said that "He has, by the curtesy *initiate,* a freehold interest, but not an estate, in the property."

But without regard to the precise interest which a tenant by the curtesy *initiate* may have, the question presently presented is whether the contract of sale, set out in 196 N. C., 508, is valid and capable of being specifically enforced so far as the interest of the male defendant is concerned. We see no valid reason for disturbing the original opinion heretofore filed in the case.

Petition dismissed.

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GUY M. THOMAS ET AL. v. Z. V. CONYERS ET AL.

(Filed 22 January, 1930.)

**1. Partition B a—In this case held: the transaction constituted a parol partition the validity of which the parties were estopped to deny.**

Where before his death the deceased owner of lands has made deeds to separate pieces or tracts of land to each and all of his children, and more than two years thereafter, and after his death, his executrices under a will disposing of his other lands and containing a residuary clause, have found the deeds and had them recorded, and the grantees after the recording of the deeds have entered each upon his or her respective parts as set out in the deed to him or her, exercised the right of absolute ownership, leased, collected rents and paid taxes, and have been parties to legal proceedings wherein they have regarded themselves as owners under the deeds: *Held,* though the deeds of gift are invalid because not registered within two years, the transactions operate as a parol partition of the lands, accepted and acquiesced in by the parties, and they are equitably estopped by their acts and conduct from maintaining that the deeds, or any of them, are invalid.

**2. Estoppel C a—Action of the parties in this case held to estop them from denying validity of parol partition.**

Where the heirs at law of a deceased owner of lands have accepted and gone into possession of their parts of land under separate deeds executed by the deceased, but kept by him in a bank without delivery until found by his executrices after his death and by them recorded: *Held*, the heirs at law are estopped by their acts and conduct, and are bound by the terms and conditions of their deeds which they have accepted from thereafter successfully claiming that the partition by parol was invalid.

**3. Same—Equitable estoppel is distinct from presumption of ouster raised by adverse possession.**

The doctrine of equitable estoppel is entirely distinct from the presumption of an ouster created by continuous adverse possession for a period of twenty years.

APPEAL by petitioners from *Moore, J.*, at September Term, 1929, of GUILFORD. Affirmed.

This was a proceeding brought and heard on appeal in the Superior Court before the clerk for partition of land. David E. Thomas, Sr., died 27 January, 1925, leaving a widow, Emma C. Thomas, and the following children: Guy M. Thomas, Ethel Thomas Porter, Jessie Fogle, the petitioners, and Dorothy Thomas Conyers, Mary Belle Thomas Petty, and David E. Thomas, Jr. In January, 1920, and prior thereto, David E. Thomas, Sr., joined by his wife, Emma C. Thomas, executed fourteen deeds of gift whereby he attempted to convey to his several children certain tracts or lots of land which he owned. The name of each grantee and the description of each lot are set out in the petition. Certain of the deeds purport to convey lots with limitations over to contingent remaindermen, including grandchildren who were represented by a guardian *ad litem*. Neither one of these deeds was delivered to the grantee during the lifetime of David E. Thomas, Sr., but all were kept in a lock box in a bank in Greensboro. David E. Thomas made a will, and a few days after his death Emma C. Thomas and Dorothy Conyers, his executrices, filed all the deeds for record in the office of the register of deeds and took them from the office after registration and delivered or mailed them to the several grantees. The widow and the children received these deeds and went into possession of the respective tracts or lots therein described and immediately began to collect rent from the tenants; that is, the widow and D. E. Thomas, Jr., collected rent from several store buildings on the land described in the deed from David E. Thomas to Emma Thomas, without objection by any of the other children until 9 February, 1928, when Emma Thomas made a deed to D. E. Thomas, Jr., who since that time has collected the rent without objection.

Each of the children of said David E. Thomas, except D. E. Thomas, Jr., was given one vacant lot each in fee simple, together with improved real property with limitations similar to those in the deed to D. E. Thomas, Jr., which vacant lots and improved real property were taken by the respective grantees under deeds which were received by the respective grantees more than two years after the date and execution thereof. The said Jessie Thomas Fogle and husband have sold and conveyed the vacant lot which she took under one of said deeds to Richardson Realty, Inc., the deed by which said land was conveyed being recorded.

The defendant, Mary Belle Thomas Petty, has likewise conveyed her vacant lot by deed to Richardson Realty, Inc., dated 14 June, 1926. The petitioner, Guy Monroe Thomas, has conveyed his vacant lot to said Dorothy Conyers by deed dated 2 June, 1924; said Dorothy Conyers in turn has conveyed said lot to C. C. Hudson by deed, and said Hudson has conveyed the same to Richardson Realty, Inc., by a subsequent deed. All of said deeds contained full covenants of seizin and warranty. On 17 March, 1924, Ethel Thomas Porter executed a written lease on the store building on the property which she took under one of said deeds from D. E. Thomas to Ferguson and Grosbayne for one year from 1 April, 1924, at a rental of $540, with an option for renewal for another year.

Ethel Thomas Porter also gave Richardson Realty, Inc., an option upon the vacant lot embraced in one of the deeds executed to her by D. E. Thomas, but said option was not exercised and said property was not purchased under said option by the optionee.

All the children of said D. E. Thomas have since his death treated as their own the respective parcels of land described in the said deeds, have paid taxes on said respective parcels of land, have collected rents from said respective parcels, have conveyed the respective parcels herein set out, and prior to this proceeding asserted no interest in and made no claim to the other tracts or parcels held by the other children and heirs at law of said D. E. Thomas, deceased.

In the year 1927 the said Dorothy Conyers Thomas instituted and prosecuted to a conclusion a proceeding in the Superior Court of Guilford County, in which all of the other children of D. E. Thomas were parties, setting out that one of the tracts of land conveyed to her was her property in fee (subject to contingencies provided in said deed), which proceeding was for the purpose of obtaining permission from the court to apply to repairs and improvements upon said property a sum of money allowed by appraisers for the taking of a strip from the front of her said lot by the city of Greensboro under condemnation proceedings for the widening of Davie Street. In her verified complaint she alleged

that she was the owner of said property, and that she acquired title thereto under deed from D. E. Thomas, dated 3 January, 1920.

In the year 1927 the said Guy Monroe Thomas instituted and prosecuted to a conclusion a proceeding in the Superior Court of Guilford County, in which all of the other children of D. E. Thomas were parties, setting out that one of the tracts of land conveyed to him by one of the deeds was his property in fee (subject to contingencies provided in said deed), which proceeding was for the purpose of obtaining permission from the court to apply to repairs and improvements upon said property a sum of money allowed by appraisers for the taking of a strip from the front of his said lot by the city of Greensboro under condemnation proceedings for the widening of Davie Street. In his verified complaint filed in said proceeding, he alleged that he was the owner of said property as aforesaid and that he acquired title thereto under deed from D. E. Thomas, dated 3 January, 1920.

The executrices named in the will of D. E. Thomas, namely, Dorothy Thomas Conyers (or Hayden) and Emma C. Thomas, duly qualified as such, and sold the lands mentioned in said will and distributed the proceeds as provided by the terms of said will. The executrices treated said deeds as a partition of the lands of the said D. E. Thomas as among his children, and did not undertake to sell the same under the power of sale or divide the proceeds according to the residuary clause of said will. The devisees and legatees in the residuary clause of said will are the six children of said D. E. Thomas. These were all the children of said D. E. Thomas living at his death, and no child of his had died before his death, leaving a child or children surviving. The executrices have paid all debts, all inheritance taxes, all the State taxes, all other claims and demands against the estate of the said D. E. Thomas, and have filed their final account and have been discharged. Under the will of D. E. Thomas they sold real estate other than that described in the deeds heretofore mentioned and distributed the net proceeds thereof to the six children of D. E. Thomas, as set out in the record.

The final account showing said distribution was filed in the office of the clerk of the Superior Court of Guilford County, North Carolina, on 27 August, 1924, and recorded. Checks in full were mailed to each of said respective children, together with a copy of said final account, and received by them, and none of said children filed exceptions to said final account, nor did they otherwise make any objection to the sale under the residuary clause of the will only of the real estate not embraced in the deeds.

On or about 9 February, 1928, Emma Thomas, executed and delivered to David E. Thomas, Jr., a deed for all her right, title and interest in and to the lands described in deed recorded in Book 570, page 324.

During the year 1927 David E. Thomas, Jr., having found that taxes, assessments, water rents and repairs were consuming practically all of the income from said property described in the deed from his father to him, instituted a special proceeding in the Superior Court of Guilford County for the sale of the lands described in said deed; all of the children of D. E. Thomas, Sr., and the husbands and wives of such of them as were married, said children being the same persons as the heirs at law of said D. E. Thomas, Sr., at his death, and the same persons who were devisees and legatees in the residuary clause of the will of the said D. E. Thomas, Sr., were made parties defendant in said proceeding. Other parties defendant to said proceeding were the grandchildren of D. E. Thomas, Sr., then *in esse,* and a guardian *ad litem* was appointed to represent said minors and the persons not *in esse,* and said guardian was personally served with summons and filed answer, and said minors, all being nonresidents, were served by publication.

At the sale under said proceeding, D. E. Thomas, Jr., became the last and highest bidder at public auction for said property and a deed was made to him by R. M. Robinson, commissioner, and has been duly recorded. By mistake and inadvertence, the deed from D. E. Thomas, Sr., to the defendant D. E. Thomas, Jr., recorded in the office of the register of deeds of Guilford County in Book 410, page 34, fixes the beginning point in the description of the property therein conveyed at the northeast corner of the intersection of South Davie and Sycamore streets, whereas, in truth and in fact the true beginning point is at the southwest corner of the intersection of South Davie and Sycamore streets, and a frontage of 115 feet is called for on Davie Street, whereas in truth and in fact said frontage is 109 feet.

It is admitted that in the proceeding entitled "David E. Thomas, Jr., *v.* Guy Monroe Thomas *et al.*," the present defendant, David E. Thomas, Jr., paid into court in said action the sum of $8,072.60 as the value, as found by the court, of the interest of contingent remaindermen in and to the tract of land involved in said proceeding.

D. E. Thomas, Sr., did not devise or attempt to devise in his last will and testament the lands conveyed to his children and his widow described in the petition in this cause, but considered that he had already given the same to his widow and children respectively by the deeds referred to in the petition.

Upon the facts set out in the record it was adjudged that the error in the deed from D. E. Thomas, Sr., to D. E. Thomas, Jr., be corrected; and further: (1) That the deeds executed by D. E. Thomas and his wife and left in the bank were void (a) because they were not delivered during the lifetime of D. E. Thomas, Sr., and (b) because, being deeds of gift, they were not recorded within two years after their execution.

(2) That D. E. Thomas, Sr., intended to make a partition among his children of the lands described in these deeds. (3) That the deeds constituted a parol partition of the grantor's land, which the children by their conduct accepted, ratified and confirmed, the ownership of each tract being specifically set out. (4) That the clerk pay to D. E. Thomas, Jr., $8,072.60, with interest from 5 March, 1928. The petitioners excepted and appealed. The appeal of the widow and guardian *ad litem* was not prosecuted.

*Frazier & Frazier for petitioners.*
*Hines, Kelly & Boren for Dorothy Conyers and Mary Belle Petty.*
*F. P. Hobgood, Jr., and R. M. Robinson for D. E. Thomas, Jr.*
*Hoyle & Harrison for defendant Mrs. Emma C. Thomas.*

ADAMS, J. The adjudication that the deeds deposited in the bank are void accords with the contention of the plaintiffs, and the defendants did not appeal. Furthermore, the adjudication is amply supported by former decisions of this Court. *Tarlton v. Griggs,* 131 N. C., 216; *Perry v. Hackney,* 142 N. C., 368; *Booth v. Hairston,* 193 N. C., 278. But the decisive question is whether in this situation the plaintiffs are entitled to the relief they seek. They are not, if in contemplation of law they are precluded from claiming title to the tracts or lots of land which are in possession of the other parties; and they are precluded if they are equitably estopped—if they are barred from asserting title by such conduct as would render their present assertion obviously unjust.

There is a distinction between equitable estoppel and estoppels at common law. The latter include estoppel by record, estoppel by deed, and certain cases of estoppel *in pais* which are recognized in courts of law. Equitable estoppel *in pais* owes its origin and development to the notion of justice promulgated by courts of chancery. It embraces estoppel by conduct which rests upon the necessity of compelling the observance of good faith. Bispham's Prin. Eq., sec. 281 *et seq.* "This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Boddie v. Bond,* 154 N. C., 359, 365.

It is true that a parol partition of land is voidable. *Collier v. Paper Corporation,* 172 N. C., 74. It is likewise true that one who accepts a deed is bound by its terms and conditions. *Fort v. Allen,* 110 N. C., 183.

That the foregoing principles were applied in the present case may be seen by reference to the following paragraph in the judgment: "Al-

though these deeds were void, the fact that they were paper writings definitely describing the respective tracts of land therein set out by metes and bounds, taken together with the acts and conduct of the grantees named therein relative to the tracts described in said deeds, constituted a parol partition of the lands of D. E. Thomas, Sr., among his six children, and the said children, by reason of their accepting and retaining the said deeds, after the registration thereof by the executrices, and by reason of their taking possession of the parcels or tracts of land described in the respective deeds to them, paying taxes on said respective tracts or parcels of land, renting, leasing and collecting rents from said respective tracts or parcels of land, and by selling and conveying some of the said parcels thus allotted to them, and by giving options thereon, and by doing the other acts and things set out in the agreed statement of facts, have thereby adopted, affirmed, ratified and acquiesced in the said parol partition, and have each and all mutually estopped themselves from claiming any of the said tracts or parcels of land described in any of the said deeds in which any of the other children were named as grantees."

The doctrine of equitable estoppel is entirely distinct from the presumption of an ouster created by adverse possession for a period of twenty years. The judgment is

Affirmed.

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ED HAMPTON v. REX SPINNING COMPANY.

(Filed 22 January, 1930.)

**Judgments L a—Judgment of nonsuit on merits of case bars subsequent action on same cause on substantially the same evidence.**

Where a cause of action has been heard under the pleadings upon evidence and a judgment as of nonsuit therein has been entered for insufficiency of the evidence to establish it, and the judgment is not appealed from, but remains upon the trial docket of the Superior Court unimpeached, another action between the same parties on the same cause of action and upon substantially the same evidence is barred by the former judgment which as to the second action is *res adjudicata*, C. S., 415.

CIVIL ACTION for damages for personal injury, heard by *McElroy, J.*, at June Term, 1929, of CHEROKEE.

The facts essential to the presentation of the legal question involved are contained in the judgment, which is as follows:

"This cause coming on to be heard before his Honor, P. A. McElroy, judge holding the courts of said county, at June Term, 1929, in said court, and after the jury has been sworn and empaneled, the pleadings

read, and testimony introduced on behalf of both plaintiff and defendant, and defendant having pleaded in its amendment to its answer in this cause, a former determination or judgment of nonsuit against the plaintiff on the same cause of action and on the same testimony, at April Term, 1928, of said court, from the records and uncontradicted testimony the court finds the following facts:

1. That on 16 May, 1927, the plaintiff in this action, Ed Hampton, instituted an action against the Rex Spinning Company above named by suing out a summons therein which was duly served on said defendant Spinning Company on the 21st day of said month, and on the 27th day of said month, plaintiff duly filed his complaint in said action in the office of the clerk of the Superior Court of said county, to which complaint the defendant filed its answer on 17 June, 1927.

2. That said cause came on for trial at April Term, 1928, of said court, before Honorable Cameron McRae, special judge, and a jury which was duly sworn and empaneled, at which trial the said plaintiff, Ed Hampton, and one J. T. Cowart, were the only witnesses who testified for plaintiff, and at the conclusion of plaintiff's testimony, and after consideration of the cause upon its merits, the court adjudged that the plaintiff, upon all the evidence, was not entitled to recover, and rendered a judgment of nonsuit against the plaintiff, from which plaintiff did not appeal, but which judgment is still in force and unreversed and has been since the date of said trial.

3. That on 29 March, 1929, the plaintiff, Ed Hampton, who is admitted to be the same Ed Hampton who was plaintiff in said former suit sued out another summons against the same defendant, which summons with the complaint of plaintiff therein was duly served on Rex Spinning Company 3 April, 1929, to which complaint defendant on 27 April, 1929, duly filed its answer, and thereafter by leave of the court, after it had overruled the first plea of estoppel set up an amendment to defendant's said answer, and stricken out so much of paragraph two of the second estoppel set up in said amendment as contained the testimony of witness, defendant's amendment to its answer was filed, and upon plaintiff's said complaint and answer of defendant, with its amendment as allowed by the court, the cause came on to be tried at the June Term, 1929, of said court.

4. That after a jury had been chosen, sworn and empaneled, the pleadings read and testimony introduced by both plaintiff and defendant, at the conclusion of the testimony, and upon the undisputed evidence in the case and records introduced, the court finds that the cause of action set up in the present action is the same as that set up in the first action which fully appears from the pleadings in both cases which were introduced in evidence.

5. The court further finds from the uncontradicted testimony of both the plaintiff Ed Hampton and his witness, J. T. Cowart, who were the only witnesses for plaintiff examined on the present trial with reference to said cause of action, that the testimony as to the cause of action was the same in both, except that on the former trial plaintiff testified that Brady was his boss, and on the latter the witness Goodman testified that Brady was under him and over plaintiff, who had orders from Brady.

Whereupon, it is considered, adjudged and decreed by the court that this, the plaintiff's cause of action in this suit, has heretofore been determined adversely to him upon the merits, and that by the judgment in said former cause that the said plaintiff is estopped to prosecute the same cause of action against the same defendant in the present cause, the court holding that the plaintiff is estopped by the former judgment.

It is further considered, adjudged and decreed by the court that the plaintiff take nothing by his action, the same be dismissed, and that this defendant go hence without day."

From the judgment rendered plaintiff appealed.

*J. D. Mallonee and Moody & Moody for plaintiff.*
*Dillard & Hill for defendant.*

BROGDEN, J. Does a judgment of nonsuit, duly entered by a judge of the Superior Court, upon the merits of the cause, and after all the evidence has been introduced by plaintiff, become determinative and conclusive in a new action brought under C. S., 415, upon the same complaint and upon the same evidence?

The plaintiff contends that C. S., 415, permits any number of suits upon the same cause of action, brought within one year from a judgment of nonsuit, irrespective of the reason or grounds of such judgment, and bases his contention upon the following decisions of this Court: *Meekins v. R. R.,* 131 N. C., 1, 42 S. E., 333; *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800; *Evans v. Alridge,* 133 N. C., 378, 45 S. E., 772; *Nunnally v. R. R.,* 134 N. C., 755, 46 S. E., 5; *Hood v. Telegraph Co.,* 135 N. C., 622, 47 S. E., 607; *Tussey v. Owen,* 147 N. C., 335, 61 S. E., 180; *Henderson v. Eller,* 147 N. C., 582, 61 S. E., 446; *Lumber Co. v. Harrison,* 148 N. C., 333, 62 S. E., 413; *Starling v. Cotton Mills,* 168 N. C., 229, 84 S. E., 388; *Culbreth v. R. R.,* 169 N. C., 723, 86 S. E., 624.

The principle was thus stated in *Tussey v. Owen, supra:* "The plaintiff may, under the decisions of this Court, bring another action within one year after the judgment of nonsuit. . . . If this were an open question the writer of this opinion would not give his assent to the principle as thus decided, as a dismissal of the case upon the merits,

whether called a nonsuit or by any other name, is equivalent in law to a judgment upon a demurrer to the evidence, which by the best-considered authorities has the same effect as a bar to another suit, as a judgment rendered upon a demurrer to the pleadings or as any other judgment upon the merits. . . . But the law has been settled the other way by actual decision upon the very question, and we now hold unanimously that another suit will lie within a year of the nonsuit."

In *Lumber Co. v. Harrison, supra,* the Court said: "We decided in *Hood v. Telegraph Co.,* 135 N. C., 622, where the same point was presented, that a second action will lie, although nonsuit had been entered against the plaintiff, on the merits, in a former suit for the same cause of action and upon the same state of facts." The decisions cited as a basis for the doctrine announced in the *Hood, Tussey* and *Harrison cases, supra,* are *Meekins v. R. R., supra; Prevatt v. Harrelson, supra; Evans v. Alridge, supra,* and *Nunnally v. R. R., supra.* It may be interesting to observe that the *Meekins case* involved a voluntary nonsuit. The *Prevatt case* contains no reference to a former suit between the parties. In the case of *Evans v. Alridge, supra,* the action was dismissed because of failure of proof of showing the publication of summons. The *Nunnally case, supra,* is a memorandum decision which does not disclose the facts. Apparently, therefore, prior to the *Hood case, supra,* there was no case involving the nonsuit of a prior action upon the merits. The original record in the *Hood case* discloses that there was a trial of the cause upon its merits and the plaintiff was nonsuited. Upon appeal to the Supreme Court the nonsuit was affirmed, 130 N. C., 743, and the petition to rehear filed by plaintiff was dismissed. *Hood v. Tel. Co.,* 131 N. C., 828, 43 S. E., 1003.

So, upon the authorities cited, it is contended that a person may bring a suit, fully develop his case in open court; and, if a judgment of nonsuit is entered, he then, within twelve months, may bring identically the same action, offer identically the same evidence, and if again nonsuited, may continue the same process indefinitely. In other words, if a plaintiff should live as long as Methuselah, he could probably bring five hundred law suits upon the same complaint, offer the same evidence, and yet, there would be no end to the litigation. The same result would follow in the event he appealed to the Supreme Court upon each judgment of nonsuit, and the Supreme Court should affirm the lower court. *Trull v. R. R.,* 151 N. C., 545, 66 S. E., 586.

The defendant, however, contends that a distinction should be drawn between cases nonsuited upon the merits, and after a full hearing, and cases nonsuited for other reasons. In support of this contention the defendant points out that even in *Hood v. Tel. Co.,* 135 N. C., 622, this Court ruled that: "Plaintiff's action was dismissed for lack of sufficient

evidence on a former trial," etc. This statement implies that the case then under consideration was different from the former case. Again in *Culbreth v. R. R.*, this Court said: "But the plaintiff may hereafter show, if she can, that such a claim was filed, as a nonsuit does not prevent the bringing of another action or bar the same, as we held in *Tussey v. Owen*. . . . Unless the plaintiff can supply the deficiency in the present testimony, another suit will not avail her." This language clearly implies that additional evidence would be necessary in the second suit.

Also, in *Smith v. Mfg. Co., supra,* the Court declared that the plaintiff would not be estopped from bringing another suit "for the merits of the case, it appeared, have not been passed upon by any conclusive ruling of the court."

In *Tuttle v. Warren,* 153 N. C., 459, 69 S. E., 426, the Court declared that the plaintiff had "shown no legal right to claim under Reuben Warren, or to avail himself of his possession of the *locus in quo*. . . . In the absence of the essential proof, we must sustain the judgment of nonsuit, but this does not prevent the plaintiff from bringing another action . . . and supplying the present deficiency in the evidence, if he is able to do so." Unquestionably, this declaration of the Court implied that the second case could not be identical with the case then being presently decided.

Again in *Prevatt v. Harrelson, supra,* the Court said: "In refusing the motion to nonsuit there was error for which, under the uniform practice of this Court, there must be a new trial. On such new trial, if the plaintiff can 'mend his lick' by additional and sufficient evidence, well and good. He has not lost the land. If he cannot offer such additional evidence, this, though a new trial in form, will be virtually a finality against him." This declaration also carries upon its face the suggestion that if a new suit is brought and maintained, the "lick must be mended" and additional evidence produced. North Carolina Practice and Procedure, by McIntosh, p. 615.

Furthermore, in *Grimes v. Andrews,* 170 N. C., 516, 87 S. E., 341, it was declared: "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, but no such thing occurred here."

The same suggestion appears in the case of *Northcott v. Northcott,* 175 N. C., 148, 95 S. E., 104.

The quotations from various cases where the question has been considered in this jurisdiction tend to show at least some degree of confusion upon the subject. Certainly, it is apparent that it was present in the minds of the judges writing the opinions that a judgment of nonsuit

upon the merits and after a full hearing, stood upon a different basis from those judgments of nonsuit upon other causes and upon other grounds.

In the last analysis, the philosophy of all procedure is based upon the idea of giving each litigant a full and ample "day in court" upon the merits of his cause, and, when this has been done, he is not entitled to another "day in court" upon identically the same cause of action and upon the identical evidence offered at a former hearing.

The confusion in the law upon the matter now presented can only be eliminated by recognizing a distinction between judgments of nonsuit upon the merits of the entire controversy and after a full hearing in court, and judgments of nonsuit upon other grounds.

Of course a bill of peace might be invoked, if litigation over identically the same cause of action and upon identically the same evidence, should be so long drawn out as to threaten to invade the domain of eternity. But even if the bill of peace should be granted, it would result in a limitation of the application of C. S., 415, as applied in some of the cases referred to—notably *Lumber Co. v. Harrison, supra,* and *Tussey v. Owen, supra.* Certainly, if such limitation can be imposed through enforcing a bill of peace, it would perhaps save time and cost to so construe C. S., 415, in the present case as to produce a uniform rule of procedure upon the question under discussion.

Other states have statutes somewhat similar to C. S., 415, but they vary greatly in their scope. Furthermore, the construction thereof by the courts are not uniform. *Bradshaw v. Bank,* 172 N. C., 632, 37 C. J., 1082.

We therefore hold, upon the particular facts appearing in the judgment in this cause, that a plaintiff may bring an action and have it heard upon its merits, and, if a judgment of nonsuit is then entered, he may bring a new suit within one year, or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court, he may under C. S., 415, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata,* and thus end that particular litigation.

Affirmed.

THE COMMERCE UNION TRUST COMPANY, MORRIS LIPINSKY, S. WHITLOCK LIPINSKY, AND LOUIS LIPINSKY, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF SOLOMON LIPINSKY, DECEASED, AND MORRIS LIPINSKY, S. WHITLOCK LIPINSKY AND LOUIS LIPINSKY, INDIVIDUALLY, V. CLARA LIPINSKY THORNER.

(Filed 22 January, 1930.)

**Wills E h—In this case held: trust estate did not terminate upon death of widow and income payable to her should be reinvested as corpus of the estate.**

Where the trustees of a trust estate created by will are directed to invest and reinvest the residue of the estate and hold the same in trust and pay the widow three-fourths of the income and pay one-fourth to the testator's daughter, the trust estate to continue during the life of the widow and for a period of not less than ten years from the date of the testator's death, and then the corpus be distributed to his four children, including the daughter, or their children *per stirpes* in case of death of the testator's children: *Held*, by the express and unambiguous language of the will, the trust estate does not terminate within the ten-year period from testator's death, and where the widow has died during this period, the three-fourths of the income she received under the will, there being no other disposition of such income, should be kept and reinvested by the trustees as an accumulation of the corpus of the trust estate until the specified life of the trust, and then divided in accordance with the distribution specified in the will.

APPEAL from *Finley, J.*, at November Term, 1929, of BUNCOMBE. Reversed.

Controversy without action (C. S., 626). The parties to this controversy submitted to the court for its determination their conflicting contentions, upon a statement of facts agreed, with respect to the disposition by testamentary trustees of the income from a trust fund in their hands.

The trust fund was created by Solomon Lipinsky, deceased, by Item VI of his last will and testament, and is held by the trustees named therein under the provisions of said item. The said item is as follows:

"Item VI. I give, devise and bequeath all the rest, residue and remainder of my property and estate, real, personal and mixed, of whatsoever nature and wherever situate, and whether now owned by me, or hereafter acquired, or to which I may be entitled at the time of my death, unto the Commerce Union Trust Company of Asheville, in the State of North Carolina, and my sons, Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky, or the survivors of them, as trustees, to be held by it and them, in trust, for the uses and purposes hereinafter set forth and declared, that is to say:

(a) The said trustees, or the survivors of them, shall hold, manage and administer said property and estate, collecting the income and profits

thereof for and during the term of the natural life of my beloved wife, Eva Lipinsky, and for a period of not less than ten years after the date of my death, and shall pay over three-fourths of the net income derived therefrom, to my said wife so long as she shall live, and one-fourth to my said daughter, and, upon the death of my said wife, or the expiration of said ten years after the date of my death (if she shall not so long survive me), or as soon thereafter as practicable, the said trustees shall pay over, deliver, transfer and convey all the principal, or corpus, of said trust fund or residuary estate to, and divide the same equally among my four children, Morris Lipinsky, S. Whitlock Lipinsky, Louis Lipinsky and Clara Lipinsky Thorner, share and share alike, thus terminating the trust by this item of my will created; *Provided, however,* if any one or more of said children shall have died leaving lawful issue, or legally adopted child, then the share of such child of mine so dying shall be paid over and delivered to the said Commerce Union Trust Company of Asheville, as trustee, to be held, invested and reinvested by it, the net income thereof to be paid by said trustee to the guardian of such issue until the youngest thereof attains the age of twenty-one years, when the principal of said share, or shares, shall be divided equally between such issue, *per stirpes,* or the heirs of their body, *per stirpes.*

(b) The said trustees, or said Trust Company and a majority of the survivors of the other of said trustees, are authorized to sell and convey, either at public or private sale, and at such prices as they deem best, any real or personal property coming into their hands by virtue of this item of my will, and to reinvest the proceeds thereof, and, from time to time, to change or alter, by exchange or otherwise, any investments of said trust fund, if the interest of said trust fund appears to be benefited thereby; special care, however, shall be taken by said trustees to avoid speculation and to insure safe and profitable investments;

(c) I direct that the said Trust Company shall keep a clear, concise and separate record of the several trusts herein created, and of all the transactions in connection with the said trust funds, which records shall, at all times, be subject to free inspection by the beneficiaries of said trust fund;

(d) I direct that the said trustees, and my executors, hereinafter named, shall receive, as compensation for their services, the usual commissions allowed by law, provided that said Commerce Union Trust Company of Asheville shall receive, for its services full two and one-half per cent (2½%) commission, the balance of the commission, if any, to be divided among the other trustees and executors, as the case may be."

The testator, Solomon Lipinsky, died on 28 March, 1925. His last will and testament was duly probated and recorded in the office of the

clerk of the Superior Court of Buncombe County, North Carolina. His three sons, named in the foregoing item of his said last will and testament as cotrustees with the Commerce Union Trust Company of Asheville, N. C., and also as beneficiaries of the trust, survived him; they are parties, both as trustees and as individuals, to this controversy without action. Mrs. Eva Lipinsky, the wife, and Mrs. Clara Lipinsky Thorner, the daughter, of the testator, also survived him. Mrs. Eva Lipinsky is dead; she died on 7 November, 1928. Mrs. Clara Lipinsky Thorner is now living; she is a party to this controversy without action.

The plaintiffs, the Commerce Union Trust Company of Asheville, N. C., and the three sons of Solomon Lipinsky, deceased, have in hand the fund which they received, and which they hold, as testamentary trustees, under the provisions of said Item VI. This fund has been invested by the said trustees, and has yielded, and continues to yield, an income which the said trustees have collected, and which they will continue to collect, as they are required to do by the provisions of said Item VI.

Three-fourths of the net income from said trust fund collected by the said trustees prior to the death of Mrs. Eva Lipinsky, was paid to her by them, in accordance with the provisions of said Item VI. Since her death, the said trustees have retained in their possession three-fourths of said net income collected by them; they now have in hand, in addition to the principal or corpus of said fund, the sum of $9,000, the said sum being three-fourths of the net income from said fund. The said trustees have refused to pay out this sum to any one.

One-fourth of the net income from said trust fund collected by said trustees, both before and since the death of Mrs. Eva Lipinsky, has been paid to Mrs. Clara Lipinsky Thorner, daughter of Solomon Lipinsky, deceased, by them, in accordance with the provisions of said Item VI.

No part of the net income from said trust fund collected by said trustees since the death of Mrs. Eva Lipinsky, widow of Solomon Lipinsky, has been paid by them to his sons, Morris Lipinsky, S. Whitlock Lipinsky or Louis Lipinsky, beneficiaries of said trust.

This controversy without action involves the disposition by said trustees of the three-fourths of the net income from said trust fund, which has been collected by said trustees since the death of Mrs. Eva Lipinsky, widow of Solomon Lipinsky, or which shall hereafter be collected by them, during the continuance of said trust. The questions submitted to the Court for its decision, as stated by the parties to this controversy without action, are as follows:

"1. Whether or not said three-fourths of said net income shall be allowed to accumulate as a part of the principal of the trust estate, and

at the termination of the trust period of ten years be divided equally among the four beneficiaries of said trust, to wit: Morris Lipinsky, S. Whitlock Lipinsky, Louis Lipinsky, and Clara Lipinsky Thorner"; or

"2. Whether or not said three-fourths of said net income shall now be paid to Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky, and no part thereof to Mrs. Clara Lipinsky Thorner. to whom one-fourth of said income is payable under Item VI."

Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky, as beneficiaries of the trust, contended that upon the death of Mrs. Eva Lipinsky, widow of Solomon Lipinsky, they became and are now entitled to share in the net income from the said trust fund, equally with their sister, Mrs. Clara Lipinsky Thorner, and that the net income which has been collected from said trust fund by the trustees since the death of Mrs. Eva Lipinsky, and the net income from said trust fund which shall be collected by said trustees during the remainder of the trust period of ten years, should be paid by the said trustees to them and to their said sister in equal shares, that is to say, to each one-fourth thereof.

Mrs. Clara Lipinsky Thorner, as a beneficiary of the trust, contended that the three-fourths of the net income from said trust fund, which has been collected by the trustees since the death of Mrs. Eva Lipinsky, and the three-fourths of said net income which shall hereafter be collected by them during the trust period of ten years, should be held by said trustees as a part of the principal of said trust fund, until the termination of the trust at the expiration of ten years from the death of Solomon Lipinsky, and that then, the entire fund in the hands of the said trustees, including the accumulations, should be divided equally among the four children of Solomon Lipinsky, in accordance with the provisions of Item VI, of his last will and testament, or that if the said three-fourths of the said net income is not required to be held until the termination of the trust, but shall be paid out by the trustees now as income, that she should share equally with her brothers in said three-fourths of said income, without accounting for the one-fourth which the trustees are directed to pay to her by the provisions of Item VI.

The court was of opinion that by the provisions of Item VI of the last will and testament of Solomon Lipinsky, the trust thereby created by the testator terminated at the death of Mrs. Eva Lipinsky, and that the principal of the trust fund in the hands of the trustees should have been divided equally among his four children, as beneficiaries of the trust; and that Mrs. Clara Lipinsky Thorner, having received from the trustees one-fourth of the net income from the said principal, collected by the trustees since the termination of the trust, is not entitled to share in the distribution of the sum now in the hands of the trustees, and held

by them as three-fourths of the net income from the trust fund, collected since the death of Mrs. Eva Lipinsky.

From judgment in accordance with the opinion of the court, the Commerce Union Trust Company of Asheville, N. C., one of the trustees, and Clara Lipinsky Thorner, appealed to the Supreme Court.

*Alfred S. Barnard for Morris Lipinsky, S. Whitlock Lipinsky and Louis Lipinsky.*

*Merrimon, Adams & Adams for the Commerce Union Trust Company.*

*Martin & Martin for Clara Lipinsky Thorner.*

CONNOR, J. We do not concur in the opinion of the Superior Court in accordance with which its judgment was rendered, to wit: "That by the terms of the last will and testament of Solomon Lipinsky, deceased, the trust created by Item VI of said will terminated upon the death of Eva Lipinsky, wife of the said Solomon Lipinsky, and that by the terms of said item, the principal or corpus of the residuary estate of the said testator should have been divided at that time, or as soon thereafter as practicable."

It is clear, we think, that it was the intent of the testator, expressed in language which is free from ambiguity, and which therefore does not call for construction (*Wooten v. Hobbs,* 170 N. C., 211, 86 S. E., 811), that the trust created by him in Item VI of his last will and testament, should continue for ten years from the date of his death, at least, and that if his wife survived the expiration of said ten years, that the trust should continue so long as she should live, and in that event should terminate at her death. As she died before the expiration of said period of ten years, the trust continues and does not terminate until the expiration of ten years from the date of the death of the testator.

The parties to this controversy without action do not seem to have had any difference of opinion as to when the trust terminates, under the provisions of Item VI. It seems to be conceded by them that the trust did not terminate at the death of Mrs. Eva Lipinsky, but that it continues until the expiration of ten years from the date of the death of the testator. Whether or not it was error for the court to determine a question not expressly submitted by the parties to the controversy, upon the facts agreed, as contended by the Commerce Union Trust Company of Asheville, we do not now decide or consider. We are of opinion and so hold that there is error in the judgment for that it was rendered in accordance with an erroneous opinion of the court upon the question as to when the trust terminated. For this error, the judgment must be reversed.

We are further of the opinion that in the absence of a direction by the testator as to the distribution of the three-fourths of the net income from the trust fund collected after the death of Mrs. Eva Lipinsky, and before the expiration of the trust, the trustees must hold said three-fourths of said income until the termination of the trust, that is, until the expiration of ten years from the date of the death of the testator. At the termination of the trust, the sum then in the hands of the trustees, representing accumulated income from the trust fund, should be paid by the trustees to the persons who, under the provisions of Item VI, are entitled to share in the principal or corpus of the trust fund.

If the three sons and the daughter of the testator shall be living at the termination of the trust, each will be entitled to an equal share of the fund, including accumulated income. Item VI, however, contains the following provision:

"*Provided, however,* if any one or more of my said children shall have died leaving lawful issue, or legally adopted child, then the share of such child of mine so dying shall be paid over and delivered to the said Commerce Union Trust Company of Asheville, as trustee, etc." The ultimate beneficiaries of the trust created by Item VI of the last will and testament of Solomon Lipinsky cannot be determined until the termination of the trust.

The suggestion of the learned counsel for the appellant, Mrs. Clara Lipinsky Thorner, both in his brief and in his argument in this Court, that the income from the trust fund, after the death of Mrs. Eva Lipinsky, should be paid by the trustees to the children of Solomon Lipinsky, as his distributees, and heirs at law, for the reason that said income is in the nature of undevised property, cannot, we think, be sustained. If the income from the trust fund collected by the trustees after the death of the testator, can be held to be the property of the testator, then the language of Item VI, is broad and comprehensive enough to include such income, and vest it in the trustees, as a part of the residuum of the estate, and therefore as part of the corpus of the trust fund.

In any event, we are of the opinion that the income from the trust fund, collected by the trustees, and retained by them, because the testator has not authorized them to pay it out, until the expiration of the trust, must be held by the trustees and paid by them, at the termination of the trust, to the persons who shall then, under the provisions of Item VI, be entitled to the fund in their hands. To the end that judgment may be entered in the Superior Court of Buncombe County in accordance with this opinion, the judgment rendered must be

Reversed.

IRA FARR v. TALLASSEE POWER COMPANY.

(Filed 22 January, 1930.)

**1. Master and Servant C b—In this case held: evidence of master's negligence was sufficient to be submitted to the jury.**

Where, in an action by an employee against his employer to recover damages for a negligent injury, the evidence tends to show that the employee was required to hook huge rocks by a cable so that they might be hoisted by a powerful derrick, and that the master, in the exercise of his nondelegable duty to provide a reasonably safe place to work, had placed a watchman on a hill to transmit signals from the employee to the engineer operating the derrick, the employee and the operator of the derrick not being in sight of each other, and that the watchman negligently signalled the operator of the derrick without first receiving his signal from the employee, and that the operator of the derrick started hoisting the rock hooked by the employee before the employee could get safely out of the way, and that he was injured while attempting to run clear of the danger: *Held*, the evidence was sufficient to have been submitted to the jury and to overrule defendant's motion as of nonsuit. C. S., 567.

**2. Master and Servant C c—In this case held: the employer could not escape liability on ground that the injury was caused by a fellow-servant.**

Where an employer, in the exercise of his nondelegable duty to provide his employee a reasonably safe place to work, places a watchman where he can see both the employees hooking huge rocks by cable to be lifted by a derrick and the operator of the derrick, the operator of the derrick and the employee hooking the rocks not being in sight of each other, the duty of the watchman being to signal the operator of the derrick when the employee was ready for the derrick to hoist a rock he had hooked: *Held*, upon an injury being inflicted upon the employee by reason of the watchman signalling the operator of the derrick before the employee had signalled him that he was ready, the employer may not escape liability on the ground that the watchman was a fellow-servant, and an instruction that under these circumstances the watchman would be a vice-principal is proper.

**3. Master and Servant C g—In this case held: act of employee in attempting to avoid imminent peril caused by master's negligence was not contributory negligence barring recovery.**

Where an employee engaged in hooking rock with a cable to be hoisted by a derrick is suddenly placed in imminent peril by reason of the employer's vice-principal negligently signalling the engineer operating the derrick to hoist the rock before the employee could get clear of the rock being hoisted: *Held*, the employee's act in running from the danger over slippery rocks, resulting in a fall causing the injury in suit, will not be held as a matter of law to be contributory negligence barring his recovery, and the submission of the question to the jury upon the appropriate issue is proper.

APPEAL by defendant from *McElroy, J.*, and a jury, at June Term, 1929, of GRAHAM. No error.

This is an action for actionable negligence instituted by plaintiff against defendant for injuries sustained.

The defendant is a corporation operating a plant that generates hydro-electric power at Tapoco, N. C. The plaintiff was employed by defendant as a carpenter and pipe-fitter, but in October, 1926, was ordered and directed to assist in removing some large rocks and boulders out of the river near the mouth of the tail race, which was blocking the flow of the water from the water turbine wheels and interfering with the proper operation of them.

The allegations of negligence are:

"(a) The defendant failed to furnish the plaintiff a proper and safe place with proper and safe surroundings and conditions in which to perform the work assigned him to do.

(b) In that the defendant negligently failed to furnish and use proper means, equipment and methods for doing the work in which the plaintiff was ordered and directed to do.

(c) In that the defendant negligently failed to use experienced and competent servants and employees in sufficient number and positions for doing the work properly and safely, in which the plaintiff was assigned and directed to do and in which he was injured.

(d) In that the defendant negligently assigned the plaintiff to work out in the river in a dangerous and unsafe place in connection with high-powered derricks and appliances when in operation and without a proper and safe way or means by which to approach and leave the said derrick cable and its appliances in safety.

(e) In that the defendant wrongfully and negligently started, caused and permitted to be in operation the said powerful derrick and cable at a time when the plaintiff was busily engaged in handling and hooking the end of the cable to a large rock or boulder out in the river in a dangerous and unsafe place, without any notice or warning to the plaintiff.

(f) In that the defendant negligently started its said machine and cable while plaintiff was busily engaged in performing his duty at and in connection therewith to the great danger and distress of plaintiff and caused plaintiff in said emergency to attempt to flee for his safety, throwing him across a rock, rupturing, bruising and permanently injuring his body, causing him to suffer great pain and mental anguish to his great damage."

The defendant denied negligence and set up the defense of contributory negligence, assumption of risk and the fellow-servant doctrine.

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

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

2. Did the plaintiff contribute to his injury by his own negligence? Answer: No.

3. Did the plaintiff assume the risk of his injury? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover? Answer: $2,000."

The necessary facts will be set forth in the opinion. The defendant made numerous assignments of error and appealed to the Supreme Court.

*T. M. Jenkins, Moody & Moody and Edwards & Leatherwood for plaintiff.*

*S. W. Black and R. L. Phillips for defendant.*

CLARKSON, J. At the close of the plaintiff's evidence and at the close of all the evidence, defendant moved for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and in this we find no error.

Plaintiff's evidence was to the effect that he was employed by the superintendent in charge of defendant's hydro-electric power plant to assist in removing large rocks out of the river, near the mouth of the tail race. In doing this a derrick and cable were used to lift the rock. A cable was stretched from one side of the mountain to the other, running across the river at the end of the tail race. The engineer in charge of the hoisting engine, W. D. Williams, was not in sight of the man at the tail race, where they hooked or hitched the rock to the cable. The superintendent, Walter Scott, had placed a man, one White, on the side of the mountain who could see the engineer and the workmen at the tail race, and whose duty it was when the rock was hooked at the tail race and the signal given to him to signal the engineer, who would start the engine, and the rock would be hoisted and carried out. When the men hooked on the rock they had to get out of the way. Plaintiff and the men were hitching on the stone 4 x 5 x 7 feet. "We got this rope around this rock and the derrick started, and I did not have time to get across this rough place without rushing for my life, for the only way to get out was the way this cable was coming. Before I could get out the derrick moved and I made a spring to get away from it. I was in the river, over on this side near the power house was water, say 30 or 35 feet, and just back of this rock it seemed to be 4 feet before you could land on another stone, and that water was deep. The only way I could do was to come out the way the cable come, and a little bar of sand

there, and then I got to get out on, and when I stepped on this stone going out from this cable wire was when I got my injury. I was traveling fast because of the danger of this rock, starting before I was ready and could get away. I stepped on a small boulder; it was slick; my left foot slipped from under me and threw me in a twist, and I felt myself tearing in my left side, and of course I felt myself tearing in my left side, and of course I was very bad hurt. If I was doing the hooking on the rock, I was the man to signal Mr. White. I was doing the hooking at the present time, and Mr. White was signalling Mr. Williams to start. Williams was not in sight of me, but I was in sight of White. I did not signal Mr. White to have the engine started. It started without a signal. When I fell White stopped the derrick until I got up out of the way. He flagged him and stopped him. . . . Mr. Walter Scott was in charge of the crew. Mr. Scott was not there, and I suppose they considered that I was in charge. I did not feel that they were altogether under my charge, because he gave me orders and did not say anything to me about it. I had no right to fire or hire them. I could only give them orders that he gave me. . . . Q. Did you tell any one that you wanted another way to get out of there? A. I wanted timbers so we could prepare a gangway, but Scott said there was not any timbers there—no 2 by 4's. Q. Did you look for timber? A. Not any but 6-inch stuff. This was short stuff, and it would take longer boards to get out in safety."

The court below charged the jury: "The court charges you that the defendant contends that White was a fellow-servant of the plaintiff, and if he gave a signal to have the engine started when he had received no such order from the plaintiff, then the defendant contends that the plaintiff was injured by the negligence of White, and that White was his fellow-servant. (The court charges you, however, that if the plaintiff has satisfied you by the greater weight of the evidence that White was stationed at the place designated by Scott, or under Scott's direction, with instructions to receive orders from the plaintiff and transmit them to the engineer to start the machinery, and if the plaintiff has further satisfied you by the greater weight of the evidence that the starting of the machinery and the moving of the cables and stones without orders from the plaintiff rendered the place at which he was required to work much more dangerous, then the court charges you that White could not be a fellow-servant of the plaintiff, but he would be a vice-principal, and the company would be responsible for his acts.)"

The assignment of error is to the part of the charge in parenthesis, and we think this the only material one to be considered on the record.

We think the evidence justified the charge as given. A similar case to the present one is *Cook v. Mfg. Co.*, 182 N. C., 205. There was a

petition in the case to rehear—183 N. C., 48, and at p. 51 we find: "The rigorous rule of the fellow-servant doctrine, as it once obtained, has been greatly modified in recent years. Speaking to this question, *Brown, J.,* in *Tanner v. Lumber Co.,* 140 N. C., 475, makes the following pertinent observation: 'The true rule now is more humane and holds the master 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. *Flake v. R. R.,* 53 N. Y., 549; *Crispin v. Bobbitt,* 81 N. Y., 521. If the negligent act of one servant is done in the discharge of some positive duty which the master owed to another servant, then negligence in the act upon the part of the servant is the negligence of the master.' "

In *Lucey v. Stack-Gibbs Lumber Co.,* 23 Idaho, 628, 46 L. R. A. (1903), p. 92, *Sullivan, J.,* said: "If it requires warning and signals to protect a servant from injury from falling trees cut by other servants, it is the master's duty to see to it that the proper signals are given, and, if the injury is caused by the failure to give the signals, the master is liable. His ability or responsibility extends beyond the selection of a servant or agent to give the signals, and includes the signal itself, and, if the servant neglects to give it, the master must answer for such negligence, as the authority to a servant to give a signal is nondelegable, and the failure to give it is imputed to the master, and the servant employed to give it is not the fellow-servant of the injured employee so far as the giving or failure to give the signal is concerned. The master cannot instruct a servant to do or perform a nondelegable or nonassignable duty, and escape liability if the servant neglects to perform such duty, in case injury results to the employee." *Riggs v. Mfg. Co.,* 190 N. C., at p. 259.

The superintendent of defendant, Walter Scott, in the exercise of due care to provide a reasonably safe place for plaintiff and the men to work, had placed a watchman, one White, on the side of the mountain for the express purpose of protecting plaintiff and the workmen. This watchman could see both the engineer in charge of the movement of the cable and the men working. Neither the workmen nor the engineer could see each other. When the heavy rock was hitched or hooked to the cable the plaintiff gave the signal to the watchman and in that way the workmen could get out of the way of the rock being dragged and hoisted. In the present case the watchman gave the signal to the engineer without authority from plaintiff, and plaintiff in the emergency in fleeing from danger was injured. It may be inferred from all the facts as disclosed by the record that the work was dangerous and that was the reason the

company placed the watchman to guard the workmen. The court below left this aspect to the jury, and in this we see no error. Under the facts and circumstances of this case, the watchman was an *alter ego.*

In *Odom v. R. R.,* 193 N. C., at p. 444, speaking to the subject in an emergency or imminent peril, it is said: "Nor can it be said, as a matter of law, from the evidence appearing on the present record, that plaintiff's intestate's alleged contributory negligence was such as to bar a recovery. In *Dyer v. Erie Ry. Co.,* 71 N. Y., 228, it was held (as stated in the last head-note): 'The mere fact that a person jumps from a vehicle in which he is traveling, where there is imminent danger of its coming in collision with an approaching train at a crossing, does not bar a recovery against the railroad corporation, although it appears that he made a mistake and would have escaped injury had he remained quiet.'" *Riggs v. Mfg. Co., supra,* at p. 260.

We think the facts in this case distinguishable from *Michaux v. Lassiter,* 188 N. C., 133. In the present case the watchman was a servant or *alter ego* of defendant for a special purpose—to give signals. He was a part of defendant's organization to protect the workmen. Plaintiff had no control over him. He was placed there by defendant, as it were a watchman on the tower to guard the workmen from danger. The false signal he gave was a means by which plaintiff was injured. The court below gave the contentions of the parties, charged the law fully applicable to the facts. The charge covered fully negligence, proximate cause, contributory negligence, assumption of risk, fellow-servant doctrine. We find

No error.

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L. F. PHILLIPS AND CLARA I. WELLS, ADMINISTRATRIX OF E. G. WELLS, DECEASED, *v.* SADIE A. KERR AND J. L. KERR, HER HUSBAND.

(Filed 22 January, 1930.)

**1. Taxation H b—Listing of property for taxation according to statute is prerequisite to validity of tax deed.**

It is required to a valid sheriff's deed under a sale of land for taxes that the property shall have been listed for taxation according to the statute applicable at the time thereof.

**2. Same—Tax list-taker does not have authority to list property for owner and sign his name thereto.**

Under a statute providing that the owner shall list his land for taxes under oath, or, in certain cases by an agent, or upon his failure therein the chairman of the board of commissioners shall list the description and valuation of the property, no authority is given the list-taker of the town-

ship to act for the owner, and in such instance the sheriff's deed to the lands to the purchaser at a tax sale does not pass title as against the owner or those claiming under him, and this result is not varied by C. S., 7925, making it the duty of the list-taker to be constantly on the lookout for unlisted property, the authority to list the property so found being confined to the chairman of the board of commissioners alone.

**3. Same—Tax deed is only presumptive proof that the property had been properly listed for taxes.**

A sheriff's deed for the sale of lands for taxes is but presumptive proof that the property had been listed for taxes as the statute requires, and may be rebutted. C. S., 8034.

**4. Taxation H c—C. S., 8034 does not apply where tax deed is void because property had not been listed for taxes.**

C. S., 8034, providing that no person shall be permitted to question the title to lands acquired under a sheriff's deed without first showing that he or the person under whom he claims had title to the property at the time of the sale does not apply when the sheriff's deed is void for the failure of the listing of the property as required by statute.

APPEAL by defendants from *Midyette, J.*, at August Term, 1929, of BLADEN. No error.

Action to recover land claimed by the *feme* defendant under a purported sale for the nonpayment of taxes. In 1923 W. T. Wallace owned the land, described as lots 16 and 18 of the B. L. Herring subdivision, but he did not list it that year for taxes. The list-taker for the township listed it in the name of W. T. Wallace, signed the owner's name, and returned the tax scroll for 1923 with the following entry: "W. T. Wallace, Wallace, N. C. Two lots, White Lake, $600. Signed W. T. Wallace." This was done without the owner's permission, consent or knowledge. Wallace did not pay the taxes for 1923, and on 5 May, 1924, the sheriff sold the lots for the unpaid taxes. On 19 May, 1925, he executed a deed to the county of Bladen for "two lots, Nos. 16 and 18 of the B. L. Herring subdivision, lying and being in Colly Township, listed in the name of W. T. Wallace for taxation for the year 1923." On 11 June, 1925, the county of Bladen executed a deed for the lots under the same description to the *feme* defendant, and this deed was registered on 2 July, 1925. W. T. Wallace and wife conveyed the lots to E. G. Wells, and Wells and wife thereafter conveyed them to the plaintiff Phillips, who secured the purchase price of $300 by a note and mortgage on the property.

In reference to the issue—"Is the plaintiff L. F. Phillips the owner in fee of the lands described in the complaint?"—his Honor directed an affirmative finding if the jury should find the facts to be as testified by the witnesses. The verdict was against the defendants and to the judgment given thereon they excepted and appealed.

*George R. Ward for plaintiffs.*
*Richard L. Herring for defendants.*

ADAMS, J. In 1923 W. T. Wallace had title to the land in suit, but he neither listed it for taxation nor authorized any one to list it for him. The township list-taker entered the property upon the tax sheet in the name of W. T. Wallace without the latter's direction, knowledge or consent; signed Wallace's name, and made a return of the tax sheet as if the property had been listed by the owner. The plaintiffs contend that the list-taker acted in this particular without authority of law, that in legal contemplation the property was not listed for taxation; that the sale for the nonpayment of taxes was void, and that the sheriff's deed conveyed no title. To support this position they rely upon *Rexford v. Phillips,* 159 N. C., 213, and subsequent cases in which it is cited and approved. In that case it was held that under the statute authorizing the sale of land for taxes it was necessary to show that the land had been listed for taxes in the manner prescribed by law; that there was no provision in the law for the listing of land by a township list-taker, and that the purported listing there attacked was void. The Court adhered to this principle in *Stone v. Phillips,* 176 N. C., 457, 460: "We consider it not improper to state further that we have held in *Rexford v. Phillips,* 159 N. C., 213, that land is not properly listed for taxation, rendering it subject to sale, unless it has been done according to the provisions of law—that is, by the owner or by his duly accredited agent in cases where listing by an agent is permissible. Revisal, secs. 5217-5218. And where neither has acted, the chairman of the board of county commissioners is authorized to list the same under section 5233, etc." The last two cases are approved in *Headman v. Commissioners,* 177 N. C., 261, in which the Court points out the distinction between a failure to list property for taxes and a mere listing in the wrong name when the property is sufficiently described. *Rexford's case* was again sustained in *Cherokee County v. McClelland,* 179 N. C., 127. *Justice Hoke* there said: "In *Rexford v. Phillips,* 159 N. C., 213, the tax deed was avoided because the land had never been put on the tax list by any one having proper authority for the purpose."

These cases are controlling unless there has been a material change in the statutes prescribing the method of listing property for taxation. As we construe the statutes, no radical change has been made affecting the point under discussion.

The question is to be determined by the law which was in force in 1923 and 1924. Public Laws 1923, ch. 12. This act contains the sections upon which rests the decision in *Rexford v. Phillips, supra.* Sections 5217, 5222, 5227 of the Revisal, cited in the opinion, are brought

forward in the act of 1923 as sections 23, 30, 27. They provide that the owner in person shall make a return of his property under oath, or in certain cases by an agent. Revisal 5218, act 1923, sec. 24. If the owner fails to make such return the chairman of the board of commissioners shall list the description and valuation of the property not given in for taxation. Revisal, 5233, act 1923, sec. 75. And if such property is omitted from the list the board of commissioners by the chairman shall add to the simple taxes of the current year all taxes due for preceding years with 25 per centum in addition to the tax with which the owner would otherwise be chargeable. Revisal 5232, act 1923, sec. 75.

The defendants say, however, that the list-taker has authority to list the property of a delinquent owner by virtue of the act of 1917. Public Laws 1917, ch. 234, sec. 25, act 1923, sec. 25, C. S., 7925. This statute makes it the duty of the county commissioners and the several list-takers "to be constantly looking out for property which has not been listed for taxation." Such property when discovered shall be duly placed upon the assessment list and properly assessed for taxation. By whom? By the chairman of the board of commissioners. He alone is charged with the duty of entering upon the tax list property not given in by the owner or his agent. Act 1923, sec. 75; *Rexford v. Phillips, supra.* He must not only list the property; he must impose the prescribed penalty. To this end the list-taker should upon discovery return to the commissioners any property not listed for taxation. Whether his discovery is before or after the tax list has been turned over to the sheriff he must return the unlisted property to the clerk of the board of commissioners. Sec. 75. The unavoidable conclusion, we think, is this: that the lots in controversy had not been legally listed when the purported sale was made, and that the sheriff's deed conveyed no title.

A tax deed, it is true, is conclusive proof that the manner of listing the property complied with the law, but it is only presumptive proof that the property had been listed. C. S., 8034. Here the undisputed evidence rebuts the presumption. The question was considered in *Rexford v. Phillips, supra,* and decided adversely to the defendant's contention. Revisal, 2909.

The defendants finally turn to the following clause in section 8034: "No person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without first showing that he or the person under whom he claims title had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or the persons under whom he claims title."

The party under whom the plaintiff claims had title when the sale was made, and the plaintiff was not required to show that he had paid all the taxes due at the time of the sale. The *feme* defendant's deed

was not made pursuant to or in conformity with the statutes applicable, and in such case the paragraph above quoted does not apply. It applies, not when the deed is void, but when the conveyance passes the title. The provision in reference to the authoritative listing of property is a basic requirement of the law. This conclusion is reached and upheld in *Rexford v. Phillips, supra,* and in *Price v. Slagle,* 189 N. C., 757. We find No error.

OTIS GREEN v. BERNARD ELIAS.

(Filed 22 January, 1930.)

1. **Mortgages H m—Purchaser at foreclosure sale does not assume personal liability on prior encumbrances, but may not attack their validity.**

   Where the purchaser of lands at a foreclosure sale of a deed of trust takes title subject to registered encumbrances prior to the deed of trust foreclosed, he does not thereby assume personal liability for the prior encumbrances, but takes title subject thereto, but he may not contest the validity of the prior encumbrances nor the amount secured thereby.

2. **Mortgages H k—Where mortgagee bids in property at foreclosure sale of purchase money mortgage he may recover deficiency from mortgagor.**

   Where the grantor of lands takes a deed of trust from the grantee to secure the balance of the purchase price, and the deed of trust is foreclosed and the grantor bids in the property at the foreclosure sale for an amount less than the full amount secured by his deed of trust, in his suit against the grantee to recover the deficiency a judgment in his favor for the amount secured by his deed of trust and the costs of foreclosure less the amount paid by him at the foreclosure sale is proper.

3. **Mortgages F b—Where purchaser of equity of redemption assumes prior encumbrances his grantor may recover sums paid in discharge thereof.**

   Where the owner of lands sells to another by deed in which, as a part of the purchase price, the grantee expressly assumes prior encumbrances on the land, and in payment of the balance of the purchase price pays the grantor a sum of money and executes a deed of trust securing notes for the remainder, and upon the grantee's default in the payment of some of the notes secured by the prior encumbrances, the grantor pays them, and later his deed of trust is foreclosed: *Held,* as between the grantor and the grantee the relation of principal and surety existed as to the prior encumbrances, and the grantor may recover against the grantee the sums paid by him in discharge thereof, and where the grantor has bought in the property at the foreclosure of his own deed of trust and accepts the deed of the trustee made subject to prior encumbrances, the grantee may not set up as a counterclaim or set-off in the grantor's action to recover the deficiency the amount he has paid on the notes secured by the prior encumbrances.

GREEN *v.* ELIAS.

APPEAL by defendant from *Johnston, Special Judge,* at July Term, 1929, of BUNCOMBE. Affirmed.

From judgment on facts agreed that plaintiff recover of defendant (1) the sum of $7,751.05, with interest thereon from 18 August, 1928; (2) the sum of $3,000, with interest thereon from 1 January, 1928; and (3) the sum of $2,416, with interest thereon from 29 March, 1928, together with the costs of the action, defendant appealed to the Supreme Court.

*Clinton W. Hughes for plaintiff.*
*Bernard, Williams & Wright for defendant.*

CONNOR, J. On 11 February, 1926, plaintiff conveyed to defendant certain land situate in Buncombe County, N. C. The purchase price for said land was paid to plaintiff by defendant, partly in cash, partly in notes executed by defendant, payable to plaintiff, and partly by defendant's agreement with plaintiff to assume and pay certain notes on which plaintiff was liable, the said notes being secured by deeds of trust on said land, which had been duly registered prior to the conveyance of the land by plaintiff to defendant.

Defendant paid to plaintiff, at the date of the conveyance of the land to him by plaintiff, in cash, the sum of $10,312.50; he executed and delivered to plaintiff his three notes, each for the sum of $3,895.83, all bearing interest from date. These notes, aggregating the sum of $11,687.49, were secured by a deed of trust on the land, executed by defendant. Defendant thus paid to plaintiff on the purchase price for said land the sum of $22,000.

Plaintiff had purchased said land from Zeb V. Nettles and R. C. Scruggs, who conveyed the same to plaintiff on 1 January, 1926. In part payment of the purchase price for said land plaintiff had executed and delivered to the said Zeb V. Nettles and R. C. Scruggs his six notes, each for the sum of $1,208, all bearing interest from date. These notes were secured by a deed of trust on said land, executed by plaintiff. Upon the conveyance of the land to him by the plaintiff, defendant expressly assumed the payment of these notes, aggregating the sum of $7,250, in part payment of the purchase price for said land.

Prior to the conveyance of said land to plaintiff, the said Zeb V. Nettles and R. C. Scruggs had executed a deed of trust on said land to secure the payment of four notes, each for the sum of $3,000 executed by them and payable to E. C. Carrier. In part payment of the purchase price for said land to the said Zeb V. Nettles and R. C. Scruggs, plaintiff had assumed the payment of their said notes, aggregating the sum of $12,000. Upon the conveyance of the land to him by the plaintiff,

defendant expressly assumed the payment of these notes, in part payment of the purchase price for said land.

The notes secured by prior deeds of trust on said land, for which plaintiff was liable, as maker or by reason of his agreement with his grantors, and which defendant assumed in part payment of the purchase price for the land conveyed to him by plaintiff, amounted to the sum of $19,250. The total purchase price for said land, which defendant paid or agreed to pay to plaintiff was $41,250.

After plaintiff conveyed the land to defendant, defendant paid one of the notes, payable to E. C. Carrier, and two of the notes, payable to Zeb V. Nettles and R. C. Scruggs, in accordance with his agreement with plaintiff. The total amount paid by defendant in discharge of his liability on said notes, by reason of his agreement with plaintiff was $5,416, and accrued interest. Defendant has failed to pay the remainder of said notes.

Upon defendant's default in his agreement with plaintiff, to pay the same, plaintiff, by reason of his liability thereon, paid one of the notes payable to E. C. Carrier, and two of the notes payable to Zeb V. Nettles and R. C. Scruggs. The total amount paid by plaintiff, for which defendant was liable by reason of his agreement with plaintiff, was $5,416, and accrued interest.

Upon default by defendant in the payment of the notes executed by him, payable to plaintiff, the deed of trust securing said notes was foreclosed by the sale of the land conveyed thereby on 7 August, 1928. The land was offered for sale by the trustee "subject to prior mortgages, liens and encumbrances, amounting to $21,725.36, taxes and street assessments." Plaintiff bid for the land, as offered by the trustee, the sum of $5,000. This bid was duly reported by the trustee to the clerk of the Superior Court of Buncombe County. The bid was accepted and the sale in accordance therewith was duly confirmed. Pursuant to the order of confirmation, the land was conveyed by the trustee to plaintiff, upon his payment of the amount of his bid, to wit, $5,000, "subject to prior mortgages, liens and encumbrances, amounting to $21,725.36, taxes and street assessments." The sum of $5,000 paid by plaintiff, in accordance with his bid, was applied as a payment on the notes executed by defendant, payable to plaintiff, and secured by the deed of trust, under which the land was sold, leaving a balance due on said notes of $7,751.05, with interest thereon from 18 August, 1928.

The total amount of the notes secured by deeds of trust, which were prior to the deed of trust under which the land was sold, with interest accrued to the date of the sale, was $21,725.36. This amount includes the notes which had been paid prior to the sale by plaintiff, to wit, a note for $3,000, payable to E. C. Carrier, and two notes, each for

$1,208, payable to Zeb V. Nettles and R. C. Scruggs. It also includes the notes paid by defendant in like amounts.

Plaintiff, by his acceptance of the deed of the trustee, conveying the land to him, "subject to prior mortgages, liens and encumbrances, amounting to $21,725.36, taxes and street assessments," did not assume or become personally liable for the said sum. *Harvey v. Knitting Mills,* 197 N. C., 177. His title to said land, however, is subject to the deeds of trust which are prior in registration to his deed from the trustee; until the amount secured by said deeds of trust has been paid, the plaintiff holds his title to the land subject to the amount secured by said deeds of trust. This amount was fixed and made certain by the terms on which the land was sold by the trustee and purchased by plaintiff. Plaintiff cannot contest the validity of the deeds of trust, nor the amount secured thereby. This action, however, has been brought by the plaintiff, not as the purchaser of the land, but as a creditor of defendant.

Upon the facts agreed, there was no error in the judgment that plaintiff recover of the defendant the sum of $7,751.05, with interest, this sum being the balance due on the notes executed by defendant and payable to plaintiff.

Nor was there error in the judgment that plaintiff recover of defendant the sum of $3,000, with interest, and the further sum of $2,416, with interest. These sums were paid by plaintiff, as surety for defendant, and only after defendant had defaulted in his agreement with plaintiff to pay the same. With respect to the notes for which these sums were paid, as between themselves, defendant was liable as principal, and plaintiff as surety. *Keller v. Parish,* 196 N. C., 733, 147 S. E., 9; *Rector v. Lyda,* 180 N. C., 577, 105 S. E., 170; *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57.

Defendant is not entitled to set up as a counterclaim or set off to the amounts which plaintiff is entitled to recover of him, the amounts paid by defendant in discharge of his liability on notes, which under his agreement with plaintiff he had assumed. Whether or not upon the facts agreed in this case, defendant has an equity to have the land sold for the payment of the entire amount of the notes secured by the deeds of trust, which are prior liens or encumbrances on the land purchased and now owned by plaintiff subject to such amount, if defendant shall be required by plaintiff to pay said amount, or any part thereof, by reason of his assumption of the notes secured by said deeds of trust, is a question not now presented for decision. Upon this question we express no opinion. The judgment in this action, which must be affirmed, will not prejudice defendant if he shall hereafter present this question for decision. The judgment is

Affirmed.

STATE v. CLEM WRENN, W. H. FOSTER AND C. C. FAW.

(Filed 22 January, 1930.)

**1. Conspiracy A a—Elements of conspiracy.**

In order to constitute a conspiracy it is required that two or more persons agree together and form the intent to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and neither the consummation of the intent nor any overt act in furtherance of the conspiracy is necessary, and while the criminal character of a combination or agreement may be inferred from facts and circumstances, such facts and circumstances must point unerringly to that end.

**2. Same—In this case held: evidence of defendant's guilt of entering into a conspiracy was insufficient.**

Where, in a prosecution for criminal conspiracy the evidence is that one of the defendants was the president of a bank negotiating notes for the county board of education and the county board of road commissioners, and that he was also president of a certain construction company, and that the second defendant was a stockholder in the construction company, and was also county superintendent of roads, and that the third defendant was the chairman of the board of education, and that the first defendant, regarded as a man of high character, procured from the other defendants notes of the board of education and of the board of road commissioners to be used to renew outstanding notes of these bodies and raised them and used the funds in his bank and for the construction company without the knowledge or consent of the codefendants who received no benefit: *Held*, the evidence is insufficient to convict the latter named codefendants of criminal conspiracy, and their motions as of nonsuit should have been allowed. C. S., 4643.

APPEAL by defendants, W. H. Foster and C. C. Faw, from *Barnhill, J.*, at Special Criminal Term, September, 1928, of WILKES.

Criminal prosecution tried upon an indictment charging Clem Wrenn, W. H. Foster and C. C. Faw with conspiracy, in that it is alleged they unlawfully and feloniously agreed, conspired and confederated among themselves to cheat and defraud Wilkes County, the Bank of Wilkes, and certain New York banks out of large sums of money, "contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State."

In support of the indictment, the evidence offered by the State tends to show that, during the years 1925, 1926 and 1927, Clem Wrenn was president of the Bank of Wilkes and also president of the Foster Construction Company, a corporation engaged in road construction work, with a bank account in the Bank of Wilkes; that W. H. Foster was interested in the Foster Construction Company, as stockholder, and was its nominal secretary and treasurer; he was also superintendent of roads of Wilkes County; that C. C. Faw was chairman of the board of educa-

tion of Wilkes County, and that a part of the funds obtained on spurious notes of the board of education were placed to the credit of the Foster Construction Company in the Bank of Wilkes and used by said company.

The principal transactions were as follows:

1. During 1926 and 1927 the board of education of Wilkes County had two valid notes outstanding, one in the sum of $10,000 and the other in the sum of $25,000, both of which had been negotiated through the Bank of Wilkes and were held by banks or bankers in the city of New York. Shortly before their maturity Wrenn, president of the Bank of Wilkes, told Faw, chairman of the board of education, that renewal notes ought to be sent to New York in time to meet said maturing notes. Faw, thereupon, called the secretary of the board, C. C. Wright, over the telephone and obtained authority to sign his name to both renewal notes. Wrenn later suggested that if the renewal notes were made out in smaller denominations perhaps a better rate of interest might be obtained. Whereupon, seven notes of $5,000 each were executed by Faw (Wright's name being signed by Faw on the authority previously given over the telephone) and delivered to Wrenn, who was to complete their execution by obtaining the signature of the county attorney and have him affix the seal of the board of education. Wrenn took the notes to the office of the county attorney and, finding him out, affixed the seal to the notes himself, had another attorney certify to their legality, and then raised said notes from $5,000 to $25,000 each. From time to time Wrenn negotiated one or more of these notes in New York, dating them apparently to suit his convenience or necessity, and placed $41,000 of the proceeds to the credit of the Foster Construction Company, and the balance over the amount for which the board of education was legally liable seems to have been used by Wrenn for his own purposes or for the Bank of Wilkes.

2. In February, 1927, the board of commissioners of Wilkes County had a $6,000 note falling due in New York, which said note was duly issued for road work in the county. To take up this note the board of commissioners executed a renewal note, in a like sum, and turned it over to Wrenn, president of the Bank of Wilkes, to be used by him in caring for the road note soon to mature. Wrenn informed Foster, superintendent of roads, that in some way this renewal note had become blurred or splotched, and that the New York bankers would not accept it. Whereupon, as the matter was urgent, he insisted that Foster see the chairman of the board of commissioners and have another note executed to take the place of the blurred or splotched one. This was done, the chairman executing a blank note, which Wrenn filled out for $25,000 instead of $6,000, and had the county seal placed on it. A few

days thereafter the chairman of the board of commissioners spoke to Wrenn about the matter, and was informed by him that the New York bankers had subsequently reconsidered their objection to the alleged blurred or splotched note, accepted it, and that he, Wrenn, had destroyed the note executed to take its place, which representation seems to have been false, as Wrenn wrongfully negotiated said note for other purposes.

It is not contended that Faw had anything to do with any of the road notes.

Wrenn testified that he alone was responsible for altering and raising the notes in question, and that neither Faw nor Foster had anything to do with any of the illegal transactions appearing of record. Faw and Foster also testified that they knew nothing of Wrenn's unlawful schemes. Wrenn is now, and was at the time of trial, serving a term in the State's prison for fraudulently issuing these six notes of $25,000 each and embezzling the proceeds, to which he pleaded guilty. He does not appeal, as prayer for judgment in the present case was continued as to him.

Prior to the failure of the Bank of Wilkes in May, 1927, Wrenn was regarded by his friends and associates as a man of integrity and honor; he had the entire respect and goodwill of the community; no one suspected his wrongdoing, and Faw and Foster both placed confidence in his word, as did the local business people.

From an adverse verdict and judgment against W. H. Foster and C. C. Faw that each be confined in the State's prison for a term of not less than four nor more than seven years, the said defendants appeal, assigning errors.

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

*Charles G. Gilreath, J. H. Burke and Manning & Manning for defendants Faw and Foster.*

STACY, C. J., after stating the case: It is not seriously contended that all three of the defendants participated in any one of the transactions appearing of record. The dealings in connection with the school notes relate only to Wrenn and Faw, while those touching the road notes involve only Wrenn and Foster. And we have discovered no evidence of sufficient probative value to establish a conspiracy between any two of the defendants.

The gist of a conspiracy has been described as an unlawful concurrence of two or more persons in a wicked scheme—a combination to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful

means—and it is said that no overt act on the part of any of the conspirators is necessary to complete the crime, but the intent to accomplish some crime or unlawful purpose, or to bring about some end, not in itself criminal or unlawful, by criminal or unlawful means, is a necessary element of the offense. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733; *S. v. Martin,* 191 N. C., 404, 132 S. E., 16; *S. v. Dalton,* 168 N. C., 204, 83 S. E., 693; *S. v. Van Pelt,* 136 N. C., 633, 49 S. E., 177; *S. v. Trammell,* 24 N. C., 379; 5 R. C. L., 1060. "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 *conspiracy* is the crime, and not its execution. *S. v. Younger,* 12 N. C., 357; 5 R. C. L., 1066. It requires the confederation of at least two, as one person cannot conspire alone, and of course it may include more. *S. v. Diggs,* 181 N. C., 550, 106 S. E., 834; *S. v. Christianbury,* 44 N. C., 46; 5 R. C. L., 1078.

It is true, of course, that the criminal character of a combination, agreement or confederacy may be inferred from facts and circumstances, where they point unerringly to that end, but here the situation of the parties seems to repel any idea of a conspiracy, certainly as between Wrenn and Faw, and while there may be more reason for inferring a combination between Wrenn and Foster, we have concluded that the evidence is not sufficient to establish this either. Faw had profited nothing by the machinations of Wrenn, nor does it appear that Foster did so knowingly, or that he was "consenting unto the wrong." So far as the record discloses, both Faw and Foster seem to have been no more than victims of misplaced confidence. This is not enough to hold them for a conspiracy.

It follows, therefore, that the motion of the appealing defendants for judgment as in case of nonsuit should have been allowed. The motion will be sustained here as provided by C. S., 4643.

Reversed.

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CLARA F. JUSTICE v. TENCH C. COXE, JR.

(Filed 22 January, 1930.)

**1. Evidence J a—Parol evidence as to payment of note held admissible.**

Where the purchase-money note secured by mortgage is given for the balance of the purchase price of lands it may be shown by parol evidence that it was contemporaneously agreed between the parties that the maker of the note was to be discharged upon his conveyance of the lands to another who was to pay the consideration and who were the real parties

to the contract and for whom the maker of the note was acting, the parol evidence not tending to vary the terms of the written instrument, but being solely as to the method of payment contemplated by the parties.

**2. Mortgages C d—Under agreement of parties in this case mortgagor was not liable for mortgage debt.**

One to whom title to lands is conveyed upon payment of part of the purchase price with money furnished by another, and who gives his note secured by a mortgage to the grantor for the balance, and who receives no benefit from the transaction, under an agreement that the mortgagor was to be discharged from liability upon his conveyance to the one furnishing a part of the purchase price: *Held*, the mortgagor acquires only the naked title in trust which he may be compelled to convey to the real beneficial party upon his assumption of the mortgage debt, and upon his transfer of the property to him is not liable to the mortgagee thereon.

APPEAL by plaintiff from *Schenck, J.*, at April Term, 1929, of BUNCOMBE. No error.

Action to recover the balance due on notes executed by defendant, and payable to plaintiff or her order.

The consideration for said notes, as alleged in the complaint, was part of the purchase price for land conveyed to defendant by plaintiff, the remainder of said purchase price having been paid to plaintiff, at the date of the conveyance by her of said land. The notes were secured by a deed of trust on said land; this deed of trust was also executed by defendant. Upon default in the payment of said notes, the deed of trust was foreclosed by the sale of the land conveyed thereby. The net proceeds of said sale were applied as payments on said notes, leaving a balance due thereon of $3,223.35. Plaintiff prays judgment that she recover of the defendant the said sum of $3,223.35, with interest and costs.

In his answer defendant admitted the execution by him of the notes sued on; he alleges, however, that he received no consideration for said notes, for that, pursuant to the terms of an agreement made by and between plaintiff and defendant, contemporaneously with the conveyance of the land to him by the plaintiff, and with the execution of said notes by him, he subsequently conveyed the land which plaintiff had conveyed to him to George W. Knight, Edward Higgins and Samuel Puleston, who assumed the payment of said notes in accordance with the terms of said agreement. Defendant contends that having performed his agreement with plaintiff, by its terms he was discharged of liability to plaintiff on said notes. He prays judgment that plaintiff take nothing by her action, and that he go hence without day and recover his costs of the plaintiff.

At the trial defendant offered evidence tending to sustain the allegations of his answer.

There was evidence tending to show that the land was conveyed by plaintiff to defendant, and that the notes sued on were executed by defendant, solely for the benefit and accommodation of plaintiff; that she had theretofore contracted in writing to sell and convey the said land to George W. Knight, Edward Higgins and Samuel Puleston, residents of the State of Florida; that because of their absence from this State on the day when she insisted upon performing her contract with them, they could not on said day execute the notes and deed of trust securing the same, in accordance with said contract; and that in order to enable plaintiff to secure the cash payment on the purchase price of said land, on said day, it was agreed by and between plaintiff and defendant, with the approval of said George W. Knight, Edward Higgins and Samuel Puleston, given to their attorneys over the telephone, that plaintiff should convey the land to defendant, and that defendant should execute the notes for the deferred payments on the purchase price, and the deed of trust securing said notes, and should thereafter, as soon as practicable, convey the land to the said George W. Knight, Edward Higgins and Samuel Puleston, who should thereupon assume the payment of the notes. This agreement was fully performed by all the parties thereto. As the result of the manner in which the transaction was handled, plaintiff received the cash payment on the purchase price for her land, the same having been made by their attorneys in this State from funds furnished by George W. Knight, Edward Higgins and Samuel Puleston for that purpose.

The only issue submitted to the jury was answered as follows: "Was there a contract, express or implied, between the plaintiff, Clara F. Justice, and the defendant, Tench C. Coxe, Jr., that the notes sued on were to be paid by George W. Knight, Edward Higgins, and Samuel Puleston, as alleged in the answer? Answer: Yes."

From judgment on the verdict that plaintiff take nothing by her action, and that defendant go without day and recover of plaintiff his costs, plaintiff appealed to the Supreme Court.

*Rollins & Smathers for plaintiff.*
*Carter & Carter and Joseph F. Ford for defendant.*

CONNOR, J. Parol evidence offered by defendant for the purpose of showing all the terms of the contract between plaintiff and defendant, with respect to the transaction of which the execution of the notes was only a part, was admissible and competent for that purpose. *Crown Co. v. Jones,* 196 N. C., 208, 145 S. E., 5. The agreement shown by the evidence does not contradict, add to, alter or vary the terms of the notes.

Plaintiff's objections to the admission of the evidence were properly overruled. On her appeal to this Court plaintiff relies solely upon assignments of error presenting her contention that the parol evidence was inadmissible and should have been excluded, for that it tended to contradict, add to, alter or vary the terms of the notes. These assignments of error cannot be sustained.

All the evidence was to the effect that defendant did not receive, and that it was not contemplated by the parties to the contract, pursuant to which the notes were executed, that he should receive any consideration for said notes. He acquired no beneficial interest in the land conveyed to him by the plaintiff. He paid no part of the cash payment on the purchase price for said land; the cash payment was made to the plaintiff by George W. Knight, Edward Higgins and Samuel Puleston, in accordance with their contract with her. Upon the consummation of the transaction, involving the conveyance of the land by plaintiff to defendant, the said George W. Knight, Edward Higgins and Samuel Puleston became the equitable owners of the land, and upon their assumption of the notes executed by defendant, would have been entitled to a decree that defendant convey the legal title to them. Defendant under his deed from the plaintiff, by reason of the agreement between him and the plaintiff, acquired the bare legal title to the land, which in accordance with his agreement with plaintiff and with them, he conveyed to George W. Knight, Edward Higgins and Samuel Puleston, upon their assumption of the notes for the balance due on the purchase price for the land.

Even if it should be held that prior to his conveyance of the land in accordance with his agreement, defendant was liable on the notes to plaintiff, upon such conveyance, in performance of his agreement, he was discharged of such liability. It would be unconscionable to hold otherwise. The law will not permit plaintiff to require defendant to agree to convey the land to a third party, and then after defendant has complied with this agreement, to hold defendant liable on the notes which in accordance with the agreement, he has required such party to assume.

The contract, which defendant alleged in his answer was entered into by and between him and the plaintiff contemporaneously with the execution of the notes, was, in effect, that defendant should be discharged of liability upon his conveyance of the land to George W. Knight, Edward Higgins and Samuel Puleston, and upon their assumption of the notes. Parol evidence to show this contract was admissible upon the principle on which *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320, was decided. In the opinion in that case it is said, "The law is firmly established that parol evidence is inadmissible to contradict or vary the terms of a nego-

tiable instrument, but this rule does not apply to a parol agreement made contemporaneously with the writing providing a mode of payment." Nor does the rule apply to such parol agreement providing for discharge of the maker otherwise than by payment. The judgment is affirmed. We find

No error.

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MELVIN GIBSON, BY HIS NEXT FRIEND, T. C. BLACK, v. LEAKSVILLE COTTON MILLS.

(Filed 22 January, 1930.)

**Master and Servant C d—In this case held: question of whether master's failure to warn servant was negligence was for jury.**

Evidence that the defendant's fourteen-year-old uninstructed employee was injured while at work on a folding machine by the knife thereof as it passed across the machine cutting off his finger, that the fact as to how the machine operated was apparent and known to him, but that he was not instructed or warned of the danger incident thereto raises an issue as to the defendant's actionable negligence to be determined by the jury, and defendant's motion as of nonsuit thereon should have been denied. C. S., 567.

APPEAL from *Moore, J.*, at June Term, 1929, of ROCKINGHAM. Reversed.

This is an action for actionable negligence, brought by Melvin Gibson, by his next friend, T. C. Black, against Leaksville Cotton Mills, for injuries sustained.

The plaintiff, Melvin Gibson, by his next friend, T. C. Black, contends that he had been working for defendant about three months in its cotton mill at Spray, N. C., when he was injured, and had not had any experience in working around mills and machinery when he started work. On 15 November, 1927, while helping to operate a folding machine, while in the scope of his employment, his left forefinger was cut off and he was otherwise injured. That he at the time was fourteen years old and was inexperienced and was not warned of the danger incident to the work. That there was a folding blade, or knife, which plays back and forth for the purpose of folding the cloth; that in straightening the cloth the blade cut off his finger. The defendant denied any negligence, and set up the plea of contributory negligence. The material facts will be set forth in the opinion.

*Glidewell, Dunn and Gwyn, by Allen H. Gwyn for plaintiff.*
*King, Sapp & King for defendant.*

PER CURIAM. The defendant introduced no evidence, and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The motion was granted and plaintiff excepted, assigned error and appealed to this Court. We think the court below should not have allowed the motion.

Gibson was a youth, fourteen years old. One Murray was his boss, or superintendent, and the evidence on the part of plaintiff is to the effect that he did not instruct him as to the danger. Gibson testified, in part, as follows: "Mr. Murray told me to do what I was doing at the time I got hurt. I was up on the table straightening out the cloth and the blade cut my finger. The blade that folds the cloth struck my finger. I could see it. I knew it was there. I knew it was in motion. *I did not know any danger in the machine.* The blade is that part of the machine that folds the cloth. The blade travels backward and forward. It follows the cloth. It was as long as across the table (pointing to table). It was in plain view moving backward and forward at the time I put my hands on the cloth to straighten it out."

In *Roth v. Northern Pacific Lumbering Co.,* 22 Pac. Rep., 845 (18 Ore., 205), it was said: "But it is to be borne in mind that there is a difference between a knowledge of the facts and a knowledge of the risks which they involve. One may know the facts, and yet not understand the risk; or, as *Mr. Justice Byles* observed, 'A servant knowing the facts may be utterly ignorant of the risks.' *Clarke v. Holmes,* 7 Hurl. & N., 937. For, after all, *Mr. Justice Hallett* said, 'It is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deductions that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed.' *McGowan v. Mining Co.,* 3 McCrary, 393, 9 Fed. Rep., 861. So that in a case like the present, where the evidence is conflicting as to whether or not the defendant had knowledge of the risks to which he was exposed, the question is preëminently for the jury." *Boswell v. Hosiery Mills,* 191 N. C., at p. 557.

The law as stated in *Sutton v. Melton,* 183 N. C., at p. 372 (citing numerous authorities), is as follows: "It is the duty of the master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, and want of capacity, and as will enable him, with the exercise of ordinary care, to perform the duties of his employment with reasonable safety to himself."

For the reasons given, the judgment is

Reversed.

J. J. CRAFFORD v. LAFAYETTE LIFE INSURANCE COMPANY.

(Filed 22 January, 1930.)

**Appearance A a—Demurrer to complaint on ground that cause of action was not stated therein is general appearance waiving service of summons.**

Where an action is begun in a general County Court of one county and the defendant is served with summons in another county, and appears and demurs to the complaint on the ground that it failed to state a cause of action for an amount within the jurisdiction of the Superior Court, and thereafter makes a special appearance and moves to strike out the service because the action was within the jurisdiction of a justice of the peace, and that therefore the County Court could not issue summons outside the county: *Held*, by appearing and demurring to the complaint the defendant waived his right to object to the service, and the County Court acquired jurisdiction whether the action was within the jurisdiction of the Superior Court or the court of a justice of the peace.

APPEAL by defendant from *Cranmer, J.*, at September Term, 1929, of ALAMANCE. Affirmed.

From judgment affirming orders of the General County Court of Alamance County, overruling its demurrer to the complaint, and denying its motion that the service of the summons be stricken out, defendant appealed to the Supreme Court.

*Carroll & Carroll for plaintiff.*

*Varser, Lawrence, Proctor & McIntyre and Coulter, Cooper & Carr for defendant.*

PER CURIAM. This action was begun in the General County Court of Alamance County. Plaintiff is a resident of said county. Defendant is a corporation, organized under the laws of this State, with its principal office at Lumberton, in Robeson County. The summons in the action was served on defendant in Robeson County.

It is immaterial for the purposes of this appeal, whether the General County Court of Alamance County has jurisdiction of this action, because, as plaintiff contends, the action is within the jurisdiction of the Superior Court of said county, or whether said court has jurisdiction of the action, because, as defendant contends, the action is within the jurisdiction of a justice of the peace of said county. In either case, the court had jurisdiction of the action. N. C. Code 1927, sec. 1608(n). If the action is within the jurisdiction of the Superior Court of Alamance County, because the sum demanded in the complaint is $229.20, the General County Court acquired jurisdiction of the defendant by the

service of the summons in Robeson County. If the action is not within the jurisdiction of the Superior Court, but is within the jurisdiction of a justice of the peace of Alamance County, because upon the allegations of the complaint, plaintiff is entitled to demand judgment for only $70, the General County Court of Alamance County acquired jurisdiction of defendant, when it appeared and demurred to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action upon which plaintiff is entitled to recover the sum of $229.20. By its appearance in the action, for the purpose of filing a demurrer to the complaint, defendant waived the defective service of the summons, because made in Robeson County, if the action is not within the jurisdiction of the Superior Court of Alamance County. *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175. The subsequent special appearance of the defendant for the purpose of its motion that the service be stricken out, was too late. The General County Court of Alamance County had theretofore acquired jurisdiction of defendant when it appeared and filed its demurrer to the complaint.

On this record, the General County Court of Alamance County has jurisdiction of the defendant, whether the plaintiff upon the allegations of his complaint has stated a cause of action for $229.20, as contended by him, or whether he has stated a cause of action for only $70, as contended by defendant. The merits of these contentions are not presented by this appeal. We decide only that there is no error in the judgment of the Superior Court, affirming the orders of the General County Court of Alamance County. The judgment is

Affirmed.

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ALFRED H. COLVARD, GRAHAM COUNTY ET AL. v. C. M. DICUS AND J. P. DICUS, TRADING AS DICUS BROTHERS.

(Filed 22 January, 1930.)

**Appeal and Error J c—Judgment supported by findings of fact supported by evidence is conclusive.**

Upon jury trial being waived under an agreement that the judge should find the facts, his judgment thereon is conclusive on appeal when the evidence supports the facts upon which the judgment was entered.

CIVIL ACTION, before *McElroy, J.,* at Fall Term, 1929, of GRAHAM.

*Morphew & Morphew and R. L. Phillips for plaintiff.*
*T. N. Jenkins and Alley & Alley for defendant.*

PER CURIAM. A jury trial was waived and the trial judge found the facts and entered judgment thereon. There was evidence to support the findings of fact, and the facts found support the judgment. In such event the findings of fact and the judgment thereon are conclusive. *Eley v. R. R.*, 165 N. C., 78, 80 S. E., 1064; *Holmes Electric Co. v. Carolina Power and Light Co.*, 197 N. C., 766.

Affirmed.

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A. C. BIGGS v. CITY OF ASHEVILLE.

(Filed 22 January, 1930.)

**Municipal Corporations J a—Where complaint shows that claim of damages was not given within time prescribed by charter nonsuit is proper.**

Where it appears upon the face of the complaint in an action against a city for damages that notice and claim of damages had not been given in the time required by the city charter as a prerequisite to the right of action, a judgment as of nonsuit is properly entered.

APPEAL by plaintiff from *Schenck, J.*, at June Term, 1929, of BUNCOMBE.

Civil action to recover damages for an alleged negligent injury resulting from certain street improvements.

The charter of the city of Asheville provides that no action for damages either to person or property shall be instituted against the said city unless within ninety days of the happening or infliction of the injury the plaintiff gives due notice to the board of commissioners of such injuries setting forth in such notice the date and place of happening of such injury, the manner and character of the same, and the amount of damages claimed therefor.

The plaintiff filed with the governing board of the city of Asheville on 2 February, 1928, a claim for damages for injuries alleged to have been sustained by him and his business and profession and for the loss of property by reason of the improvements placed on Woodfin Street by the defendant and set forth in said notice that the damages commenced to occur on the ..... day of August, 1925, and continued throughout the years 1925, 1926, and 1927.

From a judgment of nonsuit the plaintiff appeals, assigning errors.

*Joseph W. Little and Kitchin & Kitchin for plaintiff.*
*George Pennell for defendant.*

PER CURIAM. It appears on the face of the notice filed by the plaintiff that the same was not given within the time, ninety days, required by the city charter, as interpreted in *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827. It would seem, therefore, that the judgment of nonsuit was correctly entered.

Affirmed.

# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

## RALEIGH

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## SPRING TERM, 1930

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GRIER-LOWRANCE CONSTRUCTION COMPANY v. WINSTON-SALEM JOURNAL COMPANY.

(Filed 12 February, 1930.)

1. **Laborers' and Materialmen's Liens B c—Subcontractor must furnish notice to owner in order to hold him responsible for debt.**

   A subcontractor or material furnisher for a building, in order to hold the owner liable for the amount of his claim, is required to give, in apt time, notice to the owner showing an itemized, detailed statement of the claim or materials furnished, except when the contract is entire and complete for a gross sum such specific itemization is not required, and when such notice has not been given he will be regarded as a stranger to the building contract between the owner and the contractor and may not maintain an action against the owner.

2. **Laborers' and Materialmen's Liens C a—In this case held: contractor could maintain action against owner for amount of subcontract.**

   Where the contract for the erection of a building has been abandoned because of the owner's failure to make payments thereunder according to its terms, and a new agreement has been entered into by the parties under which the contractor agrees to complete the building upon the owner's agreement to pay certain additional charges, and the contractor furnishes a statement under the new agreement showing the amounts due for specified items and providing that "there may be some additional charges and credits which may affect the above statement, in which event an additional statement will be rendered," and it appears that the amount of a certain subcontract was omitted from the statement, and that the sub-

contractor may not hold the owner responsible therefor because of failure to give the required notice: *Held*, the contractor may maintain his action against the owner upon the agreement for the amount due on the subcontract.

**3. Appeal and Error K d—Where judgment erroneously includes sum certain with amount recoverable by plaintiff, judgment will be modified and affirmed.**

Where a judgment appealed from correctly awards a recovery in a sum stated, but erroneously includes an amount which may readily be ascertained, it is not necessary to award a new trial on appeal, and the judgment will be modified and affirmed.

CIVIL ACTION, before *Harding, J.*, at March Term, 1929, of IREDELL.

The plaintiff is a corporation engaged in general contracting business, and on the 19th day of August, 1926, entered into a contract with the defendant to furnish labor and material necessary for the construction and erection of a building in the city of Winston-Salem, according to plans and specifications furnished by Harold Macklin, architect. The contract price was $144,950.

The plaintiff began work on the building, but the defendant neglected to comply with the provisions of said contract, which were to be kept and performed by the defendant, in that, said defendant failed to make monthly payments according to the agreement. Subsequently the plaintiff notified the defendant that it would not proceed further with the work. Thereupon, plaintiff alleges, that it was mutually agreed "that the defendant would pay the plaintiff the total cost of all labor, material, equipment, repairs, power and rent of property, telephone, telegraph, equipment rental and all miscellaneous expenses, and also interest expense caused by not receiving checks for estimates when due, discounts lost by not receiving checks when estimates were due and interest on deferred payments of estimates."

The plaintiff then proceeded to complete the building according to plans and specifications.

Thereafter, in pursuance of such new agreement, the plaintiff submitted to the defendant a statement which was introduced in evidence and referred to as Exhibit "1." This paper writing is as follows:

"GRIER-LOWRANCE CONSTRUCTION COMPANY, STATESVILLE, N. C.
FINAL ESTIMATE.

Winston-Salem Journal Building. 25 August, 1927.

| | |
|---|---|
| Total labor, material, equipment, repair, power, rent on property, telephone, telegraph and misc. expenses to 1 August, 1927 | $149,229.50 |
| Material, labor and misc. expenses from 1 August to date | 1,573.69 |

| | | |
|---|---|---|
| Balance to be billed on T. M. B. flooring | $ | 1,007.84 |
| Balance to be billed on oak flooring | | 720.00 |
| Amount due plaster contract | | 300.00 |
| Equipment rental | | 1,500.00 |
| Interest expense caused by not receiving checks for estimates when due | | 2,522.53 |
| Discounts lost by not receiving check when estimates were due | | 14,522.11 |
| Interest on estimates (deferred payments) | | 1,034.26 |
| | | $159,409.93 |
| Plus 10% | | 15,944.00 |
| | | $175,353.93 |
| Less amount previously paid | | 132,763.50 |
| Amount payable | $ | 42,590.43 |
| Less 10% on the above interest charges ($5,008.90) | | 500.89 |
| | $ | 42,089.54 |
| Less balance to be billed on oak flooring | | 720.00 |
| | $ | 41,369.54 |

There may occur some additional charges or credits which may affect the above statement, but in the event we will make an additional statement to the Winston-Salem Journal showing these charges or credits, and attaching our check to cover in the event that the credits are larger than the debits.

Approved for payment, H. Macklin, Architect, 25 August, '27."

In accordance with the terms of said Exhibit "1" the defendant gave the plaintiff a note for $41,369.54, which was afterwards paid in full.

The plaintiff made a subcontract for the roofing and certain metal work on said building with the Ingold Roofing Company.

Subsequent to the settlement above referred to, in November, 1927, the plaintiff discovered that the Ingold Company had never been paid for the roofing and sheet metal work. The Ingold Company sent a bill to the plaintiff at that time for $2,080 for material which had been used in said building. The defendant refused to pay the bill, and thereupon the plaintiff brought suit. A single issue of indebtedness was submitted to the jury, and the jury answered the issue in favor of plaintiff, awarding a recovery of $2,228 with interest from date.

From judgment upon the verdict the defendant appealed.

*Grier & Grier for plaintiff.*
*Manly, Hendren & Womble for defendant.*

BROGDEN, J. Can a contractor sue the owner and recover the contract price for labor and material furnished such owner by a subcontractor or materialman; and, if so, under what circumstances?

In *Hardware Co. v. Schools,* 151 N. C., 507, 66 S. E., 583, this Court said: "Even a cursory perusal of our statute (Revisal, ch. 48) will make it plainly appear that a subcontractor or a person who furnishes materials for the construction of the building has no claim against the owner apart from the claim he acquires by virtue of his lien after notice to the owner and before he settles with the contractor. The statute was not intended to change the well-settled general principle that there must be privity of contract before any liability by one person to another can arise. We know that this general principle has its exceptions, arising out of the peculiar nature of the cases to which they apply."

The identical question involved in the present suit was considered in the case of *Perry v. Swanner,* 150 N. C., 141, 63 S. E., 611. In that case the contractor sued the owner and the trial judge sustained a motion of nonsuit. The plaintiff, who was a contractor, brought the suit in his own name to the use of various materialmen. In affirming the judgment of nonsuit the Court said: "It is not a question of parties, as we understand the matter, that is raised by the motion to nonsuit, but a question as to whether or not the plaintiff has made out a cause of action upon which he personally can recover. There is only one plaintiff to this action, and the fact that he sues to the use of a number of others who furnished material to defendants for the construction of the house does not necessarily make them parties, so as to be bound by a final judgment. . . . The plaintiff testified that he furnished to defendants written statements of the sum due to the materialmen, in accordance with the statute (Revisal, secs. 2021, 2022, 2023). When that statute is complied with, a direct obligation upon the part of the owner to the materialman may be created upon which the latter may sue in his own name." Hence to constitute the owner the debtor of the materialman, or to establish privity of contract in such cases, there must be a notice and the resulting lien, in order to enable the materialman or subcontractor to maintain a suit in his own name. *Foundry Co. v. Aluminum Co.,* 172 N. C., 704, 90 S. E., 923. In the event the notice is given the owner either by the contractor or the subcontractor or materialman, then it becomes the "duty of the owner to retain from the money thus due the contractor a sum not exceeding the price contracted for"; and in such event, the materialman or subcontractor may maintain an action against the owner personally, even though the action to enforce the lien

was not commenced within the prescribed statutory period. *Campbell v. Hall,* 187 N. C., 464, 121 S. E., 761.

The question then arises: What constitutes such notice as will confer upon the subcontractor or materialman the right to maintain a suit in his own name? The decisions of this Court referring to the question may be found in the following cases: *Jefferson v. Bryant,* 161 N. C., 404, 77 S. E., 341; *Building Supply Co. v. Hospital Co.,* 174 N. C., 57, 93 S. E., 440; *Building Supply Co. v. Hospital Co.,* 176 N. C., 87, 97 S. E., 146; *King v. Elliott,* 197 N. C., 93. These decisions, in substance, require that the notice or itemized statement must be "filed in detail, specifying the materials furnished or labor performed and the time thereof." Such notice or itemized statement must show substantial compliance with the statute. However, if it is an entire contract for a gross sum the particularity otherwise required is not essential.

The record in the case at bar discloses that Ingold Roofing Company did not furnish the owner, or defendant, a notice, neither did it attempt to file or enforce a lien upon the property.

It further appears that the Ingold Company rendered the bill directly to the plaintiff. A witness for plaintiff, who was associated with the Ingold Company, testified: "This bill is against the Grier-Lowrance Construction Company. I did not at any time contemplate filing a lien on the building. I know the concern of Grier-Lowrance Construction Company." Mr. Grier, who was secretary and treasurer of plaintiff, testified: "The Ingold Company rendered this bill to me. I am due this bill to the Ingold Company. The Winston-Salem Journal Company is due this bill to me." Mr. Moon, witness for the defendant, testified: "I contracted with the Grier-Lowrance Construction Company to do the work. I do not know who did it."

There was evidence to the effect that after the bill was rendered to the plaintiff the matter of payment thereof was discussed with Mr. Moon, who apparently was the agent of defendant. There is no evidence in the record, as we interpret it, tending to show that any itemized statement or notice was ever furnished to the owner by either the contractor or the subcontractor or materialman. Indeed, the subcontractor or materialman was asserting his claim exclusively against the contractor. Under these circumstances we are of the opinion, and so hold, that the plaintiff can maintain the action.

The defendant offered the original contract in evidence. Upon objection by the plaintiff this paper-writing was excluded. It is clear that, whether the original contract was totally abandoned or not, the settlement was made between the parties on the basis of Exhibit "1." The said Exhibit "1" contained these words: "There may occur some additional charges or credits which may affect the above statement, but in

the event we will make an additional statement to the Winston-Salem Journal showing these charges or credits, and attaching our check to cover in the event that the credits are larger than the debits." This language is a definite declaration that there might be other items of adjustment between the parties, and this case was tried upon the theory that the amount due for the roofing and sheet metal was such an item and was included within the meaning of the language used. Therefore, the original contract did not seem to be material.

However, we do not think that the foregoing language contained in Exhibit "1" covered or included an allowance of 10% upon the amount of the Ingold bill. From an inspection of Exhibit "1" it would appear that the 10% allowance applied only to the items therein set forth, or the settlement therein made. It appears that the trial judge permitted the jury to consider this item. This was error, but not such error as to warrant a new trial. It should be stricken from the judgment.

There are other exceptions to which we have given careful consideration, but none of them warrant the awarding of a new trial.

Modified and affirmed.

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ELLA C. THOMPSON AND VIRGINIA P. CIBOTTI v. STOKES BUCHANAN, MRS. BERTIE M. WILSON AND R. B. BUCHANAN.

(Filed 12 February, 1930.)

**1. Deeds and Conveyances D b—Competency of testimony as to declarations of boundaries of lands.**

Hearsay evidence of declarations of a decedent as to the location of certain lines and corners of a tract of land in order to be competent must be of declarations made *ante litem motam* by a declarant dead when the evidence is offered and disinterested at the time they were made.

**2. Same—Declaration of one who has parted with his interest in lands cannot be used to disparage title of those claiming under him.**

Where the owner of lands has parted with his title testimony as to his subsequent declarations against the interest of those claiming under him is incompetent, but where evidence of like nature, effect and character has been admitted without objection, exception to the admission of such evidence will not be sustained on appeal.

**3. Trial B c—Exception to evidence will not be sustained where like evidence had been admitted without objection.**

Exception to the admission of evidence will not be considered on appeal where it appears that evidence of like nature, effect and character had been previously admitted without objection.

**4. Deeds and Conveyances D b—Testimony of declarations of adjoining owner is admissible unless made in his own interest.**

Evidence of declarations of an adjoining owner of lands in dispute as to boundaries and corners is admissible unless made in his own interest, and under the facts of this appeal *held:* the reference to the matter under exception was too meagre upon which to award a new trial.

**5. Trial E g—Where the charge construed as a whole is correct it will not be held for error.**

Where the entire charge of the judge to the jury correctly gives the principles of law under the evidence so that a jury of intelligent men must have understood it, it will not be held for error on appeal.

CIVIL ACTION, before *Finley, J.,* at July Term, 1928, of MITCHELL.

A full statement of the facts is contained in the former appeal in this case, reported in 195 N. C., 155, 141 S. E., 580.

In the present trial the main controversy revolves about the question of the location of the beginning corner of the land in dispute, the plaintiffs contending that the beginning corner as shown on the map was "Walnut A." The defendants, upon the other hand, contended that the beginning point was "Walnut at point 1" on the map.

Two issues were submitted to the jury, as follows:

1. "Are the plaintiffs the owners of the land shown on the court map by the figures 1, 2, 3, 4, 5, 6, and back to 1?"

2. "Are the plaintiffs the owners of the lands shown on the court map by the letters A, B, C, D, E, F, and back to A, or any part thereof, except as stated in the first issue?"

The first issue was answered "yes" by consent, and the jury answered the second issue "no."

From judgment upon the verdict plaintiffs appealed.

*W. B. Councill of counsel for plaintiffs.*

*S. J. Black, W. C. Newland, S. J. Ervin, and S. J. Ervin, Jr., for defendants.*

BROGDEN, J. 1. Are declarations of a deceased owner of land as to the beginning corner, made during the period of his ownership, competent against those claiming under him?

2. Are the declarations of such deceased owner, made after he had parted with his title, competent against those who claim under him?

It appears from the evidence that Pat Abernethy owned an interest in the land or a mineral interest in it up to 7 September, 1909, and that on that day he conveyed his interest to one of the plaintiffs. It does not appear when Abernethy acquired the interest. The defendants offered testimony to the effect that surveys of the land had been made

in 1922 and in 1924, and that Abernethy, now deceased, was present at the time of these surveys, and that he pointed out the corners of the Irby lease and stated that such corner was "a walnut standing on the bank of the road." The defendants further offered the declaration of Abernethy at the time of such survey, with respect to the walnut, as follows: "He said it looked natural; that it was standing right where it always was."

Another witness for defendants testified with reference to the walnut, as follows: "Yes, Mr. Pat Abernethy pointed it out to me at one time. I believe it was in the year 1918. I was out there. I got him to go with me the year after my wife's father died, as well as I recollect. It was up to me to kinder look after the property, and I got him to go with me and point out the boundary lines of that Hawk Mining tract, and we went up the ridge to a hole in the ground. I asked him to go in front and point out to me where the corner was. . . . He went and looked around a little and finally located that hole in the ground, figure 2, and told me that was the corner between the Heap and Clapp contention and the Burleson contention. He pointed out the oak that was marked there, he said in 1885, when they had a survey after they got up a dispute between the parties mining under Heap and Clapp and the parties mining under Burleson as to the location of the underground workings, and that he went after a surveyor, and it was one of the coldest days he ever saw in his life, and they got up there and surveyed to that point and then had an underground survey to determine where the workings were and that they marked that tree that was there as a more permanent mark, and that he took a memorandum of those marks and the distance from the chestnut stump and the shaft that was there, and that he had it at home in his safe, and that he would send it to me, but he never did." The witness was asked if he and Abernethy went down to the walnut tree claimed by the defendants as a beginning point of the Burleson lease and the Bowman deed. The witness answered: "Yes, we went on up there, and he looked around a little on the ground and said that corner was standing there then, above the road, the beginning corner, 1, as laid down on the map was the corner."

The plaintiffs objected to all the foregoing evidence. The objection was overruled and the plaintiffs excepted.

It appeared that Abernethy had conveyed his interest in the land to one of the plaintiffs in 1909, and that some of these declarations having been made in 1918, in 1922, and in 1924, were made after Abernethy had parted with his interest in the land. The general rule is stated in *Singleton v. Roebuck,* 178 N. C., 201, 100 S. E., 313, as follows: "It is the law in this State that under certain restrictions both hearsay evidence and common reputation are admissible on questions of private

boundary. . . . The restrictions on hearsay evidence of this character—declarations of an individual as to the location of certain lines and corners—established by repeated decisions, are: That the declarations be made *ante litem motam;* that the declarant be dead when they are offered, and that he was disinterested when they were made." However, it was held in *Lumber Co. v. Lumber Co.,* 169 N. C., 80, 85 S. E., 438, that: "It may be said that where the declarant has parted with his interest, what he has afterwards said about lines and boundaries cannot be used against those claiming under him to disparage their title. . . . It may be added that the testimony of Bent Cook as to declarations of Bryson was incompetent, as they were made after Bryson had disposed of his interest, and would disparage those claiming under him. 16 Cyc., 979." But the record shows the following entry: There was "testimony on the part of witness, R. E. Wiseman, and of the witness, Fate Wilson, that P. H. Abernethy had pointed out the lines and corners of the land in controversy as the lines and corners thereof, which was admitted without objection or exception prior to the objection and exception to the testimony, which is the subject of the first, second, third, fifth and sixth exceptions. There was also testimony to the same effect from another witness, Robert Buchanan, tending to show, that in 1885, P. H. Abernethy had pointed out the lines and corners of the land in controversy, and there was no objection or exception to the admission of this evidence."

The declarations of Abernethy in 1885, while he was the owner of an interest in the land, would be competent against him and those claiming under him. *Smith v. Moore,* 142 N. C., 277, 55 S. E., 275; *Roe v. Journegan,* 175 N. C., 261, 95 S. E., 495; *Singleton v. Roebuck,* 178 N. C., 201, 100 S. E., 313; *Carr v. Bizzell,* 192 N. C., 212, 134 S. E., 462. Moreover, if the declarations of Abernethy made subsequent to 1909 were incompetent, it clearly appears from the portion of the record quoted above, that testimony of like nature, effect, and character had been offered in evidence without objection. It has been repeatedly held by this Court that if testimony of the same nature as that objected to, is given by a witness in other portions of his testimony, without objection, that the exception thereto cannot be sustained. *Marshall v. Tel. Co.,* 181 N. C., 410, 107 S. E., 498; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Tilghman v. Hancock,* 196 N. C., 780, 147 S. E., 300.

The record further shows the following: "For the purpose of showing that the white walnut, contended by the plaintiffs to be their corner, is on the south side of the old Turnpike Road, was there in 1881, the defendants offered a deed from Charles Burleson and wife to Elizabeth Young, dated 19 December, 1881. Plaintiffs objected to the introduction of this deed. Objection overruled; plaintiffs excepted." Charles

Burleson was the grantor in the Bowman deed under which plaintiffs claim and was dead at the time of the trial. It does not appear from the record what the wording of the declaration in the deed was. Apparently it was the declaration of an adjoining owner. In *Sullivan v. Blount,* 165 N. C., 7, 80 S. E., 892, this Court held that: "The fact that the declarant owns an adjoining tract of land does not render the declarations incompetent, . . . unless made in his own interest." The record does not disclose that Burleson was claiming any interest in the land in controversy. Furthermore, there was testimony without objection, tending to show that the white walnut claimed by the plaintiffs as the beginning corner was on the south side of the Turnpike Road, and also that such beginning corner was the beginning corner of three tracts of land, and the purported declaration would apparently corroborate this testimony. At any rate, the meager reference does not convince us that the introduction of the deed was reversible error.

The plaintiffs contend that the instructions given by the trial judge to the jury were contradictory and misleading, particularly with reference to the location of the beginning corner of the land in controversy; but a careful reading of the entire charge leaves the impression that no man of ordinary intelligence could have failed to understand that the controversy between the parties as to the beginning corner was whether such corner was at the Walnut marked "A" on the map or at the Walnut marked "1."

Upon a careful review of the entire case, we are constrained to hold that no reversible error appears from the record, and the judgment is affirmed.

No error.

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WARREN H. BOOKER v. TOWN OF HIGHLANDS.

(Filed 12 February, 1930.)

**1. Jury C b—Right to jury trial is waived by failure to except to order of reference and to tender issues on exceptions to referee's findings.**

The failure of a party to except to an order for compulsory reference and to file exceptions in apt time to particular findings of fact by the referee when the report is unfavorable and to tender issues on the exceptions and demand a jury trial thereon will be deemed a waiver of his right to trial by jury. C. S., 573.

**2. Same—Where party tenders issues on his exceptions to referee's findings his failure to tender issues on adversary's exceptions is not waiver.**

Where a party excepts to an order for compulsory reference and the referee's report is not wholly favorable to either party and both file

exceptions to the findings of fact by the referee, and the objecting party tenders determinative issues based upon his exceptions and demands a trial by jury thereon, it is not required that he retender issues based on facts pointed out in other set of exceptions filed by the adverse party in order to preserve his right to trial by jury.

**3. Reference D a—Where upon trial on exceptions to referee's report amendment is allowed, evidence on matter in amendment is admissible.**

While a trial by jury upon issues submitted on exceptions to the findings of the referee is upon the record of the proceedings before the referee, it does not include his findings or conclusions, but only the evidence taken before him signed by the witnesses and certified as the statute requires; and where after the filing of the report an amendment is allowed by the court on matters not included in the reference of the case, additional evidence may be introduced on the matters in the amendment.

APPEAL by plaintiff from *McElroy, J.*, at April Term, 1929, of MACON.

Civil action by plaintiff to recover of defendant $2,381.44, balance alleged to be due for engineering services rendered in connection with the construction of a hydro-electric plant and sewer system.

The defendant denied liability and set up a number of counterclaims, aggregating $28,406.30, for losses alleged to have been sustained by reason of plaintiff's incompetence, negligence, and want of skill in supervising the work in question.

At the instance of the plaintiff, and over the objection and exception of the defendant, a reference was ordered and the matters heard by Hon. J. D. Mallonee, who found the facts and reported the same, together with his conclusions of law, to the court. In his report, the referee disallowed the defendant's counterclaims in toto, and concluded that the plaintiff was entitled to recover the sum of $1,889.10 with interest. The report, therefore, was not wholly favorable to either party, being adverse to the defendant and only partially favorable to the plaintiff, and was accordingly objectionable to both.

The defendant objected and excepted to the order of reference at the time it was made, duly filed exceptions to the report of the referee, tendered appropriate issues, and demanded a jury trial on the issues thus tendered and raised by the pleadings.

Thereafter, the plaintiff filed exceptions to the report of the referee, but no issues were tendered on these exceptions, either by the plaintiff or the defendant.

When the matter came on for hearing at the April Term, 1929, the plaintiff moved the court to consider and pass upon the exceptions filed to the report of the referee, by both plaintiff and defendant, without submitting any issues to the jury, contending that the defendant had

waived its right to a jury trial by failing to tender issues on the plaintiff's exceptions. The defendant resisted this motion and demanded a jury trial on the issues already tendered by it upon its own exceptions.

From an order holding that the defendant was entitled to a jury trial on the issues tendered and raised by the pleadings, the plaintiff appeals, assigning error.

*Jones & Jones and Tillett, Tillett & Kennedy for plaintiff.*
*George B. Patton and Edwards & Leatherwood for defendant.*

STACY, C. J., after stating the case: It may be conceded that up to the time plaintiff filed his exceptions to the report of the referee, the defendant had preserved its right to a jury trial, as an examination of the record discloses that ojection was duly entered to the order of reference, and, on the coming in of the referee's report, exceptions were filed thereto in apt time, appropriate issues properly tendered, and a jury trial demanded on the issues thus tendered and raised by the pleadings. *Brown v. Broadhurst,* 197 N. C., 738, 150 S. E., 355.

The appeal, therefore, presents the single question as to whether the defendant, under the circumstances disclosed by the record, waived its right to a jury trial simply because it failed to tender issues on the plaintiff's exceptions. We think not, as appropriate issues had already been tendered on the defendant's exceptions, and it would serve no useful purpose to require their virtual retender, *cessante ratione cessat et lex.*

True, it has been held by us that when a compulsory reference is ordered, the party who would preserve the right to have the issues found by a jury, must duly except to the order of reference, and, on the coming in of the referee's report, if it be adverse, he must file exceptions thereto in apt time, properly tender appropriate issues, and demand a jury trial on each of the issues thus tendered; and, if the referee's report be in his favor, he must seasonably tender issues on the exceptions, if any, filed to the report by the adverse party, and demand a jury trial thereon, or else the right to have the controverted facts determined by a jury will be deemed to be waived, so far as he is concerned. *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, *S. c.,* 118 N. C., 746, 24 S. E., 517.

But in the instant case, the report of the referee was not satisfactory to either party. It was adverse to the defendant and only partially favorable to the plaintiff. Both sides filed exceptions to it. Hence the rule requiring a party to tender issues on the exceptions filed by his adversary and demand a jury trial thereon, in order to preserve his right to have the contested matters settled by a jury, would not apply, for appropriate issues raised by the pleadings had already been ten-

dered on the defendant's exceptions and a jury trial demanded thereon. This was held to be sufficient in *Keerl v. Hayes,* 166 N. C., 553, 82 S. E., 861. When the reason of any particular rule ceases, the rule itself ceases.

Compulsory references are authorized in certain instances by C. S., 573, but when such a reference is ordered under the statute neither party is deprived of his constitutional right to a trial by jury of the issues of fact arising on the pleadings. It is provided, however, that "such trial shall be only upon the written evidence taken before the referee." This refers to the testimony of all the witnesses taken down by the referee, or under his direction, signed by them, and returned to the court as a part of the record in the cause as required by C. S., 577. But the report of the referee, consisting of his findings of fact and conclusions of law, would not be competent as evidence before the jury. *Bradshaw v. Lumber Co.,* 172 N. C., 219, 90 S. E., 146.

It has been said, however, that where an amendment to the pleadings is allowed, after the report is in, containing an additional charge, the parties ought to be allowed to offer evidence before the jury as to such charge, for it was not embraced in the reference. *Moore v. Westbrook,* 156 N. C., 482, 72 S. E., 482.

This restriction that the trial before the jury shall be only upon the written evidence taken before the referee (adopted in 1897, repealed in 1917, and reënacted in 1919) was not in the law at the time *Driller Co. v. Worth, supra,* was decided, 1895. But the reasonableness of the rules laid down in that case, and followed in many others, has never been questioned. *Trust Co. v. Jenkins,* 196 N. C., 428, 146 S. E., 68.

It may be adduced from the authorities that a party who would preserve his right to a jury trial in a compulsory reference should observe the following procedure:

1. Object to the order of reference at the time it is made. *Driller Co. v. Worth, supra; Ogden v. Land Co.,* 146 N. C., 443, 59 S. E., 1027.

2. On the coming in of the report of the referee, if it be adverse, file exceptions in apt time to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Wilson v. Featherstone,* 120 N. C., 446, 27 S. E., 124; *Yelverton v. Coley,* 101 N. C., 248, 7 S. E., 672.

3. If the report of the referee be favorable and unobjectionable, tender appropriate issues based on the facts pointed out in the exceptions, if any, filed to the report by the adverse party and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Jenkins v. Parker, supra; Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16; *Robinson v. Johnson,* 174 N. C., 232, 93 S. E., 743.

4. If the report of the referee be not wholly favorable to either party and both sides file exceptions thereto, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. But if a jury trial be insured on the determinative issues raised by the pleadings, as in the instant case, by tendering appropriate issues based on the facts pointed out in one set of exceptions and by demanding a jury trial thereon, the retender of said issues based on facts pointed out in the other set of exceptions and a jury trial demanded thereon need not be made. *Keerl v. Hayes, supra.*

A failure to observe any one of these requirements may constitute a waiver of the party's right to have the controverted matters submitted to a jury and authorize the judge to pass upon the exceptions without the aid of a jury, for it has been held that although a party duly enters his objection to a compulsory reference, he may yet waive his right to a jury trial by failing to assert such right definitely and specifically in each exception to the referee's report, and by failing to tender the proper issues. *Robinson v. Johnson, supra; Alley v. Rogers,* 170 N. C., 538, 87 S. E., 326.

For a valuable treatment of the subject and statement of the rules applicable, see McIntosh's North Carolina Practice and Procedure in Civil Cases, 567, *et seq.*

There was no error in the court's ruling.

Affirmed.

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UNION INDEMNITY COMPANY v. HENRY D. PERRY.

(Filed 12 February, 1930.)

**1. Principal and Surety B b—Question of whether additional work was done under original contract covered by bond held for jury.**

Where a contract with a city provides for the construction of certain water and sewer improvements, and the contract further provides for the construction of additional similar work if ordered by the city council, all in accordance with plans and specifications attached, and the contractor gives bond with express reference to the contract with provision that the rate of premium for the indemnity expressly provided for in the bond would apply to the extra or additional work if subsequently ordered by the city: *Held*, upon further similar work being done under the same specifications, etc., by order of the city council, the question of whether such work was done under the original contract is for the jury, the surety being liable on the bond for the additional work if done under the original contract and being entitled to recover from the contractor the additional premium therefor.

**2. Corporations G b; Municipal Corporations F a—Where contract with corporation has been completed, plea of ultra vires is not available to it in action for consideration.**

Where a contract with a corporation has been fully performed by both parties and nothing remains to be done but the payment of the consideration by the corporation, the plea of *ultra vires* is not available to the corporation; and where a contractor for the construction of certain municipal improvements has given a surety bond to insure his faithful performance, etc., and has completed the work under the contract, he may not, in an action by the surety to recover the premium due on the surety bond, set up the plea that the contract with the city was void for failure to comply with C. S., 2830, with regard to the advertisement for bids.

CLARKSON, J., dissents.

CIVIL ACTION, before *Clement, J.*, at April Term, 1929, of GUILFORD.

In the summer of 1925 the governing authorities of the city of High Point desired to do certain sewer and water connections and street work in said city. Advertisement for bids was made and plans and specifications prepared and submitted. The defendant Perry was a successful bidder for the work, and on 24 July, 1925, he entered into a contract with the city of High Point. The portion of the contract pertinent to this controversy is as follows: "That the contractor will furnish all materials and labor necessary and construct the proposed water and sewer extension in the northern part of the city and any other similar work which may be ordered by the city council, all in accordance with plans and specifications hereto attached and made a part hereof, at and for the rates and prices respectively set out in the contractor's proposal," etc. The estimated amount of the proposed work was $57,948.50. The defendant applied to the agents of the plaintiff to furnish a surety bond, guaranteeing the faithful performance of said contract. The application for the bond recited that the amount of the contract was $57,948.50, but contained this further provision: "Should the contract exceed the said amount, the undersigned agrees to pay to the company as additional premium for such excess, a further sum calculated at the same rate per thousand; such additional premium to be chargeable as above from the date of the award of said additional work." The rate referred to is $1.50 per thousand. Thereupon, the plaintiff executed and delivered a bond to the city of High Point in the sum of $16,487.10. The penalty of this bond seems to have been the proper amount based upon an estimated contract of $57,948.50, and the defendant paid the required premium of $869.22. Thereafter, in accordance with the terms of said contract and bond the defendant began work in the northern part of the city known as Mechanicsville, and this particular work was finished about the last of December, 1925, or the first of January, 1926. Later on the defendant put in sewer and water lines on Jones Street,

Rotary Street, and various other parts of the city. This work done in other parts of the city was the same kind of work that had been done by Mr. Perry at Mechanicsville and was done at the same unit price, and according to the same specifications.

The engineer of the city testified without objection: "I was informed by the city manager that after the Mechanicsville job was finished, the city council would order that certain other streets have sewer and water lines installed on them." The total amount of work done by the defendant was $219,763.88, or work in excess of the original contract estimate of $161,815.41.

Upon these facts the plaintiff contended that the defendant owed an additional premium of 1½% on the excess work, aggregating $2,427.23. The defendant contended that the bond for $16,487.10 was all the bond that the city required, and that therefore he was not liable for an additional premium covering the additional work. He also pleaded C. S., sec. 2830.

At the conclusion of the evidence defendant moved for judgment of nonsuit. The motion was allowed and the action dismissed.

From the foregoing judgment plaintiff appealed.

*Manly, Hendren & Womble for plaintiff.*
*King, Sapp & King for defendant.*

BROGDEN, J. The bond executed by the defendant referred specifically to the contract between the defendant and the city of High Point, and the contract "for construction of water and sewer improvements in High Point, North Carolina," was expressly made a part of said bond. The obligation of the bond was to the effect that if the defendant principal should faithfully perform said contract according to the terms and conditions thereof, then the obligation would be void, or otherwise remain in full force and effect. The contract provided not only for the "proposed water and sewer connections in the northern part of the city," but also "for any other similar work which may be ordered by the city council, all in accordance with plans and specifications hereto attached and made a part hereof," etc.

Upon this state of facts two questions arise:

(1) Was the extra work done under the original contract between the parties?

(2) Was the awarding of extra work an *ultra vires* act and forbidden by C. S., 2830?

If the additional work was done under the terms of the original contract, then the plaintiff surety undertook to guarantee the faithful performance of said contract. Hence, if the contractor had defaulted in the performance of the additional work, the surety would have been

liable for such default. It necessarily follows that, if the surety was liable for such default, it was entitled to receive from the defendant an additional premium as specified in the contract between the plaintiff and the defendant. However, the defendant offered evidence tending to show that the additional work was done under a separate and distinct contract with the city of High Point. Therefore, an issue of fact was raised, and such question must be submitted to a jury.

The second proposition of law involves the construction of C. S., 2830. It appears from the evidence that proper advertisement was made for bids, and there is no evidence that the contract was divided for the purpose of evading C. S., 2830. But even if it be conceded that the contract between the defendant and the city of High Point was *ultra vires,* the defendant is not in a position, upon the facts, to take advantage of such plea, because the contract was fully performed by both parties thereto. This Court said in *Hutchins v. Bank,* 128 N. C., 72, 38 S. E., 252, that "where a corporation has entered into a contract which has been fully executed on the other part and nothing remains for it to do but to pay the consideration promised, it will not be allowed to set up the plea of *ultra vires.*" This principle is settled law in this jurisdiction. *Trustees v. Realty Co.,* 134 N. C., 41, 46 S. E., 723; *McCracken v. R. R.,* 168 N. C., 62, 84 S. E., 30; *Sherrill v. Trust Co.,* 176 N. C., 591, 97 S. E., 471; *Bank v. Odom,* 188 N. C., 672, 125 S. E., 394; *Commissioners of Brunswick v. Bank,* 196 N. C., 198, 145 S. E., 227. There is an exhaustive note on *ultra vires* in L. R. A., 1917 A, p. 749, *et seq.* Moreover, the corporation is not making such plea. Furthermore, it has been held by this Court "that the doctrine of *ultra vires* has been very much modified in recent years, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were formerly declared absolutely void." *Victor v. Mills,* 148 N. C., 107, 61 S. E., 648.

Reversed.

CLARKSON, J., dissents.

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L. B. LEFTWICH v. J. D. FRANKS, C. W. GOLD AND W. F. MANSON.

(Filed 12 February, 1930.)

**Mortgages G b; Partnership D a—Evidence that assumption of mortgage debt was partnership act held sufficient to be submitted to the jury.**

Where partners in a real estate business own certain lands which one of the partners trades with a third person for other lands, and receives a deed in which the plaintiff's mortgage on the lands is expressly assumed,

the deed being made to one partner with the consent of the other for the benefit of them both, and there is evidence that each thereafter spoke of the mortgage debt as a partnership liability: *Held*, the evidence is sufficient to be submitted to the jury as to whether the mortgage was a partnership liability upon which both were liable, and the motion as of nonsuit of the partner for whose benefit the other took title should have been overruled.

CIVIL ACTION, before *Shaw, J.*, at April Term, 1929, of GUILFORD.

Plaintiff alleged and offered evidence tending to show that prior to 16 July, 1926, he was the owner and developer of Lindhurst, a real estate subdivision located in the western section of the city of Greensboro. On 16 July, 1926, he sold and conveyed to Fannie E. Welborn, subject to certain encumbrances recited in said deed, which the grantee assumed and agreed to pay, the following described lots in said subdivision: Lots 3, 4, 5, 6, and 7. The grantee, Fannie E. Welborn, in order to secure the balance of the purchase money on said lots, executed and delivered to the plaintiff a series of notes secured by deed of trust upon the property.

The plaintiff further alleged and offered evidence tending to show that the defendants, J. D. Franks and C. W. Gold, "jointly owned a certain lot located on Walker Avenue . . . in the city of Greensboro," and that the title to said property was in the name of the defendant Franks "by and with the consent of defendant, C. W. Gold"; that on or about 1 October, 1926, Fannie E. Welborn conveyed to W. F. Manson said lots 3, 4, 5, 6, and 7, of the Lindhurst subdivision, and in exchange therefor J. D. Franks conveyed to said Fannie Welborn the Walker Avenue property. The plaintiff alleged that Fannie Welborn and Franks and Gold mutually agreed that each party to the conveyances would assume the payment of all mortgages and prior encumbrances that existed on the property that each party received in the trade. In the deed from Fannie Welborn to Manson there was a recital to the effect that the grantee would assume the payment of said encumbrances specified in detail in said recital, aggregating $11,015.55.

Plaintiff learned of the conveyance by Fannie E. Welborn in October, 1926. As a result of his conversation with Mrs. Welborn he made demand upon the defendant Franks to pay one of the notes which had matured. In response to said demand the defendant Franks paid to the plaintiff Leftwich $738.59. Later on the defendant Franks and the defendant Gold executed a note which was discounted, and from the proceeds thereof the sum of $2,411 was paid on said indebtedness.

It appeared in evidence that the defendant Manson was employed by the First Realty and Loan Company, of which defendant Franks was president. Manson was offered as a witness by the plaintiff and testified

that he knew nothing of the transaction and had never seen the deed from Mrs. Welborn, and that he was not a partner with the defendants, Franks or Gold, and had nothing to do with the negotiation or the exchange of property.

The plaintiff further testified that he had various conversations with the defendant Franks in regard to the payment of his notes, and that Franks delayed making payment on the ground that he had not been able to confer with "his partner." Subsequently plaintiff conferred with the defendant Gold about the payment of the Welborn notes, and the defendant Gold referred to the notes as "our notes on those Lindhurst lots," and requested plaintiff to send him a statement of the amount owing on the notes, and the plaintiff complied with the request, sending an itemized statement of all notes and the amounts due thereon. Upon another occasion, when plaintiff was making demand upon Gold for payment, said defendant asked plaintiff, "L. B., how much do we owe you on that stuff at the present time, altogether?" Later on in the conversation, Gold remarked: "What discount will you allow me if I will pay off the full amount of that thing right now?" Thereupon plaintiff made a proposition to allow $300 discount, and Gold said "that the proposition sounded all right to him, but before taking up the notes he wanted to talk with his partner, Franks, telling me to hold the notes and he would see me in the meantime and let me know at ten o'clock the next morning." Plaintiff testified that next morning Gold called him and informed him that he had definitely decided to take up the notes and get the discount. Subsequently Gold notified plaintiff that he could not settle the matter right now as he was "having the title looked up, and until I get that done I do not want to go into it further." In a day or two the defendant Gold notified the plaintiff that he would not proceed further with the matter or pay off the notes. Plaintiff testified: "I said, C. W. (Gold), you do not question that you are the owner of these lots?" He said, "There is no question about ownership. I just did not sign any papers; therefore, I am not legally liable."

The balance due on the notes was $4,344.33. Plaintiff took a voluntary nonsuit as to the defendant Manson, and at the conclusion of plaintiff's evidence the court sustained the motion of nonsuit as to defendant Gold.

The following issues were submitted to the jury:

1. "Did the defendant Franks assume the payment of the notes executed by Mrs. Fannie Welborn to the plaintiff L. B. Leftwich as set out and alleged in the complaint?"

2. "If so, what amount, if any, is the plaintiff entitled to recover of defendant Franks?"

The jury answered the first issue "Yes," and the second issue, $4,343.23."

Judgment was rendered upon the verdict, from which judgment the defendant Franks gave notice of appeal, but did not perfect his appeal.

Plaintiff appealed from the judgment of nonsuit as to C. W. Gold, and the sole question now before us is raised by said judgment of nonsuit.

*Herbert S. Falk and Sidney S. Alderman for plaintiff.*
*Brooks, Parker, Smith & Wharton for defendant, C. W. Gold.*

BROGDEN, J. The plaintiff alleged that the defendants, Franks and Gold, were partners in the real estate business, and as such partners owned the Walker Street property. The jury by its verdict has found that the defendant Franks assumed the payment of the notes executed by Mrs. Welborn and payable to the plaintiff.

Therefore, the determinative question is whether there was sufficient evidence of partnership between Franks and Gold to be submitted to the jury.

The general law of partnerships applies to a partnership formed for the purpose of buying, selling, and dealing in land. *Brogden v. Gibson,* 165 N. C., 16, 80 S. E., 966; *Gorham v. Cotton,* 174 N. C., 727, 94 S. E., 450; *Newby v. Realty Co.,* 182 N. C., 34, 108 S. E., 323; *Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56; *Justice v. Sherard,* 197 N. C., 237.

In the *Gorham case, supra,* the law was thus stated: "That, to make a partnership, two or more persons should combine their 'property, effects, labor, or skill in common business or venture, and under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent for the others in matters appertaining to the partnership and within the scope of its business.'" It was further held "that in order to constitute a partnership it is necessary that there should be something more than the joint ownership of property; that mere community of interest by ownership is sufficient to create a tenant in common; that, before there can be a partnership, there must be an agreement for community of profits and loss." *Robinson v. Daughtry,* 171 N. C., 200, 88 S. E., 252; *Bank v. Odom,* 188 N. C., 672, 125 S. E., 394.

Viewing the evidence with that liberality which the law prescribes, we are of the opinion that the judgment of nonsuit, as to Gold, should be reversed.

Reversed.

M. HINNANT ET AL. v. JOHNSTON COUNTY HIGHWAY COMMISSION ET AL.

(Filed 12 February, 1930.)

**Highways C a—County highway commission could discontinue section of road without giving notice under C. S., 3762, under facts in this case.**

Where a county highway commission is given authority by statute "to abandon any existing county road or convert it into a cartway" and "to change or relocate any existing road, and add any new roads," and the power thus given is limited by an amendment adding the words "as now given county commissioners by statute" after the word "cartway": *Held*, the limitation of the amendment refers only to "abandonment" and conversion into a "cartway," and the county highway commission is given power to make a change in an old road by discontinuing a short section thereof without giving notice required of county commissioners by C. S., 3762, but such discontinuance will be restrained until adequate access to a cemetery along the discontinuance is provided.

APPEAL by defendants from *Midyette, J.*, at June Term, 1924, of JOHNSTON. Modified and affirmed.

This was an application for an order to restrain the defendants from closing a section of a public road. The defendants are the Johnston County Highway Commission, a corporation, the individual members thereof, and Joe Pittman, over whose land the section of road extends. No evidence was offered at the hearing, but the material facts appearing from the complaint and answers appear to be substantially as herein given.

The closed section is a part of a public road referred to as Old Highway 22. It extended in a northeast and southwest direction a distance of 500 yards on the land of the defendant Pittman. About two years before the hearing the Johnston County Highway Commission constructed and laid a hard surface on New Highway 22, which extends east and west through Pittman's land. At the east boundary of this land New Highway 22 connects with the Goldsboro Road which runs north and south. A triangle is thus formed by the two roads and Pittman's eastern boundary line, and in the northeast corner of the triangle is a cemetery. After New Highway 22 had been constructed the Johnston County Highway Commission discontinued the use of the described section of the old road and authorized Pittman to barricade it at the western boundary of his land. Thereupon the plaintiffs for themselves and on behalf of other taxpayers brought suit to enjoin the defendants from obstructing or discontinuing the section of Old Highway 22. The defendants admitted that the County Highway Commission had given no notice of its intention to close the section of the old

road under C. S., 3762, and Judge Midyette continued the restraining order until the hearing in order to give the Commission an opportunity to issue a notice in compliance with said section, without prejudice to the legal rights of the parties. The defendants excepted and appealed.

*Abell & Shepard for plaintiffs.*
*James D. Parker for defendants.*

ADAMS, J. The trial court held as a matter of law that the Johnston County Highway Commission could not change any part of the old road without giving the notice prescribed by section 3762 of the Consolidated Statutes and, as such notice had not been given, that the order of the commission was void. The first question is whether there was error in this ruling.

In 1927 the General Assembly created a county highway commission for Johnston County, assigned it certain functions, and defined its powers. Public-Local Laws 1927, ch. 433. Section 8 was as follows: "That immediately upon its organization the said county highway commission shall assume control of all the public roads of the county of Johnston other than State highways. And the said county highway commission shall cause to be made a general survey and map of all existing county roads in said county, and the said commission is hereby given full authority to abandon any existing county road or to convert the same into a cartway. Said commission is also vested with full authority to change or relocate any existing road, or add any new roads, endeavoring to so arrange and develop the county road system of Johnston County so as to make it coördinate with the State highway system so far as it is practicable to do so, and likewise to serve in the most practicable manner the several towns and community centers created by the consolidation of the public school districts of the county." This section was amended by striking out the period after the word cartway and adding the words "as now given county commissioners by statute." Public-Local Laws 1927, ch. 602, sec. 3. Section 3762 of the Consolidated Statutes provides that the board of county commissioners shall not establish or order the laying out of any public road or discontinue or alter it unless upon petition in writing and unless it appear that every person over whose lands the road may pass shall have had due notice of the intention to file the petition. His Honor was of opinion that the amendment above set out required the County Highway Commission to give a similar notice, but in this conclusion we do not concur. It will be seen that section 8, which we have quoted, contains distinct clauses. In one the County Highway Commission is given full authority to abandon any existing road or to convert it into a cartway,

"as now given county commissioners by statute"; that is, before abandoning a public road or converting it into a cartway the Commission must give the proper notice of a hearing. But in this case the old road was neither converted into a cartway nor abandoned. The order discontinuing a short section of it simply made a change in the old road; and the power to make the change was expressly conferred by the clause of section 8 which provides that the County Highway Commission is vested with full authority to change or relocate any existing road or add any new roads. When nothing more than a change of this kind is made the amended statute does not call for such a notice as section 3762 requires of county commissioners. Moreover, the discontinued part of the old road is on the land of the defendant Pittman, with the exception of a very few feet at the western boundary where the two roads intersect, and he not only does not object, but favors the change.

But the proposed change in the road should not be made until adequate and satisfactory access to the cemetery is provided. Under existing conditions, if the change is effected, approach to the burying-ground must be either over the land of Pittman from Old Highway 22 or over the lands of Mrs. Bowen and Pittman from the Goldsboro Road. Those who have occasion to go there to bury the dead, to care for the graves, to protect the property, or to perform any proper and legitimate act must be free from the possible imputation of committing a trespass on the property of others.

To this end the restraining order will be continued to the hearing, although no notice was necessary for a discontinuance of the section of the old road. As modified the judgment is affirmed.

Modified and affirmed.

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THE STEPHENS COMPANY v. JACOB BINDER, JR., ET AL.

(Filed 12 February, 1930.)

**Deeds and Conveyances C g—In this case held: development company was not bound by restrictions in deeds to purchasers.**

The mere fact that a development company has made and registered a map of lands showing its division into streets and lots of a certain size, and has conveyed some of the lots by deeds referring to the map and containing restrictions as to the size of the lots, is not alone sufficient evidence of a general scheme or plan to include the remaining lots within the restrictive clauses of the conveyances or to create a right or easement in the absence of express or implied covenants to this effect, and an order restraining the development company from dividing and selling the remaining lands into lots of a smaller size will not lie.

STEPHENS COMPANY *v.* BINDER.

APPEAL by defendants from *Shaw, J.*, at September Term, 1929, of MECKLENBURG. No error.

Action to determine the validity of the claims of defendants, that each has the right, as the owner of a lot included within Block 26, Myers Park, claiming title thereto under plaintiff, to enjoin plaintiff from dividing for purposes of sale that portion of said block, which is included within lots numbered 10 to 20, as shown on a map of Block 26, Myers Park, recorded in the office of the register of deeds of Mecklenburg County, and now owned by plaintiff, into lots of less frontage than 100 feet, and of less area than one-half an acre, and also from changing the location of certain streets shown on said map.

Plaintiff alleges that the claim of defendants are clouds upon its title to said land, and prays that it be adjudged that said claims are invalid.

Defendants allege that Block 26, Myers Park, was platted and mapped by plaintiff, the owner thereof, under a general scheme or plan for its development as a high-class residential section, and that said general plan or scheme is shown by the map of Block 26, Myers Park, which plaintiff caused to be made and recorded, prior to its conveyance of the lots now owned by defendants. Defendants contend that they each have the right to enjoin plaintiff from conveying any lots included in said Block 26, contrary to the said general plan or scheme, as shown by said map.

The issue submitted to the jury was answered as follows: "Have the defendants a right to prevent plaintiff from subdividing that part of Block 26, embraced in lots Nos. 10 to 20 inclusive, into lots of less than 100 feet frontage, and less than one-half acre in size, and also from changing the location of 'A Road' and that part of 'Q Road,' on the east side of Block 26? Answer: No."

In accordance with the verdict, it was considered, ordered and adjudged "that plaintiff is the owner of that part of Block 26, of Myers Park embraced in lots 10 to 20, inclusive, as shown by map recorded in Map Book No. 230, at page 276, in the office of the register of deeds of Mecklenburg County, and that the defendants have no rights to prevent the plaintiff from subdividing said land into lots with a less frontage than 100 feet, and a less area than one-half acre, and no right to prevent the plaintiff from altering the location of 'A Road,' and that part of 'Q Road' that lies on the east side of Block 26."

From the judgment rendered, the defendants appealed to the Supreme Court.

*Whitlock, Dockery & Shaw and Taliaferro & Clarkson for plaintiff.*
*H. L. Taylor for defendants.*

CONNOR, J. On or about 1 January, 1913, plaintiff, a corporation, owned in fee simple, a parcel of land, containing about 15 acres, located within the boundaries of Myers Park, a suburb of the city of Charlotte, N. C. It caused a map of said parcel of land to be made, and recorded in the office of the register of deeds of Mecklenburg County. On this map the said parcel of land is designated as Block 26, Myers Park. The map shows said parcel of land divided into twenty lots, nine of said lots fronting on the "Boulevard," and the remaining eleven lots, number 10 to 20, fronting on "Q Road" and "A Road." Each of the twenty lots as shown on said map, has a frontage of not less than 100 feet, and an area of lot less than one-half an acre.

After the said map was recorded, plaintiff sold and conveyed the nine lots shown on the map as fronting on the "Boulevard," to various persons. In the deed for each of these lots reference is made to the map of Block 26, as recorded in the office of the register of deeds of Mecklenburg County. None of the eleven remaining lots, fronting on "Q Road" and on "A Road," and lying in the rear of the nine lots which have been sold and conveyed, has been sold or conveyed by plaintiff. All of these lots are now owned by plaintiff.

In each of the deeds by which the nine lots were conveyed by the plaintiff to the original purchaser, there are restrictive covenants, which the grantee, for himself, his heirs and assigns, agrees to observe and abide by. These restrictive covenants are applicable only to the lot conveyed by and described in the deed from plaintiff to its grantee. There is no express covenant in any of said deeds, by which plaintiff binds itself with respect to the other lots owned by it and included within Block 26. None of the defendants, claiming under the immediate grantee of the plaintiff, has any right to or easement in lots owned by plaintiff, at the date of its conveyance of the lot now owned by said defendant to its grantee, by reason of any express covenant on the part of the plaintiff.

The contention of defendants that there are implied covenants binding on the plaintiff with respect to the lots not sold or conveyed by it, which they have a right to enforce, cannot be sustained. There is nothing in the record which shows that plaintiff planned and mapped the parcel of land owned by it, and designated as Block 26, Myers Park, for development under a general plan or scheme. The map alone is not sufficient to support the contention of defendants. *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697. It is admitted that plaintiff conveyed nine of the lots shown on the map with restrictions, substantially similar, and that it has not conveyed any of the remaining eleven lots. No restrictions have been imposed by plaintiff upon that portion of Block 26 which it now owns, either expressly or by implication.

In the absence of a covenant, express or implied, to the contrary, binding on the plaintiff, the plaintiff has the right to subdivide that portion of Block 26, Myers Park, which it has not sold or conveyed, and which it now owns in fee simple, into lots of such frontage and of such size as it may desire, and defendants have no right to prevent by injunction or otherwise the exercise of this right by plaintiff.

In each of the deeds by which plaintiff conveyed to the several purchasers the lots now owned by defendants, the plaintiff reserved the right to change, alter or close up any street or avenue shown on the map of Block 26, Myers Park, which it had caused to be made and recorded, not adjacent to the lot conveyed by said deed, and not necessary to the full enjoyment by its grantee of said lot. There was no error in the charge of the court to the jury, that if the jury should find the facts to be as testified by the witnesses, they should answer the issue, "No."

Assignments of error based upon exceptions to the rulings of the court upon plaintiff's objections to the introduction of evidence offered by defendants cannot be sustained. The evidence excluded was not competent to show that plaintiff had sold and conveyed lots now owned by defendants in accordance with a general plan or scheme for the development of Block 26, Myers Park.

There was no evidence tending to support an affirmative answer to the issue tendered by defendants. The issue submitted by the court and answered by the jury arises upon the pleadings and is determinative of the controversy involved in this action. The judgment is affirmed. We find

No error.

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ROXIE CONLEY v. C. R. CABE, ADMINISTRATOR OF THE ESTATE OF S. C. CONLEY, DECEASED.

(Filed 12 February, 1930.)

**1. Bastards B b—Contract for support of illegitimate child is valid and is enforceable by the child.**

A contract made by the father of an illegitimate child with the mother of such child for its support, maintenance, and education is not contrary to public policy and is valid and enforceable by the child for whose benefit it was made.

**2. Executors and Administrators D c—Measure of damages recoverable against estate of father by illegitimate child on contract for support.**

Where the estate of the father of an illegitimate child is sued by the child upon a contract made by the deceased with the mother of such child for its maintenance, support and education, the measure of damages

recoverable against the estate upon sufficient proof on the contract is a reasonable amount, taking into consideration the conditions and standing of the plaintiff in the community, for the support and maintenance and education of the child during minority, less such sums as may have been paid by the father during his lifetime for this purpose.

**3. Evidence D b—Mother of illegitimate child suing estate of father on contract for support is not party in interest within meaning of C. S., 1795.**

The mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, is not a party interested in the event of the action whose evidence on the trial is excluded under the provisions of C. S., 1795.

APPEAL by defendant from *McElroy, J.*, and a jury, at April Term, 1929, of MACON. No error.

This was an action for breach of contract.

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

"1. Is the plaintiff the illegitimate child of defendant's intestate, S. C. Conley, as alleged in the complaint? Answer: Yes.

2. Did defendant's intestate, S. C. Conley, contract to and with Nancy Conley, the mother of the plaintiff, to take care of, maintain, support and educate plaintiff? Answer: Yes.

3. Did the defendant's intestate, the said S. C. Conley, fully perform said contract? Answer: No.

4. What amount, if any, is plaintiff entitled to recover of the defendant as administrator? Answer: $2,772."

*Jones & Jones and Bourne, Parker & Jones for plaintiff.*

*Edwards & Leatherwood for defendant.*

CLARKSON, J. After the jury had been sworn and empaneled to try this action and after the pleadings had been read, the defendant demurred *ore tenus* to the complaint. The motion was overruled, and defendant excepted and assigned error.

The defendant introduced no evidence and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The motion was overruled and defendant excepted and assigned error. We think the court below was correct in overruling the demurrer *ore tenus* and also the motion for judgment as in case of nonsuit. We think there was sufficient evidence to be submitted to the jury.

The suit is properly brought. In *Parlier v. Miller,* 186 N. C., at p. 503, it is said: "We deduce from the authorities that it is well settled that where a contract between two parties is made for the benefit of a

third, the latter may sue thereon and recover, although not strictly a privy to the contract." *Bank v. Assur. Co.*, 188 N. C., 753; *Thayer v. Thayer*, 189 N. C., 508.

In *Redmond v. Roberts, ante,* at p. 163, speaking to the subject, it is said: "It is clearly established in this State that a contract made by the father of an illegitimate child with the mother thereof for support and maintenance of such child, is not contrary to public policy, but is a valid and enforceable agreement supported by sufficient consideration. *Hyatt v. McCoy*, 195 N. C., 762, 143 S. E., 518."

The fact that some one else partially performed what the contract contemplated should be done for plaintiff did not relieve defendant's intestate of his duty under the contract. The jury has found, under proper instruction, that defendant's intestate made the contract for plaintiff's benefit and breached it. We see no prejudicial error in the admission of evidence set forth in the record, which was excepted to by defendant and error assigned and allowed by the court.

We see no error in the following portion of the charge which defendant excepted to and assigned as error: "The court charges you that if the plaintiff—if you have answered the first and second issues Yes, and the third issue No, and then the plaintiff would be entitled to recover of the estate of said intestate a reasonable amount for her support, maintenance and education during her minority, taking into consideration the condition and standing of the plaintiff in the community in which she lived, less such amount as you may find from the evidence that the defendant's intestate has paid the plaintiff, or to her mother for her use during her minority. And the difference between such an amount as you may find shall be a reasonable amount for the support, education and maintenance of the plaintiff less such an amount as defendant's intestate may have actually paid, the difference between those two amounts would be your answer to the fourth issue."

C. S., 1795, has no application to the evidence of Mrs. Nancy Conley, mother of the plaintiff. She was not "a party or a person interested in the event, . . . concerning a personal transaction or communication between the witness and the deceased person." *Fort Worth & Denver City Ry. Co. v. Hegwood, post,* 309.

The court below did not impinge upon, but fully complied with C. S., 564.

The evidence was plenary to support the verdict. In the judgment we find

No error.

W. B. WIGGINS, CHAIRMAN, ET AL. v. BOARD OF EDUCATION OF GRAHAM COUNTY ET AL.

(Filed 12 February, 1930.)

**Schools and School Districts D b—County board of education has power to employ school janitor rather than school committee.**

Under the provisions of 3 C. S., 5429, the county board of education is authorized to select and employ janitors for a school building in a local tax district in preference to one appointed by the district school committee for the same position.

CIVIL ACTION, before *Schenck, J.*, at Chambers, at Sylva, 8 October, 1929. From GRAHAM.

The plaintiffs are the members of the school committee for Cheoah Graded School District No. 1. The defendants are the board of education of Graham County, the superintendent of public instruction for said county, and T. M. McKeldrey.

The facts essential to the development of the legal question involved are contained in the judgment of the court, which is as follows: "This cause coming on to be heard before the undersigned judge, upon the order of his Honor, Harwood, Judge, dated 28 September, 1929, after the reading of the pleadings and argument of counsel, the court finds the following facts:

1. That W. B. Wiggins, A. V. Elliott, W. H. Jones, C. C. Ghormley and N. E. Millsaps are at this time, and were, on 15 August, 1929, the duly constituted school committee of Cheoah Graded School District No. 1, of Graham County, North Carolina.

2. That on the said 15 August, 1929, the said committee executed the alleged and purported contract set out in the pleadings with one G. T. Roberts as janitor of Robbinsville High School, one of the schools in said district.

3. That at this time, and as well as on 2 July, 1929, and 15 August, 1929, C. Z. Denton, J. J. Millsaps, and Harvey Jenkins are the duly constituted board of education of Graham County, North Carolina.

4. That on the said 2 July, 1929, said board of education duly executed the alleged and purported contract with one P. M. McKeldrey as janitor of the aforementioned school, a copy of which is attached to the answer. And the court being of the opinion, upon the foregoing facts, that the said McKeldrey is the duly appointed janitor of said building, and that the said Roberts is not such janitor, as a matter of law, dismisses the restraining order heretofore signed in so far as it prohibits the said McKeldrey from entering upon and continuing his duties as

such janitor, and further restrains the said G. T. Roberts, or any of the coplaintiffs, from interfering with the said McKeldrey in the performance of his duties as such janitor."

From judgment rendered plaintiffs appealed.

*Moody & Moody for plaintiffs.*
*Dillard & Hill for defendants.*

BROGDEN, J. Is the selection of a janitor for a school building in a local tax district within the power of the district school committee or the county board of education?

In the case at bar, two janitors were selected for the same building, one by the district committee, and the other by the county board of education. The pertinent provisions of the school law apparently impose the responsibility for school property primarily upon the board of education. For instance, the legal title to school property must be vested in the board, and the building of new schoolhouses and the repairing of an old schoolhouse is under the control of the board of education. Indeed, under certain conditions, the board can actually sell the school property and deliver a good title to the purchaser. The county board, in order to encourage the use of property for civic purposes, may "make rules and regulations governing the use of school property." Furthermore, 3 C. S., 5429 provides that "all powers and duties conferred and imposed by law respecting public schools which are not expressly confirmed and imposed upon some other officials, are conferred and imposed upon the county board of education." Moreover, the county board of education is required to prepare and file what is known as the May budget. The law requires that this budget shall provide three separate school funds. 3 C. S., 5596. The current expense fund under the provisions of the law must provide for the operation of the school plant, which includes by express language, the "wages of janitors."

The plaintiffs rely upon the provisions of 3 C. S., 5538. This section confers upon the school committee the care and custody of all schoolhouses, etc., subject, however, "to rules and regulations governing school property adopted by the county board of education," etc. While 3 C. S., 5538, by narrow and strict interpretation might support the plaintiffs' theory, yet a consideration of the law, in its entirety, leads us to the conclusion that the county board of education has the right to employ a janitor under the facts and circumstances disclosed in the present record.

Affirmed.

N. F. HOUCK AND M. V. HOUCK v. THE AMERICAN EAGLE FIRE INSURANCE COMPANY.

(Filed 12 February, 1930.)

**1. Insurance D a—Life estate in house and lot is insurable interest.**

The life estates of tenants in common in a lot upon which a house is situated is an insurable interest in the house, and a policy of fire insurance issued thereon is valid and enforceable.

**2. Insurance N d—Life tenants may recover full amount of insurance as trustees of remaindermen.**

Where a policy of fire insurance is issued to tenants in common for life for the benefit of themselves and the remaindermen, the tenants in common for life may recover the full value of the policy, after loss, as trustees of the remaindermen.

**3. Insurance K a—Knoweldge of agent that insured was not owner in fee of property held imputed to insurer in this case.**

Where the agent of the insurer, with full knowledge that the insured were tenants in common for life in the property upon which application for insurance is made, and after the request of the insured that a policy be issued protecting all interests in the property, issues a policy for the insurer providing that the policy should be void if the insured was not the sole and unconditional owner: *Held*, the knowledge of the agent will be imputed to the company issuing the policy and accepting the full premium, and it will be held to have waived the provisions in the policy as to ownership.

**4. Insurance G a—Where insurer consents to transfer it is estopped to deny the validity thereof.**

Where an insurance company consents to the transfer of the policy by the insured to another who is a tenant in common for life with him, the company is estopped to deny the validity of the transfer.

APPEAL by plaintiffs from *McElroy, J.*, at July Term, 1929, of ASHE. Reversed.

This is an action on a policy of fire insurance, issued by the defendant company to the plaintiff, N. F. Houck, on 1 July, 1925, insuring the said N. F. Houck against loss or damage by fire to a dwelling-house, in a sum not exceeding $1,500. By its terms the policy continued in force for three years from the date of its issuance, and expired on 1 July, 1928. The premium for said policy was paid by the said N. F. Houck. At his request, the policy was transferred from him to his wife, the plaintiff, M. V. Houck, on 26 June, 1926, by an endorsement made thereon by the agent of the defendant company, who issued the policy in its behalf. The house covered by the policy was destroyed by fire on 5 October, 1927. After the fire, the house was appraised at $1,598.04; by the terms of the policy the defendant is liable, if liable at all, for the sum of $1,198.53.

Defendant company denied liability under the policy on the ground that neither N. F. Houck nor M. V. Houck was the owner in fee simple of the land on which the house was located at the date of the issuance of the policy, or at the date of its transfer from N. F. Houck to M. V. Houck, and on the further ground that neither of them at said dates was the sole and unconditional owner of said house. Defendant relied upon provisions in the policy to the effect that same should be void, if the insured was not the owner in fee simple of said land, or was not the sole and unconditional owner of said house.

Plaintiffs admitted that N. F. Houck was not the owner in fee simple of said land at the date of the issuance of the policy and that he was not the sole and unconditional owner of said house, at said date; they further admitted that M. V. Houck was not such owner of said land, and was not such owner of said house, at the date of the transfer of the policy to her. They alleged and offered evidence tending to show that at the date of the issuance of the policy the plaintiffs, N. F. Houck and M. V. Houck, his wife, were the owners as tenants in common of an estate in said land for the life of N. F. Houck, and that the children of N. F. Houck, as heirs at law of their mother, his first wife, owned the said land in fee, subject to said life estate, and that the house covered by said policy was built on said land, after the death of his first wife, by the plaintiff, N. F. Houck, and his second wife, the plaintiff, M. V. Houck.

Evidence offered by the plaintiffs tended to show that at the time the policy was issued to N. F. Houck and at the time it was subsequently transferred from him to M. V. Houck, the said N. F. Houck informed the agent of the defendant company of the true conditions of the title to said land and house, and requested said agent to issue a policy which would protect all persons who were interested in said house, in the event the same should be damaged or destroyed by fire. With this information, and upon this request, the agent issued the policy, naming the plaintiff, N. F. Houck, as the insured therein, and subsequently endorsed the transfer on the policy, at the request of the said N. F. Houck. Plaintiffs contended that defendant having issued and transferred the policy with full knowledge of the true condition of the title to the land and house, waived the provisions of the policy on which it relies to defeat a recovery in this action.

From judgment dismissing the action as upon nonsuit, on motion of defendant, at the close of the evidence for the plaintiffs (C. S., 567) plaintiffs appealed to the Supreme Court.

*C. W. Higgins and T. C. Bowie for plaintiffs.*
*Brooks, Parker, Smith & Wharton for defendant.*

CONNOR, J. The contention of the defendant that the evidence offered by the plaintiffs fails to show that plaintiffs, or either of them, had an insurable interest in the house covered by the policy, cannot be sustained. The evidence shows that plaintiffs owned an estate for the life of N. F. Houck in the land on which the house was located, and that they owned such estate as tenants in common. The ownership by the plaintiffs of this estate gave them an insurable interest in the house. It has been held by this Court that a person owning only an equitable interest in property has an interest therein which is insurable against loss or damage by fire. *Gerringer v. Ins. Co.,* 133 N. C., 407, 45 S. E., 773. In *Batts v. Sullivan,* 182 N. C., 129, 108 S. E., 511, it is said: "It may be stated as a general proposition, sustained by all the authorities, that whenever a person will suffer a loss by the destruction of property, he has an insurable interest therein." There was evidence tending to show that the policy was applied for and issued for the protection not only of the plaintiffs, as owners of a life estate in the house, but also for the protection of the remaindermen. The law is that "when a tenant for life, intending to insure the property for the benefit of himself and the remaindermen receives a policy for the full value of the fee, by mistake of the insurer, who accepts the full premium, the insured may recover the full value of the policy, after loss, as trustee for the remaindermen." 14 R. C. L., 1307.

There was evidence tending to show that at the date of the issuance of the policy, defendant's agent was informed by the plaintiff, N. F. Houck, that he and M. V. Houck owned only an estate in the land for his life, and that his children owned the remainder in fee. This knowledge is imputed to the defendant. This evidence was sufficient to show a waiver by defendant of the provisions of the policy on which it relies. *Midkiff v. Ins. Co.,* 197 N. C., 139, 147 S. E., 812; *Aldridge v. Ins. Co.,* 194 N. C., 683, 140 S. E., 706; *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.

The defendant is not released from liability on the policy by reason of its transfer from N. F. Houck to M. V. Houck. Both N. F. Houck and M. V. Houck are plaintiffs in this action. The defendant consented to the transfer and is therefore estopped to contend that it is invalid. *Blackburn v. Ins. Co.,* 116 N. C., 821, 21 S. E., 922.

There is error in the judgment dismissing the action. The judgment is

Reversed.

H. G. NASH, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF THE CITY OF MONROE, N. C., v. CITY OF MONROE ET AL.

(Filed 12 February, 1930.)

**Taxation A a—Maintenance of hospital is not necessary expense, and question must be submitted to voters.**

The maintenance of a hospital is not a necessary governmental expense for which a municipality may levy a tax within or in excess of the constitional limitation except by a vote of the people under special legislative authority, and while the city may with funds on hand purchase equipment for one donated to it, its payment of its note given to a bank for money borrowed for this purpose in anticipation of the collection of taxes by the city will be restrained.

CIVIL ACTION, before *Clement, J.*, in Chambers, 1 August, 1929. From UNION.

Ellen Fitzgerald by her last will and testament devised her "residence lot and dwelling and buildings thereon" to the city of Monroe for the "purpose of providing a hospital for the sick and diseased, and others requiring surgical or medical attention."

On 1 July, 1925, the city of Monroe entered into a contract with Dr. A. F. Mahoney by the terms of which Dr. Mahoney was to take charge of and run said hospital in such manner as he should see fit, and he was to be responsible for all debts incurred for the operation of the hospital, and to keep all bills promptly paid. It was thought desirable to have the management of the hospital changed in order to obtain certain benefits from the Duke Foundation. On 26 April, 1929, Dr. Mahoney appeared before the board of aldermen, requesting that the hospital equipment owned by him be purchased by the city and county for the sum of $10,000, provided the city would pay $5,000 and the county $5,000. The record discloses that the board of aldermen at various meetings declined to enter into the arrangement until 10 July, 1929. On said date the board of aldermen passed the following resolution:

"Be it ordained by the board of aldermen of the city of Monroe:

That the city of Monroe borrow from the First National Bank of Monroe, N. C., the sum of $5,000, to be due and payable on 10 October, 1929, at the rate of six per cent per annum. That said note be executed by the mayor of the city of Monroe, and by the clerk of the city of Monroe, in the name of the city of Monroe and the corporate seal of the municipality be affixed to said note.

That the proceeds from said loan be turned over to the business manager of the Ellen Fitzgerald Hospital in accordance with resolution heretofore passed in regard to said donation and hospital.

That said money is borrowed in anticipation of the collection of the taxes and revenues of the city of Monroe for the year 1929, and that said appropriations be included in the annual budget and sufficient rate levied to take care of said appropriation.

This 10 July, 1929."

Contemporaneously with the passage of said resolution Dr. Mahoney executed and delivered to the city of Monroe a bill of sale for certain equipment and supplies belonging to him and used by him in the operation of the hospital. The bill of sale recited a consideration of $5,000 and other consideration.

Pursuant to said resolution the city executed and delivered, on 11 July, 1929, to the First National Bank of Monroe its negotiable note in the sum of $5,000. Thereafter, on 12 July, an action was brought by the plaintiff to restrain the payment of said note and to restrain the city of Monroe from including the amount thereof in the budget of said city.

The defendants filed an answer contending that said note was valid and setting out in detail the benefits which accrued to the community by reason of the operation of said hospital.

Upon the hearing the trial judge was of the opinion that the defendants had no power or authority to incur the indebtedness in controversy or to execute the note referred to in the pleadings, or to include such note in the budget for the fiscal year or to levy any tax for the payment of same. Thereupon it was adjudged that the injunction theretofore issued in the cause be continued to the hearing. It was further adjudged that the city of Monroe be restrained "from the payment of said note or any part thereof out of the funds of the city."

From judgment, so rendered, the defendant appealed.

*J. L. Jones and J. L. DeLaney for plaintiff.*
*Gilliam Craig and John C. Sikes for defendant.*

BROGDEN, J. The maintenance of a municipal hospital is not a necessary governmental expense. *Armstrong v. Commissioners,* 185 N. C., 405, 117 S. E., 388.

Moreover, "for purposes other than necessary expenses a tax cannot be levied within or in excess of the constitutional limitation except by a vote of the people under special legislative authority." *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25; *Tate v. Commissioners,* 122 N. C., 812, 30 S. E., 352.

Undoubtedly, if the city of Monroe had the money in its treasury, it could purchase equipment for its hospital. *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611; *Henderson v. Wilmington, supra.* But the city of Monroe did not have such funds in hand and undertook to pledge

the faith and credit of the city in order to obtain the money. This cannot be done except in accordance with the methods provided by law.

It appears from the judgment that the city was restrained from paying the note now held by the First National Bank of Monroe. The bank was not a party to the action, and this portion of the judgment must be stricken out. Otherwise the judgment is correct.

Modified and affirmed.

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STATE v. FLOYD STANLEY.

(Filed 12 February, 1930.)

**Criminal Law L a—Appeal in capital case will be dismissed when not prosecuted under rules after examination of record for errors.**

An appeal *in forma pauperis* by a defendant convicted of a capital felony will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the rules of Court regulating appeals, after an examination of the record for errors appearing on its face.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. Criminal prosecution tried at the April Term, 1929, Craven Superior Court upon an indictment charging the prisoner with the murder of one James Bryant, which resulted in a conviction of murder in the first degree and sentence of death. From the verdict thus rendered and judgment entered thereon, the prisoner gave notice of appeal to the Supreme Court, but has failed to prosecute same, as required by the rules, or to take any steps looking to that end, albeit the prisoner was allowed to appeal *in forma pauperis*. *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728. The motion of the Attorney-General to docket and dismiss the appeal must be allowed. *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881. But this we do only after an examination of the case to see that no error appears on the face of the record, as the life of the prisoner is involved. *S. v. Newsome,* 196 N. C., 16, 144 S. E., 300. None appears on the present record.

Appeal dismissed.

FORT WORTH AND DENVER CITY RAILWAY COMPANY v. C. P. HEGWOOD, ADMINISTRATOR OF THE ESTATE OF SAMUEL KESTLER.

(Filed 12 February, 1930.)

1. **Evidence I b—Original voucher records in this case held admissible as verified regular entries of deceased.**

   Where in an action against the administrator of the plaintiff's deceased auditor of expenditures it is alleged that the deceased had the power, in the absence of his superior, to initiate and sign vouchers of the plaintiff and that the deceased, in the absence of his superior, initiated and signed two vouchers to a fictitious firm, endorsed them, and embezzled the proceeds collected therefrom, the introduction of the original record vouchers entered in the regular course of business by the deceased in his handwriting and under his immediate control, and proved to have come from the proper depository are admissible in evidence as verified regular entries, the original observer being dead.

2. **Evidence D b—In this case held: witness was not party interested in event and his testimony was not prohibited by C. S., 1795.**

   The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, is not incompetent as falling within the provisions of C. S., 1795, prohibiting testimony as to transactions or communications with a decedent by a party in interest, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action.

3. **Limitation of Actions B b—Whether fraud should have been discovered three years before commencement of action held question for jury.**

   Where, in an action against the administrator of a deceased to recover sums embezzled by the deceased, the defendant pleads the three-year statute of limitations, and there is evidence that the fraud practiced on the plaintiff by the deceased was not and, in the exercise of due diligence, could not have been discovered by the plaintiff three years before the commencement of the action, the question is properly submitted to the jury, and their finding in favor of the plaintiff will be upheld. C. S., 441(9).

APPEAL by defendant from *Harding, J.*, and a jury, at January Term, 1929, of IREDELL. No error.

The complaint, among other things, alleges: "That the defendant's intestate, Samuel Kestler, during the year 1924, while in the employment of the plaintiff as auditor of disbursements, as hereinbefore set out, by means of two certain false and fraudulent vouchers issued or initiated by him, and made payable to the order of Phœnix Brokerage Company, one for the sum of $2,970 and the other for the sum of $4,080.16, each of said vouchers purporting to be for fuel oil, when in fact no such

orders had been given and no such purchases had been made, obtained from plaintiff the sum of $7,050.16, and falsely and fraudulently misapplied, misappropriated, embezzled and converted to his own use said sums, to plaintiff's loss and damage in the sum of $7,050.16. That the defendant's intestate obtained the aforesaid sum or sums from the plaintiff with intent to cheat and defraud plaintiff, while holding a position of trust with the plaintiff, to wit, auditor of disbursements, in the following false, fraudulent and deceptive manner: (1) The said intestate issued or initiated voucher No. 18047 in the sum of $2,970, payable to the order of the Phœnix Brokerage Co., said voucher purporting to be for fuel oil, which was never ordered or received by plaintiff, and which voucher was paid by the treasurer of plaintiff on 22 April, 1924. (2) The said intestate issued or initiated voucher No. 22691 in the sum of $4,080.16, payable to the order of the Phœnix Brokerage Co., said voucher purporting to be for fuel oil which was never ordered or received by plaintiff, and which voucher was paid by the treasurer of plaintiff on 20 September, 1924. (3) Both of the vouchers herein mentioned were made payable by said intestate, falsely and fraudulently, to Phœnix Brokerage Company, when in truth and in fact there was no such company in existence; that each of said vouchers was endorsed falsely and fraudulently in the name of Phœnix Brokerage Company, a false and fictitious person or company, either by defendant's intestate or by some one at his request, unknown to plaintiff; that after said vouchers were so endorsed, each of them was deposited for collection and collected by the defendant's said intestate or his agent, through the Fidelity National Bank of Oklahoma City, Oklahoma; that defendant's intestate, thus fraudulently and falsely, obtained the proceeds from the collection of said vouchers and immediately misappropriated, misapplied, embezzled and converted the same to his own use, thereby cheating and defrauding plaintiff out of the sums and amounts above set forth, aggregating the sum of $7,050.16; that plaintiff never received or realized anything of value for said sums, and that the same were obtained, converted, embezzled and misappropriated by defendant's intestate without the knowledge, consent or authority of plaintiff; that by reason of the fraud and deceit practiced on the plaintiff by defendant's intestate, as above set out, the plaintiff has suffered loss and been damaged in the sum of $2,970 with interest from 22 April, 1924, and the further sum of $4,080.16 with interest from 20 September, 1924. . . . That plaintiff did not and could not by the exercise of reasonable diligence discover the alleged fraud and deceit, conversion and embezzlement on the part of defendant's intestate until during the month of April, 1927, a short time prior to said intestate's death, and that some of the facts in connection therewith were not discovered until after the death of said intestate."

The defendant denied the allegations of the complaint and set up the plea of the statute of limitation. Defendant alleged that plaintiff had ample opportunity and ought to have discovered the fraud, if any there was, by the exercise of due diligence. The defendant introduced no evidence.

The facts of the record are to the effect that the defendant's intestate, Samuel Kestler, went with plaintiff's company in 1908. In 1920 he was appointed auditor of expenditures, which position he held until about February, 1925, when he resigned on account of drinking, but the company had every confidence in him. W. C. Logan, the general auditor, was the only one over him. Kestler had direct supervision and charge of all expenditures. The voucher books, records and accounts pertaining to all expenditures were kept under his immediate supervision. In the absence from the city of W. C. Logan, the general auditor, Kestler had authority to initiate and approve for payment vouchers drawn on the company. The voucher after being paid was returned to the office of the auditor of expenditures and filed in the office where it originated. The respresentative of the Interstate Commerce Commission, in checking up under the Transportation Act, called attention to the fact that two vouchers could not be found on file. A very careful search was made for the original papers dealing with the two items by Logan and they could not be found. (1) Voucher No. 18047 in favor of the Phœnix Brokerage Company of Oklahoma City, in the sum of $2,970, for fuel oil; (2) Voucher No. 22691 in favor of the Phœnix Brokerage Company of Oklahoma City for $4,080.16 for fuel oil. The company had paid out the money, the funds disbursed and the company inured no benefit whatever in the transaction.

All the following evidence was objected to by defendant: Plaintiff kept certain original voucher register sheets in a book kept in the department of auditor and expenditures, made under the general supervision of Samuel Kestler in the usual course of business, made from day to day and month to month. Defendant's intestate had control over also another sheet showing detail of operating expenses, made in the usual course of business in the office. The original sheets, or records, were introduced for the month of March, 1924. Record voucher No. 18047, is described as material, sent Grant Locomotive Works, $2,970. The writing on this voucher being in the handwriting of defendant's intestate, Samuel Kestler. Record also introduced made under the general supervision of Kestler, auditor of expenditures. It shows voucher issued to Phœnix Brokerage Company, to wit: The tenth item, counting from the bottom up, records audit No. 22691; date sent treasurer, 12 September, day paid 20 September, 1924, name Phœnix Brokerage Company for fuel oil, amount $4,080.16. Disbursed and charged to fuel

stock account $4,080.16. The moving of the above item shown in the treasurer's record and his testimony on the dates indicated the above. All the records were identified and proved as coming from the proper depository. Defendant excepted to the above evidence and assigned error, which will be commented on hereafter in the opinion.

Careful investigation was made and there was no such firm in Oklahoma City as the Phœnix Brokerage Company. The vouchers were run through the Fidelity National Bank of Oklahoma City. In that bank was a New York Exchange in Kestler's favor bearing his personal endorsement. Kestler's brother-in-law lived in Oklahoma City. Logan was able to find all the vouchers for all expenditures during Kestler's time, with the exception of the two items in question, and he made special efforts to find these two particular vouchers and was unable to find them. He did not find the supporting orders for these vouchers. In 1924 plaintiff received no material or fuel oil from the Phœnix Brokerage Company.

The transactions in controversy, when the vouchers were made by Kestler, his superior Logan was out of the city at Fort Worth, the head office of plaintiff's company. In 1927 the matter was discovered. W. C. Logan testified in part: "The bookkeeping and auditing is strictly in conformity with the requirements of the Interstate Commerce Commission, that governs and regulates the keeping of accounts and records of steam railroad companies. . . . Q. If you had been diligent in 1924 as you were in 1927, you could have discovered it? A. I think not. I am diligent all the time." The treasurer had no authority to pay unless Logan would be absent. "In his absence both signatures as auditor of expenditures and general auditor were the same, no other signature would be required."

The two items of $2,970 and $4,080.16 passed through the Fidelity National Bank of Oklahoma City and only two vouchers payable to the Phœnix Brokerage Company came through the treasurer's office. The purchasing agent for plaintiff's company kept a record of purchases in 1924, had no record of such and made no purchases from the Phœnix Brokerage Company, and never had any business transaction with that company and never heard of such a company, and never received any fuel oil from such a company. He purchased everything for plaintiff except the food for the dining car. The auditor of expenditures initiated the vouchers.

H. B. Ruch, chief clerk to the general auditor, testified, in part, unobjected to: "My records don't show that the Fort Worth and Denver City Railway Company received any oil from the Phœnix Brokerage Company in September during the year 1924. From the records in my office the railway received no fuel oil in 1924, from the Phœnix

Brokerage Company. They received nothing from that company in 1924. The two vouchers issued to the Phœnix Brokerage Company in 1924 were not issued in payment of anything received by the Fort Worth and Denver City Railway Company. I have investigated the Phœnix Brokerage Company. There was no such organization known other than this particular transaction. I know from what particular point we purchased fuel oil in 1924."

R. C. Stuart, vice-president and cashier of Fidelity National Bank of Oklahoma City, testified in part: "L. D. Lindsay had an account in our bank in the years 1923 and 1924." The bank issued a draft to S. Kestler about 24 April, 1924, name of A. Kestler is on the back of it. "All these records are the original records of the bank and were made at the time of the transaction, and the Exhibits 'A' and 'B' show items on the amount of $2,970 and $4,080.16, as being deposited to the account of L. D. Lindsay."

L. D. Lindsay, who was the brother-in-law of Kestler, who lived in Oklahoma City, testified in part: "In 1924 he (Kestler) was living at Fort Worth, Texas, working for the Fort Worth and Denver City Railway Company. Don't know how long he worked for them; it was a number of years. He came up to see me while I lived at Oklahoma City, and I had business with him. I carried a check or voucher through the Fidelity National Bank at the instance of Sam Kestler in the year 1924. There were two transactions of this kind. That occurred in April and September, 24 April and 24 September. Q. Now, Mr. Lindsay, just tell us what occurred; that is, what you did with reference to each of those transactions that you mentioned. (Objection by the defendant, under section 1795, C. S.; objection overruled; exception, assignment of error.) Sam Kestler came to Oklahoma City with a check made to the Phœnix Brokerage Company and told me that he and another man had sold some oil to the Fort Worth and Denver Railway, and this check was in payment of this oil. He asked me to run the check through my checking account as if his name appeared in it he would lose his job with the railroad, and he couldn't trust his partner with that much money. . . . I deposited in that bank voucher or vouchers drawn on the Fort Worth and Denver City Railway Company. I got these vouchers from Sam Kestler. I do not know where the vouchers are now. They were made payable to the Phœnix Brokerage Company. There were two vouchers, one in April, 1924, and one in September, 1924. I don't recall the amount of these vouchers; they ran into hundreds of dollars, both of them. They were credited to my account in the bank, and no one else had a right to check on my account. Two-thirds of each deposit was sent to Sam Kestler with New York Exchange checks, the balance, except $100 each, which was given to me for handling the transaction,

was sent to Sam Kestler with my personal checks. . . . Q. Mr. Lindsay, did you ever hear of the Phœnix Brokerage Company? A. No, sir. I lived in Oklahoma City three years. I had no dealings with the Phœnix Brokerage Company other than that related. I never heard of a firm by that name except in those two transactions. These two checks or vouchers came into my possession through Sam Kestler, who brought them to me at Oklahoma City in person. . . . I did not think it peculiar that he should make a trip to Oklahoma City on Sunday on these matters, because he could leave Fort Worth on Saturday night and get back to the office on Monday morning. I did not ask him why he did not mail them, because he frequently came up to spend Sundays with us, and there was nothing unusual about his visit there on Sunday."

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

"1. Did defendant's intestate, Samuel Kestler, while acting as auditor of expenditures for plaintiff, falsely and fraudulently, by means of a certain voucher, collect, receive and misappropriate or embezzle the sum of $2,970 belonging to plaintiff as alleged in the complaint? Answer: Yes.

2. Did defendant's intestate, Samuel Kestler, while acting as auditor of expenditures for plaintiff, falsely and fraudulently, by means of a certain voucher, collect, receive and misappropriate or embezzle the sum of $4,080.16 belonging to plaintiff, as alleged in the complaint? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover of defendant? Answer: $7,050.16.

4. Is plaintiff's cause of action against the defendant barred by the Statute of Limitations? Answer: No."

The defendant made numerous exceptions, assignments of error, and appealed to the Supreme Court.

*Zeb V. Turlington, Long & Glover and P. S. Carlton for plaintiff.*
*W. D. Turner and Dent Turner for defendant.*

CLARKSON, J. It was the contention of plaintiff that defendant's intestate, Samuel Kestler, embezzled two sums of money of plaintiff: (1) $2,970 represented by voucher No. 18047, payable to the order of the Phœnix Brokerage Company, for fuel oil, for which plaintiff received no benefit and paid by plaintiff's treasurer 22 April, 1924. Samuel Kestler initiated this voucher and in the absence of his superior, the general auditor, he had authority to sign same. (2) $4,080.16, represented by voucher No. 22691, payable to the order of the Phœnix

Brokerage Company, for fuel oil which plaintiff never received any benefit from and paid by plaintiff's treasurer on 20 September, 1924. Samuel Kestler initiated this voucher and in the absence of his superior, Logan, the general auditor, he had authority to sign the same, and these vouchers were signed in his absence. It may be noted that in the allegations and proof there is a few days discrepancy in the dates of the vouchers in April and September, which is immaterial.

The representative of the Interstate Commerce Commission, in checking up under the Transportation Act, could not find these vouchers, and a very careful search was made by Logan, the general auditor, over Samuel Kestler, and they could not be found. Samuel Kestler was auditor of expenditures and there was kept under his immediate control in the department of auditor and expenditures certain original voucher register sheets, kept in a book.

The original sheets, or records, were introduced in evidence in the court below and identified and proved as coming from the proper depository. Record Voucher 18047 is described as material, sent Grant Locomotive Works, amount $2,970, issued to Phœnix Brokerage Company. The writing on this record voucher being in the handwriting of Samuel Kestler. Record Voucher 22691, issued to Phœnix Brokerage Company, for fuel oil, amount $4,080.16. The dates were shown on the original sheets. The moving of the above items is shown in the treasurer's record and the dates. The original sheets and records were under the immediate control of Samuel Kestler. The moving of these items was shown on the treasurer's record under his control. The treasurer testifying to the fact. All this and other like evidence was objected to by defendant and allowed by the court below. Exceptions and assignments of error were duly made to this evidence by defendant, which we think cannot be sustained. The writing on the first record voucher was in the handwriting of Kestler, the records were under his immediate control. These were regular entries that Kestler in the regular course of the business of the company, was in duty bound to keep, under his immediate control. He, in the performance of his duty, was bound to know the import of each entry. Kestler being dead, the record vouchers in his handwriting and under his control were admissible in evidence. The moving of the items, testified to by the department heads was competent. The probative force was for the jury.

Dean Wigmore, in discussing exceptions to the hearsay rule—regular entries—in Vol. 3, 2d ed., at p. 281-2, says: "The rulings upon the subject are not yet harmonious: (a) There are, first, a number of States accepting with practical completeness the conclusion above reached, *i. e.*, in given cases admitting verified regular entries without requiring the salesmen, timekeepers, or other original observers having personal

knowledge, to be produced or accounted for. (b) There are rulings admitting verified regular entries after a showing that the original observer was deceased; possibly absence from the jurisdiction, insanity, or the like, would equally have sufficed."

In the note we find the following: "(1905) *Foreman's Insurance Co. v. Seaboard A. L. Co.*, 138 N. C., 42, 50 S. E., 452 (time of arrival of train at H.; the train sheet, verified by the train dispatcher at R., admitted without calling the operator at H., who reported the arrival; *(one of the best modern opinions by Connor, J.)* (1908); *Jones v. Atlantic C. L. R. Co.*, 148 N. C., 449, 62 S. E., 521 (conductor's train record, not admitted to show condition of stock solely because the conductor himself was not offered)." *Horse Exchange v. Wilson,* 152 N. C., 21; *S. v. Hendricks,* 187 N. C., 327; *Flowers v. Spears,* 190 N. C., 747; *Morrison v. Finance Co.,* 197 N. C., 322; *Heid Bros. v. Commercial Nat. Bank* (Texas), 24 A. L. R., at p. 910-11.

In *Peebles v. Idol, ante,* at p. 60, this observation is made: "It has been held that the books of a bank when they are proved to have come from the proper depository, are admissible in evidence. 10 R. C. L., p. 1175, sec. 373." See *Lumber Co. v. Lumber Co.,* 176 N. C., 500; *S. v. Hightower,* 187 N. C., 300.

It was in evidence that there was no such firm in existence in Oklahoma City as the Phœnix Brokerage Company. The two vouchers made payable to the Phœnix Brokerage Company were deposited by L. D. Lindsay, a brother-in-law of Samuel Kestler, in the name of L. D. Lindsay, the first on 24 April, 1924, and the other on 24 September, 1924, in the Fidelity National Bank of Oklahoma City and paid to Kestler. Two-thirds of each deposit was sent to Kestler by New York Exchange check and the balance, except $200 retained by Lindsay for his services, was sent to Kestler by personal check of Lindsay. The defendant excepted to this evidence and assigned error as incompetent under C. S., 1795. We cannot so hold.

The material part of this section for our consideration is as follows: "A party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise." Lindsay was in no way a party or a person interested in the result of the action.

"Exclusion does not apply when witness has no interest in the result of the action. The interest which disqualifies one from testifying under C. S., 1795, *supra,* is a direct, legal or pecuniary interest in the event of the action. *Helsabeck v. Doub,* 167 N. C., 205; *In re Gorham,* 177 N. C., 275." *Herring v. Ipock,* 187 N. C., at p. 461.

C. S., 441, subsection 9, is as follows: "For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have

accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Mr. McIntosh in N. C. Practice & Procedure, speaking to the subject, at p. 167-8, sec. 183, says: "An action for relief on the ground of fraud or mistake must be brought within three years after the cause of action accrues; but the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. . . . The cause of action is deemed to have accrued from the discovery by the injured party of the facts constituting fraud or mistake, and not from the date of the fraud or mistake. Following the rule formerly applied in equity, knowledge is a fact to be determined by the circumstances of each case, and the statute runs from the time the injured party knows of the fraud or mistake, or could by reasonable diligence have discovered it."

It is contended by defendant: "The summons was issued 13 April, 1928; the transaction relative to the vouchers took place in April and September, 1924, more than three years before the action was brought." That Logan was the general auditor and could by reasonable diligence have discovered it. Logan testified: "Q. If you had been diligent in 1924 as you were in 1927 you could have discovered it? A. I think not. I am diligent all the time." This, and other evidence bearing on this aspect, was left to the jury.

The charge, taken as a whole, we think, covered this aspect of the case. There was evidence objected to in the record and like evidence unobjected to. We cannot see that this line of objection was prejudicial. The able briefs of counsel go into every phase of the evidence and law on the subject, and, after a thorough consideration of the record and briefs, we do not think there is any prejudicial or reversible error, and we find in the judgment

No error.

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STATE OF NORTH CAROLINA EX REL. CORPORATION COMMISSION v. TRANSPORTATION COMMITTEE OF THE NORTH CAROLINA COMMISSION ON INTERRACIAL CO-OPERATION.

(Filed 12 February, 1930.)

**Constitutional Law G a; Corporation Commission A c—Commission has power to require bus lines to provide equal separate accommodations for races.**

The Corporation Commission is given plenary power by statute to require bus lines operating between points within the State in carrying passengers for hire, which are public-service corporations, to provide indiscriminatory separate accommodations for the carriage of white and negro passengers, and for their separate accommodations at the bus

stations, the working out of the plans or details for the purpose being vested largely within the discretion of the Commission, and where this is done without racial discrimination it is not objectionable as being in contravention of Thirteenth and Fourteenth Amendments to the Federal Constitution. C. S., 3494, 3497, amended by chapter 216, Public Laws of 1929, and section 7, Public Laws of 1927. Hotels, theatres, etc., distinguished from public-service corporations, and the policy of our State with regard to the equal treatment of the negro race discussed by Mr. JUSTICE CLARKSON.

APPEAL by plaintiff from *Barnhill, J.*, at Chambers, Rocky Mount, N. C., 27 March, 1929. From WAKE. Affirmed.

The judgment of the court below is as follows:

"After examination of the record and hearing argument of counsel, the court holds:

1. That the petition herein filed originally before the Corporation Commission and constituting a part of the record of this case states and sets forth a matter or cause of action within the cognizance and jurisdiction of the Corporation Commission, and that bus operators who have received franchises to transport passengers for hire, pursuant to chapter 136, Public Laws of 1927, and other pertinent statutes, and who have undertaken to operate pursuant to such franchises and who enjoy the privileges and immunities of such franchises are common carriers.

2. That chapter 136, Public Laws of 1927, and other pertinent statutes confer upon the Corporation Commission full power and authority to make reasonable rules and regulations governing and regulating the transporting of all passengers, including negroes, on buses and to require that bus operators operating under a general and unlimited franchise provide equal but separate accommodations for white and negro passengers.

3. That the legislative enactment of 1929, to wit: House Bill No. 196 and Senate Bill No. 1011, not being effective until 30 June, 1929, does not affect this litigation.

4. That the exceptions of the petitioners to the dismissal of the petition as upon demurrer should have been sustained.

Now, therefore, upon motion of petitioners, the transportation committee above named, it is hereby ordered, adjudged and decreed, as follows:

1. That the exceptions of the petitioners to the dismissal of the petition by the Corporation Commission be, and the same are hereby sustained.

2. That the Corporation Commission has and is entitled to exercise full power and authority to make reasonable rules and regulations governing and regulating the transporting of all passengers on buses, including negroes, and to require that bus operators, operating under

franchises, granted pursuant to chapter 136, Public Laws of 1927, and other pertinent statutes, provide equal, but separate, accommodations for white and negro passengers.

3. That this cause is hereby remanded to the Corporation Commission for further proceedings upon said petition and for further orders pursuant to this decree.

The court being of the opinion that the right of the members of each race to travel on buses operated under such franchises for the transportation of passengers for hire is available after a reasonable time, within which the Corporation Commission may work out the details and put into force reasonable regulations and rules requiring and insuring separate accommodations for the races.

Now, therefore, it is further ordered, adjudged and decreed: That such rules and regulations have been so provided and so promulgated by the Corporation Commission within a reasonable time after the final judgment herein, the respondents, the bus operators, are not required to transport negro passengers, but they are required to transport negro passengers immediately after the entering and promulgating of such rules and regulations as aforesaid."

*I. M. Bailey for plaintiff.*
*Varser, Lawrence, Proctor & McIntyre for defendant.*

CLARKSON, J. The petition of the Transportation Committee of the North Carolina Commission of Interracial Coöperation, among other things, says: "That the petitioners are citizens and residents and taxpayers of the State of North Carolina, and organized and interested in, among other purposes, promoting the best interest of the white and negro races in North Carolina and their relations to each other, and as one of the means of accomplishing this purpose, they are endeavoring to secure for the use and enjoyment of the negro traveling public such transportation privileges and the enjoyment of such transportation rights as belong to them as citizens of North Carolina, in such a manner as to promote and to insure the welfare of all races. That the respondents named above are motor-vehicle carriers of passengers for hire over the State highway system of public roads, pursuant to certificates granted by the Corporation Commission of the State of North Carolina. . . . Wherefore your petitioners pray that notice of this petition be given to the respondents and that a hearing be had, and that the Commission enter such rules and regulations as will insure to the negro traveling public the said separate accommodations on said buses, as well as separate accommodations in the union and individual bus passenger stations, and in such other matters and details as may appear reasonable and necessary to this Commission, and that such orders be entered as will

promote the enforcement of said rules and regulations and the enjoyment of the rights to travel separately on said buses, as aforesaid."

It is contended by defendant "That separate accommodations can be provided for the negro race in such bus travel without placing any unjust or unbearable burden upon the bus carriers, and that in buses, and in the rear thereof, a simple and inexpensive partition wall of transparent material, movable and adjustable, can be used so that the races may be separated in each bus, or that in emergency separate buses can be operated, in that the traveling public is ready and willing to accommodate itself to the use of such separate accommodations. It further appears that just as practical separate accommodations for the races on bus travel can be provided as on railroads and steamboats."

It has long been the settled policy of this State, promulgated through the legislative branch of the government, to have separation or segregation of the white and negro races with equal accommodations, in the public institutions of the State, and by public service corporations. Separate schools for the white race and negro race; separate asylums and other institutions for the afflicted negroes in the State, separate reformatories, etc. In the cities and towns that have them, separate parks, separate libraries, etc. By public service corporations, separation and segregation on railroad trains, steamboats, street cars, separation and segregation in the railroad and steamboat companies' passenger stations. *S. v. Williams,* 186 N. C., 627.

In recent years, since the constructive policy of hard-surfaced and dependable roads in the State, the bus line has become one of the most important carriers of passengers. We think the Corporation Commission has full and plenary power, under the present law, to see to it that the bus lines provide separate accommodations for white and negro passengers, and separate bus station facilities. This matter is left largely to the discretion of the Corporation Commission as to the manner and method. As to separate apartments in the buses or separate buses run for the accommodation of the white and negro races, this is a matter for the Corporation Commission to determine, taking into consideration the terminals of the lines, population, economical conditions. The matter should be worked out in good faith by the Corporation Commission, taking all things into consideration, for the best welfare of the white and negro races, so that justice can be accomplished in this racial condition that exists among us—a duty that the State owes to all of its citizens. Chapter 136, Public Laws 1927, especially section 7 of said act.

Chapter 216, Public Laws 1929, amending C. S., 3494 and 3497, and section 7, chapter 136, Public Laws 1927, which went into effect 30 June, 1929, the act "Relative to separation of the races in transportation by motor vehicle." We think this act also authorizes the Cor-

poration Commission to work out in good faith the manner and method left to the sound discretion of the Commission—a sane and sensible solution giving adequate and equal accommodation to the white and negro races, taking into consideration all matters including economical conditions relative to a workable solution.

It goes without saying that hotels, innkeepers, theatres, and the like are not engaged in public or *quasi*-public business and have not been subject to such regulations as herein set forth as are applicable to the public institutions of the State and public service corporations. *S. v. Steele,* 106 N. C., 766; *Money v. Hotel Co.,* 174 N. C., 508.

In *Pickett v. Kuchan,* 49 A. L. R. (Ill.), p. 499, in annotation on p. 511, we find the following: "And it has been stated that any law 'which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feeling and long-established prejudices, and would be justly odious.' Civil Rights Bill (1875) 1 Hughes, 541, 2d ed., Cas. No. 18258. And it has been stated that it is doubtful, to say the least, if socalled Civil Rights Statute could be made to apply to purely private business. *Brown v. J. H. Bell Co.,* 27 L. R. A. 407 (Iowa)."

The Congress of the United States, on 1 March, 1875, passed "An act to protect all citizens in their civil and legal rights." 18 Stat., 335. The law passed by Congress: "Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section 2 made any violation of the above section a misdemeanor and upon conviction a fine of not less than $500 nor more than $1,000 or imprisonment of not less than 30 days nor more than a year, and provided a penalty of $500 to the person aggrieved.

Under this act certain persons were convicted, and from the judgments rendered appeals were taken to the Supreme Court of the United States to test the constitutionality of the act. They are known as the Civil Rights Cases, and reported in the 109 U. S., p. 3. At p. 4 the facts: "Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one on information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Single-

ton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, 'said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude.'" The Court held: The first and second sections of the Civil Rights Act passed 1 March, 1875, are unconstitutional enactments as applied to the several States, not being authorized either by the Thirteenth and Fourteenth Amendments of the Constitution. The Fourteenth Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is *corrective* legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts. The act was declared unconstitutional and void, and the defendants acquitted.

In *McCabe v. A. T. & S. R. Ry. Co.*, 235 U. S., at p. 158, it is said: "The Legislature of the State of Oklahoma passed an act, approved 18 December, 1907 (Rev. Laws, Okla., 1910, sec. 860 *et seq.)*, known as the 'Separate Coach Law.' It provided that 'every railway company . . . doing business in this State, as a common carrier of passengers for hire' should 'provide separate coaches or compartments, for the accommodation of the white and negro races, which separate coaches or cars' should 'be equal in all points of comfort and convenience' (sec. 1); that at passenger depots there should be maintained 'separate waiting rooms,' likewise with equal facilities (sec. 2); that the term negro, as used in the act, should include every person of African descent, as defined by the State Constitution (sec. 3); and that each compartment of a railway coach 'divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach,' within the meaning of the statute (sec. 4). It was further provided that nothing contained in the act should be construed to prevent railway companies 'from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly' (sec. 7). Other sections prescribed penalties both for carrier, and for passengers, failing to observe the law. . . . (p. 160). That it had been decided by this Court, so that the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a State to require separate, but equal, accommodations for the two races. *Plessy v. Ferguson,* 163 U. S., 537. That the provision of section 7, above quoted, relating to sleeping cars, dining cars and chair cars did not offend against the Fourteenth Amendment, as these cars were, comparatively speaking, luxuries, and that it was competent for the Legislature to take into consideration the limited

demand for such accommodations by the one race, as compared with the demand on the part of the other. That in determining the validity of the statute the doctrine that an act although 'fair on its face' might be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself *(Yick Wo v. Hopkins,* 118 U. S., 356, 373) was not applicable, as there was no basis in the present case for holding that any discriminations by carriers which were unauthorized by the statute were practiced under State authority. That the act, in the absence of a different construction by the State court, must be construed as applying to transportation exclusively intrastate, and hence did not contravene the commerce clause of the Federal Constitution." *Hall v. DeCuir,* 95 U. S., 547.

It is held in *Lowery v. School Trustees,* 140 N. C., at p. 34, the essential principles underlying the establishment and maintenance of the public school system of this State are: First, the two races must be taught in separate schools, and second, there must be no discrimination for or against either race. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for that purpose. Const. of N. C., Art. IX, sec. 2; C. S., 5537, 5538.

In our State Constitution, Art. XIV, sec. 8, we find: "All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are hereby forever prohibited." *S. v. Melton,* 44 N. C., 49; *Puitt v. Commissioners,* 94 N. C., 709.

C. S., 4340, is as follows: "All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusively, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's prison for not less than four months or more than ten years, and may also be fined, in the discretion of the court."

Before the Emancipation Proclamation, 1 January, 1863, there was a large element of free negroes in this State and the South. In the Southern States there was a strong anti-slavery sentiment. Leading men manumitted their slaves by will and otherwise. Gen. Robert E. Lee, the Southern Chieftain, was an open abolitionist, and freed his personal slaves long before 1861. An interesting case on this subject is *Johnson v. Clarkson,* 21 S. C. Eq. Reports, p. 305. In that case defendant's brother left his entire estate, valued at $116,500 (this included the value of his negroes) in trust to his brother for the purpose of freeing them. The will was made 2 October, 1840. Among the directions given defendant by his brother was the following: "If the law forbidding the emancipation of slaves in South Carolina is then in

force, so that *all* my negroes must be removed, then the husbands and wives of any of mine belonging to other persons, must be purchased from moneys of my estate not vested in lands, if there is a sufficient amount, but if there is not a sufficient sum, then so much as is necessary in addition, must be taken from the sale of the lands. . . . Husbands and wives must on no account be separated. . . . I wish no evasion of the law practiced, but application to be made to the Legislature to permit it to be executed."

John Lord, of Stamford, Conn., who wrote "Beacon Lights of History," in 1858 visited one of the defendants in the *Johnson case, supra,* and in Vol. 8, at p. 235-6, speaking of his host, says: "He was a wealthy planter and showed how well a benevolent, Christian gentleman could care for two hundred negroes. He had religious services for them on Sunday, at which a brilliant young clergyman officiated. The slaves seemed comfortable and happy, they sang their negro songs with great glee. . . . Christianity had worked on material ready for its reception—on a race naturally religious, affectionate and faithful. It took one thousand years to elevate the Germanic barbarian."

In the *Johnson case, supra,* the great jurist, James L. Pettigrew (Petigru), appeared for the legatees, to sustain the will. His kinsman, the heroic General James Johnston Pettigrew, of this State, made the famous charge with Pickett at Gettysburg on Cemetery Ridge, 3 July, 1863, and was wounded and later gave his life for the cause. In 1852 he became associated in the practice of law with James L. Pettigrew (Petigru) and continued until the breaking out of the War Between the States. *Sic mundi gloria transit.*

We repeat what was said in *S. v. Williams,* 186 N. C., at p. 633-4: "We believe, in this State, that the negro has 'the equal protection of the laws.' In fact, the best friends that the negro has are his white neighbors. The negro has been in many respects a chosen people—brought here, the land of opportunity, among civilized people, without any effort on their part, from Africa. The burden 'imposed, not sought,' has been on the white people of this State to civilize and Christianize them. The trust has been and is being faithfully performed. The race is making great strides. It is a matter of common knowledge that if in a trial of a case before a jury that involves a moneyed transaction between a white man and a negro man, if there is the least evidence that the white man has overreached or cheated a negro, the juries invariably decide for the negro. The best element of the negroes in this State are in full accord with law enforcement and the punishment of the negro who would overstep the bounds of race and be guilty of race or kindred crimes." The judgment below is

Affirmed.

THE BOARD OF EDUCATION OF BUNCOMBE COUNTY v. H. E. WALTER, AUDITOR OF BUNCOMBE COUNTY, AND COUNTY ACCOUNTANT.

(Filed 12 February, 1930.)

**1. Schools and School Districts D b—School system should be guarded from partisan strife.**

Under the constitutional provisions and the statutes enacted with regard to the subject, it is the policy of this State to guard with jealous care its school system from partisan strife.

**2. Schools and School Districts C a — County Commissioners may not usurp right of board of education to purchase its supplies.**

The board of education of a county is required in its large discretion to provide suitable supplies for the public schools of the county out of funds provided by taxation by the county commissioners in the manner prescribed by statute, and when funds have been provided as the statutes direct the purchases by the county board of education within its appropriation are to be paid upon its voucher out of the funds so appropriated, and the board of county commissioners may not usurp the power of the board of education to make such purchases under a resolution consolidating purchases of supplies for all departments of the county government under the provisions of chapter 146, Public Laws of 1927, the county board of education not being a department of the county government within the intent and meaning of the act. 3 C. S., 5585, 5586, 5595, 5617.

**3. Same—Mandamus will lie to compel county accountant to approve purchases made by authorized agent of board of education.**

Where the board of education of a county has issued warrants for the payment of supplies purchased for the public schools of the county out of funds duly appropriated for the purpose by the board of county commissioners as the statutes provide, it is the duty of the county accountant to approve them for payment, and upon his refusal to do so *mandamus* will lie. Public Laws of 1927, ch. 146, sec. 3.

APPEAL by defendant from *Finley, J.*, at November Term, 1929, of BUNCOMBE. Affirmed.

The court below found the following facts:

"1. That the board of education is a body corporate, and that Albert Teague, J. T. Roberts, Jno. A. Goode, Claude Felmet and M. J. West, were elected members of said board by virtue of chapter 180, Public Laws, 1929.

2. That defendant, H. E. Walter, is the duly elected and qualified auditor of Buncombe County, and by virtue of the Public Laws, 1927, is county accountant.

3. That the board of education is vested with such power and authority as is conferred upon it by chapter 95, of the Consolidated Statutes of North Carolina, and the laws amendatory thereof, Public and/or Public-Local and/or Private acts.

4. That on 23 May, 1929, said board undertook to delegate to one Doc Roberts power and authority to make all purchases of school supplies as shown in the complaint, and performance of various and sundry duties as shown in the complaint, all the supplies purchased by him being approved as shown in finding No. 7.

5. That, on the 3d day of ....., 1929, the board of county commissioners for Buncombe County elected L. D. Maney as the purchasing agent, through whom all supplies for the county should be purchased, and on 26 July, 1929, pursuant to chapter 91 of the Public Laws of 1927, designated the said Maney as purchasing agent of Buncombe County, to purchase all supplies for the county government of Buncombe County, including supplies of every kind used in the operation of the school system of said county. (Exhibit A, complaint.)

6. That on 22 July, 1929, the board of county commissioners of Buncombe County duly adopted the annual appropriation resolution for public schools required by section 8 of the County Fiscal Control Act, and said appropriation was divided into three classes, to wit: Current expense fund, $935,553.50; capital outlay fund, $49,696.50; debt service fund, $131,676.75—total, $1,116,926.75.

7. That there was presented by plaintiff to the county auditor and accountant a voucher or warrant, dated 8 August, 1929, drawn upon the treasurer of Buncombe County, signed by the chairman of the board of education, and by the secretary of said board, payable to the order of Glasgow, Stuart & Company, for the sum of $9.30, another voucher or warrant of similar purport and intendment, drawn to the order of the Beaman Lumber Company, for $7.40; another warrant or voucher of similar purport and intendment, dated 9 August, 1929, payable to the order of the Turner Auto Company, for the sum of $10.25, and another warrant or voucher, of similar purport and intendment, dated 16 August, 1929, payable to the order of J. M. Westall & Company, for the sum of $53.20. All of the foregoing represented supplies purchased by the said Doc Roberts aforesaid, the purchases being approved by the board of education of Buncombe County.

7. That the said vouchers aforesaid were presented to the defendant, as auditor and county accountant, pursuant to the provisions of chapter 146, Public Laws 1927, for his endorsement on the vouchers and warrants, and the requisitions signed by the said Roberts attached thereto, and the said Walter refused to endorse either the warrants or the requisitions for the reason that said supplies were not properly purchased through the purchasing agent designated by the county and did not constitute valid obligations.

8. That on 15 October, 1929, a requisition and warrant was presented to the defendant for the sum of $90, payable to the Asheville Battery

Company, for supplies purchased by the said Roberts, and defendant refused to make any endorsement thereon, for the same reason as he had refused to endorse the other vouchers, warrants and requisitions.

The court being of the opinion that the board of education of Buncombe County is a part of the State-wide system of education, and not a part of the county government, and not a department of the county government, and that chapter 91, Public Laws, 1927, has no application to, and was not intended to apply to acts of the board of education in any manner whatsoever:

It is, upon motion of attorneys for the plaintiff, considered and adjudged, that the said refusal of the defendant as county auditor and accountant, to make the endorsements required by sections 15 and 16 of the County Fiscal Control Act, on all requisitions for the purchase of supplies and materials, and warrants or vouchers in payment thereof, as set forth in the complaint, is unlawful and unwarranted; and it is further ordered and adjudged, that the said H. E. Walter, as county auditor and accountant, be and he is hereby directed and required to make the endorsements specified in said act on all the aforesaid warrants or vouchers and requisitions for materials and supplies purchased by Doc Roberts or otherwise for the plaintiff, in connection with the public school system of Buncombe County, and within the appropriations made therefor, when the same have been presented to him by the plaintiff or its duly authorized officers and agents, properly signed and executed.

It is further ordered and adjudged, that a writ of mandamus is hereby ordered to be issued by this court, directed to the defendant, requiring him to do and perform the matters and things required of him in this decree, and the clerk of this court is directed to cause a certified copy of the said writ of mandamus to be served upon the defendants.

It is further ordered and decreed, that the plaintiff have and recover of the defendant the costs of this action to be taxed by the clerk."

*Chas. N. Malone, Zeb. F. Curtis, Zeb. Nettles and S. G. Bernard for plaintiff.*

*Don C. Young and Merrimon, Adams & Adams for defendant.*

CLARKSON, J. The questions involved (1) Is the board of education of Buncombe County a department of the county government within the meaning of chapter 91, Public Laws 1927? We think not. (2) Is the board of education of Buncombe County a separate and distinct corporation and a part of the State-wide system of education? There is a dual relationship. We do not think it necessary to set forth to any great extent the constitutional provisions and the acts of the General Assembly dealing with the powers and duties of the board of education and the

board of county commissioners. It is sufficient to say, from a careful examination of the Constitution and acts of the General Assembly, that it has been the policy of this State to guard with jealous care its school system to a great extent free from partisan strife.

Chapter 91, Public Laws 1927, the title is "An act to provide improved methods of county government." The preamble, in part: "Whereas, in the organization of the county government it is intended that the board of county commissioners shall be the central governing body, with the right to supervise and control the different departments of the county government, to levy taxes, and to control the finances of the county."

Section 12 of the act, in part, is as follows: "It shall be the duty of the board of commissioners to provide for the purchasing of supplies for the different departments of the county government," etc. There is nothing said in this act in reference to the board of education.

Chapter 95, Michie N. C. Code, 1927, Anno., under "Education," gives the incorporation of the *State Board of Education* and its powers, responsibilities and duties. C. S., 5394, *et seq.* It also gives the incorporation of the *County Board of Education* and its powers, responsibilities and duties. C. S., 5410, *et seq.* Large discretion is given the county board of education in the direction and supervision of the school system. C. S., 5474: "It is the duty of the county board of education to provide suitable supplies for school buildings under its jurisdiction, such as window shades, fuel, chalk, erasers, blackboards, and other necessary supplies, and provide standard high school with reference books, library, maps and equipment for teaching science, and the teachers and principal shall be held responsible for the proper care of the same during the school term." This, and other sections, give the board the right to purchase supplies and do all that the vouchers or warrants indicate, in this action they did do. See *Wiggins v. Board of Education, ante,* 301.

C. S., 5585, is as follows: "It shall be the duty of the county board of education of each county to make a fair estimate in accordance with law of the amount necessary to provide a six months school term, and it shall be the duty of the county commissioners of each county to determine and provide the amount necessary to maintain the school six months in accordance with law. And either the members of the county board of education or the members of the board of county commissioners failing to perform their respective duties shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court."

C. S., 5586, provides for the State public school fund an equalizing fund for a six months school term, as provided by the Constitution.

C. S., 5595, provides for the "May Budget"; C. S., 5596, contents of the May Budget. This section provides in detail almost every imaginable necessity for an up-to-date school system. 5603, duty of board of county commissioners to provide funds for six months term; 5604, commissioners required to raise full amount; 5608, procedure in cases of disagreement or refusal of county commissioners to levy school taxes.

C. S., Art. 19, under "Education," gives the entire method of how the board of county commissioners shall proceed.

C. S., 5617, in part: "The county board of education shall divide the funds belonging to the county into two classes: (1) those portioned to districts for salaries for instructional service and other regular employees, and (2) those reserved to the county board of education for all other necessary expenses included in the budget under current expense fund, capital outlay fund, and debt service fund. The treasurer shall pay out funds reserved to the county board of education only on warrants signed by the chairman and secretary of said board," etc. See Laws 1929, ch. 180, 201, 245, 274, 323.

Finding of fact (6) in the present case, says: "That on 22 July, 1929, the board of county commissioners of Buncombe County duly adopted the annual appropriation resolution for public schools required by section 8 of the County Fiscal Control Act, and said appropriation was divided into three classes, to wit: Current expense fund, $935,-553.50; capital outlay fund, $49,696.50; debt service fund, $131,676.75; total, $1,116,926.75."

Chapter 146, Public Laws 1927, is known as "The County Fiscal Control Act."

The defendant, H. E. Walter, under said act, section 3, was appointed by the board of county commissioners of Buncombe County as "county accountant."

Section 2 of this act deals with school funds and defines the meaning of the funds as used in the act. (c) Constitutional school maintenance "means the maintenance of schools for the six months term required by State Constitution." (j-3) "County-wide school expenses over and above constitutional school maintenance."

Section 8, subsection (b): "The powers given by the general law to the county board of education and county commissioners jointly, in respect to the determination of the amount to be raised or expended for the maintenance of the six months school term, shall be observed by the county accountant and by the board of county commissioners."

The county commissioners passed a resolution consolidating purchases of supplies for all departments of county government and attempted, under chapter 91, Public Laws of 1927, to usurp this duty heretofore put by law on the board of education of Buncombe County.

That act, as seen, is entitled "An act to provide improved methods for county government." Nowhere in the act in the school system mentioned, although the board of county commissioners and the board of education are by law made separate corporations. If intended to apply to the board of education, how easily so important a function of government as the school system could have been mentioned. *Expressio unius est exclusio alterius.* The law in existence placed this duty on the board of education. The county accountant, under the resolution of the board of county commissioners refused to pay certain bills for supplies which the board of education had purchased, through its duly constituted agent, and proper warrants and orders were made for same, in accordance with the "May Budget." The "May Budget" appropriation was agreed to by the dual bodies, the board of education and the board of county commissioners, and these funds were segregated for the purpose heretofore mentioned for the county schools. These orders and warrants by the proper officials of the board of education, were within the appropriation of the "May Budget," and in accordance with section 8, Public Laws 1927, ch. 146. That being so, it was the duty of the defendant, the county accountant, to approve them. Defendant had no autocratic power under the act to refuse to approve the orders or warrants for supplies. Public Laws 1927, ch. 146, secs. 15 and 16.

It is the duty of the courts to reconcile, if possible, the different acts of the General Assembly, dealing with these matters, and we see no difficulty in this case. *Leonard v. Sink, ante,* 114. Any other holding would create confusion and discord between two bodies of high official dignity, which it goes without saying have the good of their county at heart.

Under our Constitution this Court, in a unanimous opinion, speaking to the subject in *Frazier v. Commissioners,* 194 N. C., at p. 61-2, said: "The Constitution of North Carolina does provide—and its provisions in that respect have been held mandatory—that the General Assembly shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one, Article IX, section 2; and that to accomplish this end, the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year, Article IX, section 3. It cannot be too often emphasized that the controlling purpose of the people of North Carolina, as declared in their Constitution, is that a State system of public schools shall be established and maintained—a system of schools supported by the State, and providing for the education of the children of the State—and that ample power has been conferred upon the General Assembly to make this pur-

pose effective. In *Tate v. Board of Education,* 192 N. C., 516, this Court has said: 'It is, however, fully within the power of the General Assembly, because of the duty imposed upon it by the Constitution, 'to provide by taxation and otherwise for a general and uniform system of public schools,' to authorize and direct the respective counties of the State, as administrative units of the public school system, or as governmental agencies employed for that purpose by the General Assembly, to provide the money for such expense by taxation and otherwise. *Lovelace v. Pratt,* 187 N. C., 686; *Lacy v. Bank,* 183 N. C., 373.'" *Hartsfield v. Craven County,* 194 N. C., 358; *Hall v. Commissioners,* 194 N. C., 769, 195 N. C., 367; *Owens v. Wake County,* 195 N. C., 132.

We think the court below properly ordered that a writ of mandamus issue. The judgment of the court below is

Affirmed.

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WINCHESTER-SIMMONS COMPANY OF PHILADELPHIA, PENNSYLVANIA, v. L. H. CUTLER, SR., ET AL.

(Filed 12 February, 1930.)

**1. Execution J a—Moneys received by legatee and invested in improvements on wife's separate property may be followed by judgment creditor.**

Where an insolvent legatee and coexecutor under a will distributes part of his legacy to himself with the consent of the other executor, and uses such funds in making improvements upon his wife's separate real property with her consent, a judgment creditor of the legatee may follow such funds and recover from the wife to the extent that her land was enhanced in value by the improvements, but not to the extent of the moneys so expended, and he acquires a judgment lien on the separate property of the wife so improved.

**2. Executors and Administrators E b—An executor must retain from a legatee's share the amount due the estate from the legatee.**

Where a legatee under a will is also a debtor of the estate it is the right and duty of the executor of the will to retain from his share as legatee whatever amount may be due by him to the estate by prior debt or by reason of matters growing out of the settlement, and a judgment creditor of the legatee may not complain that he was thus precluded from collecting his debt.

CIVIL ACTION, before *Daniels, J.,* at May Term, 1929, of CRAVEN.

This cause has been considered by this Court upon two former appeals, reported in 194 N. C., 698, and 195 N. C., 612, in which the facts are set out.

After the last appeal L. H. Cutler and E. W. Wadsworth, executors of the estate of Sarah E. Wadsworth, filed an account of said estate, covering a period from 1 December, 1927, to 5 June, 1928. Exceptions were filed to the account by the receiver and the judgment creditor. The clerk of the Superior Court heard the exceptions and rendered a judgment. The defendant Cutler filed exceptions to the judgment rendered by the clerk and appealed to the trial judge. The cause was heard by Daniels, J., at the May Term, 1929, of Craven Superior Court, and the following judgment rendered:

"This cause coming on to be heard and being heard by his Honor, F. A. Daniels, Julge, on exceptions and appeal from an order of L. E. Lancaster, clerk, made 26 January, 1929, and the court being of the opinion that the order of the clerk, heretofore mentioned, should be overruled, as more fully in detail hereinafter set out, for that the court finds from the evidence and admission in open court the following facts:

1. That the $2,000 in North Carolina bonds which were withdrawn by L. H. Cutler prior to the institution of the supplemental proceedings on behalf of Winchester-Simmons Company, were withdrawn without notice of said supplemental proceedings and that at the time of said withdrawal the same were charged by L. H. Cutler, executor, to L. H. Cutler, legatee, on the books kept by the executor. That the money was largely, if not all, used to repair and prepare a home for L. H. Cutler and wife, Laura D. Cutler, suitable for habitation to their condition and station in life, on the property of Laura Cutler. Such taking of the bonds by L. H. Cutler being without the knowledge of his coexecutor previously obtained and without any order of court.

2. The court further finds as a fact that such withdrawal and use was not an advancement to Laura D. Cutler or any portion of the bequest to her and is not chargeable to her. And in this connection it is found that the knowledge of Wadsworth, coexecutor, as to such withdrawal, is immaterial and that said Wadsworth had expressly authorized, directed and requested the said Cutler, executor, to take charge of the active handling of the estate of Sarah E. Wadsworth.

3. The court finds as a fact that the warranty of L. H. Cutler in the conveyance to Roberts and Watkins, trustee, is in the following language, to wit:

And the said L. H. Cutler for himself and his heirs and administrators, covenants to and with the said party of the second part, his heirs and assigns, that he is seized of said premises in fee simple and has a good right to convey the same, and that the same is free and clear of all encumbrances, except a certain mortgage now held by Miss Mollie Heath, for the sum of $2,000 upon that portion of the lands above described, being on the north side of Pollock Street, adjoining the lot now

occupied by L. H. Cutler, and that he doth warrant and defend the title to the same against the lawful claims of all persons."

4. The court finds that the note secured by the Heath mortgage was due to the estate of Sarah E. Wadsworth and that L. H. Cutler, one of the beneficiaries of Sarah E. Wadsworth, was the maker of said note and liable to the estate therefor. That said L. H. Cutler was also co-executor of the estate of Sarah E. Wadsworth; that as such executor it was his duty, both morally and legally, to pay the said note to the estate out of any funds due the maker (beneficiary and executor) or otherwise, of the estate and it is found as a fact that the estate has a prior claim to any funds due said Cutler to the extent of said note secured by the Heath mortgage. This original note and mortgage are exhibited to the court at time this judgment is signed.

5. The court finds as a fact that said lot on Pollock Street was sold free of debt for the sum of $6,300, and that it was offered for sale on the understanding that the Heath mortgage would be paid by funds other than those derived from sale under the deed of trust.

7. The court finds as a fact that said note of L. H. Cutler for $2,000 secured by the Heath mortgage is a debt of L. H. Cutler due to the estate of Sarah E. Wadsworth; that the same was reported as such debt upon the initial inventory of the estate, and has never been paid; that the same is a proper deduction of any portion of the legacies or bequests made to the said L. H. Cutler under the will of Sarah E. Wadsworth.

8. That the court finds as a fact that the legacy of $5,000 in North Carolina bonds to Laura D. Cutler was in accordance with the order of L. E. Lancaster, clerk, said order being dated 1 March, 1928, paid over and delivered to said Laura D. Cutler.

9. It is further found as a fact that the $5,000 in bonds bequeathed to L. H. Cutler have been applied as a credit, first on the $2,000 in North Carolina bonds, withdrawn by the said Cutler and used as set out in findings 1 and 2 herein, and second, applied on the inheritance tax paid on the legacy to the said Cutler, and third on the debt of $2,000 due by the said Cutler to the estate of Sarah E. Wadsworth.

10. The court finds as a fact that the amount payable to the residuary legatee is impossible of determination until the final determination by the clerk of the other matters in controversy in accordance with the terms of this order.

11. The court finds as a fact that the item of $30.80 was expended as court cost by the executors in seeking an interpretation of the terms of the will of Sarah E. Wadsworth and that such act on their part was within their rights and in accordance with their duty and a proper charge against the Wadsworth estate.

12. It is further found as a fact that Laura D. Cutler is not a party to or before this court in these proceedings, and that the legacy of $5,000 in North Carolina bonds has been delivered to the said Laura D. Cutler, such payment being in accordance with the order of Lancaster, clerk, dated 1 March, 1928.

13. The court finds as a fact that the trustees under the conveyance of Cutler to Watkins and Roberts did, prior to any knowledge that he, Roberts, had of the institution of the supplemental proceedings by Winchester-Simmons Company, demand of the said executors that the prior mortgage on the Pollock Street lot be paid out of funds in the hands of the executors due L. H. Cutler from the Wadsworth estate in order to exonerate the conveyance to said trustees and the debt secured thereby.

14. That the property securing the debts in the deed of trust of Cutler to Watkins and Roberts, trustee, was insufficient to pay the debts secured, by a considerable margin.

It is thereupon considered, ordered and adjudged by the court that except as to matters hereinafter specifically affirmed, the order of L. E. Lancaster, clerk, dated 26 January, 1929, be and the same is hereby overruled and this cause is remanded to the clerk of the Superior Court with instructions to receive and audit the account of Cutler and Wadsworth, executors, which said account shall show and said executors are hereby directed to file an account showing that the $5,000 in North Carolina bonds and all other legacies other than the legacy to L. H. Cutler, Sr., and to the residuary legatee, have been paid as shown by the evidence. That of the legacy to L. H. Cutler, $2,000 in bonds that was withdrawn and used prior to the institution of the supplemental proceedings be charged against the legacy so made to said Cutler.

That the amount of the Heath mortgage securing note of L. H. Cutler held by the Wadsworth estate be paid out of said legacy to L. H. Cutler; and further, that the amount of inheritance tax paid on the bequests and legacy to L. H. Cutler under the will of Sarah E. Wadsworth be charged against the said $5,000 in bonds bequeathed to the said Cutler. That from the remainder there shall be deducted the personal property exemption belonging to the said Cutler as allowed him by the Constitution or statute of North Carolina, and that the remainder, if any, in the hands of the said executors, of such bequests to L. H. Cutler, be paid over and delivered to H. P. Whitehurst, receiver, to be by him applied in accordance with the order of his appointment as such receiver and supplemental orders amending the same.

It is further considered, ordered and adjudged that the $30.80 expended in court cost by the executors in seeking an interpretation of the will of Sarah E. Wadsworth be and the same is hereby allowed as a proper charge against the estate as reported by the executors.

It is also considered, ordered and adjudged that the clerk of this court shall, in accordance with the statute, make such allowance to the executors for the handling of said estate as shall in his judgment be proper and that subject to any amounts due the estate by the said L. H. Cutler, said commission so allowed to L. H. Cutler, to wit, one-half, shall be paid over into the hands of H. P. Whitehurst, receiver, to be by him applied in accordance with the terms of his appointment.

And this cause is hereby retained for the purpose of carrying into effect the provisions of this order and such further proceedings as are consistent therewith, including the right of the executors to file such amended account as they may be required to file by the clerk of the court, in order to show in detail the receipts and expenditures as well as the payments to beneficiaries of said estate.

This order is signed out of term, and out of the county in accordance with stipulation made by counsel at the time of the hearing of this cause before the undersigned at the May Term, Craven Superior Court."

From the foregoing judgment plaintiffs appealed.

There are certain additional facts which are perhaps necessary to an understanding of the controversy between the parties, which may be briefly stated as follows:

In September, 1922, the defendant, L. H. Cutler, and his wife, Laura D. Cutler, executed and delivered a deed of trust or assignment to J. C. Watkins and D. M. Roberts, in which said conveyance the defendant Cutler conveyed all of his property to said trustees, authorizing, empowering, and directing them to sell all of said property and from the proceeds thereof pay certain indebtedness of defendant Cutler, aggregating approximately $95,000 and fully specified in said deed of trust. This instrument was filed for registration on 16 October, 1922.

Subsequently, on 21 September, 1925, the plaintiff, Winchester-Simmons Company, recovered a judgment against the defendant Cutler for $12,842.08 with interest from 19 July, 1923.

Sarah Wadsworth died in October, 1926, leaving a last will and testament and appointing the defendant L. H. Cutler, and E. W. Wadsworth, executors of said will. Said will bequeathed a legacy of $5,000 in North Carolina bonds to the defendant Cutler. In January, 1927, Cutler took $2,000 of said bonds and secured a loan on them and used a portion of the proceeds thereof for the repair and improvement of the home of himself and wife. The title to the property was in the name of the wife. Thereafter, in July, 1927, the plaintiff instituted supplemental proceedings before the clerk of the court to subject the bonds owned by Cutler to the payment of the judgment.

*H. P. Whitehurst and Ernest M. Green for plaintiff.*
*Whitehurst & Barden and Ward & Ward for defendants.*

BROGDEN, J. The record presents two questions of law.

1. If an insolvent legatee receives and applies a portion of the legacy to make improvements upon the land of his wife, can a judgment creditor of such legatee recover from the wife, and if so, what amount?

2. Can such legatee, who is also a coexecutor of the testatrix bequeathing the legacy, deduct from his legacy and pay the amount due the estate of his testatrix by him, and thus exclude a judgment creditor from such amount?

The defendant Cutler, under previous decision of this Court, was entitled to a legacy of $5,000 in North Carolina bonds from the estate of Sarah E. Wadsworth by virtue of the terms of her will, in which the defendant and another were named as executors thereof. As such coexecutor the defendant took active charge and management of the estate with the consent and approval of the other executor.

After the plaintiff had secured a judgment against him, but before the supplementary proceedings had been instituted, the defendant took a portion of his said legacy and made improvements and repairs upon the property of his wife, Laura D. Cutler. The principle of law applicable is thus stated in *Michael v. Moore,* 157 N. C., 462, 73 S. E., 104: "We entertain no doubt as to the plaintiff's right to follow the fund invested by his debtor in improvements upon his wife's land. No principle is better settled by our decisions than the one that an insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and when it is done, creditors may subject the property so purchased or improved to the payment of their claims." However, the lien of the creditor, in such event, is confined to the enhanced value of the land by reason of the expenditure rather than to the amount spent in making improvements. *Garland v. Arrowood,* 177 N. C., 371, 99 S. E., 100; *Garland v. Arrowood,* 179 N. C., 697, 103 S. E., 2; *Wallace v. Phillips,* 195 N. C., 665. It necessarily follows that the legacy of Laura D. Cutler is not chargeable with the amount of such repairs and improvements, upon the theory of advancements. It is also clear that such amounts as the defendant spent for ordinary living expenses in the support of himself or his family prior to the supplemental proceedings is not recoverable by the creditor upon the facts disclosed in the record.

The second question of law involves the right of the defendant as executor of the estate of Sarah Wadsworth to retain from his legacy an amount sufficient to pay the note held by Sarah Wadsworth against the defendant. The general rule is to the effect that it is the right and duty of a personal representative to retain from the share of each legatee whatever amount may be due said estate by said legatee either as debtor to the estate or by reason of matters growing out of the settle-

ment. Schouler on Executors, secs. 208-470-492 (a), Mordecai Law Lectures, Vol. II, page 1348; *Rogers v. Gooch,* 87 N. C., 442; *Balsley v. Balsley,* 116 N. C., 472, 21 S. E., 954; *Dodson v. Fulk,* 147 N. C., 530, 61 S. E., 383; *Nicholson v. Serrill,* 191 N. C., 96, 131 S. E., 377.

In the *Nicholson case, supra,* this Court said: "The right and duty of an executor to deduct from a legacy the amount of any indebtedness of the legatee to the estate of his testator, is well settled, and is in full accord with the elementary principles of justice."

Upon the findings of fact, the judgment rendered was correct, with the exception and modification hereinbefore pointed out; that is to say, the plaintiff is entitled to recover from Laura D. Cutler the enhanced value of her land by reason of repairs and improvements made thereon by the defendant L. H. Cutler from his own funds.

Modified and affirmed.

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J. B. CULLINS AND NATHAN CULLINS, INDIVIDUALLY AND COPARTNERS, TRADING AS COLLEGE LAUNDRY, v. NORTH CAROLINA STATE COLLEGE OF AGRICULTURE AND ENGINEERING.

(Filed 12 February, 1930.)

**Injunctions D b—Where great injury might result to plaintiff if temporary order is dissolved continuance should ordinarily be granted.**

Ordinarily a restraining order will be continued to the hearing when it is made to appear that thereby no harm will result to the defendant and that the plaintiff might suffer great injury if it is dissolved.

APPEAL by defendant from *Nunn, J.,* at Chambers in Raleigh, WAKE Superior Court, 26 September, 1929. Affirmed.

This is a provisional remedy brought by plaintiffs against defendant for injunctive relief under C. S., 843. On 1 January, 1923, J. B. Cullins (who assigned one-half interest in the laundry business to Nathan Cullins) and defendant entered into a contract to launder and press clothes; J. B. Cullins to install certain laundry and clothes pressing machinery in the basement of the dining-room of the State College and to do the laundry service for the college students and others, the students to have preference, price to be agreed upon by the president of the college and plaintiff J. B. Cullins. A controversy arose between the plaintiff J. B. Cullins and the president of the college, the details of which are unnecessary to set forth. Out of this controversy arose the question of the construction of the following part of the contract:

"For unsatisfactory laundry service by the party of the first part, the party of the second part after thirty days written notice to remedy the

same without result, may terminate this agreement upon six months written notice to the party of the first part—provided that the party of the second part shall have the option to purchase plant and pay to the party of the first part, at the time of such termination, the reasonable cash value of the complete laundry equipment and appliances installed under this agreement, or else allow the party of the first part to remove said equipment. In the event of such termination of this agreement, and the parties hereto not being able to agree as to the reasonable cash value of such equipment and appliances, each of the parties hereto shall select an appraiser, and the value decided upon by any two of the three appraisers shall be final, and the amount said party of the second part shall pay to the party of the first part for the same. If the party of the first part shall for any other reason than unsatisfactory work be required to move out, the party of the second part shall buy the plant at a price agreed upon by a board of arbitrators, selected as above. This agreement shall be binding upon the heirs, executors, administrators, assigns and successors of the parties hereto."

The plaintiff alleges, among other things, in substance, that under the contract he had installed machinery at a large cost to perform his contract so as to give satisfactory laundry service. That he is giving satisfactory laundry service and performing his part of the contract; that defendant is threatening to eject him, in violation of the contract, and to close up his business and remove his machinery put there at great cost and improved as the necessary demands required as the years went by on account of the increase of the student body and their demand for better service; that the machinery is worth little except for the purpose for which it is now used, and that the property would be practically confiscated. "That moreover, the said machinery, equipment and appliances are of such nature that the same would rapidly and permanently deteriorate and damage if the same are not in operation, and that to disassemble or remove the same would be practically to destroy it, and if the plaintiffs are wrongfully prevented from the operation of the said plant by being locked out of the possession of the same by the defendant, or if the said plant is itself disassembled or removed by the defendant, or if the operation of the same is discontinued, the plaintiff will suffer irreparable injury, damage and harm; and the plaintiffs say further that the profits which would be lost to the plaintiffs by a wrongful termination of said agreement or a wrongful stoppage of the operation of the same would be speculative, uncertain and incapable of definite ascertainment, and that the plaintiffs would not have an adequate remedy at law on account thereof."

Judge W. C. Harris issued a restraining order and the matter was heard before Judge R. A. Nunn, and the restraining order was continued until the hearing of the case.

*Clyde A. Douglass and Robert N. Simms for plaintiff.*

*Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for defendant.*

PER CURIAM. The only exception and assignment of error made by defendant was to the order by the court below continuing the restraining order to the hearing of the case. In this we can see no error. *Wentz v. Land Co.,* 193 N. C., at p. 34; *Realty Co. v. Barnes,* 197 N. C., 6; *Scott v. Gillis,* 197 N. C., 223; *Land Co. v. Cole,* 197 N. C., 452.

In *Brinkley v. Norman,* 190 N. C., 851, it is said: "This appeal is controlled by the principle announced in *Seip v. Wright,* 173 N. C., 14, and in many other cases: 'Where it will not harm the defendant to continue the injunction and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the party until the final hearing.'" *Hurwitz v. Sand Co.,* 189 N. C., 1.

For the reasons given, the judgment below is

Affirmed.

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CHARLES W. BUNDY, RECEIVER OF TRIPLETT LUMBER COMPANY, v. COMMERCIAL CREDIT COMPANY.

(Filed 12 February, 1930.)

**Usury C a; Pleadings D b—In this case held: cause of action for usury was stated and demurer for misjoinder should have been overruled.**

Where the plaintiff, a receiver of an insolvent corporation, seeks to enjoin the defendant from interfering with the collection of certain accounts of the insolvent which the defendant claims as purchaser, under contract, and by consent order it is agreed that the plaintiff collect the accounts and that each party reserves his rights as to the proceeds, and thereafter the plaintiff files an amended complaint alleging that the contract of purchase of the accounts by the defendant was a subterfuge for the charging of usury and demands the statutory penalty: *Held,* the amended complaint stated facts sufficient to constitute a cause of action, and there was no misjoinder of causes.

APPEAL by plaintiff from *Sink, Special Judge,* at September Special Term, 1929, of MECKLENBURG. Reversed.

Charles W. Bundy was duly appointed receiver of the Triplett Lumber Company, a corporation. The allegations in the complaint are to the effect that the Triplett Lumber Company owned sundry accounts, setting forth from whom and the amounts, due it, aggregating the sum of $13,020. That the defendant had filed a claim with plaintiff receiver,

claiming that the Triplett Lumber Company owed it $12,051.40, and also claiming to be the owner of the accounts above referred to and demanding from the debtors that the amounts be paid to defendant and not to plaintiff receiver. That in consequence of these conflicting demands the debtors were uncertain to whom to pay and by delay in collecting there might be loss. "That the plaintiff is fearful lest a large part of said accounts will be lost or the value thereof destroyed unless they are promptly and speedily collected; that, unless the defendant is restrained and enjoined from continuing its demands and notices, the plaintiff will be unable to collect said accounts without the necessity of instituting separate suits against each one of the said debtors, although the plaintiff is informed and believes that any rights which the defendant may have against any or all of said accounts rest upon the same basis, and that, to force this plaintiff to institute separate suits against each of the said debtors, will be a useless and unnecessary waste and expense." That defendant be restrained from collecting the accounts and plaintiff receiver be ordered to collect same; and "that the defendant be ordered and directed to assert in said receivership proceedings any right, title or interest which it may have, or claim, into or against said accounts, or any of them."

Defendant in its answer admits it claims to be the owner of the sundry accounts under a contract made by it and the Triplett Lumber Company, on 29 September, 1926, and sets forth a copy of the contract. It claims that the sundry accounts were purchased in due course of business for value. It admits that it has notified the debtors to pay the sundry accounts to it as defendant owns them. That under the above contract no title to the account passed to plaintiff as receiver and prayed that the restraining order be denied.

The matter came on for hearing before Judge A. M. Stack on 2 April, 1929, and a consent order was agreed to and plaintiff ordered to collect the sundry accounts. "That the rights of the plaintiff and defendants attach to the proceeds arising from the collection of said accounts in the same way and manner as they now attach to said accounts themselves; and that, after said accounts have been collected by the receiver, as herein authorized and directed, both parties shall then present all the facts to the court and the rights of the parties, in and to the proceeds from the collection of said accounts, shall then be fully determined, and the rights of either party in and to said proceeds shall not in any way be prejudiced by the entry of this order. This cause is retained for further orders."

On 22 August, 1929, plaintiff, upon motion and by consent of defendant, was allowed to file an amendment to the complaint and defendant allowed 30 days in which to file an answer. It may be noted that in the

consent order no mention is made of a demurrer, but no advantage is taken of it. The amended complaint referred entirely to the dealings of the parties under the written contract which had theretofore been set forth in the defendant's answer. The amendment alleged, in substance, that said contract had been used by the defendant as a subterfuge to collect usurious interest from the lumber company and prayed for a full determination of the rights of the parties and an accounting of all the transactions between the parties under said contract, claiming that usury was collected to the amount of $9,915.39, and under C. S., 2306, demanding judgment for $19,830.78. Thereupon the defendant filed a demurrer to the amended complaint, first upon the ground that several causes of action had been improperly united therein, and also upon the ground that the amended complaint failed to state facts sufficient to constitute a cause of action. This demurrer was sustained, the judgment reciting further that "The causes of action set up in the amended complaint are hereby dismissed." To this judgment the plaintiff duly excepted and assigned error, and appealed to the Supreme Court.

*John M. Robinson and Hunter M. Jones for plaintiff.*
*J. Lawrence Jones, J. L. DeLaney and D. R. Dills for defendant.*

PER CURIAM. The case presents a controversy over a question of procedure, but when we go to the heart of the matter, it would seem to be controlled by the second proposition laid down in *Waters v. Garris,* 188 N. C., at p. 310, as follows: "Second. In any action brought by the creditor to recover upon any usurious note or other evidence of debt affected with usury, it is lawful for the party against whom the action is brought to plead as a counterclaim or set-off, the penalties provided by the statute, to wit, twice the amount of interest paid, and also the forfeiture of the entire interest charged."

The gravamen of plaintiff's first complaint was to collect sundry accounts, as delay and controversy would entail great loss. Defendant set up the contract by which it claimed these sundry accounts. Plaintiff's amended complaint pleaded usury as a counterclaim or set-off, and demanded the penalty under the usury statute.

We think the amended complaint states facts sufficient to constitute a cause of action, and there was no misjoinder of causes of action. We will not discuss this phase, as the case goes back for trial. The judgment below is

Reversed.

AMERICAN AGRICULTURAL CHEMICAL COMPANY v. W. A. BROCK.

(Filed 19 February, 1930.)

**Taxation D a—Where assessment of property for taxes has not been made at time of foreclosure, proceeds from sale are not liable therefor.**

Construing C. S., 2815, providing that the lien for taxes attaches to realty annually on the first of May, with C. S., 7980, requiring the one selling lands under foreclosure sale of a mortgage or deed of trust to pay all taxes then assessed against the property out of the proceeds, it is *held:* where the taxes have not been assessed nor the tax rate ascertained under the provisions of the County Fiscal Control Act until after the foreclosure sale has been made, the proceeds or surplus from the foreclosure sale are not subject to the payment of the taxes, and the lien of a judgment creditor of the mortgagor is payable out of the surplus from the sale without deducting the amount of the taxes, and the taxes later assessed attach to the land in the hands of the purchaser at the foreclosure sale, although they attach to the land as of the first of May.

APPEAL by defendant from *Sinclair, J.,* at November Term, 1929, of PASQUOTANK. Affirmed.

Special proceeding instituted under C. S., 2593, to determine the question of the plaintiff's right to a fund paid into the office of the clerk as the surplus remaining after payment of the amount due on a deed of trust executed by W. H. Jennette and L. B. Jennette and their wives to the Southern Trust Company to secure an indebtedness of $12,000. The plaintiff claims that it is entitled to the fund in question by virtue of a judgment recovered against the makers of the deed of trust and docketed after its registration. A jury trial was waived and by consent of parties the trial judge found the following to be the facts: There is now in the hands of the clerk of the Superior Court of Pasquotank County the sum of $1,456.91, representing the surplus formerly held by the trustee from the sale of the warehouse under the deed of trust described in the petition herein, which deed of trust was recorded in said county on 2 July, 1923. After several raises in the bid under foreclosure proceedings, a final resale was held, and said property was struck off and sold to defendant and three other parties, as set out in the answer herein, on 19 May, 1928. An order of confirmation of said sale was entered by the clerk of the Superior Court of said county on 2 June, 1928, and the trustee was therein directed to make title for said property to the purchasers. A deed dated 9 June, 1928, acknowledged 2 July, 1928, was delivered to the defendant by the trustee on 3 July, 1928, the defendant having become the assignee of the bid of the other three purchasers on 19 June, 1928. The county commissioners of Pasquotank County at a special meeting held on 28 July, 1928, determined

the tax rate for Pasquotank County for the tax year 1928-29, and levied upon all the taxable property of Pasquotank County. The board of aldermen of Elizabeth City, it being the proper agency so to do, on 23 July, 1929, determined the tax rate for Elizabeth City for the tax year 1928-29, and levied upon all taxable property within said town.

At the time of the sale referred to above, confirmation thereof, and delivery of the deed to defendant, no tax rate had been determined by the said county or city authorities for said year, 1928. On 3 October, 1927, a judgment was duly rendered in the Superior Court of Pasquotank County in favor of the plaintiff herein and against the said W. H. and L. B. Jennette for the sum of $1,499.46 and costs, said judgment being properly cross-indexed and docketed on the same day as rendered, in the office of the clerk of the Superior Court of said county. Said judgment has not been either wholly or partially paid or satisfied, and is now, and was at the times hereinbefore mentioned, a validly existing lien on all of the real estate of the said W. H. and L. B. Jennette, the lien of said judgment being immediately subsequent to the lien of said deed of trust, except in so far as the lien for city and county taxes for the tax years 1927-28, 1928-29, and certain paving assessments hereinafter referred to, intervene. The amount of said county and city taxes due on said property for the year 1928-29 is $522.43. Neither of said judgment debtors has ever had a homestead allotted to him, and both are, and were at all times referred to herein, residents of North Carolina. Neither of said judgment debtors claims any interest in said fund, but neither of said judgment debtors has ever conveyed or assigned any interest he might have in said funds.

It was agreed by the parties that the city and county taxes for 1927 ($617.22) and the paving assessments ($93.16) should be paid out of the fund in the hands of the clerk. It was thereupon adjudged that at the time of the sale and confirmation, and of delivery of the deed to defendant, no taxes for the city or county had been assessed for the tax year 1928-29; that no levy of said tax had been made by the authorities of the city or county; that the plaintiff's petition ought to be allowed; that the taxes for 1928, are not a proper charge against the fund in the hands of the clerk; and that this fund be applied as a payment on the plaintiff's judgment. The defendant excepted and appealed.

*McMullan & LeRoy for plaintiff.*
*Ehringhaus & Hall for defendant.*

ADAMS, J. The deed of trust was executed on 1 July, 1923, and was duly registered the next day. The plaintiff's judgment was recovered and docketed on 3 October, 1927. The property described in the deed

of trust was first exposed to sale in February, 1928, but was finally sold on 19 May, 1928. On 2 June, 1928, the clerk issued an order requiring the trustee to make title to the purchaser; the trustee executed his deed on 9 June, 1928, acknowledged it on 2 July, 1928, and delivered it to the defendant on 3 July, 1928. After paying the amount due on the deed of trust the trustee held a surplus, the application of which was disputed, and being in doubt as to the parties entitled to it, he brought this proceeding under C. S., 2592 *et seq.*, for the purpose of having the proper party finally determined. The clerk made an order that the surplus be paid on the plaintiff's claim and on appeal to the Superior Court his judgment was affirmed.

It is provided in C. S., 7987, that the lien of State, county and municipal taxes shall annually attach to all real estate of the taxpayer on the first day of June, but it is likewise provided in C. S., 2815, and in Public Laws 1927, ch. 80, sec. 440, that the lien shall attach annually on the first day of May; and it was held in *Shaffner v. Lipinsky,* 194 N. C., 1, that the lien of assessed taxes attaches to real estate as of this date.

In C. S., 7980, provision is made for adjusting the rights of contesting parties: "In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all taxes then assessed upon the property and remaining unpaid. . . . And whenever any real estate shall be sold by any person under any power of sale conferred upon him by any deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of such sale all taxes then assessed upon such real estate," etc.

The defendant contends that the lien of the State, county, and municipal taxes levied for the calendar year 1928-29 attached to all real estate described in the deed of trust on the first day of May, 1928; that this is the first lien on the land; and that it should be satisfied out of the fund arising from the sale of the property in preference to the lien created by the docketed judgment. The plaintiff contends that the board of county commissioners did not levy any tax until 28 July, 1928 (C. S., 7971(40), that no tax had been assessed against the real property at that time, and that C. S., 7980, provides for the payment of such taxes only as are assessed upon the property and remain unpaid at the date of the sale. These diverse contentions present the question in controversy.

The County Fiscal Control Act went into effect on 7 March, 1927. P. L., 1927, ch. 146. It requires the board of county commissioners to appoint an accountant who shall prepare an estimate of the amounts

necessary to be appropriated to different objects of the county and its subdivisions for the next ensuing fiscal year. After the accountant submits his budget estimate the board, not later than the fourth Monday in July in each year, must adopt and record on its minutes an appropriation resolution by which appropriations shall be made for the several purposes of the county, and not later than Wednesday after the third Monday in August in each year and after the ascertainment of the assessed valuation of property for taxation the board must levy such rate of tax as shall be necessary upon all the taxable property of the county, in the case of county appropriations, and upon all the taxable property in each subdivision, in the case of appropriations for subdivisions. Secs. 10, 11, 12. Under these provisions the board of aldermen determined the tax rate and levied upon the taxable property in the city on 23 July, 1928, and on 28 July, 1928, the board of county commissioners made a like assessment upon property within the county.

If the uncomputed and unassessed tax was a lien upon the land at the time of the trustee's sale the tax lien was superior to the lien created by the deed of trust or the plaintiff's judgment. And as the purchaser's title relates back to the date of the deed of trust the land may yet be subject to a sale under the tax lien unless the defendant's contention that it should be paid out of the fund is correct in contemplation of law, especially in view of the holding that the object of C. S., 7980, is to pass a clear title to the purchaser. *Wooten v. Sugg,* 114 N. C., 295; *Exum v. Baker,* 115 N. C., 242; *Smith v. Miller,* 158 N. C., 99, 103.

Was the uncomputed and unassessed tax a lien on the surplus fund when the clerk ordered the trustee to execute a deed to the purchaser? We think not. The statute contemplates the payment, out of the proceeds of the sale, of such taxes as are assessed when the sale is made. C. S., 7980. To assess a tax is to fix the proportion which each person among those who are liable to it has to pay; to fix or settle a sum to be paid by way of a tax; to charge with a tax. Black's Law Dictionary; Bouvier's Law Dictionary. An assessment or levy of a tax is essential to its certainty. The judgment sets out the fact that no tax had been levied or assessed when the trustee executed his deed. It was impossible for the trustee to pay a tax which had never been levied, and the parties claimed a right to an immediate distribution of the fund. The defendant's contention involves, not only uncertainty as to the amount of tax to be levied, but indefinite delay in settlement by the trustee. For the purpose of attaching to and following the land the lien of the tax when assessed and levied relates back to the first day of May; but the proceeds of a sale made under section 7980 may be applied to such taxes only as are assessed when the sale is made. We are not inadvertent to

the difficulties arising from statutes which are not easily to be reconciled, but we are of opinion that our disposition of the question conforms to the spirit of the law. The judgment debtors claim no interest in the fund and are not proper parties. The interests are those only of the plaintiff and the defendant. The judgment is

Affirmed.

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EVERARD SHEMWELL, BY BAXTER SHEMWELL, HIS GUARDIAN, v. FRANK D. LETHCO, SOUTHERN REAL ESTATE LOAN AND TRUST COMPANY ET AL.

(Filed 19 February, 1930.)

**Pleadings D b—Where there is misjoinder of parties and causes, action should be dimissed.**

Where new parties to an action are made who demur upon the ground of misjoinder of parties and causes of action as to them, the demurrer will be sustained and the cause of action demurred to will be dismissed if it appears upon the pleadings liberally construed that the demurrer is well taken. C. S., 511, 535.

APPEAL by defendant Lethco, from *Stack, J.*, at April Term, 1929, of MECKLENBURG. Affirmed.

This is an action brought by plaintiff against the defendants, alleging that a certain note set forth in the complaint, secured by deed in trust made by the Asheville Realty Company, a corporation, was void and of no effect and praying that same be canceled and asking injunctive relief *pendente lite*. The defendant Lethco and Trust Company answered denying the allegations. The defendant Lethco and Trust Company further answer and as a cross-complaint, or bill of action, make numerous allegations and pray that (1) The Asheville Realty Company, (2) Baxter Shemwell, (3) A. L. Sink, (4) Fred Sechrist and (5) Chas. Young be made parties defendant. The plaintiffs reply. Upon notice the matter of additional parties was heard before the clerk and an order made to the effect that they be made parties. Plaintiff excepted and appealed to the Superior Court. The Superior Court judge allowed the motion making the additional parties. The plaintiff excepted, assigned error and appealed to the Supreme Court.

This appeal is No. 478, at the Spring Term, 1929, of the Supreme Court; under an agreed stipulation, it was continued to be heard at the Fall Term, 1929, when the defendants' appeal from the judgment, sustaining the demurrer to defendants' cross-complaint or action, is heard. These two appeals are now considered by this Court together. The new

parties brought in made a motion that the original defendants recast their answer and cross-actions, etc.

At April Term of the Superior Court the matter coming on to be heard on the foregoing motion, the defendant Lethco tendered judgment by default final on his cross-complaint or action. The court below refused to sign the judgment tendered and defendant Lethco excepted. At said term the new parties asked to withdraw their motion to have defendants recast their answer and cross-complaint, etc., without prejudice and file demurrer to the cross-complaint set forth in the answer of defendant Lethco and Southern Real Estate Loan and Trust Company. The Court below allowed the motion, and defendant Letcho excepted.

The demurrer is as follows:

"The defendants, Asheville Realty Company, Baxter Shemwell, A. L. Sink, Fred Sechrist and Charles Young, demur to the cross-action set forth in the answer of Frank D. Lethco and Southern Real Estate Loan and Trust Company upon the following grounds:

1. For that the allegations contained in said answer do not state facts sufficient to constitute a cause of action against these defendants or any of them.

2. For that there is a misjoinder of parties and causes in that the causes of action sought to be alleged in the answer of said defendants do not affect the plaintiff or his cause of action as set forth in his complaint.

3. For that there is a misjoinder of the parties and causes in that all of the causes of action attempted to be alleged in the said answer against these defendants do not all affect all of the defendants.

Defendant Lethco excepted. The court below sustained the demurrer. Defendant Lethco excepted. On the exceptions above set forth by defendant Lethco, assignments of error were duly made and an appeal taken to this Court.

*Tillett, Tillett & Kennedy for plaintiff, Baxter Shemwell and Asheville Realty Company.*

*H. L. Taylor for defendant Lethco.*

*C. H. Gover for A. L. Sink, Fred Sechrist and Chas. Young.*

PER CURIAM. Pending this appeal the defendant Lethco died. The Commercial National Bank of Charlotte duly qualified as executor of his will, and has been made a party defendant in the action and permitted to and has adopted the pleadings heretofore had in this action. We do not think that any of the assignments of error made by defendant Lethco can be sustained. The Superior Court has large discretion in reference to some of defendants' assignments of error and from the view

we take of this matter, if error not prejudicial. Without going into an analysis of the cross-complaint, bill or action, we think the court below correct in sustaining the demurrer filed by the new parties brought into the original action by the cross-complaint, bill or action of defendant Lethco, when he filed answer to plaintiff's complaint.

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, and a demurrer is interposed upon this ground, the demurrer should be sustained and the action dismissed." *Land Co. v. Beatty,* 69 N. C., 329; *Rose v. Warehouse Co.,* 182 N. C., 107; *Pender County v. King,* 197 N. C., 50.

"A misjoinder of parties is not a material defect, and the action will proceed as to the parties properly joined; a misjoinder of causes is a defect, which may cause a separation into different actions; and a misjoinder of parties and of causes is a more serious defect, in that it may result in a dismissal of the action." McIntosh, N. C. Prac. & Proc. in Civil Cases, sec. 442, p. 453. See C. S., 456, 460, 506, 507, 508, 511, 516, 519, 521, 522; *Merrill v. Merrill,* 92 N. C., 657; *Killian v. Hanna,* 193 N. C., 17; *Thompson v. Buchanan,* 195 N. C., 155.

Under our Code of Civil Procedure, we have universally held that in construing pleadings for the purpose of determining its effect, its allegations are liberally construed with a view to substantial justice between the parties. This does not mean that injustice should be done to others by improper joinder of parties and causes of action. We should maintain a liberal but orderly system of practice and procedure, a jungle system would work injustice and sooner or later our practice and procedure would be a tangled web and maze. C. S., 535. *Clendenin v. Turner,* 96 N. C., 421.

We have read the record carefully in reference to the contentions of the parties and the briefs of the respective parties charging each other that the action and cross-action are inequitable. We pass only on the demurrer, as we are dealing simply with allegations. The parties contend in their briefs that there is an attempt to repudiate on one side and unconscionable claim on the other; the "pot calling the kettle black," but these are contentions of fact to be determined in the court below and not for us. The judgment of the court below is

Affirmed.

STATE v. BLACKWELL BARKLEY.

(Filed 19 February, 1930.)

**Grand Jury A a—Where juror is qualified to serve during one week of a term he is not qualified to serve during another—Motion to quash.**

Where a juror is qualified to serve on the grand jury for a certain week of the term of the criminal court, C. S., 2314, he is not qualified to serve for a different week, and he may not participate in the finding of a true bill upon an indictment during the week of the term for which he was not qualified, and in such cases the accused may successfully move to quash the bill of indictment if he makes a motion therefor when he is arraigned to answer, and before the jury has been empaneled to try his case. C. S., 2335.

APPEAL by defendant from *Sinclair, J.*, at November Term, 1929, of PASQUOTANK. Error.

This is a criminal action tried at November Term, 1929, of the Superior Court of Pasquotank County, on an indictment returned by the grand jury for said term, charging that defendant on 9 August, 1929, did wilfully, unlawfully and feloniously offer to L. R. Holmes, chief of police of Elizabeth City, N. C., a bribe with the corrupt intent to influence the said chief of police in the performance of his official duties, in violation of C. S., 4373. The jury returned a verdict that defendant is guilty.

From judgment on the verdict that defendant be imprisoned in the State's prison for a term of not less than two or more than three years, the defendant appealed to the Supreme Court.

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

*C. E. Bailey and Thos. J. Markham for defendant.*

CONNOR, J. The indictment upon which the defendant in this action was arraigned was returned by the grand jury, which was drawn, sworn and empaneled on the first day of November Term, 1929, of the Superior Court of Pasquotank County. The indictment was returned by the grand jury during the first week of said term.

Defendant's first assignment of error on his appeal to this Court is based on his exception to the order of the trial judge denying his motion that the indictment be quashed, for that Charles E. Sanders, Jr., who was sworn and who served as a member of the grand jury by which the indictment was returned, was not a regular juror for the first week of the November Term, 1929, of the Superior Court of Pasquotank County and for that he was not drawn as a grand juror for said term. This

motion was made before the jury was sworn and empaneled to try the issue between the State and the defendant. It was made on defendant's arraignment, and before he entered a plea to the indictment. The motion was, therefore, made in apt time.

It is provided by statute in this State that "all exceptions to grand jurors for or on account of their disqualifications shall be taken before the jury is sworn and empaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." C. S., 2335. In *S. v. Paramore,* 146 N. C., 604, 60 S. E., 502, it was held that the motion to quash the indictment in that case, made upon defendant's arraignment, and before he entered a plea to the indictment, was made in apt time. In that case the indictment was quashed because one of the members of the grand jury by which it was returned, was not qualified to serve as a grand juror at the term of the court at which the indictment was returned.

Upon the hearing of defendant's motion in the instant case, the trial judge found the facts and concluded therefrom that Charles E. Sanders, Jr., was duly qualified to serve as a grand juror during the first week of said term. The motion was denied, and defendant duly excepted.

The regular jurors for the November Term, 1929, of the Superior Court of Pasquotank County were drawn by the board of commissioners of said county in accordance with the provisions of the statute. C. S., 2314. As required by statute, some of said jurors were drawn to serve during the first week and others were drawn to serve during the second week of said term. Among the jurors drawn to serve during the first week was Charles E. Sanders; he, however, was not summoned, and did not attend during the said first week, for the reason that he was absent from the State. Among the jurors drawn to serve during the second week was Charles E. Sanders, Jr.; he was duly summoned by the sheriff to attend and serve as a juror during the second week. When the court convened on the first day of the term, Charles E. Sanders, Jr., attended. He was present in the court room when the names of regular jurors who were drawn to serve as grand jurors, were called. The name of Charles E. Sanders was drawn as a grand juror; when his name was called he did not answer. Charles E. Sanders, Jr., answered, and went into the jury box. He was sworn and served on the grand jury during the term until the grand jury was discharged. He was present and participated as a member of the grand jury when the bill of indictment in this action was acted upon by the grand jury and returned as a "true bill."

When it is provided by statute that a regular term of the Superior Court to be held in their county shall continue for more than one week, the board of commissioners are required by statute to draw jurors for

each week of the term. When jurors have served for the week for which they were drawn and summoned, the statute requires that they shall be discharged by the judge. Ordinarily, grand jurors are chosen from the regular jurors for the first week, in the manner provided by statute. C. S., 2333. It has been held, however, that where the court did not convene until the beginning of the second week, because of the absence of the judge assigned to hold the term, during the first week, grand jurors may be chosen from the regular jurors for the second week. *S. v. Wood,* 175 N. C., 809, 95 S. E., 1050. No person, however, is qualified to serve as a grand juror who is not a regular juror for the week during which the grand jury is drawn. Charles E. Sanders, Jr., was not drawn by the board of commissioners or summoned by the sheriff as a regular juror for the first week of the November Term, 1929, of the Superior Court of Pasquotank County; he was, therefore, not qualified to serve as a grand juror at said term. Indeed, Charles E. Sanders, Jr., was not drawn as a grand juror in accordance with the requirements of the statute. C. S., 2333. No scroll of paper on which his name was written was placed in a box or hat, and drawn therefrom by a child under the age of ten years. Charles E. Sanders, Jr., although qualified to serve as a regular juror during the second week of the term, was not qualified to serve as such juror during the first week. He was not qualified to serve as a grand juror at the time he served as such. In *S. v. Perry,* 122 N. C., 1018, 29 S. E., 384, it is held that the competency of a person to serve as a grand juror depends upon his qualifications at the time he serves, and not upon his qualifications at some other time. There was error in holding that Charles E. Sanders, Jr., was duly qualified to serve as a grand juror during the first week of the November Term, 1929, of the Superior Court of Pasquotank County.

As Charles E. Sanders, Jr., was not qualified to serve as a member of the grand jury by which the indictment in this action was returned, and as notwithstanding his disqualification, he was present at and participated in the deliberations of the grand jury which resulted in the return of the indictment, it must be held, in accordance with authoritative decisions of this Court, that there was error in the denial of defendant's motion that the indictment be quashed. *S. v. Paramore,* 146 N. C., 605, 60 S. E., 502; *S. v. Haywood,* 94 N. C., 847; *S. v. Watson,* 86 N. C., 624; *S. v. Smith,* 80 N. C., 410; *S. v. Baldwin,* 80 N. C., 390.

In the last cited case it is said: "It is settled that the defendant, as indeed every person accused of a violation of the criminal law of the State, has the right not to be put to a public trial except on a bill of indictment preferred by a grand jury composed of persons qualified as by statute prescribed. If there be a defect in the accusing body, it is the right of the party indicted, by plea in abatement or by motion to quash,

to avail himself of such defect; but it is required to be exercised at the earliest opportunity after bill found, which must be upon the arraignment when the party is first called upon to answer. *S. v. Griffice,* 74 N. C., 316; *S. v. Haywood,* 73 N. C., 437."

The order denying defendant's motion that the indictment be quashed is reversed. The motion should have been allowed. There was

Error.

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STATE v. CHARLIE LASSITER.

(Filed 19 February, 1930.)

**Intoxicating Liquor A a—Constitutional Law B a—State statutory provision making the purchase of intoxicating liquor unlawful is valid.**

The State in its inherent and reserved power preserved to it by the Tenth Amendment to the Federal Constitution may enact valid laws relating to prohibition when not in conflict with the Eighteenth Amendment to the Federal Constitution, or congressional legislation, and our State statute, 3 C. S., 3411(b), making the purchase of intoxicating liquor a criminal offense is valid and enforceable.

APPEAL by defendant from *Sinclair, J.,* at December Term, 1929, of CHOWAN.

Criminal prosecution tried upon an indictment charging the defendant with (1) transporting, (2) purchasing, (3) possessing, and (4) having in his possession for the purpose of sale intoxicating liquors, contrary to the statute in such cases made and provided and against the peace and dignity of the State.

It was shown on the trial that the officers found a quantity of liquor, less than a gallon, in the defendant's bedroom. The defendant admitted purchasing the liquor in question for his own use.

Verdict: "Guilty of purchasing liquor."

Judgment: Imprisonment in the county jail for 30 days and to pay a fine of $50 and the costs.

The defendant appeals, assigning error.

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

*L. E. Griffin for defendant.*

STACY, C. J. It is the position of the defendant that as the Volstead Act, 41 U. S. Statutes at Large, 305, does not prohibit the purchase of liquor and the Turlington Act, ch. 1, Public Laws 1923, was adopted

"to make the State law conform to the National law in relation to intoxicating liquor" under the "concurrent power" clause of the Eighteenth Amendment, the State was, therefore, at the time of the enactment of the local statute, limited in its power to legislate more stringently on the subject than the Congress had done.

A similar argument was advanced in the case of *U. S. v. Lanza,* 260 U. S., 377, and answered by *Mr. Chief Justice Taft,* speaking for the Supreme Court of the United States, as follows:

"The Amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

"To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, State power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior State laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in *Vigliotti v. Pennsylvania,* 258 U. S., 403.

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

Speaking to the same subject in *S. v. Hammond,* 188 N. C., 602, 125 S. E., 402, *Hoke, C. J.,* delivering the opinion of the Court, said:

"Again, it is held that the power of a State to enact statutes in regulation of the manufacture, sale and disposition of intoxicating liquors is not rested alone or dependent upon the Eighteenth Amendment to the Federal Constitution, the Prohibition Amendment, but by virtue of its sovereignty and in the reasonable exercise of its police powers, the State may if it sees proper establish more stringent regulations on this subject than are contemplated by the amendment referred to, with the limitation that the State may not authorize or sanction that which the National Amendment prohibits, and that if, in case of concurrent legislation as therein authorized, designed to enforce the amendment, there is conflict between the Federal and State law, the provisions of the Federal statute shall prevail. *S. v. Harrison,* 184 N. C., p. 762; *S. v. Barksdale,* 181 N. C., p. 621; *S. v. Fore,* 180 N. C., p. 744; *Rhode Island v. Palmer,* 253 U. S., p. 350."

It results, therefore, if we assume the law to be, as it has been defined, "the highest expression obtainable, at any given time, of the people's conception of the correct rule of conduct," that, as now expressed in the valid statutes of this State, it is unlawful to purchase, at any time or place in North Carolina, any quantity of intoxicating liquors for beverage purposes. *S. v. Winston,* 194 N. C., 243, 139 S. E., 240. The same statute which makes it unlawful for any person to sell any intoxicating liquor as a beverage also makes it unlawful for any person to purchase it for such purpose. The seller and the purchaser are declared equally liable under the law. *S. v. Hickey, ante,* 45, 150 S. E., 615.

It is the avowed will of a majority of the people of this commonwealth that the use of intoxicating liquor as a beverage shall be prevented, and so the statute provides that it shall be unlawful to sell it or to purchase it for such purpose. The right of the State so to legislate, without infringement of the Federal law, is undoubted. Such was its right before the adoption of the Eighteenth Amendment and the passage of the Volstead Act, and such right is still preserved to it under the Tenth Amendment to the Constitution of the United States. *S. v. Harrison, supra.*

No error.

Z. B. BULLUCK v. R. C. HALEY ET AL.

(Filed 19 February, 1930.)

1. **Attachment H a—Intervener may not attack validity of attachment.**

Interveners in attachment may contest with the plaintiff the issue of their ownership of the property but not the regularity of the attachment or the validity of the seizure of the property thereunder.

2. **Replevin G a—Party is not entitled to sell part of property held under replevy bond and pay for part sold and return the rest thereof.**

An intervener obtaining the possession of property attached by giving a replevy bond may not sell part of the property, such sale not being made as provided by C. S., 812, and claim the right to pay for the part sold and return the balance thereof.

APPEAL by intervener from *Daniels, J.*, at October Term, 1929, of NASH.

Civil action for debt in which the plaintiff invoked the ancillary remedy of attachment against the property of the defendant, R. C. Haley, alleging that he had departed from the State with intent to defraud his creditors.

W. J. Edwards & Company intervened, claimed title to the property attached, consisting of certain household and kitchen furniture, executed a replevin bond, and took possession of the property in attachment.

The following verdict was rendered on the trial:

"1. What amount, if any, is plaintiff entitled to recover of the defendant, R. C. Haley? Answer: $708.10.

"2. Was the property attached the property of the defendant, R. C. Haley? Answer: Yes.

"3. What was the value of the property attached at the time of its delivery to the interpleader? Answer: $500."

From a judgment on the verdict in favor of the plaintiff, the intervener appeals, assigning the following errors:

"1. That his Honor erred in refusing to dismiss or abate the action because of lack of proper service of summons and warrant of attachment upon the defendant, R. C. Haley.

"2. That his Honor erred in refusing to charge the jury that they should find the value of the property attached in two sums, one sum to be the value of the property sold, and the other to be the value of the property unsold, and in charging the jury that they should find the value in one sum only."

*Thorpe & Thorpe for plaintiff.*

*J. A. Edgerton and T. T. Thorne for interpleader.*

STACY, C. J., after stating the case: The first assignment of error cannot be sustained. Interveners in attachment may contest with the plaintiff the issue of their ownership of the property, but not the regularity of the attachment or the validity of the seizure. *Feed Co. v. Feed Co.,* 182 N. C., 690, 109 S. E., 881; *Forbis v. Lumber Co.,* 165 N. C., 403, 81 S. E., 599; *Bank v. Furniture Co.,* 120 N. C., 475, 26 S. E., 927.

The second assignment of error is equally untenable. No part of the property was sold as provided by C. S., 812. The intervener, of its own volition, after obtaining possession of the property, disposed of some of it and is now claiming the right to return the balance and pay for the part that was sold. This right was denied, in principle at least, by the decision in *Saliba v. Mother Agnes,* 193 N. C., 251, 136 S. E., 706. And it may be added that "it is not so nominated in the (replevin) bond."

The record as presented shows no reversible error within our appellate jurisdiction.

No error.

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W. E. WOOD v. AVERY JONES.

(Filed 19 February, 1930.)

**Trial F a—Where it appears that one of the issues submitted to the jury was ambiguous a new trial will be awarded.**

Where issues of negligence, contributory negligence, and damages are submitted to the jury in a personal injury action, and the jury answers the first two in the affirmative and awards damages, a new trial will be awarded on appeal if it appears, in the light of the record, that the second issue was ambiguous.

APPEAL by defendant from *Sinclair, J.,* and a jury, at November Term, 1929, of PASQUOTANK. New trial.

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? Answer: Yes.

2. Did the defendant by his own negligence contribute to his injury? Answer: Yes.

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

The court below on the verdict as rendered gave judgment in favor of plaintiff. Defendant excepted and assigned error and appealed to the Supreme Court.

*Aydlett & Simpson for plaintiff.*
*Ehringhaus & Hall for defendant.*

CLARKSON, J. In the light of the record, we think the second issue ambiguous, and no judgment should have been rendered on the verdict. 27 R. C. L., under "Verdict," p. 858, part sec. 30, speaking to the subject, says: "A verdict should be certain and import a definite meaning free from ambiguity. The jury cannot find both for the plaintiff and the defendant on the same issue, as for instance, by a verdict giving the plaintiff damages and finding the defendant not guilty. And a verdict which is too uncertain or indefinite to be construed either as a general or special verdict may be rejected by the court as meaningless and of no effect." In *Rankin v. Oates,* 183 N. C., at p. 518, it is said: "The court was without authority to reverse the jury's finding on the second issue, answer it himself, and then render judgment on the verdict as amended. *Garland v. Arrowood,* 177 N. C., 373; *Sprinkle v. Wellborn,* 140 N. C., 163; *Hemphill v. Hemphill,* 99 N. C., 436." See *Bartholomew v. Parrish,* 186 N. C., 81; *Lumber Co. v. Lumber Co.,* 187 N. C., 417; *Alston v. Alston,* 189 N. C., 299; *Sitterson v. Sitterson,* 191 N. C., 319. There must be a

New trial.

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NATHAN O'BERRY, TREASURER OF THE STATE OF NORTH CAROLINA, v. MECKLENBURG COUNTY AND MECKLENBURG COUNTY HIGHWAY COMMISSION.

(Filed 19 February, 1930.)

**1. Counties A a—A county is a governmental agency of the State.**

A county is a governmental agency of the State and an integral portion of the general administration of State policy.

**2. Statutes B a—General statutes do not bind the sovereign unless by express provision.**

General statutes do not bind the sovereign unless the sovereign is expressly mentioned therein.

**3. Taxation B e—Statute levying excise tax on distributors of gasoline does not apply to counties using gasoline for governmental functions.**

A county purchasing gasoline for use by it in trucks and automobiles in the discharge of its governmental function of maintenance of its highways is not a "distributor" within the purview of chapter 93, Public Laws of 1927, imposing an excise tax upon distributors of gasoline, since general statutes do not bind the sovereign unless the sovereign is expressly mentioned, and under the express language of the statute the Legislature could not have intended to include counties thereunder since counties could not be subject to the procedure for its enforcement nor

liable for the penalty for its evasion. As to whether Article V, section 5, of the State Constitution prohibits the General Assembly from levying such a tax on a county, *quære*, but not decided, the question not being necessary to the determination of the case.

CIVIL ACTION, before *Grady, J.*, at Chambers, WAKE County.

On 2 August, 1928, the Treasurer of North Carolina instituted an action in the Superior Court of Wake County against Mecklenburg County and the Mecklenburg Highway Commission. It was alleged in the complaint that the defendant, Mecklenburg County, was a body politic and corporate, and authorized to sue and be sued. It was further alleged that "the General Assembly of North Carolina enacted chapter 93, Public Laws of 1927, wherein there was levied and imposed a tax of four cents per gallon on all motor fuel, sold, distributed or used in this State; that all of the net proceeds of said tax is required to be paid into the State Treasury and there placed to the credit of the State Highway Fund, to be used for the purposes hereinbefore stated." It was further alleged that the county of Mecklenburg had received and used in the State of North Carolina from 13 April, 1927, to 27 June, 1928, 184,485 gallons of gasoline, and that said gasoline was subject to a tax of four cents per gallon, amounting to $7,379.40.

The cause of action is confined exclusively to the liability of Mecklenburg County for said tax.

The county filed an answer admitting that it had bought the amount of gasoline alleged in the complaint, outside of the State of North Carolina, and that said defendant "used said gasoline in the State of North Carolina solely and exclusively for the operation of automobiles, trucks, tractors, road building machinery and other machinery and appliances, in the performance of the duties vested in it, and required of it by law, in the construction and maintenance of the public highways of Mecklenburg County, and the defendant avers that in carrying out such duties it was performing a governmental function and was an instrumentality of the State."

Upon the hearing the following judgment was rendered:

"The defendant has received and used in the county of Mecklenburg since 3 April, 1927, up to 27 June, 1928, 184,485 gallons of gasoline, which was used by it in the building of roads in said county and in the management, operation and maintenance of the roads, camps or convict camps of said county. Said gasoline was purchased outside of the State and shipped into the State through interstate commerce, without the payment of the tax of 4 cents per gallon, as provided by the laws of 1927, in cases of 'distributors' as defined in said act.

The tax or excise on said gasoline, if due at all, amounts to $7,379.40; and that amount is due to the State through its Treasurer, by the de-

fendant, if the defendant is liable at all for said tax, under the provisions of chapter 93, Public Laws of 1927.

The defendant contends that it is not liable for said tax or duty, by whatever name it may be called, for that:

(a) It is a political subdivision of the State, engaged in governmental duties and cannot be taxed, or required to pay any duty on gasoline under the provisions of said act, because the imposition of such tax or duty would be in contravention of Article V, section 5, of the Constitution of North Carolina.

(b) The defendant does not fall within the meaning of the word "distributor" as defined in said act of 1927.

These are the questions presented, and upon the decision of the Court, as to these two questions, it is admitted that the rights of the parties depend.

The Court has already held that the defendant is a political subdivision of the State, engaged in governmental functions. *Jenkins v. Griffith,* 189 N. C., 633, 127 S. E., 625. This being true in fact, the Court is of the opinion that the imposition of the tax of four cents per gallon upon gasoline purchased and used by the defendant is in contravention of the Constitution, Art. V, sec. 5.

The act of 1927, chapter 93, Public Laws, states that the word distributor shall include any person, firm, association or corporation that has on hand or in its possession, in this State, motor fuels being held for the purpose of sale, distribution or use, within the State. Section 3 of said act further limits and defines the meaning of the word distributor, and, as the entire statute should be considered in construing section 1 *(Jones v. Board of Education,* 185 N. C., 303), the Court is of the opinion that the word distributor as used in section 1, means only those who are engaged in the business of buying and selling motor fuels, and that it does not apply to the defendant in this case.

Wherefore, it is now considered by the Court, ordered, adjudged and decreed, that the plaintiff is not entitled to recover anything in this action; that the defendant go hence without day and recover its costs, to be taxed by the clerk."

From the foregoing judgment the plaintiff appealed.

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

*J. L. DeLaney and John S. Cansler for defendant.*

BROGDEN, J. The record presents two questions of law, to wit:

(1) Is a county liable for a tax upon gasoline, used by it in the discharge of its governmental functions?

(2) Is a county using gasoline in the discharge of its governmental functions within the purview of chapter 93, Public Laws of 1927?

The defendant contends that it is not liable for said tax by reason of the application of Article V, section 5, of the Constitution of North Carolina, the pertinent portion of which is that "property belonging to the State, or to municipal corporations, shall be exempt from taxation," etc. A county under our system of government is not strictly a municipal corporation. This concept runs through the law, beginning with *Mills v. Williams,* 33 N. C., 558. The distinction between public and private corporations was thus expressed in that case: "The substantial distinction is this: some corporations are created by the *mere will* of the Legislature, there being *no other party interested or concerned.* To this body a portion of the power of the Legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of contract. The Legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party.* These two parties made a contract."

Again in *Bell v. Commissioners,* 127 N. C., 85, 37 S. E., 136, this Court declared: "Counties are not, in a strictly legal sense, municipal corporations, like cities and towns. They are rather instrumentalities of government, and are given corporate powers to execute their purposes, and they are not liable for damages, in the absence of statutory provisions giving a right of action." To the same effect is the utterance in *Jones v. Commissioners,* 137 N. C., 579, 50 S. E., 291, in these words: "These counties are not, strictly speaking, municipal corporations at all in the ordinary acceptation of the term. They have many of the features of such corporations, but they are usually termed *quasi*-public corporations. In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except where this power is restricted by constitutional provision." The weight of authority is to the effect that all the powers and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy. *White v. Commissioners,* 90 N. C., 437; *Hughes v. Commissioners,* 107 N. C., 598, 12 S. E., 465; *Pritchard v. Commissioners,* 126 N. C., 908, 36 S. E., 353; *Burgin v. Smith,* 151 N. C., 561, 66 S. E., 607; *Marsh v. Early,* 169 N. C., 465, 86 S. E., 303.

Therefore, property held by a county is held for the express purpose of aiding or facilitating the discharge of governmental functions. For

this reason the property of the State and the property of the counties is exempt from taxation by express provisions of the Constitution in Article V, section 5 thereof.

Another reason for exempting the property of the State and counties from taxation is thus stated by Cooley on Taxation, Vol. II, 4 ed., paragraph 621: "Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the State and its municipalities, and which is held by them for public purposes. All such property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the State and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the Constitution or a statute."

It is clear, from all the authorities upon the subject, that the State cannot levy a tax upon gasoline owned by a county, but the plaintiff insists that the said tax on the use of gasoline by a county is not a tax on property but an excise tax. This position is sound and is supported by uniform judicial declaration upon the subject. *Askren v. Continental Oil Co.*, 252 U. S., 444; *Bowman v. Continental Oil Co.*, 256 U. S., 642; *Texas Co. v. Brown*, 258 U. S., 466; *Chicago Motor Club v. Kinney*, 160 N. E., 163; *City of Portland v. Kozer*, 217 Pac., 833; *Crockett v. Salt Lake County*, 270 Pac., 142, 60 A. L. R., 867.

"Taxes are charges imposed by the General Assembly, or under its authority for public purposes, and upon grounds of public policy." *Commissioners v. Hall*, 177 N. C., 490, 99 S. E., 372. Excise taxes are defined by Cooley, Vol. I, 4 ed., sec. 42, as "taxes laid upon the manufacture, sale or consumption of commodities within the county, upon licenses to pursue certain occupations and upon corporate privileges." An excise tax is therefore a charge imposed by law, and in the case at bar, it is a charge upon the use of property devoted wholly to the discharge of governmental functions. Gasoline is essential to the governmental function of road building. Therefore, to levy a tax upon the use of one of the means by which governmental function is discharged is to lay a burden upon governmental function itself. This idea was ex-

pressed by the Supreme Court of the United States in *Helson v. Kentucky,* decided 18 April, 1929, and reported in 73 L. Ed., 683. In that case the State of Kentucky levied a tax upon the use of gasoline which was essential to the operation of a ferry boat engaged in interstate commerce. The Court said: "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce." *Panhandle Oil Co. v. Mississippi,* 277 U. S., 218, 56 A. L. R., 585. The defendant county cannot dispose of gasoline except to use it for governmental purposes. Hence in the hands of the county the use of gasoline constitutes its sole property value. Moreover, is it to be presumed, in the absence of express statutory declaration to that effect, that the General Assembly intended to levy a charge or excise tax upon the performance of governmental function? The State Capitol in Raleigh is owned by the State. The physical property is therefore exempt from taxation by virtue of the constitutional exemption. Could the Legislature levy a privilege tax or excise tax of $10,000, or other sum, a year upon the use of the capitol by the Legislature and the Governor and other State officers in discharging their constitutional and governmental duties? As to whether the Legislature has such power, we do not decide, but certainly such power would not be presumed, or such a result anticipated, in the absence of express statutory declaration. This conclusion is justified by the utterance of the Court in *Guilford County v. Georgia Co.,* 112 N. C., 34, 17 S. E., 10, as follows: "General statutes do not bind the sovereign, unless specially mentioned in them. . . . The county is a part of the delegated authority of the State, and is *pro hac vice* the State."

Without deciding the constitutional question involved, we are of the opinion that the defendant does not come within the purview of chapter 93, Public Laws of 1927. In that statute a tax of four cents per gallon was laid upon a "distributor." Section 1 of the act defines a distributor as "any person, firm, farm, association, or corporation that has on hand or in his or its possession in this State, motor fuel being held for the purpose of sale, distribution or use within the State," etc.

The contention of the plaintiff is that the county of Mecklenburg is such a corporation as to bring it within the definition of "distributor," and that it is admitted that such corporation had the gasoline specified in the complaint in its possession for "use within the State." The question then, is whether a county is a "distributor" when it uses gasoline in the discharge of its governmental function. That is to say, when the General Assembly used the word "corporation" in said act, did it have in mind the ordinary business corporation, or did it also have in mind governmental agencies? The chief method of probing legislative intent is to examine the language which is supposed to express that intent. In

section 3 of the act it is declared that "any distributor engaged in business . . . and another distributor, prior to the commencement of doing business" shall "file an application for a license setting forth the name under which such distributor transacts or intends to transact business within the State, the address of each place of business and a designation of the principal place of business." Such distributor shall also file a bond in an amount not exceeding $10,000 with such surety as may be required. Such distributor shall also keep a record of all fuels purchased, received, sold, delivered or used by him. If any distributor makes a false or fraudulent report, he shall be guilty of a misdemeanor and fined not less than $100 nor more than $1,000. Furthermore, if the tax is not paid, the State Treasurer can secure a judgment for the amount and the Treasurer shall have "all remedies now, or which may hereafter be given by the laws of the State of North Carolina for the collection of taxes, . . . for the collection of judgment recovered by the State Treasurer under this section." In other words, if a county shall be deemed to be a distributor, it must make an application, give a bond and procure a surety. If any false statement should be made the county could thereupon be arrested and fined not less than $100 nor more than $1,000. Thereafter, the State Treasurer would take judgment, and if the county did not pay, he could levy an execution upon the county's property and sell it at the courthouse door. The property of a county cannot thus be subjected to debt. *Hughes v. Commissioners,* 107 N. C., 598, 12 S. E., 465; *Gooch v. Gregory,* 65 N. C., 142; *Hardware Co. v. Schools,* 151 N. C., 507, 66 S. E., 583.

Furthermore, general statutes do not bind the sovereign unless the sovereign is expressly mentioned. Thus in *S. v. Garland,* 29 N. C., 48, *Ruffin, C. J.,* wrote: "It is a known and firmly established maxim that general statutes do not bind the sovereign, unless expressly mentioned in them. Laws are made prima facie for the government of the citizens, and not of the State itself."

These considerations lead unerringly to the conclusion that the General Assembly did not intend to include governmental agencies within the term "distributor."

Our attention has been called to only one case in the country deciding the identical question involved in this litigation. That case is *Crockett v. Salt Lake County,* 270 Pac., 142, 60 A. L. R., 867. The Supreme Court of Utah decided that a county was liable for the tax under a statute somewhat similar to our statute. The Court was sharply divided and the dissenting opinions are strong and persuasive. The *Portland case, supra,* is also in point, but that case involved the rights of a city.

Affirmed.

J. A. MINNIS, ADMINISTRATOR OF C. H. SHARPE, DECEASED, v. W. E. SHARPE ET AL.,

AND

R. L. SELF v. W. E. SHARPE ET AL.,

AND

MRS. C. T. M. CLAPP ET AL. v. W. E. SHARPE ET AL.,

AND

MISS ALMA GARRISON v. W. E. SHARPE ET AL.

(Filed 19 February, 1930.)

**1. Corporations C c—Where directors should have discovered fraud of officer of corporation they are liable to persons defrauded.**

Where the president of a real estate corporation fraudulently converts the funds of its customers to the use of the corporation over a long period of time, and the directors know of, or should have discovered such fraud on the part of their officer by the exercise of reasonable diligence in the performance of their duties, an action will lie by the persons thus defrauded against the directors.

**2. Corporations H a—Cause of action against directors by persons defrauded by officer of corporation does not pass to corporation's receiver.**

Where the directors of a corporation are directly liable to third persons dealing with it arising from the defalcation or mismanagement of its officers, it is not a cause of action arising only to the corporation that passes to the receiver upon its insolvency, requiring the permission of the court to maintain it.

APPEAL by defendants from *Cranmer, J.*, at Hillsboro, N. C., 19 August, 1929. From ALAMANCE. Affirmed.

These were civil actions instituted in Alamance County and were consolidated for the purpose of hearing the demurrers to the complaints.

The allegations of the complaints of the other plaintiffs against the defendants are practically the same (and some additional charges) as the complaint in J. A. Minnis, administrator of C. H. Sharpe. The demurrers filed by defendants were the same as in the J. A. Minnis, administrator, action. W. E. Sharpe, Sallie Sharpe and the trustees served with summons, filed no demurrers.

The court below rendered the following judgment:

"These causes consolidated for the purpose of hearing the demurrers to the complaints and coming on to be heard before the Hon. E. H. Cranmer, judge holding courts of the Tenth Judicial District, at Hillsboro, N. C., on 19 August, 1929, and being heard:

It is ordered that the demurrer to each and every of said causes be, and it is hereby overruled and the defendants are hereby allowed thirty days in which to answer."

The defendants assign as error the action of the court in overruling the demurrers and signing the judgment or order set out in the record, and appealed to the Supreme Court.

*Cooper A. Hall and Shuping & Hampton for plaintiffs.*
*M. C. Terrell, H. J. Rhodes, F. P. Hobgood and Brooks, Parker, Smith & Wharton for defendants.*

CLARKSON, J. The allegations of the complaint are to the effect that W. E. Sharpe was for ten or fifteen years vice-president, director and general manager of the Alamance Insurance and Real Estate Company, a corporation. The said corporation was engaged in buying and selling real estate, issuing and selling bonds, negotiating loans upon property owned by others, acting as trustee in deeds of trust and collecting money to be paid upon bonds of individuals; that Sharpe pursued a systematic course of dealing with plaintiff's intestate and the other plaintiffs, in collecting money from them to be applied on mortgages and deeds of trust, and misapplied and misappropriated their funds for the use of said corporation. That actionable fraud in other particulars are sufficiently pleaded and charged against W. E. Sharpe. That the corporation became insolvent and in December, 1928, was placed in the hands of a receiver by United States District Court for the middle district of North Carolina, for the purpose of liquidating its affairs. That the directors were elected annually and that Kirk Holt was elected president and director. He is dead and Maude G. Holt, defendant, has duly qualified and is acting executrix of his estate; that defendants Kirk Holt was president and director, J. L. Scott and John M. Fix were directors, at the time that the wrongs that plaintiffs complain of were perpetrated; that they elected W. E. Sharpe annually to the position stated and gave him entire management of the assets and properties of the corporation. He had entire supervision and management during a period of ten or fifteen years and during that period was pursuing a systematic method of cheating, defrauding and pursuing all fraudulent methods known to the ingenuity of man in the name of the corporation; that some $300,000 was misapplied and misappropriated by Sharpe during the time mentioned belonging to hordes of individuals.

It is charged (1) That during the period above mentioned, W. E. Sharpe was elected annually as vice-president, director and general manager by the above-named directors; (2) that they well knew, or could have known by ordinary care and diligence, that said Sharpe was pursuing the policy above set forth; (3) that they exercised no supervision, made no examination and instituted no inquiry into the affairs of the corporation; that they failed to devote ordinary skill and diligence in

the management of the business, did not familiarize themselves with the business, but entrusted the whole management to Sharpe; that they negligently and recklessly delegated the business, management and control of the corporation to said Sharpe, who by his fraudulent schemes and negligent and wasteful mismanagement of the corporation wrecked same, causing plaintiff's intestate the loss and damage set forth. (4) That the defendant directors utterly neglected and failed to perform the duties incumbent upon them by the by-laws to have an audit of the affairs of the corporation and otherwise grossly neglected to attend to the affairs of the corporation. (5) That the defendants directors had knowledge of or could have easily ascertained the fraud and embezzlement of said Sharpe, before mentioned, by the exercise of ordinary care and prudence in examining the books and assets of the corporation. (6) That they failed and grossly neglected to exercise ordinary care and prudence in the performance of their official duties and in selecting the managing officer of the corporation; that by reason of such neglect, inattention and wilful abuse of their trust, as before stated, and as proximate result, plaintiff's intestate has suffered loss—alleging the amount and praying for judgment.

The defendants' demurrers as to the allegations and lack of allegations in the various complaints, are to the effect: (1) That there is no allegation that any of the defendants personally received any of the funds paid and that plaintiffs have or will sustain any loss. (2) That plaintiffs will not be paid in full out of the assets of the corporation. (3) That the receiver of the Alamance Insurance and Real Estate Company are not only proper but necessary parties, and there is no allegation that application has been made to U. S. District Court for permission to sue said corporation or the receiver thereof. (4) That plaintiffs have filed their claims with the receiver; that same have been disallowed or that they will not be paid in full.

"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." *Glass Co. v. Hotel Corp.,* 197 N. C., at p. 12; *S. v. Trust Co.,* 192 N. C., at p. 247.

We think the court below was correct in overruling the demurrers of the defendants. This action involves the liability of officers, viz., the president and director; vice-president, director and general manager; and other directors of the Alamance Insurance and Real Estate Company, a corporation, to third persons, the plaintiffs, for torts. W. E. Sharpe, the vice-president, director and general manager, did not demur.

The question arises in this action as to the liability of corporate officers to third persons for damages resulting to said persons from torts committed by or participated in by the corporate officers, or where the corporate officers were grossly negligent of their duties and management. Torts of the corporation and its officers as causing a direct or peculiar loss to third persons. Where third persons are injured by a wrong done by the corporation, the corporation can act only by officers or agents, hence third persons should be entitled to recover from the officers or agents who are wrongdoers.

Fletcher Cyc. Corp., Vol. 4, p. 3771, part sec. 2535, speaking to the subject, says: "It is thoroughly well settled that a man is personally liable for all torts committed by him, consisting in misfeasance—as fraud, conversion, acts done negligently, etc.—notwithstanding he may have acted as the agent or under directions of another. And this is true to the full extent as to torts committed by the officers or agents of a corporation in the management of its affairs. The fact that the circumstances are such as to render the corporation liable is altogether immaterial. The person injured may hold either liable, and generally he may hold both as joint *tort-feasors.* Corporate officers are liable for their torts, although committed when acting officially. They are liable for their torts regardless of whether the corporation is liable. . . . (p. 3772). It is no defense to such an action that the corporation is in the hands of a receiver and that hence the receiver should sue, since the cause of action is not one which passes to a receiver." *Houston v. Thornton,* 122 N. C., 365; *Russell v. Boone,* 188 N. C., 830. Part section 2536, Fletcher, *supra,* at p. 3773: "To make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; that is to say, he must be a participant in the wrongful act. Some knowledge and participation, actual or implied, must be brought home to him." Section 2540, p. 3777: "A general manager is liable for wilfully applying private funds, in the hands of the corporation, to the debts of the corporation. So knowingly permitting funds belonging to another to be appropriated to the use of the corporation, makes the directors personally liable. And directors are liable for the misapplication of funds held in trust by the corporation, where they knew, or ought to have known, thereof. So a director of a business corporation who presumably had knowledge that it was receiving deposits of money for safe-keeping, and that it was being misappropriated, is personally liable where he acquiesced therein. Directors who mingle money collected for another with the funds of the corporation, in violation of the instructions of the owner, or who knowingly permit their subordinates to do so, whereby the fund is lost, are personally liable therefor." *Virginia-Carolina Chemical Co. v. Floyd,* 158 N. C., 455.

In *Caldwell v. Bates,* 118 N. C., at p. 325, we find: "That the directors are liable for gross neglect of their duties, and mismanagement—though not for errors of judgment made in good faith—as well as for fraud and deceit."

The following observations are made in *Anthony v. Jeffress,* 172 N. C., at p. 379: "It is immaterial whether the defendants were cognizant of the insolvent condition of the company or not. The law charges them with actual knowledge of its financial condition, and holds them responsible for damages sustained by stockholders and creditors by reason of their negligence, fraud or deceit. *Pender v. Speight,* 159 N. C., 616; *Townsend v. Williams,* 117 N. C., 330; *Solomon v. Bates,* 118 N. C., 315." *Hauser v. Tate,* 85 N. C., at p. 84-5; *Besselieu v. Brown,* 177 N. C., 65; *Braswell v. Morrow,* 195 N. C., 127.

The allegations in the present action deal with the liability of officers to third persons for torts. We are not dealing with "the question as to the right of creditors of the corporation to recover for torts of corporate officers where the injury is primarily to the corporation and it affects the creditors only as it affects all the creditors through the injury to the corporation to whom they look for payment of their debts." Fletcher, *supra,* at p. 3770.

In *Wall v. Howard,* 194 N. C., at p. 311, these observations are made: "Upon these pleadings only one question of law arises, and that is whether this case, upon the complaint as drawn, is governed by the principle announced in *Douglass v. Dawson,* 190 N. C., 458, or *Bane v. Powell,* 192 N. C., 387. When money is placed in a bank upon general deposit the relationship of debtor and creditor thereupon arises and the money passes from the depositor to the bank. *Corporation Commission v. Trust Co.,* 193 N. C., 696. As long as a bank is solvent, as defined by law, the officers and directors are authorized to receive deposits and permit the bank to receive them. In other words, in such case deposits are rightfully received. If such deposits, so made, are thereafter misapplied, lost or wasted through the negligence of the officers and directors, and as a result thereof the bank becomes insolvent, this is a wrong done the bank, and it or its receivers alone, nothing else appearing, can maintain the action for damages, and the principle of *Douglass v. Dawson* applies. But if the bank is insolvent at the time the deposit is made, then the officers and directors commit a wrong, under the law, in permitting the deposit to be made. In other words, the taking and receiving money from the depositor, thus swelling the assets of an insolvent bank, is a wrongful act done him personally and individually, for which wrong he alone can sue. In such event, the principle of *Bane v. Powell* applies." *Ham v. Norwood,* 196 N. C., 762.

In the present action, among other things, the charge is made that Sharpe, vice-president, director and general manager, misapplied moneys

collected from or for plaintiffs and used same in the corporation business, and this was systematically done, through long years. This was known, or in the exercise of reasonable care ought to have been known, by the defendants, directors, that this was an actionable wrong to plaintiffs. A private corporation like the one in this controversy has no authority like a bank that takes depositors' money. The bank is allowed to take money on deposit and it is mingled with other depositors' money and passes to the bank and the relation of debtor and creditor is created. Ordinarily there is no "trust quality." *Corporation Commission v. Trust Co.*, 193 N. C., 696; *Corporation Commission v. Trust Co.*, 194 N. C., 125. The complaints allege causes of action against all the defendants as wrongdoers—joint *tort-feasors*—and as a proximate result causing a direct or peculiar loss to plaintiffs. The demurrers were properly overruled by the court below. For the reasons given, the judgment below is

Affirmed.

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HILDA SAUNDERS ASHLEY v. A. R. BROWN.

(Filed 19 February, 1930.)

1. **Statutes B b—In absence of express provision statutes will not be given retroactive effect unless necessary from construction.**

   A statute which is not remedial or curative, but which affects a substantial right will not be construed as retroactive or retrospective unless it expressly provides therefor, or by construction it is necessary to so regard it to carry out the legislative intent.

2. **Process B e—Statute providing for service on Commissioner of Revenue in action against nonresident automobile owner has no retroactive effect.**

   The statute which provides that a nonresident by using the highways of the State, will be deemed to have appointed the Commissioner of Revenue as his agent for the service of process is not remedial or curative, but affects a substantial right, and the appointment of the Commissioner thereunder is contractual, and the statute is not to be given retroactive effect, and service of process thereunder in an action accruing before the effective force of the statute is void.

3. **Statutes B a—Statute adopted from another state will ordinarily be given the construction placed upon it by the state from which adopted.**

   Where a statute is adopted in our State from another State or country, as a general rule, it is to be construed in accordance with the interpretation given it by the State or country from which it is adopted, especially when the statute itself does not express any intention to the contrary.

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1929, of CAMDEN. Affirmed.

This is an action to recover damages for personal injury. The plaintiff alleges that on 2 December, 1928, the defendant negligently operated an automobile on a public highway in Camden County and negligently caused its collision with a car in which the plaintiff was traveling, and thereby inflicted upon her serious personal injury for which she is entitled to damages. The defendant entered a special appearance and moved to dismiss the action for the reason that there had been no valid service of process upon him and that the court had no jurisdiction to proceed against him in the premises. The motion was allowed, judgment was entered, and the plaintiff excepted and appealed.

The defendant was not personally served. The only evidence of the service of process is contained in the plaintiff's affidavit which was filed 25 September, 1929. She alleges that the summons was issued on 10 August, 1929; that the summons and the complaint were served on the defendant by reading the summons and by delivering a copy of the summons and of the complaint together with $1.00 to A. J. Maxwell, Commissioner of Revenue of North Carolina, on 20 August, 1929; that a copy of the summons and a copy of the complaint were mailed to the defendant by said Commissioner by registered mail and received by the defendant on 19 September, 1929; that on 19 August, 1929, the plaintiff caused the summons and the complaint to be served on the defendant by mailing a copy of each of these papers to the defendant by registered mail and that said copy was received by the defendant on 30 August, 1929. She further alleges that these acts are shown by the following return receipts which are attached to her affidavit:

1. Post Office Department—Official business
   Registered Article
   No. 574
   Return to Mrs. Hilda Saunders Ashley,
   c/o McMullan & LeRoy,
   Elizabeth City, N. C.

RETURN RECEIPT:

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

A. R. BROWN
(Signature or Name of Addressee)

Date of delivery, 30 August, 1929.

2. Post Office Department—official business.
   Registered Article
   No. 4692
   Return to A. J. Maxwell, Commissioner, Raleigh, N. C.

RETURN RECEIPT:

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

A. R. BROWN
(Signature or Name of Addressee)

Date of delivery, 19 September, 1929.

*McMullan & LeRoy for plaintiff.*
*W. Shepard Drewry and Ehringhaus & Hall for defendant.*

ADAMS, J. In 1929 the General Assembly enacted a statute regulating the service of process upon nonresidents of the State in civil actions growing out of accidents or collisions in which the owners or operators of motor vehicles are charged with liability in damages. P. L. 1929, ch. 75. The act was ratified 1 March, 1929, and immediately became effective. The first section is as follows:

"That the acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or the operation by such nonresident of a motor vehicle on the public highways of the State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Revenue, or of his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy thereof, with a fee of one dollar, in the hands of said Commissioner of Revenue, or in his office, and such service shall be sufficient service upon the said nonresident: *Provided,* that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or the Commissioner of Revenue to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action."

The trial court found the following facts and made them a part of the judgment: (1) The plaintiff's injury, which is the subject of the action, occurred on 2 December, 1928, and therefore prior to the ratification of the act; (2) the plaintiff is a nonresident of North Carolina and a resident of Virginia; (3) the defendant is a nonresident of North Carolina; (4) when the injury occurred both parties were and have since continuously been nonresidents of the State; (5) at no time since 3 December, 1928, has the defendant been in the State, or driven, or caused or expressly or impliedly permitted to be driven upon its highways any motor vehicle which he owned or controlled. Since the facts thus found are binding upon this Court, it is obvious that the determinative question is whether the act of 1929 is retrospective or only prospective in its operation.

As applied to statutes the words retroactive and retrospective may be regarded as synonymous and may broadly be defined as having reference to a state of things existing before the act in question. A retrospective law may be defined more specifically as one "which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence." Black on Interpretation of Laws, 247.

Concerning its retrospective operation the statute contains no express declaration of the legislative intent. We must therefore observe the general rule that all statutes are to be construed as having only prospective operation unless an intention to give them retrospective effect is expressly declared or necessarily implied; or, as stated in *United States v. Heth,* 7 U. S., 3 Cranch, 398, 413, 2 Law Ed., 479, 483, that "words in a statute ought not to have a retrospective application, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied." A specific application of the rule in several of its phases may be seen by reference to the following cases: *United States v. Burr,* 159 U. S., 78, 40 L. Ed., 82; *United States v. American Sugar Ref. Co.,* 202 U. S., 563, 50 L. Ed., 1149; *Wilkinson v. Wright,* 1 N. C., 422; *Peace v. Nailing,* 16 N. C., 289, 296; *Merwin v. Ballard,* 66 N. C., 398; *Greer v. Asheville,* 114 N. C., 678; *Mann v. Allen,* 171 N. C., 219; *Waddill v. Masten,* 172 N. C., 582; *Commissioners v. Blue,* 190 N. C., 638.

An intention to make the statute retrospective is neither expressly declared nor necessarily implied; but an intention to make its operation prospective only is clearly indicated. The service of process under this act upon a nonresident of the State is predicated upon the appointment by the nonresident of the Commissioner of Revenue, or his successor in office, as the attorney upon whom, in actions against the nonresident, a

summons or other lawful process may be served; and the appointment of an attorney for this purpose is predicated upon the acceptance by a nonresident of the privilege of operating motor vehicles upon the public highways of the State. His acceptance of this right at any time after the act was ratified is deemed equivalent to the appointment of the Commissioner of Revenue as his attorney. But at the date of the alleged injury his use of the public highways did not impliedly or otherwise have the effect of appointing an attorney upon whom process could be served for the purpose of bringing him within the jurisdiction of the courts of this State; and the defendant has not at any time since the ratification of the act been in the State or permitted a motor vehicle owned or controlled by him to be driven on its highways.

Curative and remedial statutes which are necessarily retrospective must be given a retrospective operation unless the effect will be to disturb vested rights or to impair the obligation of contracts. 25 R. C. L., 790, *et seq.* But the statute under consideration is neither remedial nor curative; it imposes a contractual obligation and affects substantial rights. If construed as retrospective, it would confer upon the plaintiff a legal right where none before existed and deprive the defendant of his exemption from the service of process by the method therein prescribed.

The act in question was modeled after the Massachusetts law. Acts and Resolves of Massachusetts, 1923, ch. 431, sec. 2. In substance the two are almost identical. The validity of the latter act was sustained by the Massachusetts Supreme Judicial Court in *Pawloski v. Hess,* 35 A. L. R., 945, and on a writ of error by the Supreme Court of the United States in *Hess v. Pawloski,* 274 U. S., 352, 71 L. Ed., 1091. See *Poti v. N. E. Road Machinery Co.,* 140 Vt., 587; *S. v. Johnston,* 79 N. J. L., 49, 74 At., 538; *Kane v. State,* 81 N. J. L., 594, 80 At., 453; *Kane v. New Jersey,* 242 U. S., 160, 62 L. Ed., 222. The question of its application to actions growing out of accidents or collisions which occurred before it became effective was considered by the Massachusetts Supreme Judicial Court in *Paraboschi v. Shaw,* 155 N. E., 445. The Court held that there was no legislative attempt to make the statute applicable to cases which had arisen before it became effective, and the order granting a motion to dismiss the action for this reason was affirmed. In the course of the opinion *Rugg, C. J.,* said: "The essence of that statute is that the operation of a motor vehicle upon the highways of this commonwealth by a nonresident shall be 'deemed equivalent to the appointment by such nonresident of the registrar of motor vehicles' as his attorney for the service of all lawful processes in the specified actions and 'a signification of his agreement that any such process against him' so served 'shall be of the same legal force and validity as if served on him personally.' The statute thus imposes upon the nonresident operating a motor vehicle as there described the contractual obligation of making

the registrar of motor vehicles his agent for the limited purpose stated. Such a contractual obligation relates to substantive rights and not merely to remedy. It is manifest from the frame of the act that there was no intention on the part of the Legislature to attempt to ascribe such contractual obligation to acts committed before the statute became operative."

This construction is applicable to the statute before us. The contractual obligation arises upon the nonresident's acceptance of proffered rights and privileges, which signifies his agreement that process served upon his attorney shall be equivalent to personal service upon himself. While the decisions of one State are not conclusive on the courts of another, there is an established principle to the effect that "where a statute is adopted from another State or country, and the same has been construed by such State or country, it is the general rule that the statute is to be held to have been adopted with the construction so given to it, and particularly where the statute itself does not express any intention to the contrary." *People v. Trust Co.*, 289 Ill., 475, cited in *Bank v. Doughton*, 189 N. C., 50. See Harvard Law Review, February, 1930, note, page 623.

The statute assailed in *Wuchter v. Pizzutti*, 276 U. S., 13, 72 L. Ed., 446, was held invalid because it contained no provision making it reasonably probable that the notice would be communicated to the person sued; but it differs materially from our statute.

We are of opinion that the act of 1929 has no application to actions growing out of accidents or collisions which occurred before it went into effect, and that the judgment of the trial court should be affirmed.

Judgment affirmed.

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STATE AND CITY BANK AND TRUST COMPANY v. M. N. HEDRICK, G. C. HOBGOOD AND BALLARD NORWOOD.

(Filed 19 February, 1930.)

**Bills and Notes C d—Purchaser of demand note six months after its date is not a holder in due course.**

A demand note to be negotiated in due course must be negotiated within a reasonable time after its date, and where the purchaser has acquired it six months after date it is not within a reasonable time, and he will not be regarded as a holder in due course, and a payment or settlement between the original parties will discharge those liable thereon, as against the rights of such purchaser, and the question of whether there should be contribution among the cosureties does not arise. C. S., 2978, 3034.

APPEAL by defendants, G. C. Hobgood and Ballard Norwood, from *Harding, J.*, at May Term, 1929, of ROWAN. Reversed.

This action was heard upon exceptions duly filed by the defendants, G. C. Hobgood and Ballard Norwood, to findings of fact and conclusions of law made by the referee, to whom the action had been referred for trial. All of the exceptions were overruled by the court. The report of the referee was in all respects approved and confirmed.

In accordance with the conclusions of law made by the referee, upon his findings of fact, judgment was rendered:

"(1) That the plaintiff recover of the defendant, M. N. Hedrick, the sum of $3,194.38, with interest on $2,904.91, from 22 April, 1925, and interest on $289.47 from 24 April, 1929, until paid, to be discharged by payment of one-third of said amount by each of the defendants.

(2) That the defendant, M. N. Hedrick, recover of the defendant, G. C. Hobgood, the sum of $1,064.79 with interest on $968.30 from 22 April, 1922, and interest on $96.49 from 24 April, 1929, until paid; the said sums to be paid to the plaintiff bank by the defendant, G. C. Hobgood, in contributory exoneration of the judgment of said bank against the defendant Hedrick; said payment when made to be credited upon and to discharge *pro tanto* the amount adjudged to be due plaintiff bank by defendant, M. N. Hedrick.

(3) That the defendant, M. N. Hedrick, recover of the defendant, Ballard Norwood, the sum of $1,064.79 with interest on $968.30 from 22 April, 1922, and interest on $96.49 from 24 April, 1929, until paid; the said sums to be paid to the plaintiff bank by the defendant, Ballard Norwood, in contributory exoneration of the judgment of said bank against the defendant Hedrick; said payment when made to be credited upon and to discharge *pro tanto* the amount adjudged to be due plaintiff bank by the defendant, M. N. Hedrick.

(4) That execution issue in this case at the instance of the defendant Hedrick against the defendants, G. C. Hobgood and Ballard Norwood, to enforce the payment of the amounts due by them in contributory exoneration as above set out.

(5) That the plaintiff recover of the defendant, M. N. Hedrick, the costs to be taxed by the clerk, and that M. N. Hedrick recover of G. C. Hobgood and Ballard Norwood, each one-third of the costs of this action, including the referee's fee and the stenographer's fee."

Neither the plaintiff nor the defendant, M. N. Hedrick, excepted to or appealed from the judgment.

The defendants, G. C. Hobgood and Ballard Norwood, excepted to said judgment and appealed therefrom to the Supreme Court.

*Royster & Royster, Craige & Craige and Parham & Lassiter for defendant Hedrick.*

*A. W. Graham, Jr., for defendant Hobgood.*

*Hicks & Stem for defendant Norwood.*

CONNOR, J. On 24 July, 1925—the date of the summons in this action—the plaintiff bank was the owner of a note for the sum of $10,000, executed by the Bank of Virgilina, and payable to the order of the plaintiff. This note was dated 7 December, 1923, and was due and payable thirty days after date. It was in renewal of a note for a like amount, executed on 10 June, 1920, by the Bank of Virgilina, and also payable to the plaintiff. The note held by plaintiff was secured by collateral transferred to plaintiff by the Bank of Virgilina.

At the date of the commencement of this action, the Bank of Virgilina was insolvent. It had been adjudged insolvent, and had ceased to do business on 9 December, 1923. Payments have been made on the note held by plaintiff out of the proceeds of collections made on the collateral securities held by plaintiff for said note. There is now due the plaintiff on said note, as found by the referee, the sum of $2,904.91, with interest from 22 April, 1922.

Plaintiff by this action seeks to recover said sum of the defendant, M. N. Hedrick, by reason of his liability on a note for $5,000, which plaintiff holds as security for the note of the Bank of Virgilina. The defendant, M. N. Hedrick, admits his liability to plaintiff for this sum; he contends, however, that the defendants, G. C. Hobgood and Ballard Norwood, are equally liable with him for said sum, for that upon the facts found by the referee, they are cosureties with him for the Bank of Virgilina on its note held by the plaintiff.

At the commencement of this action, plaintiff held as collateral security for the note of the Bank of Virgilina, three notes, each for the sum of $5,000. Each of these notes was payable to the order of the Bank of Virgilina, and each had been endorsed and negotiated to the plaintiff by said Bank of Virgilina as security for its note to the plaintiff for the sum of $10,000. No payment has been made on either of said notes, and they were all past due at the commencement of this action.

One of these notes, dated 8 December, 1923, and due four months after date, was executed by Griswold & Hedrick, a partnership, of which the defendant, M. N. Hedrick, was a member. This note was executed by the makers for the accommodation of the Bank of Virgilina. They received no consideration for said note. On 9 December, 1923, this note was negotiated to the plaintiff by the Bank of Virgilina, the payee, under such circumstances as constituted the plaintiff the holder in due course of said note. For this reason the defendant, M. N. Hedrick, admitted his liability to the plaintiff for the amount which was due the plaintiff on the note of the Bank of Virgilina, at the commencement of this action, to wit: $2,904.91, with interest from 22 April, 1922.

The other two notes, held by the plaintiff as collateral security for the note of the Bank of Virgilina, were each dated 23 September, 1919;

each was due on demand. One of these notes was executed by Jones & Hobgood, a partnership, of which the defendant, G. C. Hobgood, was a member. The other note was executed by the defendant, Ballard Norwood, and Peyton Puryear, who were partners under the firm name of Norwood & Puryear. Both of these notes were endorsed by the Bank of Virgilina and delivered to the plaintiff on 10 June, 1920, as collateral security for its note to the plaintiff, for the sum of $10,000, executed on said day. Neither the firm of Jones & Hobgood nor the firm of Norwood & Puryear was indebted to the Bank of Virgilina on account of said notes on 10 June, 1920.

Both said firms were engaged in the business of selling tobacco as warehousemen at Virgilina in the State of Virginia during the tobacco selling season of 1919. This season began in September and closed in December of said year. At the beginning of the season both said firms made arrangements with the Bank of Virgilina to pay their checks for tobacco sold by them. In contemplation of possible overdrafts in their account with said bank, each firm executed its note for $5,000, payable to the order of the bank, and due on demand. It was understood that no overdraft would stand on the books of the bank for more than a few days. Each note was held by the bank to cover any possible overdraft in the account of the makers. At the close of the tobacco selling season on or about 20 December, 1919, both said firms had a full settlement with the bank, paying to said bank whatever sum was due on their respective notes. At the date of said settlement, each note was in the possession of the cashier of the bank. He promised to return said notes with their canceled checks to each of said firms. He failed to do this, and subsequently on 10 June, 1920, fraudulently endorsed and negotiated both said notes to the plaintiff.

The referee found as a matter of fact and concluded as a matter of law, that both said notes, dated 23 September, 1919, and due on demand, and negotiated to the plaintiff by the payee on 10 June, 1920, were negotiated within a reasonable time after their issuance, and that therefore the plaintiff took said notes and held the same as a holder in due course. The conclusion of the referee that the defendants, G. C. Hobgood and Ballard Norwood, are liable to plaintiff as sureties, for the amount now due the plaintiff by the Bank of Virgilina, as the balance due on its note for $10,000, and that the three defendants are cosureties for said amount, is predicated upon his finding that plaintiff is the holder in due course of each of said notes for $5,000. It is conceded that plaintiff is the holder in due course of the note executed by Griswold & Hedrick; if the plaintiff is not the holder in due course of the notes executed by Jones & Hobgood and by Norwood & Puryear, then upon the facts found by the referee, plaintiff could not recover upon said notes. If the defendants, G. C. Hobgood and Ballard Norwood, are not liable in this

action to the plaintiff, they cannot be held liable to the defendant, M. N. Hedrick, as cosureties with him. The determinative question, therefore on this appeal, is whether plaintiff is the holder in due course of the notes executed by Jones & Hobgood and by Norwood & Puryear.

It is generally held, without regard to statutory provisions, that a negotiable instrument due and payable on demand is not overdue for the purpose of negotiation, until after the lapse of a reasonable time, and that what is a reasonable time depends upon the facts and circumstances of the particular case. 8 C. J., p. 408, section 603. These principles have been recognized as the law and are included in the Uniform Negotiable Instruments Act, which has been enacted as the law in this State. C. S., 3034, and C. S., 2978. Where a negotiable instrument, payable on demand, is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. Upon the facts found by the referee, in the instant case, and approved by the Court, we are of opinion that as a matter of law, the negotiation of the notes dated 23 September, 1919, and due on demand, to the plaintiff on 10 June, 1920, was after the lapse of a reasonable time, and that therefore it was error to hold that plaintiff became and was the holder in due course of said notes. Even if it should be held that upon the facts of the instant case, the notes were not overdue until after 20 December, 1919, nearly six months had elapsed from said date before the notes were negotiated to the plaintiff on 10 June, 1920. This is an unreasonable time, and plaintiff cannot be held a purchaser of the notes before maturity, which is essential to make it a holder in due course. C. S., 3033.

As neither the defendant, G. C. Hobgood, nor the defendant, Ballard Norwood, upon the facts found by the referee, is liable to plaintiff on the notes held by plaintiff, neither can be held liable to the defendant, M. N. Hedrick, as cosureties for the Bank of Virgilina.

The judgment that defendant, M. N. Hedrick, recover in this action of the defendants, G. C. Hobgood and Ballard Norwood, is reversed.

As neither the plaintiff nor the defendant, M. N. Hedrick, excepted to or appealed from the judgment, the judgment in favor of plaintiff and against the defendant, M. N. Hedrick, has not been considered on this appeal.

As there was error in holding that defendants, G. C. Hobgood and Ballard Norwood, were cosureties with the defendant, M. N. Hedrick, and that for that reason the defendant Hedrick was entitled to recover in this action against them, we do not discuss or decide other interesting questions presented by this appeal.

In accordance with this opinion, the judgment, insofar as it affects the defendants, G. C. Hobgood and Ballard Norwood, is

Reversed.

STATE v. WILLIAM BATTLE.

(Filed 19 February, 1930.)

**Criminal Law G m—Conviction may not be had on evidence which raises only conjecture or suspicion of guilt.**

A conviction of larceny may not be had upon evidence which creates only a conjecture or suspicion that the defendant had committed the offense.

APPEAL by defendant from *Moore, Special Judge,* at September Term, 1929, of EDGECOMBE. Reversed.

The defendant was charged (1) with breaking and entering a dwelling-house of Sam Evans and stealing money from a meter box in the possession of Sam Evans, the property of the city of Rocky Mount; (2) with receiving same, knowing the property to have been stolen. When the breaking and entering took place, the evidence would indicate it was about 12:30 in the day time, some time in February, 1929. The amount alleged to have been stolen was about $2.75, and was taken from a meter box on the back porch of Sam Evans' house.

The defendant introduced no evidence, but in the testimony of witnesses for the State he denied the charge. There was a verdict of guilty. The defendant, at the close of the State's evidence, moved for judgment as in case of nonsuit, C. S., 4643, and also prayed that the court instruct the jury to return a verdict of not guilty. Defendant's motion and prayer were refused. The defendant excepted, assigned error and appealed to the Supreme Court.

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

*T. T. Thorne for defendant.*

PER CURIAM. The defendant was charged with (1) breaking and entering a dwelling-house and stealing from a meter box about $2.75; (2) for receiving same knowing the money to have been stolen.

We think there is merely a suspicion or conjecture in regard to the charges in the bill of indictment against defendant, but no sufficient evidence to be submitted to the jury. The judgment below is

Reversed.

EDWIN JAMES v. FARMERS PEANUT COMPANY.

(Filed 19 February, 1930.)

**Master and Servant D a—The letter of an independent contract is not ordinarily liable for injury to employee of independent contractor.**

The owner of a building is not liable in damages to an employee of an independent contractor injured while engaged in painting the building under the independent contract therefor.

APPEAL by plaintiff from *Moore, Special Judge,* at October Term, 1929, of PASQUOTANK. Affirmed.

Action to recover damages resulting from personal injuries sustained by plaintiff, and alleged to have been caused by the negligence of defendant.

It is conceded that at the time plaintiff was injured, he was at work as the employee of an independent contractor, on a building owned by the defendant.

From judgment dismissing the action as upon nonsuit, at the close of the evidence for plaintiff (C. S., 567), plaintiff appealed to the Supreme Court.

*Thompson & Wilson for plaintiff.*

*Ehringhaus & Hall, Hughes, Little & Seawell and Worth & Horner for defendant.*

PER CURIAM. The evidence offered by plaintiff at the trial of this action fails to show a breach by defendant of any duty which the defendant owed to the plaintiff. Plaintiff was not an employee of defendant; he was the employee of an independent contractor, who had undertaken by his contract with defendant to paint a building owned by defendant. Plaintiff was injured while at work as the employee of the independent contractor.

The general rule that the contractee is not liable for injuries to employees of an independent contractor, where such injuries are caused by the negligence of the latter, is applicable to the facts shown by the evidence in the instant case. 39 C. J., 1341. Upon these facts, exceptions to this rule, recognized and applied in *Paderick v. Lumber Co.,* 190 N. C., 308, 130 S. E., 29, and in *Greer v. Const. Co.,* 190 N. C., 632, 130 S. E., 739, are not applicable. There is no error in the judgment.

Affirmed.

LILLIAN A. ROBERTS v. ABERDEEN-SOUTHERN PINES SYNDICATE ET AL.

(Filed 26 February, 1930.)

1. **Bills and Notes G a—Payee looking for payment out of funds of trust is estopped from contending that trustees were personally liable.**

   Where the payee of a note, at the time he agrees to lend a sum of money to a Massachusetts Trust, and at the time he accepts a note of the trust signed by the trustees, knows that by express provisions in the Declaration and Indenture of Trust that the trustees were exempt from personal liability for debts of the trust, the payee is estopped from contending that the trustees are personally liable on the note. As to whether owners of a beneficial interest in a Massachusetts Trust are liable as partners or whether such a trust is contrary to public policy, is not presented on the record and not decided.

2. **Bills and Notes H a—Burden of proving personal liability of trustees on note of Massachusetts Trust is on plaintiff.**

   Where the plaintiff seeks to hold the trustees of a Massachusetts Trust personally liable on a note signed by them as trustees the burden of proof is on the plaintiff.

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1929, of MOORE. No error.

This is an action to recover on a note executed by A. M. Steinburg, trustee, and M. D. Shannon, trustee, in the name of Aberdeen-Southern Pines Syndicate. The note is dated 29 November, 1926, and was due four months after date. Plaintiff is the holder of said note.

Prior to the delivery of said note, certain of the defendants endorsed the same and thereby became liable to the holder of the note as endorsers. Each of said defendants, at the time he endorsed said note, was the owner of a certificate of interest in the Aberdeen-Southern Pines Syndicate, in whose name and for whose benefit the note was executed. It was admitted by these defendants that prior to the commencement of this action, the said note, upon its due presentment according to its tenor, was dishonored by nonpayment. The defendants who endorsed said note do not deny their liability to the plaintiff as holder of said note for the amount due thereon.

Plaintiff alleges in her complaint that the defendants other than the endorsers of said note, are liable to her as joint adventurers or as partners, doing business at the date of the execution of said note under the name of the Aberdeen-Southern Pines Syndicate, for that at said date each of said defendants was the owner of a certificate of interest in said syndicate. The said defendants admit that they were the owners of certificates of interest in said syndicate, as alleged; they deny, however,

that they were partners by reason of such ownership. They allege that plaintiff loaned the sum of $10,250 to the Aberdeen-Southern Pines Syndicate, and took the note sued on in this action as security therefor, with knowledge, both actual and constructive, that by the express provisions of the Declaration and Indenture of Trust, under which said syndicate was formed, the Aberdeen-Southern Pines Syndicate is a trust and not a partnership, and that neither the trustee nor the *cestuis que trustents* are personally liable as partners or otherwise, for the debts of said syndicate; that only the trust fund, in the hands of the trustees is liable for said debts.

The issues submitted to the jury were answered as follows:

"(1) What is the amount due on the note sued upon in this action? Answer: $10,250, with interest thereon at 6 per cent from 29 November, 1926.

(2) Are the defendants who endorsed said note liable and bound for the payment thereof? Answer: Yes.

(3) Are the defendants, other than those who endorsed said note, liable and bound for the payment thereof? Answer: No."

From judgment on the verdict denying plaintiff judgment for the amount due on the note sued on, against defendants who are not endorsers of said note, plaintiff appealed to the Supreme Court.

*H. F. Seawell & Sons for plaintiff.*

*Varser, Lawrence, Proctor & McIntyre for defendants other than the endorsers.*

CONNOR, J. The burden of proof on the third issue submitted to the jury at the trial of this action, was on the plaintiff. The court instructed the jury that if they should find the facts to be as all the evidence tended to show, they should answer this issue "No." Plaintiff duly excepted to this instruction, and on her appeal to this Court contends that her assignment of error based on this exception should be sustained. The only question to be decided on this appeal is whether or not there was error in this instruction.

Plaintiff contends that under the provisions of the Declaration and Indenture of Trust, by which the Aberdeen-Southern Pines Syndicate was created, the owners of certificates of interest issued by said syndicate as evidence of their investments in the trust fund of said syndicate, are joint adventurers, and are liable as partners for debts incurred by the trustees for and in behalf of the syndicate; she contends that the Aberdeen-Southern Pines Syndicate is in law a partnership and not a common-law trust, notwithstanding the express declaration in the Declaration and Indenture of Trust by which the said syndicate was created to

that effect. If this contention is well founded, then the defendants referred to in the third issue, upon all the evidence are liable on the note held by the plaintiff, nothing else appearing, and there was error in the instruction, as contended by plaintiff.

The defendants referred to in the third issue contend, on the other hand, that they are not partners, but merely *cestuis que trustent,* for that the Aberdeen-Southern Pines Syndicate, created by the Declaration and Indenture of Trust offered in evidence by the plaintiff, is not a partnership, but a common-law trust, such as is recognized in the State of Massachusetts, and therefore called a Massachusetts trust. They contend further that, even if it shall be held as a matter of law, that in the absence of a statute in this State recognizing a common-law or Massachusetts trust, as a valid business organization, distinguishable from a partnership or from a corporation, said syndicate is a partnership, and that said defendants are partners and therefore liable to creditors of said syndicate, generally, they are not liable in this action to the plaintiff, for the reason that she loaned the money now due to her on said note, to the said syndicate, with knowledge, both actual and constructive, that it is expressly provided in the Declaration and Indenture of Trust by which the said syndicate was created, that said syndicate is a trust, and not a partnership, and that "no owner of any certificate or beneficial interest therein shall be personally liable for any debts, covenants, demands or contracts of any kind, or torts of the syndicate beyond the payment in full of the amount for which his certificate of beneficial interest was issued."

If the latter contention is well founded, it will not be necessary for us to discuss or to decide the question involved in the former contention. We have no authoritative decision of this Court upon the question as to whether a business organization such as the Aberdeen-Southern Pines Syndicate is a common-law trust or a partnership. It is admittedly not a corporation, for although it has some of the characteristics of a corporation, it was not organized under or pursuant to the law of this State or of any other State, as a corporation. The courts in other jurisdictions are not in accord in their decisions of this question. The syndicate has some of the characteristics of a partnership, and many courts hold that similar business organizations are partnerships, with the result that trustees and owners of beneficial interests therein are liable as partners, for debts contracted in carrying on its business, notwithstanding provisions for their exemption from personal liability. See annotation, "Massachusetts or Business Trust," 58 A. L. R., p. 518. The annotator says: "It may be well to remark here that while some of the recent decisions seem to tend toward clearing up, at least in some jurisdictions, certain legal points as to the form of business organization commonly

known as the 'Massachusetts Trust,' other courts indicate, by the care with which they express their views on the particular narrow points involved, that they are still far from clear as to the status of this hybrid form of organization, or as to the extent to which it should be allowed to develop."

One of the tests sometimes, but not universally, applied by the courts in determining whether a business organization such as the Aberdeen-Southern Pines Syndicate is a partnership or a common-law trust, is whether the owners of beneficial interests therein have or do not have control of the business for the conduct of which the organization was created. This in *Schumann-Heink v. Folsom,* 328 Ill., 321, 159 N. E., 250, 58 A. L. R., 485, it is said: "Where, under the declaration of trust, the unit holders retain control over the trustees, and have authority to control the management of the business, the partnership relation exists. *Frost v. Thompson,* 219 Mass., 360, 106 N. E., 1009; *Hart v. Seymour,* 147 Ill., 598, 35 N. E., 246; Dunn, Business Trusts, secs. 140 *et seq.* On the other hand, where the declaration of trust gives the trustees full control in the management of the business of the trust, and the certificate holders are not associated in carrying on the business, and have no control over the trustees, then there is no liability as partners. *Smith v. Anderson,* L. R., 15, ch. div. 247, C. A.; *Williams v. Milton,* 215 Mass., 1, 102 N. E., 355; *Mayo v. Moritz,* 151 Mass., 481, 24 N. E., 1083; *Rhode Island Hospital Trust Co. v. Copeland,* 39 R. I., 193, 98 Atl., 273; *Bills v. Hackathorn,* 159 Ark., 621, 31 A. L. R., 847, 252 S. W., 602; *H. Kramer & Co. v. Cummings,* 225 Ill. App., 26; *Home Lumber Co. v. Hopkins,* 107 Kan., 153, 10 A. L. R., 879, 190 Pac., 601.

If the above test should be applied to the Aberdeen-Southern Pines Syndicate, in order to determine whether the said syndicate is a partnership or a common-law trust, we should hold that said syndicate is not a partnership, but a common-law trust, for by the provisions of the Declaration and Indenture of Trust, by which the said syndicate was created, the owners of beneficial interests therein have no control of the management of the business of the syndicate. Whether in that event, we should further hold that in the absence of statutory recognition in this State of the common-law or Massachusetts trust, such a trust is unlawful as contrary to public policy, is not necessarily presented on this record. We, therefore, do not discuss or decide this question, which is discussed in the brief filed in this Court for appellant.

All the evidence offered at the trial of this action tended to show that plaintiff, at the time she agreed to lend the sum of $10,250 to the Aberdeen-Southern Pines Syndicate, and at the time she accepted the note sued on as security for said loan, had full knowledge, both actual and constructive, of the provisions in the Declaration and Indenture of

Trust, by which said syndicate was created, expressly exempting the owners of certificates of beneficial interests in said syndicate from personal liability for the debts of the syndicate. If the jury found the facts to be as this evidence tended to show, plaintiff is estopped from contending that defendants referred to in the third issue are liable and bound for the payment of the note held by her. There was therefore no error in the instruction of the court with respect to the third issue.

In *Heink v. Folsom,* 328 Ill., 321, 159 N. E., 250, 58 A. L. R., 485, it is said: "It is not against public policy to make an agreement with a creditor that he shall, in case of default in payment, look exclusively to a particular fund for his reimbursement."

Even where a business organization such as the Aberdeen-Southern Pines Syndicate is held to be a partnership, as in Texas, it is also held that the owner of a certificate of interest in such organization, is not personally liable to a creditor who extended credit to the organization with knowledge that such owner was expressly exempted from personal liability by the provisions of the instrument by which the organization was created. See *Shelton v. Montoya Oil & Gas Co.,* 292 S. W., 165; *Farmers State Bank & Trust Co. v. Gorman Home Refinery,* 3 S. W. (2d), 65.

In *McCarthy v. Parker,* 243 Mass., 465, 138 N. E., 8, it was held that even assuming that the shareholders of a business trust were partners as to creditors not contracting to look solely to the trust property, and that as such they were personally liable to creditors generally, a creditor who knew that the declaration, by which the trust was created, expressly exempted the shareholders from such liability, could look only to the trust property for payment of his debt. He could not hold the shareholders personally liable for his debt. The judgment is affirmed. We find

No error.

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N. C. NEWBERN v. J. W. FISHER.

(Filed 26 February, 1930.)

**Frauds, Statute of A a—In this case held: promise to save surety on note harmless was original agreement not falling within provisions of statute.**

Where in order to provide a line of credit at the bank for his son the father, without his son's knowledge, and before the transactions, promised another that he would save him harmless if he would endorse his son's notes, and thereafter the promisee signs the son's notes as surety and is required to pay them: *Held,* the promise was an original agreement and

does not fall within the provisions of the Statute of Frauds, and is enforceable by the promisee though not in writing nor signed as the statute requires. C. S., 987. The conflict between the courts on the matter of original and collateral promises discussed by MR. CHIEF JUSTICE STACY.

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1929, of CURRITUCK.

Civil action *ex contractu* for money paid.

The evidence discloses that the plaintiff endorsed certain notes executed by I. W. Fisher to the First and Citizens National Bank of Elizabeth City, N. C., at the instance of the defendant, who orally agreed to be responsible therefor and to protect the plaintiff from loss, in case he should have to pay any of said notes; that the purpose of the defendant was to enable his son, I. W. Fisher, to obtain a line of credit at the bank, up to $4,000, for use in carrying on his business; that the agreement between plaintiff and defendant was made solely at the solicitation of the defendant, without the consent of his son who knew nothing of the understanding, and before any notes were endorsed by the plaintiff; and that plaintiff has been required to pay said notes, aggregating $3,870, by reason of his endorsement.

The court being of opinion that the agreement in question was void under the statute of frauds, and, therefore, unenforceable under the defendant's plea, directed a verdict for the defendant and entered judgment accordingly, from which the plaintiff appeals, assigning errors.

*Aydlett & Simpson for plaintiff.*
*Ehringhaus & Hall and Thompson & Wilson for defendant.*

STACY, C. J., after stating the case: Is a special promise by one, not a party to a note, to save another harmless if he will become surety thereon, an undertaking to answer the debt, default or miscarriage of another within the meaning of the statute of frauds? The question is not new. It is old and vexatious. The decisions are hopelessly in conflict. Notes 1 A. L. R., 383, and 6 Ann. Cas., 671; 25 R. C. L., 524; 25 C. J., 155.

The only uniformity found among the decisions relates to a matter of terminology. The "special promise," mentioned in the statute, is regarded as meaning an express promise, and contracts held to be outside the statute, and, therefore, unaffected by it, are usually termed "original" or "independent," while those which fall within its provisions are spoken of as "collateral." But no universal test of difference between an original undertaking and a collateral one has been established by the decisions. The distinction which separates these two classes of contracts is what has kept the courts in constant division. It is a diffi-

cult question, and the cue to its solution is not easy to find. *Resseter v. Waterman,* 151 Ill., 169.

According to the prevailing view, however, such a promise as we are now considering is held to be an original and not a collateral agreement, and, therefore, not within that section of the statute of frauds which provides that no action shall be brought on any special promise to answer the debt, default or miscarriage of another, unless said agreement, or some memorandum or note thereof, shall be in writing and signed by the party charged therewith or some other person thereunto by him lawfully authorized. C. S., 987; Browne on the Statute of Frauds (5 ed.), p. 197; Reed on the Statute of Frauds, Vol. I, p. 235; *Jones v. Bacon,* 145 N. Y., 446, 40 N. E., 216; *Reed v. Holcomb,* 31 Conn., 360; *Mills v. Brown,* 11 Iowa, 314; *Resseter v. Waterman,* 151 Ill., 169; *Keesling v. Frazier,* 119 Ind., 185; *Hawes v. Murphy,* 191 Mass., 469; *Noyes v. Ostrom,* 113 Minn., 111; *Alphin v. Lowman,* 115 Va., 441. At least, such is the holding in a majority of the cases where the surety acts solely upon the promise. *Demeritt v. Bickford,* 58 N. H., 223; *Vogel v. Melm,* 31 Wis., 306.

The reasons assigned by the courts for this conclusion are not always the same. Some point out, *arguendo,* that the promise is to the debtor and not to the creditor; others, that the promise is the main inducement to the risk, even if the principal obligor be also bound, expressly or by implication of law; still others, that the action in favor of the surety against the principal obligor needs must rest upon an assumpsit, raised by a subsequent fact, to wit, the payment of the debt, which tends to negative the existence of a contract between him and the surety at the time the obligation was signed; and *a fortiori* if the promise preceded the signing, as in the instant case; while others are apparently influenced by the inherent equity of the particular case, rather than by any connected chain of reasoning. *Macey v. Childress,* 2 Tenn. Ch., 438. In *Wildes v. Dudlow,* 23 W. R., 435, Id., 2 C. L. J., 317, *Malins, V. C.,* said it was "plain upon principle" that a promise to indemnify is not within the statute, and let it go at that. See, also, above citations of both Browne on the Statute of Frauds and Reed on the Statute of Frauds.

On the other hand, the courts taking the opposite view, eschew the nice refinements and diverse reasoning of the majority, and place their decisions on the strict letter of the statute. *Posten v. Clem,* 201 Ala., 529; *Craft v. Lott,* 87 Miss., 590; *Gansey v. Orr,* 173 Mo., 532; *Hartley v. Sandford,* 66 N. J. L., 627; *Nugent v. Wolfe,* 111 Pa., 471. In contrast to the position of *Vice-Chancellor Malins* in *Wildes v. Dudlow, supra,* above stated, and for which he was content to give no reason, *Cooper, J.,* in *May v. Williams,* 61 Miss., 125, thought it was equally

plain upon principle that a promise to indemnify one who becomes surety for another at the request of the promisor is within the Statute of Frauds and unenforceable, unless evidenced by writing. To like effect, is the opinion of *Dixon, J.*, in *Hartley v. Sandford, supra.*

The English courts have vacillated on the subject, and, to a large extent, the American courts have vacillated with them. See valuable opinion of *Elliott, J.*, in *Anderson v. Spence,* 72 Ind., 315, 37 Am. Rep., 162.

The assumption of responsibility on the part of the promisee would seem to be a sufficient consideration to support the contract. *Jones v. Bacon, supra.*

Because of the decisions in *Draughan v. Bunting,* 31 N. C., 10, *Stanley v. Hendricks,* 35 N. C., 87, and *Combs v. Harshaw,* 63 N. C., 198, North Carolina has been classified with the minority on this subject. But a careful examination of these cases will disclose that in each the defendant or promisor had "an axe to grind." In the first he was already surety on the note to be signed, and his promise was, therefore, in a sense as to the promisee, a superadded agreement to answer for his own subsisting liability. *Hartley v. Sandford, supra.* In the second he was interested in removing a tenant from his house, to whom he was indebted, and the promise was made to the creditor. In the third the promise was likewise direct to the creditor. Unless these decisions can be thus distinguished, they are in conflict with the great weight of authority.

Cases like *Jennings v. Keel,* 196 N. C., 675, 146 S. E., 716; *Dale v. Lumber Co.,* 152 N. C., 651, 68 S. E., 134, and *Whitehurst v. Hyman,* 90 N. C., 489, are not decisive of the question here presented, as they were made to rest upon another principle.

We are of opinion that the decisions of the majority, as above pointed out, are accordant with sound principles, and while the position of the minority may be less difficult to maintain, we are disposed to cast our lot with the majority and undertake to work out the rights of the parties as they may arise in each case.

It is true, that, in the instant case, the plaintiff, on cross-examination, gave evidence tending to show a collateral agreement and not an original one, but this contradiction in his testimony would not take the case from the jury. *Moore v. Ins. Co.,* 193 N. C., 538, 137 S. E., 580; *Christman v. Hilliard,* 167 N. C., 4, 82 S. E., 949; *Shell v. Roseman,* 155 N. C., 90, 71 S. E., 86.

It follows, therefore, from what is said above, that, upon the facts appearing on the present record, there was error in directing a verdict for the defendant.

New trial.

R. E. SENTELLE v. BOARD OF EDUCATION.

(Filed 26 February, 1930.)

1. **Pleadings I a: D d—Where good cause is stated judgment on pleadings will be denied and defective statement is waived by failure to demur.**

A motion for judgment on the pleadings is properly refused when the complaint states a good cause of action, and where it is objectionable as a defective statement of a good cause of action the defendant waives the defect by failing to demur and by answering its allegations and pleading to the merits.

2. **Schools and School Districts D c—Agreement that superintendent might later attack settlement is valid and will support action.**

Where the board of education of a county forces the county superintendent, by threats of criminal action, to make a settlement according to an accountant's report which he maintains is erroneous, and there is sufficient evidence to be submitted to the jury of an agreement that such payment by the superintendent should not preclude him from afterwards attacking the settlement for errors and irregularities: *Held,* in the superintendent's action alleging errors in the settlement and seeking to recover the moneys wrongfully paid, the defendant's motion as of nonsuit is properly denied.

3. **Appeal and Error J e—Where court withdraws incompetent letters from evidence before jury knows of contents it is not reversible error.**

Where certain letters are erroneously admitted in evidence, and the trial court, before they have been read and before the jury has any knowledge of their contents, withdraws them from evidence and instructs the jury not to consider them, the incident could not have influenced the jury to the prejudice of the objecting party and it will not be held for reversible error.

4. **Evidence D f—Admission of memorandum for purpose of corroborating witness held not error.**

Where the plaintiff and the cashier of a bank have testified that the plaintiff had transferred certain funds on deposit in the bank, the introduction in evidence for the purpose of corroborating their testimony of a memorandum, testified by the cashier to be a bank record and a correction of deposit, is not reversible error.

5. **Trial B e—Failure of trial court to instruct jury not to consider certain incompetent evidence withdrawn by him is reversible error.**

Where erroneous evidence has been admitted to the consideration of the jury under exception, it is the duty of the trial court to withdraw it from the evidence, but where he withdraws such evidence and fails to instruct the jury not to consider it in making up their verdict, it constitutes reversible error.

**6. Appeal and Error K b—Where judgment erroneously contains definite item, judgment less such amount may be rendered if appellant consents.**

Where a certain and definite item of damages has been erroneously included in the judgment upon the verdict of the jury, the case may be remanded to the Superior Court for the rendition of a judgment less the erroneous amount if the appellee consents thereto, otherwise a new trial of the issues affected thereby will be had before a jury.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1929, of EDGECOMBE. Error.

Excepting a brief interval the plaintiff was superintendent of public instruction of Edgecombe County from 1 July, 1920, to 18 January, 1926, when he resigned his office. The defendant employed auditors to make an annual examination and audit of his accounts and accepted the audits thus made at the end of each fiscal year up to 1924. The defendant then employed A. Lee Rawlings & Company to make an audit for the year beginning 1 July, 1924, and ending 30 June, 1925. There is evidence that these accountants inspected the audits previously made and reported certain irregularities and deficiencies in the plaintiff's accounts. The defendant demanded that the plaintiff make settlement in accordance with this report. Thereupon the plaintiff, threatened with criminal prosecution for the misappropriation of funds, paid the amount claimed to be due, alleging that it was erroneous, wrongful, and unjust, and, with the defendant's consent, "reserving his right to resist payment and to recover the money unjustly required of him and paid by him, . . . and to receive credit for errors and corrections in the said audit." The plaintiff alleges that before bringing suit he demanded of the defendant return of the amount he had wrongfully paid and that the defendant refused to return the amount or any part of it. The defendant filed an answer denying liability, and at the trial the jury in response to the issue found that the defendant is indebted to the plaintiff in the sum of $4,840.33 with interest from 18 January, 1926. Judgment for the plaintiff; appeal by defendant upon error assigned.

*V. E. Fountain and H. H. Philips for plaintiff.*
*George M. Fountain for defendant.*

ADAMS, J. The exceptions addressed to the appellant's motions for judgment upon the pleadings and for dismissal of the action as in case of nonsuit must be overruled. The first motion rests upon the objection that the complaint does not particularly set forth the several items constituting the alleged errors and irregularities or allege that any substantial error or irregularity appears in the last report of the certified

accountants. The objection is not valid. There is a broad distinction between the statement of a defective cause of action, and a defective statement of a good cause of action. The complaint is not within the first class; and if within the second (a question we need not discuss) the defendant did not file a demurrer, but waived the defect by answering the complaint and pleading to the merits. *Johnson v. Finch,* 93 N. C., 205; *Warlick v. Lowman,* 103 N. C., 122, 126; *Wright v. Ins. Co.,* 138 N. C., 488; *Eddleman v. Lentz,* 158 N. C., 65. The defendant made no application for a bill of particulars to make more definite the alleged cause of action. C. S., 534; *Bristol v. R. R.,* 175 N. C., 509.

The second motion was properly denied because the evidence interpreted most favorably for the plaintiff was of sufficient probative force to justify its submission to the jury. This, in our opinion, is patent. Both the oral evidence and the record evidence are in support of an agreement between the parties that the plaintiff's payment of the amount claimed to be due should not preclude him from afterwards attacking the settlement for errors and irregularities; and that errors are alleged is not to be doubted. The defendant's disposition of the money is immaterial upon the question whether the settlement was incorrect. The crucial point is whether the plaintiff was required to pay more than was due, or whether the defendant was unduly enriched at the plaintiff's expense.

The plaintiff offered in evidence nine statements or letters written by teachers in the county concerning the distribution of school books. The judge afterwards withdrew them and instructed the jury not to consider them. The defendant objected to the introduction of the papers and to their withdrawal. They were not read in the hearing of the jury, but were merely turned over to the stenographer for identification. So far as the record discloses no member of the jury had any knowledge of the contents of the letters and such knowledge cannot reasonably be inferred from the form of the questions preceding the introduction of the papers in evidence. We do not see how this incident could have influenced the jury to the prejudice of the defendant. It is the duty as well as the province of the trial court to withdraw incompetent evidence from the consideration of the jury. *McAlister v. McAlister,* 34 N. C., 184; *Cooper v. R. R.,* 163 N. C., 150; *S. v. Stewart,* 189 N. C., 340.

The fourth and fifth exceptions relate to the admission in evidence of a bank slip tending to show the transfer of an item of $465 from the "agent's account" to one of the county funds, with which the plaintiff is not credited in his settlement. It is contended that the evidence was hearsay. The plaintiff testified that the transfer was actually made, and the cashier of the bank said that the memorandum slip was the cor-

rection of a deposit in the bank, that it was a record of the bank, and that the item had been transferred as the plaintiff contends. In these circumstances the admission of the memorandum as corroborative evidence does not entitle the defendant to a new trial. Exceptions 6, 7, and 10 point out no sufficient cause for reversing the judgment, and raise no question calling for special comment.

But error is shown by exceptions twelve and thirteen. On his cross-examination R. L. Lee, a witness for the defendant, was permitted to identify and read a letter written to the plaintiff by the General Seating Company. The plaintiff afterwards, by the court's consent, withdrew the letter as evidence. The introduction and the recall of the letter were subject to the defendant's exception. The judge did not instruct the jury not to consider the letter as a part of the plaintiff's evidence. His failure to do so was no doubt an inadvertence, as he had given this caution upon the withdrawal of other papers. But if an inadvertence, it was nevertheless error. He should have told the jury not to consider the contents of the letter in making up their verdict. *S. v. Davis,* 15 N. C., 612; *S. v. May, ibid.,* 328; *S. v. Collins,* 93 N. C., 564; *S. v. Crane,* 110 N. C., 530; *Toole v. Toole,* 112 N. C., 153; *S. v. Flemming,* 130 N. C., 688; *Stephenson v. Raleigh,* 178 N. C., 168; *S. v. Stewart, supra; S. v. Griffin,* 190 N. C., 133; *Hyatt v. McCoy,* 194 N. C., 760.

The plaintiff's claim consists of several items, some of which have no connection with others. The letter in question refers to an item of $124 charged for drayage on desks ordered from the General Seating Company and paid by the plaintiff. The allowance or disallowance of this item will not affect any other item in the plaintiff's account. As an appellate Court, we have no power to amend the verdict, but the plaintiff's counsel in his oral arguments and in his brief consents to deduct this item from the verdict and the judgment and to this extent to reduce the amount of his recovery. Since the verdict and judgment will not otherwise be affected this course may be pursued in the Superior Court and a judgment may there be rendered for the amount of the plaintiff's present judgment less $124; but if the plaintiff does not consent to the reduction there will be a new trial. This accords with the principle announced in *Ragland v. Lassiter,* 174 N. C., 579, to the effect that the court can allow the appellee to make the deduction or, if he does not make it, to submit his cause to another jury.

Error.

A. RAY KATZ, TRUSTEE, v. JOSEPH B. DAUGHTREY.

(Filed 26 February, 1930.)

**1. Deeds and Conveyances D c—Description in deed in this case held too vague to admit parol evidence of identification and deed was void.**

A deed which fails to describe with certainty the property sought to be conveyed, does not fix a beginning point or any of the boundaries, and contains no reference to anything extrinsic by reference to which the description could be made certain, is too vague and indefinite to admit of parol evidence of identification, and it being impossible to identify the land sought to be conveyed, the deed is inoperative, C. S., 992, not applying to such cases.

**2. Adverse Possession A h—Deed void for vagueness of description is not color of title.**

A deed which is inoperative because the land intended to be conveyed is incapable of identification from the description therein, is inoperative as color of title.

APPEAL by plaintiff from *Moore, Special Judge,* at September Term, 1929, of NORTHAMPTON.

Civil action to quiet title and to remove cloud therefrom, converted into an action in ejectment upon the defendant's plea of ownership by adverse possession for seven years under color.

The plaintiff and the defendant claim title from a common source. The plaintiff's deed, dated 1 October, 1928, is for "All that fifty (50) acres of land, more or less, which is known as a part of the Dorsey S. Deloatch land, lying on and bounded by the west side of the county road leading from the township of Jackson to Creeksville, said road representing the eastern boundary of said property and bounded on the south," west and north by the lands of others, naming them, etc. The sufficiency of the description in this deed to cover the whole 50-acre tract is not questioned.

The defendant's deed, dated 23 August, 1915, and duly registered 22 December, 1915, describes the land in controversy as follows: "The parties of the first part have this day made this deed of gift of twenty-five (25) acres of land on the west side of the county road leading from Jackson to Creeksville." The defendant offered evidence tending to show adverse possession of the southern part, or southern half, of the 50-acre tract, described in plaintiff's deed, for seven years under this deed. It is admitted that at the time of its execution and delivery the common grantor owned only one tract of land on the west side of said road containing 50 acres.

The court held the defendant's deed to be good as color of title for the southern portion of the 50-acre tract, or the 25 acres in controversy, and directed a verdict accordingly. From this ruling the plaintiff appeals, assigning errors.

*Gay & Midyette for plaintiff.*
*E. R. Tyler and Burgwyn & Norfleet for defendant.*

STACY, C. J., after stating the case: The case turns on the question as to whether the defendant's deed, which is prior in date of execution and registration to that of the plaintiff's, is valid, either to pass title, or as color thereof.

That the deed is void for vagueness and uncertainty of description would seem to admit of no doubt. It fails to describe with certainty the property sought to be conveyed, and it contains no reference to anything extrinsic, which by recourse thereto is capable of making the description certain under the principle of *id certum est quod certum reddi potest. Cathey v. Lumber Co.*, 151 N. C., 592, 66 S. E., 580; *Harris v. Woodard*, 130 N. C., 580, 41 S. E., 790; *Hemphill v. Annis*, 119 N. C., 514, 26 S. E., 152; *Harrell v. Butler*, 92 N. C., 20; *Greer v. Rhyne*, 69 N. C., 350; *Murdock v. Anderson*, 57 N. C., 77; *Allen v. Chambers*, 39 N. C., 125; *Robeson v. Lewis*, 64 N. C., 734; *Edmundson v. Hooks*, 33 N. C., 372. See, also, *Gilbert v. Wright*, 195 N. C., 165, 141 S. E., 577; *Perry v. Scott*, 109 N. C., 374, 14 S. E., 294, and *Farmer v. Batts*, 83 N. C., 387.

The defendant's deed presumably attempts to convey twenty-five acres of a fifty-acre tract (though this may be doubted) without fixing the beginning point or any of the boundaries of the twenty-five acres. This is too vague and indefinite to admit of parol evidence to fit the description to the thing intended to be conveyed. *Harrison v. Hahn*, 95 N. C., 28. Section 992 of the Consolidated Statutes, which deals with indefinite descriptions, applies only to descriptions which are capable of being aided by parol, and not to those incapable of such assistance. *Bissette v. Strickland*, 191 N. C., 260, 131 S. E., 655; *Harris v. Woodard, supra.*

If the land intended to be conveyed cannot be identified from the description contained in the deed, it follows as a necessary corollary, that as the deed is, for this reason, inoperative, it is equally inoperative as color of title. If the land cannot be identified for one purpose, how can it be for another? *Campbell v. Miller*, 165 N. C., 51, 80 S. E., 974; *Barker v. R. R.*, 125 N. C., 596, 34 S. E., 701; *Dickens v. Barnes*, 79 N. C., 490; *Hinchey v. Nichols*, 72 N. C., 66; *Capps v. Holt*, 58 N. C., 153.

A deed which conveys no title, because the land intended to be conveyed thereby is incapable of identification from the description contained therein, would necessarily be inoperative as color of title. *Fincannon v. Sudderth*, 144 N. C., 587, 57 S. E., 337.

There was error in directing a verdict for the defendant.

New trial.

WILEY G. BATTS v. C. MACK BATTS, EXECUTOR OF ZILPHIA E. BATTS.

(Filed 26 February, 1930.)

**1. Executors and Administrators D f—Action on claim against executor is barred if not brought within six months from its rejection.**

Where a claim against an executor is rejected by him in writing and is not referred in accordance with the provisions of C. S., 99, an action thereon is barred if not brought within six months after the rejection of the claim by the executor. C. S., 100.

**2. Executors and Administrators D b: Husband and Wife B f—Medical expenses of wife paid by husband are his debt and not debt of estate.**

Where the husband has voluntarily paid for medical services rendered his deceased wife, without any expectation at the time that he would be reimbursed out of money belonging to the estate of his wife, and in the absence of a contract to that effect, the expenses so paid are to be regarded as his own debt and the executor of the wife should reject a claim therefor.

**3. Executors and Administrators D f—Action on claim for funeral expenses is barred if not brought within six months from its rejection.**

While the statute classifies funeral expenses as a debt of the estate, C. S., 93, the amount due therefor cannot be regarded as a legacy in this State, and where a husband who has paid the funeral expenses of his wife makes claim therefor upon her executor and the claim is rejected, and is not referred in accordance with C. S., 99, an action on the claim is barred by his failure to bring it within six months from the time of its rejection by the executor. C. S., 100.

APPEAL by plaintiff from *Devin, J.*, at December Term, 1929, of NASH. Affirmed.

This is an action to recover on a claim against the estate of defendant's testatrix, for money paid by plaintiff, her husband, for medical services rendered to her, and for her funeral expenses.

At the trial in the Superior Court, defendant relied upon his plea that the action is barred by the statute of limitations, C. S., 100. On the facts agreed, the plea was sustained.

From judgment that plaintiff recover nothing of the defendant in this action, plaintiff appealed to the Supreme Court.

*Gilliam & Bond and J. W. Keel for plaintiff.*
*Cooley & Bone for defendant.*

CONNOR, J. Defendant's plea that this action is barred by the provisions of C. S., 100, was properly sustained.

The claim on which the action was brought was presented to the defendant, as the executor of Zilphia E. Batts, deceased, on 1 October, 1927. Plaintiff was promptly notified by defendant, in writing, that the claim was rejected. The claim was not thereupon referred in accordance with the provisions of C. S., 99. This action was not commenced within six months after plaintiff was notified, in writing, that his claim had been rejected. Upon these agreed facts, the plaintiff is barred from maintaining an action on the claim. C. S., 100. *Morrisey v. Hill,* 142 N. C., 356, 55 S. E., 193. In the cited case it is said: "The language of the statute is positive and explicit, and it must be enforced in accordance with the plain meaning of its terms."

The claim is for money paid by plaintiff for medical services rendered to his deceased wife and for her funeral expenses. The money was paid by plaintiff voluntarily, and without any expectation at the time that he would be reimbursed by the defendant, out of money belonging to the estate of his wife.

In the absence of a contract by which the wife agreed to pay for medical services rendered to her, the plaintiff, as her husband, was alone liable for such services. When plaintiff paid the amount due for such services, he paid his own debt, and not the debt of his wife. *Bowen v. Daugherty,* 168 N. C., 242, 84 S. E., 265.

While funeral expenses, strictly speaking, are not an indebtedness of the deceased, they are so classified by the statute, C. S., 93, and are made a charge upon assets in the hands of the executor or administrator, to be paid by him as a debt of the decedent. *Ray v. Honeycutt,* 119 N. C., 510, 26 S. E., 127. The amount due for funeral expenses cannot be regarded as a legacy in this State. Where a claim for an amount due for funeral expenses has been presented to the executor, and rejected by him, in writing, an action on such claim must be commenced within six months; otherwise, the action is barred by the express provisions of C. S., 100. Whether the plaintiff was relieved of his liability for the funeral expenses of his wife, who by her last will and testament directed her executor to pay her just debts and burial expenses, is not presented by this appeal. In any event, his action to recover the amount paid by him, upon the facts agreed, is barred by the statute and the judgment is, for that reason,

Affirmed.

KATHERINE R. TIEFFENBRUN, WIDOW OF JAMES H. TIEFFENBRUN, v. J. P. FLANNERY.

(Filed 26 February, 1930.)

**Death B a—In action by nonresident for wrongful death occurring in another state our statute prescribing time within which it must be brought controls.**

C. S., 160, giving the right of action for a wrongful death to the administrator of the deceased confers a right not existing at common law, and the provision that the action be brought within one year is a condition annexed to the cause of action and also a statute of limitation in regard thereto, and an action brought against a resident defendant by a nonresident plaintiff for a wrongful death occurring in another State is controlled by our statute prescribing the time within which such action can be brought and not a general statute of the State in which the death occurred which allows a longer period.

CIVIL ACTION, before *Moore, J.*, at March Term, 1929, of GUILFORD.

The plaintiff is a citizen and resident of the State of Missouri, and is the widow of James H. Tieffenbrun, and is also administratrix of his estate under appointment by the Probate Court of Duncan County, Missouri.

On 30 August, 1925, in the city of Miami, State of Florida, the said James H. Tieffenbrun was struck by an automobile owned and operated by the defendant, who is a resident of the county of Guilford, North Carolina. As a result of the injury so received Tieffenbrun died in Florida on 30 August, 1925. On 29 August, 1927, the plaintiff instituted this suit in Guilford County, North Carolina, against the defendant for the recovery of damages for the wrongful death of said Tieffenbrun. The plaintiff is the wife of said deceased and alleges that the death of her husband was occasioned and brought about by the negligence of defendant in driving and operating his automobile and in violation of certain statutes of Florida, regulating the operation of motor vehicles, which statutes were introduced in evidence at the trial.

The defendant filed an answer denying the allegations of the complaint and alleging that the action could not be maintained for that:

(1) The widow of said deceased could not maintain an action for wrongful death in the courts of North Carolina by virtue of the dissimilarity of the pertinent statutes of North Carolina and Florida.

(2) The suit was brought more than one year after the death of said deceased and could not be maintained in the courts of this State by virtue of the applicability of C. S., 160.

The following judgment was rendered:

"This cause coming on to be heard and being heard by the Hon. Walter E. Moore, judge presiding at the March Civil Term, 1929, of the Superior Court of Guilford County, and a jury, and the jury having been empaneled, the pleadings read, the summons introduced in evidence by the plaintiff, and counsel for plaintiff and defendant having agreed and admitted in open court that the statutory laws of Florida as set out in the complaint are correctly set out therein, and furthermore, that the statute of limitations of the State of Florida applicable to actions for wrongful death is not contained in the statute creating such right of action, and that it is not a condition of such action, but is a general statute of limitations contained in a separate statute, to wit, in the Revised General Statutes of Florida for 1920, section 2930, subsection 6, which reads as follows:

" 'Within two years—An action by another than the State upon a statute for a penalty or forfeiture; an action for libel, slander, assault, battery or false imprisonment; an action arising upon account of an act causing a wrongful death'; that the said James H. Tieffenbrun, deceased, died on 30 August, 1925. Upon said pleadings, evidence, admissions and agreements, counsel for defendant thereupon made a motion to dismiss said action, for that the same is barred by Consolidated Statutes, section 160, and that the plaintiff is not the proper party to maintain said action:

Thereupon, after hearing and considering the argument of counsel for plaintiff and counsel for the defendant, the contention of counsel for plaintiff being that the limit of time within which this action can be commenced is contained in C. S., 445, and the contention of counsel for defendant that it is contained in C. S., 160, the court finds the following facts:

(1) That this action was instituted for the purpose of recovering damages on account of the wrongful death of James H. Tieffenbrun in the city of Miami, State of Florida, which death occurred on 30 August, 1925;

(2) That a summons was issued in this action by the clerk of the Superior Court of Guilford County on 29 August, 1927, directed to the sheriff of Guilford County, and that the said summons was served on the defendant on the said 29 August, 1927;

(3) That this action was instituted by the plaintiff individually as the widow of James H. Tieffenbrun;

(4) That the statute of limitations of the State of Florida above set out applicable to actions for wrongful death is not applicable to this action, the same being a general statute of limitations of two years not

contained in the wrongful death statute of the State of Florida set out in the complaint herein, and not being a condition of such action.

From the foregoing, the court being of opinion that this action is barred by the time limit contained in C. S., 160, and furthermore that this action cannot be maintained by the plaintiff individually:

It is thereupon considered, ordered and adjudged, that the defendant's motion to dismiss this action be, and the same is hereby granted, and that the said action be, and the same is hereby dismissed, and that the plaintiff be taxed with the cost of said action."

From judgment rendered the plaintiff appealed.

*Frazier & Frazier, of Greensboro, N. C., and Randolph & Randolph, of St. Joseph, Missouri, for plaintiff.*

*R. M. Robinson for defendant.*

BROGDEN, J. Can an action for wrongful death be maintained in the courts of this State upon a cause of action created by the law of a foreign State for a killing occurring in said foreign State more than one year from the time the action is instituted in this State?

C. S., 160, was originally enacted by chapter 39, Public Laws of 1854, and appeared in the Revised Code of 1854 in chapter 1, sections 8, 9, 10 and 11 thereof. The original verbiage of the act has been changed from time to time and amendments have been added thereto, but these changes have no bearing upon the merits of the question at issue.

The statute has been construed in many decisions of this Court, notably: *Taylor v. Iron Co.,* 94 N. C., 525; *Best v. Kinston,* 106 N. C., 205, 10 S. E., 997; *Hartness v. Pharr,* 133 N. C., 566, 45 S. E., 901; *Lassiter v. R. R.,* 136 N. C., 89, 48 S. E., 642; *Hall v. R. R.,* 146 N. C., 345, 59 S. E., 879; *Gulledge v. R. R.,* 147 N. C., 234, 60 S. E., 1134; *Gulledge v. R. R.,* 148 N. C., 567, 62 S. E., 732; *Hall v. R. R.,* 149 N. C., 108, 62 S. E., 899; *Trull v. R. R.,* 151 N. C., 545, 66 S. E., 586; *Harrington v. Wadesboro,* 153 N. C., 437, 69 S. E., 399; *Abernethy v. R. R.,* 159 N. C., 340, 74 S. E., 890; *Bennett v. R. R.,* 159 N. C., 346, 74 S. E., 883; *Broadnax v. Broadnax,* 160 N. C., 432, 76 S. E., 216; *Hood v. Telegraph Co.,* 162 N. C., 70, 77 S. E., 1096; *Mitchell v. Talley,* 182 N. C., 683, 109 S. E., 882; *Capps v. R. R.,* 183 N. C., 181, 111 S. E., 533; *Hatch v. R. R.,* 183 N. C., 617, 112 S. E., 529; *Tonkins v. Cooper,* 187 N. C., 570, 122 S. E., 294; *Craig v. Lumber Co.,* 189 N. C., 137, 126 S. E., 312; *McGuire v. Lumber Co.,* 190 N. C., 806, 131 S. E., 274; *Hanes v. Utilities Co.,* 191 N. C., 13, 131 S. E., 402; *Avery v. Brantley,* 191 N. C., 396, 131 S. E., 721; *Holloway v. Moser,* 193 N. C., 185, 136 S. E., 375; *Hanie v. Penland,* 193 N. C., 800, 138 S. E., 165; *Brooks v.*

*Lumber Co.,* 194 N. C., 141, 138 S. E., 532; *Hines v. Foundation,* 196 N. C., 322, 145 S. E., 612; *Neely v. Minus,* 196 N. C., 345, 145 S. E., 771.

These decisions have settled the following aspects of wrongful death in this jurisdiction:

(1) No suit can be maintained upon a cause of action arising in this State by any person except an executor or administrator duly appointed by the local court. *Hall v. R. R., supra.*

(2) If a wife sues in her individual capacity, and after the expiration of one year, seeks to amend by adding the word "administratrix" after her name, the action then becomes a new and independent suit, and the court has no power to permit such amendment. However, if the suit is brought under the Employer's Liability Act, such an amendment made after two years does not constitute a new action. *R. R. v. Wulf,* 226 U. S., 570; *R. R. v. Weyler,* 158 U. S., 285.

(3) The law of a foreign State where the cause of action arose pleaded in our courts by way of amendment does not constitute a new cause of action. *Lassiter v. R. R., supra.*

(4) If an action brought within a year is nonsuited, a new action may be brought within one year after such nonsuit. *Trull v. R. R., supra.*

(5) Attachment will lie in actions for wrongful death. *Mitchell v. Talley, supra.*

(6) The action does not abate by reason of the death of defendant. *Tonkins v. Cooper, supra.*

(7) A wife cannot recover damages for mental anguish and loss of consortium by reason of the wrongful killing of her husband. *Craig v. Lumber Co., supra; Hinnant v. Power Co.,* 189 N. C., 120, 126 S. E., 307. See, also, *McDaniel v. Trent Mills,* 197 N. C., 342.

(8) The father of a minor child is entitled to one-half of recovery although divorced from the mother who brings the suit as administratrix of such minor. *Avery v. Brantley, supra.*

(9) The deposition of an injured party duly and properly taken in a suit for damages for personal injury is competent in an action for the wrongful death of such party. *Hartis v. Electric R. R.,* 162 N. C., 236, 78 S. E., 164.

(10) If there is a discontinuance, a new summons issued after one year, constitutes a new action, which is not maintainable. *McGuire v. Lumber Co., supra.*

(11) The fact that a defendant is a nonresident does not excuse the failure to bring a suit within one year. *Neely v. Minus, supra.*

(12) A widow's year's allowance or support cannot be allotted out of the proceeds of a recovery. *Broadnax v. Broadnax, supra.*

(13) Commissions of the administrator, court costs and expenses, and counsel fees may be paid out of the recovery. *Baker v. R. R.*, 91 N. C., 308.

(14) If the cause of action arose in a foreign State, issues of fact must be determined by the rules of evidence obtaining in this jurisdiction. However, the issues are governed by the law of the State where the cause of action arose. *Harrison v. R. R.*, 168 N. C., 382, 84 S. E., 519.

In all of our decisions upon the subject the general principle is announced that the time limit of one year prescribed in C. S., 160, is a condition annexed to the cause of action. Construing the statute in *Taylor v. Cranberry Iron Co.*, 94 N. C., 525, this Court said: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it, must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."

It has also been held in a long line of cases that it is not necessary to plead C. S., 160, as a statute of limitation, but that evidence must be introduced at the trial showing that the action was brought within the statutory period. In some of the cases the time clause is referred to as a "statutory condition of liability." The overwhelming weight of authority, declared in textbooks and in decisions of Appellate Courts, is to the effect that the time clause is a condition annexed to the cause of action. It is also thoroughly settled that an action for wrongful death is transitory.

In view of the aforesaid principles of law, the plaintiff asserts that she has the right to maintain an action in the courts of North Carolina for the death of her husband in Florida, occasioned by the negligence of a resident of this State. She proceeds upon the theory that by reason of the fact that such causes of action are transitory they follow the person, and can, therefore, be asserted in any forum which has jurisdiction of the parties and of the cause of action. Furthermore, if the time limit contained in C. S., 160, is annexed to the cause of action, it cannot be a statute of limitations, and as she brings to North Carolina a valid cause of action from Florida, she is entitled to maintain the same in our courts.

The record discloses that the Florida statute of limitations applicable is two years from the time of death, and this suit was brought in Guilford County on the day preceding the expiration of the two-year period.

The determinative question, then, is whether the time limit of C. S., 160, constitutes a statute of limitation as well as a condition annexed to liability.

"Statutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced. Statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are statutes of limitations." Wood on Limitations, Vol. 1, sec. 1. It is a general rule declared in the textbooks and in the decisions of Appellate Courts that statutes of limitations being procedural in nature and working upon the remedy, govern the cause of action in the particular forum in which such cause of action is asserted. In other words, the statute of limitations of the place of trial, or *lex fori*, governs the action.

The case at bar, therefore, squarely presents the question as to whether a cause of action arising in one State can be maintained in another State having a shorter time period. This question has occasioned extensive debate among textwriters and judges. Wharton on Conflict of Laws, 3 ed., Vol. II, page 1264, says: "While the bar of the statute by which the cause of action is created thus precludes the maintenance of an action thereon in another jurisdiction, the law of which allows a longer period, the converse is not necessarily true; though some of the cases hold that the statute creating the cause of action governs in this respect, when it prescribes a longer, as well as when it prescribes a shorter, period than that fixed by the law of the forum. This view, however, seems to rest upon a misapprehension. The reason the lapse of the time prescribed by the statute creating the cause of action prevents the maintenance of an action in another jurisdiction is that it extinguishes the cause of action, and there is thenceforth nothing to support an action in any jurisdiction. Assuming, however, that the time allowed by the foreign statute creating the cause of action has not expired, the plaintiff comes to the bar of the forum with a concededly existing cause of action; but it is not apparent why an action thereon does not, as in the case of an existing cause of action at common law, fall within the operation of the general principle that the limitation of actions is governed by the law of the forum." The contrary theory is announced in *Keep v. National Tube Co.*, 154 Fed., 121, and in *Theroux v. Northern Pac. R. R. Co.*, 64 Fed., 84. In the *Keep case, supra*, the injured party died in Minnesota. The administrator brought suit in the Federal Court of New Jersey. The statute of the forum, to wit, New Jersey, provided that the suit should be brought by the personal representative of the deceased, and that the recovery was for the exclusive benefit of the widow and next of kin. The time limit was

twelve months. The Minnesota statute, where the death occurred, limited the recovery to $5,000, and the time limit prescribed was two years. The Court said: "The record of this case shows, however, that this action was commenced more than twelve months after the death of the plaintiff's intestate, though within two years from that time. The defendant contends that no action can be maintained on the Minnesota statute in New Jersey after the expiration of the period of twelve months limited in the New Jersey statute. It is true that actions are barred not by the *lex loci,* but the *lex fori;* but the limitation of time within which an action may be instituted under the Minnesota statute, or that within which it may be instituted under the New Jersey statute, is so connected with the right of action itself that it does not operate as a mere limitation of time within which the remedy may be prosecuted. A general statute of limitations curtails a preëxistent common-law right; but the right of action for damages resulting from death is unknown to the common law. It is a new right created by statute for a limited period. In Minnesota that right exists for two years; in New Jersey it exists for twelve months. One who acquires such a right under the New Jersey statute, or under the Minnesota statute, may carry it with him into any jurisdiction where a substantially similar right has been created. Why should the time within which such a right may be enforced be curtailed in a jurisdiction different from that in which the right was created by any statute other than one which, like a general statute of limitations, operates on the remedy only?"

In the *Theroux case* the death occurred in Montana and suit was brought in Minnesota. The Montana statute prescribed three years, and the Minnesota statute two years. The suit was brought after two years, but within the three-year period. The *Theroux case* declares: "It follows, of course, that, if the courts of another State refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law, to that extent they refuse to give effect to the foreign law, and by so doing impair the rights intended to be created." Many authorities are cited and quoted from in both cases. *Negaubauer v. Great Northern R. R. Co.,* 99 N. W., 620, 2 Ann. Cas.; *Brunswick Terminal Co. v. National Bank,* 99 Fed., 635, 48 L. R. A., 625.

The author of a note upon the question in 46 L. R. A. (N. S.), p. 687, discusses the cases dealing with the conflict arising by virtue of a longer period of limitation in the State where the cause of action arose and the shorter period of limitation in the State where the suit is brought. After summarizing the various arguments, he concludes as follows: "As already stated, it is not apparent why the doctrine that the limitation prescribed by the foreign statute which creates the right of action, so that the latter is extinguished when the time so prescribed has expired,

and will not thereafter sustain an action anywhere, should exclude the operation of the general rule which refers the question of limitation to the *lex fori* if the period prescribed by the foreign statute has not expired." Goodrich on Conflict of Laws, p. 171, says: "Suit on a cause of action created by statute thus limiting the right must, then, be brought within the time fixed by the law creating the claim. Suppose, however, that the *lex fori* creates a cause of action under similar circumstances, but provides a shorter limitation period. It would seem that the plaintiff could not recover if his action was not within the limitation period set by the *lex fori* also. The right is not gone until it is lost under the law creating it. But the statute of the forum shows the local policy as to the time in which such actions are to be brought. It could well be interpreted as limiting locally created rights, and as a precedural bar to all actions of this type, no matter where arising. The authorities are divided on the question, which cannot be regarded as settled."

The authorities supporting both theories are assembled in a note appended to the above text.

All statutes of limitations are essentially time clocks, and while C. S., 160, has been construed as a condition annexed to the cause of action, it is also a time limit to the procedure. At all events, it is a legislative declaration of the policy of this State, providing in express and mandatory language that no action for wrongful death shall be asserted in the courts of this State after the expiration of one year from the time of death. Certainly, it is not to be supposed that the legislative department intended to confer upon nonresidents more extensive rights in the courts than accorded to citizens of this State.

Affirmed.

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CAROLINA POWER AND LIGHT COMPANY v. W. G. REEVES AND WIFE, LENA REEVES.

(Filed 26 February, 1930.)

**1. Eminent Domain C e—One whose land is taken is entitled to value of land taken and damages to contiguous land, less special benefits.**

In proceedings to condemn lands of a private owner for the erection of an electric power transmission line, it is required of the jury of view to fix the damages to the owner for the lands to be taken together with peculiar damages to his contiguous lands resulting therefrom, less any special benefits accruing to him by reason thereof.

**2. Eminent Domain A b—Statutory provisions as to condemnation are to be strictly construed.**

The right to take private property for public use is governed by statute, and the statutes under which this right arises are to be strictly construed.

**3. Eminent Domain D c—Judge has discretionary power to remand the case to the appraisers or retain it for trial in the Superior Court.**

Where the petitioner in condemnation proceedings and the owner of the land sought to be condemned both except to the report of the appraisers and appeal from the confirmation of the report by the clerk to the Superior Court, it is within the discretion of the trial judge to remand the case for another appraisal for errors committed by the appraisers in making the award or for ambiguity in their report, or to retain the entire case for a jury trial and determination in the latter court, C. S., 1724, and his refusal to remand the case will not be held for error.

APPEAL by defendants from *Finley, J.,* at April Term, 1929, of TRANSYLVANIA. Affirmed.

This is a petition brought by plaintiff, a public-service corporation, against defendants to condemn a certain right of way over defendants' land, under chapters 32 and 33 C. S., for a transmission electric power line. The clerk duly appointed commissioners to enter upon the land and assess the damage and special benefits to the owners. On 4 January, 1929, they made the following report:

"We visited the premises of the owners, and after taking into full consideration the quality and quantity of the land aforesaid, we have estimated and do assess damages aforesaid at the sum of $2,000. We have estimated the special benefits which the said owners will receive from the construction of said electric line to be the sum of ..... dollars."

On 7 January, 1929, the clerk made the following order:

"And it appearing to the court from said report that they failed to comply with the statute in making said report; it is now ordered by the court that this cause be, and the same is hereby remanded to said commissioners to the end that they may forthwith make and file a new report in said cause, in accordance with the statute in such cases made and provided."

On 10 January, 1929, they made the following report:

"We visited the premises of the owners, and after taking in the following considerations, the quantity and quality of the land aforesaid, the actual fencing likely to be occasioned by the work of the corporation and all other inconveniences likely to result to the owners, we have estimated and do assess the damages, aforesaid, at the sum of $2,000. The aforegoing damages is for an easement for the use of the plaintiff, the Carolina Power and Light Company, through and over the land of the defendants, a width of fifty feet only, as the same is now surveyed, and

staked out through the land of the defendants, and does not include damages that may accrue to the defendants' other land that may accrue to the defendants by reason of the plaintiff or petitioner or its employees in going to and from the easement as surveyed, through and over other lands of the defendants. We have estimated the special benefits which said owners would receive from the construction of the power line through and over the land of the defendants—nothing. We suggest and recommend that the power line of the petitioner be resurveyed and changed so as to enter the lands of the defendants at the bend of the river, just above what is known as Turkey Creek, thence a straight line to the place where the line as now surveyed enters what is known as the Glazener bluffs, and if such location is made the same would in our opinion be of much less damage to the defendants' land than the line as now located, and would be of very little more inconvenience, if any, to the petitioner in building its towers and erecting its power line."

The plaintiff excepted to the report of the commissioners as being excessive and that in the assessment they took into consideration future damages that may arise; that no award for special benefits to the owners were assessed and deducted. That award was made to the owners for injuries resulting to adjacent lands and no damages can or will result therefrom.

The defendant owners excepted on the ground that the damages were inadequate. "That the commissioners in making their findings as to damage, failed to take into consideration the damage to the property of the defendant other than the value of the actual land taken for the power line." That the width of the land was inaccurate, as more was customarily taken; that the commissioners had no power to recommend a change in the line; that the location was unjust as it passes through the middle of defendants' land and would entirely destroy the value of defendants' land for industrial purposes and greatly diminish the value of the land for agricultural purposes; that the report is ambiguous.

The clerk, on 28 January, 1929, overruled the exceptions of both plaintiff and defendants, and confirmed the report. Both parties objected and excepted and appealed to the Superior Court, and the cause was transferred to the civil issue docket.

The defendants set forth a long motion and petition, which we need not repeat, alleging certain irregularities, as theretofore mentioned in the exceptions to the decree, and other irregularities and wrongs, from which they appealed and prayed: "(1) That said attempted decree of confirmation and all subsequent proceedings in this cause based thereupon, be vacated and set aside; (2) for costs, and (3) for general relief, including relief by injunction as aforesaid."

The plaintiff in turn answered the petition making denial to defendants' allegations. Judge Schenck, upon the motion and petition of defendants, caused notice to issue to plaintiff to appear on 1 April, 1929, at Brevard, N. C., to show cause why the relief of defendants' petition should not be granted. The matter was duly heard before Finley, Judge, at the April Term of the Superior Court of Transylvania County upon the entire record. Also numerous affidavits appear in the record. Defendants contending, among other things, that the line had been changed from that which was originally called for in plaintiff's petition, and defendants also contending in substance that they were entitled to an appraisal by the commissioners as to the injury or damage to the whole tract of defendants' land. This was denied by plaintiff.

Judge T. B. Finley rendered the following order and judgment: "The motion and petition of the defendants, petitioners, to vacate and set aside the judgment of the clerk of the Superior Court, confirming the report of the appraisers and for an interlocutory injunction for the causes and purposes alleged in said petition, coming on for hearing and being heard before his Honor, T. B. Finley, judge presiding, on 6 April, 1929; t is upon motion of counsel for plaintiff, ordered and adjudged that the motion and relief demanded in said petition of the defendants, petitioners, be and the same is hereby refused and disallowed."

The defendants excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

*R. F. Phillips, William E. Breece and Rollins & Smathers for plaintiff.*

*Hamlin & Kimzey, Ralph R. Fisher and Carter & Carter for defendants.*

CLARKSON, J. It appears that plaintiff has completed the erection of its transmission line across defendants' land, so the question of injunction now becomes a mooted or academic discussion. *Glenn v. Culbreth,* 197 N. C., 675.

The final judgment or decree was rendered by the clerk on 28 January, 1929, and the record discloses the following: "From the foregoing decree both petitioner and defendants object and except and appeal to the Superior Court. Notice of appeal by both parties given and waived in open court, and this cause is thereupon transferred to the civil issue docket, and all papers heretofore filed in this cause are herewith sent. This 29 January, 1929. Roland Owen, clerk Superior Court."

The present condemnation proceedings was instituted under C. S., chs. 32 and 33. Chapter 32 gives the law in reference to the acquisition and condemnation of property for electric, telegraph and power com-

panies. C. S., ch. 33, is the chapter on "Eminent Domain." Under chapter 32, we find C. S., 1702: "The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and that manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Article 2, entitled 'Condemnation Proceedings,' of the chapter Eminent Domain."

Under chapter 33 we find, C. S., 1723, in part: "Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal," etc.

C. S., 1724, is as follows: "In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire right of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the Superior Court in term, if upon the hearing of such appeal a trial by a jury be demanded."

Condemnation proceedings are statutory and as the right to take private property for public use is given, the rule of strict construction ordinarily applies. *Board of Education v. Forrest,* 193 N. C., 519.

One of defendants' exceptions to the report of the commissioners is on the ground "That the commissioners in making their findings as to damage, failed to take into consideration the damage to the property of the defendants other than the value of the actual land taken for the power line." The record discloses that defendants filed exceptions, and among others the above. The clerk overruled the exceptions and confirmed the report. Defendants objected and excepted and appealed to the Superior Court, and the cause was transferred to the civil issue

docket. See *Ayden v. Lancaster,* 195 N. C., 297; *Electric Co. v. Light Co.,* 197 N. C., 766. The defendants filed a long motion and petition in the cause, among other things asking injunctive relief. The matter was heard on the record proper and numerous affidavits before the court below in term.

From a careful reading of the report of the commissioners, we do not think in the appraisal the commissioners took into consideration in fixing the compensation for the land taken as described in the petition, the injury done to the other land of defendants. At least the report is uncertain, indefinite and ambiguous. *Wood v. Jones, ante,* 356.

Under C. S., 1723, *supra,* we find "The court or judge on the hearing may direct a new appraisal," etc. The exception of defendants embodied a substantial right. The commissioners should have, in ascertaining what is just compensation, applied the following rule:

(1) What compensation is the defendant entitled to recover of the plaintiff, on account of taking the land described in the petition for the erection of its transmission line across defendants' land?

(2) What compensation is the defendants entitled to recover of the plaintiff for the injury and damage, if any, to their other land by reason of the taking of said land and erection of its transmission line across defendants' land?

(3) What special benefits will defendants receive peculiar to their land and not in common with the other landowners in the vicinity by reason of the erection by plaintiff of its transmission line across defendants' land? *Ayden v. Lancaster,* 197 N. C., 556.

The question involved: Should the court below, under C. S., 1723, have directed a new appraisal and remanded the proceedings to the clerk to that end or did the Superior Court have the discretion to have these issues tried *de novo* in the Superior Court? We think the court below had discretion in the matter. C. S., 637, is as follows: "Whenever a civil action or special proceeding begun before the clerk of the Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so." Under this section the judge now has final jurisdiction to determine the whole matter in controversy. *Lictie v. Chappell,* 111 N. C., 347, 16 S. E., 171; *Faison v. Williams,* 121 N. C., 152, 28 S. E., 188; *Oldham v. Rieger,* 145 N. C., 254, 58 S. E., 1091; *Hall v. Artis,* 186 N. C., 105, 118 S. E., 901. The court has the right in its discretion to remand the cause to the clerk for further proceedings. *York v. McCall,* 160 N. C.,

276, 280, 76 S. E., 84; Michie N. C. Code, 1927, p. 250-1; *Little v. Duncan,* 149 N. C., 84. See C. S., 536; *McNair v. Yarboro,* 186 N. C., 111.

Construing C. S., 1723, with C. S., 637, we think on appeal to the Superior Court the matter was in the sound discretion of the court to remand the proceeding to the clerk or for trial *de novo.* If in the discretion of the court below the proceeding is not remanded, the defendants have the right of a jury trial "if upon the hearing of such appeal a trial by a jury be demanded." C. S., 1724.

In *Ayden v. Lancaster,* 195 N. C., at p. 299, speaking to the subject: "The appeal of defendants from the order of the clerk confirming the report of the commissioners brought into the Superior Court the entire case, where the jury trial must be had *de novo* so far as the question of damage is concerned." In that case defendants demanded a jury trial.

Mr. McIntosh, in North Carolina Practice and Procedure, at p. 63-64, states the matter as follows: "As a department of the Superior Court, the clerk has jurisdiction to hear and determine certain cases which do not come before the judge in the first instance, such as matters of probate and special proceedings; and it became necessary to determine whether the appellate jurisdiction in such cases was derivative, as in appeals from other courts. It was first held that if a case was improperly brought before the clerk, when it should have been before the judge at term, and it came before the judge by appeal, all necessary amendments would be made and the jurisdiction retained; but if the case was properly before the clerk, and came before the judge on appeal, an amendment could not be made to include matters over which the clerk would have had no jurisdiction. It was also held that when an appeal came before the judge from the clerk, and further action was necessary, the judge should decide the question presented for review and remand the case to the clerk. To prevent the confusion thus arising in different departments of the same court, it was enacted in 1887 that, when any case begun before the clerk is, 'for any ground whatever,' sent before the judge, he may proceed to hear and determine all matters in controversy, or may, in his discretion, remand the case to the clerk. By reason of this statute, it is held that the appellate jurisdiction is not derivative in any case, even when the clerk had no jurisdiction, but the case is still in the same court for review and for such other action as may be necessary."

The refusal of the court to vacate and set aside the judgment of the clerk and to order a new appraisal does not deny appellants the right to have the matters determined by a jury in the Superior Court.

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

Affirmed.

ANNA L. EARLE v. ROBERT EARLE AND THE GLOBE INDEMNITY COMPANY.

(Filed 26 February, 1930.)

1. **Husband and Wife B d—A wife may maintain an action against her husband for a negligent injury.**

   An action by the wife against her husband for a negligent injury will lie in the courts of this State, C. S., 454, 2513, and after summons has been duly served and a verified complaint filed in accordance with statute, a judgment by default and inquiry may be entered against the husband upon his failure to answer. 3 C. S., 597(a).

2. **Judgments K b—Insurer liable to person injured only upon return of unsatisfied execution may not move to set aside judgment against insured.**

   In order to set aside a judgment by default and inquiry on the ground of mistake, inadvertence, surprise or excusable neglect, C. S., 600, the mistake or surprise, etc., must be on the part of the party making the motion to set aside, and where the judgment is obtained against an insured by the person negligently injured by him, and the policy of accident insurance expressly provides that the insurer shall not be liable to the person injured until after return of execution against the insured unsatisfied, the insurer may not make a motion to have the judgment against the insured set aside for the surprise, excusable neglect, etc., of the insurer caused by failure of the insured to give notice of the accident and send all process and pleadings to the insurer under the terms of the policy.

APPEAL by plaintiff from *Cranmer, J.*, at November Term, 1929, of EDGECOMBE. Reversed.

The summons in the action was dated 8 July, 1929, and service was made on defendant, Robert Earle, on the same date and on Insurance Commissioner for The Globe Indemnity Company, 12 July, 1929. Complaint was duly verified and filed before the clerk on 8 July, 1929. The defendant Indemnity Company, by consent, was allowed until 1 September, 1929, to file pleadings. The time was, by consent, extended to 1 January, 1930, and on 14 October, 1929, plaintiff took a voluntary nonsuit as to the Indemnity Company. On 9 August, 1929, and on 14 October, 1929, judgment by default and inquiry before the clerk was rendered against defendant Robert Earle. Both judgments by default and inquiry before the clerk ordered the causes "to be transferred to the civil issue docket in order that the amount of damages sustained by the plaintiff from and on account of the alleged negligence of the defendant, Robert Earle, and the amount of damages which the plaintiff claims she is entitled to recover from the defendant, Robert Earle, be ascertained, determined and fixed by a jury." On 30 October, 1929, the defendant Indemnity Company made a motion to set aside the default

and inquiry judgments rendered against Robert Earle on the ground of mistake, inadvertence, surprise or excusable neglect. On 9 November, 1929, the clerk refused the motion of the Indemnity Company, and in the judgment set forth among other things:

"That the defendant, Robert Earle, nor any one in his behalf, entered any appearance or filed any pleadings or motions within the time allowed by law.

"That the consent orders entered on 3 August, 1929, and 21 August, 1929, granting an extension of time to the defendant Globe Indemnity Company, to file answer, applied only to such pleadings as it might wish to file in its own behalf and did not contemplate or apply to any pleadings it might desire to file in behalf of its codefendant, Robert Earle.

"That the defendant, Globe Indemnity Company, purposely refused to enter any appearance or file any pleadings for and in behalf of Robert Earle within the time allowed by law.

"Therefore, it is by the court ordered and decreed, that the motion of the Globe Indemnity Company filed herein be, and the same is hereby denied, and the two judgments heretofore entered, be and the same are hereby in all respects ratified and reaffirmed."

From this judgment the Indemnity Company appealed to the Superior Court. The record discloses numerous affidavits introduced on the hearing of the motion in the Superior Court. The order setting aside the judgments of the clerk and findings of fact comprise about fifteen pages of the record.

The defendant Indemnity Company contends: "That according to the terms of the insurance or indemnity contract or agreement entered into by and between the said Robert Earle, defendant, and Globe Indemnity Company, it was expressly stipulated and agreed, among other things, (1) that upon the occurrence of any accident to which the policy applied, the said Robert Earle should give immediate written notice thereof with the fullest information obtainable to Globe Indemnity Company, at Newark, N. J., or to one of its duly authorized representatives; that the assured shall give like notice with full particulars of any claim made on account of such accident; and that if thereafter suit is brought against the assured to enforce such claim the assured shall immediately forward to the company at Newark, N. J., every summons or other process that may be served upon the assured; (2) that the said Robert Earle should not voluntarily assume any liability or incur any expense. other than for immediate surgical relief, or settle any claim, or satisfy any judgment from which an appeal may be taken, except at his own cost; and that whenever requested by the company and at the company's expense, the said Robert Earle, defendant, should aid in securing information and evidence and the attendance of witnesses, and shall fully

coöperate with the company except in a pecuniary way, in all matters which the company deems necessary in the defense of any suit or in the prosecution of any appeal." That from the report or statement filed of the accident by defendant, no liability attached to him, and furthermore the injuries to plaintiff were sustained in the State of Virginia, and a wife could not in that State maintain an action against her husband for a tort committed by him on her during coverture, and further that defendant Robert Earle had not been guilty of any negligence. "That in disregard of the terms and conditions of said policy of insurance or indemnity, the said Robert Earle, defendant, did not give to Globe Indemnity Company, or to any of its duly authorized representatives, any notice of any kind that action had been instituted against him on account of the injury sustained by the plaintiff, as set forth in his report, the only knowledge this company having had of said action being from the copy of summons and complaint sent to it by the State Insurance Commissioner of North Carolina; nor did the said Robert Earle, defendant, in compliance with the terms of said policy, ever send to the home office of said company, at Newark, N. J., the summons, complaint and other process that was served upon him, or any notice whatsoever of said suit; nor did the said Robert Earle, defendant, ever file an answer or other pleadings in this cause, or do anything which would tend to free himself and reduce the damages which might be awarded in the event the plaintiff should be entitled to recover."

The judgment rendered in the court below is as follows:

"It is therefore, by the court, in its discretion, adjudged and decreed, that the default and inquiry judgment rendered by the clerk of the Superior Court of Edgecombe County on 9 August, 1929, in favor of the plaintiff and against the defendant, Robert Earle, be, and the same is hereby set aside in full; and it is further so ordered, adjudged and decreed, that so much of the second judgment rendered by the clerk of the Superior Court of Edgecombe County on 14 October, 1929, as adjudged that 'It is, therefore, on motion of Henry C. Bourne, attorney for plaintiff, ordered, adjudged and decreed, that said plaintiff recover judgment by default and inquiry against the said defendant, Robert Earle, and this cause be and the same is hereby transferred to the trial docket of the Superior Court at term, for the purpose of ascertaining the amount of damages the said plaintiff is entitled to recover against the defendant, Robert Earle, be, and the same is hereby set aside in full. It is further ordered, adjudged and decreed that Globe Indemnity Company have until 15 January, 1930, to file answers in this cause, for and in behalf of the said Robert Earle, defendant, and for and in behalf of itself, as it may deem advisable.' "

The plaintiff excepted and assigned error to the judgment as signed and entered, as erroneous and contrary to law, and appealed to the Supreme Court.

Other necessary facts will be set forth in the opinion.

*Henry C. Bourne for plaintiff.*
*H. H. Philips for Globe Indemnity Company.*

CLARKSON, J. In the present action defendant, Robert Earle, was duly served with summons. The complaint was properly verified and filed within the time required by the statute. The court had jurisdiction of the person and the complaint alleges actionable negligence against the defendant. It is a suit of the wife against the husband for negligent injury, but it is now well settled in this jurisdiction that such an action will lie. C. S., 454, 2513; *Crowell v. Crowell,* 180 N. C., 516, *S. c.,* 181 N. C., 66; *Roberts v. Roberts,* 185 N. C., 566; *Small v. Morrison,* 185 N. C., 577; *In re Will of Witherington,* 186 N. C., 152; *Roberts v. Guaranty Co.,* 188 N. C., 795; *Hyatt v. McCoy,* 194 N. C., 25; *Etheredge v. Cochran,* 196 N. C., 681.

Judgment by default and inquiry was rendered before the clerk on 9 August, 1929, and transferred to the civil issue docket to have the damage determined and fixed by a jury, and a like judgment was rendered on 14 October, 1929. No appeal was taken by defendant from these judgments. No doubt the two judgments were taken "in abundance of caution," and to comply with N. C. Code, 1927, 597(b). At least defendant did not appeal from either judgment by default and inquiry.

N. C. Code, 1927, 597(a) is as follows: "If no answer is filed, the plaintiff shall be entitled to judgment by default final or default and inquiry as authorized by sections 595, 596 and 597, and all present or future amendments of the said sections; and all judgments by default final shall be duly recorded by the clerk and be docketed and indexed in the same manner as judgments of the Superior Court and be of the same force and effect as if rendered in term and before a judge of the Superior Court; and in all cases of judgment by default and inquiry rendered by the clerk, the clerk shall docket the case in the Superior Court at term time for trial upon the issues raised before a jury, or otherwise, as provided by law, and all judgments by default and inquiry shall be of the same force and effect as if rendered in term and before a judge of the Superior Court."

A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of the amount of damages open to the inquiry, *Junge v. MacKnight,* 137 N. C., 285, 288, 49

S. E., 474; *Farmer-Cole Plumbing Co. v. Wilson Hotel Co.*, 168 N. C., 577, 84 S. E., 1008; *Armstrong v. Asbury*, 170 N. C., 160, 86 S. E., 1038; *Gillam v. Cherry*, 192 N. C., at p. 198; but the burden of proving any damages beyond such as are nominal rests upon the plaintiff. *Hill v. Hotel Co.*, 188 N. C., 586, 125 S. E., 266.

The Globe Indemnity Company had issued a policy of insurance, or indemnity, to the defendant, Robert Earle, who the Indemnity Company charged had violated his contract with the company, and had not given proper notice of the accident or of this action, or defended the suit. The Globe Indemnity Company, in its motion to set aside the judgments, "respectfully petitions and moves the court that it will, on account of mistake, inadvertence, surprise or excusable neglect, and in its discretion, relieve said The Globe Indemnity Company and Robert Earle, defendant, from two judgments rendered in favor of the plaintiff and against the defendant, Robert Earle (as hereinbefore set out), and will set aside and vacate said judgments, and will allow your petitioner to file an answer in this action for and in behalf of the said Robert Earle, defendant, and it respectfully assigns as reasons," etc.

C. S., 600, is as follows: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion *de novo: Provided, however,* nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained."

In *Foster v. Allison Corporation*, 191 N. C., at p. 173, the following is said: "It will be noted that the statute says 'through his mistake, inadvertence, surprise or excusable neglect.' We think this language 'through his' *ex vi termini* means personal knowledge, he can then apply for the relief as set forth in C. S., 600."

"If the statute gives the right to open or vacate a judgment taken against a party through 'his' mistake, no mistake made by any other person will justify this action." 34 C. J., part sec. 516, "Judgments," at p. 298, citing cases from California, Indiana, Montana, New York, and *Boyden v. Williams*, 80 N. C., 95. See *Commissioners of Chowan v. Bank*, 197 N. C., 410.

In *Small v. Morrison*, 185 N. C., at p. 579, we find: "By express stipulation, the indemnitor is not to be held liable in an action at the instance

of the injured party, unless and until 'execution against the assured is returned unsatisfied' in an action brought against him. This, in terms, is made a condition precedent to the right of the injured party to maintain an action against the indemnity company; and where the rights of the parties are fixed by contract, the law will uphold such rights." The policy in the present action has the above provision and further "no action shall lie against the company to recover upon any claim or for any loss under Insuring Agreement I (a) and I (b) until the amount of such claim or loss shall have been fixed and rendered certain either by judgment against the assured after trial of the issue or by agreement between the parties with the written consent of the company nor unless brought within two years thereafter."

The principle is thus stated in *Harrison v. Transit Co.*, 192 N. C., at p. 548: "The prevailing doctrine is that if the indemnity is clearly one against loss suffered by the assured no action can be maintained against the indemnity company until some loss or damage has been shown; but if the contract indemnifies against liability a right of action against the principal and the surety company accrues when the injury occurs." *Williams v. Motor Lines,* 195 N. C., 682.

In *Luttrell v. Hardin,* 193 N. C., at p. 269, speaking to the subject, citing numerous authorities, it is said: "It is well settled in this jurisdiction: 'That the assured . . . must actually sustain a loss before an action will lie upon the indemnity policy, as this is expressly required by the terms.' *Killian v. Hanna, ante,* p. 20. It has been repeatedly held that the fact that a defendant in an actionable negligence action carried indemnity insurance could not be shown on the trial. Such evidence is incompetent." The contract made between The Globe Indemnity Co., and defendant Robert Earle, has no ambiguity about it, but is clear, and its provisions have been construed time and time again by the Courts. It must abide the written words.

In this jurisdiction, "coverture is not now a defense in bar of the running of the statute of limitations since 13 February, 1899." *In re Will of Witherington, supra,* at p. 154.

From the view we take of this action, the question as to whether a meritorious defense is shown is not necessary to be considered. Nor do we decide as to whether appellant may assert such defense against the judgment rendered herein. For the reasons given, the judgment below is

Reversed.

F. A. GIBBS ET AL. v. BENNY LOUISE MILLS AND C. D. JUSTICE.

(Filed 26 February, 1930.)

1. **Parties A b—Trial court may allow real party in interest to be made plaintiff during trial when defendant is not prejudiced thereby.**

   Where the cause of action is not changed or the rights of the defendant prejudiced it is not error for the trial court to permit the real party in interest voluntarily to be substituted as plaintiff in the action during the progress of the trial and after the jury had been empaneled, and proceed with the trial of the action.

2. **Limitation of Action B a—Where trespass from diverted surface water is intermittent recovery of damages for three-year period is not barred.**

   Where an obstruction diverting the natural flow of surface water is entirely upon the defendant's land and the trespass upon the plaintiff's land resulting therefrom is intermittent, an instruction that the plaintiff could recover any damage done her property within three years prior to the action is not error.

APPEAL by defendant Justice from *Sinclair, J.*, at August Special Term, 1929, of BUNCOMBE. No error.

*John H. Cathey and Isabel Cathey for appellant.*
*J. Y. Jordan, Jr., for appellee.*

PER CURIAM. The plaintiff brought suit for the wrongful diversion of the natural flow of surface water and its discharge upon the plaintiff's property. In answer to the issues the jury found that the defendant, Benny Louise Mills, had not and that the defendant, C. D. Justice, had collected and discharged surface water upon the property of the plaintiff, and assessed damages. The judge directed the jury to find upon all the evidence that the action was not barred by the statute of limitations.

The two questions presented are thus stated by the appellant: (1) Can the court during the progress of the trial and after the jury has been empaneled, order the real party in interest to be made a party plaintiff instead of ordering a mistrial and withdrawing a juror? (2) Did the court err in directing a negative answer to the fourth issue on the statute of limitations?

The suit was brought in the name of F. A. Gibbs, but during the trial it was shown by records which the appellant introduced that Rebecca Gibbs, his wife, was the owner of the land. The first interrogatory propounded by the appellant impliedly admits that Mrs. Gibbs was the real party in interest, and raises the question whether the trial judge had the legal right to permit her voluntarily to become a plaintiff and to refuse

to withdraw a juror and grant a mistrial; for the record discloses that Mrs. Gibbs voluntarily came into court and asked to be substituted as plaintiff.

The presiding judge was not necessarily bound to grant a mistrial and continue the case in the absence of anything to indicate that the defendants would be prejudiced by going on with the trial. There was no suggestion that the jury was not satisfactory, and there seems to have been no bona fide contention that the *feme* plaintiff was not the owner of the lot. The real controversy involved the damage done the property, and the parties had ample opportunity by filing additional pleadings and by introducing evidence to present their contentions. The actual controversy was not changed by making Mrs. Gibbs a party, and the appellant, so far as we can see, was not prejudiced by her voluntary appearance as a plaintiff under an order of the court. Under these conditions we are of opinion that the judge was not required as a matter of law to continue the case. He would no doubt have continued it if the nature of the controversy had been changed or the defendants had been prejudiced.

The undisputed evidence shows in reference to the statute of limitations that the obstruction was entirely upon the land of the defendants. The trespass was not continuing but intermittent. There was therefore no error in the instruction that the plaintiff could recover for any damage done her property, in the manner alleged, within three years prior to the time she became a party to the action. *Roberts v. Baldwin,* 151 N. C., 407; *Duval v. R. R.,* 161 N. C., 448; *Langley v. Hosiery Mills,* 194 N. C., 644. We find

No error.

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M. J. CORL v. J. A. CANNON.

(Filed 26 February, 1930.)

**Trial F a—Where issues submitted to the jury are inconsistent a new trial will be awarded.**

Where the trial judge instructs the jury to answer conflicting issues as to negligence and contributory negligence so that he may determine who is and who is not entitled to recover, a new trial will be ordered on appeal so that a consistent verdict may be found by the jury.

APPEAL by plaintiff from *Harding, J.,* at January Term, 1929, of CABARRUS. New trial.

On the issues submitted to the jury and their findings thereon, the following judgment was rendered by the court below:

"This action having been called and tried by his Honor and a jury, and the jury having answered the issues as follows:

1. Did the defendant notify the plaintiff of his intention to excavate near the wall of the building described in the complaint as the plaintiff's building? Answer: No.

2. Did the defendant excavate near the wall of the plaintiff's building wantonly and with utter indifference to the rights of the plaintiff, as alleged in the complaint? Answer: No.

3. Was the plaintiff's building injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

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

5. What compensatory damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $600.

6. What damages (punitive), if any, is the plaintiff entitled to recover of the defendant? Answer: No.

By consent, the motions of the plaintiff and defendant for judgment was continued to the February Term, 1929.

It is now on motion of Hartsell & Hartsell, and R. L. Smith, counsel for the defendant, adjudged that the plaintiff recover nothing of the defendant, J. A. Cannon, and that the defendant, J. A. Cannon, recover of the plaintiff, M. J. Corl, and George F. Corl, the surety, on his prosecution bond, his costs of action to be taxed by the clerk."

*Armfield, Sherrin & Barnhardt for plaintiff.*
*Hartsell & Hartsell for defendant.*

PER CURIAM. The defense of contributory negligence seems to have been submitted to the jury upon the theory that, after due notice of defendant's intention to excavate near plaintiff's building, the plaintiff failed to take any precaution or to exercise proper care for the protection of his own property. But the first issue finds that the defendant gave the plaintiff no notice of his intention to excavate near the building in question. Hence, the first and fourth issues, interpreted in the light of the record, would seem to be in conflict. The court instructed the jury: "Now, gentlemen, I want you to answer all these issues, and then, when you answer these issues, the court will determine who recovers and who does not." In this state of the record, it would appear that a consistent verdict should be rendered to enable the court to determine the rights of the parties. *Wood v. Jones, ante,* 356. To this end a new trial must be awarded.

New trial.

A. J. HINES v. W. A. WILLIAMS ET AL.

(Filed 5 March, 1930.)

**Taxation H a—Where contingent interests of children living and unborn are represented by guardian ad litem they are bound by foreclosure proceedings of tax certificate.**

Under the provisions of chapter 334, Public Laws of 1929, amending the procedure for the sale of lands for taxes as theretofore provided by statute (C. S., 8038, Art. 14, amended by Public Laws of 1927, etc.), requiring that the deed shall convey the real estate in fee to the purchaser at the foreclosure sale for taxes free from any claims of the taxpayer, his wife, the husband or any other person whether or not such person's claims are disclosed by the record, it is *held:* that where the lands so sold are subject to a life estate with contingent remaindermen over, involving the contingent interests of children living and unborn, and all interests are properly before the court either in person or by guardian *ad litem*, and have been legally represented, the judgment is binding upon all of the parties, and the purchaser gets good title to the property thereunder in fee simple absolute as against all parties having a vested or contingent interest. C. S., 452, 1744, 1745.

APPEAL by the purchaser of real estate under a tax sale certificate to determine the validity of a deed tendered to him by the commissioner appointed to make the sale. Heard by *Devin, J.*, at December Term, 1929, of WILSON. Affirmed.

N. W. Williams died leaving a will containing the following devise: "I give and devise to my daughter Sug Allen, the wife of L. A. Allen, . . . a certain tract or parcel of land (describing it). To have and to hold the above-described . . . tract of land to her, the said Sug Allen, for and during the term of her natural life and no longer, and after her death to her issue in fee, if any, and in the event she dies without issue, thence to Plummer Williams, Wiley Williams, and the son of Bug Williams, now deceased, and their issue. But in the event either should die without issue his share is to pass and vest in the survivor, or their issue, share and share alike." Sug Allen died without issue, and the title then vested in Plummer Williams, Wiley Williams (who is W. A. Williams), and Willard Williams, son of Bug Williams, subject to the condition subsequent. These three filed a petition before the clerk of the Superior Court for partition of the land described in the foregoing devise. Lot No. 2 was allotted to Wiley Williams, and he listed the land in his own name for the taxes in 1926. The tax on the land was not paid, and on 8 June, 1927, the sheriff of Wilson County sold the land for nonpayment of the taxes, and A. J. Hines became the purchaser. Thereupon the sheriff issued to him a tax sale certificate as prescribed by law. More than twelve months elapsed and the land was

not redeemed; it was sold on 4 June, 1928, for the taxes of 1927, and the county of Wilson became the purchaser. The plaintiff brought suit to foreclose the tax sale certificate; a guardian *ad litem* was appointed for the children of Wiley Williams, all of whom are minors; and the guardian filed an answer admitting the allegations of the complaint. All parties known to have any interest in the land, either vested or contingent, were made parties defendant in pursuance of chapter 221 of the Public Laws of 1927; the clerk made an order that notice be given to all persons claiming an interest to appear in the action and set up their defense. The notice was accordingly issued and a guardian *ad litem* was appointed for the unborn children and unborn claimants and he filed an answer admitting the allegations of the complaint. The clerk adjudged that the plaintiff held a certificate of sale executed by the sheriff on 6 June, 1927; that as purchaser he had a lien on the property in the amount set out in the judgment; and that a commissioner sell the land on Monday, 30 September, 1929, and make a report of the sale. The commissioner sold the land, and made his report; and the clerk confirmed the sale and directed the commissioner to make a deed in fee to the purchaser. The commissioner tendered a deed conveying the property in fee simple and the purchaser declined to accept the deed and pay the purchase price. A rule was served upon him to show cause why he should not accept the deed, and he answered that the commissioner could not convey an indefeasible fee for the reason that certain minors have vested and contingent interests in said property which the commissioner was not authorized to convey. The clerk held that the deed conveyed a good and indefeasible title in fee. The purchaser excepted and appealed to the Superior Court and the judgment of the clerk was affirmed. The purchaser excepted and appealed to the Supreme Court.

*David Isear for plaintiff, appellant.*

*R. L. Brinkley and Connor & Hill for appellee.*

*Attorney-General Brummitt and Assistant Attorney-General Nash as Amici Curiæ.*

ADAMS, J. The appeal presents the question whether the commissioner's deed conveys a good title to the purchaser.

It was formerly provided by statute that the land of a minor should in no case be liable to sale for taxes, but that his guardian should pay the tax when due; also that in case of the guardian's default the tax list in the hands of the sheriff should be an execution to be satisfied out of his individual property or out of the personal property of his ward. Laws 1872-73, ch. 115, sec. 28(4); Laws 1876-77, ch. 155, sec. 29; The

Code, sec. 3691. In 1887 the General Assembly modified the law by appending the following proviso to the section conferring the right to redeem land sold for taxes: "*Provided,* that infants, idiots and insane persons may redeem any land belonging to them from such sale within one year after the expiration of such disability, on like terms as if redemption had been made within one year from the date of said sale and from the date of each subsequent payment of taxes thereon at the rate of twenty per centum per annum on the several amounts so paid by the purchaser until redemption." Laws 1887, ch. 137, sec. 65. Sections 91-93 gave the owner of a certificate of tax sale the right at his election to foreclose it by a civil action at any time before the expiration of two years from the date of the certificate.

This proviso is the last clause in section 8038, Article 14, of the Consolidated Statutes. In several material respects Article 14 was amended by the act of 1927. Sections 8028-8037 were repealed and others were substituted. In the latter the holder of a certificate of sale is given the right of foreclosure by a civil action; the purchaser is given a lien as in case of a mortgage on the real estate sold for the amount paid and interest, penalties, costs, and charges; those claiming an interest disclosed by the records must be parties to the action; notice must be given to all other persons claiming an interest in the subject-matter; and a judgment of foreclosure may be rendered. In 1929 statutes were enacted affecting the procedure and providing that the deed shall convey the real estate in fee to the purchaser, free from any claims of the taxpayer, the wife, the husband, or any other person whether or not such claims are disclosed by the records. Laws 1929, ch. 204, ratified on 16 March, 1929, and ch. 334, ratified 19 March, 1929, as of 9 March, 1927.

It is not the policy of the law indefinitely to suspend the payment of taxes. The statutes which formerly prohibited the sale of an infant's land for taxes provided for the enforcement by other means of timely payment. It was a general rule of the common law that an infant should lose nothing by nonclaim or neglect of demanding his right and that his disabilities should be deemed privileges securing him from the harmful consequences of his improvident acts; but when sued he was protected by a guardian who was to defend him from all attacks. Courts of equitable jurisdiction exercised their general power and duty as *parens patriæ* for his protection; and an infant when represented by a guardian, subjected to the jurisdiction of the court, and taken under the protection of the law, was as a rule bound by the judgment or decree.

It is contended that the last clause of section 8038 should be interpreted as applying only to cases in which the purchaser, instead of foreclosing his certificate, demands and receives from the officer a deed

under section 8024 *et seq.*, and that the clause in the act of 1927, ch. 221, sec. 4, declaring foreclosure to be the purchaser's "sole right and only remedy" debars the purchaser from calling for a deed under the sections referred to and by implication repeals the minor's right of redemption after his disability expires. This question does not necessarily arise on the record. The plaintiff is not an infant attempting to redeem land sold for taxes, but a purchaser under proceedings to foreclose a tax sale certificate. The last clause of section 8038 evidently has no application to cases in which the certificate is foreclosed and the infants are properly before the court and protected by its judgment. In the present case the certificate was duly foreclosed; a guardian *ad litem* was appointed for the infant defendants, and, after due service of process, he filed an answer for them; another guardian *ad litem* appointed to represent the unborn children of Wiley Williams, Plummer Williams and Willard Williams and all other persons who have or may have any interest in the land, after due service of process, likewise filed an answer. The clerk, after adjudging a foreclosure of the certificate, appointed a commissioner to sell the land, confirmed his report of the sale, and directed him to execute a deed to the purchaser. It appears that the infant defendants and all persons having a vested or contingent interest in the land have had their day in court. We must therefore hold that they are bound by the judgment and that the deed conveys title in fee to the purchaser. *Lumber Co. v. Herrington*, 183 N. C., 85; *Bank v. Alexander*, 188 N. C., 667, 671; *Matthews v. Joyce*, 85 N. C., 258; *Glisson v. Glisson*, 153 N. C., 185; *Rawls v. Henries*, 172 N. C., 218; C. S., 452, 1744, 1745.

Judgment affirmed.

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STATE v. R. W. LAMB.

(Filed 5 March, 1930.)

**Forgery A a—Execution or alteration of writing purporting to be act of another is essential element of forgery.**

In order to constitute forgery there must be an execution or alteration of a paper-writing so as to make the writing or its alteration purport to be the act of another person, and where the writing alleged to be a forgery is an endorsement of a check in the name of the payee per procuration or as agent without authority, and the one so signing receives the money thereon and fails or refuses to pay it to the payee, the offense is not forgery and defendant's motion as of nonsuit should be granted. As to the nature of the offense, the question is not presented on this appeal and not decided.

STATE *v.* LAMB.

APPEAL by defendant from *Midyette, J.*, at September Term, 1929, of CRAVEN. Reversed.

The defendant was indicted for forging an endorsement on the back of the following check or voucher, which was payable to M. P. Mitchell:

"The Board of Education of Craven County. No. 5019.

To Citizens Bank & Trust Company, New Bern, N. C., Treasurer.

Date: 3 July, 1928.

Pay to the Order of M. P. Mitchell.....$140.00
One Hundred Forty Dollars.
The payment of which amount has been duly authorized by the Board of Education or the proper school committee.

The Board of Education of Craven County.
B. O. JONES, County Auditor.

C. A. SEIFERT, Chairman.
R. S. PROCTOR, Secretary."

The alleged false and forged endorsement appearing on the back of said order was as follows:

M. P. MITCHELL,
R. W. LAMB.

The defendant, complying with the statute, moved to dismiss the action as in case of nonsuit. The motion was denied, the defendant was convicted, and from the judgment pronounced he appealed, upon error assigned.

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

*George T. Willis and C. L. Abernethy for defendant.*

ADAMS, J. The defendant excepted, not only to the denial of his motion to dismiss the action, but to the following instruction given the jury: "If you are satisfied from the evidence beyond a reasonable doubt, the burden being on the State, that the defendant signed the name of M. P. Mitchell to this order or paper described in the bill of indictment without the authority of M. P. Mitchell; and further, if the State satisfies you from the evidence beyond a reasonable doubt that he did so with intent to defraud, then it would be your duty to return a verdict of guilty. If you are not so satisfied, if you have a reasonable doubt about it, it would be your duty to return a verdict of not guilty."

The defendant was a member of the school committee of the Fort Barnwell School District and M. P. Mitchell, a colored woman, taught

children of her race in one of the schools. At the end of the school term the county board of education was due her one hundred and forty dollars. The defendant procured a voucher for the sum from the county superintendent of public instruction, took it to the sheriff's office, and endorsed on it the names "M. P. Mitchell, R. W. Lamb." Some one in the office paid him the money and he gave a receipt for it signed "M. P. Mitchell, by R. W. Lamb." He neglected or refused to pay the money to M. P. Mitchell and she prosecuted him for forgery. The defense was twofold: (1) That she had authorized him to endorse the voucher and collect the money; (2) that if not authorized his endorsement of the voucher was nothing more than a wrongful assumption of agency and is wanting in elements essential to the crime of forgery. The first was determined against the defendant; the second presents the law upon which he relies for reversal of the judgment. Following the briefs, the oral argument for the State and for the defendant proceeded on the theory that endorsing the voucher and giving the receipt were in reality one transaction and that the significance of the endorsement was in effect the same as that of the signature to the receipt, the defendant in each instance pretending to act in the capacity of an authorized agent.

The books abound in definitions of forgery. Blackstone defines it as "the fraudulent making or alteration of a writing to the prejudice of another man's right" (4 Bl., 247); *Buller, J.*, as "the making of a false instrument with intent to deceive" *(Rex v. Coogan,* 2 East P. C., 853); *Blackburn, J.*, as "the false making of an instrument to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements" *(In re Windsor,* 10 Cox C. C., 118, 123, 6 B. & S., 522); *Shee, J.*, as "the making or altering of a document with intent to defraud or prejudice another so as to make it appear to be a document made by another." 10 Cox C. C., 124.

It would be difficult to frame a definition to include all possible cases; but as a rule the false writing must purport to be the writing of a party other than the one who makes it and it must indicate an attempted deception of similarity. Annotation, 22 A. D., 321; *Sale v. State,* 120 Ga., 183, 47 S. E., 531; 2 Bishop's Crim. Law, sec. 572. Forgery is the attempted imitation of another's personal act. *Mann v. People,* 15 Hun. (N. Y.), 155, affirmed in *People v. Mann,* 75 N. Y., 484, 31 A. R., 483. Hence signing as the agent of another without authority does not constitute forgery. Clark's Crim. Law, 2 ed., 355. The English Courts applied the principle in *Rex v. White,* 1 Den. C. C., 208, 2 Car. & K., 404, 2 Cox C. C., 210. There a prisoner falsely averring an authority to endorse a bill of exchange for T. Tomlinson, wrote on the back of the bill "Per procuration Thomas Tomlinson, Emanuel White." The bill

was thereupon discounted, and the prisoner went off with the money. It was held that the endorsement was not a forgery. 2 Mews' Eng. Case Law Digest, 1262. In *Rex v. Arscott,* 6 Car. & P., 408, the prisoner endorsed a bill of exchange to R. Aickman as follows: "Received for R. Aickman, G. Arscott." As the prisoner apparently received the money for another and signed his own name the court held that he must be acquitted of forgery. In 3 Archbold's Crim. Pr. and Plds., 537-543, it is said: "If a man draw, accept, or endorse a bill of exchange in the name of another, without his authority it is forgery. But if he sign it with his own name, per procuration . . . it is no forgery." The reason is that forgery cannot be predicated of a writing not intended to be a semblance of something which it does not purport to be and which is in itself not false. *Barron v. State,* 77 S. E. (Ga.), 214.

In this country the weight of authority follows the English precedents, although the minority view is upheld by substantial reasoning. In *S. v. Wilson,* 28 Minn., 52, 9 N. W., 28, it was shown that the defendant had executed a written instrument which purported to be a conveyance of land by James D. Hoitt to Joseph F. Miller, the form of the signature being "James D. Hoitt, by H. H. Wilson, his attorney in fact." The Court held that there was no forgery and that the action should have been dismissed.

A similar question arose in *S. v. Taylor,* 25 L. R. A. (La.), 591. The defendant prepared a promissory note and without authority signed the names of several persons, writing under them these words: "I was authorized to sign the above names of the order. E. R. Taylor." He was charged with forgery and the indictment was quashed. In an opinion delivered by *Breaux, J.,* the Court said: "Assuming that the acts are correctly charged, forgery is not the crime the defendant has committed. Forgery is defined as the making or altering of a writing so as to make the alteration purport to be the act of another person. This definition does not embrace the making of a note per procuration of the party whom he intends to represent."

In *People v. Bendit,* 31 L. R. A., 831, a receipt for money was signed "Wm. Cluff & Co., A. B." Whether the defendant had done the acts complained of was in doubt, but the Court said that he was not guilty of forgery, assuming his identification, because "when the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another." The same conclusion was reached in *Barron v. State, supra,* in which the signature was "W. R. Amason, W. H. B.," and it is maintained in a number of other cases. *Goucher v. Nebraska,* 41 A. L. R., 227, and Annotation, 241; *West Virginia v. Sotak,* 46 A. L. R., 1523, and Annotation, 1529; Annotation, *People v. Bendit, supra.*

According to the principle thus enunciated the defendant's acts do not constitute forgery and his motion to dismiss the action should have been allowed. The question whether he is guilty of another crime is beyond the scope of this appeal. The judgment is

Reversed.

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C. L. DARDEN, ADMINISTRATOR OF EVAN POWELL, v. ROBERT G. LASSITER & COMPANY.

(Filed 5 March, 1930.)

**Master and Servant C b—Evidence of master's failure to provide reasonably safe place to work in exercise of due care held sufficient.**

Evidence tending to show that plaintiff's intestate, employed by the defendant, was engaged in doing fine grading at the bottom of a ditch 7 feet deep and 21 inches wide, the sides of which were saturated with water from recent rains which seeped in and had to be pumped out, that there had been cave-ins prior to the accident in suit, that quicksand had been encountered at one place in digging the ditch, that defendant's foreman had ordered braces to be placed in the ditch every 8 feet, in accordance with the usual method of doing such work, but that plaintiff's intestate was not employed to put in the braces, and that shortly after defendant's foreman had gone to lunch the sides of the ditch, where no braces had been put in for 18 or 20 feet, caved in, causing the injury to plaintiff's intestate resulting in death: *Held*, the evidence was sufficient to overrule defendant's motion as of nonsuit, and the submission of the case on the usual issues, on the theory of defendant's duty, in the exercise of due care, to furnish a reasonably safe place to work and reasonably safe means and appliances, and plaintiff's intestate's assumption of ordinary, obvious risks, was proper.

APPEAL by defendant from *Daniels, J.*, October-November Term, 1929, of WILSON.

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.

The evidence tends to show that on 29 December, 1927, plaintiff's intestate, Evan Powell, was in the employ of the defendant, working in a trench or ditch cut along Mercer Street in the town of Wilson, preparatory to laying therein sewer or water mains. The trench in question was cut by a ditching machine to approximately the required depth, and plaintiff's intestate was engaged in smoothing out the bottom of the trench to an uniform grade, called "fine grading," when the trench caved in and so injured him, along with two other workmen, that he died the following day.

Plaintiff's intestate, a colored man about 29 years of age, had been working with this particular crew for about two months, though he had been in the employ of the defendant, as a day laborer, for approximately five months prior to the time of his injury. At the point where the deceased was injured, the trench was approximately seven feet deep and about 21 inches wide. There had been considerable rainfall and the ground was saturated with water. It seeped in from the walls on both sides, and there had been a couple of cave-ins prior to this one, and about fifteen yards from where the last one occurred, quicksand had been encountered about six feet below the surface of the ground. A pump was used to keep the water out of the trench.

Defendant's foreman, O. L. Pickering, in charge of operations, directed that certain bracing be used to keep the walls of the trench from falling in, which consisted of two upright pieces of timber, placed from 8 to 16 feet apart along the sides of the ditch, with two horizontal braces placed between them, one at the top and the other at the bottom. But there were no longitudinal stringers used to keep the banks of the ditch from falling or caving in, as was customary in such work.

On the day in question, the foreman went to lunch about 12:30 and left the others working in the ditch. There were no braces for a space of 18 or 20 feet (one witness said from 35 to 40 feet) immediately behind the machine, where plaintiff's intestate was working, and shortly after the foreman left, the bank of the ditch suddenly caved in, just beyond the last brace, and temporarily buried three of the workmen. "These parties were caught in the slide or cave-in between the last one of the braces up in the ditch and the machine."

The defendant's foreman testified in part as follows: "It was my duty to see that these braces were put in. I instructed them to put the braces in at intervals of 8 feet. There was a space behind the machine of about 12 or 15 feet in which there were no braces. They had put in all the braces I had instructed them to put in except the last one. They did not have it in when I left. I left them to put that in—the one right behind the machine—and to lay the pipe. Evan Powell was in the ditch at the time I left. He was leveling the bottom or doing fine grading."

It was no part of plaintiff's intestate's duty to put in the braces. "Evan Powell was fine grader in the bottom of the ditch." Other employees were instructed to place the braces in the ditch, which was done under the immediate supervision of the foreman, who, in turn, was under the supervision of an engineer, employed by the defendant.

The defendant offered evidence tending to show that it was a part of plaintiff's intestate's duty to help put in the braces, hence it was contended that he necessarily assumed the risk of his injury.

The usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury, which resulted in a verdict for the plaintiff. From the judgment entered thereon the defendant appeals, assigning errors.

*A. C. Dickens and Finch & Rand for plaintiff.*
*Parham & Lassiter and Connor & Hill for defendant.*

STACY, C. J., after stating the case: The case, with evidence sufficient to carry it to the jury, was tried upon the theory that in law the defendant was in duty bound, in the exercise of ordinary care, to provide a reasonably safe place for plaintiff's intestate to work, and to furnish him reasonably safe means and suitable appliances with which to execute the work assigned, subject to the limitation that the deceased took upon himself, as an employee or servant of the defendant, the ordinary risks of danger incident to the employment, which were obvious or could have been perceived by him in the exercise of his senses and by the use of ordinary care and circumspection. In this, there was no error. *Lindsey v. Lumber Co.,* 190 N. C., 844, 130 S. E., 713; *Van Steenburgh v. Thornton,* 58 N. J. L., 160. Such was the holding in *McDougald v. Lumberton,* 129 N. C., 200, 39 S. E., 826, a case somewhat similar to the one at bar and involving the same principles. See, also, *City of Fort Wayne v. Christie,* 156 Ind., 172; Notes 21 A. & E. Ann. Cas., 708, and 7 A. & E. Ann. Cas., 301.

The case of *Mace v. Mineral Co.,* 169 N. C., 143, 85 S. E., 152, strongly relied upon by appellant, is not in point (except upon the defendant's evidence which was rejected by the jury), for in that case the plaintiff's intestate was foreman or overseer in charge of the work.

Whether "fine grading" in the bottom of a trench, such as plaintiff's intestate was doing in the instant case, is dangerous, or otherwise, would seem to depend upon a variety of circumstances. In some cases, it might be entirely safe; in others, not. The size and dimensions of the trench might affect it. The character of the soil would certainly have some influence. The presence of limestone, or quicksand, or of earth newly filled in, the moisture in the ground and numerous other conditions might render such work more or less safe, or more or less hazardous. The state of the weather or the season of the year might have something to do with it. But all of these are matters of fact, about which there may be conflicting evidence, as in the instant case, calling for determination by a jury.

Indeed, in the instant case, the fact that plaintiff's intestate's work was done under the immediate supervision and direction of the defendant's foreman would seem to be equivalent to an assurance that he

might safely proceed with it. *Smith v. Kansas City,* 125 Mo. App., 150. When the foreman went to get his lunch, he left plaintiff's intestate at work in the trench, leveling the bottom or doing fine grading. He was, therefore, at the time of leaving, in a better position than plaintiff's intestate to observe and appreciate the danger. *City of Fort Wayne v. Christie, supra.*

The case was properly submitted to the jury.

No error.

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BOARD OF EDUCATION OF JOHNSTON COUNTY v. BOARD OF COMMISSIONERS OF JOHNSTON COUNTY.

(Filed 5 March, 1930.)

**Appeal and Error J g—Where tax has been levied and six months school had, question of necessary tax rate is moot and not necessary to be decided.**

Where the county board of education has submitted to the board of county commissioners the amount to be included in the budget for a six months term of public schools, and upon a joint session of the two boards the clerk of the court has met with them as arbitrator (C. S., 5608), and decided for the board of education, and on appeal the judge of the Superior Court has accordingly directed an issue, and pending appeal has entered an order for a tax levy to take care of the debt service and a current expense fund for the schools, C. S., 5609, and on appeal to the Supreme Court it appears that the tax has been accordingly collected and applied to the support of the schools, and the six months term has almost expired: *Held,* the appeal presents an abstract question unnecessary to decide, and *held, further,* in any view of the record there was no error.

APPEAL by defendant from *Sinclair, J.,* at September Term, 1929, of JOHNSTON. No error.

*Abell & Shepard for plaintiff.*

*James Raynor, Ezra Parker and Winfield H. Lyon for defendant.*

*Attorney-General Brummitt and Assistant Attorney-General Nash as Amici Curiæ.*

ADAMS, J. On 10 July, 1929, the plaintiff submitted to the defendant a proposed budget of the necessary expenses of operating the public schools of Johnston County for a term of six months. The defendant rejected the budget in part and suggested certain reductions. The parties held a joint session on 6 August, 1929, the plaintiff voting to adopt the budget and the defendant to amend it. The clerk of the Superior

Court was called upon to act as arbitrator of the issues raised by the disagreement. C. S., 5608. The clerk held that the amount proposed in the budget was essential to the maintenance of the schools and ordered the defendant to levy a tax sufficient for this purpose. The defendant appealed to the Superior Court and the jury under a directed instruction found in response to the issue that $10,175, the amount in controversy, was needed to maintain the schools for a term of six months. Judge Sinclair rendered judgment that the defendant levy a tax sufficient, with sums received from other sources, to produce the following amounts: for current expenses $399,348.89; for capital outlay, $3,650.50; for debt service, $156,176.46, the three items aggregating $559,176.46. C. S., 5596. The defendant excepted and appealed to this Court. To prevent delay beyond a reasonable time for levying the tax, the judge directed the defendant to levy a tax for the ensuing year at a rate sufficient to raise $156,176.97 for the debt service fund and an amount, which with funds derived from other sources, would total $405,541.15, which was the current expense fund for the previous year. The defendant excepted and appealed.

The presiding judge made this order pursuant to the authority conferred by section 5609. In consequence the defendant levied a tax sufficient to produce a debt service fund and current expense fund in excess of the amount which would have been collected for these purposes under the budget. The tax, or a large part of it, has been collected and applied to the support of the schools and the term of six months has almost expired. A new trial or a reversal of the judgment would not alter these conditions. The appeal therefore raises a question which is abstract or academic. It would be useless to consider the bare question whether there was error in ordering the levy of a school tax which has been collected and paid out. It is the custom of appellate courts to disregard matters which have no relation to concrete form. *Wikel v. Commissioners*, 120 N. C., 451; *Harrison v. Bryan*, 148 N. C., 315; *Pickler v. Board of Education*, 149 N. C., 221; *Wallace v. Wilkesboro*, 151 N. C., 614; *Moore v. Monument Co.*, 166 N. C., 211; *Kilpatrick v. Harvey*, 170 N. C., 668; *Glenn v. Culbreth*, 197 N. C., 675.

We do not mean to say that there was error in the judgment. In objecting to the budget the defendant proposed reductions amounting to $25,275.62. The plaintiff agreed that this amount should be reduced by deducting $14,000 as the charge for fire insurance; and the defendant agreed that from its proposed reductions the items of $500 and $600.62 should be eliminated. The remaining question was whether the difference ($10,175) was needed to maintain the schools for six months and it was determined under an issue which was submitted to the jury. Under the last clause of section 5608 the jury was permitted to consider "all

papers and records relating to the case," including the verified budget. It is contended by the plaintiff that there is no exception to the admission of the papers and records, no competent evidence to impeach the items embraced in the issue, and that the directed instruction was correct. In any view of the record we find

No error.

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H. H. CASEY v. EAST CAROLINA RAILWAY.

(Filed 5 March, 1930.)

1. **Appeal and Error E c—Where appellant has failed to make a concise statement of the evidence required by rules, appeal will be dismissed.**

   Where the appellant has failed to make a concise statement of the evidence according to the Rules of Practice in the Supreme Court, but gives the entire evidence in the form of questions to and answers of the witnesses, taken from the stenographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee.

2. **Appeal and Error J e—Where delay in filing bill of particulars has not prejudiced appellant it will not be held for reversible error.**

   A delay of a few days beyond the time ordered to file a bill of particulars will not justify the finding of reversible error on appeal when the bill has been filed for a sufficient time before the trial to make the delay unprejudicial or harmless.

APPEAL by defendant from *Lyon, Emergency Judge,* at October Special Term, 1929, of GREENE.

Civil action to recover damages for alleged breach of contract and for the value of certain crossties delivered under the contract.

Upon denial of liability and issues joined, both on plaintiff's cause of action and the defendant's counterclaim, there was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

*F. E. Wallace, J. Paul Frizzelle and P. R. Hines for plaintiff.*
*John Hill Paylor and L. V. Morrill for defendant.*

STACY, C. J. The principal exceptions, upon which the defendant relies, are, first, the refusal of the court to dismiss the action for failure of plaintiff to file a bill of particulars within the time specified, and, second, for refusal to order a compulsory reference on motion of the defendant. Neither assignment of error, based on these exceptions, can be sustained. While the plaintiff was a few days late in filing his bill

of particulars, nevertheless it appears that same was filed 21 February, 1929, and the case was not tried until the October Special Term thereafter, nearly eight months after the date of filing. No harm came to the defendant from this delay.

Nor was there error in overruling the defendant's motion for a compulsory reference. C. S., 573.

But for another reason the judgment must be affirmed and the appeal dismissed. There appears to have been no attempt to make out a concise statement of the case on appeal as required by the rules. The entire evidence is in the form of questions and answers, transcribed from the stenographer's notes, and the appellee has lodged a motion to dismiss the appeal under authority of *Brewer v. Mfg. Co.*, 161 N. C., 211, 76 S. E., 237; *Skipper v. Lumber Co.*, 158 N. C., 322, 74 S. E., 342; *Bucken v. R. R.*, 157 N. C., 443, 73 S. E., 137; *Cressler v. Asheville*, 138 N. C., 482, 51 S. E., 53. The motion must be allowed.

Affirmed and dismissed.

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W. M. NISSEN v. MAE H. BAKER ET AL.

(Filed 5 March, 1930.)

1. **Trusts A c—Where one pays consideration for land an equitable trust is therein created for his benefit.**

   Where one pays the consideration for a tract of land conveyed to another there is a trust created in favor of the one so paying the consideration, who may enforce his equity upon proper proof not only against the holder of the legal title but against all persons other than purchasers for value without notice, unless he is estopped by his conduct or representations from setting up his claim.

2. **Estoppel C a—Representation that legal title was absolute would estop owner of equity from asserting his title against one relying thereon.**

   The equitable owner of lands under a trust created by payment of the consideration for the lands would be estopped by his acts and representations, made to a creditor of the holder of the legal title, that the legal title was absolute, from asserting his equity against such creditor when the creditor has acted upon the representations to the prejudice of his rights.

3. **Estoppel C e—Evidence of misrepresentations by claimant of equitable title held insufficient to be submitted to the jury.**

   Where a creditor of a holder of the legal title to lands under a registered deed contends that he was induced to lend credit to such holder by misrepresentations of the owner of the equitable title that the legal title was absolute, and the only evidence of such misrepresentations on the part of the equitable owner was that the holder of the legal title was

his secretary and agent and had represented that he held the absolute title, but that at the time he made the representations he was acting for himself and not the equitable owner: *Held*, evidence of misrepresentations by the owner of the equity was insufficient to be submitted to the jury and motion as of nonsuit on the issue of estoppel should have been granted.

**4. Appeal and Error J g—Where nonsuit should have been granted alleged error in trial need not be considered on appeal.**

Where on appeal error is found in the trial court's refusal to grant a motion as of nonsuit upon an issue, the Supreme Court may reverse the judgment without discussing assigned errors of law relating to the trial of the issue.

APPEAL by plaintiff from *Sink, Special Judge,* at May Special Term, 1929, of MECKLENBURG. Reversed.

This action was begun by the plaintiff on 29 October, 1927, against the defendants, the heirs at law, the widow, and the administrator of John R. Baker, deceased, for judgment that the said heirs at law hold the legal title to certain lots or parcels of land situate in Mecklenburg County, North Carolina, and described in the complaint, as trustees for the plaintiff, that said widow and said administrator have no right, title or interest in or to said lots or parcels of land, and that said defendants convey the said lots or parcels of land to the plaintiff.

It is alleged in the complaint and there was evidence tending to show that on 12 January, 1927, certain lots or parcels of land situate in Mecklenburg County, North Carolina, being the same lots or parcels of land as those described in the complaint, were conveyed to John R. Baker by a deed which was subsequently registered in said county on 14 February, 1927; that the consideration for said conveyance was furnished by the plaintiff, W. M. Nissen, and that no part of said consideration was furnished by the said John R. Baker; that the said John R. Baker by said deed took the legal title to said lots or parcels of land as trustee for the plaintiff, and that he held such title as trustee for the plaintiff at the date of his death in August, 1927. The only defendants in this action at the time it was begun were the heirs at law, the widow, and the administrator of John R. Baker, deceased. They filed answers denying any knowledge or information sufficient to form a belief as to the truth of the material allegations of the complaint. They offered no evidence at the trial in contradiction of the evidence offered by the plaintiff pertinent to the issues determinative of the right of plaintiff to recover judgment against them, as prayed for in the original complaint.

On 20 April, 1928, upon its motion, supported by affidavits and other evidence, the Carolina Beach Corporation, a creditor of John R. Baker,

deceased, was made a party defendant in this action, and was allowed time to file an answer to the complaint.

By its answer, duly filed thereafter, the said Carolina Beach Corporation denied all the material allegations of the complaint on which plaintiff prayed for judgment against the original defendants. It further alleged that at the time it extended credit to the said John R. Baker in the transaction with him out of which its claim against the estate of the said John R. Baker, deceased, arose, the said John R. Baker, as the general agent of the plaintiff, W. M. Nissen, and with his full knowledge and approval, represented to the said Carolina Beach Corporation that he, the said John R. Baker, was the owner of the lots or parcels of land described in the complaint, being the same lots or parcels of land as those conveyed to the said John R. Baker by the deed then on record in Mecklenburg County; that said representation was made by the said John R. Baker for the express purpose of inducing the Carolina Beach Corporation to release the plaintiff in this action from liability to the said Carolina Beach Corporation growing out of a transaction with respect to real estate which it had had with the said John R. Baker, as agent of the plaintiff; and that the said Carolina Beach Corporation relying upon said representation, released the plaintiff from liability to it, and agreed to accept the said John R. Baker alone as its debtor in said transaction.

The defendant, Carolina Beach Corporation, specifically alleged in its answer that "the plaintiff by his said acts, conduct, representations, and inducements is now estopped as to the Carolina Beach Corporation to deny that the said Baker was the owner and that the said Baker's heirs are now the owners of the property described in the complaint, and that plaintiff is further estopped to deny that the Carolina Beach Corporation is entitled to have the property described in the complaint sold and its claims against the estate of the said Baker paid from the proceeds thereof."

Plaintiff in his reply to the answer of the Carolina Beach Corporation, denied all allegations therein of acts, conduct, representations or inducements by him, upon which said defendant alleged that plaintiff is estopped as to the Carolina Beach Corporation from maintaining this action.

Plaintiff thereafter, by leave of court, filed an amended complaint in which he alleged that subsequent to the filing of his original complaint in this action, certain of the lots or parcels of land conveyed to John R. Baker by the deed dated 12 January, 1927, had been sold under valid deeds of trust, executed and registered prior to the conveyance of said lots or parcels of land to the said John R. Baker, and that plaintiff as the purchaser at said sales, is now the owner of said lots or parcels of

land, holding title thereto under deeds executed to him by the trustees in said deeds of trust.

Plaintiff further alleged in his amended complaint that prior to the commencement of this action, and before any controversy as to his ownership of the equitable title to said lots or parcels of land had arisen, he paid certain notes secured by deeds of trust on certain of said lots or parcels of land conveyed to John R. Baker, as trustee for him, and that such payments were made by him because he had assumed the said notes as the equitable owner of said lots or parcels of land, when the same were conveyed to the said John R. Baker, as trustee for him; he alleges that in any event, he is entitled to a first lien on said lots or parcels of land for the amounts paid by him on said notes.

The issues determinative of the right of the plaintiff to recover of the defendants, the heirs at law, the widow and the administrator of John R. Baker, deceased, in this action, were answered as follows:

"(1) Did the plaintiff furnish the consideration for the conveyance to John R. Baker of the property described in the complaint? Answer: Yes.

(2) Did John R. Baker hold the legal title to the property described in the complaint as trustee for the plaintiff? Answer: Yes."

From judgment in accordance with the answers to these issues there was no appeal.

The issues determinative of the right of the defendant, Carolina Beach Corporation, to the relief prayed for in its answer against the plaintiff, were answered as follows:

"(3) If so, is the plaintiff estopped from claiming title to said property against the Carolina Beach Corporation as alleged in the answer of the Carolina Beach Corporation? Answer: Yes.

(4) In what amount, if any, is the estate of John R. Baker indebted to the Carolina Beach Corporation? Answer: $8,583.33.

(5) Did the plaintiff purchase at foreclosure sales, under deeds of trust duly recorded prior to the time the deed to John R. Baker was filed for record, the lands described in the trustee's deeds referred to in the amended complaint? Answer: Yes."

Other issues submitted to the jury, involving amounts paid by plaintiff in total or partial discharge of liens on certain of the lots or parcels of land conveyed to John R. Baker and existing at the date of said conveyance, were answered by consent. These amounts were all paid by plaintiff prior to the commencement of this action, and in recognition of his liability for said amounts, by reason of the assumption of the indebtedness secured by deeds of trust on said lots or parcels of land, by John R. Baker, as trustee for plaintiff, when the same were conveyed to him.

In accordance with the answers to the third and fourth issues, it was ordered, considered and adjudged by the court that "W. M. Nissen is estopped as against the Carolina Beach Corporation to assert any title or claim of title or right to the lands described in the complaint and amended complaint in this cause, unless and until he pays to the Carolina Beach Corporation the sum of $8,583.33."

It was further ordered, adjudged and decreed that the lands described in the complaint be sold by a commissioner appointed for that purpose, and that the proceeds of said sale be applied, first, to the payment of the expenses of said sale, and second, to the payment of the claim of the Carolina Beach Corporation in the sum of $8,583.33; and that the balance of such proceeds, if any, be paid to the plaintiff, W. M. Nissen.

There was no adjudication of the rights of plaintiff, if any, upon the affirmative answer to the fifth issue, nor upon the answers to the remaining issues fixing the amounts paid by plaintiff in total or partial discharge of liens upon certain of the lots or parcels of land described in the complaint, which existed at the date of the conveyance of said lots or parcels of land to John R. Baker, and which were discharged by plaintiff prior to the commencement of this action.

From the judgment rendered, plaintiff appealed to the Supreme Court.

*Oscar O. Efird, John M. Robinson and Hunter M. Jones for plaintiff.*

*Ratcliff, Hudson & Ferrell and Tillett, Tillett & Kennedy for defendant, Carolina Beach Corporation.*

CONNOR, J. As our decision of the determinative question presented by plaintiff's assignments of error with respect to the trial of the third issue will dispose of this appeal, we shall not decide or discuss questions presented by his other assignments of error. None of these questions involve the third issue, which is alone determinative of the right of defendant, Carolina Beach Corporation, to recover of the plaintiff in this action. There was no appeal from the judgment that plaintiff, as against the defendants who are the holders of the legal title to the land described in the complaint, is the equitable and beneficial owner of said land and is entitled to a conveyance to him of the legal title held by said defendants. The judgment in that respect is final and conclusive.

In its answer, the Carolina Beach Corporation alleges that the plaintiff is estopped from asserting his ownership of the equitable title to the land described in the complaint, if it shall be adjudged in this action that he is entitled to such ownership, and from thereby defeating the right of said corporation, as a creditor of John R. Baker, deceased, to have said land sold for the payment of its debt. This general allegation

is based, primarily, on the specific allegation that the plaintiff, at the time it extended credit to the said John R. Baker, and as an inducement for the extension of such credit, represented to said corporation that the said John R. Baker was the owner of the land described in the complaint. Plaintiff in his reply to the said answer, denied that he made such representation.

The burden of proof on the issue thus raised by the pleadings, and submitted to the jury as the third issue, was on the defendant, Carolina Beach Corporation. Plaintiff contends that there was no evidence from which the jury could find that plaintiff made any representation to the Carolina Beach Corporation, with respect to the title to the land described in the complaint, as alleged in defendant's answer. This contention is presented by plaintiff's assignments of error based on his exception to the refusal of the court to allow his motion for judgment as of nonsuit, at the close of all the evidence, by his exceptions to the refusal of the court to give his prayers for instructions on the third issue, and by his exceptions to instructions as given by the court on said issue in its charge to the jury. We are of opinion that these assignments of error should be sustained, for that there was no evidence tending to show that plaintiff, orally or otherwise, made any representation to the defendant with respect to the title to the land described in the complaint. As there was no evidence to sustain an affirmative answer to the third issue, the judgment founded on such answer must be reversed.

Plaintiff is not estopped from asserting as against the defendant, Carolina Beach Corporation, his equitable title to the land described in the complaint by the fact alone that the deed by which said land was conveyed to John R. Baker was on record in Mecklenburg County and that it did not appear on the face of said deed that the said John R. Baker held only the legal title to said land as trustee for the plaintiff. At the date of the commencement of this action, the Carolina Beach Corporation was merely a creditor of John R. Baker; it had acquired no lien, by docketed judgment or otherwise on the land described in the complaint. Plaintiff was the owner of the equitable title to said land, which was enforceable not only against the holder of the legal title, but also against all persons, other than purchasers for value, without notice. *Spence v. Pottery Co.*, 185 N. C., 218, 117 S. E., 32. See, however, *Trust Co. v. Collins*, 194 N. C., 363, 139 S. E., 593, in which it is said:

"The principles upon which the doctrine of equitable estoppel is founded have been more frequently applied where the title to property, real or personal, has passed immediately, by sale or conveyance; they are likewise applicable, at least ordinarily, where credit has been extended upon the well-founded belief of the creditor that his debtor is the owner of specific property, subject to sale under execution on a judg-

ment against him, which in truth and in fact is owned at the time by another, who prior to the extension of credit has represented to the creditor that the debtor is the owner of the property. In such case, where all the essential elements of an equitable estoppel are found to exist, it may well be held that the true owner is estopped from asserting his title as against the creditor who has reduced his debt to judgment."

The only evidence relied upon by defendant, Carolina Beach Corporation, as tending to show that plaintiff represented to said corporation that John R. Baker was the owner of said land, was the testimony of the president and of the secretary of said corporation. Both of these witnesses for the defendant testified that at a conference between them and the said John R. Baker, prior to 22 June, 1927, the said Baker represented to them that he was the owner of the land described in the complaint, and that a subsequent examination of the records of Mecklenburg County showed that a deed by which the said land had been conveyed to him was duly registered in said county. There was evidence tending to show that at this time Baker was the private secretary and agent of the plaintiff, but also tending to show that at said conference Baker was acting for himself, and not for the plaintiff. The plaintiff was not present at said conference. Both the witnesses testified that they had no communication with plaintiff, oral or otherwise, with respect to the subject-matter of said conference, or with respect to the title to the land described in the complaint. In the absence of any evidence tending to show that plaintiff made any representation to the defendant corporation with respect to the title to said land, prior to its extension of credit to the said Baker, plaintiff's motion for judgment as of nonsuit should have been allowed.

Although John R. Baker held the legal title to the land described in the complaint, under the deed dated 12 January, 1927, and duly recorded on 14 February, 1927, as trustee for the plaintiff, at the time he represented that he was the owner of said land, such representation, being in disparagement of the title of the plaintiff, and for the benefit of the said Baker, only, was not competent as evidence against the plaintiff. *Perkins v. Brinkley*, 133 N. C., 348, 45 S. E., 652.

There are other errors in this appeal for which plaintiff would be entitled to a new trial. As there was error, however, in the refusal of the court to allow plaintiff's motion for judgment as of nonsuit, it is needless to discuss errors for which a new trial should be granted.

The judgment that plaintiff is estopped as against the Carolina Beach Corporation to assert his equitable title to the land described in the complaint unless and until he pays to the said corporation the amount of its debt against the estate of John R. Baker, deceased, as found by the jury, and that the land be sold for the payment of said debt, is

Reversed.

KIRBY *v.* COMMISSIONERS OF PERSON.

DEFENDANTS' APPEAL.

APPEAL by defendant, Carolina Beach Corporation, from *Sink, Special Judge,* at May Special Term, 1929, of MECKLENBURG. Dismissed.

From judgment in accordance with the answer to the fourth issue submitted to the jury at the trial of this action, defendant, Carolina Beach Corporation, appealed to the Supreme Court.

*Oscar O. Efird, John M. Robinson and Hunter M. Jones for plaintiff.*

*Ratcliff, Hudson & Ferrell and Tillett, Tillett & Kennedy for defendant, Carolina Beach Corporation.*

CONNOR, J. The question presented by this appeal need not be decided, as we have held in plaintiff's appeal from the judgment in this action, that said judgment must be reversed for error in the refusal of plaintiff's motion for judgment as of nonsuit. This appeal is

Dismissed.

J. E. KIRBY v. BOARD OF COMMISSIONERS FOR PERSON COUNTY.

(Filed 5 March, 1930.)

**1. Taxation A g—Where suit to restrain issuance of bonds is not brought within 30 days after notice, validity of bonds will be upheld.**

Where the board of county commissioners have under ordinance duly passed and hearing thereon had are about to issue bonds for the necessary purpose of erecting a jail, etc., contrary to the restrictions of the County Finance Act limiting the amount of bonds for other than school purposes to an amount not to exceed five per cent of the property valuation, a suit to restrain the issuance of the bonds is required by the express terms of the statute, C. S., 1334(20) to be commenced within thirty days after the publication of the required notice and order of the issue, and a suit instituted after the time prescribed cannot be maintained and the validity of the bonds will be upheld. The question of whether the statute is strictly one of limitation or a condition annexed to the cause of action is immaterial.

**2. Taxation A b—Sections restricting tax rate and limiting time in which validity of bonds may be attacked to be construed in para materia.**

The section of Municipal Finance Act, Public Laws of 1927, relating to the restriction on taxation, and the section relating to the time in which proceedings may be brought attacking an authorized levy of tax or issuance of bonds are to be construed in *pari materia.*

CIVIL ACTION, before *Sinclair, J.,* in Chambers, at Durham, 27 June, 1929. From PERSON.

The record discloses that for many years the jail facilities of Person County have been wholly inadequate and unsanitary. At the January Term, 1924, of Person Superior Court the said jail was ordered closed by the judge of the Superior Court because of failure of the structure to comply with the law. Repairs were made, but at the August, 1927, Term the judge of the Superior Court ordered the jail closed and instructed the solicitor to indict the members of the board of county commissioners for failure to provide a proper jail. The said commissioners were presented by the grand jury and are now facing indictment.

On 7 November, 1927, the board of commissioners of Person County passed a resolution authorizing the issuance of $125,000 in bonds for the purpose of building a new courthouse and jail. A petition was filed demanding an election, and an election was duly held on 7 February, 1928, at which election the proposition was defeated. Thereafter, on 23 April, 1928, a new order authorizing the issuance of $150,000 of bonds was submitted to a vote of the people on 5 June, 1928, and the proposition was again defeated.

Thereafter, on 7 January, 1929, the board of commissioners of Person County duly adopted a bond ordinance authorizing the issuance of $150,000 of bonds to be known as courthouse and jail bonds. The bonds were to be issued pursuant to the County Finance Act of 1927. The bond order provided in section 5 "that this order shall take effect upon its passage, and the present order having been published for thirty days and no petition having been filed with the board for the submission of the order to the voters of the county, as provided by the County Finance Act, shall not be submitted to the voters."

Thereafter, on 24 June, 1925, the plaintiff instituted an action to restrain the defendant "from proceeding further in the issuing and sale of said courthouse and jail bonds and from levying said tax," etc.

The defendant filed an answer and the cause came on for hearing, and it was adjudged that "upon consideration of the pleadings herein filed, the amendment to the answer pleading the provisions of subsection 20, section 1334, of the Consolidated Statutes, having been filed by leave of this court, and the argument of counsel, the court being of the opinion that the bond orders of the defendant sought to be restrained by plaintiff, the bonds proposed to be issued, sold and delivered thereunder and the taxes proposed to be levied are valid and legal in every respect and that the plaintiff is, therefore, not entitled to the relief demanded in this complaint, it is therefore ordered, adjudged and decreed that the temporary injunction issued in this cause on 24 June, 1929, be, and is hereby dissolved."

From the foregoing judgment plaintiff appealed.

It is admitted that on 7 March, 1927, the date of the ratification of the County Finance Act, that the assessed valuation for taxation for said county was $14,683,010, and that the net indebtedness for other than school purposes was $580,407.25, same being less than four per cent of the assessed valuation of that date. It was admitted that on 7 January, 1929, when the present bond order was adopted that the assessed valuation of property in said county was $13,219,369, and the net indebtedness of said county for other than school purposes, including the proposed issue of $150,000, was $696,812.25. It was further admitted that the indebtedness of Person County for other than school purposes, including the amount of the proposed bond issue, will exceed five per cent of the assessed value of all taxable property of said county, and that the net indebtedness for other than school purposes on 7 March, 1927, was less than four per cent of the then assessed valuation of property.

*F. O. Carver for plaintiff.*
*Robert P. Burns for defendant.*

BROGDEN, J. No question is raised with reference to the validity and regularity of all preliminary steps required by the statute in adopting bond ordinances or resolutions. The merits of the whole controversy depend upon the proper construction of section 17, chapter 81, Public Laws of 1927, with reference to that part of said section which undertakes to fix a debt limit for the county. It is conceded that the proposed bond issue is for a necessary governmental expense, and hence special legislative authority for issuing bonds for such purpose is contained in section 8 of said County Finance Act. The portion of section 17 of said act involved in this appeal is as follows: "And no order shall be passed for the issuance of bonds other than school bonds unless it appears from said sworn statement that the net indebtedness for other than school purposes does not exceed five per cent of said assessed valuation . . . and that if the net debt of any county for other than school purposes shall, on the day this act is ratified be in excess of four-fifths of the limitation above fixed therefor, such order may be passed if the net debt for other than school purposes shall not be increased thereby more than two per cent of such assessed valuation," etc. The County Finance Act was ratified on 7 March, 1927. The admitted facts disclose that on that date the net debt of Person County for other than school purposes was less than four per cent of the then assessed valuation of property. Apparently the County Finance Act undertook to prohibit the issuing of bonds for "other than school purposes" in excess of five per cent of the assessed valuation of property unless at the time the act took effect a

county had theretofore issued bonds in excess of four per cent of the assessed valuation of property. If the net indebtedness "for other than school purposes" was less than four per cent on the date the act was ratified, then the utmost limit of bonds could not exceed five per cent of the assessed valuation. However, if the net indebtedness "for other than school purposes" was more than four per cent of the assessed valuation on 7 March, 1927, then additional bonds in an amount not exceeding two per cent of the assessed valuation could be issued and sold.

Applying the law as written to the facts in the case at bar, it is clear that the two per cent increase does not apply. Therefore, it necessarily follows that the bond order authorizing $150,000 exceeded the debt limit.

The bond order was finally passed on 11 February, 1929, after a public hearing held on 21 January, 1929. Suit was not instituted until 24 June, 1929, or after a lapse of four months from the final passage of the bond ordinance. The defendant pleads section 20 of chapter 81, Public Laws of 1927, which is now C. S., 1334 (20), which provides in substance that the validity of the bond order shall not "be open to question in any court upon any ground whatever" unless the proceeding be commenced "within thirty days after the first publication of notice as aforesaid and the order or supposed order referred to in the notice." C. S., 1334 (20) has not been construed by this Court, but statutes requiring notice to be given and providing that failure to give a notice within the time specified will operate as a bar, have been frequently construed and upheld. *Neal v. Marion,* 126 N. C., 412, 35 S. E., 812; *Board of Education v. Town of Greenville,* 132 N. C., 4, 43 S. E., 472; *Dockery v. Hamlet,* 162 N. C., 118, 78 S. E., 13; *Noland v. Asheville,* 197 N. C., 300.

Other jurisdictions have adopted the same construction of similar statutes. *Montgomery v. City of Atlanta,* 134 S. E., 152; *King v. Mayor of City of Butte,* 230 Pac., 62; *Waters v. Bayonne,* 104 Atlantic, 770; *Ditzel v. Evergreen Highway District,* 187 Pac., 269; *Henderson Land, Timber and Investment Co. v. Police Jury of Vernon Parish,* 106 So., 285.

The time limit discussed in the foregoing authorities ranges from fifteen days to one year. Some of the courts interpret the time limit as a condition precedent or annexed to the cause of action. Others refer to it as a special statute of limitation.

As intimated in *Board of Education v. Town of Greenville, supra,* it is unnecessary to inquire or to decide whether the statute is strictly one of limitation or a condition precedent annexed to the cause of action. In either event, the statute in plain and imperative English provides that the validity of a bond ordinance shall not be open to question unless

the suit is brought within thirty days after the first publication of notice. This statute is part of the act authorizing the bond ordinance, and hence all parts of the same statute must be read and construed together. The effect of the time limit is that, after the lapse of thirty days, if no suit has been instituted, the bond ordinance is deemed to be valid for all purposes.

There are other questions referred to in the briefs, but they are not material in view of the construction placed upon the statute.

Affirmed.

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GRACE M. BLADES AND HUSBAND, W. B. BLADES, v. FLOYD M. SIMMONS.

(Filed 5 March, 1930.)

**Injunctions D b—Where record does not show that plaintiff's action is invalid continuance on ground of irreparable injury will be upheld.**

Where the defendant sets up that the plaintiff's cause of action is invalid because a parol trust in favor of a grantor in a deed cannot be created by oral evidence, and it does not appear from the record that the alleged trust is to be established by oral evidence, and the judgment recites that a continuance of the restraining order will not irreparably injure the defendant and that a dissolution might cause great injury to the plaintiff, the judgment continuing the order to the hearing will be affirmed.

APPEAL by defendant from an order of *Nunn, J.*, at Chambers, on 26 August, 1929, continuing a restraining order to the hearing. From CRAVEN. Affirmed.

*Moore & Dunn and Warren & Warren for plaintiffs.*

*J. F. Duncan and Ward & Ward for defendant.*

PER CURIAM. It is alleged in the complaint that in the course of negotiations between W. B. Blades and the defendant the parties agreed that the plaintiffs should convey to the defendant a certain lot in the city of New Bern for the purpose of securing the payment of $20,000 with interest, and that upon payment of this amount the defendant should reconvey the lot to the *feme* plaintiff. The complaint and the answer raise issues of fact which, nothing else appearing, would require the intervention of a jury; but the defendant alleges that the plaintiffs' cause of action is invalid because a parol trust cannot be created by agreement of the parties in favor of the grantors in the deed or either of them. We may say without debating this question that it does not

necessarily appear from the record that the creation of the alleged trust is to be established, if at all, by oral testimony; and upon the facts as disclosed by the record we find no sufficient cause for reversing the judgment. The judgment contains the recital that a continuance of the restraining order will not irreparably harm the defendant and that a dissolution of it might cause great injury to the plaintiff.

Judgment affirmed.

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GEORGE B. GREENE, COMMISSIONER, v. H. STADIEM AND WIFE, YETTIE STADIEM.

(Filed 12 March, 1930.)

1. **Partition A b—Parties not of age or in esse, being tenants in common with others sui juris, are not bound by consent decree for partition.**

   Where, under a devise for life to the children of the testator with remainder to his grandchildren to be held in common by them until the youngest shall arrive at the age of 21 years, the holders of the life estates and devisees of age of the remainder in common obtain a consent decree for partial partition: *Held*, the testamentary postponement of the partition not being void, the partial partition is adverse to the grandchildren not of age or not *in esse*, and they are not bound by the proceedings, and the commissioner appointed to sell the land for partition cannot give a good fee-simple title.

2. **Wills E g—Restriction on partition of lands devised until the children of the holders of the life estate are of age is valid.**

   A testamentary provision prohibiting or postponing partition of devised lands for a definite time or during the minority of the devisees is not regarded as a restraint on alienation or a limitation repugnant to the fee, and is generally upheld.

APPEAL by defendants from *Daniels, J.*, at October Term, 1929, of LENOIR.

Controversy without action, submitted on an agreed statement of facts.

The plaintiff, commissioner appointed by the court in a partition proceeding to convey a certain store and lot in the town of Kinston to the defendants for a consideration of $22,000, duly executed and tendered deed therefor, but the defendants decline to accept said deed and refuse to pay the purchase price, on the ground that the title offered is defective.

The sufficiency of the title offered was properly made to depend upon the construction of the following item in the will of John L. Nelson:

"Item 7. I give and devise in fee simple, after the full enjoyment of the life estate of my wife, Mary A., and the full enjoyment of the life estate of my daughter Reba, and the full enjoyment of the life estate of my daughter Retha, in manner set out in Item 2 and Item 4 and Item 5 of this my last will and testament, all the said brick building to the lawful begotten children of my daughters Retha and Reba, that the said children shall hold said property in common until the youngest one of said children shall arrive at the age of 21 years. By the word children I mean the children of my daughters now born or that may be born to them in the future."

The brick building mentioned in the above item of the will consists of two adjoining stores of approximately equal value. This property as a whole was devised to the testator's wife for her natural life, and at her death, the northern store was to go to his daughter, Reba Byrd, during her natural life, and the southern store was devised to his daughter, Retha Blow, during her natural life, which is the part now sought to be sold. The remainder in fee of said property is disposed of in the 7th item of the will.

The testator's widow, Mary A. Nelson, is dead and his two daughters, Mrs. Reba Byrd and Mrs. Retha Blow, are now in the enjoyment of the life estates so devised to them. The first is a widow, 55 years of age, with eight children, all living, and the second is married, 47 years of age, with three children, all living. Some of the children now living (5) are under 21 years of age.

On the facts agreed, the court, being of opinion that the deed tendered was sufficient to convey a good title, gave judgment for the plaintiff, from which the defendants appeal, assigning errors.

*Sutton & Greene for plaintiff.*
*F. E. Wallace for defendants.*

STACY, C. J. Two questions are presented by the appeal:

1. Do the children of the present life tenants take vested remainder interests in the property in question subject only to open up and let in after-born children, if any, of one or both of the present life tenants? *Lumber Co. v. Herrington,* 183 N. C., 85, 110 S. E., 656.

2. Does the provision "that the said children shall hold said property in common until the youngest of said children shall arrive at the age of 21 years" preclude a division or partition of said lands at the present time, all parties now living having consented, in a proceeding instituted for the purpose, that the children of Mrs. Reba Byrd should be allotted the northern store subject to the life estate of their mother, and the

children of Mrs. Retha Blow the southern store subject to the life estate of their mother, and that the after-born children, if any, of Mrs. Reba Byrd should share only with their brothers and sisters in the northern store, and the after-born children, if any, of Mrs. Retha Blow should share only with their brother and sisters in the southern store?

Conceding, without deciding, that the testator's grandchildren, children of his two daughters, Reba and Retha, take vested remainder interests in the property in question (*Green v. Green,* 86 N. C., 546), and conceding further that by consent those now living and *sui juris* may disregard the testamentary provision requiring said property to be held in common until the youngest of said children shall become of age, *non constat,* unless said testamentary postponement of partition be void, or contrary to public policy, the division or partial partition, entered by consent, would not be binding on the children under age or on any child or children that may hereafter be born to either of the present life tenants, for as to them the proceeding was adverse and the consent judgment entered in the partition proceeding is in direct violation of the terms of the will. Mrs. Reba Byrd and her children are not parties to this proceeding, though they were parties to the partition proceeding in which the plaintiff was appointed commissioner to sell the *locus in quo.*

It is the contention of the plaintiff that the testamentary postponement of partition in question is void because in restraint of the full enjoyment of the fee. This view prevailed in the court below upon the theory that it was a restraint on alienation and, therefore, void. *Combs v. Paul,* 191 N. C., 789, 133 S. E., 93; *Brooks v. Griffin,* 177 N. C., 7, 97 S. E., 730; *Wool v. Fleetwood,* 136 N. C., 460, 48 S. E., 785; *Latimer v. Waddell,* 119 N. C., 370, 26 S. E., 122.

But a testamentary provision, prohibiting or postponing partition, for a definite time, or during the minority of the devisees, is not regarded as a restraint on alienation, or limitation repugnant to the fee, and is generally upheld. *Blake v. Blake,* 118 N. C., 575, 24 S. E., 424; *Peterson v. Damoude,* 98 Neb., 370, 14 A. L. R., 1238, and note.

Speaking to the subject in *Dee v. Dee,* 212 Ill., 338, *Scott, J.,* delivering the opinion of the Court, said: "The general rule is that an adult tenant in common may demand partition as a matter of right (*Martin v. Martin,* 170 Ill., 639); and the fact that he is a remainderman and that the particular estate has not expired is not a valid objection (*Drake v. Merkle,* 153 Ill., 318); but equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed upon the estate by one through whom he claims (21 Am. & Eng. Ency. of Law, 2 ed., 1158; *Hill v. Reno,* 112 Ill., 154; *Ingraham v. Mariner,* 194 *ibid.,* 269; *Brown v. Brown,* 43 Ind., 474; *Hunt v. Wright,* 47 N. H., 396); nor is such a condition or re-

striction in the instrument conveying the estate invalid as repugnant to the estate granted, or as against public policy. *Hunt v. Wright, supra.*"

It is true, the guardian *ad litem* of such child or children, if any, as may hereafter be born to Mrs. Retha Blow, did not resist the judgment of partition, but it should be remembered that the tenants in fee of the property in question all derive their interests from the will of John L. Nelson, and while the restriction in question may, in the judgment of some, be unwise, nevertheless it is his will, and the provision is valid. Note 14, A. L. R., 1240.

It should be observed, perhaps, that the parties are not undertaking to sell the land in question for reinvestment. C. S., 1744.

It follows, therefore, from this view of the case, in keeping with the agreement under which the controversy was submitted without action, that the same should be dismissed unless title in accordance with the partition decree could be given, that the action must be dismissed.

Action dismissed.

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O. E. HARPER, ADMINISTRATOR OF MARY RUTH HARPER, DECEASED, v. FRANK BULLOCK.

(Filed 12 March, 1930.)

**1. Death B a—Where it appears of record that action for wrongful death was brought within year, judgment denying nonsuit will be upheld.**

Where, in an action to recover damages for a wrongful death, the date of the death is admitted in the pleadings and summons bears date of issuance within one year therefrom, and these matters affirmatively appear in the record on appeal, the presumption is that the evidence was properly before the jury, and the judgment of the trial court denying defendant's motion as of nonsuit, entered on the ground that the action was barred by the statute, will be upheld. C. S., 160.

**2. Food A a—Evidence that death was proximate result of defendant's negligence held sufficient to be submitted to the jury.**

Where, in an action to recover damages for the wrongful death of the plaintiff's intestate, the evidence tends to show that the intestate became sick after purchasing and eating wieners bought from the defendant, and that she complained of pains in her stomach and that she continued to grow worse until her death about two weeks later, and that the wieners were made in part of rotten meat, and that another in company with the intestate was also made sick from eating wieners bought at the same time, with medical expert testimony to the contrary that death did not result from eating the wieners: *Held*, the evidence that death was the proximate result of the defendant's negligence was sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit.

APPEAL by defendant from *Devin, J.*, at October Term, 1929, of EDGECOMBE. No error.

This is a civil action to recover damages resulting from the death of plaintiff's intestate, caused by the negligence of defendant.

The issues submitted to the jury were answered as follows:

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

2. If so, what damage is plaintiff entitled to recover? Answer: $2,083.30."

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

*J. W. Keel, C. C. Pierce and Ward & Grimes for plaintiff.*

*Thos. J. Pearsall, Geo. M. Fountain and Gilliam & Bond for defendant.*

CONNOR, J. Defendant's only assignment of error on his appeal to this Court is based on his exception to the order of the trial court, refusing to allow his motion for judgment as of nonsuit, at the close of all the evidence. C. S., 567. In support of this assignment of error, defendant contends:

1. That there was no evidence at the trial that this action was begun within one year from the date of the death of plaintiff's intestate.

2. That there was not sufficient evidence that the death of plaintiff's intestate was the proximate result of the eating by her of wieners, or sausages, manufactured by the defendant, and sold by him to plaintiff's intestate.

It is alleged in the complaint and admitted in the answer that plaintiff's intestate died on 29 August, 1927. It does not appear from the evidence set out in the case on appeal, when this action to recover damages for her wrongful death was begun—whether before or after the expiration of one year from said date. It appears, however, from the record, as certified to this Court on defendant's appeal, that the summons was issued on 18 April, 1928. There is no contention that this is not the date of its issuance and therefore of the commencement of this action. It thus appears that the action was in fact brought by the plaintiff within one year from the date of the death of his intestate. C. S., 160.

In *Harrington v. Wadesboro,* 153 N. C., 437, 69 S. E., 399, it is said that "the authorities are to the effect that courts will take judicial notice of facts and entries of record in the suit being presently tried, and in support of the validity of the verdict and judgment it is proper for the

appellate court to assume that a fact of this character was brought to the attention of the jury in some permissible way." Where the record shows that an action to recover damages for a wrongful death was brought within one year from the date of the death, and that there was no controversy at the trial as to whether or not it was brought within such time, an order refusing to allow defendant's motion for judgment as of nonsuit, will not be held error in this Court, because it does not affirmatively appear in the case on appeal that the summons was issued prior to the expiration of one year from the admitted date of the death. Where it affirmatively appears from the evidence as certified to this Court that the action was not brought within the year, a judgment dismissing the action as of nonsuit will be affirmed, as was done in the case of *Hanie v. Penland*, 193 N. C., 800, 135 S. E., 165. See *Tieffenbrun v. Flannery, ante*, 397, and cases cited in the opinion of *Brogden, J.*

The evidence offered by the plaintiff tended to show that defendant was negligent with respect to the meat used by him and his employees in the manufacture of the wieners or sausages which he sold to plaintiff's intestate, and which she ate almost immediately after she had bought them. Defendant offered evidence to the contrary. The conflicting evidence with respect to defendant's negligence as alleged in the complaint was properly submitted to the jury. It is sufficient to say that the evidence offered by plaintiff was amply sufficient to support his allegation that defendant used, or caused to be used by his employees, in the manufacture of the wieners or sausages, which he sold to plaintiff's intestate, and which she ate, meat which was unfit for human consumption, and which was calculated to cause the wieners or sausages to make the plaintiff sick.

The question chiefly debated on the argument of this appeal was whether there was any evidence at the trial of this action from which the jury could find that defendant's negligence was the proximate cause of the death of plaintiff's intestate. If there was such evidence, there was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit; otherwise, there was error, and the judgment must be reversed.

Plaintiff's intestate, Mary Ruth Harper, at the date of her death, 29 August, 1927, was about nine years of age. Prior to 16 August, 1927, she was a bright, happy, healthy child. On said day, she and Elsie Jackson, then about ten years of age, went to defendant's place of business, in Rocky Mount, N. C., and there bought some wieners or sausages. Soon after they ate the wieners or sausages they both became very sick. There was evidence tending to show that these wieners or sausages were made of rotten or decomposed meat, and other ingredients,

which made them unfit for human consumption. Both the girls vomited repeatedly, and then went to the home of Elsie Jackson. The mother of Elsie Jackson testified that both the girls were deathly sick when they came to her home. Mary Ruth spent the night in the Jackson home and was sick the next morning. She then went to her home, accompanied by Elsie Jackson. Her mother testified that Mary Ruth was very pale and sick when she came home. She was put to bed and remained there until her death on 29 August, 1927. She gradually grew worse, complaining constantly of pain in her stomach. Her stomach became swollen and distended, and she vomited repeatedly. A physician was called to see her on the seventh day after she had eaten the wieners or sausages, and attended her until her death. His treatment did not relieve her.

This physician, as a witness for defendant, testified that he treated Mary Ruth for nephritis or Bright's disease, and that in his opinion, although they were made of decomposed and rotten meat, the wieners or sausages, which the child had eaten on 16 August, 1927, did not cause her death on 29 August, 1927. Other physicians, who testified for defendant as expert witnesses, concurred in this opinion.

The principle is well established in the law that when both the negligence and the injury alleged in the complaint in an action to recover damages resulting from the injury are admitted or shown by the evidence at the trial, the question as to whether or not the negligence was the proximate cause of the injury is ordinarily for the jury. The negligence of the defendant, although followed in point of time by the injury to the plaintiff, is not actionable unless there is the relation of cause and effect between them (*Byrd v. Express Co.*, 139 N. C., 273, 51 S. E., 851), and the burden is upon the plaintiff to show not only the negligence of the defendant and the injury to himself, but also that the negligence of the defendant was the proximate cause of his injury.

Giving full force to these elementary principles, we are of the opinion that there was evidence on the trial of this action from which the jury could find that the negligence of the defendant was the proximate cause of the death of plaintiff's intestate. The charge of the court to the jury does not appear in the case on appeal, for the reason that there were no exceptions to instructions given therein. The learned judge who presided at the trial properly submitted the evidence to the jury, and we are assured correctly instructed them as to the law. We find

No error.

BRANCH INVESTMENT COMPANY v. J. S. WOOTEN AND WIFE, MAMIE G. WOOTEN,

AND

J. S. WOOTEN AND WIFE, MAMIE G. WOOTEN, v. BRANCH BANKING AND TRUST COMPANY, AND METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 12 March, 1930.)

**Mortgages A c—Member of firm securing loan upon commission does not have interest disqualifying him from taking acknowledgment of mortgage.**

The pecuniary interest which disqualifies a notary public from taking the acknowledgment and privy examination of a husband and wife to their mortgage of lands is an interest in the lands conveyed, and does not include his interest in the transaction as a member of the firm securing the loan upon a commission.

APPEAL by defendants J. S. Wooten and wife, Mamie G. Wooten, from *Daniels, J.*, and a jury, at November Term, 1929, of LENOIR. No error.

The above-entitled two civil actions having been consolidated by order of the court, came on for trial before his Honor, F. A. Daniels, judge presiding. The issues submitted to the jury and their answers thereto were as follows:

"1. Did J. S. Wooten and wife, Mamie G. Wooten, execute and deliver unto the Metropolitan Life Insurance Company their note in the sum of $6,000, as alleged? Answer: Yes.

2. Was the Metropolitan Life Insurance Company the owner of said note at the institution of these actions? Answer: Yes.

3. Did W. B. Douglass, notary public, fail and neglect to take the private examination of Mamie G. Wooten, as required by law, to the deed of trust of J. S. Wooten and wife to Branch Banking and Trust Company, trustee, as alleged? Answer: No.

4. Was W. B. Douglass, notary public, so financially interested in the said deed of trust as to disqualify him from taking the acknowledgment of J. S. Wooten and wife, Mamie G. Wooten? Answer: No.

5. Is the Branch Investment Company the owner of and entitled to the possession of the lot of real estate in controversy? Answer: Yes.

6. Were the proceeds of the $6,000 used to discharge valid subsisting liens against the real estate of J. S. Wooten and wife, Mamie G. Wooten, located on the northwest corner of McLewean Street and Vernon Avenue? Answer: Yes, except $99.62 and $420 and $75."

There was evidence tending to support the findings of the jury on the first, second and third issues.

The court below charged the jury: "As to the fourth issue, which is 'Was W. B. Douglass, notary public, so financially interested in said deed of trust as to disqualify him from taking the acknowledgment of J. S. Wooten and wife?' After such investigation as I have been able to devote to the legal question involved, with the aid of the gentlemen on both sides, I am of the opinion that in order to constitute such disqualification he must have been financially interested in the property conveyed, and there being no evidence to that effect, I charge you that if you believe the evidence you will answer the fourth issue No, that is, that he was not financially interested in the deed of trust."

To this charge defendants excepted and also to the judgment as set out in the record, duly assigned error and appealed to the Supreme Court.

*Sutton & Greene, David W. Isear and Connor & Hill for plaintiff.*
*Rouse & Rouse for defendant.*

CLARKSON, J. The question involved: Is a deed of trust executed by a husband and wife rendered void by reason of the fact that the acknowledgment thereof by the makers and privy examination of the wife were taken by a notary public who was a member of the firm which negotiated the loan secured thereby and which firm was entitled to receive a commission out of the loan for its services, there being no evidence of fraud or undue influence? We think not.

In *White v. Connelly,* 105 N. C., at p. 70, the following safe rule is quoted: "No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that *Lord Coke* has laid it down, that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself.'" We do not think this salutary rule applicable to the facts in this action:

In *Holmes v. Carr,* 163 N. C., at p. 123, we find: "We have numerous decisions that an acknowledgment of a deed by the husband and wife and privy examination of wife taken before a justice of the peace, commissioner, or a notary is a judicial or at least a *quasi*-judicial act, and that a probate is void if taken before one who has an interest in the conveyance. *White v. Connelly,* 105 N. C., 65; *Long v. Crews,* 113 N. C., 256; *Land Co. v. Jennett,* 128 N. C., 4. But this must be a pecuniary interest in the property conveyed. In *Gregory v. Ellis,* 82 N. C., 227, *Dillard, J.,* says: 'No judge, whether probate or other, could take jurisdiction of any cause wherein he was a party or otherwise had a *pecuniary interest.*"

Speaking to the subject in *Hinton v. Hall,* 166 N. C., at p. 479, we find: "W. L. Cahoon had no pecuniary interest in the transaction, and

his relation to Williams as brother-in-law did not disqualify him as notary public to take the acknowledgment of Hall and the privy examination of Hall's wife. Cahoon testified that of the $800 loaned Hall, $75 was paid to himself for a debt which Hall owed him and $300 for an indebtedness of Hall to Cahoon's wife for a tract of land."

In *Cowan v. Dale,* 189 N. C., at p. 687, it is written: "A. N. Dale, the deputy clerk who probated the chattel mortgage, was one of the grantees therein and by reason of his interest was not qualified to exercise this particular judicial function. An officer who has a pecuniary interest in a deed or mortgage as a party, trustee, or *cestui que trust* is disqualified to probate it or take the acknowledgment of its execution. *Long v. Crews,* 113 N. C., 256; *Lance v. Tainter,* 137 N. C., 249; *Holmes v. Carr,* 163 N. C., 122." See *McAllister v. Purcell,* 124 N. C., 262.

From the authorities in this jurisdiction, the principle laid down ordinarily is to the effect that the notary must not have a pecuniary or financial interest in the property conveyed. Under the facts and circumstances of this case he had none, and the court below so charged the jury. We find

No error.

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DWIGHT M. CASTELLOE v. NORMAN G. PHELPS.

(Filed 12 March, 1930.)

**1. Libel and Slander A a—In this case held: under facts and circumstances of their utterance, words of defendant were actionable per se.**

A publication claimed to be defamatory should be considered in the sense in which those who heard it would ordinarily understand it, and the circumstances of the utterance and the hearers' knowledge of facts influencing their understanding of the words are pertinent, and where the words spoken by the defendant thus considered permit the inference that he intended and was understood to charge the plaintiff with having uttered a criminal slander and added that the plaintiff should be put on the roads: *Held,* if such be the meaning of the language used the words employed by the defendant are actionable *per se.*

**2. Libel and Slander D e—Where words are ambiguous question of whether defamatory meaning was intended and understood is for jury.**

Where the words used by the defendant are capable of two constructions, one defamatory and the other not, it is for the jury to determine which of the two meanings was intended and understood by those by whom they were heard, taking into consideration the facts and circumstances of the utterance, and in an action thereon defendant's motion as of nonsuit should have been denied.

**3. Libel and Slander B b—In this case held: qualified privilege of defendant did not defeat plaintiff's right to go to the jury.**

In this case *held:* defendant's plea of qualified privilege in that the words claimed to be defamatory were spoken by him as a member of the board of trustees of a public school during a meeting cannot defeat plaintiff's right to go to the jury.

APPEAL by plaintiff from *Small, J.,* at August Term, 1929, of BERTIE. Civil action for slander.

The evidence discloses that plaintiff was principal of Colerain High School, and defendant a member of the board of trustees of said school. In the early morning of 9 December, 1924, about 7 a.m., five of the lady teachers of said school reported to the defendant at his home that the plaintiff had wrongfully accused them the night before of having a man in their room in the teacherage, and that they had come to tender their resignations; whereupon, the defendant called the plaintiff into a conference with the school board and the lady teachers in question. It is alleged that, during said conference, the defendant lost his temper and angrily addressed the plaintiff, loud enough to be heard by all those present and others on the outside, in words in substance as follows: "Mr. Castelloe, you have committed a crime and you ought to be put on the roads."

It is further in evidence that thereafter, and during the morning of the same day, the defendant, while in conversation with the matron of the school, voluntarily repeated in substance language to the same import of and concerning the plaintiff.

About 9:15 p.m. that night the defendant came to the plaintiff at the dormitory and said: "Mr. Castelloe, we have come for your resignation," and pointing to 18 or 20 men, who were standing under a tree about 50 or 60 feet away, added: "Those men have come here after you and you had better get out of Colerain tonight," which he did.

Plaintiff says the words used by the defendant, viewed in the light of the attendant circumstances, by fair intendment, meant to charge that the plaintiff had uttered a criminal slander against the teachers in question, and that they were so understood by those who heard them. Plaintiff testified that no such insinuation was made or intended by him, and that he had only charged the parties in question with a violation of the rules of the school.

From a judgment of nonsuit entered at the close of all the evidence, the plaintiff appeals, assigning errors.

*W. H. S. Burgwyn, E. R. Tyler and A. T. Castelloe for plaintiff.*

*R. Hunt Parker, J. A. Pritchett and J. H. Matthews for defendant.*

STACY, C. J. Are the words "You have committed a crime and you ought to be put on the roads," addressed to one in the presence of others, and later repeated to another, actionable *per se?* We think so, when viewed in the light of their imputation and the circumstances under which they were uttered in the instant case.

The words spoken by the defendant, considering the manner and circumstance of their use, as pointed out in *Cotton v. Fisheries Products Co.,* 177 N. C., 56, 97 S. E., 712, permit the inference, and were probably understood by those who heard them to mean, that the defendant intended to impute to the plaintiff, and did charge him with having uttered, a criminal slander, for which, he added, the plaintiff ought to be put on the roads, *i. e.,* subjected to infamous punishment. If such be the meaning of the language used, and the plaintiff says that it is, then, under the decision in *Jones v. Brinkley,* 174 N. C., 23, 93 S. E., 372, the words employed by the defendant are actionable *per se. Vincent v. Pace,* 178 N. C., 421, 100 S. E., 581.

The decisions are to the effect that a publication claimed to be defamatory should be considered in the sense in which those to whom it was addressed, or who heard it, would ordinarily understand it. When thus considered, if its meaning be such as to bear but one interpretation, it is for the court to say whether or not that signification is defamatory. On the other hand, if it be capable of two meanings, one actionable and the other not, it is for the jury to determine which of the two meanings was intended and so understood by those to whom it was addressed or by whom it was heard. *Washington Post Co. v. Chaloner,* 250 U. S., 290; *Publishing Co. v. Smith,* 149 Fed., 704. The circumstances of the publication are to be considered. *Riddell v. Thayer,* 127 Mass., 487. And the hearers' knowledge of facts which would influence their understanding of the words used is also pertinent. *Sydney v. Pub. Corp.,* 242 N. Y., 208. Indeed, it has been held in this jurisdiction (as stated in 2nd headnote, *Webster v. Sharpe,* 116 N. C., 466, 21 S. E., 912) that words spoken to a person or in his presence, which, taken in connection with the whole conversation, amount to a charge of a crime (storebreaking), to the reasonable apprehension of the persons hearing them, are slanderous and defamatory, although they do not, in terms, charge the crime. See, also, 17 R. C. L., 266.

Nothing was said in *Deese v. Collins,* 191 N. C., 749, 133 S. E., 92, or *Stokes v. Arey,* 53 N. C., 66, strongly relied upon by appellee, which, when properly interpreted, conflicts with our present position. Both cases are accordant herewith.

True, the defendant's evidence views the matter in a different light and undertakes to impute a less offensive meaning to the words used, but on a motion to nonsuit, we do not weigh the probable values of conflict-

ing testimony. This is a matter for the jury. *S. v. Howard,* 169 N. C., 312, 84 S. E., 807; *McCall v. Sustair,* 157 N. C., 179, 72 S. E., 974; *Reeves v. Bowden,* 97 N. C., 30; *Lucas v. Nichols,* 52 N. C., 32.

Nor can the defendant's plea of qualified privilege defeat the plaintiff's right to go to the jury. *Newberry v. Willis,* 195 N. C., 302, 142 S. E., 10; *Elmore v. R. R.,* 189 N. C., 658, 127 S. E., 710.

Reversed.

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Z. C. SMITH v. ROLAND LUMBER COMPANY.

(Filed 12 March, 1930.)

**Master and Servant C b—Evidence of master's failure, in the exercise of due care, to furnish suitable appliances held insufficient.**

Where, in an action by an employee to recover of his employer damages for the latter's failure to furnish, in the exercise of due care, a reasonably safe place to work and reasonably safe appliances and equipment therefor, the evidence tends only to show that the plaintiff, experienced in such work, used an empty nail keg to stand on to inspect lumber from the higher side of a truck and was injured by falling therefrom, when the inspection could have been made from the lower side while standing on the dock, that the defendant had neither furnished nor instructed the use of the nail keg, and there is no evidence that it was the defendant's duty to furnish any appliance or that plaintiff had requested any: *Held,* the evidence was insufficient to show any breach of duty to the plaintiff, and defendant's motion as of nonsuit should have been allowed.

APPEAL by defendant from *Midyette, J.,* at October Term, 1929, of CRAVEN. Reversed.

Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant in failing to exercise due care to furnish plaintiff, its employee (1) a reasonably safe place to work, and (2) reasonably safe appliances and equipment to do the work required of him.

Defendant denied the allegations of negligence in the complaint and alleged in its answer that plaintiff by his own negligence contributed to his injuries.

The issues submitted to the jury were answered favorably to the contentions of the plaintiff.

From judgment that plaintiff recover of the defendant the sum of $500, his damages as assessed by the jury, defendant appealed to the Supreme Court.

*Warren & Warren and McK. Carmichael for plaintiff.*

*Moore & Dunn for defendant.*

CONNOR, J. There was no evidence at the trial of this action tending to show that defendant furnished to plaintiff, as an appliance to enable him to do his work, the empty nail keg, on which plaintiff was standing when he fell and was injured. Plaintiff testified that he found the nail keg near the truck on which the lumber he was inspecting was loaded and that he used the keg to stand on while inspecting the lumber, because he had seen another inspector employed by defendant using it for that purpose. This inspector testified that he had used the keg for his own convenience. There was no evidence tending to show that defendant knew that the nail keg had been used by its inspectors to stand on while inspecting the lumber on the truck.

Nor was there evidence tending to show conditions under which it was the duty of defendant, as the employer of plaintiff, to furnish him any appliance to enable him to inspect the lumber from the higher end of the truck. The evidence tended to show that the lumber on the truck could have been inspected by plaintiff while standing either at the lower end or at the center of the truck. In either case, plaintiff could have inspected the lumber on the truck, while standing on the floor of the dock. Plaintiff chose to inspect the lumber from the higher end of the truck, and in order to do so, he used the empty nail keg to stand on. There was no evidence tending to show that after plaintiff chose to inspect the lumber on the truck from the higher rather than from the lower end or from the center of the truck, he requested defendant to furnish him an appliance to enable him to do his work in this manner, or that he advised defendant that he required such an appliance.

Defendant did not know, nor did it have reason to apprehend, when plaintiff was directed to go to the dock and inspect the lumber on the truck, that he would choose to make his inspection from the higher end of the truck, or that he would select an empty nail keg as the place on which to stand while inspecting the lumber. Plaintiff was an experienced lumber inspector, and defendant had a right to assume that he would exercise the care of a prudent man in doing his work, for his own safety.

In the absence of evidence tending to show any breach of its duty to plaintiff, as its employee, with respect to the place at which he was required to work, or with respect to appliances required for doing his work, defendant is not liable to plaintiff in this action, and there was error in the refusal of the court to allow defendant's motion for judgment as of nonsuit. The principles of law relied upon by plaintiff, as appellee in this Court, are well settled; but in the absence of evidence from which the jury could find facts to which these principles are applicable, they cannot avail plaintiff in this action. *Bradley v. Coal Co.*, 169 N. C., 255, 85 S. E., 388. The judgment is

Reversed.

STATE v. JOHN SAWYER.

(Filed 12 March, 1930.)

**Criminal Law I g—Instruction in this case held to comply with C. S., 564 and to be free from error.**

An introductory statement by the trial court in his instruction to the jury in a prosecution for murder that he would not take up the time of the jury to read from his notes of the testimony in the case in the absence of request of counsel is not error when he has nevertheless stated the evidence in a plain and correct manner and declared and explained the law arising thereon, C. S., 564, and judgment upon the verdict of guilty of murder in the first degree will be sustained when the record is free from error.

APPEAL by defendant from *Devin, J.*, at September Term, 1929, of MARTIN.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one J. I. Britton.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

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

*H. W. Stubbs and B. A. Critcher for defendant.*

STACY, C. J. On the afternoon of 26 July, 1929, the prisoner ambushed himself under a cherry tree in a hedgerow and shot the deceased in the face as he came within a distance of about twelve feet. The prisoner then reloaded his gun, stepped over the fence, or hedgerow, followed the deceased as he went "kinder bent over" down a tobacco row, for a distance of approximately thirty yards, and shot him again. Here the deceased fell, between two tobacco rows, where he died soon thereafter.

The prisoner testified that he "felt like it was necessary for him to shoot the deceased in order to protect his own life," but the case is free from any such necessity, real or apparent.

The principal assignment of error is to the following statement made by the judge at the beginning of his charge:

"I will not take up your time to read from my notes of the testimony in the absence of a request from counsel on either side. I will state the evidence to you as concisely as I can for the purpose of refreshing your recollection, reminding you that it is your duty to remember all the evidence, whether I call it to your attention or not."

There was no error in this statement. The evidence was simple and direct, and notwithstanding the introductory remark of the judge, of which the prisoner complains, he nevertheless stated the evidence in a plain and correct manner and declared and explained the law arising thereon. C. S., 564. The record is free from error, hence the verdict and judgment must be upheld.

No error.

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C. L. SORRELL ET AL. v. J. L. SORRELL ET AL.

(Filed 12 March, 1930.)

1. **Trusts A b—Parol trust in favor of cestui que trust may be engrafted on his deed in absence of actual fraud since fraud is presumed.**

   While a grantor may not engraft a parol trust on his own deed to lands in the absence of fraud, undue influence, etc., fraud is presumed in a deed from a *cestui que trust* to a trustee, and where a party enters into possession of lands under a power of attorney to rent and manage the property for the owner, and the owner gives the deed in question in pursuance of a general scheme or agreement in order to liquidate the indebtedness on the property and prevent foreclosure, a fiduciary relationship exists between the parties and the grantor may engraft a parol trust upon the lands without allegation or evidence of actual fraud.

2. **Limitations of Actions B b—Statute does not run from demand where parties are in fiduciary relationship.**

   Where a *cestui que trust* seeks to establish a trust estate in the property held in trust against the trustee taking deed therefor, and to force an accounting for rents and profits therefrom, the mere fact of demand on the trustee therefor will not terminate the trust relationship and the statute of limitations and lapse of time have no application during the continuance of the fiduciary relationship, and the *cestui que trust* is not barred from maintaining his rights.

3. **Trusts F c—Trustee will not ordinarily be permitted to terminate relationship in order to acquire trust property.**

   The law will not ordinarily permit a trustee to terminate the trust relationship in order that he may personally acquire title or ownership of the property impressed with the trust.

CIVIL ACTION, before *Daniels, J.*, at November Term, 1929, of HARNETT.

The evidence tended to show that the plaintiff, C. L. Sorrell, owned 166 acres of land in Harnett County, which he had inherited from his father. The defendant, J. L. Sorrell, is a nephew of the plaintiff.

On 16 May, 1914, the plaintiff, C. L. Sorrell, executed and delivered to the defendant a power of attorney in the following language:

"Know all men by these presents, that I, Colvin L. Sorrell, of Harnett County and State of North Carolina, have made, constituted and appointed, and by these presents do make, constitute and appoint John L. Sorrell my true and lawful attorney for myself and in my name, to rent out and lease all the lands that I own and all the lands that I may own during the continuation of this power given by me. That it shall be lawful for him, the said John L. Sorrell, to enter on his duties as such attorney, to rent and buy or sell the products of my farms located in said county and known as the place I now reside upon, and adjoining the lands of W. R. Sorrell and others. To have said lands as his mind may direct in the management of buying and selling and removing as such all things at all times which go to make him, the said John L. Sorrell, agent for me, to so contract for me, feeling and knowing that it is better for my estate, I proclaim such confidence in him that I so make him my attorney for valuable services rendered to me and feeling sure of his competency to so act, giving and granting unto John L. Sorrell, said attorney, full power and authority to do and perform all and every act and thing whatsoever requirement is necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present with full power of substitution and revocation, hereby ratifying and confirming all that John L. Sorrell, said attorney and substitute shall lawfully do or cause to be done by virtue thereof.

I have hereunto set my hand and seal this 16 May, 1914."

The plaintiff offered evidence tending to show that he was an old man and was unable to rent his land, and that he went to the defendant and asked the defendant to take charge of his property. At the time the power of attorney was executed and the defendant took charge of plaintiff's property, there was a mortgage on the property executed by plaintiff to Alonzo Parrish and the Parrish-Godwin Company, amounting to approximately $7,000. The mortgagee advertised the land for sale at public auction in March, 1915. Before the sale, the plaintiff and the defendant agreed that the defendant, J. L. Sorrell, should attend the sale and purchase the land for the plaintiff "regardless of what price was bid for the land." The defendant, in pursuance of such agreement, attended the sale and bid $12,000 for the property, and thereupon, on 16 March, 1915, Parrish-Godwin Co., mortgagee, conveyed the property to J. L. Sorrell for a recited consideration of $10,125, which said deed was duly recorded. After the sale Parrish-Godwin Company conferred with the plaintiff and agreed to carry the debt until 1 January, 1916, provided the land should be conveyed to Murchison, who was an employee of Parrish-Godwin Company, and who should hold the title to the land for the benefit of said company. Thereupon, on 17 March, 1915, J. L. Sorrell conveyed the property to W. S. Murchison, which deed was duly recorded.

The plaintiff offered evidence tending to show that the defendant, J. L. Sorrell, agreed to procure the money to pay off the Parrish-Godwin debt on or before 1 January, 1916, and that in pursuance of such agreement the defendant represented that it was necessary to have the title in his name in order to procure a loan upon favorable terms.

Subsequently, on 24 December, 1915, the plaintiff, C. L. Sorrell, conveyed the land to J. L. Sorrell, which deed was duly recorded. Thereafter, on 28 December, 1915, Murchison and wife conveyed the property to C. L. Sorrell by deed which is duly recorded. The defendant, J. L. Sorrell, and his wife, and W. R. Sorrell and wife, father of defendant, executed a deed of trust upon the property in controversy and other property belonging to W. R. Sorrell to the Life Insurance Company of Virginia, and from the proceeds of said loan paid off the Parrish-Godwin debt. Later on, the defendant secured a loan of $10,000 from his codefendant, Federal Land Bank of Columbia. The plaintiff lived with his nephew awhile and then boarded around in the neighborhood. The defendant took possession of said property, sold wood and timber, cleared up land and made extensive improvements thereon. The defendant also sold five mules belonging to the plaintiff and received all the rents and profits from said land.

The plaintiff offered evidence tending to show that in the spring of 1915 the land was worth $30,000. There was evidence on the part of the defendant tending to show that at said time the land was worth from $40 to $50 an acre. The defendant also offered evidence tending to show that the plaintiff had from time to time made statements that the defendant had purchased the land and paid for it a fair and reasonable price.

The defendant bought the 44-acre tract of land at a tax sale, but admitted there was a defect in the deed, and that for this reason he was not now claiming the property as his own. The plaintiff testified that he had made demand upon the defendant for an accounting, and that the defendant had declined to render a statement of the transactions.

The following issues were submitted to the jury:

1. "Did the defendant, J. L. Sorrell, acquire title to said 166-acre tract of land as trustee for the plaintiff?"

2. "Is the plaintiff's cause of action, as alleged in the complaint, barred by the 7-year statute of limitations?"

3. "Is the plaintiff, Calvin L. Sorrell, the owner in fee simple and entitled to the possession of the 44⅓-acre tract of land described in the complaint?"

The jury answered the first issue "Yes," and the third issue, "No," and the fourth issue "Yes," and the court instructed the jury that if the first issue was answered "Yes," the second should be answered "No."

Upon the verdict, as rendered, the following judgment was entered:

"It is now considered and adjudged by the court that the defendant, J. L. Sorrell, holds the 166-acre tract of land described in the pleadings as trustee for the benefit of the plaintiff, C. L. Sorrell.

It is further considered and adjudged by the court that the plaintiff is entitled to an accounting by said trustee, J. L. Sorrell, to the end that it may be ascertained the amount of debts of the plaintiff paid by the defendant, the improvements, if any, placed in good faith upon said land by the defendant, to the extent that the same has enhanced the value of said land, and other necessary expenses of the defendant in the discharge of his trust for the benefit of the plaintiff on the one hand, and that he may account for all moneys received by him, if any, on account of the sale of property belonging to the plaintiff, and for rents and profits received by the defendant while in the possession and control of said tract of land, and for such encumbrances placed upon said land by the defendant, J. L. Sorrell, such accounting to be had before a referee appointed or to be appointed by the court in this cause.

It is further considered and adjudged by the court that the plaintiff is the owner in fee simple and entitled to the possession of the 44⅓-acre tract of land described in the complaint, and that he have and hold possession of the same.

It further appearing to the court from the pleadings that the defendant, J. L. Sorrell, with the joinder of his wife and W. R. Sorrell and his wife, have executed unto the Federal Land Bank of Columbia a mortgage deed covering the 166 acres of land and other lands belonging to the defendant, J. L. Sorrell, as security for a recited loan of $10,000; and it further appearing to the court that as between the plaintiff, C. L. Sorrell and the Federal Land Bank of Columbia, the conveyance in said mortgage of the 166-acre tract of land is unaffected by the trust herein declared; and it further appearing to the court that the plaintiff, C. L. Sorrell, is entitled to have the Federal Land Bank of Columbia exhaust all other securities belonging to the defendant or held by it before resorting to the 166 acres of land:

It is therefore further considered and decreed by the court that the Federal Land Bank of Columbia retain undiminished all securities now held by it for the payment of said loan, and that in the event of default in the payment of said loan or any installment thereof, that the said Federal Land Bank of Columbia give due notice to the plaintiff and his assigns of record of such default, and in the event of a sale by the Federal Land Bank of Columbia of the mortgaged premises or any part thereof or the collection of its debt against J. L. Sorrell, that it be and it is hereby required to exhaust the said J. L. Sorrell and his property pledged in said mortgage before resorting to a sale of the 166 acres of

land referred to in this cause, and which is adjudged herein to be held by the said J. L. Sorrell as trustee for the plaintiff, C. L. Sorrell.

It is further considered and adjudged by the court that pending the accounting herein ordered, that the defendant, J. L. Sorrell, give a good and sufficient bond in the sum of $1,000 payable to the plaintiff, C. L. Sorrell, to the end that he will render a full accounting for the rents and profits received by him pending the accounting ordered in this cause, and will pay the same over unto the plaintiff to the extent that he may be so ordered in the further orders of the court in this cause, said bond to be approved by the clerk of this court after notice to plaintiff's attorneys, and upon the defendant's failure to give such bond, then the plaintiff may apply to the court for the appointment of a receiver to take charge of the premises and rent out the same and hold all rents and profits pending the further order of the court in this cause.

It is further considered and adjudged by the court that the defendant, J. L. Sorrell, pay the cost of this action to be taxed by the clerk of this court.

And this cause is retained for further orders and an accounting between the defendant as trustee and the plaintiff."

From the judgment so rendered the defendant appealed.

*Young & Young and R. L. Godwin for defendant.*
*J. R. Baggett and Clifford & Williams for plaintiff.*

BROGDEN, J. The defendant asserts that the plaintiff is not entitled to recover for the reason that the evidence discloses that the plaintiff is attempting to engraft a parol trust upon an absolute deed in favor of the grantor, and relies upon *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028; *Tire Co. v. Lester,* 192 N. C., 642, 135 S. E., 778; *Waddell v. Aycock,* 195 N. C., 268, 142 S. E., 10.

There was neither allegation nor proof of undue influence or actual fraud involved in the transaction. Hence, if the principles announced in the cases referred to, apply, the plaintiff is not entitled to recover.

However, the plaintiff insists that the evidence discloses that an active trust was created by virtue of the power of attorney executed and delivered by the plaintiff to the defendant, and that in pursuance of said agreement the defendant went into possession of said land and took full and complete charge thereof with power to contract with reference thereto, and that these facts and circumstances prevent the application of the principle announced in the *Gaylord case* and other cases of similar import.

We do not think that the principle contended for by the defendant is determinative of the merits of this controversy. The evidence tended to

show an active trust relationship existing between the parties, and that the conveyance of the land on 24 December, 1915, by the plaintiff to the the defendant was in pursuance of a general scheme or agreement between the parties for working out and liquidating the indebtedness owed by the plaintiff. Hence, a fiduciary relationship existed between the parties, and while there was neither allegation nor evidence of actual fraud, the law presumes fraud in transactions where confidential relationships exist between the parties. This principle was expressed in *Atkins v. Withers,* 94 N. C., 581, as follows: "The cases in which the law will presume fraud, arising from the confidential relations of the parties to a contract, are, executors and administrators, guardian and ward, trustees and *cestui que trust,* principal and agent, brokers, factors, etc., mortgagor and mortgagee, attorneys and clients, and to those have been added, we think very appropriately, husband and wife. The rule is founded on the special facilities which, in such relation, the party in the superior position has of committing a fraud upon him in the inferior situation, and the law looking to the frailty of human nature, requires the party in the superior situation to show that his action has been fair, honest and honorable, not so much because he has committed a fraud, but that he may have done so." *Norfleet v. Hawkins,* 93 N. C., 392.

Furthermore, at the time the plaintiff conveyed the land to defendant, to wit, on 24 December, 1915, the legal title to the property was then outstanding in Murchison.

Notwithstanding, the defendant insists that the statute of limitations is a bar to plaintiff's right to recover, and at all events, the plaintiff should be estopped by lapse of time from prosecuting the action. This contention, however, cannot be sustained.

This Court said in *Commissioners v. Lash,* 89 N. C., 159: "The cases in which a demand is held to be necessary, and when made to put the statute in motion, will be found to be concluded or finished agencies, where nothing remains to be done but to account for and pay over the fund. They are inapplicable to a continuous indefinite agency, in which, from the confidence reposed in the agent, he assumes fiduciary relations towards his employer in the management of interests committed to his charge and becomes a trustee. While this relation subsists, though there may have been unheeded calls on him for information, by the mutual acquiescence of the parties, it cannot be hostile so as to permit the running of the statute."

Again, in *Blount v. Robeson,* 56 N. C., 73, *Pearson, J.,* wrote: "When a confidential relation is established between parties, either by act of law, as in the case of copartners, tenants in common, etc., or by agreement of the parties as in case of a trust, or agency, the rights incident

to that relation, continue until the relation is put an end to, and the statute of limitations and lapse of time, have no application." *Lummus v. Davidson,* 160 N. C., 484, 76 S. E., 474; *Rouse v. Rouse,* 167 N. C., 208, 83 S. E., 305; *Hilton v. Gordon,* 177 N. C., 342, 99 S. E., 5.

Moreover, the law does not favor permitting a party to attempt to put an end to a trust in order that he may personally acquire title or ownership of property impressed with the trust. Hence, it appearing that a continuing and active trust existed between the parties, the *cestui que trust* is not required to take action until there has been an unqualified disavowal by clear and unequivocal acts or words. *Hospital v. Nicholson,* 190 N. C., 119, 129 S. E., 149.

We conclude, therefore, that the question was fairly submitted to the jury, and the judgment rendered upon the verdict must be affirmed.

No error.

J. G. LAYTON AND WIFE, MAUDE C. LAYTON, v. JOHN P. BYRD AND WIFE, BETTIE BYRD, G. M. TILGHMAN, AND E. F. YOUNG, TRUSTEE.

(Filed 12 March, 1930.)

**1. Improvements A a—Mortgagor has neither statutory nor equitable right to improvements as against mortgagee.**

While C. S., ch. 12, Art. 29, does not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made if this can be done without prejudice to the interests of his cotenants, but this equitable principle does not apply as between mortgagor and mortgagee.

**2. Mortgages C d—Improvements by mortgagor or his grantee are subject to the mortgage lien.**

Where a party buys the interests of all the tenants in common in lands and becomes the sole owner thereof, and places improvements upon the land, such improvements are subject equally with the land itself to the lien of a registered mortgage placed upon the land by one of the tenants in common prior to the conveyance, and the improvements inure to the benefit of the mortgagee and to the purchaser at the foreclosure sale, and ignorance of the grantee of the tenants in common of the prior, registered mortgage does not affect the rights of the parties, the registered mortgage being notice not only of the existence of the mortgage, but also of all it contained.

APPEAL by plaintiffs from *Lyon, J.,* at September Term, 1929, of HARNETT. Error.

Plaintiffs filed a petition for partition before the clerk alleging that J. G. Layton and John P. Byrd are tenants in common of a tract of land in which Layton owns a one-third undivided interest and Byrd a two-thirds undivided interest.

The facts are substantially as follows: Prior to 1917 R. L. Godwin, B. Fleishman, and Hyman Fleishman owned this land as tenants in common, each having a one-third undivided interest. On 1 January, 1917, R. L. Godwin and his wife executed and delivered to G. M. Tilghman a mortgage conveying his one-third undivided interest in this tract, together with other land, to secure an indebtedness of $6,000. The mortgage was registered 15 January, 1917. On 17 October, 1919, R. L. Godwin, Hyman Fleishman, B. Fleishman, and their wives, conveyed their interest to John P. Byrd, who thereafter put valuable improvements on the land. Godwin conveyed to Byrd an equity of redemption. Byrd did not assume payment of Godwin's indebtedness to Tilghman and had no actual knowledge of the Godwin mortgage until after he had made the alleged improvements. Pursuant to an order of the Superior Court the mortgage executed by Godwin was foreclosed, and on 18 January, 1929, the commissioner who made the sale conveyed to Layton the one-third undivided interest formerly owned by Godwin. Layton then executed a deed of trust on the land to E. F. Young, trustee, to secure a note for $3,900 due Tilghman. All the improvements on the land were made by Byrd after the registration of the Godwin mortgage and prior to 18 January, 1929, and consisted of clearings and tenant houses. Layton had no information as to the improvements until after the date of his purchase of the mortgaged premises. Byrd is left in full possession of a two-thirds undivided interest in the land, but under the foreclosure has been ousted of any right or title dependent upon the title of Godwin.

The clerk made an order that Byrd is entitled to the present worth of the improvements as his individual property and that the commissioners who divide the land shall award to Layton one-third in value of the land adjudged in its unimproved condition and to Byrd two-thirds in value in its unimproved condition, and that Byrd be awarded such additional share as will equal the present enhanced value of such property growing out of the improvements, and that if the commissioners are unable to make actual partition so as to effect this purpose, they shall, by the charge of owelty, provide for the partition in accordance with the order. Commissioners were appointed and the cause was retained.

Plaintiffs excepted and appealed from the order of the clerk and the order was affirmed by the Superior Court. The plaintiffs excepted and appealed upon assigned error.

*Clifford & Williams for plaintiffs.*
*Charles Ross for defendants.*

ADAMS, J. The appeal brings up for review that part of the judgment which allows "betterments on account of improvements alleged to have been made by John P. Byrd on the lands described in the petition." We understand this to be merely an allowance for improvements and not for statutory betterments, because all parties admit that the matters in controversy must be determined by the application of equitable principles without regard to the law of betterments prescribed in C. S., ch. 12, Art. 29. In fact section 710 declares that nothing in this article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises; and it has been held that this section does not apply to tenants in common. *Pope v. Whitehead,* 68 N. C., 191; *Holt v. Couch,* 125 N. C., 456. In *Wharton v. Moore,* 84 N. C., 479, *Ashe, J.,* assigned as the probable reason for enacting section 710 the admitted principle that the right to betterments is not conceded to mortgagors, and this statement of the law was approved in *Belvin v. Raleigh Paper Co.,* 123 N. C., 138, 143.

The clerk's judgment, which was affirmed by the judge on appeal, gave to J. G. Layton one-third in value of the land in its unimproved condition that is, one-third in value as if the partition had been made before the land was enhanced by the improvements. It is particularly this part of the judgment which the appellants assail.

Our decisions have uniformly maintained the principle that if one tenant in common makes improvements upon the common property he will be entitled upon partition to have that part of the property which he has improved allotted to him and its value assessed as if no improvements had been made, if this can be done without prejudice to the interest of his cotenants. *Pope v. Whitehead, supra; Collett v. Henderson,* 80 N. C., 337; *Cox v. Ward,* 107 N. C., 507; *Pipkin v. Pipkin,* 120 N. C., 161, in which the word "not" seems to have been inadvertently inserted. *Daniel v. Dixon,* 163 N. C., 137. This is a right which rests upon equitable principles and one which was recognized as such before the law of betterments (P. L., 1871-72, ch. 147) was enacted. *Jones v. Carland,* 55 N. C., 502; *Pope v. Whitehead, supra.*

But this equity has no application to the facts set out in the judgment. It is important to remember that Godwin's mortgage to Tilghman was registered on 15 January, 1917, and that Byrd acquired the title of all the tenants in common (Godwin, H. Fleishman, and B. Fleishman) on 17 October, 1919. Byrd made the improvements on the land after he had received their deed and had succeeded to their rights. At this time he was the sole owner of the land, subject to the lien of the mortgage. There was no co-owner against whom he could assert the equity on which he now relies. He and the mortgagee were not tenants

in common. The mortgage was a conveyance by Godwin of the legal title to his interest in the land as a security for the debt. *Robinson v. Willoughby,* 65 N. C., 520; *Stevens v. Turlington,* 186 N. C., 191. The mortgagor continued to be the owner of his interest in the land until he conveyed it to Byrd. *Killebrew v. Hines,* 104 N. C., 182, 190. Since by virtue of C. S., 710, *supra,* the statutes relating to betterments cannot avail the defendants, it becomes necessary to decide whether the judgment can be upheld on any other equitable principle.

The judgment recites as a finding of fact that Layton had no information that improvements had been made until after he had purchased the mortgaged interest in the land; and upon this finding Byrd makes the contention that Layton has no equity because he was not misled when he purchased the land at the sale under foreclosure and that he took only such title as Godwin had before the land was improved. Byrd further contends that the mortgagee in this case did not acquire a right to the improvements put upon the mortgaged premises because Byrd did not assume the payment of Godwin's debt and because the mortgagee could not have obtained a deficiency judgment against Byrd. Why, then, it is asked, should Layton be permitted to enhance his bargain by adding to Godwin's interest one-third in value of Byrd's improvements?

In 1 Jones on Mortgages (7 ed.), sec. 147, the author says: "The lien of a mortgage extends to all improvements and repairs subsequently made upon the mortgaged premises, whether made by the mortgagor or by a purchaser from him without actual notice of the existence of the mortgage." This statement of the law is upheld in a number of decisions by other courts. *Martin v. Beatty,* 54 Ill., 100, was a suit in chancery to foreclose a mortgage, the question being whether a mortgagor or his grantee could enforce as a lien prior to that of the mortgagee the amount expended by the grantee for improvements made on the property after the execution of the mortgage. It was held that neither the mortgagor nor his grantee could expend money on the mortgaged property to the detriment of the mortgagee. In *Insurance Co. v. Huntington,* 57 Kan., 744, the Court said: "It is well settled that permanent accessions to a freehold, whether placed there by the mortgagor or one claiming under him, are regarded as a part of the mortgaged property and become additional security for the mortgage debt." The Supreme Court of the State of New York has held that when lands sold and conveyed by a mortgagor are charged with the mortgage debt, improvements that constitute a part of the realty, irrespective of the question by whom they are made, are subject to the lien of the mortgage equally with the land which is thus improved. *Rice v. Dewey,* 54 Bar., 455. The conclusion is adhered to in the later case of *Gibson v. Am. Loan & Trust Co.,* 58 Hun., 443, in which several supporting cases are cited. In *Childs v.*

*Dolan,* 5 Allen (Mass.), 319, it appeared that the demandant or plaintiff claimed title to premises sold under a mortgage. The mortgagor conveyed a part of the mortgaged premises to a tenant who claimed an allowance for improvements made by her after she had received the mortgagor's title which she had reason to believe good. The Supreme Judicial Court held that her claim for improvements was properly rejected because it did not exist against the mortgagee or those claiming under him, in favor of the tenant who had possession of the land as owner of the equity. The Supreme Court of Missouri made a similar decision in *Ivy v. Yancey,* 31 S. W., 937, saying that unless provision is made in the mortgage for an allowance for improvements, all improvements in case of foreclosure will inure to the benefit of the mortgagee or the purchaser at the foreclosure sale. It is therefore immaterial whether or not Byrd assumed the payment of Godwin's debt.

These cases lead to the conclusion that improvements put upon mortgaged land by the mortgagor or his grantee are subject equally with the land itself to the lien of the mortgage, and inure to the benefit of the mortgagee and in case of foreclosure to the benefit of the purchaser under the mortgage. Byrd's ignorance of the Godwin mortgage cannot benefit him because the recorded mortgage was notice to all subsequent purchasers from the mortgagor, not only of the existence of the mortgage, but of all it contained. *Wharton v. Moore, supra; Scott v. Battle,* 85 N. C., 185, 193; *Eaton v. Doub,* 190 N. C., 14. Nor can he profit by Layton's ignorance of the improvements. Immediately after receiving his deed Layton executed a deed of trust on the interest he had purchased to secure payment of the purchase money. If the lien on the improvements attaches in like manner with the lien on the land, as we have shown, Layton's want of information could not affect the rights of the trustee or modify the application of the principle. But we rest our decision on the proposition that the lien of the Godwin mortgage attached to the improvements made by Byrd just as it attached to Godwin's interest in the land and that the foreclosure of the mortgage lien passed title to the mortgaged interest and to the attaching improvements.

There was error in adjudging that the land be divided in its unimproved condition without reference to the improvements. The judgment will be modified so as to conform to this opinion.

Error.

J. L. WATSON v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 12 March, 1930.)

**Judgments O b—Judgment in garnishment in another state according to its laws is defense to action for salary garnished.**

Where a corporation does business in this State and in another State, and is a citizen of both, and has been garnished there for salary of an employee residing in this State after personal service on it and service by publication on the employee according to the law of the other State, and has been required to pay a valid judgment in the proceedings there, in an action brought by the employee here the judgment of the other State will be given full faith and credit under the provisions of the Federal Constitution, Art. IV, sec. 1, and is a bar to the action brought here, though the plaintiff in the former action may have originally proceeded in either jurisdiction.

APPEAL by plaintiff from *Small, J.*, at September Term, 1929, of WARREN. Affirmed.

Plaintiff brought suit to recover $196.60 alleged to be due for services rendered the defendant. The case was heard upon the following agreed statement of facts:

The plaintiff is a resident of Warren County, N. C., and now resides at Norlina. The Seaboard Air Line Railway Company, defendant, is a corporation, both of the State of Virginia and State of North Carolina, and does business as a common carrier of freight and passengers in both states, and in several other of the Southern States, having its principal office at Norfolk, Virginia. The plaintiff is an employee of the defendant, and has been for many years; he is now, and has been for more than four years prior to the commencement of this action, the defendant's section agent and telegraph operator at Paschall, North Carolina. He is paid for services rendered the defendant by a check, voucher or draft, which is sent out from Portsmouth, Va., and upon which is printed the name of Matthews, treasurer of said company. The printed check, voucher or draft, is forwarded to the defendant's division paymaster in the city of Raleigh, and by him a monthly payroll is made out. This check, voucher or draft is then signed in the city of Raleigh by one F. M. Buck, whose office is in Raleigh, and is then sent by the said paymaster from the city auditor's office to the plaintiff's place of business at Paschall, North Carolina. The checks, vouchers or drafts, attached to this agreement, become part of it. The draft is drawn on the treasurer of the company at Portsmouth, Va., and is paid there.

Form of check:

Form 1027.

SEABOARD AIR LINE RAILWAY COMPANY.

No Protest. No. 3—38—75. 7—2.

Portsmouth, Va., 1 August, 1928.

Treasurer Seaboard Air Line Railway Company,
Portsmouth, Virginia.

Pay to the order of ..... J. L. Watson
Sixty-seven & 20/100 Dollars ..... $67.20

In full for services rendered second half month during the sixty days from date of July, 1928.

Payment will not be made after September, 1928.

Not negotiable unless countersigned.

Not valid if drawn for more than two hundred dollars.

F. M. BUCK,
*for General Auditor.*

Some time prior to 27 November, 1928, Fleishman-Morris Company, creditor of the plaintiff, in a proceeding instituted in civil justice court in the city of Richmond, sued out an attachment, and by process duly served upon the defendant's agent in Richmond, garnished and attached plaintiff's salary, and collected the same from the defendant company, to the amount of $196.60. The defendant company had plaintiff's checks, vouchers or drafts, which were issued to him from the defendant's auditor's office in Raleigh, N. C., returned or forwarded to the city of Richmond, Va., and money due thereon was paid by defendant company to the attaching creditor of the plaintiff, after a judgment had been rendered in the aforesaid court, no personal service of summons being made upon J. L. Watson, plaintiff. In the action brought by Fleishman-Morris Company the defendant appeared and endeavored to have the attachment dismissed on the ground that it had been improperly instituted and was invalid, but the civil justice court overruled the objection and held that the attachment was validly and properly instituted. In the action brought by Fleishman-Morris Company, hereinbefore referred to, summons was served on J. L. Watson by publication and personally on the railway company. The plaintiff had knowledge of the proceedings by letter from the defendant. The law of attachment of the State of Virginia, at all times referred to herein, is set forth in section 6379 of the Virginia Code as follows: "The following shall be sufficient grounds for an attachment: That the principal defendant, or one of the principal defendants: (1) is a foreign corporation, or is not a resident

of this State, and has estate or debts owing to said defendant within the county or city in which the attachment is . . . The word 'estate,' as herein used, shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity."

Upon the foregoing facts it was adjudged that the plaintiff take nothing by his action, and he excepted and appealed.

*John H. Kerr for plaintiff.*

*Williams & Banzet, Murray Allen, and J. Pearson Upchurch for defendant.*

ADAMS, J. It was shown in the suit prosecuted in Virginia that the plaintiff in this action was the principal debtor of the Fleishman-Morris Company, a mercantile concern in the city of Richmond, and was not a resident of that State. He was a resident of North Carolina and was served with summons by publication. The defendant, a corporation both of Virginia and of North Carolina, having its principal office in Norfolk, was served personally. Watson, the plaintiff herein, had knowledge of the proceedings in the Virginia court, but did not appear or set up any defense. The railway company resisted the attachment and refused to pay the creditor's claim until it should be finally determined by a valid judgment. The Fleishman-Morris Company recovered judgment and the railway company's indebtedness to the plaintiff was condemned and applied under the attachment in payment or part payment of the judgment.

This appeal is controlled by the law as stated in *Chicago, Rock Island & Pac. Ry. Co. v. Sturm,* 174 U. S., 710, 43 L. Ed., 1144. It appeared in that case that the railway company was a corporation duly organized under the laws of the States of Illinois and Iowa, doing business in the State of Kansas. Sturm brought suit in Kansas against the railway company to recover $140 for wages and recovered judgment for this amount with interest and costs. A. H. Willard had previously commenced an action against Sturm in a justice's court in Iowa to recover $78.63 with interest, had sued out a writ of attachment and garnishment, and had garnished the railway company which was indebted to Sturm at that time in the sum of $77.17 for wages. Sturm contended that his wages were exempt under the laws of Kansas and were not subject to proceedings in garnishment. Notwithstanding the garnishment in Iowa, Sturm recovered judgment against the railway company in Kansas and the judgment was affirmed by the Supreme Court. The Supreme Court of the United States reversed the judgment, holding the general rule of law to be that for the purpose of founding administra-

tion all simple contract debts are assets at the domicile of the debtor; that exemption laws are not a part of the contract but of the remedy, subject to the law of the forum; that jurisdiction in garnishment of a debt due a nonresident creditor may be acquired without service on him except by publication; and that full faith and credit must be given in each State to the public acts, records, and judicial proceedings of every other State. Constitution, Art. IV, sec. 1.

In *Harris v. Balk,* 198 U. S., 215, 49 L. Ed., 1023, the facts were as follows: Harris, a resident of North Carolina, was indebted to Balk, also a resident of North Carolina, in the sum of $180. Balk was indebted to Jacob Epstein of Baltimore in the sum of $300. Harris went to Baltimore to purchase merchandise and Epstein caused to be issued a nonresident writ of attachment against Balk, and attached the amount due Balk from Harris. A writ of summons and a declaration against Balk (as provided by the Maryland statute) were delivered to the sheriff and by him posted at the courthouse door, as required by the law of Maryland. Before the return day Harris came back to North Carolina, and through his counsel in the Maryland proceeding consented to an order of condemnation against him as garnishee of his debt to Balk. Harris paid this amount to Epstein's counsel. Balk then sued Harris in North Carolina, and Harris pleaded the Maryland judgment in bar. This plea was not allowed, and on appeal the judgment was affirmed by the Supreme Court. In reversing the judgment the Supreme Court of the United States said: "If there be a law of the State providing for the attachment of the debt, then, if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that State."

Substantially the same principle was upheld in *Baltimore & O. R. Co. v. Hostetter,* 240 U. S., 620, 60 L. Ed., 829.

The wages sought to be recovered in this action are the wages that were attached; the law of Virginia provided for the attachment of the debt; the garnishee was a Virginia corporation; the plaintiff could have maintained an action against the defendant in North Carolina or in Virginia; and jurisdiction was acquired by the Virginia court by constructive service on Watson, and by garnishment of the debt due him and by personal service on his employer. Under these conditions the cited cases fully sustain the judgment of the Superior Court. The appellant cites *Mo. Pac. Ry. Co. v. Sharitt,* 43 Kan., 375, but this case was disapproved in *Ry. Co. v. Sturm, supra.*

Affirmed.

MARTHA HAWKINS, ADMINISTRATRIX OF THE ESTATE OF SID HAWKINS, DECEASED, v. ROWLAND LUMBER COMPANY.

(Filed 12 March, 1930.)

**1. Appeal and Error E b—Charge of lower court is presumed correct when it is not set out in the record.**

The charge of the trial court to the jury is presumed to be correct on appeal when it is not set out in the record.

**2. Master and Servant E a—Federal employer's Liability Act applies to logging roads.**

Where the defendant in an action to recover damages for a wrongful death is a logging road, the fellow-servant rule does not apply, and contributory negligence is considered in mitigation of damages by the jury.

APPEAL by defendant from *Midyette, J.,* and a jury, at October Term, 1929, of CRAVEN. No error.

This is an action for actionable negligence brought by plaintiff, for the death of her intestate, against defendant.

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

"1. Was Walter Lindsay an independent contractor of the Rowland Lumber Company, and was plaintiff's intestate in the employ of said independent contractor at the time of his injury and death? Answer: No.

2. Was the plaintiff's intestate killed by the negligence of the Rowland Lumber Company, as alleged in the complaint? Answer: Yes.

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

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

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

*Ernest M. Green and W. B. R. Guion for plaintiff.*
*Moore & Dunn for defendant.*

PER CURIAM. The defendant at the close of plaintiff's evidence and at the close of all the evidence made motions for judgment as in case of nonsuit, under C. S., 567. The court below overruled the motions, and in this we see no error. Defendant also requested certain prayers for instruction; the court below refused these, and in this we think the court correct.

The charge of the court below is not in the record. The presumption is that the court below charged the law applicable to the facts.

As to negligence in not giving signals, see *Farr v. Power Co., ante,* p. 247.

The defendant was a logging road and the fellow-servant doctrine has no application—contributory negligence no bar, but mitigates damages. See C. S., 160, 3465, 3467, 3470; *Stewart v. Blackwood Lumber Co.,* 193 N. C., 138; *Brooks v. Suncrest Lumber Co.,* 194 N. C., 141. We think the case in many respects similar to *Lilley v. Cooperage Co.,* 194 N. C., 250. We find

No error.

D. G. MATTHEWS v. ED. JONES ET AL.

(Filed 12 March, 1930.)

**Appeal and Error F b—Appeal will be dismissed when assignments of error according to Rules do not appear in record.**

Exceptive assignments of error according to the Rules of Practice in the Supreme Court must appear in the record on appeal or the case will be dismissed.

APPEAL by plaintiff from *Devin, J.,* at September Term, 1929, of MARTIN.

Civil action to recover rent and to enforce a landlord's lien.

From a judgment for the rent, but without enforcement against the crops, the plaintiff appeals, assigning errors.

*B. A. Critcher for plaintiff.*

*A. R. Dunning for defendants.*

PER CURIAM. The record fails to disclose any exceptive assignment of error, made in accordance with the rules, which can be sustained, hence the judgment will be upheld. *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735.

No error.

FARMERS ATLANTIC BANK v. THE FIRST NATIONAL BANK OF MURFREESBORO, N. C., ET AL.

(Filed 19 March, 1930.)

**1. Contracts F b—Allegation of performance of agreement incidental to main contract held not necessary in this case.**

Where a contract is entered into whereby a bank, in anticipation of insolvency, agrees to transfer all of its assets to another bank, and give bond with its directors as sureties to indemnify the transferee bank against loss in case the liabilities exceed the assets, and the transferee bank agrees to pay off all liabilities, and the contract contains an agreement, incidental to the main purpose of the contract and not considered by the parties as a substantial part of the consideration therefor, whereby the transferee bank agrees to maintain a branch bank in the locality, subject to the approval of the Corporation Commission: *Held*, in an action on the bond given in accordance with the contract it is not necessary for the transferee bank to allege performances of the incidental agreement.

**2. Corporations G b—Party receiving benefits of contract with corporation is estopped from setting up defense that contract was ultra vires.**

Where a bank transfers all of its assets to another bank and gives bond with its directors as sureties to indemnify the transferee bank against loss in case the liabilities exceed the assets, and the transferee bank agrees to pay off all liabilities of the transferer bank: *Held*, upon the execution of the agreement by the transferee bank, neither the stockholders nor the creditors of the transferer bank can complain, and the transferer bank and its sureties, having received the benefit of the contract, are estopped in an action on the bond to set up the defense that contract was *ultra vires* the transferee bank.

APPEAL by defendants from *Small, J.*, at October Term, 1929, of HERTFORD. Affirmed.

This is an action to recover on a bond executed by the defendant, the First National Bank of Murfreesboro, N. C., as principal, and its co-defendants, directors of said National Bank, as sureties.

By the terms of said bond, the defendants agreed to indemnify and save harmless the plaintiff from any loss which plaintiff might sustain, resulting from its performance of a contract by which it agreed to pay off and discharge all the liabilities of the defendant, the First National Bank of Murfreesboro, N. C., in consideration of the conveyance and transfer to it of all the assets of said National Bank. The said contract was entered into because of the apprehension of defendants that said National Bank was about to become insolvent, and that loss would thereby result not only to its creditors and stockholders, but also to its directors, the sureties on said bond.

Plaintiff has paid off and discharged all the liabilities of the defendant bank, aggregating the sum of $288,976.36. The total amount collected or collectible by plaintiff from the assets conveyed and transferred to it by defendant bank, is $261,319.37. Plaintiff by the performance of its contract with the defendant bank, has suffered a loss in the sum of $27,656.99, which exceeds the penal sum of the bond sued on in this action, to wit: $25,000. It demands judgment that it recover of defendants the sum of $25,000.

The action was heard on defendants' demurrer to the complaint.

From judgment overruling their demurrer, and allowing defendants thirty days in which to answer the complaint, defendants appealed to the Supreme Court.

*Travis & Travis, Bridger & Ely, and Alvah Early for plaintiff.*

*D. C. Barnes, Lloyd J. Lawrence and Burgwyn & Norfleet for defendants.*

CONNOR, J. It is manifest that the defendant, the First National Bank of Murfreesboro, was induced, primarily and chiefly, to enter into the contract with the plaintiff by the agreement of the plaintiff bank, in consideration of the conveyance and transfer to it of all the assets of the defendant bank, that it would pay off and discharge all the liabilities of the said defendant bank and thereby save its stockholders from loss by reason of their individual statutory liability, and also save its directors from loss by reason of personal liability which they may have incurred by violations of provisions of the banking laws of the United States. The contract was entered into because of the apprehension of the stockholders and directors of the defendant bank that it was, or was about to become, insolvent. The agreement of plaintiff, a banking corporation organized under the laws of this State, with its principal place of business at Ahoskie, N. C., to operate a branch bank at Murfreesboro, N. C., subject to the approval of the Corporation Commission of this State, was merely incidental to the controlling purpose of the contract. There is no specific reference in the bond to this agreement. The performance by the plaintiff of this agreement is not a condition precedent to liability on the bond and the failure of the plaintiff to allege in its complaint that it had performed the same, does not affect its right to recover on the bond in accordance with its terms. The principle that a party to a contract, in order to maintain an action for damage for its breach, or for specific performance, if it be such a contract as will be enforced specifically by the court, must both allege and prove performance by him, or a waiver of performance by the party against whom

relief is sought *(Land Co. v. Smith,* 191 N. C., 619, 132 S. E., 593) is not applicable. If there was a breach by plaintiff of this agreement, for which the defendant bank would be entitled to damages, it is not such a breach of the contract between the parties as will relieve the defendant bank of its liability on the bond. *Westerman v. Fibre Co.,* 162 N. C., 294, 78 S. E., 221. The complaint in this action is not demurrable because of the failure of plaintiff to allege therein its performance of an incidental agreement, which the parties manifestly did not regard as a substantial consideration for the contract.

The contention of the defendants that they cannot be held liable to the plaintiff in this action, upon the facts alleged in the complaint, which are admitted by the demurrer *(Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800), for that the execution by the defendant bank of both the contract and the bond was *ultra vires,* and that for this reason there was error in the judgment overruling their demurrer to the complaint, cannot be sustained.

The conveyance and transfer of its assets to the plaintiff by the defendant bank, while made in contemplation of its insolvency, was not made to prevent the application of its assets to the payment of its liabilities; both the purpose and the result of such conveyance and transfer was the payment in full of all the liabilities of the defendant bank. Upon the admitted facts, no one of its creditors has just ground for complaint. Creditors having been paid by the plaintiff are estopped from challenging the validity of the contract, pursuant to which they have been paid in full. Nor can a stockholder of the defendant bank complain that the contract was unlawful; all stockholders, as the result of the contract, and of its performance by the plaintiff, have been relieved of their individual, statutory liability to creditors of the bank and have therefore been benefited by plaintiff's performance of the contract. It does not appear from the complaint that the Comptroller of the Currency has approved the contract, but as it does appear that the defendant bank did not undertake to sell or assign its franchise as a national bank, it will be presumed that the contract was approved by him. The defendant bank, and its codefendants, who are not only sureties on its bond, but also its directors, having received the full benefit of the contract, in accordance with its terms, by plaintiff's performance of the same, will not now be heard to deny liability on the bond on the ground that the defendant bank had no power to execute the bond or to enter into the contract. Where a corporation, whether engaged in the banking or in other business, has received full value for a liability, incurred by its contract, it will not ordinarily be relieved of such liability upon the contention that the contract was *ultra vires. Quarries Co. v. Bank,* 190 N. C., 277, 129 S. E., 619.

As the defendant bank, the principal, is liable on the bond, it follows that its codefendants, the sureties, are also liable, and that there is no error in the judgment overruling the demurrer. If defendants desire to do so, they may, under the judgment, file an answer and by denial of material allegation of the complaint, raise issues of fact, upon which they will be entitled to trial. The judgment, overruling the demurrer, is Affirmed.

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C. H. JULIAN v. W. L. WARD, H. S. RAGAN, L. E. ROCKETT, M. L. WOOD, AND A. S. HINSHAW, BOARD OF COUNTY COMMISSIONERS OF RANDOLPH COUNTY.

(Filed 19 March, 1930.)

**Taxation A a—In this case held: local statute requiring submission of bonds to voters does not apply to bonds for necessary school term.**

Where the board of county commissioners of a county, acting as an administrative agency for the State, order, in accordance with statutory procedure, the issuance of bonds to provide funds for the purchase of sites for, and the erection of, schoolhouses necessary to carry out the constitutional mandate for a six months term of public school for children between the ages of six and twenty-one years, Const., Art. IX, it is not required that the question of the issuance of such bonds be submitted to the vote of the electorate, and a public-local act, forbidding the commissioners of the county to issue bonds without first submitting the matter to a vote of the people, does not apply to such bonds, but only to local matters.

APPEAL by plaintiff from *Shaw, J.*, at January Term, 1930, of RANDOLPH. Affirmed.

This is an action for injunctive relief. The court below made the following order, or judgment:

"This cause coming on to be heard by his Honor, Thomas J. Shaw, Superior Court judge, holding court in the Fifteenth Judicial District, in Chambers, at Troy, North Carolina, and it appearing to the court that, Hon. P. A. McElroy, Superior Court judge, on 8 January, 1930, issued an order restraining the defendants from issuing bonds by authority of a certain bond order mentioned and set out in the complaint filed in this cause; and, that in said order, the defendants are required to appear before the undersigned, at Troy, North Carolina, to show cause, if any they have, why said restraining order should not be made permanent; and, it further appearing to the court that, said hearing was, by consent of counsel for plaintiff and defendants, continued from 22 January, 1930, until 23 January, 1930.

"After reading the pleadings, including the complaint and answer, both of which are taken and considered as affidavits, and, after hearing the arguments of counsel for both plaintiff and defendants, the court finds, as a fact, that, on 1 July, 1929, the defendants passed a bond order for the issuance of $100,000 of Randolph County bonds, the proceeds of said bond issue to be used for the purchase of school sites, and the erection of school buildings on said sites, said sites being located at Franklinville, N. C., Cedar Falls, N. C., and Archdale, N. C., all of said towns being located in Randolph County, North Carolina.

"The court further finds, as a fact that, said bond order was passed on its final passage, on 18 July, 1929, and that a notice thereof was duly published, as is by law provided, and that the same was accompanied by a financial statement of said county, which shows the assessed property valuation thereof to be $27,364,013, and the school debt of said county to be $324,225, and the percentage that said net school debt bears to the said assessed valuation to be .01184.

"The court further finds, as a fact, that the issuance of the said bonds and the expenditure of the money to be derived from the sale thereof is a necessary expense; that it is necessary to issue said bonds, and to use the funds to be derived from the sale thereof, in order for the public schools of North Carolina to be maintained as is required by the Constitution of said State.

"The court further finds, as a fact that, in the issuance of said bonds, the above named defendants are acting as administrative agencies of the State, and are employed by the General Assembly to discharge the duties, imposed upon them by the Constitution, to provide a State system of public schools, according to the provisions of said Constitution; that since they are acting as such State agencies, it is not necessary for the question of the issuance of said bonds to be submitted to a vote of the qualified voters of the county of Randolph.

"It is, therefore, in accordance with the above named findings, ordered and adjudged that the restraining order heretofore issued by his Honor, P. A. McElroy, be and the same is hereby dissolved."

The plaintiff excepted and assigned error to the above order, or judgment, and appealed to the Supreme Court.

*Moser & Burns for plaintiff.*
*A. I. Ferree and C. N. Cox for defendants.*

CLARKSON, J. The question involved: Does a public-local statute, forbidding "the board of county commissioners for the county of Randolph" to issue bonds without first submitting the matter to a vote of the people of said county, prevent said commissioners, acting as an ad-

ministrative agency of the State, from issuing bonds for the purpose of purchasing land, building the necessary schoolhouses and operating the schools in said county as required by the Constitution without submitting the matter to a vote of the people? We think not. The board of commissioners for the county of Randolph, acting as an administrative agency of the State, can issue the bonds without a vote of the people as the Public-Local Statute applies only to local matters.

Under Article IX, "Education," in the Constitution of North Carolina, we find the following sections:

"SECTION 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

SEC. 2. The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race.

SEC. 3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year, and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment."

Under these and other pertinent sections of the Constitution, it has been held in this jurisdiction that these provisions are mandatory. It is the duty of the State to provide a general and uniform State system of public schools of at least six months in every year wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. Under the mandatory provision in relation to the public school system of the State, the financing of the public school system of the State is in the discretion of the General Assembly by appropriate legislation either by State appropriation or through the county acting as an administrative agency of the State. *Lacy v. Bank,* 183 N. C., 373; *Lovelace v. Pratt,* 187 N. C., 686; *Frazier v. Commissioners,* 194 N. C., 49; *Hall v. Commissioners of Duplin,* 194 N. C., 768.

In the present action, in reference to Randolph County, the order, or judgment, in the court below, recites: "The court further finds, as a fact that, in the issuance of said bonds the above named defendants are acting as administrative agencies of the State, and are employed by the

General Assembly to discharge the duties, imposed upon them by the Constitution, to provide a State system of public schools, according to the provisions of said Constitution."

We think that this Public-Local Act must be construed as subordinate to the provisions of the Constitution, in reference to the public school system. See *Hartsfield v. Craven County,* 194 N. C., 358; *Owens v. Wake County,* 195 N. C., 132.

In *Hall v. Commissioners of Duplin County,* 195 N. C., at p. 369, is the following: "The decisions of this Court are to the effect that bonds and notes to be issued for erecting and equipping schoolhouses and purchasing lands necessary for school purposes without submitting the question to popular vote 'where such schoolhouses are required for the establishment or maintenance of the State system of public schools in accordance with the provisions of the Constitution.' The power is not given the county to issue bonds for the erection and purchase of schoolhouses without a popular vote, except where such schoolhouses and necessary land therefor are required for the establishment and maintenance of a six months school term as provided by the Constitution. *Lovelace v. Pratt,* 187 N. C., 686; *Frazier v. Commissioners,* 194 N. C., 49; *Owens v. Wake County, ante,* 132. The purpose for which the bonds are issued must be stated and set forth in the bond resolution itself."

It appears from the record and order or judgment in the court below that the law in the above particulars has been substantially complied with. The judgment below is

Affirmed.

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STATE v. JOHN MACON.

(Filed 19 March, 1930.)

**1. Homicide B a—Evidence of premeditation and deliberation held sufficient to be submitted to the jury.**

Where in a prosecution for murder there is evidence tending to show that the defendant knew that he was wanted by officers of the law and that the deceased, in company with other officers, inquired for the defendant at the house where he was staying and were told that the defendant was at the barn when in fact he was in the house, and that the defendant stepped out of the house, saw the officers, went back into the house and fired the fatal shot with a pistol from a crack in the door, with evidence to the contrary that he did not shoot until he had been shot at by the officers while he was attempting to escape: *Held,* the evidence of premeditation and deliberation was sufficient to be submitted to the jury, C. S., 4200, and the refusal to give the defendant's prayer for an instruction that he could not be found guilty of murder in the first degree was not error. C. S., 565.

**2. Homicide E a—Where evidence shows that defendant shot before knowing of deceased's purpose to arrest him, lawfulness of arrest is immaterial.**

Where the defendant in a prosecution for murder contends that he shot the deceased in self-defense after the deceased had wounded him while attempting to arrest him without a warrant, and all the evidence tends to show that the defendant shot the deceased before the deceased or any of his companions had informed him of their purpose to arrest him; that neither the deceased nor any of his companions had attempted to arrest the defendant prior to that time, and there is evidence that the defendant shot after premeditation and deliberation: *Held*, it was immaterial that the officers had no warrant for the defendant's arrest, and the refusal to instruct the jury as to the lawfulness of the arrest was not error, and *held further*, there was ample evidence that the officers had reasonable grounds for arresting the defendant without a warrant, C. S., 4544, and an instruction that the jury might find the defendant guilty of murder in the first or second degree, or of manslaughter, or acquit him, was not error.

APPEAL by defendant from *Small, J.*, at September Term, 1929, of WARREN. No error.

This is a criminal action in which the defendant was tried on an indictment for murder. There was a verdict that defendant is guilty of murder in the first degree.

From judgment on the verdict that defendant suffer death by means of electrocution, as provided by statute, C. S., 4658, defendant appealed to the Supreme Court.

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

*No counsel for defendant.*

CONNOR, J. On 3 May, 1929, at the home of Baldy Mitchell, in Warren County, North Carolina, the defendant shot and killed Sam Pinnell. Deceased was shot in the morning at about 8 o'clock; he died that night at about 11 o'clock.

The evidence for the State tended to show that defendant was in the house at the time he fired his pistol at the deceased; that he opened the door, saw deceased standing a short distance from the house, and stepped back into the house; and that he then cracked the door, and fired his pistol at the deceased, thereby inflicting the fatal wound. Defendant then came out of the house, when he and the deceased, who was armed with a shot gun, exchanged several shots at each other. There was conflict in the evidence as to whether defendant was wounded by the shot fired by the deceased. Defendant attempted to escape, but was wounded by companions of the deceased, who thereafter arrested him.

There was evidence for the defendant tending to show that he did not fire his pistol at the deceased until after he came out of the house and until after the deceased had fired at him with his shot gun. Defendant contended that he killed the deceased in self-defense, or at most without deliberation and premeditation.

The deceased, Sam Pinnell, accompanied by his brother, Robert Pinnell, a deputy sheriff of Warren County, Walter Mustian, also a deputy sheriff of said county, and his brother, E. H. Pinnell, had gone to the home of Baldy Mitchell early on the morning of 3 May, 1929, for the purpose of arresting defendant, at the request of the sheriff of Franklin County, North Carolina. Robert Pinnell, who had been a deputy sheriff of Warren County for several years, had been informed by the sheriff of Franklin County that defendant, in 1912, had killed James Sherrod, in Franklin County, and that he had fled from said county and had remained away therefrom for the purpose of avoiding arrest on a charge of murder.

Defendant had been in Warren County only a few weeks and at the home of Baldy Mitchell only a few days. Sam Pinnell and his brother, E. H. Pinnell, were summoned by their brother, Robert Pinnell, to go with him and the other deputy sheriff to aid in the arrest of the defendant. Neither of them had a warrant for the arrest of the defendant. They were acting at the request of the sheriff of Franklin County and relied upon the information given them by the said sheriff. When they arrived at the home of Baldy Mitchell, where they had reason to believe they would find the defendant, they inquired of his wife, Bessie Mitchell, if defendant was there. She told them that defendant was at the barn, some distance from the house. Defendant was, in fact, in the house at the time the inquiry was made and there was evidence tending to show that he heard the inquiry made of Bessie Mitchell and also heard her reply. There was no evidence tending to show that at this time, either of the officers told Bessie Mitchell why they were inquiring for the defendant, or for what purpose they had come to her home.

The defendant testified that he knew he was wanted in Franklin County to answer the charge that he had murdered James Sherrod, and that he suspected that the men who inquired of Bessie Mitchell, if he was at her home, were officers and that they were seeking to arrest him. He testified further: "When the officers came there that morning, I did not know whether they were after me or not. I knew I was wanted for murder. I was sitting in the room with Bessie Mitchell and her daughter. I had my pistol in its holster strapped around my waist. I did not hear the officers asking anything. I went to the back door when the men came because I was going out that way. I was not running away until I got out of the house. I did not see the men before I got out

of the house. I did not open the door and see Mr. Pinnell and then shut the door and shoot through a crack. When I went out he had gone twenty-five or thirty steps from the house, somebody ordered me to halt, but I ran because I knew I was wanted. I thought it was somebody after me to arrest me for murder in Franklin County, and I tried to get away. When somebody ordered me to halt, I knew it was officers who wanted me in Franklin County for killing James Sherrod. I saw Mr. Pinnell after I ran out into the yard. I was shot in the back before I fired. I turned and shot Mr. Pinnell, as I was running away. I kept going until I fell." There was evidence tending to show that after defendant had shot and fatally wounded Sam Pinnell, he was shot and wounded by the other officers.

Defendant admitted that he had shot and killed James Sherrod, in Franklin County, and that he had fled from said county to avoid arrest on a charge of murder. He testified that the killing of Sherrod was accidental.

There was evidence that the general character of defendant is bad; there was no evidence to the contrary.

The court instructed the jury that they should return a verdict that the defendant is guilty of murder in the first degree, or of murder in the second degree, or of manslaughter, or that defendant is not guilty, as they should find the facts to be from all the evidence. The contentions of both the State and the defendant as to the facts and as to the law, were fully and fairly stated in the charge to the jury. There was no exception to the charge as given as to the law applicable to the facts as the jury might find them to be from the evidence.

The only assignments of error on defendant's appeal to this Court are based on his exceptions to the refusal of the court to instruct the jury in accordance with his requests in writing, made in apt time. C. S., 565. Neither of these assignments of error can be sustained.

There was evidence from which the jury could find not only that defendant is guilty of murder, but also that the murder was committed after deliberation and premeditation, and that therefore the defendant is guilty of murder in the first degree. C. S., 4200. *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Walker,* 173 N. C., 780, 92 S. E., 327. This evidence was submitted to the jury under instructions which are in accord with authoritative decisions of this Court. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Walker,* 193 N. C., 489, 137 S. E., 429.

All the evidence for the State tends to show that neither the deceased nor any of his companions had attempted to arrest the defendant, prior to the time defendant fired his pistol at the deceased and thereby inflicted the fatal wound. It was therefore immaterial that they had no warrant for his arrest. Defendant shot and killed the deceased before he or any of his companions had informed him of their purpose to arrest

him on a charge of murder. There was therefore no error in the refusal of the court to instruct the jury as to the lawfulness of an arrest of the defendant without a warrant. There was ample evidence, however, tending to show that deceased and his companions had reasonable ground for arresting the defendant for murder, without a warrant. C. S., 4544.

We find no error on this appeal. The defendant has had a fair trial, in which all his rights under the law were carefully safeguarded. The judgment is affirmed.

No error.

C. L. DUNBAR v. BOARD OF COMMISSIONERS OF ALBEMARLE DRAINAGE DISTRICT, AND ALBEMARLE DRAINAGE DISTRICT.

(Filed 19 March, 1930.)

1. **Abatement and Revival B b—Where relief sought could not be obtained in prior pending action, subsequent action is not abated thereby.**

   The pendency of an action, brought by a drainage district and the present plaintiff as a landowner in such district against another drainage district wherein it was adjudged that the defendant district had the right to empty its overflow of waters into a certain canal upon its maintenance of temporary dams and subsequent erection of permanent dams to prevent the overflow of water on the lands in the plaintiff district, is not a bar to the present action brought to recover damages from the overflow of waters caused by the defendant's negligent failure to maintain the temporary dams in accordance with the judgment, the present cause of action having arisen since the institution of the prior action, and the relief sought being unobtainable therein.

2. **Drainage Districts C a—In this case held: instruction as to district's liability for failing to maintain dams was correct.**

   Where in an action against a drainage district the evidence discloses that in a prior action the district was ordered to maintain certain temporary dams until permanent dams could be erected in order to prevent the overflow of waters from a canal, and that such temporary dams were washed away, causing injury to the plaintiff's land from overflow water, an instruction to the jury that the defendant's liability was to be determined by their finding from the evidence whether or not defendant was negligent in failing to restore and maintain the temporary dams pending the erection of permanent dams, as required by the former judgment, is not error.

APPEAL by defendants from *Devin, J.*, at July Term, 1929, of WASHINGTON. No error.

This is an action to recover damages for injuries to plaintiff's land and crops, caused by the flooding of said land by water which flowed thereon from the defendant drainage district.

Plaintiff's land is located within the boundaries of Pungo River Drainage District, which lies between the defendant drainage district and the Pungo River. Prior to the organization of the defendant drainage district, the Pungo River Canal had been constructed as a part of the drainage system of the Pungo River Drainage District. The defendant drainage district, after its organization, had cut into the Pungo River Canal, for the purpose of draining water from said district into said canal and thence into Pungo River. By reason of the construction of the drainage system of the defendant, the volume of water flowing into said Pungo River Canal was greatly increased, causing said water to overflow upon the land of the plaintiff, which is included within the boundaries of the Pungo River Drainage District.

Prior to the commencement of this action in the Superior Court of Washington County, an action was instituted in the Superior Court of Beaufort County, entitled "Board of Drainage Commissioners of Pungo River District, C. L. Dunbar *et al.*, Landowners of said District, *v.* Board of Drainage Commissioners of Albemarle Drainage District"; at May Term, 1922, of the Superior Court of Beaufort County, a judgment was rendered in said action, adjudging that the defendant, Albemarle Drainage District, has the right to drain water from lands included in said district into Pungo River Canal, and thence into Pungo River, provided the volume of water so drained shall not exceed the volume which naturally drained therein prior to the establishment of said drainage district. In said judgment it was ordered that the defendant erect and maintain at the head of Pungo River Canal such dams as will prevent any greater quantity of water flowing into said canal from the lands in said district, than flowed therein prior to the creation of said Albemarle Drainage District; engineers were appointed by the court to determine the size and kind of dams required for that purpose. It was further ordered by the court that pending the report of said engineers, the temporary dams already erected by the defendant drainage district shall be maintained by it, for the protection of the lands included within the boundaries of the Pungo River Drainage District from waters drained into Pungo River Canal from the Albemarle Drainage District. The engineers appointed in the judgment have not acted, and no permanent dams have been erected by the defendant in accordance with the provisions of said judgment. From the date of said judgment, until 15 July, 1924, the temporary dams referred to in said judgment were maintained by defendant, but on or about said date, the said temporary dams were washed out, and since said date, defendant has wrongfully, carelessly and negligently, as alleged in the complaint, failed to restore the same or to erect permanent dams of the kind and character referred to in and required by said judgment. As the result of defendant's negli-

gent failure to restore said temporary dams or to erect permanent dams, water flowing from defendant drainage district into the Pungo River Canal, in greater volume than prior to the creation of the defendant drainage district, has overflowed from said canal upon the land of plaintiff, thereby causing plaintiff damages resulting from injuries to his land and to his crops.

Defendants denied the material allegations of the complaint. After the pleadings were read at the trial, defendants moved that this action be dismissed, for that the action instituted by plaintiff and other landowners in Pungo River Drainage District against Albemarle Drainage District in the Superior Court of Beaufort County, is still pending, and plaintiff is therefore not entitled to maintain an independent action for relief upon the facts alleged in his complaint. This motion was denied, and defendant excepted.

The issues submitted to the jury were answered as follows:

"1. Were the lands and crops of the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. What damage, if any, is plaintiff entitled to recover therefor? Answer: $4,500."

From judgment that plaintiff recover of defendant the sum of $4,500, together with the costs of this action, defendant appealed to the Supreme Court.

*Ehringhaus & Hall and McMullan & LeRoy for plaintiff.*
*W. L. Whitley and McLean & Rodman for defendant.*

CONNOR, J. There was no error in the refusal of the trial court to dismiss this action, on motion of defendant, for that the action instituted in the Superior Court of Beaufort County, wherein the plaintiff and the defendants in this action are parties, is still pending. The pleadings in that action do not appear on the record in this action. The judgment in that action, however, which does appear on the record in this action, purports to be and is final and conclusive of the rights of the parties thereto with respect to all the matters involved therein. The purpose of that action, as appears from the judgment, was to have an adjudication of the rights of the parties thereto with respect to the use of Pungo River Canal for drainage of waters from the Albemarle Drainage District into Pungo River. It does not appear that the plaintiffs therein, including the plaintiff in this action, had alleged any facts in their pleadings upon which they or either of them demanded judgment for damages. It does not appear that at the date of the commencement of said action, or at the date of the rendition of the judgment therein, any of the plaintiffs had suffered any damages caused by the wrongful acts of defendant drainage district. The cause of action alleged in the complaint in this

action has arisen since the rendition of the judgment in that action. Upon this cause of action, plaintiff alone is entitled to recover, whereas upon the cause of action on which judgment was rendered in the action pending in the Superior Court of Beaufort County, only the plaintiff therein, Pungo River Drainage District, was entitled to recover. The owners of land included in said district were not necessary, even if proper parties. Plaintiff could not have the relief in the action pending in Beaufort County, which he is seeking in this action. He can, therefore, maintain an independent action for such relief. In *Crawford v. Allen,* 180 N. C., 245, 104 S. E., 468, quoting from *Hudson v. Coble,* 97 N. C., 263, 1 S. E., 841, it is said: "Numerous adjudications have established the general proposition that when relief can be had in a pending cause, it must be there sought. *Murrill v. Murrill,* 84 N. C., 182, and many other cases." Where, however, the relief sought cannot be had in a pending cause, the plaintiff, although both he and the defendants are parties to such cause, may maintain an independent action for such relief. Defendant's first assignment of error based upon exceptions to the refusal of the court to dismiss the action, or to nonsuit the plaintiff, at the close of all the evidence, is not sustained.

Nor can the other assignments of error, based upon exceptions to instructions of the court to the jury, be sustained.

The jury was properly instructed by the court that defendants' liability to plaintiff in this action, was to be determined, primarily, by their finding from the evidence whether or not defendant was negligent in failing to restore and maintain the temporary dams, pending the erection of the permanent dams, as required by the judgment in the action instituted in Beaufort County. The jury was not instructed that defendant was liable as an insurer, for damages sustained by plaintiff.

We find no error in the charge. The judgment is affirmed.

No error.

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## STATE v. MACON MYRICK, ROBERT MYRICK AND ED WOODRUFF.

(Filed 19 March, 1930.)

**Bail B d—Agreement by telephone to become surety for appearance of one for whom warrant had been issued is invalid as bond or recognizance.**

A promise, made over a telephone to a justice of the peace, to sign a bail bond or enter into a recognizance for one for whom a warrant of arrest has been issued, and which the promisees later refused to execute, is invalid as a bail bond or as a recognizance, and in the Superior Court in an action on the magistrate's certificate to this effect the plea of *nul tiel* record by the supposed sureties will be sustained.

STATE *v.* MYRICK.

CRIMINAL ACTION, before *Sink, Special Judge,* at August Term, 1929, of HALIFAX.

The defendant, Macon Myrick, on or about 24 November, 1928, assaulted a man named Shell. On the night of 24 November, W. O. Thompson, a justice of the peace, issued a warrant for said Myrick. Between 12 and 1 o'clock, on the early morning of 25 November, and before the defendant was arrested the defendant, Robert Myrick, called the justice of the peace over telephone to inquire about the amount of bail required for the appearance of defendant, Macon Myrick. After some discussion over the telephone, the justice of the peace stated that he would require a bond of $500 for the appearance of said defendant in the court of said justice of the peace. Thereupon the defendant, Robert Myrick, and the defendant, Ed Woodruff, in a telephone conversation with the magistrate stated that they would go on the bond of said Macon Myrick. In consequence of said telephone conversation the said Macon Myrick was not arrested under said warrant. On the next day the defendant, Macon Myrick, was called and failed, and the defendants, Robert Myrick and Ed Woodruff, have never signed the bond. No bond was ever written out, but a blank bond called a recognizance was sent up to the Superior Court with the following notation: "The above sureties agreed by telephone to go on this bond in the presence of G. F. Gray. Taken, subscribed and acknowledged, this 26 November, 1928, before me and W. O. Thompson. ....., Justice of the Peace."

In the Superior Court the facts were found by the trial judge as aforesaid. The defendant, Macon Myrick, was solemnly called and failed, and thereafter judgment *nisi* issued against the defendants, Robert Myrick and Ed Woodruff, as sureties on said purported bond. The sureties denied liability on said bond and pleaded *nul tiel* record. The plea was overruled, and judgment entered against said sureties with direction that execution issue upon said judgment. Whereupon the defendants, sureties, appeal.

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

*George C. Green for defendant.*

BROGDEN, J. Is an oral promise, made over a telephone, to a justice of the peace issuing a warrant, to sign a bail bond or enter into a recognizance, binding upon such purported sureties, who thereafter declined to sign said bond or enter into said recognizance?

The earlier declarations of this Court upon the subject of bail bond tend to manifest a disposition to construe such instruments strictly. For instance, it was held in *Walker v. Lewis,* 3 N. C., 16, "that a bail

bond having all the forms of such an instrument, except the seal, was invalid, and that the plea of *nul tiel* record would be upheld."

Again, in *Adams v. Hedgepeth,* 50 N. C., 327, it was held that "the signing and sealing of a party at the foot of a bail bond, without his name's being mentioned in the condition, or any other part of the body of the instrument, does not constitute him the bail of the party sued." This case was dealing with certain aspects of a civil action, but the principle announced was broad and comprehensive. *S. v. Edney,* 60 N. C., 463. Of course, the law has been liberalized through the years and doubtless such technical objections would not now be permitted to prevail in criminal procedure. However, the distinction between a recognizance and a bail bond was thoroughly discussed in the case of *S. v. Bradsher,* 189 N. C., 401, 127 S. E., 349, by *Connor, J.* The authorities are therein assembled and applied. The purported instrument in the case at bar, under the law as interpreted by this Court, is neither a recognizance nor a bond. Hence the defendants are not bound thereon, and the judgment must be

Reversed.

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TALLEY & BAUGHAM, INC., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 March, 1930.)

**Carriers B c—Evidence of delay in transporting beyond ordinary time and damages is sufficient to take case to jury.**

Where damages only are sought in an action against a railroad company for failure to transport and deliver a shipment in a reasonable time, evidence in behalf of the plaintiff that the shipment in question was delayed beyond the ordinary time required, and that damages resulted therefrom is sufficient to take the case to the jury and to deny the defendant's motion as of nonsuit, the deductible time allowed by the penalty statute, C. S., 3516, applies to actions brought to recover the penalty given by the statute and not to actions for damages only.

APPEAL by defendant from *Moore, Special Judge,* at September Term, 1929, of BEAUFORT.

Civil action for damages imputed to defendant for failure to transport, within a reasonable time, a shipment of fifty-eight barrels of Irish potatoes from Washington, N. C., to Greensboro, N. C., a distance of 207 miles.

The potatoes in question were delivered to the defendant's agent at Washington, in good condition, on Saturday morning, 11 June, 1927,

between the hours of 8 and 11 o'clock, consigned to plaintiff at Greensboro, order notify W. I. Anderson & Company. The shipment reached Greensboro Wednesday morning following, 15 June, in a damaged condition. Anderson & Company were immediately notified. There was evidence for the plaintiff that during the same season, potatoes had been shipped on Saturday from Washington to Greensboro, in less than carload lots, and reached Greensboro the following Monday morning.

The defendant's evidence tends to show that the shipment in question was handled in the usual way, carried Saturday afternoon to Rocky Mount, a transfer station, and on the following Monday was consolidated with other shipments going in the same direction, left Rocky Mount Tuesday morning, 14 June, was delivered to the Southern Railway at Selma on schedule time, and reached Greensboro, Wednesday morning at 12:05 a.m.

There was a verdict and judgment for the plaintiff for $58, from which the defendant appeals, assigning as principal error the refusal of the court to grant the defendant's motion for judgment of nonsuit.

*Ward & Grimes for plaintiff.*
*MacLean & Rodman for defendant.*

STACY, C. J. The plaintiff, having offered evidence tending to show that the defendant omitted and neglected to transport the shipment in question within the "ordinary time required" *(Stone v. R. R.,* 144 N. C., 220, 56 S. E., 932), and damage resulting therefrom, was entitled to go to the jury. *Jenkins v. R. R.,* 146 N. C., 178, 59 S. E., 663; *Meredith v. R. R.,* 137 N. C., 478, 50 S. E., 1.

The case of *Shaw v. Express Co.,* 171 N. C., 216, 88 S. E., 222, strongly relied upon by the defendant, is neither controlling nor in point, as the facts of that case readily distinguish it from the one at bar.

The deductible time allowed by C. S., 3516, in computing "reasonable time," to wit, "two days at the initial point and forty-eight hours at one intermediate point for each hundred miles distance or fraction thereof," applies to actions brought to recover the penalty given by said section and fixing the amount thereof, and not to actions for damages only, such as we have in the instant case. *Jenkins v. R. R., supra.*

There was no error in submitting the case to the jury.

No error.

H. C. BRIDGERS, TRUSTEE, v. FARMERS BANKING AND TRUST COMPANY AND B. M. HART,

AND

H. C. BRIDGERS, TRUSTEE, v. FARMERS BANKING AND TRUST COMPANY, AND B. M. HART, D. T. WILLIAMS, J. C. RUFFIN AND T. P. JENKINS.

(Filed 19 March, 1930.)

**1. Bankruptcy C c—Definition of preference which may be set aside.**

A preference given a creditor which can be set aside under the provisions of the Federal Bankruptcy Act must be one made within four months preceding the filing of the petition, when the debtor is insolvent, with knowledge by the creditor or information sufficient to put him upon inquiry that will lead to knowledge of the debtor's insolvency, and by which such creditor will receive a larger per cent of his debt than others in the same class or which will diminish or deplete the bankrupt's assets.

**2. Same—Upon conflicting evidence as to whether preference diminished bankrupt's assets the question is for the jury.**

Where there is conflicting evidence as to whether the preferences alleged to have been made by a bankrupt diminished or depleted his assets, it being contended by the creditor that they were made from the sale of collateral hypothecated to secure the debt more than four months preceding the filing of the petition in bankruptcy, the issue should be submitted to the jury.

**3. Same—Actual notice of creditor of insolvency is not necessary if he was put upon inquiry which would have led to such knowledge.**

Actual notice of the creditor of the insolvency of a bankrupt is not required to set aside a preference under the provisions of the Federal Bankruptcy Act, but the creditor is required to exercise ordinary care to ascertain the facts, and where he has sufficient knowledge to put him upon inquiry he is chargeable with all the facts which such inquiry would have disclosed, and in this case *held:* evidence of such knowledge was sufficient to be submitted to the jury.

**4. Bankruptcy C e—Trustee in bankruptcy has burden of proving preference depleted bankrupt's assets.**

The trustee in bankruptcy has the burden of showing that payments on a preëxisting debt made by a bankrupt within four months prior to the filing of the petition in bankruptcy diminished or depleted the assets of the bankrupt, and where there is conflicting evidence as to whether the bankrupt's estate was thereby diminished or depleted an issue is raised for the determination of the jury.

**5. Evidence F e—Where plaintiff has introduced admissions in the answer defendant may introduce paragraphs explaining such admissions.**

Where the plaintiff in the action has offered in evidence certain allegations of the complaint and admissions in the answer, it is competent for the defendant to introduce all paragraphs of the answer in which such admissions were explained or modified, but not of extraneous matter.

**6. Trial B c—Objection to admission of evidence is untenable where evidence of same character has been admitted without objection.**

Where certain evidence has been introduced on the trial without objection the complaining party may not successfully except to the introduction of other evidence of substantially the same character.

CIVIL ACTION, before *Devin, J.*, at November Term, 1929, of EDGECOMBE.

Two actions were instituted by H. C. Bridgers, trustee in bankruptcy of Carolina Leaf Tobacco Company. In both suits the plaintiff alleged that within four months of the bankruptcy of the Carolina Leaf Tobacco Company the said bankrupt had made preferential payments to the defendant bank upon certain notes held by said bank. Upon said notes there were certain individual endorsers, but not the same endorsers on each note. Hence separate actions were instituted, but both actions were consolidated and tried together.

The Carolina Leaf Tobacco Company was adjudged a bankrupt in June, 1925. On 3 April, 1925, the said bankrupt executed and delivered to the defendant bank a note for $5,000, which was endorsed by certain individuals who were directors of the bankrupt. This note represented a renewal of a larger indebtedness which had been reduced from time to time previous to 3 April, 1925. On 2 May, 1925, the bankrupt executed and delivered to said bank a note for $3,000. The property of the bankrupt was advertised for taxes and there were certain claims for labor due. The proceeds of the $3,000 note was used to pay taxes and to discharge unpaid claims for labor, and a balance of $1,250 was credited by the bank on the $5,000 note aforesaid. On 14 May, 1925, the sum of $400 was credited on the $5,000 note, and on 21 May, 1925, there were two credits on the $3,000 note, to wit, one of $758.75, the other of $1,699.90. There was evidence tending to show that the $758.75 credit was derived from the sale of hogshead material and tobacco by the bankrupt, the proceeds thereof being paid to the defendant bank, and that the $1,699.90 credit was derived from the sale of tobacco by the bankrupt, the proceeds thereof having been paid to the defendant bank. There was further evidence tending to show that tobacco warehouse receipts were deposited by the bankrupt as collateral to all of said loans, and the defendants contended that the credits on both of said notes were derived from the sale of collateral duly deposited with the defendant bank at the time of the execution of said notes. There was evidence to the contrary.

The issues submitted to the jury with respect to the $3,000 note were as follows:

1. "Did the payment of $758 on the $3,000 note constitute a preference under the bankruptcy laws of the United States, as alleged in the complaint?"

2. "Did the payment of $1,699 on the $3,000 note constitute a preference under the bankruptcy laws of the United States as alleged in the complaint?"

The jury answered the first issue "Yes," and the second issue, "No."

The issues submitted on the $5,000 note were as follows:

1. "Did the payment of the $1,250 on the $5,000 note constitute a preference under the bankruptcy laws of the United States as alleged in the complaint?"

2. "Did the payment of the $400 on said $5,000 note constitute a preference under the bankruptcy laws of the United States, as alleged in the complaint?"

The jury answered the first issue, "Yes," and the second issue, "Yes."

From judgments upon the verdicts the defendants appealed.

*Henry C. Bourne for plaintiff.*
*George M. Fountain for defendants.*

BROGDEN, J. What are the constituent elements of a voidable preference as contemplated and defined by section 60 of the National Bankruptcy Act?

The Bankruptcy Act, section 60(a) provides in substance that: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition or after the filing of the petition and before the adjudication, . . . made a transfer of any of his property, and the effect of the . . . transfer will be to enable any of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class," etc. Section 60(b) provides in substance that if the bankrupt shall make a transfer of his property amounting to a preference "and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

It is declared by the textwriters that a preference consists of eight elements. Remington on Bankruptcy, 3 ed., Vol. 4, sec. 1630, *et seq.* These elements so far as applicable to the case at bar may be classified as follows:

1. The insolvency of the debtor or bankrupt at the time the preference is given.

2. The preference must be given within four months prior to the filing of the petition in bankruptcy.

3. The creditor receiving the preference must thereby obtain a larger percentage of his debt than any other creditor of the same class.

4. The giving of the preference must diminish or deplete the estate of the debtor bankrupt.

5. The person receiving such preference must have reasonable cause to believe, at the time, that the enforcement of the transfer would effect a preference. *Wright v. Cotten,* 140 N. C., 1, 52 S. E., 141; *Weeks v. Spooner,* 142 N. C., 479, 55 S. E., 432; *McNeeley v. Shoe Co.,* 170 N. C., 278, 87 S. E., 64; Remington Bankruptcy, 3 ed., *supra.*

The evidence discloses that the bankrupt was a debtor of the defendant bank at the time the credits were applied, and that all of such credits were applied within the period of four months. However, the defendants contend that most of the credits were derived from the proceeds of the sale of collateral duly pledged by the bankrupt, and hence such credits did not diminish or deplete the estate of debtor. The principle invoked by the defendant upon this aspect of the case was thus expressed in *Weeks v. Spooner,* 142 N. C., 479. "A preference within four months prior to bankruptcy is held invalid, because it diminishes the common fund by the sum or property given the preferred creditor. But when there is a full and fair present consideration, it is not a preference, for the fund is not diminished, the debtor receiving in exchange the value of the property transferred. However, the generally accepted principle, adopted by the courts, is, that there can be no preferential transfer without a depletion of the debtor's estate, and the burden of showing such depletion by payments or credits, made upon a preëxisting indebtedness, is upon the trustee. *Miller v. Fisk Tire Co.,* 11 Fed., 2d, 301; *New Port Bank v. Herkimer Bank,* 225 U. S., 178, 56 L. Ed., 1042.

The evidence was conflicting upon the question of depletion of the estate resulting from the payments made by the debtor. Therefore, the trial judge properly submitted such issue of fact to the jury.

There was also sufficient evidence to be submitted to the jury upon the question of knowledge or notice of insolvency at the time the credits were made. All the authorities concur in declaring that actual knowledge is not required, but reasonable cause to believe that a preference would result is sufficient to impose liability. Hence, a creditor receiving a payment or "transfer" within the period of four months must exercise ordinary care to ascertain the facts, and, if the facts are sufficient to put him upon inquiry, he is chargeable with all the knowledge that such reasonable inquiry would have disclosed. *Wilson v. Taylor,* 154 N. C., 211, 70 S. E., 286.

In the case at bar the defendant knew that the property of the debtor was being advertised for sale for taxes, and that the debtor was not able in due course of business to meet payments for work and labor done. It was also in evidence that the president of defendant bank attended a meeting of the stockholders of the bankrupt some time prior to 2 May,

1925. In the meeting there was a general discussion of the financial condition of the bankrupt. The president of the defendant bank testified: "From that discussion I was of the opinion that unless some of the directors helped them and they collected some of the book accounts they had in New York where they had sold tobacco, they would have a hard time getting along unless some one wanted to endorse for them." Certainly from all the facts and circumstances disclosed by the record, there was sufficient evidence to be submitted to the jury upon the question of notice.

The plaintiff offered certain allegations of the complaint and certain admissions in the answers. Thereupon the defendant sought to offer in evidence all paragraphs of the answers in which such admissions were contained. The trial judge permitted the defendant to offer such portions of the answers as tended to modify or explain the admission therein offered by the plaintiff, but declined to permit the defendant to introduce other allegations of extraneous matter or such as purported to deal with the history and development of the controversy. The ruling of the trial judge is upheld for the reason that the defendant was only entitled to offer from his answer such allegations as actually explained or modified the admission offered by the plaintiff. *Jones v. R. R.*, 176 N. C., 260, 97 S. E., 48; *Weston v. Typewriter Co.*, 183 N. C., 1, 110 S. E., 581; *Malcolm v. Cotton Mills*, 191 N. C., 727, 133 S. E., 7.

The defendant also objected to the testimony of plaintiff to the effect that the payments on the notes diminished the assets of the North Carolina Leaf Tobacco Company. The record, however, discloses that the plaintiff had already given the same testimony before objection was made. Hence such exception cannot be sustained.

In its final analysis, issues of fact were developed which were properly submitted to the jury, and the verdicts and judgments thereon are determinative.

No error.

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MARK BURTON v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 19 March, 1930.)

**1. Insurance E b—Policy of insurance merges all prior agreements and stands as contract of parties until reformation.**

A policy of insurance indemnifying against loss caused by specified accidents will stand as the contract of the parties, merging all prior parol agreements therein, until reformed for fraud or mutual mistake, which must be established by the plaintiff by clear, cogent, and convincing proof.

**2. Insurance E c—To recover for injury not covered by policy allegation of fraud and issue on reformation are necessary.**

In order to reform a contract of accident insurance for fraud or mistake it is necessary for the plaintiff in the suit to allege and prove the fraud or mistake and have issues passed upon by the jury, and where the action is founded only on the allegation and evidence of the fraud and deceit without the necessary prayer for, and issue on reformation, the plaintiff may not recover for an injury from an accident not covered by the policy, and the courts will at most place the parties in *statu quo* by reimbursing the plaintiff for the premium paid with interest.

CIVIL ACTION, before *Stack, J.*, at May Term, 1929, of MECKLENBURG.

The plaintiff alleged that on or about November, 1924, the defendant, through its agent, sold to him a certain accident insurance policy known as the "Industrial Travel and Pedestrian Policy." That thereafter, as a result of negotiations, the defendant company issued to the plaintiff one accident policy of insurance known as the "Standard Industrial Travel and Pedestrian Policy." Plaintiff alleged that the agent represented to him that this policy provided an indemnity of $500 against loss of either eye from "any cause."

Plaintiff further alleged, as a second cause of action, that in November, 1927, the agent of the defendant again solicited him to purchase an accident policy of insurance, and that thereafter the defendant issued its "Standard Travel and Pedestrian Policy." The plaintiff alleged that the agent represented that the second policy would provide "a benefit to him of $1,250 for the loss, by any cause, of either eye, foot, or hand, and certain other benefits for other physical injuries."

Plaintiff further alleged that he was unable to read and accepted both of said policies, believing that they contained provisions as represented by the agent of defendant. It was alleged that in 1928 "plaintiff lost the sight of his left eye, for all practical purposes, when he was hit in the eye, by a police officer, with a blackjack."

The first policy required the payment of a weekly premium of five cents and provided a benefit of $500 for the loss of either eye "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—or 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, 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," etc.

The second policy required an annual premium of $5 and provided a benefit of $1,250 for the loss of either eye and contained the same coverage clause as the first policy above, and in addition thereto, contained a clause covering injury to a "telegraph or other messenger boy," etc.

Plaintiff further alleged that after sustaining the injuries alleged, he discovered that the policies which he held were totally different from those represented to him by the agent of the defendant at the time he acquired the insurance, and that the representations so made were false and fraudulent, intended to deceive, were reasonably relied upon, and did deceive the plaintiff.

Whereupon, plaintiff prayed judgment for the sum of $1,750, same being the indemnity provided in both policies.

The defendant denied that any false representations were made, and asserted that the plaintiff received the identical policies applied for, and that the agent had no authority to contract for a policy of insurance other than that authorized by the defendant.

The evidence disclosed that the plaintiff had paid in premiums on both policies the sum of $20.40.

The issues and answers thereto were as follows:

1. "Did the defendant, through its agent, represent to the plaintiff that it could and would issue to the plaintiff insurance policies containing the provisions set forth in the complaint, to wit, a benefit of $500 for the loss of an eye, by any cause, and a benefit of $1,250 for the loss of an eye by any cause?" Answer: "Yes."

2. "If so, were such representations false and made for the purpose of deceiving the plaintiff?" Answer: "Yes."

3. "If so, were such representations relied upon by the plaintiff?" Answer: "Yes."

4. "If so, was the plaintiff induced thereby to enter into said contracts of insurance?" Answer: "Yes."

5. "What amount is the plaintiff entitled to recover of the defendant?" Answer: "$20.40 with interest."

The court instructed the jury to answer the fifth issue $20.40 with interest.

From judgment upon the verdict the plaintiff appealed.

*G. T. Carswell and Joe W. Ervin for plaintiff.*
*Hamilton C. Jones for defendant.*

BROGDEN, J. (1) Can an illiterate insured, receiving certain written policies of insurance not covering his injury, recover benefits falsely and fraudulently represented to be contained in the policies, without reforming the contracts?

(2) Can such contracts be reformed by a mere showing of fraud and without any allegation or issue warranting reformation and without a prayer for such relief?

*Justice Hoke,* delivering the opinion in *Floars v. Insurance Co.,* 144 N. C., 232, 56 S. E., 915, wrote: "It is also accepted doctrine that when the parties have bargained together touching a contract of insurance, and reached an agreement, and in carrying out, or in the effort to carry out, the agreement a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties. Like other written contracts, it may be set aside or corrected from fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain." *Hollingsworth v. Supreme Council,* 175 N. C., 615, 96 S. E., 81; *Graham v. Ins. Co.,* 176 N. C., 313, 97 S. E., 6; *Elam v. Realty Co.,* 182 N. C., 599, 106 S. E., 632.

In the *Graham case, supra,* the Court remarked: "The written policy accepted by plaintiff stands as embodying the contract, and the rights of the parties must be determined by its terms until the contract is reformed by the court."

In the case at bar the plaintiff does not ask that the policy be reformed so as to provide the specified benefit "for the loss, by any cause, of either eye," etc. In other words, he sues for benefits provided in policies of insurance which limited the benefit to certain specific causes, and yet seeks to recover without reforming the policy the same benefits accruing by reason of accidental injury to his eye from any cause whatsoever. The question, then, is whether a contract of insurance can be reformed and enforced as reformed without appropriate allegation, issue, or prayer for relief. The identical question was considered by this Court in *Britton v. Insurance Co.,* 165 N. C., 149, 80 S. E., 1072. The Court said: "But the reformation is subject to the same rules of law as applied to all other instruments in writing. It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other." *Pate v. Lumber Co.,* 165 N. C., 184, 81 S. E., 132. Again in *Mfg. Co. v. Cloer,* 140 N. C., 128, 52 S. E., 305, the Court declared: "Defendants do not pray for a reformation of the deed as they should have done, but the court would award it if the allegations of the answer and the findings of a jury upon appropriate issues justified it."

It is perhaps well to note that in the *Cloer case* there was allegation warranting reformation, but no issue was submitted to the jury upon that phase of the case. The same idea is expressed in *Webb v. Borden,* 145 N. C., 188, 58 S. E., 1083, in which the Court declared: "While, under The Code system of procedure, it is settled by many decisions of this Court that, in an action for the recovery of land, the plaintiff may, by proper averments, invoke the equitable power of the court to reform a deed in his chain of title, he must make the essential averments, so that the defendant may either admit or deny them, and an issue may be framed presenting the controversy in that respect." *Welch v. Ins. Co.,* 196 N. C., 546, 146 S. E., 216. The legal requirement of appropriate allegation, prayer, or issue as a basis for reformation doubtless rests upon the fact that a higher degree of proof is required to warrant such relief. It is accepted law in this jurisdiction that, in order to reform a written instrument, the proof must be clear, cogent, and convincing. *Floars v. Ins. Co.,* 144 N. C., 232, 56 S. E., 915; *Graham v. Ins. Co.,* 176 N. C., 313, 97 S. E., 6; *Lloyd v. Speight,* 195 N. C., 179, 141 S. E., 574.

In the case of *Newton v. Clark,* 174 N. C., 393, 93 S. E., 951, *Allen, J.,* writing for the Court, said: "There is neither allegation nor proof that the deed which the plaintiff asked to have reformed was not executed as it was intended to be, or that the clause of defeasance was omitted by reason of ignorance, mistake, fraud or undue advantage, and this, under our authorities, is fatal to the plaintiff's action."

The principle was also tersely stated by *Walker, J.,* in *Ricks v. Brooks,* 179 N. C., 204. The Court said: "In an action for reformation it must be alleged and shown, by evidence, clear, strong, and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties, because of a mistake common to both parties, or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud, or undue advantage something material has been inserted, or omitted, contrary to such agreement and the intention of the parties."

It would seem to be apparent from the pertinent decisions of this Court that the case at bar was not instituted or tried upon the theory of a reformation of the contract of insurance which is the subject of the controversy.

The plaintiff relies upon *Sykes v. Ins. Co.,* 148 N. C., 13, 61 S. E., 610. In the statement of facts in that case the Court says: "This action was brought to recover the amount of premium paid by the male plaintiff to the defendant on certain insurance policies described in the pleadings." That case was tried solely upon that theory. It is true that the opinion declared: "Plaintiff recovered according to the reformed con-

tract, and therefore can only have four per cent interest on the premium." And hence it is contended that the *Sykes case* is authority for the position that reformation may be decreed without allegation, prayer or issue, and without requiring the party seeking reformation to establish his rights by clear, strong, and convincing proof. This, of course, is an extreme interpretation, but if the decision is susceptible of such interpretation, a long line of decisions of this Court are to the contrary. Moreover, without attempting to distinguish the *Sykes case,* the pleadings in the case at bar present a cause of action for fraud and deceit. The case was tried upon that theory, and that was the only theory presented to the jury by the trial judge. Hence, as the record now stands, the charge was correct.

No error.

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SIDDIE McCOY COX AND LIZZIE A. DOUGHERTY v. J. E. HEATH ET AL.

(Filed 19 March, 1930.)

**Wills E f—Devise to "nearest heirs" carries estate to living sisters and to children of deceased brothers per stirpes.**

Where a testator at the time of making a will has a brother and two sisters living and one brother dead, and the surviving brother predeceases the testator, and the will devises the testator's lands, after a life estate, to his "nearest heirs," these words will be construed to devise the remainder to all of his heirs as ascertained by the canons of descent, and the children of the deceased brothers are entitled to share in the estate *per stirpes.*

APPEAL by plaintiffs from *Barnhill, J.,* 16 January, 1930, at Chambers at Rocky Mount. From CRAVEN. Affirmed.

Controversy without action. It is agreed:

"1. That E. H. Heath died 14 November, 1921, a resident of Craven County, North Carolina, leaving a last will and testament in words and figures as follows:

'I, E. H. Heath, do make and publish this my last will and testament, hereby revoking all former wills by me made. I bequeath all my personal property whatsoever the same may be, to my wife, Lydia E. Heath, for her maintenance and until her death, then what is left of the property unexpended I give to my nearest heirs. Also I devise all my real estate whatsoever the same may be, to my wife, Lydia E. Heath, until her death, then I give it to my nearest heirs.

'I appoint my said wife the executrix of this my last will and testament. My will is that my said wife shall not be required to give any bond or security to the judge of probate for the execution of the duties of executrix.

'In witness whereof, I have hereunto set my hand and seal, this 20 January, 1917. E. H. Heath.'

2. That said will was filed for probate on 16 November, 1921, and recorded in Book of Wills 'I,' page 198, in the office of the clerk of the Superior Court of Craven County.

3. That the widow and life tenant, Lydia E. Heath, died on 6 May, 1929.

4. That the property referred to in the will is situated in Craven County, North Carolina.

5. That at all times prior to his death, the said E. H. Heath was on equally friendly terms with the parties to this controversy, and while living with the parents of his nieces and nephews.

6. That Siddie McCoy Cox, age 64, and Lizzie A. Dougherty, age 74, are sisters of E. H. Heath, the testator.

7. That Edmond B. Heath, brother of the testator, died 28 June, 1898, leaving surviving him the following children: C. F. Heath, J. E. Heath, D. S. Heath, G. J. Heath, J. A. Heath, Fronie Heath, who married Fred Ipock; Damie Heath, who married Clarence Wayne; Macie Heath, who married Horace Clark; Lillie Heath, who married C. H. Riggs; Mollie Heath, who married Ernest Glover; W. E. Heath, who died since the testator, leaving his widow, Ada Heath and one minor child, Artha Heath, and one child named Verla Heath, who is mentally incapable of transacting business, who appear in this action by their next friend, Ada Heath; Arden Heath, who died leaving surviving him his widow, Dora Heath, and one minor child, Ida Belle Heath, who appears in this action by her next friend, Dora Gaskins.

8. That Fred Heath died 5 June, 1919, leaving surviving him the following children: Janie Heath, who married Harman Wilson; Rosa Heath, who married Herbert McCoy, said McCoy being now dead; Bertha Heath, who married Edward Turnage; Jackson Heath, Clyde Heath, Fred Heath, Roy Heath; that said Fred Heath, brother of the testator, was predeceased by his daughter, Susan Mary Heath, who married Luke Jones, and the said Susan Mary Jones left surviving her, her husband, Luke Jones, her son Clarence Jones, and a son by a former marriage, George Charlton.

9. The widow and life tenant, prior to her death, consumed all the personal property and this controversy only concerns the proper construction of the will as same affects the real estate.

10. The named plaintiffs, sisters of the testator, E. H. Heath, contend that they, under the terms of the will, take all of said property to the exclusion of the nieces and nephews of the testator.

11. The named defendants, being the nieces and nephews of the testator, contend that under the terms of the will the property should

descend *per stirpes* to the sisters and the representatives of the deceased brothers, and that they take in the same manner as their immediate ancestors would have taken had such ancestors survived the testator.

12. If the court shall be of the opinion, on the facts herein set out, that said property, under the terms of the will, descends to the surviving sisters of the testator to the exclusion of the representatives of the deceased brothers, it is agreed that the court shall render judgment accordingly; if the court shall be of the opinion that said property descends equally to the surviving sisters and to the children and representatives of the deceased brothers *per stirpes,* it is agreed that judgment shall be rendered accordingly."

The court rendered judgment "That the plaintiffs and the defendants take the real estate bequeathed by E. H. Heath *per stirpes.*" The plaintiffs excepted and assigned error and appealed to the Supreme Court.

*D. L. Ward for plaintiffs.*
*Whitehurst & Barden for defendants.*

CLARKSON, J. The question for our decision: Who are entitled to the real estate under the will of the testator, E. H. Heath, who used the words "my nearest heirs?" The testator died 14 November, 1921, and this will was probated 16 November, 1921. The will was made 20 January, 1917, and at the time the testator had a wife, who survived him and died 6 May, 1929. The provision in the will to be considered: "I devise all my real estate whatsoever the same may be, to my wife, Lydia E. Heath, until her death, *then I give it to my nearest heirs.*" He had a brother and two sisters living when the will was made and one brother dead; this brother died 28 June, 1898; both brothers left heirs—who are defendants in this action. The other brother died 5 June, 1919. Do the two sisters, plaintiffs in this action, get under the will the entire property left by their brothers as "my nearest heirs," or do the heirs of the two brothers representing their ancestor get an equal share with their aunts, the plaintiffs? We think that all share alike as "my nearest heirs"—that is, the two sisters get one-half and the heirs of the two dead brothers get one-half, representing their ancestors *per stirpes.*

This Court in *Wallace v. Wallace,* 181 N. C., at p. 163, citing numerous authorities, said: "And considering the facts further, the grantee, C. A. Wallace, having died without children or issue to take under the deed, the question recurs as to who are entitled under the ulterior limitation to 'his next of kin,' the claimants being respectively his three surviving brothers, his widow, and the children of deceased brothers and sisters. On this question it has been held in this jurisdiction, in a long line of cases in which the question was directly considered, that these

words mean 'nearest of kin' and that in the construction of deeds and wills, unless there are terms in the instrument showing a contrary intent, the words 'next of kin,' without more do not recognize or permit the principle of representation." In other words, his "nearest of kin" are the nearest blood kin, the three surviving brothers.

In the present action we can find no decision in this State deciding who are "my nearest heirs." If the words "my nearest heirs" were synonymous with the words "his next of kin," the *Wallace case, supra,* would govern—but this idea is persuasive but not controlling, as it would destroy the efficacy of the word "heirs."

At the time this will was made the testator had a wife and two sisters, the plaintiffs, and a brother living, and one brother dead who left heirs. The testator was on friendly terms with the family. A brother had died before and after the will was made and before testator died. There is no language in the will to indicate any favorites among the blood. The testator used the words "my nearest heirs." The word "heirs" has a technical, well defined, meaning. At common law: A person who succeeds by the rules of law, to an estate in lands, tenements and hereditaments, upon the death of his ancestor by descent and right of relationship. As the word "heirs" was used, to give it meaning, in the absence of contrary intention expressed in the will, we must conclude that the testator intended that the property should go by descent *per stirpes.* The "nearest heirs" are all those persons upon whom the law would cast the inheritance—those who are heirs are therefore necessarily nearest heirs.

In the case of *Ward v. Stow,* 17 N. C., at p. 512, *Gaston, J.,* says: "*An heir* is he who succeeds by descent to the inheritance of an ancestor, and in this, its appropriate sense, the word comprehends all heirs, and the heirs of heirs *ad infinitum,* as they are called by the law to the inheritance. This succession is regulated by the canons of descent. According to one of these, the lineal descendants of any person deceased represent their ancestor, or stand in the place in which such ancestor would have stood if living at the time of the descent cast, and it is this taking by a right of representation which is termed a succession *per stirpes* or by stocks, the branches taking the same share which their stock would have taken." *Witty v. Witty,* 184 N. C., 375.

In the case of *Kello v. Kello's Executors,* 127 Va. Rep., at p. 379-80, we find the following: "In the case of *Gwynne v. Muddock,* 14 Ves., p. 488, the Court construing the words 'nighest heir at law' held: 'It would be contrary to the intention to divide them *(i. e.,* the real and personal property devised), and it would be contrary to the words to give the whole to the next of kin. Therefore, the Court has no alternative but to adhere to the words of the will, and permit the person who answers the

description of heir at law to enjoy the whole.' This case would seem in point as the next of kin were before the court as claimants. The court awarded the estate to the heirs at law apparently upon the theory that the persons who would take as heirs at law were necessarily the nearest heirs at law. Having in mind that the word 'heirs' means the next of kin according to our statute of descents, and therefore, the persons upon whom the law would cast the estate in the event of intestacy, the words 'nearest heirs' used by the testator, John G. Kello, are equivalent to the words 'nearest heirs at law,' which are the precise words construed by Sir William Grant in the case cited, *supra.*

The word 'heirs,' when unexplained and uncontrolled by the context, must be interpreted according to its strict technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in case of intestacy. 2 Jarman (5 ed.), p. 61; *Tillman v. Davis,* 95 N. Y., 24, 47 Am. Rep., 1." See *Croom v. Herring,* 11 N. C., 395; *Fields v. Rollins,* 186 N. C., 221; *Clark v. Clark,* 194 N. C., 288.

For the reasons given the judgment of the court below is

Affirmed.

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STATE v. MRS. T. E. McAFEE.

(Filed 19 March, 1930.)

**Criminal Law K b—Where execution of judgment is suspended the court may at any time direct execution of the sentence.**

Where a defendant in a criminal action is found guilty and is sentenced for a certain time in jail, suspending execution of the sentence for thirty days with a provision that at the end thereof capias to issue under the direction of the solicitor if the defendant were found within the State: *Held,* the essential part of the judgment is the punishment and the time the sentence should begin is directory, and the court may thereafter (in this case a period of four years) upon its own initiative direct the execution of the sentence theretofore imposed. Cases of suspended judgments and prayers for judgment continued distinguished.

APPEAL by defendant from *Lyon, Emergency Judge,* at December Term, 1929, of LENOIR. Affirmed.

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

*O. H. Allen for defendant.*

ADAMS, J. At the October Term, 1924, of the Superior Court of Lenoir County, the defendant was found guilty of a breach of the prohi-

bition law and was sentenced to imprisonment in jail for a term of fifteen months. Execution of the sentence was suspended for thirty days with a provision that a capias should issue at the end of this period upon the direction of the solicitor, if the defendant was found within the State. She excepted to the judgment and appealed to the Supreme Court, and at the Spring Term of 1925 the judgment was affirmed. 189 N. C., 320.

The defendant was convicted of a misdemeanor at the May Term of 1925, and was sentenced to imprisonment in jail for a term of two years, capias not to issue in sixty days. She was told that unless she left the State under the provisions of the judgment entered at the October Term of 1924, she would be committed to jail under the judgment rendered at the May Term of 1925. The defendant then left the State and did not return until the latter part of 1927. After her return she conducted some sort of mercantile business within a short distance of the courthouse until the second day of November, 1929, when the judge of the municipal court issued a warrant charging her with a misdemeanor. On the same day the clerk of the Superior Court issued a capias on the judgment given at May Term, 1925.

The defendant sued out a writ of *habeas corpus* before Judge Daniels, who adjudged that she should be discharged from imprisonment under the judgments of October Term, 1924, and May Term, 1925, and that upon entering into bond in the sum of $500 in each of the judgments of the municipal court of Kinston and Lenoir County for her appearance at the next criminal term of the Superior Court, she should be discharged from imprisonment thereunder.

At December Term, 1929, while the defendant was in the Superior Court awaiting trial on the warrant charging her with a violation of the prohibition law, the presiding judge, on motion of the State, committed her to jail for a term of two years under the judgment pronounced at May Term, 1925. The defendant excepted to this order and appealed to the Supreme Court.

It is well to recall the fact that this is not a case in which the judgment was suspended or the prayer for judgment was continued. If it were the cases of *S. v. Hilton,* 151 N. C., 687, and *S. v. Gooding,* 194 N. C., 271, would be in point. The question is whether at the November Term, 1929, four years after the defendant had been convicted, and two years after she had returned to the State, the Superior Court had jurisdiction to imprison her under the judgment pronounced upon her conviction at the May Term of 1925. Why a commitment was not issued promptly upon her return does not appear; but the delay cannot defeat the object of the prosecution or exempt the defendant from liability to punishment. The essential point of a judgment imposed in a criminal

action is the punishment and the time when the sentence shall actually begin is not material because it is only directory. If for any cause the sentence is not executed at the time named the defendant may again be brought before the court and a new period may be prescribed. 8 R. C. L., 231, sec. 229.

The Court applied the principle in *S. v. Cockerham,* 24 N. C., 204. The defendant was convicted in the fall of 1841 and was sentenced to imprisonment for a short term. He did not escape, but he was not imprisoned, and after the period prescribed for his punishment he was taken into custody. His counsel objected on the ground that the time had elapsed in which the sentence was to have been carried into execution and that the court had no power to imprison him. The objection was overruled, and from an order that he be imprisoned he appealed. On appeal the order was affirmed for reasons thus stated: "The time at which a sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two calendar months; and the words which follow in the record, 'from and after 1 November next,' direct the time of executing the judgment. The entry, indeed, would have been more formal had the judgment and the mandate for carrying it into effect been separate and distinct. But, however, informal, it can be understood, in conformity to the law, as consisting of distinct parts and, therefore, ought to be so understood. Upon the defendant appearing in court and his identity not being denied, and it being admitted that the sentence of the court had not been executed, it was proper to make the necessary order for carrying the sentence into execution."

The principle was reannounced and adhered to in *S. v. McClure,* 61 N. C., 491, in *S. v. Cardwell,* 95 N. C., 643, and in other cases. The judgment is

Affirmed.

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STATE v. MRS. T. E. McAFEE.

(Filed 19 March, 1930.)

See same case next preceding.

APPEAL by defendant from *Lyon, Emergency Judge,* at December Term, 1929, of LENOIR. Affirmed.

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

*O. H. Allen for defendant.*

ADAMS, J. The disposition of the defendant's appeal is controlled by the opinion in the preceding case—*S. v. Mrs. T. E. McAfee, ante,* 507.

Judgment affirmed.

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F. L. MOORE v. W. R. MOORE.

(Filed 19 March, 1930.)

**Wills D a—Where objection is not made that proceeding is collateral attack upon will, judgment that will was void will not be disturbed.**

A will probated in common form will stand until set aside in a direct proceeding, but where the probate is attacked in a suit to remove a cloud upon title to lands, and objection is not made that the action is a collateral attack upon the will, and trial has been accordingly had, a decree of the court that the will was revoked by the subsequent marriage of the testator and that the deed tendered by the plaintiff conveyed a good title, will be upheld.

CIVIL ACTION, before *Small, J.,* at February Term, 1930, of HARNETT.

Pharoh J. Stancill owned the land in controversy, and on 1 November, 1906, executed a paper-writing purporting to be his last will and testament. Thereafter, on 2 February, 1908, Pharoh J. Stancill married Narcissa A. Moore. At the time of his death he left surviving him no child or children or issue of such, but left eight half brothers and sisters and a widow. The plaintiff is one of the half brothers and claims a one-eighth undivided interest in said land subject to the dower of the widow. On 23 December, 1929, the will of said Pharoh J. Stancill was duly admitted to probate. The plaintiff offered to sell his one-eighth undivided interest to the defendant, and the defendant agreed to purchase said land, but refused to accept the deed upon the ground that the will of Pharoh J. Stancill constituted a cloud upon the title. The cause was submitted to the trial judge, who was of the opinion that the will was revoked by the subsequent marriage of testator, and that the deed tendered by plaintiff to defendant conveyed a good and valid title, from which judgment the defendant appealed.

*Clifford & Williams for plaintiff.*

*West & Williford for defendant.*

PER CURIAM. C. S., 4134, provides that subsequent marriage, with certain exceptions, revokes all prior wills made by a testator. *Means v. Ury,* 141 N. C., 248, 53 S. E., 850; *In re Bradford,* 183 N. C., 4, 110 S. E., 586.

The probate of a will in common form is binding and conclusive until set aside by a direct proceeding. *Mills v. Mills,* 195 N. C., 595, 143 S. E., 130; *In re Will of Cooper,* 196 N. C., 418, 145 S. E., 782. However, the present proceeding was treated by the parties as an action to remove the probate as a cloud upon title, and hence no point was made that the proceeding constituted a collateral attack upon the will.

Upon such state of the record the judgment is

Affirmed.

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C. L. WHITE v. T. A. RIDDLE AND J. W. GILLIAM, TRADING AS T. A. RIDDLE & COMPANY.

(Filed 26 March, 1930.)

**1. Landlord and Tenant H a—Farm laborer's lien relates back to time of commencement of work and is superior to liens filed thereafter.**

The lien of a laborer upon a crop relates back to the time of the commencement of the work, and by the express provisions of the statute his lien is preferred to all other liens filed thereafter, C. S., 2472, 2480, 2488, and where notice is filed according to C. S., 2470, and the laborer has perfected his lien, it is superior to an agricultural lien and chattel mortgage upon the same crop executed and filed after the commencement of the work, but before notice of the laborer's lien, and C. S., 2471, relating to priority of payment of liens according to priority of notice filed with a justice of the peace or clerk, has no application.

**2. Interest B a—In tort actions for conversion interest is allowable in the discretion of the jury.**

In tort actions for conversion interest is allowable in the discretion of the jury, and where the jury has failed to award interest the plaintiff's contention that he is entitled thereto cannot be sustained.

CIVIL ACTION, before *Barnhill, J.,* at September Term, 1929, of LEE.

The agreed facts were as follows:

1. "That on 24 February, 1927, L. M. White executed to T. A. Riddle & Company an agricultural lien and chattel mortgage in the sum of $800, on all crops grown by him on his land situate in Johnsonville Township, Harnett County, N. C., during the crop year 1927, which said instrument was duly filed for registration in said Harnett County

on 9 March, 1927, and at the same time, namely, 24 February, 1927, said L. M. White executed a note for $800, as evidence of said indebtedness."

2. "That the defendant, T. A. Riddle & Company, received of the said crops or the proceeds of sales therefrom, the sum of $713.25, all of which, except $74.00, was received prior to the filing of the lien hereinafter referred to."

3. "That the plaintiff, C. L. White, brought this action against the defendants to recover the sum of $127.85, with interest from 6 December, 1927, claiming a prior lien thereon by virtue of a certain judgment rendered in his favor and against said L. M. White in justice's court, Harnett County, North Carolina, in the amount of $190.00, which said judgment was declared a laborer's lien upon the said crops raised by said L. M. White on his said lands in Harnett County during the crop year of 1927, and which said judgment was rendered on account of labor performed by said C. L. White in the cultivation of said crops during said year, and beginning 1 February, 1927."

4. "That no notice of claim of lien was filed by said C. L. White until 1 November, 1927; that such notice was filed in said justice's court on that date."

5. "That under an execution issued on the said justice's judgment certain corn grown by said L. M. White on said lands was sold and $70.25 net was applied to the said judgment, leaving a balance due on same of $127.85, and interest from 1 October, 1927."

6. "Defendants deny that said lien is superior or entitled to preference to that of the said mortgage lien or any part of said crops or the proceeds therefrom delivered to said defendants prior to the filing of said notice of lien, as required by section 2471, of the Consolidated Statutes, and for other matters of law to be assigned on the argument."

Upon the foregoing facts the following judgment was entered:

"This cause coming on for hearing as to the matters in controversy between plaintiff and T. A. Riddle & Company upon agreed statement of facts, which is hereby referred to and made a part of this judgment, and the court being of the opinion, and so holding, that plaintiff's lien is a first and prior lien on the property, of the value of $74.00 received after the notice and claim of lien was filed, but is not a first and prior lien on the portion received and appropriated by defendants prior to filing of the notice and claim of lien by plaintiff, upon motion, it is decreed, ordered and adjudged, that plaintiff do have and recover of the defendants, T. A. Riddle and J. W. Gilliam, trading as T. A. Riddle & Company, the sum of $74.00, with interest thereon from the first day of this term, and that defendants do pay the cost of this action to be taxed by the clerk."

From the judgment so rendered the plaintiff appealed.

*H. M. Jackson and Hoyle & Hoyle for plaintiff.*
*Seawell & McPherson for defendant.*

BROGDEN, J. Is a laborer's lien, duly perfected, on a crop, superior to an agricultural lien and chattel mortgage upon said crop, duly recorded?

The laborer began work on the crop on 1 February, 1927, and the agricultural lien and chattel mortgage were executed on 24 February, 1927. C. S., 2472, 2480, and 2488 provide a lien for laborers in order that the work of their hands may be securely safeguarded and preserved. C. S., 2472, declares in plain and unequivocal language that a laborer's lien upon a crop "shall be preferred to every other lien or encumbrance which attached to the crop subsequent to the time at which the work was commenced." C. S., 2470, provides for the filing of notice of lien. If the notice is properly filed, then the lien reaches back to the time when the work was commenced.

It has been uniformly declared by the Court that, a lien properly filed upon real estate and the right resulting therefrom asserted in apt time, relates back to the beginning of the work or furnishing of material, and as against such lien, even the rights of innocent purchasers cannot prevail. *Burr v. Maultsby,* 99 N. C., 263; *Harris v. Cheshire,* 189 N. C., 219, 126 S. E., 593; *King v. Elliott,* 197 N. C., 93.

There is no sound reason why the same principle should not apply to crops. Indeed, the principle announced in *Burr v. Maultsby, supra,* has been invoked by this Court in support of placing the lien of the laborer upon a crop upon the same basis as the lien of a laborer upon a piece of land. In *Rouse v. Wooten,* 104 N. C., 229, 10 S. E., 190, the Court said: "It may be said that persons who take 'agricultural liens' cannot have knowledge of such rights of the cropper, as his contract is not required to be registered. But they must take notice of the cropper's rights, just as they do the like rights and labor contracts of agricultural tenants. They take such liens at their peril; they should make proper inquiry before taking them. It might be better to require notice of a cropper's contract to be registered, as required in case of the laborer's lien, but the statute does not so require. . . . The lessor, landlord or employer cannot consume or dispose of the crop himself, nor can his assigns, nor can they encumber it, to the prejudice of the cropper. Any sale of, or lien created upon it, is made subject to his right; otherwise the remedy thus given would be meaningless and nugatory—an empty pretense and a mockery of him whose labor had contributed to the production of the crop. The statute does not intend this. It intends to encourage and favor the laborer as to those matters and things upon which his labor has been bestowed, and that he shall certainly reap the just benefit of his toil."

While it is suggested that the *Rouse case* dealt with a division of the crop, it is to be observed that the Court held that a cropper was "a laborer receiving pay in a share of the crop." *McCoy v. Wood,* 70 N. C., 125; *Warren v. Woodard,* 70 N. C., 382. The notice of lien must, however, show upon its face substantial compliance with the statute. *Cook v. Cobb,* 101 N. C., 68, 7 S. E., 700; *King v. Elliott, supra.*

C. S., 2471, provides that liens "shall be paid and settled according to priority of the notice of the lien filed with the justice or the clerk." This section has been construed in *Mfg. Co. v. Andrews,* 165 N. C., 285, 81 S. E., 418, in which case it was held that the section applied only to liens "required to be filed with the proper officers," etc. The defendant claims a lien by virtue of a chattel mortgage and agricultural lien. No notice of such a lien is required to be filed with a justice or the clerk.

Plaintiff contends that he is entitled to interest. This contention cannot be sustained. While there is wide divergence of judicial opinion upon the subject, this Court has adopted the theory that in tort actions for conversion, interest is allowable in the discretion of the jury. *Stephens v. Koonce,* 103 N. C., 266, 9 S. E., 315; *Lance v. Butler,* 135 N. C., 419, 47 S. E., 488.

The Court concludes and adjudges that the plaintiff has a first lien upon the entire crop for the amount of his claim.

Reversed.

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MORRIS FLEISHMAN v. A. D. BURROWES, RECEIVER OF THE NATIONAL BANK OF FAYETTEVILLE.

(Filed 26 March, 1930.)

**1. Estoppel A a—In this case held: plaintiff was not estopped by deed from setting up claim for damages for destruction of easement.**

Where the owner of land adjoining a bank building has been induced by the receiver of the bank to give a release of his claim to an easement in an alleyway which had been closed by the bank under an agreement that a certain sum of money was to be placed in escrow and used to pay damages pending the determination of the rights of the parties: *Held,* the plaintiff is not estopped by his deed from bringing action against the receiver for the damages sustained by him by reason of the closing of the alleyway, the bank having received the benefit of the agreement.

**2. Evidence D g—In this case held: testimony was to agreement and not to understanding of party, and was competent.**

Where a question is asked the plaintiff as a witness in his own behalf "what was your understanding?" of a contract material to the controversy,

"what was the agreement?" and it appears that the answer was to the fact of agreement, the admission of evidence thus adduced will not be held for error as relating to the understanding of the witness.

**3. Pleadings D a—Demurrer will not be sustained where technical deficiency in complaint has been cured in reply filed by permission of court.**

Under our liberal practice and procedure the plaintiff will not be held down to a technical position of the defendant as to the allegations in the complaint where the plaintiff has been permitted by the court in its discretionary power to file a reply which fully sets out the agreement of the parties, and the overruling of a demurrer will not be disturbed on appeal.

APPEAL by defendant from *Grady, J.*, and a jury, at February Term, 1930, of CUMBERLAND. No error.

The following judgment was rendered in the court below:

"This cause coming on to be heard at this term of the court before the undersigned judge and a jury, and the jury having responded to the issues submitted to them, as follows:

1. Is the plaintiff, Morris Fleishman, the owner and in possession of a store and lot on the north side of Hay Street, in the city of Fayetteville, adjoining the bank building and lot formerly belonging to the National Bank of Fayetteville? Answer: Yes.

2. In connection with his lot and store, did the plaintiff own and use certain rights and easements in an alleyway and stairway on a space of land located between the plaintiff's store and lot and the National Bank Building? Answer: Yes.

3. Did the National Bank of Fayetteville tear down the stairway and close the alleyway in the erection of the bank building now located on the bank lot? Answer: Yes.

4. Did the plaintiff, at the request of the former receiver of the National Bank, release and convey his rights and easements in the alleyway and stairway to the Cumberland Savings and Trust Company, with the understanding and agreement that his rights therein were to be properly adjudicated, and that any damages he may have suffered should and would be collected out of the funds then held by R. H. Dye, Charles G. Rose and R. W. Herring, trustees, so far as the funds might extend? Answer: Yes.

5. Was the fund of $2,500, with all accrued interest, placed with the trustees to protect the rights of the plaintiff in the event it was decided that he owned the easements and rights in the alleyway and stairway and had been deprived of the use of the same? Answer: Yes.

6. What damages, if any, has the plaintiff sustained by reason of the destruction of the stairway, the closing of the alleyway and the loss of his rights and easements therein? Answer: $2,500, and interest.

It is, thereupon, on motion of Rose & Lyon, attorneys for the plaintiff, considered, ordered and adjudged that the plaintiff do have and recover of the defendant the sum of $2,500, with interest thereon from 18 January, 1928, at the rate of six per cent per annum, and that the fund in the hands of R. H. Dye, Charles G. Rose and R. W. Herring, trustees, with all accrued interest thereon, is condemned, and the said trustees are directed to apply the same to the satisfaction of this judgment as far as the same may extend, and the defendant herein is taxed with all the costs."

The following stipulation of counsel appears in the record: "It is stipulated and agreed between counsel for plaintiff and defendant that the only question to be presented to the Supreme Court is the legal effect of the deed from Fleishman and wife to Cumberland Savings and Trust Company, dated 18 January, 1929, and whether the plaintiff is estopped to claim the right to recover the fund of $2,500, held in escrow and deposited in Cumberland National Bank to the credit of R. H. Dye, Chas. G. Rose and R. W. Herring on the date of the deed. Subject to the foregoing stipulation, it is agreed that the foregoing constitutes the record and case on appeal."

The defendant made numerous exceptions and assignments of error. Defendant demurred *ore tenus* to the complaint and reply. Defendant moved to strike out the reply and certain paragraphs of the complaint, also to certain issues tendered by plaintiff; to the admission of certain testimony; to the refusal of the court below to nonsuit plaintiff at the close of plaintiff's evidence and at the close of all the evidence; to the charge of the court to the jury, on the third, fourth, fifth and sixth issues, and to that portion of the charge reading as follows:

"But I charge you, gentlemen, as a matter of law, that if the deed from Fleishman to the Cumberland Savings and Trust Company was executed and delivered under the agreement that $2,500 of the money was to be reserved in escrow, that then the execution of that deed does not preclude him from bringing this suit, and has nothing to do with the case whatever. Because, if the jury finds as a fact that the receiver of the old National Bank induced Mr. Fleishman and his wife to execute this deed, in order to perfect the title in their grantee, the Cumberland Savings and Trust Company, with the understanding that a part of the purchase money was to be withheld for the purpose of paying Fleishman's damages, then the receiver cannot be heard, gentlemen, to complain now that that deed has been made; because, if the jury finds it was made under these circumstances it was made for the benefit of the receiver, and he cannot now be heard to complain, because of the fact the deed was made.

"The fourth issue is: Did the plaintiff, at the request of the former receiver of the National Bank, release and convey his rights and easements in the alleyway and stairway to the Cumberland Savings and Trust Company, with the understanding and agreement that his rights therein were to be properly adjudicated, and that any damages he may have suffered should and would be collected out of the funds then held by R. H. Dye, Charles G. Rose and R. W. Herring, trustees, so far as the funds extend? Now, gentlemen, if you find the facts to be as testified to by all of the witnesses who have gone upon the stand, there being no evidence to the contrary, it would be your duty to answer that issue, Yes.

"The fifth issue is: Was the fund of $2,500, with all accrued interest, placed with the trustees to protect the rights of the plaintiff in the event it was decided that he owned the easements and rights in the alleyway and stairway and had been deprived of the use of the same?

"If you find the facts to be as testified to by all the witnesses, there being no evidence to the contrary, it is your duty, gentlemen, to answer that issue, Yes."

The court below overruled all the defendant's exceptions. Defendant assigned errors and appealed to the Supreme Court.

*Rose & Lyon for plaintiff.*
*Blackwell & Blackwell for defendant.*

CLARKSON, J. Under the stipulation of counsel appearing in the record, we find the only question presented to us for our determination: "Is the legal effect of the deed from Fleishman and wife to Cumberland Savings and Trust Company, dated 18 January, 1928, and whether the plaintiff is estopped to claim the right to recover the fund of $2,500, held in escrow and deposited in Cumberland National Bank to the credit of R. H. Dye, Chas. G. Rose and R. W. Herring, on the date of the deed?"

We do not think that plaintiff is estopped to maintain this action. It will be noted that the question asked Fleishman: "What was your understanding about the $2,500 put up? What was the agreement? Answer: Why, he offered to put up $2,500, and we will have a settlement as soon as we get this building straightened out; we would get our people together, our lawyers, and settle this matter up with me, to my satisfaction."

If the question was confined to *understanding,* the assignment of error by defendant would prevail, but the question was more than understanding—*what was the agreement? Overall Co. v. Holmes,* 186 N. C., at pp. 431-32; 22 C. J., Evidence, at pp. 515, 516. Under our liberal practice and procedure, we do not think that plaintiff can be

held down to the technical position of defendant as to the allegations in the complaint of plaintiff, the reply sets out the agreement of the parties fully, and the court below had the discretion to permit plaintiff to file the reply. *Sams v. Cochran,* 188 N. C., at p. 733. From the view we take of this action, we see no new or novel proposition of law presented by the appeal. In the judgment of the court below we find

No error.

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THE ROYAL INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND, AND THE HOME INSURANCE COMPANY OF NEW YORK v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 March, 1930.)

1. **Interest B a—In actions for the tortious or wrongful destruction of property interest is allowable in the discretion of the jury.**

   Where the plaintiffs, insurers of the shipper, bring action on a subrogation receipt and assignment from the shipper, to recover damages for the negligent burning of cotton by the carrier, and the jury awards damages without interest thereon: *Held,* the awarding of interest for a tortious or wrongful destruction of property is within the discretion of the jury, and the plaintiffs are not entitled thereto as a matter of law, except from the time of the judgment.

2. **Trial E g—Charge will be construed contextually as a whole.**

   An instruction will not be held for error if, when it is construed connectedly and contextually as a whole, it is correct.

APPEALS by plaintiffs and defendant from *Daniels, J.,* at October Term, 1929, of SAMPSON.

Civil action to recover damages for an alleged negligent burning of cotton, insured by plaintiffs and paid for by them under their policies of insurance, the plaintiffs basing their cause of action on a subrogation receipt and assignment from the owner of said cotton.

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

"1. Are the plaintiffs, by paying the value of the cotton insured by them to Bethune, Colwell & Co., subrogated to the rights and remedies of the said Bethune, Colwell & Co., against the defendant railroad company? Answer: Yes.

2. Was the cotton of Bethune, Colwell & Co., which was insured by plaintiffs and loss of which was paid for by them, burned by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

3. Was Bethune, Colwell & Co. guilty of contributory negligence, as alleged in the answer? Answer: No.

4. What damages, if any, are plaintiffs entitled to recover? Answer: $9,075.86."

From a judgment on the verdict, both plaintiffs and defendant appeal, assigning errors.

*Butler & Butler and R. L. Herring for plaintiffs.*
*L. J. Poisson and A. McL. Graham for defendant.*

PLAINTIFFS' APPEAL.

STACY, C. J. The plaintiffs present the single question as to whether they are entitled, as a matter of right, to interest on the amount of damages assessed from the date of the destruction of the property? We think not, for, under the decisions in this jurisdiction, the allowance of interest in such cases rests in the sound discretion of the jury.

The case was tried upon the theory that the plaintiffs, as subrogees, were entitled to recover, if entitled to recover at all, the fair market value of the cotton at the time and place of its destruction, plus interest thereon, if the jury, in its discretion, should so award, the total recovery of plaintiffs, however, not to exceed the amounts paid under their policies. 25 R. C. L., 1388. The jury awarded no interest, either as such or as a part of the damages, hence, under our decisions, the damages fixed by the jury, being, as they are, for tortious or wrongful destruction of property, do not, as a matter of law, bear interest until after judgment. *Harper v. R. R.,* 161 N. C., 451, 77 S. E., 415; *Devereaux v. Burgwin,* 33 N. C., 490; *Rippey v. Miller,* 46 N. C., 480; *Guano Co. v. Magee,* 86 N. C., 351; *Williams v. Lumber Co.,* 118 N. C., 928, 24 S. E., 800; *Lance v. Butler,* 135 N. C., 419, 47 S. E., 488; *Stephens v. Koonce,* 103 N. C., 266, 9 S. E., 315; *Hoke v. Whisnant,* 174 N. C., 660, 94 S. E., 446; *Chatham v. Mecklenburg Realty Co.,* 174 N. C., 675, 94 S. E., 447; *Acme Mfg. Co. v. McQueen,* 189 N. C., 311, 127 S. E., 246; *Sears, Roebuck & Co. v. Rouse Banking Co.,* 191 N. C., 506, 132 S. E., 468; *Wilson v. Troy,* 135 N. Y., 96; 18 L. R. A., 449; 17 C. J., 824.

The question, therefore, as to whether the plaintiffs, under the equitable doctrine of subrogation, would be entitled to interest on the amounts paid under their policies from the dates of such payments, cannot arise as the amount of damages awarded by the jury is only equal to the principal sums paid by the plaintiffs without interest. *Herring v. R. R.,* 189 N. C., 285, 127 S. E., 8. The right of subrogation, it should be remembered, is not founded on contract, but is a creature of equity and is enforced solely for the purpose of accomplishing the ends of substantial justice. *Memphis, etc., R. R. v. Dow,* 120 U. S., 287.

The plaintiffs are not demanding a new trial on the issue of damages, but an allowance of interest by the court as a matter of right. It is

sufficient to say that as the matter was discretionary with the jury, the plaintiffs are entitled to recover no more than the verdict awards. *Ins. Co. v. R. R.*, 193 N. C., 404, 137 S. E., 309; *S. c.*, 195 N. C., 693, 143 S. E., 516.

On plaintiffs' appeal, therefore, there is no error.

DEFENDANT'S APPEAL.

STACY, C. J. No new question is presented by the defendant's appeal. Several exceptions were the subject of earnest debate before us, and while they may not be altogether free from difficulty, a careful perusal of the entire record leaves us with the impression that the defendant has no just cause to complain at the manner in which the case was tried.

The charge contains one or two expressions, which, standing alone, might be subject to some criticism, but reading it contextually in the same connected way in which it was given, as we are required to do, it would seem to be free from reversible error. Hence, the verdict and judgment will be upheld.

No error.

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L. F. EASON AND WIFE, ALMA EASON, v. W. E. BUFFALOE ET AL.

(Filed 26 March, 1930.)

**Deeds and Conveyances C g—In this case held: complaint stated cause of action on covenant not to convey without restriction in deed.**

Where, in an action against a grantor and a State institution purchasing land from him, the complaint alleges that the grantor sold the plaintiff lots in a development by deed containing a restrictive covenant against negro occupancy and covenanted that other lots in the development would be sold by deeds containing like restrictions, according to a registered map, and that the grantor sold the State institution lots in the development by deed not containing the restriction and that the institution was planning to erect a school for negroes thereon, and the plaintiff seeks to recover damages therefor from the grantor, and attaches funds in the hands of the State institution: *Held*, the recorded map of the tract is insufficient alone to show a general scheme for development, and in the absence of an admission by the institution, or a finding upon competent evidence that the lots purchased by it were included in a general scheme, it is not bound by the restriction, and the complaint states a cause of action against the grantor, and the demurrer thereto was properly overruled. As to whether the State institution is bound by the restriction is not presented on this appeal.

APPEAL by defendant, W. E. Buffaloe, from *Cowper, Special Judge*, at January Special Term, 1930, of WAKE. Affirmed.

This is an action to recover damages for breach of covenant with respect to the conveyance of certain lots owned by defendant, and

included in a parcel of land which had been divided by defendant into lots for development and sale under a general plan and scheme, by which all of said lots would be owned and occupied by white people.

Plaintiffs are the owners of three of said lots, the same having been sold and conveyed to them by defendant. The deed by which said lots were conveyed to plaintiffs contains a clause in words as follows:

"Covenant: All parties to this deed covenant to and with each other and themselves and their heirs and assigns, that the above described lands shall not be sold to nor occupied by negroes, and that this covenant runs with the land."

Plaintiffs allege in their complaint that prior to the sale and conveyance of said lots to them, defendant had divided the parcel of land which included said lots, and which was then owned by defendant, into lots for development and sale, under a general plan and scheme, by which all of said lots would be owned and occupied by white people; that at the time of said sale and conveyance, defendant covenanted with plaintiffs that all the remaining lots included in said parcel of land, when sold, would be conveyed by deeds containing covenants between the defendant as grantor, and the purchasers, as grantees, in words identical with the words of the covenant contained in the deed by which defendant conveyed the lots purchased by plaintiffs, to them; and that subsequent to said sale and conveyance to plaintiffs, defendant sold and conveyed to his codefendant, the State School for the Blind and Deaf, Inc., certain of said remaining lots by deed which does not contain a covenant that said lots shall not be sold to or occupied by negroes. The State School for the Blind and Deaf, Inc., has announced its purpose to erect and maintain on the lots sold and conveyed to it by defendant, a school for negroes.

Plaintiffs further allege that they have been damaged in the sum of $2,000 by defendants' breach of covenant with respect to the conveyance of said lots, and demand judgment that they recover of defendant the said sum of $2,000.

No cause of action is alleged in the complaint against the defendant, the State School for the Blind and Deaf, Inc. The said school was made a party defendant in this action, only for the purpose of attaching funds alleged to be in its hands for the satisfaction of the judgment in favor of plaintiffs and against the defendant, W. E. Buffaloe.

The defendant, W. E. Buffaloe, demurred to the complaint, for that the facts stated therein are not sufficient to constitute a cause of action against him.

From judgment overruling the demurrer and allowing defendant time to file an answer to the complaint, the defendant, W. E. Buffaloe, appealed to the Supreme Court.

*W. Brantley Womble for plaintiffs.*
*Chas. U. Harris for defendants.*

CONNOR, J. There is no error in the judgment overruling the demurrer to the complaint in this action. The only question presented for decision is whether or not the facts alleged in the complaint, admitted by the demurrer *(Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563), are sufficient to constitute a cause of action on which plaintiff is entitled to recover of the defendant, W. E. Buffaloe. This question was correctly decided in the Superior Court, and the judgment overruling the demurrer is affirmed.

The contention discussed in the brief for the defendant filed in this Court that notwithstanding the absence of the covenant in the deed from defendant to the State School for the Blind and the Deaf, Inc., upon the facts alleged in the complaint, the plaintiffs have sustained no damage, because the said school is bound by the restrictive covenant contained in the deeds to plaintiffs and to purchasers of other lots, is not presented by this appeal. There is no admission by the State School for the Blind and Deaf, Inc., that the lots conveyed to said school by the defendant were included in a general plan and scheme for the development of the parcel of land owned by the defendant, W. E. Buffaloe. In the absence of such an admission, or of a finding upon competent evidence of such fact, the said school holds title to the lots conveyed to it by defendant, free of any restrictive covenant. See *Stephens Co. v. Binder, ante,* 295. The map of the parcel of land, showing its division into lots, recorded in the office of the register of deeds of Wake County, is not sufficient alone to show a general plan and scheme for development and sale by deeds containing restrictive covenants. *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697.

Affirmed.

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STATE v. F. H. CRAWFORD.

(Filed 26 March, 1930.)

**1. Bills and Notes I f—Postdated check does not come within intent and meaning of bad check law.**

A postdated check given for a past due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. Chapter 62, Public Laws of 1927.

**2. Statutes B c—Criminal statutes should be strictly construed.**

It is a rule of universal acceptance that criminal statutes should be strictly construed.

APPEAL by the State from *Daniels, J.*, at February Term, 1930, of WAKE.

Criminal prosecution tried upon an indictment charging the defendant with uttering and delivering to another a worthless check in violation of chapter 62, Public Laws 1927, generally known as the "Bad Check Law."

It is established by the special verdict that on 7 May, 1928, the defendant, at his place of business in Wake Forest, gave to a representative of the Ideal Brick Company, of Slocum, N. C., a check for $133 in settlement of a past due account, said check being drawn on the Citizens Bank of Wake Forest, and postdated 12 May, 1928. The Ideal Brick Company deposited said check in a bank at Fayetteville, and, in the usual course of business, it reached the Citizens Bank of Wake Forest on 14 May, 1928, and was presented for payment, which was refused because the drawer did not have sufficient funds on deposit in or credit with said bank to pay the check on presentation, the defendant knowing at the time of drawing and delivering said check that he did not have such funds or credit.

(Note: The verdict is silent as to whether this information was conveyed to the representative of the payee of the check. However, the fact that the check was not presented for payment until after its due date would indicate that such was the understanding.)

Thereafter the defendant was adjudged a bankrupt. The Ideal Brick Company proved its claim before the referee and was paid a dividend thereon. On 4 February, 1929, the defendant obtained his discharge in bankruptcy.

The indictment was returned at the March Term, 1929, Wake Superior Court, and was heard on appeal at the last term, 197 N. C., 513.

From a judgment pronounced on the above findings, that the defendant is not guilty and that he be discharged, the State appeals, assigning error.

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

*Gulley & Gulley for defendant.*

STACY, C. J. A postdated check, given for a past due account, is not a representation, importing criminal liability if untrue, that the drawer has funds or credit in the bank, sufficient to pay the same upon presentation.

The fact that the check is postdated would seem to imply no more than that on its date, the drawer will have or expects to have, funds or credit in the bank sufficient to insure its payment at that time. 11 R. C. L., 853. Thus the status of the parties, except for the additional promise represented thereby, would apparently be the same, or remain unchanged, for the time being at least. Under the facts of the present case, therefore, it could hardly be said that the defendant has violated the statute which makes it unlawful for any person, firm or corporation, to issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation. Chapter 62, Public Laws 1927.

It would serve no useful purpose to review the decisions elsewhere (collected in 35 A. L. R., 384), for our statute is specifically directed against the issuance of checks or drafts on any bank or depository when the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same *upon presentation. S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216. Indeed, a check is defined by C. S., 3167 as "a bill of exchange drawn on a bank payable on demand." See, also, definition in *Trust Co. v. Bank,* 166 N. C., 112, 81 S. E., 1074. And it is a rule of universal acceptance that criminal statutes should be strictly construed. *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756.

No error.

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CAROLINA COACH COMPANY v. J. A. HARTNESS, SECRETARY OF STATE, AND NATHAN O'BERRY, TREASURER OF THE STATE OF NORTH CAROLINA.

(Filed 26 March, 1930.)

**1. Corporations A a—Statutory authority is necessary to creation, consolidation, and merger of corporations.**

Statutory authority is necessary to create a corporation or to merge or consolidate existing corporations, and the State retains visitorial and supervisory powers over corporations created, consolidated, or merged under its sanction.

**2. Corporations J a—Statute under which union of corporations is accomplished controls as to whether union is merger or consolidation.**

Whether the union of two corporations is a merger or consolidation is not determined by appearance of a merger from the retention of the name of one and the abandonment of the name of the other, nor the use of the word "merger" in the statute under which the union is accomplished when it is apparent that it is not used in its technical sense, but the provisions

of the statute under which the union is accomplished controls, whether it provides for a merger in the technical sense or whether it provides for a consolidation.

**3. Taxation B b—Where two corporations consolidate a new corporation is created which is liable for franchise tax.**

Where two public-service corporations enter into an agreement for their union and the continuance of the business under the name of one with the combined assets of both, and file their application therefor with the Secretary of State, the statute under which the union is accomplished controls as to whether the union is a merger in the technical sense or a consolidation, and where the statute provides for converting the shares of stock of the old corporations into stock of the "new corporation," and for the surrender to and cancellation by the "new corporation" of the stock of the old ones: *Held*, the statute provides for the creation of a new corporation by consolidation, and the new corporation created thereunder is liable for the franchise tax imposed by chapter 36, Public Laws of 1929.

APPEAL by defendants from *Harris, J.*, at October Term, 1929, of WAKE. Reversed.

Submission of controversy without action under C. S., ch. 12, Art. 25. The agreed facts are as follows:

1. The Carolina Coach Company is a North Carolina corporation chartered by the Secretary of State's office on 20 November, 1925, its certificate of incorporation being recorded in the office of the clerk of the Superior Court of Wake County, on 25 November, 1925. A copy of an amendment to the certificate of incorporation dated 2 October, 1926, also was duly filed in the office of the clerk of Superior Court of Wake County. The corporation is engaged in the motor bus transportation of passengers under franchises or permits issued by the Corporation Commission of the State.

2. The defendant, James A. Hartness, was Secretary of State on 26 March, 1929, and prior thereto, and has since that date been and still is Secretary of State, performing the functions of that office. The defendant, Nathan O'Berry, was Treasurer of the State of North Carolina on 26 March, 1929, and prior thereto, and has since that date been and still is Treasurer of the State, performing the functions of that office.

3. Prior to 26 March, 1929, the Southern Coach Company was a corporation of North Carolina, having its principal office and place of business in the city of Greensboro and conducting a transportation business similar to the business of the Carolina Coach Company.

4. On 25 March, 1929, following an agreement between the stockholders and the directors of the Carolina Coach Company on the one hand and the stockholders and directors of the Southern Coach Company on the other hand, an agreement of merger was executed by both corporations, whereby the Southern Coach Company was merged into

the Carolina Coach Company under and by virtue of the provisions of Article 13 of chapter 22 of the Consolidated Statutes of North Carolina, sections 1224-A to 1224-F, inclusive, said merger agreement being filed in the office of the Secretary of State of North Carolina on 26 March, 1929, said merger agreement with other exhibits attached hereto containing all of the facts necessary to an understanding of the question being presented to the court.

5. When the plaintiff corporation offered to file in the office of the Secretary of State the said merger agreement under the provisions of the law, the Secretary of State demanded and exacted of the plaintiff the payment of the sum of $1,100, being forty cents on each $1,000 of the authorized capital stock of the Carolina Coach Company, before filing or allowing said merger agreement to be filed. Thereupon, the plaintiff, Carolina Coach Company, paid under protest to the defendant, J. A. Hartness, Secretary of State, the sum of $1,100, and thereafter within 30 days filed a written demand for the return of the $1,100 with the said J. A. Hartness, Secretary of State, and Nathan O'Berry, State Treasurer. Thereafter the said J. A. Hartness, Secretary of State, and the said Nathan O'Berry, State Treasurer, refused to return or refund the said $1,100 and still hold same, as plaintiff contends, contrary to law. And the plaintiff, Carolina Coach Company, has performed all the requirements of the law with respect to payment under protest and demand and notice for refund.

The articles of incorporation and the merger agreement are made a part of the statement of facts. The question at issue is whether the plaintiff should have been required to pay $1,100 into the office of the Secretary of State before filing the merger agreement. Upon consideration of the agreed facts Judge Harris held that payment of the sum in controversy had been exacted without warrant of law and adjudged that the plaintiff recover of the defendants the sum of $1,100, the amount paid under protest by the plaintiff, and interest thereon from 26 March, 1929, together with costs. The defendants excepted and appealed.

*Attorney-General Brummitt and Assistant Attorney-General Nash for appellants.*

*Smith & Joyner for appellee.*

ADAMS, J. The certificate of incorporation of the Carolina Coach Company, the plaintiff herein, was filed in the office of the Secretary of State on 20 November, 1925, and the stock subscribers, their successors and assigns, were thereby made a body corporate, bearing the name specified in the certificate. The total authorized capital stock was 45,000 shares without nominal or par value, 20,000 shares representing preferred stock, 20,000 shares class A common stock, and 20,000 shares

class B common stock. On 2 October, 1926, the charter was amended by changing the authorized capital stock to 27,500 shares without nominal or par value, 20,000 shares representing preferred stock, 2,500 shares class A common stock, and 5,000 shares class B common stock. The Southern Coach Company was incorporated 19 February, 1926, and the "agreement of merger" executed by the Carolina Coach Company and the Southern Coach Company was filed in the office of the Secretary of State on 26 March, 1929.

In 1901 the General Assembly enacted a statute imposing prescribed taxes for filing in the office of the Secretary of State certificates of incorporation, of increase or decrease of capital stock, of extension or renewal of corporate existence, of change of name or of business, and other certificates relative to corporations. P. L. 1901, ch. 2, sec. 96; Revisal of 1905, sec. 1233. This section was amended in 1920 and the tax was increased. P. L., Ex. Ses. 1920, ch. 1, sec. 7c. Under modified phraseology the amended act appears in the Consolidated Statutes as section 1218. The act authorizing the merger or consolidation of corporations did not go into effect until 27 February, 1925. P. L. 1925, ch. 77. It was perhaps for this reason that at the session of 1929 the General Assembly amended section 1218 by making it conform to the act of 1920, the amendment becoming effective on 20 February, 1929. The two pertinent sections of the latter statute are as follows:

"On filing any certificate or paper relative to corporations in the office of the Secretary of State, the following tax shall be paid to the State Treasurer for the use of the State:

1. For certificates of incorporation, forty cents for each thousand dollars of the total amount of capital stock authorized, but in no case less than forty dollars.

3. Extension or renewal of corporate existence of any corporation, the same as required for the original certificate of incorporation by this section." P. L. 1929, ch. 36.

If the written instrument executed by the plaintiff and the Southern Coach Company, referred to in the statement of facts as an "agreement of merger," or a "merger agreement," is in law a certificate of incorporation or an extension or renewal of corporate existence, the tax is undoubtedly collectible. The question of the plaintiff's liability for the tax turns, therefore, upon the legal effect of the agreement, taken in connection with the facts disclosed by the attached exhibits.

It may first be noted that in view of the statement of facts we are not concerned with the law relating to the voluntary conveyance of corporate property (C. S., 1138), or a sale of stock by one corporation to another (C. S., 1166), or a sale of corporate property under execution (C. S., 1201), or a sale of the property and franchises of a public

service corporation to satisfy a mortgage or other encumbrance as provided in section 1221. But, as hereafter pointed out, we are primarily concerned with the construction of certain other statutes.

A corporation is a creature of the law. "It cannot be created by mere agreement of the associates, but it is necessary to obtain sovereign sanction, for corporations today can be created only by or under legislative authority. The privilege which the Legislature confers upon human beings enabling them to act as a legal unit is the corporate franchise." 1 Fletcher, Cyc. Corp., sec. 14. The franchise is distinguishable from the capital and from the tangible property and assets of the corporation. A corporation may acquire, hold, and transfer property; but the sovereign is not indifferent to the public interest. Having granted the franchise, the State retains jurisdiction to exercise visitorial or supervisory powers over the management of the internal affairs of domestic corporations.

Legislative sanction is essential, not only to the creation, but to the merger or consolidation of corporations. Morawetz on Corp., secs. 544, 545. Recognizing this principle the coach companies based their agreement upon the act of 1925, which is cited above; and the legal effect of the agreement must be sought in the terms and purpose of the act which purports to authorize its execution. The plaintiff argues that under the provisions of this act corporations existing under the laws of the State may at their election enter into an agreement of merger or of consolidation, and that the agreement of the companies is a merger of one into the other, and not the creation of a new corporation as the result of consolidation. The defendants say that the agreement is in legal effect the consolidation of the two companies resulting in the creation of a new corporation.

There is, of course, a technical distinction between consolidation and merger. Merger has been defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased. It is the uniting of two or more corporations by the transfer of property to one of them, which continues in existence, the others being merged therein. But ordinarily the legal effect of consolidation is to extinguish the constituent companies and create a new corporation. Bouvier's Law Dic., Cen. Ed., 799, 801; Black's Law Dic., 774; 12 C. J., 530; 40 C. J., 649. The distinction is clearly stated by Fletcher in 7 Cyclopedia, sec. 4662: "A merger, using the word in its strict legal sense, exists only where one of the constituent companies remains in being, absorbing or merging into itself all the other constituent companies, while in the case of a consolidation a new corporation is created and generally all the consolidating companies surrender their existence." It has accordingly been held that where one corpora-

tion loses its identity and is merged in another, the latter preserving its identity and issuing new stock in favor of the stockholders of the former, the transaction is not a consolidation or the creation of a new corporation, but is merely the enlargement of the old one. *News Pub. Co. v. Blair,* 29 Fed. (2d), 955. But if a statute provides for the consolidation of corporations and not for merger in the technical sense, an apparent merger by the retention of the name of one and the abandonment of the name of the other does not prevent the operation of the rule that consolidation creates a new corporation and puts an end to the separate existence of the constituent companies. *Chicago Title & T. Co. v. Doyle,* 259 Ill., 489, 47 L. R. A. (N. S.), 1066.

Whether, therefore, uniting two or more corporations works their dissolution and creates a new corporation depends upon the statutes under which the union is accomplished. And here we encounter the pivotal question whether under the act of 1925 the coach companies were merged or consolidated.

In an analysis of the statutes it is noticeable that they do not observe the technical distinction between "merger" and "consolidation." The terms are loosely applied; "merger" appears in the headlines of four sections of the act and once in the body of the several sections. It is not clear that it was not used indiscriminately as synonymous with consolidation; and the words "consolidated corporation" manifestly import a separate and distinct entity. This is obvious from the frequent recurrence of the word "new" as descriptive of the corporation created by the consolidation. Provision is made for converting the shares of each of the old corporations into stock of the "new corporation." Section 1224(a). Before receiving stock in the "new" or consolidated corporation, the shareholders of the old corporations must surrender to the "new" corporation their certificates of stock in the old corporation, and these certificates shall be canceled by the "new" corporation. Section 1224(b). If a person owning a lost, destroyed, or misplaced certificate of stock in one of the old corporations is dissatisfied with the terms of the "merger" he may have his stock appraised and paid for upon indemnifying the "new" corporation against loss. Section 1224(b). The statutes thus express the primary purpose of creating a new corporation by the consolidation of corporations existing under the laws of this State.

The plaintiff's contention is based upon the first clause in section 1224(a): "Any two or more corporations organized under the provisions of this chapter, or existing under the laws of this State, for the purpose of carrying on any kind of business, may consolidate into a single corporation which may be either one of said consolidated corporations or a new corporation to be formed by means of such consolidation." It is

insisted that the plaintiff is the "single corporation"; that it has absorbed the other; and that its identity and existence continue.

Whatever force would otherwise attach to this position is neutralized by other statutory provisions. An agreement signed by a majority of the directors is prerequisite to consolidation and to the so-called merger, whether the "single corporation" be one of the consolidated corporations or a new corporation formed by means of such consolidation. Without the agreement there can be neither merger nor consolidation; but the instant the agreement is signed, acknowledged, filed, and recorded the separate existence of the constituent corporations ceases and the consolidating corporations become a single corporation in accordance with the agreement. Section 1224(b). When the separate existence of the constituent corporations comes to an end the new corporation acquires not only the property, but the powers, privileges and franchises of the old corporations, which thereafter have neither property nor franchise. It is provided that all interests of the old corporations shall thereafter be the property of the consolidated corporations as effectually as they had previously been the property of the constituent corporations. Section 1224(b).

The single or consolidated corporation may issue bonds or other obligations, negotiable or otherwise, to an amount sufficient with its capital stock to meet such obligations as may be necessary to effect the consolidation and to secure the payment of its obligations by mortgaging its corporate franchise and its real and personal property. Section 1224(f).

The fact that the agreement is styled a merger is immaterial; it cannot affect our decision. The law controls the corporations; the corporations do not control the law.

We therefore conclude that the agreement of the coach companies was in contemplation of law a certificate of incorporation and that the plaintiff was liable for the tax imposed by the act of 1929.

Judgment reversed.

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BANK OF ROSE HILL ET AL. v. A. McL. GRAHAM, ADMINISTRATOR OF JOHN A. BANNERMAN, DECEASED, AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 26 March, 1930.)

**1. Principal and Surety B d—Provision in bond that it should be void if defalcation were settled without surety's consent is binding.**

Under an express stipulation in a bond indemnifying an employer against loss through the dishonesty of his employee, that if the employer settled or compromised such loss without the consent of the surety the

surety bond was to become void from the beginning, a settlement by the employer with the employee in violation of the provision releases the surety from liability.

**2. Same—Settlement of bank officer's defalcation by cashier is settlement by bank.**

Where a cashier of a bank misappropriates funds of the bank, and the defalcation is discovered by the assistant cashier, who has succeeded to the duties of the cashier, and the latter effects a settlement with the former without the surety's consent, by which the defalcation is made good and the proceeds turned over into the assets of the bank, such settlement is regarded as a settlement or compromise by the bank of a loss which might have become the basis of a claim against the surety and renders the surety bond void in accordance with an express provision therein it should be void if settlement were made without the surety's consent, and the fact that the assistant cashier had not called the defalcation and settlement to the attention of the directors of the bank is immaterial.

**3. Reference C b—Where findings of referee are not excepted to they are conclusive.**

Unexcepted to findings of fact by a referee are conclusive both in the Superior Court and in the Supreme Court on appeal.

**4. Appeal and Error J e—Where plaintiff is not entitled to recover in any event, refusal to submit issues to jury is not error.**

Where the plaintiff is not entitled to recover of a surety in any event, the refusal of the trial court to submit issues as to the surety's liability, tendered by the plaintiff and based on his exceptions to the referee's report, is not error, the answers to the issues being immaterial.

APPEAL by plaintiff from *Daniels, J.*, at August Term, 1929, of DUPLIN. Affirmed.

This is an action on a bond in the sum of five thousand dollars, dated 25 April, 1925, and executed by John A. Bannerman, as principal, and the Fidelity and Deposit Company, as surety.

The bond is payable to the plaintiff, Bank of Rose Hill, and is conditioned for the faithful and honest performance by John A. Bannerman, the principal, of his duties as cashier of the said bank.

Among other provisions and stipulations contained in said bond is the following:

"Section 6. If the employer shall sustain any loss that might be made the basis of a claim hereunder, and shall settle or compromise such loss with the employee without first securing the consent of the surety to such settlement or compromise, this bond shall thereupon become void from the beginning."

The plaintiff alleges in its complaint that while the bond sued on in this action was in force, John A. Bannerman, the principal therein, as its cashier, fraudulently misapplied and converted to his own use, money belonging to the plaintiff, the obligee in said bond, of the aggregate

amount of $6,756.43, thereby causing plaintiff a loss of said amount. This allegation is denied in each of the answers filed by the defendants.

The defendant, the Fidelity and Deposit Company of Maryland, further alleges in its answer, that after the execution of said bond, plaintiff settled with the said John A. Bannerman, its cashier, a loss which the plaintiff had sustained in the sum of $5,000, which might have been made the basis of a claim under said bond, without first securing the consent of said defendant, and that by reason of such settlement the bond is now and has been at all times since its execution, void, as stipulated and provided in section 6 of said bond. This allegation is denied in the reply filed by the plaintiff.

The action was referred, without the consent of the parties, for the trial of the issues raised by the pleadings. The plaintiff and each of the defendants duly excepted to the order of compulsory reference, each thereby reserving its right to a trial by jury of the issues of fact raised by the pleadings. C. S., 573.

The report of the referee, containing his findings of fact, and his conclusions of law, with exceptions thereto duly filed by the plaintiff, and by the defendant, the Fidelity and Deposit Company of Maryland, came on for hearing at August Term, 1929, of the Superior Court of Duplin County. The defendant, A. McL. Graham, administrator of John A. Bannerman, deceased, filed no exception to the report of the referee, either to his findings of fact or to his conclusions of law.

Upon his findings of fact, the referee concluded that plaintiff is entitled to recover of the defendant, A. McL. Graham, administrator of John A. Bannerman, deceased, the sum of $6,756.43, with interest and costs; and that plaintiff is entitled to recover of the said defendant, A. McL. Graham, administrator of John A. Bannerman, deceased, the principal in the bond sued on in this action, and of the defendant, the Fidelity and Deposit Company of Maryland, the surety in said bond, the sum of $56.43, with interest.

Both the plaintiff and the defendant, the Fidelity and Deposit Company of Maryland, duly filed exceptions to certain findings of fact, and conclusions of law, set out in the report of the referee. Plaintiff tendered issues upon its exceptions, and demanded that said issues be submitted to a jury for trial. Defendant, the Fidelity and Deposit Company of Maryland, moved for judgment on the referee's finding of fact, No. 11, contending that its exception to his conclusions of law No. 2 should be sustained.

The referee's finding of fact No. 11, to which there was no exception by the plaintiff, is as follows:

"11. That sometime during the year 1922, the said John A. Bannerman, while cashier of the Bank of Rose Hill, did, without the knowledge

or consent of said bank, abstract and misapply from the funds thereof the sum of $5,000, and to conceal said misapplication and prevent its showing in the bank's balances, made a false entry, or false entries, of withdrawal upon the account of Charles Teachey in said bank; that the shortage caused thereby in said account, as early as October, 1922, came to the knowledge of W. P. Mallard, then assistant cashier and performing the duties of cashier, and having in charge the general management of said bank, and Miss Lillian Rackley (now Mrs. A. E. Boney), a clerical employee of said bank, and of Joseph Howe, a special clerical employee of the bank for about two weeks, in October, 1922, neither of whom was a director of said bank; that said Mallard and Howe called said shortage to the attention of said John A. Bannerman, who gave no satisfaction to them about it; that this knowledge was not communicated to any director of the bank or any one else concerned with its affairs and management.

"That said Mallard and Howe arranged a conference about said shortage with J. R. Bannerman, the father of John A. Bannerman, on 30 January, 1923, at which no one was present except said Mallard, Howe, and the two Bannermans, and when and where the bank sheets showing the shortage were presented and the shortage disclosed to the said J. R. Bannerman, who thereupon paid to said Mallard, for the use and benefit of the Bank of Rose Hill, and to cover the shortage of John A. Bannerman in the account of Charles Teachey, $5,000 in cash, and by and through the connivance of all present the said bank sheets showing said account and shortage on the same, were completely destroyed; that a receipt was given by W. P. Mallard, as assistant cashier of said bank, for the said $5,000, the said receipt being set out in the evidence *verbatim;* the said sum so received was by said Mallard, assistant cashier, duly applied to the cover of said shortage and went into the assets of said bank, and so remains to this time; that no notice or knowledge of either the said shortage, or the said conference, payment or destruction of the said bank sheets ever came to any director or officer of said bank, or any one concerned with its affairs, except as above stated, until after this suit was commenced; that no notice or knowledge of any of the matters above stated, or any fact concerning said abstraction, shortage, false entries, conference, payment or destruction of said bank sheets, was ever given or communicated to the defendant, the Fidelity and Deposit Company of Maryland, until long after this action was commenced, and was never so communicated to said defendant by said bank, or any one on its behalf."

The referee's conclusion of law No. 2, to which the defendant, the Fidelity and Deposit Company of Maryland duly excepted, is as follows:

"2. That the notice and knowledge had by the assistant cashier and clerical force of the Bank of Rose Hill, of the various acts of dishonesty and misapplication of funds of said bank by John A. Bannerman, cashier of said bank, are not imputed to said bank, under the circumstances in this cause."

The foregoing conclusion of law was reversed, and upon the referee's finding of fact No. 11, it was ordered, considered and adjudged that plaintiff is not entitled to recover in this action of the defendant, the Fidelity and Deposit Company of Maryland.

The court declined to submit to the jury the issues raised by the exceptions of the plaintiff to the report of the referee. These issues involved only matters in controversy between the plaintiff and the defendant, the Fidelity and Deposit Company of Maryland. The plaintiff contends that there was error in certain findings of fact made by the referee, upon which he concluded that said defendant was not liable, as surety on the bond, to the plaintiff, for the full amount of its claim against the defendant, A. McL. Graham, administrator of John A. Bannerman, the principal in the bond.

Upon the findings of fact, and conclusions of law, in the report of the referee, to which there was no exception by the defendant, A. McL. Graham, administrator of John A. Bannerman, deceased, it was ordered, considered and adjudged that plaintiff recover of said defendant the sum of $6,756.43, with interest and costs.

From the judgment that it recover nothing in this action of the defendant, the Fidelity and Deposit Company of Maryland, the plaintiff appealed to the Supreme Court.

*Geo. R. Ward and Ward & Ward for plaintiff.*
*Isaac C. Wright for defendant.*

CONNOR, J. The determinative question involved in this appeal is whether, after the execution of the bond sued on in this action, and while the same, according to its terms, was in force, the plaintiff, Bank of Rose Hill, as employer of John A. Bannerman, its cashier, made a settlement with its said employee of the loss which it had sustained by reason of his default, and which might have been made the basis of a claim under the bond against the defendant, the Fidelity and Deposit Company of Maryland, the surety thereon. If this assistant cashier was authorized to make the settlement with its cashier, for the loss which the plaintiff had sustained by reason of the latter's default, then the settlement as found by the referee was made by the bank, and by reason of the stipulation and provision contained in section 6 of the bond, the bond was void from the beginning, and the surety is not liable to the

obligee for any default of the principal, without regard to whether such default occurred before or after the execution of the bond.

The facts with respect to the loss, and also with respect to the settlement, were found by the referee, and are fully set out in his report. There was no exception to these findings of fact. A finding of fact made by the referee, in the absence of an exception thereto, was conclusive on the hearing in the Superior Court, as it is on the appeal to this Court.

The settlement of the loss which the plaintiff had sustained by reason of the default of its cashier was made with said cashier, by the assistant cashier of the plaintiff. The assistant cashier did not undertake to compromise plaintiff's claim against the cashier for the amount of the loss. He demanded and received payment in full of the claim. Upon all the facts found by the referee in this case, the assistant cashier was authorized to make the settlement, which he did in good faith, and in the interest of the bank. Under the express provision of the bond, the settlement without the consent of the surety rendered the bond void from the beginning and released the surety from any and all liability thereunder to the obligee.

At the date of the settlement with him John A. Bannerman was the cashier of the plaintiff bank only in name. He had ceased to be the active cashier, and his duties and powers had devolved upon the assistant cashier, pending the election and qualification of his successor. Upon his discovery of the shortage in the account of a customer of the bank, which had occurred while the cashier was in active charge of the bank, it was the duty of the assistant cashier to demand and insist upon a settlement of the loss which the bank had sustained by the shortage. This he did in good faith. The money which he received in settlement of the claim against the cashier, was promptly applied to the payment of the loss. The failure of the assistant cashier to report the loss and the settlement to the directors did not affect the validity of the settlement. Upon the express provision of the bond, the effect of the settlement was to render the bond void from the beginning and to release the surety from any and all liability thereunder to the obligee.

There was no error in the refusal of the court to submit the issues presented by the plaintiff, based upon its exceptions to the report of the referee, to the jury. These issues involved only matters in controversy between the plaintiff and the surety. As there was no error in the judgment that plaintiff in no event is entitled to recover in this action of the surety, the answers to the issues are immaterial. The judgment is

Affirmed.

GENIE NEWTON, ADMINISTRATRIX, v. LEON S. BRASSFIELD AND W. B. DRAKE, RECEIVERS, ET AL.

(Filed 26 March, 1930.)

**1. Highways B g—Evidence of intestate's contributory negligence in running in front of bus held sufficient.**

Evidence in this case that the plaintiff's intestate suddenly ran in front of and was killed by the defendant company's bus is held sufficient to sustain an affirmative answer to the issue of contributory negligence and bar a recovery in an action for wrongful death.

**2. Appeal and Error J e—Assignments of error on issue answered in appellant's favor will not be sustained.**

Assignments of error arising on an issue found in the appellant's favor will not be sustained on appeal.

**3. Trial G d—Jurors will not be heard to impeach their own verdict.**

Jurors will not be heard to impeach a verdict after it has been rendered to and received by the court.

APPEAL by plaintiff from *Harwood, Special Judge,* and a jury, at Special November Term, 1929, of WAKE. No error.

This is an action for actionable negligence brought by plaintiff against the defendants for damages for killing her intestate. The defendants 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's intestate, Charles T. Newton, injured and killed by the negligence of the defendants as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate, Charles T. Newton, by his own negligence, contribute to his injuries and death as alleged in the defendant's answer? Answer: Yes.

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

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

*M. C. Pearce and Thos. W. Ruffin for plaintiff.*
*Clyde A. Douglass and W. B. Jones for defendants.*

PER CURIAM. The plaintiff's intestate was killed by a bus operated by defendant, on 22 June, 1929, about 9:15 p.m. on Highway No. 50, in the village of Forrestville, in Wake County, N. C. The plaintiff's intestate left surviving him a wife and five children. The defendants' bus was going around a curve or semi-circle, and killed plaintiff's intes-

tate on the highway. The jury on the trial of the facts found the defendants guilty of negligence and the plaintiff's intestate guilty of contributory negligence.

Some of the witnesses for plaintiff testified in part:

*Genie Newton:* Saw her husband killed. "From the time the light shown on him he was 129 steps away, and the bus came just like an areoplane. I saw my husband at the time the light first shone on him; he ran to get out of the way. In regard to how much time elapsed from the time the light was on him until the bus hit him, it was just like lightning." The bus was going 50 miles an hour; the road was crooked. She further testified: "A driver of an automobile could see around this curve after he turned, but the bus driver could not see from where he was. The bus was twenty-nine steps from my husband when the light shone on him." On cross-examination: "My husband was hit on the right side, by the left fender of the bus. He was not trying to run across the road in front of the bus. He was trying to get out of the way of the bus. . . . It was the left fender and lamp that hit him. It was turning to the left when it hit him. It was going around a curve. . . . He (my husband) was in a curve and he could not see." In response to the question, "What was there to keep him from seeing across an open space where it ends?" witness answered, "You just could not see. It (the highway) was crooked. It was as crooked as your arm. You cannot look across and up where the curve begins. . . . He was not a deaf man, and was not hard of hearing. His hearing was all right. His eyesight was good." In response to the question, "Could he see all right; do you know why he went across the road and turned back to go that way?" Witness answered, "He just changed. He started slowly across the road, and he kept a slow gait until the light of the bus shined on him and then he ran. He was already in front of it when the light shined on him. The left fender struck him. It just came like that and hit him while he was running to the right side."

*W. T. Raines* testified in part: "The bus ran 220 feet after it struck Mr. Newton. It carried the body of Mr. Newton 107 feet, and it went 113 feet before it dropped the body, making a total distance of 220 feet." On cross-examination: "The bank would not interfere with the view of the man on the road, but it would interfere with the light of a bus seeing a man. A man in the center of the road could see beyond the curve if he would stop and look. If Mr. Newton stopped in the road before going on that road he could have seen that bus coming down the road. The bus was running fifty miles per hour before it hit. . . . It was a star-light night. It was not bright. There was a light where it happened on that post. . . . I said awhile ago if Mr. Newton had stopped and looked towards Wake Forest he would have seen the light,

but his back was towards Wake Forest. The bus driver could not have seen across these lots and seen Mr. Newton. At a point 200 feet from where Mr. Newton was struck the light did not focus on the highway; it focused thirty feet off the highway. I was on the inside and Mr. Newton was on the outside. From where Mr. Newton started across he was in a better position to see the bus than I was."

*Mrs. W. T. Raines:* "The bus ran into him. When the light flashed on him he tried to run across and the bus ran on him. He was struck immediately when he ran in front of it, it was just as quick as that. He was in the center of the road as near as I could see. He left and ran into the west side right in the path of the bus. When he jumped in front of it it was just a little way from him. There was no time to stop after the light flashed on him. He was in the center of the road when the light flashed on him, as near as I could see."

*R. V. Bridges,* on cross-examination, testified: "He was not in the center of the road when the light flashed on him. He liked one step of being in the center of the road. I did not see any reason for him to jump right in front of the bus. He jumped in between and the bus was right on him. The driver did not have any time to do anything. The bus hit him as soon as he jumped in front of it."

Some of the witnesses for the defendants testified in part:

*D. A. Baker:* "I was sitting a little behind the driver. I could have put my hand on his shirt. When I first saw Mr. Newton he was approaching the highway. Mr. Newton was not on the hard surface; he was coming toward the highway and stepped upon the highway. I could not say whether he was on the shoulder or not; he was on the east side, and came to a halt and dashed right in front of the bus. The bus was right at him. The bus was making thirty or thirty-five miles an hour. It was traveling on the right hand side of the highway. The left hand fender of the bus struck Mr. Newton. . . . There was nothing to obstruct my view of the way the wreck happened."

It was in evidence on the part of defendants that the horn blew several times and further evidence to the effect that the view was unobstructed towards Wake Forest for practically 500 feet.

*J. B. Lee,* the bus driver: "At the time Mr. Newton was killed I was going south. It was running thirty or thirty-five miles per hour when Mr. Newton was killed. I have traveled the highway from Forestville a good many times in the night time. I was at all times able to see a distance of 200 feet ahead of me between the beginning of the curve and the point at which Mr. Newton was hit. I was on the right side. I was not on the left side. When I first saw Mr. Newton he was on the left side of the road, near the edge of the hard surface. He was walking on the edge of the hard surface and stopped and he turned and looked in the direction of Wake Forest. As the bus came around the curve at a slow

rate of speed and I got so near to him that it was impossible to stop, he dashed and ran across the road right in front of the bus." At this point the witness was asked the following question: "If he had remained where he was before he dashed and ran across would the bus have hit him at all?" Answer, "No." "The bus was within thirty feet of him when he dashed in front of it. The left hand fender and the headlight struck him. When it struck him I went all to pieces and lost my nerve, just like a man would have done in striking a human being. I was not able to stop immediately."

It will be noted that the jury on the first issue found the defendant guilty of negligence, and on the second issue the plaintiff guilty of contributory negligence. Several assignments of error of plaintiff relate to the first issue; they cannot be sustained, as the finding by the jury on that issue was in his favor. We see no prejudicial error in the exceptions to the evidence and the refusal of the prayers for instruction as requested by plaintiff in the light of the findings of the jury. As to the five jurors who signed the statement, it is well settled that jurors cannot be heard to impeach their verdict. We can find on the whole record no prejudicial or reversible error. The case was submitted to the jury, and as triers of the fact we are bound by their findings. We find in law

No error.

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MRS. R. B. JORDAN v. C. G. HATCH.

(Filed 26 March, 1930.)

1. **Trial E c—Where requested instructions are substantially given it is sufficient.**

   Where special instructions requested are substantially given in the charge it is sufficient.

2. **Trial G c—Directed verdict will not be given on conflicting evidence.**

   A directed verdict will not be given on conflicting evidence.

3. **Trial E c—Instructions as to matter not raised by pleadings or contentions are not required.**

   Instructions in a personal injury case as to concurrent negligence are not required when the question is not raised by the pleadings or the contentions of the parties.

APPEAL by plaintiff from *Cranmer, J.*, at July Term, 1929, of LEE. No error.

Action to recover damages for personal injuries sustained by plaintiff, when the automobile in which she was riding as a guest was struck by a truck owned by defendant and driven by his employee.

The driver of the automobile turned sharply to the left, and drove across the highway for the purpose of entering an intersecting road. The truck, which was following the automobile, struck it before the automobile had cleared the highway. As a result of the collision, plaintiff was injured.

Plaintiff alleges in her complaint and offered evidence tending to show that the collision was caused by the negligence of the driver of the truck, and that his negligence was the sole, proximate cause of her injuries. These allegations are denied by the defendant, who offered evidence tending to contradict the contentions of the plaintiff.

Plaintiff specifically alleges in her complaint and offered evidence tending to show that at the time of and immediately before the collision, the automobile in which she was riding was operated by its driver in a careful and lawful manner. This allegation is denied by the defendant, who offered evidence tending to show that the sole, proximate cause of plaintiff's injuries was the negligence of the driver of the automobile in which plaintiff was riding.

The jury by its answer to the first issue found that plaintiff was not injured by the negligence of defendant as alleged in the complaint.

From judgment that plaintiff recover nothing of the defendant by this action, plaintiff appealed to the Supreme Court.

*Gavin, Teague & Byerly, and Hoyle & Hoyle for plaintiff.*
*No counsel for defendant.*

PER CURIAM. The only assignments of error on this appeal are based upon plaintiff's exceptions with respect to the charge of the court to the jury. These assignments of error cannot be sustained.

Plaintiff's prayers for instructions to which she was entitled were given substantially, although not literally, in the charge. This was sufficient, as has been generally held by this Court. *Lloyd v. Bowen,* 170 N. C., 216, 86 S. E., 797, and cases cited in the opinion of *Walker, J.* It was not error to refuse to charge the jury, as requested by plaintiff, that upon all the evidence they should answer the first issue, Yes. The evidence with respect to this issue was conflicting, and was therefore properly submitted to the jury, both upon the question of defendant's negligence, and upon the question of sole, proximate cause of the injuries sustained by plaintiff. *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180. Neither the allegations in the pleadings, nor the contentions of the parties called for an instruction as to concurrent negligence. *White v. Realty Co.,* 182 N. C., 536, 109 S. E., 564.

We find no error on this appeal for which the judgment should be reversed.

No error.

KATHLEEN JONES, ADMINISTRATRIX OF LETTIE JONES, v. S. J. STANCIL, W. L. DUPREE, L. J. PENNY AND MRS. L. J. PENNY.

(Filed 26 March, 1930.)

**Master and Servant D b—Where lessee was to use lessor's truck only during day, lessor is not liable for injury caused by defective lights.**

Where under the terms of a lease the lessee was to use the lessor's automobile truck only during the day, the lessor is not liable in damages to a third person for an injury caused by defective lights thereon while the lessee was driving the truck at night in violation of the terms of the agreement.

APPEAL by plaintiff from *Lyon, Emergency Judge,* January Special Term, 1930. From WAKE. Affirmed.

*Thos. W. Ruffin for plaintiff.*
*Robert N. Simms for L. J. Penny and Mrs. L. J. Penny.*

PER CURIAM. The defendant Stancil rented a farm owned by Mrs. L. J. Penny for the year 1929. The rental contract was made by Stancil and L. J. Penny, who represented his wife in the transaction. Penny was to furnish the land, the stock, and one-half the fertilizer. Stancil was to furnish the labor, and the crop was to be divided between them. Stancil hired a Ford truck from Penny in which Stancil hauled cotton pickers to and from the farm. On 19 October, 1928, a collision occurred between the truck, which was driven by Stancil, and a Ford coupe, which was driven by W. L. Dupree. The plaintiff's intestate was injured by the collision and within a short time she died from the effects of her injury. The plaintiff brought suit to recover damages for her wrongful death. At the close of her evidence her counsel admitted that she had no cause of action against Dupree; the judge dismissed the action against L. J. Penny and his wife, and the plaintiff took a voluntary nonsuit as to Stancil.

The plaintiff contends that there was error in ordering a nonsuit as to L. J. Penny. The contention is based upon the theory that Penny owned the truck; that he knew it had no lights; that it could not be safely operated at night; and that the owner is liable for injuries caused by the negligence of the lessee. It is needless to consider this proposition of law for the reason that the plaintiff's evidence shows that according to the agreement between Penny and Stancil the truck was to be operated only in daytime when there would be no occasion for using the lights. If Stancil was negligent in operating the truck in breach of his agreement his negligence cannot be imputed to Penny, who contracted to prevent the negligence which resulted in the intestate's injury.

Judgment affirmed.

MAX MAYERS, EXECUTOR OF THE WILL OF JOE DANIEL, DECEASED, v. BANK OF BLADEN, REXFORD SQUIRES, AND L. E. SQUIRES.

(Filed 2 April, 1930.)

**1. Bills and Notes D b: D c—One signing note as maker is primarily liable to holder and is not discharged by extension.**

The negotiable instrument law fixes the liability of the parties on a negotiable instrument, and where a party signs a note as maker, C. S., 2977, he is primarily liable thereon to a holder in due course, and he may not claim to be secondarily liable as an accommodation endorser (C. S., 3009), contrary to the express terms of the instrument as against a holder who acquires for value before maturity, and his position that he was discharged by an extension of time of payment given to another whose name appears on the instrument as endorser is not meritorious.

**2. Mortgages F d—Where holder of note takes a mortgage from surety and buys in property at tax sale, maker is not entitled to have note credited with value of land.**

Where the one primarily liable on a negotiable note for which one secondarily liable has given as additional security a mortgage on lands, and the holder for value before maturity has recovered judgment against those liable on the note, and then has bought in the land mortgaged as additional security at a tax sale and has received from the sheriff a tax deed therefor: *Held*, the one primarily liable upon the instrument has no equity of subrogation or otherwise to require the holder of the instrument to apply as a credit on the note the value of the land for which he received the tax deed, the mortgagor of the land not appealing from the judgment of the lower court.

APPEAL by plaintiff from *Grady, J.*, at January Term, 1930, of BLADEN County. Affirmed.

On 1 May, 1920, Joe Daniel executed and delivered to L. E. Squires two notes under seal, each in the sum of $2,000 with interest at 6 per cent, the first due 15 December, 1920, and the second 1 January, 1921. L. E. Squires and Rexford Squires, his son, endorsed them in blank, and on 15 September, 1920, the Bank of Bladen bought them. The bank alleged that it purchased them for value, before maturity, and without notice of any equities in favor of the maker or endorsers. On 15 September, 1920, at the time the bank bought the notes, Rexford Squires executed to the bank a mortgage on two tracts of land in Bladen and Columbus counties to secure the indebtedness evidenced by the two bonds which Joe Daniel had executed to L. E. Squires.

The Bank of Bladen on 13 February, 1923, instituted an action and secured a judgment against Joe Daniel and Rexford Squires on the two notes referred to above and obtained a decree for the foreclosure of the mortgage. On 21 January, 1926, Joe Daniel borrowed from the bank the sum of $375, which added to the judgment amounted to $4,635, and

to secure the payment of the judgment and the amount borrowed he assigned to the bank certain mortgages which he held and conveyed to it certain articles of personal property. He expressly agreed that the judgment against him should remain in force and effect, and that this instrument should be additional security. The amount thus secured was reduced by subsequent payments.

The plaintiff, as executor, brought the present suit on 16 January, 1929, to cancel the judgment which had been recovered against Joe Daniel by the Bank of Bladen. Judge Grady gave judgment for the plaintiff against L. E. Squires and Rexford Squires, who did not appeal, and judgment of nonsuit as against the Bank of Bladen and from the judgment of nonsuit the plaintiff appealed.

*I. C. Wright for plaintiff.*
*H. H. Clark for Bank of Bladen.*

ADAMS, J. As revealed by the complaint the plaintiff's theory of the case is substantially as follows: L. B. Squires bought two tracts of land from George Currie and had the deed made to his son Rexford Squires, who held the legal title as agent or trustee for his father; the debt secured by the mortgage executed by Rexford Squires to the Bank of Bladen was the debt of L. E. Squires; the notes endorsed to the bank by L. E. Squires and Rexford Squires were executed by Joe Daniel, the plaintiff's testator, without receiving value, and for the accommodation of the payee; the bank knew that the notes were accommodation paper; at most Daniel was only a surety; the bank extended the time of payment without the knowledge or consent of Daniel, and permitted L. E. Squires to cut the timber from the mortgaged land and dispose of it without applying it on the debt, thereby releasing Daniel from liability on the notes; and for these reasons the plaintiff is entitled to a cancellation of the judgment which is a lien on the testator's real estate.

The evidence does not support this theory. Daniel executed the two notes 1 May, 1920; the bank bought them 15 or 16 September, 1920, and required a mortgage which was then given by Rexford Squires as additional security. Ostensibly, then, Daniel was the primary debtor. Under the Negotiable Instruments Law the person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay it, and all other parties are secondarily liable. C. S., 2977. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or endorser, without receiving value therefor, and for the purpose of lending his name to some other person. C. S., 3009. The accommodation party referred to in this section is regarded as the one primarily liable under the provisions of section 2977. 5 Uniform Laws Annotated, 528. The position that by execut-

ing an accommodation note the maker merely lends his credit to the payee and does not become liable to him does not warrant the conclusion that the maker is not liable to a holder for value. By the terms of the statute an accommodation party is liable to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. C. S., 3009. A holder for value is not necessarily a holder in due course. 5 Uniform Laws Annotated, 212. The general rule is that the maker of an accommodation note is liable to a holder for value with or without notice of the character of the maker's obligation. 5 Uniform Laws, Supplement 1928, page 80. It follows that knowledge of an endorsee for value that the note was given for the accommodation of the payee is not a defense to an action by the endorsee against the accommodating maker. Brannan's Neg. Ins. Law, 4 ed., 270. But there is evidence tending to show that the Bank of Bladen was not only a holder for value, but a holder in due course. C. S., 3033. The bank denied that the notes were accommodation paper, but if it be granted that they were, the fact cannot under the circumstances disclosed by the evidence avail the plaintiff as ground for relief.

It is manifest from what has been said that the plaintiff's position with respect to the alleged suretyship of his testator is not meritorious. It is an extension of time given by a creditor to the principal debtor which under certain conditions discharges the surety from liability; but a release of the surety does not usually affect the liability of the principal. The debt due the bank may have been the debt of L. E. Squires; but as between the bank and the maker of the note the question of primary liability is fixed by the terms of the instrument. We find no evidence whatever that the bank by extending the time of payment to the mortgagor or by permitting timber to be removed from the land intended to do anything, or did anything, to impair its right to hold the maker of the notes to his primary liability for the debt.

The mortgagor failed to pay the taxes due on the land described in the mortgage executed by Rexford Squires to the Bank of Bladen, and the county of Columbus brought suit against the bank and others for the collection of the tax. Commissioners duly appointed sold the land and the bank became the purchaser. The plaintiff contends that as the mortgagee purchased the mortgaged property at a tax sale and received a deed for it the mortgagor can elect to have the mortgagee credit the mortgage debt with the value of the land. It will be noted, however, that the mortgagor has not appealed. He seems to be content with the judgment. The plaintiff's testator, as we have seen, was primarily liable to the bank, and the plaintiff is not in a position to be subrogated to any rights the defaulting mortgagor may have had.

The record is inconsistent with the plaintiff's contention. The testator not only suffered judgment to be entered against him on the notes; after the judgment was docketed he borrowed money from the bank and secured both the amount borrowed and the docketed judgment by his own mortgage and his assignment of other securities to the bank. With knowledge of existing conditions he admitted his indebtedness and attempted to make the bank secure. We have discovered no valid reason in law or equity for granting the relief sought by the plaintiff upon his complaint and his evidence.

Judgment affirmed.

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## STATE v. FRANK BIRKMAN.

(Filed 2 April, 1930.)

**Homicide G d—Where accused is without means, his failure to provide proper burial is incompetent as evidence of his having killed his wife.**

In a prosecution of a husband for the murder of his wife evidence that he failed to provide or help purchase a coffin and clothes for the burial of the wife is incompetent as evidence of his guilt of her murder when it appears from uncontradicted evidence that the husband was out of a job and without means at the time, and an instruction to the jury that it might consider this circumstance in so far as it related to the defendant's attitude toward his wife and so far as the jury thought it threw light upon what the defendant did to his wife is reversible error, and the judgment of second degree murder will be set aside and a new trial ordered on appeal.

CRIMINAL ACTION, before *Johnson, Special Judge,* at August Term, 1929, of CUMBERLAND.

The defendant was indicted for killing his wife. The evidence tended to show that the defendant and the deceased were married on 4 August, 1929. The deceased died on the night of 12 August, 1929. The evidence tended to show that the deceased and her husband had had some dispute on the afternoon of August 12th, and that thereafter the deceased went to the room of Mrs. Sallie Andrews at the Palace Hotel in Fayetteville, arriving there about 8:30 o'clock. The defendant came to their room about 11:30 o'clock, and the deceased was lying on the bed. "She jumped up off the bed and started fighting Frank, scratching him in the face, and Frank hit her somewhere between her breast and her lower body (indicating between her middle breast line and her pelvis). . . . He struck her like that (indicating a punch with the fist straight out in front, on level about elbows). When he hit her she just crumpled down, her hands, head and all, just went down; she fell on the

floor, and Frank picked her up in his arms and threw her on the bed. . . . Frank pulled her up further on the bed and put pillows under her head. He said, 'Old lady, if you ain't dead, I will beat hell out of you tomorrow.' The deceased said nothing else and became quiet. Later on in the night, after applying ice to her head and portions of her body, a doctor was summoned who pronounced her dead."

There was evidence to the effect that the deceased had been drinking. The uncontradicted evidence was that the defendant had no job at the time of his wife's death. His relatives were also without financial means. A sister of deceased, over the objection of defendant, was permitted to testify as follows: "I asked him (defendant) about putting her in a casket, and he said he was not able and he could not get it, and I asked him if he could get his people to help out, and he said, 'No, they were not able.' I asked him about buying a pair of hose, and he said he did not have the money. Me and my father arranged for the funeral. The body was carried to McColl to an undertaker's office, and then we took her home. After the body got to McColl I did not see Birkman until the next morning. He was at Roy McLaurin's office, in McColl. Roy McLaurin is the mayor. Frank did not have much to say to me. He said we could go ahead and have the autopsy made, but that we would find out that she committed suicide. . . . I didn't go along with the body to South Carolina. It was not in a coffin. It was first taken to an undertaker's office and arrangements made to put it in a casket, and then it was carried to my house. When the body got there it had the same clothes on it. Other clothes were put on the body when we took her back to the undertaker's office."

The defendant was convicted of murder in the second degree and sentenced to a term of not less than four nor more than seven years in the State's prison.

From judgment pronounced the defendant appealed.

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

*Nimocks & Nimocks and Bullard & Stringfield for defendant.*

BROGDEN, J. In arraying the contentions of the State, the trial judge stated to the jury: "The State contends that his conduct afterwards, in failing to provide his wife a burial, according to the customs in civilized and enlightened communities, his failure and refusal to provide suitable clothing, and to assume a tender attitude toward her, is evidence from which you may infer, both, that he struck her, and that at the time he entertained towards her malice, at the time he struck her."

Thereafter, the trial judge instructed the jury: "The fact that a woman has died and has been sent to South Carolina, under circum-

stances that may not appeal to you as being proper, is no ground for convicting the defendant. That has no place in the trial. You can consider those circumstances in so far as they relate to the attitude of the defendant toward his wife, and in so far as you may think it throws light upon what he did to his wife, if anything."

The uncontradicted evidence was to the effect that the defendant at the time of the death of his wife was totally without financial means to purchase suitable clothing or provide a suitable and proper casket for his wife. His failure to provide a casket and suitable clothing was used by the State not only as evidence of malice, but also as evidence that he struck the blow which caused the death of the wife. The defendant denied that he struck his wife, and the evidence does not disclose that there was any evidence of a blow found upon her body after her death. The declarations, mental attitude or unnatural conduct of an accused may, in proper instances, be submitted to the consideration of a jury upon the question of guilt. *S. v. Brabham,* 108 N. C., 793, 13 S. E., 217; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *S. v. Lance,* 149 N. C., 551, 63 S. E., 198; *S. v. Plyler,* 153 N. C., 630, 69 S. E., 269; *S. v. Atwood,* 176 N. C., 704, 97 S. E., 12.

However, there seems to be no legal support for the theory that the financial inability of an accused to provide a proper burial is evidence of guilt. If any evidence had been offered tending to show that the defendant was financially able to provide a proper and decent burial for his wife, and neglected and refused to do so, such circumstance might be competent and admissible, at least, upon the question of malice; but no such a situation is disclosed in the present record, and the defendant's exception is sustained and a new trial awarded.

There are certain exceptions to the expert testimony relating to the force of the blow alleged to have been inflicted by the defendant. Portions of this testimony lie in the twilight zone of legal competency, but as a new trial must be had, we deem it unnecessary to discuss them.

New trial.

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STATE v. NATHAN BLAKE.

(Filed 2 April, 1930.)

**Criminal Law G l—Defendant is entitled to testify upon voir dire as to voluntariness of confession.**

Where evidence is taken upon the *voir dire* as to the competency or voluntariness of the confession of the prisoner charged with murder, the prisoner, at his own request, is entitled to be heard as to the voluntariness

of the confession, and a denial of the right will be held for reversible error as denying to the prisoner the benefit of his own testimony and as impelling him to take the stand upon the trial to deny its voluntariness.

APPEAL by defendant from *Cranmer, J.,* at December Term, 1929, of DURHAM.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one Will Hall.

From an adverse verdict and judgment of death by electrocution pronounced thereon, the prisoner appeals, assigning errors.

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

*Philip A. Escoffery for defendant.*

STACY, C. J. The record is in a very unsatisfactory condition, but one circumstance seems to appear with certainty, and that is, in hearing evidence on the *voir dire* to determine the competency or voluntariness of an alleged confession, made by the prisoner while in jail, the court declined to permit the prisoner to testify, and ruled upon the State's evidence alone that said confession was voluntary, and admitted the same in evidence. In this there was error. *S. v. Fox,* 197 N. C., 478, 149 S. E., 735. The prisoner, at his own request, was entitled to be heard on the preliminary inquiry looking to the admissibility of the alleged confession in evidence. *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603.

The ruling was hurtful in two ways: 1. It denied to the prisoner the benefit of his own testimony while the admissibility of the alleged confession was in issue; and (2) thereafter he felt impelled to take the stand as a witness in his own behalf and deny its voluntariness, but for the admission of which a different course might have been pursued on the trial.

For the error, as indicated, in declining to hear the prisoner on the preliminary inquiry as to the voluntariness of the alleged confession, a new trial must be awarded, and it is so ordered.

New trial.

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SCOTT DRUG COMPANY v. MRS. N. A. PATTERSON.

(Filed 2 April, 1930.)

**Venue C a—Removal of receivership action from county of defendant's residence for creditors' convenience is erroneous.**

Where an action in the nature of a creditors' bill and for the appointment of a receiver is brought in the county wherein the defendant resides, and a temporary receiver is therein appointed, upon the hearing at

chambers in another county wherein the temporary receivership is made permanent, an order removing the cause to the county of the hearing for the convenience of a large number of creditors is improvidently made, and that part of the judgment will be stricken out on appeal.

APPEAL by defendant from *Harris, J.*, at January Term, 1930, of ORANGE.

Civil action in the nature of a creditors' bill and for the appointment of a receiver.

The action was instituted in the Superior Court of Orange County 7 January, 1930, and on the following day a temporary receiver was appointed and the defendant required to appear in Durham, before Hon. W. C. Harris, at Chambers, on 17 January, 1930, and show cause why the temporary receivership should not be continued.

Thereafter, at the hearing in Durham, the receivership was made permanent, and the cause ordered removed from Orange County to Durham County "for the convenience of a large number of the creditors and attorneys for creditors," and to be consolidated with another cause pending in the Superior Court of the latter county. The plaintiff is a corporation with its principal place of business in Mecklenburg County, while the defendant is a resident of Orange County.

The defendant appeals from the order of removal, assigning same as error.

*No counsel appearing for plaintiff.*
*H. A. Whitfield and Gattis & Gattis for defendant.*

STACY, C. J. The order of removal was improvidently entered. This part of the judgment will be stricken out. *Turnage v. Dunn,* 196 N. C., 105, 144 S. E., 521; *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1.

Error.

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SEABOARD AIR LINE RAILWAY COMPANY v. BRUNSWICK COUNTY.

(Filed 2 April, 1930.)

**1. Appeal and Error E a—Record must show exception to judgment and appeal therefrom.**

In order to confer jurisdiction on the Supreme Court on appeal the record must show exception to the judgment and appeal therefrom and notice to the appellees either in open court or within the time prescribed by statute, C. S., 641, 642, Const., Art. IV, sec. 8, and where this does not appear of record the appeal will be dismissed.

**2. Appeal and Error F b—Assignments of error must be based upon exceptions.**

Assignments of error on appeal must be based upon exceptions appearing of record or they will not be considered on appeal.

**3. Taxation E c—Strict compliance with C. S., 7979 must be had in action brought thereunder, but question not decided on this appeal.**

Ordinarily when an action is based on statutory authority the statute must be strictly complied with, but in this case the question of whether the plaintiff complied with C. S., 7979, and could maintain his action to recover a tax illegally levied, is not decided, the record not containing an exception to the judgment and appeal therefrom.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1930, of BRUNSWICK. Dismissed.

This is an action to recover the sum of $614.22 paid by plaintiff to the sheriff of Brunswick County on account of taxes illegally levied upon its property and demanded by said sheriff.

At the trial defendant conceded that said sum of money was levied as a tax on plaintiff's property without lawful authority. It contended, however, that plaintiff is not entitled to recover in this action because of its failure to comply strictly with the provisions of C. S., 7979, with respect to the demand for the refund of the amount which it had paid to the sheriff under protest.

Upon the facts found by the court, there was judgment for the plaintiff.

*John D. Bellamy & Sons for plaintiff.*
*C. Ed Taylor and J. W. Ruark for defendant.*

CONNOR, J. It does not appear on the record filed in this Court by the defendant that defendant excepted to the judgment or appealed therefrom to this Court. The judgment is set out in the case on appeal which was served on counsel for plaintiff. There are no entries, however, showing any exception by defendant, or any notice of appeal to the plaintiff, either in open court or within the time prescribed by statute. C. S., 641; C. S., 642. The appeal docketed in this Court by the defendant must therefore be dismissed. *Corp. Com. v. R. R.*, 185 N. C., 435, 117 S. E., 563; *Howell v. Jones*, 109 N. C., 102, 13 S. E., 889. The record filed in this Court must show at least that an appeal was taken from the judgment. Otherwise this Court acquires no jurisdiction of the action. Const. of N. C., Art. IV, sec. 8.

The assignments of error shown in the transcript filed in this Court are not based upon exceptions appearing in the case on appeal. They

will therefore not be considered. They do not supply the want of exceptions. *Boyer v. Jarrell,* 180 N. C., 479, 105 S. E., 9.

The question discussed on the hearing in this Court, to wit: Whether in the absence of a demand on the treasurer of the county, within thirty days after the payment to the sheriff, under protest in writing, for the refund of money paid to him for a tax illegally levied by the county, the taxpayer is entitled to recover in an action instituted under C. S., 7979, is not decided for the reason that this Court is without jurisdiction of the action. In this case, the demand for refund was made, within the required time, of the sheriff, to whom the money was paid, under protest, in writing, and also of the board of county commissioners; no demand, however, was made of the treasurer of the county, as required by the statute. Ordinarily, where an action is authorized by statute, and can be maintained only because of statutory authority, the provisions of the statute must be strictly complied with. A substantial compliance is not sufficient. The appeal is

Dismissed.

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STATE v. C. P. LOCKEY.

(Filed 2 April, 1930.)

**1. Constitutional Law C b—Act prescribing examination of barbers and sanitary standards for shops is constitutional—Police Power.**

Chapter 119, Public Laws of 1929, known as the Barber's Act, requiring the examination of barbers of the State by a board appointed by the Governor, and prescribing certain sanitary standards for barber shops, relates to the public health and is constitutional as a valid exercise of the police power of the State.

**2. Constitutional Law D a—Barber's Act does not violate "Equal Protection Clause" of the Federal Constitution.**

The classification of barbers made by chapter 119, Public Laws of 1929, in accordance with the population of the cities and towns wherein they conduct their business (sec. 23) is not an arbitrary or unreasonable one either as relating only to certain persons among the taxpayers or to only certain individuals among the barbers themselves in accordance with the population of the cities and towns in which they carry on their business, and the act bears equally on all of the class and is available to all barbers who are qualified and desire to come under its provisions, and the act is not a discrimination forbidden by the State Constitution nor by the Fourteenth Amendment to the Federal Constitution.

**3. Barbers A a—Chapter 119, Public Laws of 1929 is held to apply to proprietor barbers.**

Construing chapter 119, Public Laws of 1929, it is *held:* that its provisions apply to proprietor barbers, as in this case the owner and operator of a one-chair barber shop.

**4. Taxation A c—Tax imposed by Barber's Act is for administration of Act and not for revenue, and is constitutional.**

The fees prescribed for barbers who are subject to the provisions of chapter 119, Public Laws of 1929, are for the expenses and enforcement of the act, which is necessary to the public health and welfare, and not an annual occupation tax imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by the Barber's Act, and assessment of the fees thereunder is constitutional.

APPEAL by defendant from *Johnson, Special Judge,* and a jury, at August Term, 1929, of CUMBERLAND. No error.

The following charge was preferred against the defendant in the recorder's court of Cumberland County, N. C.:

"J. G. Shannonhouse, being duly sworn, complains and says, that at and in said county, in Cross Creek Township, on or about the 21st day of August, 1929, C. P. Lockey did unlawfully, wilfully violate section 1, chapter 119, of the Public Laws of 1929, by shaving and cutting hair for various persons for pay, without first having obtained a certificate of registration either as a registered apprentice or a registered barber issued by the State Board of Barber Examiners, said acts of shaving and cutting hair having been done in the city of Fayetteville, a city having a population of more than two thousand people, contrary to the form of the statute, and against the peace and dignity of the State."

On the charge an order of arrest was duly made and defendant was tried before the recorder, convicted and fined $10.00, and appealed to the Superior Court. In the Superior Court the defendant was convicted and a like fine was imposed. The defendant duly excepted, assigned errors and appealed to the Supreme Court.

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

*C. P. Lockey in propria persona.*

CLARKSON, J. The defendant was convicted of exercising the trade or profession of barbering without obtaining the certificate of registration, as required by the Barber's Act, chapter 119, Public Laws of 1929, and from the judgment upon such conviction, appealed to this Court.

The practice of barbering is defined in section 2 of the act. The act became effective June 30, 1929. The evidence shows that the defendant was operating a one-chair barber shop in the city of Fayetteville, after the effective date of the Barber Act, without having obtained a certificate of registration, as required by that act. This was a violation of section 1 of the act, with the penalty therefor fixed in section 21, as a fine of not less than $10.00 nor more than $50.00.

He had paid the annual occupation tax, provided in section 140 of the Revenue Act of 1929, chapter 345, Public Laws. The amount he had paid was $2.00. The Barber's Act required the payment by a barber, as distinguished from an apprentice, of $5.00 for the certificate to be issued, under the act. In addition thereto, it required the payment of $3.00 annual tax, to be applied for the purpose of the act. The payment of the $5.00 tax was once for all.

The defendant contends (1) that chapter 119, Public Laws 1929, is unconstitutional. We cannot so hold.

It is admitted that defendant did what the act prohibited him from doing. The "Barber's Act" is a comprehensive one. A State Board of Barber Examiners is established, consisting of three barbers of experience who have practiced barbering at least five years and are appointed by the Governor for 6, 4 and 2 years. The Governor may remove any member for good cause shown and appoint a successor for the unexpired term. The board, not less than four times a year, shall conduct examinations of applicants for certificates of registration to practice (1) as registered barbers, (2) as registered apprentices.

Section 14 reads as follows: "The fee to be paid by an applicant for a certificate of registration to practice barbering, as an apprentice is three dollars and such fee must accompany his application. The annual license fee of an apprentice shall be one dollar and fifty cents. The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration as a registered barber is five dollars. The annual license fee of a registered barber shall be three dollars. All licenses, both for apprentices and for registered barbers, shall be renewed as of the thirtieth day of June of each and every year, and such renewals for apprentices shall be one dollar and fifty cents, and for registered barbers three dollars. The fee for registration of an expired certificate for registered barbers shall be five dollars, and registration of unexpired certificate of an apprentice shall be three dollars. The fees herein set out are not to be increased by the Board of Barber Examiners, but said board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient."

SEC. 16. Provides that the State Board of Health shall have authority to make reasonable rules and regulations for the sanitary management of barber shops and barber schools. Have a right to inspect same. From the fees collected under this act $6,000 is appropriated to the State Board of Health to enforce the act.

SEC. 19. "The Board may either refuse to issue or renew, or may suspend or revoke, any certificate of registration for any one or combination of the following causes: 1. Conviction of a felony shown by certified copy of the record of the court of conviction. 2. Gross malpractice or gross incompetency. 3. Continued practice by a person knowingly hav-

ing an infectious or contagious disease. 4. Advertising by means of knowingly false or deceptive statements. 5. Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs. 6. The commission of any of the offenses described in section twenty-one, subdivisions three, four and six: (3. Permitting any person in one's employ, supervision or control, to practice as a barber unless that person has a certificate as a registered barber. 4. Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations. 6. The wilful failure to display a certificate of registration as required by section seventeen)."

SEC. 20 provides for notice and a hearing.

SEC. 21 makes the violation of certain matters a misdemeanor, punishable upon conviction by a fine of not less than ten dollars nor more than fifty ($50.00) dollars.

SEC. 23. "That the provisions of this act shall apply only to those barber shops maintained and operated in those cities and towns of the State with a population of two thousand or more, as shown by United States census of nineteen hundred and twenty, and to shops maintained and operated within a distance of one mile from the boundary limits of such cities and towns: *Provided,* that in towns of less population barbers may willingly come into the association, be bound by its regulations and protected by its benefits: *Provided further,* this act shall apply to all cities and towns in the county of Bladen irrespective of population."

The defendant contends that the General Assembly had no authority to create an expense and arbitrarily and unreasonably classify the citizens and taxpayers of the State and unjustly place the whole burden upon a few thousand of a particular class—the barbers. He further contends that the act makes a further arbitrary and unreasonable classification among the barbers themselves in making the act applicable to towns of 2,000 or more population. We think the act constitutional and not arbitrary.

In *Carley & Hamilton, Inc., v. Snook,* U. S. Supreme Court Reports, Vol. 50, No. 9, at p. 207, it is said: "It is for the Legislature to draw the line between the two classes." *Express Co. v. Charlotte,* 186 N. C., 668; *Clark v. Maxwell,* 197 N. C., 604.

In *S. v. Call,* 121 N. C., at p. 647, citing numerous authorities, it is held: "The statute bearing alike upon all individuals of each class is not a discrimination forbidden by the State Constitution nor by the Fourteenth Amendment. . . . It has been frequently adjudged by the Supreme Court of the United States that the Fourteenth Amendment does not restrict the powers of the State when the statute applies equally to all persons in the same class, and that ordinarily the Legislature is the sole judge of the classification."

The right to establish the qualifications of an "attorney at law" is constitutional and rests in the police power by virtue of which a State is authorized to enact laws to preserve the public safety, maintain the public peace, and promote and preserve the public health and morals. *In re Applicants for License,* 143 N. C., 1.

The power of the General Assembly to regulate the practice of "medicine and surgery" has been held constitutional. *S. v. Van Doran,* 109 N. C., 864; *S. v. Call,* 121 N. C., 643.

In *S. v. Call, supra,* at p. 646, it is laid down that the law-making power of the State, in the exercise of its police power, has a right to require an examination and certificate as to the competency of persons "to teach, to be druggists, pilots, engineers or exercise other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency. Cooley Torts, 289; Cooley Const. Lim. (6 ed.), 745, 746; Tiedeman Police Power, section 87. To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privilege. The door stands open to all who possess the requisite age and good character and can pass the examination which is exacted of all applicants alike."

The General Assembly has power to regulate those engaged in the practice of "dentistry." *S. v. Hicks,* 143 N. C., 689. Those engaged in the practice of "osteopathy," "chiropractic and suggestotherapy." *S. v. Siler,* 169 N. C., 315. In *S. v. Scott,* 182 N. C., at p. 880, it is said: "The State in the lawful exercise of its police power has created the State Board of Accountancy and required examinations of applicants to safeguard the public against incompetent accountants." See *S. v. Carter,* 129 N. C., 560; *S. v. VanHook,* 182 N. C., 831; *S. v. Deposit Co.,* 191 N. C., at p. 646.

The United States Supreme Court has frequently held such acts constitutional and within the police power of a State. "Optometrists," *McNaughton v. Johnson,* 242 U. S., 344. "Dentistry," *Graves v. Minnesota,* 272 U. S., 425. "Physicians," *Hawker v. N. Y.,* 170 U. S., 189.

*Mr. Justice Brandeis* in *Lambert v. Yellowley,* 272 U. S., at p. 596, citing numerous authorities says: "Besides, there is no right to practice medicine which is not subordinate to the police power of the States."

The defendant contends "This legislation ushers in, for the first time in this State, the unheard of, unbelievable and unthinkable proposition, to tax the hired man, the daily worker, for exercising the God-given right and privilege, of working with his own hands to earn his bread by the sweat of his brow (face). The journeyman barber is not a business or professional man, he is just the hired worker, to work at one of the proprietor's barber chairs. He has no interest in the shop equip-

ment or fixtures, no responsibility, pays none of the many expenses of the shop. He is just like the contractor's or construction man's carpenter, bricklayer and plasterer. He is hired to work for the proprietor barber, while the carpenter and bricklayer is hired to work for the construction man. The construction man or contractor pays a privilege tax under the Revenue Act, so does the proprietor barber; nobody objects to that; but, who has ever heard of the carpenter or bricklayer being taxed for the privilege of hiring himself out to work with his hands for a living?" Defendant's contentions cannot be sustained. The act comes under the police power of the State.

In 6 R. C. L., sec. 182, at p. 183, speaking to the subject of police power, we find: "The police power is an attribute or sovereignty, passed by every sovereign State, and is a necessary attribute of every civilized government. It is inherent in the States of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizen, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government." It is difficult to define. Blackstone defines it as "the due regulation and domestic order of the kingdom; whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." *Judge Cooley* says that the police power of a State "embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." *Police power:* 1. The power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society (12 C. J., 904, sec. 412, title Constitutional Law). 2. A power of organization of a system of regulations tending to the health, order, convenience, and comfort of the inhabitants, and to the prevention and punishment of injuries and offenses to the public (31 Cyc., 902). The police power is elastic, stretching out to meet the progress of the age.

The defendant was operating a one-chair barber shop. No doubt he had the peculiar and well-known barber sign to attract the general public to his place of business. The health of the public is of primary

importance. It is a matter of common knowledge that it is as essential to have barbers who are infected with communicable diseases to be eliminated by physical examinations as it is to have this done for infected foodhandlers. Communicable diseases are spread by human contact. Barbers come into intimate contact with their customers and *vice versa.* Certain skin diseases are transmissible; so is vermin. Venereal disease and other diseases can be transmitted, so it was the judgment of the General Assembly to have barbers, barber shops and barber schools subjected to reasonable sanitary regulations for the protection of public health. The whole family, the father, mother and children, now patronize barber shops.

The defendant, as it were, is in the service of the general public and cannot live unto himself; and the health of the general public is well within the police power of the State. The General Assembly in its wisdom has seen fit to place the barber shop, barber schools and barbers on a high plane of health efficiency to protect the public. It goes without saying that barbering requires a degree of skill, proficiency and training. Then again, the act requires a high physical and moral standard for the barber. It requires training, skill and efficiency for the barber and requires sanitary regulations in reference to the barber and barber shop patronized by the general public. All in the class are treated alike. We think the regulations reasonable and the whole act in the interest of skill and proficiency, health and sanitation; and brings the barber and barber shop up to a high standard for the protection of the health of the public.

The present case is not like a recent case decided by the Supreme Court of the United States: An act of the Pennsylvania Legislature, approved 13 May, 1927, required every pharmacy in the State to be owned by licensed pharmacists, and in case of corporations, associations and copartnerships provided that all partners or members thereof shall be licensed pharmacists, except those already engaged in such business. The Louis K. Ligget Company, a Massachusetts corporation, authorized to do business in Pennsylvania and engaged in the drug business in that State at the time of the passage of the above-mentioned act, purchased and proceeded to open up additional pharmacies and made application to the Pennsylvania State Board of Pharmacy for a permit to carry on the business, which was refused. The Attorney-General and district attorney threatened prosecution under the act of 13 May, 1927, on the ground that the members (stockholders) of the Louis K. Ligget Company were not registered pharmacists. The corporation then brought suit, in the District Court of the United States for the Eastern District of Pennsylvania, to enjoin the prosecuting officers from carrying out their threats, on the ground that the act in question violated the due process and equal

protection clauses of the Fourteenth Amendment to the Federal Constitution. The Court below, three judges sitting, denied a preliminary injunction on an agreed case dismissed the bill for want of equity (22 Fed. Reporter (second series) 993), and the plaintiff appealed to the Supreme Court of the United States.

*Mr. Justice Sutherland* delivered the opinion of the Court, *Louis K. Ligget Co. v. Baldridge,* reported in 49 Sup. Ct. Rep., 57, reversing the decree, in which he held among other things that a foreign corporation was a "person" within the Fourteenth Amendment and entitled to enjoin State officers from enforcing an act which infringed its property rights and denied it the equal protection of the laws and that the act in question was not within the "police power" of the State of Pennsylvania in that it did not bear any real or substantial relation to the public health, safety or morals and was therefore an arbitrary and unlawful interference with private business. He said in part that the act "deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A State cannot, 'under the guise of protecting the public,' arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. . . . The claim that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment." Synopsis of opinion taken from West Publishing Co. Docket, February-March, 1930.

The defendant's second contention is that by a fair and reasonable construction of chapter 119, Public Laws of 1919, the same should be held not to apply to proprietor barbers. Sections 1 and 2 of the act are to the contrary. They make no such distinctions.

The third contention of defendant is untenable, and we think this is fully answered by Mr. Nash, the efficient and capable Assistant Attorney-General, as follows: "The annual occupation tax of the Revenue Act is for the privilege of exercising the trade of barbering and is simply a Revenue Act, whereas, the Barber's Act is an exercise of the public power of the State to secure the public welfare by requiring proven capacity in the barbers and sanitary arrangements both in the barber shop and the tools that are used therein. The fees levied in this act are solely to pay the expenses of its operation and those of proper inspection by the State Board of Health. Section 16 of the act, specifically appropriates $6,000 per annum from the funds derived from the act to

the State Board of Health to pay the expenses of inspection of barber shops in the State of North Carolina. As there are about 4,148 barbers in the State, subject to the provisions of the act, the $5.00 temporary fee and the $3.00 annual fee cannot be so disproportioned to the expenses of enforcing the act as to at all affect its constitutionality, at this point." We find in law

No error.

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MAMIE CARR BOWDEN v. S. H. KRESS AND COMPANY.

(Filed 2 April, 1930.)

1. **Negligence C c—Res ipsa loquitur does not apply to injury caused by falling on floor of store building.**

   The doctrine of *res ipsa loquitur* does not apply to an injury received by a customer or invitee in a store building caused by the customer's slipping and falling on the oiled floor of the store.

2. **Negligence A c—Evidence of negligence in failing to use due care to keep floors in reasonably safe condition held sufficient.**

   Evidence that a customer in a merchandising establishment received the injury in suit as a result of slipping and falling on the oiled floor of an aisle at a place where there was an unusual accumulation of oil, tending to show that the oil was improperly or negligently applied, and that such condition existed for more than a week is sufficient to take the case to the jury on the question of whether the condition had existed for such length of time as should have been discovered by the exercise of ordinary care.

CIVIL ACTION, before *Moore, Special Judge,* at August Term, 1929, of WAYNE.

The defendant is engaged in operating a mercantile business in the city of Goldsboro, North Carolina. The stock of merchandise carried by defendant was arranged on tables, counters and shelves for the purpose of effective display. There were several aisles in the store, and the defendant from time to time used a floor dressing or floor oil upon the aisles for the purpose of keeping down dust.

The plaintiff alleged that on the afternoon of 11 December, 1926, she visited the store of defendant for the purpose of making certain purchases of merchandise. After purchasing some needles and silk near the entrance, she inquired of a clerk where she could find some paint. She was directed to the rear of the store. She walked slowly down the aisle, examining merchandise displayed upon the tables and counters in order to ascertain if there was any other article which she

desired to purchase. While walking down one of the aisles she testified: "I seemed to have stepped on something very slick and my feet both went out from under me and I fell on my hip. I did not observe the condition of the floor where I fell nor did I later before I was moved from the store. The fall shocked me. . . . The slippery floor caused me to fall. I was conscious of the floor being slick because my feet slipped out from under me. There was absolutely nothing to make me slip but the slick floor."

Another witness for plaintiff testified that he was sent for by the plaintiff when she fell and immediately went to the store of defendant. He said: "When I went in Kress' store I observed the floor, and it was slippery from oil or some substance used on the floor. It was more noticeable at the point where she fell than at any other point."

Another witness went into the store before the plaintiff was removed, and in describing the place where plaintiff fell, said: "It was a soft, slippery place, and you could see in the oil where her foot slipped in it—the print of her shoe when it turned over. The oil on the floor would have been visible to any one who had inspected the floor. . . . There was lots more oil at this place than there was at any other places in the store. I didn't see anything at all only where the floor had been oiled."

Another witness said: "The floor at that point was slick with a kind of thick oil or something. . . . It seemed like it was pretty thick on the floor there." Another witness said: "The floor looked like it was slicker where she fell than it was at any other point in the store. It seemed like there was more oil there."

The evidence further showed that the defendant had purchased an approved floor oil or dressing which was in general use for the purpose of oiling floors, and that the floors were always oiled on Saturday night after the store was closed. The injury to plaintiff occurred on Saturday afternoon and the floor had been oiled the preceding Saturday night, so that the oil had been on the floor about a week.

There was further evidence to the effect that the floor had been properly inspected and properly oiled, and that there was no more oil at the point where plaintiff fell than at other places in the aisles. Plaintiff sustained serious and permanent injury.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The damage assessed by the jury was $5,000.

From judgment upon the verdict the defendant appealed.

*Ruark & Ruark for plaintiff.*
*Dickinson & Freeman for defendant.*

BROGDEN, J. What duty does the owner of a store owe to a customer with respect to the condition of the floors of such store?

The general rule deduced from the authorities is that an owner or occupant of buildings who directly or by implication invites or induces others to enter therein, owes a duty to such persons to exercise ordinary care to keep such premises in a reasonably safe condition and to give warning of hidden peril. The owner is not an insurer of the safety of the invitee while on the premises. *Leavister v. Piano Co.,* 185 N. C., 152, 116 S. E., 405; *Bohannon v. Stores Co.,* 197 N. C., 755.

Moreover, the judicial utterances upon the subject concur in the view that the doctrine of *res ipsa loquitur* does not apply to injury resulting from slipping or falling occasioned by the presence of grease or oil upon the floors of a store.

The courts discussing the liability of a store-owner for injury received by customers and other invitees as the result of the accumulation of water, oil or grease upon the floors, have adopted widely divergent views. The leading cases denying liability are *Spickernagle v. Woolworth,* 84 Atlantic, 909; *Kresge v. Fader,* 158 N. E., 174; *Dimarco v. Cupp Grocery Co.,* 88 Pa. Superior Court, 450; *Lavine v. United Paper Board Co.,* 154 N. E., 635. Cases permitting recovery for such injuries are as follows: *Harverty Furniture Co. v. Jewell,* 144 S. E., 46; *Robinson v. Woolworth Co.,* 261 Pac., 253; *Benesch & Sons v. Kerkler,* 139 Atlantic, 557; *McNeill v. Brown & Co.,* 22 Fed. (2d), 675; *Markham v. Bell Stores Co.,* 132 Atlantic, 178; *Bradworth v. Woolworth Co.,* 140 S. E., 105.

The leading authorities upon the subject are assembled in 35 A. L. R., 181; 58 A. L. R., 136. The South Carolina Court in the *Bradford case, supra,* declared that the analogy of master and servant was applicable to injuries sustained by a customer as a result of a fall upon an oiled floor. This theory was attacked in two dissenting opinions and particularly in the dissenting opinion of *Cothran, J.,* in which the authorities upon the entire subject are discussed.

Perhaps the case most similar to the case at bar is that of *Benesch & Sons v. Kerkler, supra.* In that case plaintiff testified that "as she was returning from a cross aisle into the right aisle leading to the exit she slipped and fell." The floor was "dark and mucky and smeary like an oiled floor would be when the oil was not dried," and that the "oily condition of the floor" caused her to fall. The case was submitted to the jury upon the theory that the oil had not dried, and that upon such facts the jury was warranted in finding that the owner was negligent. The Court said: "It was not the mere fact that the floor was oiled and that the appellee fell that entitled her to recover; it was the condition in

which the floor was left as the result of oiling that was submitted to the jury, and took it out of the rule laid down in the case of *Spickernagle v. Woolworth,"* etc.

It will serve no useful or beneficial purpose to attempt to analyze the various decisions or to elaborate the theories upon which particular decisions are based. This is done in the cases and annotations already referred to. The only practical question is to determine which line the case at bar belongs to, under the law as held and interpreted by the courts.

We are of the opinion and so hold that there was sufficient evidence of negligence to be submitted to the jury. Viewing the evidence of plaintiff with that liberality which the law demands in cases of nonsuit, it is apparent that there was an accumulation of oil upon the floor where the plaintiff sustained her injury. This accumulation was unusual for the reason that the testimony tended to show that there was much more oil at this point than at any other point in the store. The print of plaintiff's shoe was observed in this patch of oil. These pertinent facts point unerringly to the conclusion that the oil was not properly applied or that it was applied in a negligent and unusual manner and had been in such condition for more than a week. Hence the trial judge properly submitted to the jury the question as to whether the condition had existed for such length of time as to have been discovered by the exercise of ordinary care.

The defendant relies upon *Bohannon v. Stores Co., supra,* but the principle announced in that case has no application. The plaintiff was an employee of the store and was familiar with the metal strips across the front of the steps. There was no evidence of any defect in the metal strips or in the steps. Furthermore, all the steps were exactly alike and in plain view. Hence there was nothing unusual or hidden.

No error.

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THEODORE G. EMPIE, TRUSTEE OF THE ESTATE OF SWIFT M. EMPIE ET AL., V. ADAM EMPIE ET AL.

(Filed 2 April, 1930.)

**Wills E f—Upon bequest in trust for legatee for life then to his brothers or their heirs, children of deceased brothers take per stirpes.**

Where a will creates a trust estate to be held for the benefit of a legatee during his life, and at his death to be held for the benefit of his wife and children, and at the death of his wife the trust to be terminated and the funds to be divided among his children or their heirs, and if no children, to be divided among his brothers and sisters or their heirs: *Held,* upon

the death of the first taker unmarried leaving brothers and sisters living and children of deceased brothers and sisters, the personal property held in trust should be divided among the surviving brother and sisters and the children of the deceased brothers and sisters *per stirpes*.

APPEAL by plaintiffs from *Grady, J.*, at December Term, 1929, of NEW HANOVER. Affirmed.

*Rodgers & Rodgers for plaintiff.*

*Bellamy & Bellamy for defendants Charlotte P. Bailey, Edward P. Bailey, Clarice Bailey, Francis B. Kidder, and Virginia B. Chisholm.*

*J. O. Carr for defendant, Manie A. Empie.*

PER CURIAM. Virginia G. Empie died 17 June, 1918, leaving a will in which, after making provision for continuing the trust created for Swift M. Empie if any of the designated trustees should die, the testatrix made this bequest: "Should Swift M. Empie marry, then the money held in trust for him, at his death, shall be held in trust for his wife or children, and at his wife's death, be divided equally among his children or their heirs. In case there are no children of the said Swift M. Empie, at his wife's death, the fund held by his trustee is to be divided among his brothers and sisters, or their heirs."

Swift M. Empie died 28 November, 1928, unmarried, leaving as the only survivors among his brothers and sisters Theodore G. Empie and Adam Empie. He survived other brothers and sisters who died leaving children. Upon the facts set out in the judgment the trial court held that the testatrix intended that at the death of Swift M. Empie the personal property in the hands of the trustee should pass to his surviving brothers and sisters, and to the heirs of the brothers and sisters who had predeceased him *per stirpes* and not *per capita*. The plaintiffs excepted and appealed.

The judgment is sustained by *Mercer v. Downs*, 191 N. C., 203, in which the devise was in words almost identical with those in case under consideration. This decision has been cited and approved in a number of cases, among them *Jessup v. Nixon*, 196 N. C., 33, and *Waller v. Brown*, 197 N. C., 508.

Upon the facts appearing of record we are of opinion that the trustee was not entitled to commissions as a matter of legal right.

Judgment affirmed.

ABBOTT REALTY COMPANY v. CITY OF CHARLOTTE.

(Filed 9 April, 1930.)

**1. Municipal Corporations F a—Contract with city not made in conformity with statutory provisions is void.**

The statutes prescribing the manner and form of making a contract by a city must be strictly complied with, and where the governing body is composed of several commissioners and the statutes prescribe that contracts with the city over a certain sum should be made by the governing body after advertising for bids, and that the contract be executed in writing and drawn or passed upon by the city attorney, a parol contract made with the commissioner of public works providing for the reimbursement of a realty company of the amount to be spent by it on a sewerage system is not binding on the city, and the realty company may not recover from the city in its action thereon. C. S., 2805, 2830, 2831, 2881.

**2. Municipal Corporations F c—City is not bound by ratification by governing body of contract not made in conformity with statutes.**

A municipal corporation is not bound by the action of its governing body in ratifying a contract which the governing body could not have made in the first instance or which was made without compliance with statutory provisions which are mandatory with respect to the manner of making such contracts, and where a contract for the repayment to a realty company of the amount to be expended by it in constructing a sewerage system was not made in compliance with the statutes, the action of the city governing body in making a part payment of the amount so expended by the realty company is not binding on the city as a ratification of the contract.

**3. Municipal Corporations F d—In this case held: plaintiff could recover from city upon quantum meruit for sewerage system.**

Where one of the commissioners of a city has made a parol agreement to repay a realty company the money it should expend in constructing a sewerage system within the corporate limits, and afterwards the city has incorporated the system so constructed into its general municipal sewerage system and collected a sewer tax from owners of lots using such system, although the original agreement is void for failure to conform to the mandatory statutory provisions in regard to the making of contracts by a city, the realty company may recover from the city upon a *quantum meruit* the reasonable and just value of the sewerage system thus taken over by the city.

APPEAL by plaintiff from *Sink, Special Judge,* at September Special Term, 1929, of MECKLENBURG. Reversed.

On 1 January, 1926, plaintiff was the owner of certain lots of land situate within the corporate limits of the city of Charlotte. These lots fronted on certain streets of said city, and were suitable for residential and business purposes. They had been developed by plaintiff for sale

for such purposes. No sewers had been constructed along and under the streets on which said lots fronted. The municipal sewerage system of defendant had not been extended to said streets. Plaintiff desired, before offering said lots for sale, that they should be connected with defendant's sewerage system.

During the winter of 1926, for the purpose of enhancing the value of said lots, and of securing purchasers for the same in the near future, plaintiff caused sewers to be constructed along and under the streets on which its lots fronted. These sewers were connected with the municipal sewerage system of the defendant. The cost of the construction of said sewers, to wit, the sum of $16,737.62, was paid by plaintiff. On 20 March, 1926, the defendant paid to plaintiff, at its request, and on account of the construction of said sewers, the sum of $3,001.86. Defendant has refused to pay the balance of the cost of said sewers. This action is to recover of defendant the said balance, to wit, the sum of $13,735.76.

Plaintiff alleges in its complaint that it caused the said sewers to be constructed and paid the cost of the same, pursuant to a contract with the defendant, by which defendant agreed that if plaintiff would pay for the construction of said sewers, defendant would thereafter reimburse plaintiff the total amount paid by plaintiff as the cost of said sewers; this allegation is denied by defendant.

Plaintiff further alleges in its complaint that the reasonable cost of said sewers was $16,737.62, and that plaintiff paid this sum for the construction of same; that defendant, at the request of plaintiff, has paid to plaintiff, on account of the cost of said sewers the sum of $3,001.86, leaving a balance of $13,735.76; and that since the completion of said sewers defendant has taken possession of and incorporated said sewers into its municipal sewerage system; this allegation is denied by defendant.

Plaintiff demands judgment that it recover of defendant the sum of $13,735.76 with interest, either on the contract alleged in the complaint, or on a *quantum meruit*.

The evidence offered by plaintiff at the trial of this action tended to show that in 1925, and for many years prior thereto, plaintiff was the owner of the lots described in the complaint; that these lots were situate within the corporate limits of the city of Charlotte, and fronted on certain streets of the said city; that they were suitable for residential and business purposes, and were developed by plaintiff for sale for such purposes; and that defendant had not extended its municipal sewerage system to the streets on which said lots fronted. Some time during the year 1925, the president of the plaintiff company had a conversation with the commissioner of public works of the defendant city, in which he advised the said commissioner of public works that plaintiff wished to have sewers constructed along and under the streets on which its lots

fronted and to have said sewers, when constructed, connected with defendant's municipal sewerage system. The said commissioner of public works advised the president of plaintiff company that the city of Charlotte had no funds on hand at that time available for the payment of the cost of the construction of said sewers. Thereupon, the said president proposed that the plaintiff would cause said sewers to be constructed, and would pay the cost of such construction, if the city of Charlotte would agree to reimburse the plaintiff such sum as plaintiff should expend for the construction of said sewers, as soon as said city should have in hand funds available for that purpose. The said commissioner of public works accepted this proposition, and authorized plaintiff to have the sewers constructed.

Relying upon the agreement between its president and the commissioner of public works of defendant city, plaintiff caused said sewers to be constructed and paid the cost of the same, to wit, the sum of $16,737.62. On 20 March, 1926, defendant paid to plaintiff, on account of the cost of the construction of said sewers, the sum of $3,001.86. This payment was made by a voucher signed and approved by the mayor and commissioner of administration and finance of the defendant city, by its commissioner of public works and by its commissioner of public safety. Defendant has refused to pay the balance of the amount expended by plaintiff in payment of the cost of the construction of said sewers, contending that it is not liable for and therefore has no lawful authority to pay the same.

There was also evidence tending to show that the reasonable cost of the construction of said sewers was $16,737.62; that plaintiff has paid the said sum to the contractors who constructed said sewers; and that since the completion of said sewers, defendant has taken over and incorporated said sewers into its municipal sewerage system. Owners of lots fronting on the streets along and under which the said sewers were constructed have connected with them as required by ordinances of the city of Charlotte, and defendant has charged said owners and collected from them the sewer tax for such connections. All the evidence tended to show that since the completion of said sewers, they have been taken over by the defendant, and have since been used by it as part of its municipal sewerage system. There was no evidence tending to show that plaintiff by its deeds conveying lots to purchasers conveyed or undertook to convey to said purchasers any easement with respect to the sewers which were constructed and paid for by plaintiff, and subsequently taken over and used by the defendant.

At the close of the evidence for plaintiff, on motion of defendant, there was judgment dismissing the action as of nonsuit. From this judgment plaintiff appealed to the Supreme Court.

*Tillett, Tillett & Kennedy for plaintiff.*
*C. A. Cochran and Stancill & Davis for defendant.*

CONNOR, J. The evidence offered by plaintiff at the trial of this action fails to show liability on the part of defendant to plaintiff by reason of a valid contract binding on the defendant, for the amount expended by plaintiff in payment of the cost of the construction of sewers along and under streets of the defendant city.

The defendant is a municipal corporation, organized under the laws of this State. Its governing body has the power, expressly conferred by statute, to make contracts for the acquisition by purchase or otherwise, and for the construction of sewers. C. S., 2805. The governing body of defendant is its board of commissioners. This board is composed of three commissioners: (1) the commissioner of public works, (2) the commissioner of public safety, and (3) the mayor and commissioner of administration and finance. C. S., 2874, and C. S., 2875. It is expressly provided by statute that this board "shall make or authorize the making of all contracts, and no contracts shall bind or be obligatory upon the city unless either made by ordinance or resolution adopted by the board of commissioners, or reduced to writing and approved by the board, or expressly authorized by ordinance or resolution adopted by the board. All contracts and all ordinances and resolutions making contracts shall be drawn by the city attorney or submitted to such officer before the same are made or passed." C. S., 2881.

There was no evidence tending to show that the board of commissioners of the defendant city made or expressly authorized its commissioner of public safety to make a contract with the plaintiff relative to the construction of sewers, as alleged in the complaint. In the absence of such evidence, defendant cannot be held liable to plaintiff in this action upon such contract.

The power conferred by statute upon the board of commissioners of defendant city, as its governing body, to make or to authorize the making of contracts binding upon the city, must be exercised by said board in strict conformity to statutory provisions. It is provided by statute that no contract for construction work, the estimated cost of which amounts to or exceeds one thousand dollars, shall be awarded by a municipal corporation unless proposals for the same shall have been invited by advertisement once in at least one newspaper of general circulation in the city, and that all such proposals shall be opened in public. C. S., 2830. It is also provided by statute that all contracts made by any department, board, or commission of a municipal corporation in which the amount involved is two hundred dollars or more, shall be in writing, and no such contract shall be deemed to have been made or

executed until signed by the officer authorized by law to sign such contract. C. S., 2831.

There was evidence tending to show that the board of commissioners of defendant city by the payment to plaintiff of the sum of $3,001.86, ratified the agreement made with plaintiff by the commissioner of public works of defendant city. However, a municipal corporation is not bound by the action of its governing body in ratifying a contract which such body had no power to make in the first instance, or which was made without compliance with statutory provisions which are mandatory with respect to the manner in which such contract may be made. If the law were otherwise, such statutory provisions would be nugatory.

We must, therefore, hold that upon all the evidence offered at the trial of this action, defendant is not liable to plaintiff for the amount which plaintiff paid for the cost of the construction of the sewers.

It does not follow, however, that plaintiff is not entitled to recover in this action. There was evidence tending to show that after the sewers were constructed and paid for by the plaintiff, defendant took them over and incorporated them into its municipal sewerage system. This evidence should have been submitted to the jury upon an appropriate issue involving plaintiff's contention that defendant is liable to it upon a *quantum meruit*. Notwithstanding the failure of plaintiff to sustain its contention that defendant is liable to it on the contract alleged in the complaint, the defendant should be and is liable for the reasonable and just value of the sewers, if the jury shall find that after their construction, defendant took them over and incorporated them into its municipal sewerage system. *McPhail v. Commissioners,* 119 N. C., 330, 25 S. E., 958.

There was error in the judgment dismissing the action as of nonsuit. The judgment must be

Reversed.

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JAMES B. MIDKIFF AND C. L. BRANNOCK, TRADING AS MIDKIFF-BRANNOCK HARDWARE COMPANY, v. THE PALMETTO FIRE INSURANCE COMPANY.

(Filed 9 April, 1930.)

**1. Judgments L a—Judgment of nonsuit on merits is not a bar to second action when evidence is not substantially identical.**

Where a cause of action has been heard upon its merits and a judgment as of nonsuit entered therein by the trial court, and the judgment of the lower court has been affirmed on appeal, another action between the same parties on the same cause of action and upon substantially the same evidence is barred by the judgment in the former action which as to the

second action is *res judicata*, but it is otherwise when the evidence in the second action is not substantially identical and entitles the plaintiff to recover if found in his favor.

**2. Insurance K a—Evidence of insurance agent's knowledge of condition constituting waiver of provision of policy held sufficient.**

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 the payment of the premium, the knowledge of the agent is imputed to the insurer and constitutes a waiver of the provision against explosives, and in this case *held:* evidence of such knowledge by the agent soliciting the policy was sufficient to be submitted to the jury and sustain their verdict in plaintiff's favor, and under the facts and circumstances of this case it was immaterial that the policy issued was signed by the partner of the soliciting agent and written by a stenographer in their office.

APPEAL by defendant from *Sink, J.*, and a jury, at January Term, 1930, of SURRY. No error.

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

"1. Did the defendant, Palmetto Fire Insurance Company, execute and deliver to the plaintiffs the policy of insurance sued on, as alleged in the complaint? Answer: Yes.

2. Did the plaintiffs carry dynamite and dynamite caps in their stock at the time of the issuance and delivery of the policy, and 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: $2,500 with interest from date of payment as set forth in policy."

Judgment was rendered on the verdict for plaintiff. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The other necessary facts will be set forth in the opinion.

*E. C. Bivens for plaintiff.*
*Brooks, Parker, Smith & Wharton for defendant.*

CLARKSON, J. This action was here on appeal by plaintiff from judgment of nonsuit. *Midkiff v. Insurance Co.*, 197 N. C., 144. At page 146 we find the following: "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."

The opinion of this Court, sustaining the nonsuit, was filed on 24 April, 1929. The present action was commenced on 17 August, 1929, within one year after the nonsuit. The costs in the original action have been paid. C. S., 415.

In *Hampton v. Spinning Co., ante,* at p. 240, it is written: "We therefore hold, upon the particular facts appearing in the judgment in this cause, that a plaintiff may bring an action and have it heard upon its merits, and, if a judgment of nonsuit is then entered, he may bring a new suit within one year, or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court, he may under C. S., 415, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata,* and thus end that particular litigation." *Chappell v. Ebert, post,* 575.

We do not think the present action is based on "substantially identical evidence." In the former opinion, *Midkiff v. Insurance Co., supra,* at page 145, it is said: "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. . . . Evidence tending to show that hardware merchants of Surry County generally carry dynamite and dynamite caps in stock was properly excluded upon defendant's objections."

In the present action the evidence is to the effect that J. A. Beach was president of the Mount Airy Insurance and Realty Company, and G. E. Sparger, Jr., was secretary and treasurer of the company. The company was an agent and Beach had license to write Fire Insurance for defendant company. The policy was signed by Sparger, but made out by the girl in the office.

James B. Midkiff testified in part: "Q. Will you state to his Honor and the jury what conversation, if any, took place between you and Mr. Beach at the time this policy was solicited? A. Well, when he came in he says, 'Boys, have you got any insurance yet?' I says 'No.' We had promised him some business. In fact, he got us some money to start

business on, and we promised to take out some insurance with him. I told him no, we hadn't taken any yet. He says, 'Well, you better have some.' He says, 'How much do you want me to write you?' I told him $2,500 on stock, and at that time he was standing about two-thirds of the way back in the store. At the special time we had there three cases of dynamite sitting on the counter, and he says, 'Jim are you going to buy steel magazines to keep this in?' I says, 'No, we are not going to buy one, Mr. Beach. We had one at the other place and didn't keep it in there half the time.' He says, 'Well, I guess that will be all right, anyhow.' . . . At that time the dynamite was sitting on top of the counter in the case where it was shipped. The policy was delivered two or three days after that."

J. A. Beach was not a witness on the former trial. On the trial in the present action, Beach testified, in part: "I was president of the company. I solicited insurance, and solicited loans or any other form of business that the company did, real estate, and so on. I solicited a policy of fire insurance from James B. Midkiff and C. L. Brannock on or about 26 August, 1926. I knew they carried dynamite in stock. They carried it from the very beginning of their business. I saw it on the counter and bought a couple of sticks of it. I saw the dynamite before this policy of $2,500 was delivered to Mr. Midkiff and Mr. Brannock. . . . I discussed the matter with Mr. Midkiff and asked him why I wasn't summoned because I knew of the facts I just stated. He said he never thought about it; said he just overlooked it, and when I called his attention to the discussion about this container, why, he remembered it. I mean a magazine that we used to use; it makes it quite a good deal safer to have dynamite." The latter testimony was admitted to corroborate Midkiff. The witness testified further: "I had a license from all the companies we represented at the time. . . . I think the girl in the office wrote it out, but Mr. Sparger usually signed; sometimes I did. . . . I delivered the policy to Mr. Midkiff and Mr. Brannock; took it down to their store."

The facts in the present action were not based on "substantially identical evidence," but entirely different evidence. We think the evidence sufficient to be submitted to the jury on the question of waiver, in accordance with the law on the subject set forth in the case of *Midkiff & Brannock v. N. C. Home Insurance Co.,* 197 N. C., 139. It is there said, at page 143, by *Mr. Justice Connor* for the Court: "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."

The principle set forth in the above decision is well settled law in this jurisdiction, and the great majority of the courts in the nation. Many of the decisions are cited in the case of *Smith v. Ætna Life Insurance Co., post,* 578, and need not be repeated.

Sparger and Beach were both officers of the Mount Airy Insurance and Realty Company and had license to write insurance for defendant company. The fact that Sparger issued and signed the policy "Mount Airy Ins. & Realty Co., G. W. Sparger, Jr., Agent," and it was made out by the girl in the office of Mount Airy Insurance and Realty Company, is immaterial under the facts and circumstances of this case. Beach, the president of the Mount Airy Insurance and Realty Company, solicited the policy and had license and authority from defendant as agent of Mount Airy Insurance and Realty Company to solicit and did solicit the insurance, and had full knowledge of the presence of the dynamite on the premises before the policy was issued and delivered, and his knowledge is imputed to the defendant company. In law we find

No error.

D. S. MILLER v. FARMERS MUTUAL LIFE INSURANCE ASSOCIATION OF NORTH CAROLINA.

(Filed 9 April, 1930.)

1. **Insurance S a—Where cause designated in policy is efficient cause of loss, recovery may be had although other causes contributed.**

   Where in an action on a policy of insurance covering loss to property from windstorms there is evidence tending to show that a windstorm and snow caused the loss to the insured, the fact that snow was a contributing cause does not preclude a recovery, it being ordinarily sufficient if the cause designated in the policy was the dominant, efficient cause of the loss, and the question of whether the windstorm was the dominant and efficient cause is for the determination of the jury, and an instruction to the effect that if the snow was a contributing cause the plaintiff could not recover is reversible error.

2. **Appeal and Error F a—Contention of appellee not based on exceptions will not be considered on appeal.**

   Where the contention of the appellee involves the consideration of questions of law and facts, and there is no exception presenting this view for decision, the Supreme Court will confine its investigation to matters based upon exceptions.

APPEAL by plaintiff from *Harris, J.,* at January Term, 1930, of DURHAM. New trial.

The plaintiff, a member of the Orange County branch of the defendant corporation, brought suit on a policy of insurance issued by the de-

fendant in the sum of $1,500 on his one-story frame building used as a pavilion and dressing room at Highland Park near the city of Hillsboro. The policy contains the following clause: "Lightning and Storm Clause—(Ordinary). This policy shall cover any direct loss or damage caused by lightning, including loss or damage by cyclone, tornado or windstorm, not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; *provided, however,* if there should be any other insurance on said property this association shall be liable only pro rata with such other insurance for any direct loss by lightning or windstorm, whether such other insurance be against direct loss by lightning and windstorm or not."

The plaintiff alleged that on 2 March, 1927, and from twenty-four to forty-eight hours before that time, the wind blew with great force; that as a result of the windstorm such quantities of snow were heaped upon the hall and dressing-room as to crush the top; and that during the terrific windstorm and snow the top of the building collapsed, doing great damage to the property. He alleged, further, that the defendant became liable to him in the sum of $1,055.64 as the measure of his loss. The defendant admitted the execution of the policy and the payment of premiums, but denied the remaining material allegations of the complaint. The following verdict was returned:

1. Was the plaintiff's pavilion and dressing hall damaged by windstorm, as alleged in the complaint? Answer: No.

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

Judgment for the defendant; appeal by the plaintiff.

*Fuller, Reade & Fuller and E. C. Brooks, Jr., for plaintiff.*
*McLendon & Hedrick for defendant.*

ADAMS, J. The defendant contends that there was no windstorm and that the plaintiff's damage was the sole proximate result of the accumulation of snow on the roof. The plaintiff contends that a windstorm was the efficient cause of the damage, and that he is entitled to recover on the policy although the snow on the roof may have contributed to the collapse of the building. With respect to these contentions the court instructed the jury as follows: "The court further charges you that unless you find from the evidence and by the greater weight thereof, the burden of proof being upon the plaintiff, that the said building was damaged by a windstorm, as I have defined a windstorm to you, unaided by snow, which was deposited on the building during the course of the snowfall, and further unaided by any snow which was blown on the

building by the wind, then the court charges you that it would be your duty to answer the first issue No." This instruction is one of the appellant's assignments of error.

Among the various forms of insurance contracts are those relating to lightning insurance and to cyclone, tornado and windstorm insurance. Some forms of lightning insurance exclude loss or damage caused by cyclone, tornado or windstorm, but the policy under consideration includes such loss in express terms. 37 C. J., 661. It is not denied that the property was damaged or that in consequence the plaintiff suffered loss. The exception presents the question whether the plaintiff must prove that a windstorm was the sole proximate cause of the damage or whether he may recover upon proof that it was the efficient cause although snow upon the roof may have been a contributing cause. On this point the weight of authority is in support of the plaintiff's contention. The general rule is that if the cause designated in the policy is the dominant and efficient cause of the loss the right of the insured to recover will not be defeated by the fact that there were contributing causes. In *Jordan v. Iowa Mut. Tornado Ins. Co.,* 130 N. W., 177, the plaintiff sought to recover damages on two policies insuring against the loss of livestock caused by tornadoes, cyclones, and windstorms, and the defense was put upon the ground that the loss, if any, was wholly outside the terms of the contract. The court held that if the windstorm was the efficient cause of the loss, the fact that other causes contributed thereto would not relieve the insurer of liability. The principle was maintained in *Phenix Ins. Co. v. Charleston Bridge Co.,* 65 Fed., 628, the court holding in effect that when the damage complained of resulted from two or more causes which could not be distinguished the entire loss would be referred to the dominant and not to the contributing cause. In reference to the question of liability on a tornado insurance policy considered in *Queen Ins. Co. v. Hudnut Co.,* 35 N. E., 397, the Appellate Court of Indiana remarked, "That the hurricane itself coming in contact with the building did not alone cause the damage is not material, but if it caused another body to come in contact and do the damage the hurricane would be the direct and controlling cause."

Of course the principle enunciated in these cases has no application if liability for the contributing cause is expressly excluded by the terms of the policy. *Holmes v. Phenix Ins. Co.,* 98 Fed., 240, 47 L. R. A., 308; *Nat. Union Fire Ins. Co. v. Crutchfield,* L. R. A., 1915 B, 1094.

The plaintiff's allegation is susceptible of the interpretation that the fall of the roof was caused by the wind and the accumulation of snow upon the house. If the jury should find from the evidence that the windstorm was the efficient cause of the damage and that the snow was contributory the combined effect would be attributed to the efficient

cause, upon the principle that "it is generally sufficient to authorize a recovery on the policy that the cause designated therein was the efficient cause of the loss, although other causes contributed thereto." 17 C. J., 694.

The instruction complained of withheld from the jury any consideration of this view of the case.

The defendant contends that if the evidence be true the plaintiff cannot recover upon the policy; but the contention involves the consideration of law and facts, and as there is no exception presenting this view we have confined our investigation to matters based on the exceptions of the appellant.

For error in the instruction there must be a

New trial.

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CARRIE STEWART CHAPPEL v. C. E. EBERT AND WIFE, LISETTA EBERT, AND R. L. BRINSON, TRADING AS SOUTHERN OIL COMPANY.

(Filed 9 April, 1930.)

**1. Judgments L a—Judgment of nonsuit on merits is not a bar to subsequent action unless evidence is substantially the same.**

It is not enough to sustain a plea of *res judicata* that a former action between the same parties on the same subject-matter was nonsuited on its merits, but, in addition, the evidence in the second action must be substantially the same as in the first in order for the judgment in the first to be a bar to the second.

**2. Courts B e—Appeal from county court may be dismissed for failure to serve case on appeal unless error appears on face of record.**

On an appeal from a County Court created by chapter 520, Public-Local Laws of 1915, amended by chapter 18, Public-Local Laws of 1925, to the Superior Court, a "statement of case on appeal" is necessary, and where the appellant fails to serve his case on appeal, the appeal is subject to dismissal unless some error appears on the face of the record proper, and where it appears from the record that the action was dismissed in the County Court upon the plea of *res judicata* for that an action between the same parties on the same subject-matter had been nonsuited on its merits, and there is no finding that the evidence in the second action was substantially the same, the judgment of the Superior Court remanding the cause to the County Court for trial will be affirmed on appeal to the Supreme Court.

APPEAL by defendants from *Finley, J.*, at November Term, 1929, of FORSYTH.

Civil action in ejectment, dismissed in Forsyth County Court 29 April, 1929, and heard on plaintiff's appeal to the Superior Court of Forsyth

County at the November Term, 1929, by Finley, J., who reversed the judgment of the County Court and remanded the cause for a new hearing.

There was a motion made by defendants before McElroy, J., at the September Term, 1929, Forsyth Superior Court, to dismiss plaintiff's appeal for failure to serve statement of case on appeal as required by law. This motion was overruled on the ground that as the plaintiff's appeal was from a judgment sustaining the defendants' plea in bar, *res judicata,* determined alone by the court records, no statement of case on appeal was necessary. Defendants duly noted an exception to this ruling.

The judgment of the County Court was to the effect that as the plaintiff had instituted a prior suit against the same defendants, concerning the same subject-matter, which was nonsuited, July Term, 1926, upon the merits of the cause, he is now estopped or barred, by judgment in the former suit, from maintaining the present action.

From the judgment of Finley, J., reversing the judgment of the County Court and remanding the cause for a new trial in the County Court, the defendants appeal, assigning errors.

*Ratcliff, Hudson & Ferrell and John J. Ingle for plaintiff.*
*Alexander & Butler for defendants.*

STACY, C. J. It is contemplated by the act creating the Forsyth County Court, chapter 520, Public-Local Laws, 1915, amended by chapter 18, Public-Local Laws, 1925, that in appeals from said County Court to the Superior Court of Forsyth County, there shall be "a statement of case on appeal," for it is provided that such appeals may be taken "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." The plaintiff's appeal, therefore, from the judgment of the County Court to the Superior Court of Forsyth County was subject to be dismissed for failure to serve statement of case on appeal, unless some error appeared on the face of the record proper, which Judge McElroy perhaps thought might be the case, as he declined to dismiss the appeal, and which Judge Finley found to be the case when he came to pass upon the appeal. In this view, both rulings are correct.

The judge of the County Court found the facts and embodied them in his judgment of dismissal. It is not enough, to sustain a plea of *res judicata,* that the former suit between the same parties, concerning the same subject-matter, should have been nonsuited on its merits, but, in addition, the evidence in the two cases must be the same or substantially the same. *Hampton v. Spinning Co., ante,* 235, 151 S. E.,

266. In this respect, the judgment of the County Court was defective, and the judgment of the Superior Court remanding the cause for another hearing is correct.

Note, the judgment pleaded as an estoppel was not rendered on facts agreed or admitted or established by a verdict *(Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535, *Hardison v. Everett,* 192 N. C., 371, 135 S. E., 288), but is one of nonsuit.

Affirmed.

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IN RE WILL OF J. C. STEWART.

(Filed 9 April, 1930.)

**Wills C d—Evidence that holographic will was found among valuable papers held sufficient.**

Evidence that a paper-writing propounded as a holographic will was found after the testator's death in a locked drawer in his desk among other papers and effects, bank books, check books, etc., in an envelope on the back of which, in the testator's handwriting, it was designated as his last will and testament, with evidence that the testator had been advised that it would operate as his will if found among his valuable papers and that the testator regarded the papers among which it was found as valuable: *Held,* the evidence that the paper-writing was found among the testator's valuable papers was sufficient to sustain a verdict in the propounders' favor upon the issue of *devisavit vel non.* C. S., 4144.

APPEAL by caveators from *McElroy, J.,* at September Term, 1929, of FORSYTH.

Application for letters of administration to settle the estate of J. C. Stewart, deceased; paper-writing offered for probate and propounded as his last will and testament; issue of *devisavit vel non* raised by a caveat filed thereto, tried in the Superior Court of Forsyth County, which resulted in a verdict and judgment establishing the paper-writing propounded as the last will and testament of the deceased.

Caveators appeal, assigning errors.

*B. R. Stewart and L. V. Scott for caveators.*
*Manly, Hendren & Womble and Hastings & Booe for propounders.*

STACY, C. J. On the trial, the controversy narrowed itself to the single question as to whether the paper-writing, propounded as a holograph will, was found among the valuable papers and effects of the deceased. C. S., 4144. He kept it with his private papers in a locked

drawer of his office desk, where it was found among other papers and effects, bank books, check books, etc., in an envelope on the back of which appeared in the handwriting of the deceased: "Last Will of J. C. Stewart as made in 1926." The evidence further discloses that the testator regarded the paper-writing as a valuable one; he wrote it and preserved it as a will, having been advised by counsel that such an instrument found among his valuable papers and effects would operate as a valid testamentary disposition of his property.

The evidence is sufficient to warrant the jury's finding, and we have discovered no error in the trial. *In re Will of Shemwell,* 197 N. C., 332, 148 S. E., 469; *In re Will of Groce,* 196 N. C., 373, 145 S. E., 689; *In re Westfeldt,* 188 N. C., 702, 125 S. E., 531. The verdict and judgment, therefore, will be upheld.

No error.

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THOMAS M. SMITH v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 9 April, 1930.)

**Insurance K a — Evidence of insurer's knowledge of substitute rule amounting to a waiver held sufficient to be submitted to the jury.**

Where an insurance company through its agents issues a policy of group insurance knowing at the time of a rule of the union of which the group were members, which rule was recognized by the employer, whereby if an employee did not work another worker could be substituted in his place, provided that he work at least one day out of a period of ninety days, or if the insurer with knowledge of such substitute rule receives premiums and by its acts, conduct, transactions or declarations treats the policy as still in force, the insurer waives a provision in regard to employees covered by the policy to the contrary, and in this case *held:* there was sufficient evidence of such knowledge and waiver on the part of the insurer or its agents to have been submitted to the jury, and defendant's motion as of nonsuit should not have been granted.

APPEAL by plaintiff from *Daniels, J.,* at Second January Term, 1930, of WAKE. Reversed.

This was an action brought by plaintiff against the defendant on 27 November, 1929, in the city court of Raleigh, to recover the sum of $300 on a "group insurance policy." In the city court plaintiff was nonsuited and appealed to the Superior Court and was again nonsuited and appealed to this Court.

The case involved a class of insurance known as "group insurance." The evidence on the part of plaintiff was to the effect that the plaintiff started to work for the *News and Observer* in September, 1920, and

handled the linotype metal that goes in the pot, and the magazines. On 22 August, 1927, he obtained license to practice law, but continued to work for the *News and Observer*. In April, 1928, he opened a law office in the Lawyers' Building. He spent from 9 o'clock in the morning until 2:30 in his law office and went to work at 3 o'clock and worked from then until 11 o'clock for the *News and Observer*. In January, 1929, he had his law office open for the practice of law. He worked January 4, 5, 6 and 7 in 1929, and two days in March, the 17th and 22d, for the *News and Observer*. In June, 1929, he worked one week, from the 14th to 21st of June. Out of this week's pay the *News and Observer* deducted from his pay the insurance premium, which was the method agreed upon by all the parties. The *News and Observer* employees are all union men, belonging to the Typographical Union. There was a substitute rule, when he did not work a substitute could work in his place. Mr. Harvey Eason was manager for the group division of defendant for North Carolina, and knew of this rule; so did Mr. Vick Moore, who had been manager of the *News and Observer* and who signed the application as "Soliciting Agent," and who wrote the insurance for defendant. The matter was discussed with the agent of defendant, the question of substitute, and it was explained to the agent in regard to the priority rule, and the agent stated that the insurance would be good just the same if they were regularly employed and had a substitute. The substitute was not protected by the policy.

The agent of defendant company knew that any one could substitute a man in his place, which was done by plaintiff. The rule was to the effect that the employee had to work one day out of 90 to hold the seniority rights. The other 89 days the employee could do as he pleased, just so one went and worked a day, but one could not work for another printing company.

The plaintiff testified, in part: "Q. Mr. Allen asked you about the seniority rights. At the time the agent of the Ætna Life Insurance Company went to the News and Observer Company in 1926-27, did Mr. Spears go into details and explain what seniority rights meant to the employees? A. Yes, and they explained as long as a man paid his premiums he would be entitled to his benefit regardless of whether he worked but one day of ninety or not. I think Mr. Eason is the general claim agent of the company. I had a conversation with him prior to the issuance of the $25 check on 21 June, 1929, with reference to seniority rights, and he approved the seniority rights down there; he stated that in Mr. Spears' presence. After that they paid me the check for $25.00." The policy and certificate were issued to plaintiff on 1 July, 1926, and were in force 28 March, 1929, at the time of the alleged injury and disability of plaintiff.

Certificate No. 26, issued 1 July, 1926, to Thomas M. Smith, material provisions applicable:

"Ætna Life Insurance Company
Accident and Liability Department
of Hartford, Connecticut.

Has insured by a Group Policy of Disability Insurance No. GS-2391 certain employees of the News and Observer Publishing Company. Under and subject to the terms and conditions of said policy Thomas M. Smith, an employee, when wholly and continuously disabled by sickness or accidental bodily injury and thereby prevented from engaging in any occupation or employment for wage or profit, will be paid indemnity at the rate of twenty-five dollars per week beginning with the first day of disability and continuing during disability except that benefits will not be paid for more than thirteen consecutive weeks. . . . *This insurance will cease upon failure on the part of the employee to pay the required premium contribution to the News and Observer Publishing Company, or upon termination of employment* except that the insurance of an employee shall not terminate while he is disabled and entitled to benefits hereunder; or upon the discontinuance of the Group Policy."

"Ætna Life Insurance Company
Accident and Liability Department
of Hartford, Connecticut.
(Herein called the Company.)

Hereby agrees, in receipt of due proof that any insured employee of News and Observer Publishing Company, of Raleigh, county of Wake, and State of North Carolina (herein called the employer) is wholly and continuously disabled by accidental bodily injury which does not arise out of and in the course of employment or by sickness, and is thereby prevented from engaging in any occupation or employment for wage or profit. To pay to such employee a weekly indemnity in the amount determined in accordance with the insurance schedule shown on the second page of this policy for the period of such disability beginning with the first day thereof, but not exceeding thirteen consecutive weeks. . . . *Insurance on any employee shall terminate as of the date he ceases to make the required premium contribution toward the cost of the insurance, leaves the service of the employer, is dismissed therefrom, is pensioned or otherwise discontinues working for said employer.* . . . The employer shall return to the Company the registration cards of those employees whose insurance has been terminated, within 31 days of the date of termination of such insurance." (In application for insurance): "What part of the premium is to be paid by the employees? All."

The insurance premiums have been paid to defendant company. Proof of claim has been made by plaintiff as required by defendant.

The plaintiff alleges: That, on 28 March, 1929, while plaintiff was in the employ of said News and Observer Publishing Company, and while the said insurance contract was in force and effect, the plaintiff received an accident, bodily injury, as a result of which the seventh vertebrae of his spinal column was broken, his left leg badly bruised and torn, and other skin abrasions, which injuries are permanent, as he is informed and believes. That, as a result of the aforesaid injuries the plaintiff, on 20 June, 1929, became wholly and continuously disabled and thereby prevented from engaging in any occupation or employment for wage or profit, and since said date, has been unable to perform any kind of work, either mental or physical. That, immediately after plaintiff's injuries became permanent and he thereby became wholly and continuously disabled, he gave the News and Observer Publishing Company notice of such disability, and has been ever since under the care of a physician. That, in compliance with his part of the contract of insurance the plaintiff furnished the defendant with a certificate of the attending physician, and did and performed each and every part of said contract of insurance encumbent upon him to do and perform. That, on 12 July, 1929, the defendant issued and delivered to the plaintiff its check or voucher in the sum of $25.00 in settlement of the plaintiff's indemnity, first accruing under the said contract of insurance. That thereafter, to wit, 27 August, 1929, the defendant issued its check or voucher in the sum of $125.00, payable to the order of the plaintiff, to cover five weeks indemnity, and as plaintiff is informed, believes and alleges, mailed said check or voucher to its agent in Raleigh, with instructions to deliver to the plaintiff, but which, for some reason unknown to the plaintiff, has never been delivered.

The prayer for judgment was for $300, amount of balance due under terms of the policy.

There was evidence on the part of plaintiff to sustain these allegations. There was some question as to whether plaintiff was "wholly and continuously disabled by sickness or accident bodily injury," etc., under the policy and the duration.

*J. S. Manning and Walter L. Spencer for plaintiff.*
*Murray Allen for defendant.*

CLARKSON, J. The defendant, at the close of the plaintiff's evidence and at the close of all the evidence, made motions for judgment as in case of nonsuit. C. S., 567. The court below granted defendant's motion at the close of all the evidence, and in this we think there was error.

The questions involved: (1) Was the plaintiff at the time of the alleged injury or disability, an employee of the News and Observer Publishing Company, under what is known as the *substitute rule,* and did the defendant issue the *group insurance* and through its agent or agents collect the insurance premiums from plaintiff with knowledge of the *substitute rule?* (2) Did the defendant or its agent or agents after the *group insurance* was issued collect the premiums from plaintiff and by its acts, conduct, transactions or declarations treat the policy as still in force with knowledge of the *substitute rule?*

It is not denied that plaintiff has paid the premiums required by defendant.

We think the whole question depends on the fact as to whether when defendant issued the "group insurance" it knew of the substitute rule, or with knowledge of the rule received premiums and by its acts, conduct, transactions or declarations treated the policy as still in force. The certificate says: "This insurance will cease *upon failure on the part of the employee to pay the required premium contribution to the News and Observer Publishing Company, or upon termination of employment,* except that the insurance of an employee shall not terminate while he is disabled and entitled to benefits hereunder; or upon the discontinuance of the group policy." The policy says: *"Insurance on any employee shall terminate as of the date he ceases to make the required premium contribution toward the cost of the insurance, leaves the service of the employer, is dismissed therefrom, is pensioned or otherwise discontinues working for said employer."*

As far as the employer, the News and Observer Publishing Company, is concerned, the evidence is plenary that it recognized the substitute rule, and under its terms considered plaintiff its employee. Further, plaintiff has never left the service of the employer or been dismissed, pensioned or otherwise discontinued working for said employer. It may be that this alone, under a liberal construction of the policy, is decisive under the language of the policy, but we do not so decide. *Poole v. Insurance Co.,* 188 N. C., at p. 469; *McCain v. Insurance Co.,* 190 N. C., at p. 551. There is evidence on the part of plaintiff that defendant, through its agent or agents knew of and recognized this substitute rule and issued the "group insurance" and took the premium from defendant with full knowledge, and after issuing the policy knew of the substitute rule, received the premiums on the policy and by its acts, conduct, transactions or declarations treated the policy as still in force.

In *Grabbs v. Insurance Co.,* 125 N. C., at p. 396, it is stated: "We think the rule is well settled that where an insurance company, life or fire, issues a policy with full knowledge of existing facts which by its terms would work a forfeiture of the policy, the insurer must be held

to have waived all such conditions, at least to the extent of its knowledge, actual or constructive. It cannot be permitted to knowingly issue a worthless policy upon a valuable consideration. An implied waiver is in the nature of an estoppel *in pais,* which might well be enforced by any court of equity under such circumstances." *Gerringer v. Ins. Co.,* 133 N. C., 407.

In *Bullard v. Ins. Co.,* 189 N. C., at p. 37, we find: "The 'iron-safe clause' in policies of insurance is generally upheld by the courts as a reasonable contract limitation upon the insurer's risk *(Coggins v. Ins. Co.,* 144 N. C., 7); but if the company, knowing the insured has not complied with this provision, collects the premiums and recognizes the validity and binding force and effect of the policy it has issued, it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived. There is a distinction between waiver and estoppel; but the waiver of a forfeiture, though in the nature of an estoppel, may be created by acts, conduct, or declarations insufficient to create a technical estoppel. . . . (p. 38) Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be the knowledge of his principal."

The principle is thus stated in *Midkiff v. Ins. Co.,* 197 N. C., at p. 143: "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."

In *Houch v. Ins. Co., ante,* at p. 305, it is written: "There was evidence tending to show that at the date of the issuance of the policy, defendant's agent was informed by the plaintiff, N. F. Houck, that he and M. V. Houck owned only an estate in the land for his life, and that

his children owned the remainder in fee. This knowledge is imputed to the defendant. This evidence was sufficient to show a waiver by defendant of the provisions of the policy on which it relies," citing authorities. *Clapp v. Ins. Co.*, 126 N. C., 388; *Strause v. Ins. Co.*, 128 N. C., 64; *Gerringer v. Ins. Co., supra; Cockfield v. Fireman's Ins. Co.*, 144 S. E., 71, 146 S. C., 351.

The cases above cited from the decisions of this Court are fully sustained by Mr. Cooley in his brief on Insurance, 2 ed., Vol. 5, p. 4204, *et seq.* Mr. Cooley further, at p. 4272, says: "If, therefore, an insurance company, with knowledge of facts vitiating a policy, enters into negotiations or transactions with the insured, by which the company recognizes or treats the policy as still in force, or by its acts, declarations, or dealings leads the insured to regard himself as protected by the policy, or induces him to incur trouble or expense, such acts, transactions, or declarations will operate as a waiver of the forfeiture, and estop the company from relying thereon as a defense to an action on the policy." And at p. 4290: "The weight of authority supports the proposition that an insurance company waives or is estopped to assert a violation of the terms of an insurance contract if the company, on being notified of the violation, remains silent and fails to object or to declare a forfeiture, or cancel or rescind the contract, within a reasonable time. This rule is no doubt in most cases based on the theory that it is a breach of good faith on the part of an insurance company to remain silent and inactive on notice of a breach, and to retain the unearned premiums, and so lead the insured to believe that his insurance contract is regarded as valid notwithstanding the breach." *Collins v. Farmville Ins. & Banking Co.*, 79 N. C., 279. See *Mutual Protective League v. Walker* (Ky.), 173 S. W. Rep., 804; *Citizens Nat. Life Ins. Co. v. Egner* (Ky.), 180 S. W. Rep., 778.

It is the settled rule of practice in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

We think the evidence of plaintiff was sufficient and should have been submitted to the jury.

Reversed.

CITY OF ELIZABETH CITY v. A. L. AYDLETT.

(Filed 9 April, 1930.)

**Municipal Corporations H c—City may not enjoin the violation of its ordinance in regard to the erection of filling stations.**

Where a city makes the violation of its ordinances in regard to the erection and maintenance of gasoline filling stations within a prescribed zone a criminal offense, and an alleged violator of the ordinance has been acquitted by a court of competent jurisdiction, equity will not afford injunctive relief at the suit of the city to restrain the continued violation of the ordinance by the person acquitted, the question as to the rights of the adjacent property owners not being presented.

STACY, C. J., and ADAMS, J., concurring.

APPEAL by defendant from *Sinclair, J.,* 7 November, 1929. From PASQUOTANK. Reversed.

This is a proceeding for injunctive relief. The plaintiff is a municipal corporation, and duly passed an ordinance regulating the location and erection of filling or gasoline stations within certain territory within the corporate limits of Elizabeth City before defendant was indicted for its violation.

The complaint, among other things, alleges: "That the defendant, A. L. Aydlett, his servants, agents and employees are wrongfully, unlawfully and in violation of said ordinance, locating, erecting, building and constructing a filling station upon that certain lot formerly used as a residence by the said Aydlett and now used in part as such residence, located on the northwest corner of West Main and North Road streets, and within that portion of the town of Elizabeth City from which filling stations are prohibited by the first section of the ordinance aforesaid. That a warrant has been issued against the said A. L. Aydlett charging him with the violation of said ordinance; that a trial was had before the court having jurisdiction of such matters, to wit: the court of the trial justice of Pasquotank County on 10 September, 1929, and the said trial justice found the said A. L. Aydlett not guilty and rendered judgment accordingly, said trial justice declaring that, in his opinion, the said ordinance was unconstitutional and void. That this plaintiff has no other relief except to ask this court for a restraining order enjoining the further violation of said ordinance by said defendant. Wherefore, plaintiff prays that a restraining order be issued by the court enjoining the said A. L. Aydlett, his servants, agents and employees in proceeding further with the erection of the said filling station, and for such other and further relief as the nature and circumstances of the case may demand."

The defendant, among other things, says that the ordinance is void.

The judgment of the court below is as follows: "This cause coming on to be heard before the undersigned judge of the Superior Court upon the pleadings, affidavits, exhibits and argument of counsel, and it appearing to the court that the plaintiff has pursued its legal remedy by criminally prosecuting the defendant in the trial justice court of Pasquotank County, which court has exclusive and final jurisdiction of the offense, and that the trial justice found the defendant not guilty, upon the ground that in his opinion the ordinance under which defendant was prosecuted was unconstitutional and void, and that, no appeal lying from said judgment of acquittal, the plaintiff has exhausted its legal remedy, and the court being of the opinion and finding as facts from the evidence that the ordinance in question was not enacted arbitrarily by the board of aldermen of Elizabeth City or with any idea of discrimination against the defendant or any other person, but in the valid discretionary exercise of the police powers vested in such aldermen to secure the safety and general welfare of the public: It is considered, adjudged and decreed that the defendant, his agents and servants be, and they are hereby permanently restrained and enjoined from constructing and erecting a filling station upon the site or location described in the complaint, and that the plaintiff recover its costs in this cause expended, to be taxed by the clerk."

The ordinance provides: "Any person, firm or corporation violating any provision of the foregoing ordinance, shall be guilty of a misdemeanor, and shall, upon conviction, pay a fine of fifty dollars for each offense and each day or part of day said violation shall continue, shall be considered and be a separate offense."

The defendant excepted, assigned error to the finding of facts set forth in the judgment and the judgment, and appealed to the Supreme Court.

*J. B. Leigh, Thompson & Wilson for plaintiff.*
*Aydlett & Simpson for defendant.*

CLARKSON, J. We think the only question involved in the appeal: Can the city of Elizabeth City maintain its action against the defendant for injunctive relief to prevent defendant violating an ordinance of the town, the violation of which is a misdemeanor—a crime? We think not.

We do not pass upon the validity of the ordinance. The record discloses that defendant was indicted and acquitted by a court of competent jurisdiction for violating the ordinance in question—Can the equitable jurisdiction of the court be invoked by a municipality in an action of this kind to enforce its ordinance? We think not.

We find this expression in plaintiff's brief, that "plaintiff has no other remedy except the use of the injunction or the use of force." We do not understand what plaintiff means by the "use of force." This is a government of law, not force, and orderly government must ever prevail or we will have anarchy. Municipalities are subject to law like other corporations and persons. Plaintiff must be mindful of the fact that under the guise of police regulations protecting the public welfare, attempts have been made to curb the free use of private property that is not a nuisance *per se.* Questions of this kind have ever been the subject of troublesome controversy as to whether the regulations are reasonable or arbitrary.

The bare question for this Court to determine: Has a court of equity jurisdiction? We are not dealing with a nuisance—all the courts have declared that filling stations and garages are held not to be nuisances *per se. MacRae v. Fayetteville, ante,* at p. 54.

In *Clinton v. Oil Co.,* 193 N. C., we said at p. 436: "We will not discuss the anomaly of plaintiff's bringing an action to enforce its own ordinance, praying injunctive relief; but decide the case on its merits, as the point is not raised by the parties."

The Law of Injunctions (Lewis & Spelling), part section 10, speaking to the subject, says: "The noninterference by injunction to shield persons from the consequences of criminal prosecutions is based on such obvious reasons of public policy that it is strange an impression ever found lodgment in legal minds to the contrary. Nevertheless, the jurisdiction has been often unsuccessfully invoked for that species of protection. The rule holds good where the remedy is sought to prevent the commission of a criminal act. It is equally clear that the wrong about to be done a party affecting his property and civil rights should be stayed or prevented, where he has no adequate legal remedy, notwithstanding that the wrongful act or conduct complained of possesses elements of criminality. It follows that a court of equity will not withhold preventive relief because such act is criminal, it also appearing that the act or conduct will result in a violation of property rights and that the applicant for relief has no other adequate remedy. The rule excluding injunction to prevent crime is as applicable where the threatened act would violate a municipal ordinance as where the violation of a statute is involved or the act would constitute a criminal offense at common law."

14 R. C. L., Injunctions, at p. 376, part section 78: "In early times the English Court of Chancery, not without much protest on the part of the common-law courts, occasionally issued injunctions to restrain the commission of certain criminal acts. This jurisdiction seems to have

been confined to cases in which other tribunals were too weak to protect the poorer and more helpless classes of the community against the power of the great nobles, and the reasons for exercising it disappeared when the common-law courts became fully capable of controlling and repressing such acts of violence and outrage. Accordingly, it is now the rule that where acts complained of are violations of the criminal law, courts of equity will not on that ground alone interfere by injunction to prevent their commission, as they will not exercise their powers for the purpose of enforcing the criminal laws by restraining criminal acts."

In *Wardens v. Washington,* 109 N. C., at p. 22, we find the law stated thus: "The plaintiffs in this action seek to have a town ordinance declared void, and an injunction against enforcing the same. . . . It is unnecessary, however, that we pass upon the question debated before us as to the power of the Legislature to authorize or to validate the ordinance in the exercise of the police power inherent in the State, for we have an express authority, if one were needed, that an injunction does not lie to prevent the enforcement of an alleged unlawful town ordinance. Should the plaintiff be injured by its enforcement, he has a redress at law by an action for damages, *Cohen v. Commissioners,* 77 N. C., 2, in which *Reade, J.,* says: 'We are aware of no principle or precedent for the interposition of a court of equity in such cases.'" *Scott v. Smith,* 121 N. C., 94; *Vickers v. Durham,* 132 N. C., 880; *Paul v. Washington,* 134 N. C., 363; *Hargett v. Bell,* 134 N. C., 394; *S. v. R. R.,* 145 N. C., 495; *Thompson v. Lumberton,* 182 N. C., 260; *Turner v. New Bern,* 187 N. C., 541; *Moore v. Bell,* 191 N. C., 305.

The exception to the general rule is thus stated in *Advertising Co. v. Asheville,* 189 N. C., at p. 738: "If it appear that an ordinance is unlawful or in conflict with the organic law and that an injunction against its enforcement is necessary for the protection of property rights or the rights of persons, otherwise irremediable, the writ is available in the exercise of the equitable power of the court." 14 R. C. L., Injunctions, part section 79; see 32 C. J., Injunctions, 438-440.

It may be noted that the ordinance passed by plaintiff municipality provides the method of enforcement. A violation is made a misdemeanor and punishment by fine of $50, and a violation each day is a separate offense.

From the facts and circumstances of this case and the reasons given, the judgment below is

Reversed.

STACY, C. J., concurring: In the absence of authority expressly conferred on plaintiff, either by its charter or by general law, to invoke the power of a court of equity to restrain the continued violation of an

ordinance, under circumstances such as here disclosed, which has not been called to our attention if such authority has been given, perhaps the plaintiff, without alleging some special damage to property owned by the city, is not the proper party to maintain the action. *Rochester v. Guthberlett,* 211 N. Y., 309, 14 R. C. L., 379.

ADAMS, J., concurring: As a rule an injunction will not be issued to restrain the enforcement of a town ordinance alleged to be invalid, because its invalidity may be pleaded as a defense. *Thompson v. Lumberton,* 182 N. C., 262. But a court of equity may restrain a criminal prosecution for an alleged breach of an unconstitutional ordinance when the prevention of such prosecution is essential to safeguard the rights of property. *Tyson & Bro. v. Banton,* 273 U. S., 418, 71 L. Ed., 718; *Advertising Co. v. Asheville,* 189 N. C., 737. If an ordinance which is valid is declared by a justice of the peace to be unconstitutional and the defendant is discharged the State has no right of appeal and the real question cannot be determined by an appellate court in the criminal proceeding. A question would then arise whether the owner of property which would be injuriously affected by such abolition of the ordinance could resort to a court of equity to enjoin the defendant from doing that which the valid ordinance expressly forbids. The present action was brought by the city, and not by an owner of property who claims that its value will be impaired by the construction of the building forbidden by the ordinance. I understand that the law with respect to the proposed question is not determined on the present record, and I therefore concur in the opinion of the Court.

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THE NATIONAL EXCHANGE BANK OF CHESTER, SOUTH CAROLINA, v. ABRAHAM SKLUT AND MORRIS SKLUT, TRADING AS A. SKLUT & COMPANY.

(Filed 9 April, 1930.)

**1. Principal and Agent C b—Evidence of agent's express or implied authority to draw drafts on principals held sufficient.**

Where there is evidence tending to show that the defendants as partners authorized their alleged agent to purchase furs and hides without furnishing the money to pay for them, and that in the course of business the agent gave numerous personal checks therefor which were covered by his drafts on the alleged principals which were paid by them, in an action by the bank accepting the drafts, to recover on later drafts which the defendants refused to pay, denying the agency and partnership, the evidence of agency and of express or implied authority to execute and nego-

tiate the drafts on the principals is held sufficient to be submitted to the jury and sustain the verdict in plaintiff's favor. The question of ratification or estoppel does not arise on this appeal.

**2. Same — Admissions of agent are admissible against the principal when a part of the res gestae.**

The fact of agency must be proven *aliunde* the admissions of the agent, but, the agency being proven, admissions by the agent relating to the business at hand are admissible against the principal when the admissions may be deemed a part of the *res gestæ*.

**3. Principal and Agent C e—Evidence of principal's liability held sufficient although there was evidence that third party was looking to agent.**

While the declarations, made by a third party dealing with the agent, that it did not care who the principal was or that it was satisfied with the credit of the agent is evidence, but not conclusive, against the liability of the principal, in this case *held:* there was sufficient evidence of the principal's liability to be submitted to the jury.

APPEAL by defendants from *Schenck, J.,* at February Term, 1930, of FORSYTH. Affirmed.

The allegations of plaintiff are to the effect that it is engaged in the general banking business in Chester, S. C., and operating in accordance with United States Banking Law. That defendants during February, 1928, and prior thereto, employed one V. B. Campbell as their agent and buyer to represent them in the purchase of furs and hides and to draw drafts on defendants, through plaintiff's bank to pay for same; this was done to facilitate the purchase and for the accommodation of defendants. The proceeds of the drafts were credited to the account of said Campbell, who paid out the money in the purchase of furs and hides for defendants, in accordance with the instructions from defendants. That in February, 1928, drafts amounting to $2,950 were so credited to Campbell's account, who paid the amount out for furs and hides for and on behalf of defendants, which were shipped by Campbell to defendants. The said drafts were forwarded to defendants through correspondence for payment by defendants who refused to pay same. Morris Sklut answering denied the material allegations of the complaint and denied that he was a partner in the business of Abraham Sklut & Co. Abraham Sklut answering denied that there was a partnership existing between Morris and Abraham Sklut and denied the allegations of the complaint.

There was evidence introduced by plaintiff sustaining the allegations of the complaint. For thirteen months prior the course and dealing between the parties were as set forth in the complaint. The drafts were in words and figures—a copy of one is as follows:

"$458.73. No. 1.

A. SKLUT & Co.
Dealers in
Hides, Skins, Tallow, Raw Furs, Wool & Bees Wax
Winston-Salem, N. C.

NP-67-127
Check No. 2969 Post Office, Chester, S. C.

Date: 21 Jan., 1927.

Pay to the order of V. B. Campbell Four Hundred Fifty-eight and 73/100 Dollars, Value Received, and Charge to Account of A. Sklut & Co.

Through the Peoples National Bank,
Winston-Salem, N. C. V. B. CAMPBELL, Buyer."

These were duly endorsed and were paid by defendants, except the ones sued on in this action.

During the thirteen months approximately $130,000 of drafts were paid by defendants in the manner set forth in the complaint. The drafts cashed prior to the one in controversy and paid by the defendants were 427. The testimony of V. B. Campbell tended to sustain the allegations of the complaint.

An unsigned $1,000 bond was introduced in evidence by plaintiff and sent by defendants to said Campbell, in part, as follows:

"The condition of the above obligation is such, that whereas the above-named Sklut and Company have in their employ the above-named principal and employee whose duties are:

1. To buy hides.
2. To buy raw furs.

That, whereas, the said employee pays for said purchases by check and in return draws a draft against the above-named firm, in his favor.

Now, therefore, the condition of the above obligation is such that if the above bounden, V. B. Campbell, and ..... his surety, shall well and truly, save, keep and bear harmless and indemnify the said A. Sklut and Company against any justifiable claims which the said firm may make which may arise by reason of any shortage in weight, misrepresentations, infidelity, or costs in connection with suits ..... then this obligation is to be void, else to remain in full force and virtue."

Campbell testified, in part: "All of those checks are for hides and furs, and they were all shipped to A. Sklut & Company, not paid. Mr. Sklut asked me how I arranged my handling of these. I told him I left them there, signed, at the bank, and that I wired or phoned as to the

amount; wired or phoned the National Exchange Bank, or Mr. McKinnell (cashier of plaintiff's bank), personally."

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

"1. Was V. B. Campbell the agent and employee of A. Sklut & Company, as alleged in the complaint? Answer: Yes.

2. Did the defendant, A. Sklut & Company, expressly or by implication, authorize V. B. Campbell to execute and negotiate to the plaintiff the drafts mentioned and described in the complaint? Answer: Yes.

3. Has the defendant satified the acts of V. B. Campbell in executing and negotiating the said drafts through the plaintiff bank? Answer: .....

4. Is the defendant estopped to deny the existence of authority to V. B. Campbell to negotiate the drafts through the plaintiff bank? Answer: .....

5. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,957.20, with interest."

Judgment was rendered on the verdict, and appeal taken to the Superior Court of Forsyth County. Exceptions and assignments of error were duly made and on appeal to the Superior Court the exceptions and assignments of error were overruled. Defendants duly made exceptions and assignments of error and appealed to the Supreme Court.

*J. M. Wise, Craige & Craige, Ingle & Rucker for plaintiff.*
*Moses Shapiro and Ira Julian for defendants.*

CLARKSON, J. The defendants, at the close of plaintiff's evidence and at the close of all the evidence, made motions for judgment as in case of nonsuit. C. S., 567. The Forsyth County Court overruled the motions, and on appeal to the Superior Court the ruling of the Forsyth County Court was sustained, and in this we can see no error. We think the evidence sufficient to be submitted to the jury.

It is well settled that "Admissions by agents, made while doing acts within the scope of the agency, and relating to the business in hand, are admissible against the principal when such admissions may be deemed a part of the *res gestæ,* but such admissions are not admissible to prove the agency; the agency must be shown *aliunde* before the agent's admissions will be received." Lockhart's Handbook on Evidence, sec. 154, citing numerous authorities. *Hunsucker v. Corbitt,* 187 N. C., at p. 503.

In *Bobbitt v. Land Co.,* 191 N. C., at p. 328, we find: "*Hoke, J.,* in *Powell v. Lumber Co.,* 168 N. C., p. 635, speaking to the question, says: 'The general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recog-

nized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually 'confided to an agent employed to transact the business which is given him to do,' and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed. *Latham v. Field,* 163 N. C., 356; *Stephens v. Lumber Co.,* 160 N. C., 107; *Gooding v. Moore,* 150 N. C., pp. 195-8; Tiffany on Agency, p. 180, 184, 191, *et seq.* The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment. *Law Reporting Co. v. Grain Co.,* 135 Mo. Rep., p. 10-15; 31 Cyc., 1326-1331.' *Furniture Co. v. Bussell,* 171 N. C., 485; *Ferguson v. Amusement Co., ibid.,* 665; *Brimmer v. Brimmer,* 174 N. C., 439; *Lumber Co. v. Johnson,* 177 N. C., 51; *Cardwell v. Garrison,* 179 N. C., 478; *Strickland v. Kress,* 183 N. C., 536."

In *Pick v. Hotel Co.,* 197 N. C., at pp. 112-13, the following principle is laid down: "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, 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 most serious aspect presented on the record, but we think the evidence sufficient to be submitted to the jury, is set forth in the following principle of law: "The fact that the third person (in this instance the bank), declares he does not care who the principal is or that he is satisfied with the credit of the agent (Campbell), is evidence, but not conclusive against the liability of the principal (Sklut)." Amer. Law Inst., Restatement of the Law of Agency, Tentative Draft 4, sec. 376, page 21, *et seq.*

We think the citations of law as above set forth are applicable to the facts in this controversy.

The question of ratification and estoppel does not arise on the appeal, as these issues were not answered by the jury. Any discussion would be academic. From a careful examination of the record, the well prepared and exhaustive briefs of counsel on both sides of the controversy, we see no prejudicial or reversible error. The numerous exceptions and assignments of error made by defendants cannot be sustained. There was sufficient evidence to be submitted to the jury on the issues. They have been decided in plaintiff's favor. The jury decide the facts. In the law we find no error. The judgment of the court below is

Affirmed.

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BESSIE OWENS ET AL. V. H. A. ROTHROCK.

(Filed 9 April, 1930.)

**Deeds and Conveyances A h—Evidence of undue influence on grantor in deed held insufficient.**

In order to set aside a deed for fraud or undue influence the plaintiff must show that the instrument did not express the real purpose and desire of the grantor, but was an expression of the mind and will of a third person in substitution thereof, and although moral turpitude or improper motive is not necessary, in this case *held:* the evidence of undue influence was insufficient and a directed verdict on the issue was free from error. *Myatt v. Myatt*, 149 N. C., 137.

APPEAL by plaintiffs from *McElroy, J.*, at December Term, 1929, of FORSYTH. No error.

*L. L. Wall, Hastings & Booe, J. M. Wells, Jr., and John C. Wallace for plaintiffs.*

*Parrish & Deal, Archie Elledge, F. B. Benbow and S. E. Hall for defendant.*

OWENS *v.* ROTHROCK.

PER CURIAM. On 17 October, 1928, Ellen Harmon, an unmarried woman, executed and delivered to the defendant a deed conveying title to certain real estate and personal property therein described. In addition to a nominal consideration the deed recites an agreement by the defendant to maintain and support the grantor, Ellen Harmon, and her sister-in-law, Mary Harmon, during their natural lives, either at the home of the defendant or at a home to be erected by him on his premises, and to provide nurses, all necessary medical service, and a suitable burial and appropriate tombstones for their graves.

Ellen Harmon died 2 December, 1928. The plaintiffs, who are her heirs at law brought suit to set aside the deed for the alleged reason that she did not have sufficient mental capacity to execute a deed and that, if she did, the deed was procured by fraud and undue influence. Each of these issues was answered adversely to the plaintiff, and from the judgment rendered for the defendant they appealed.

The trial judge instructed the jury that there was not sufficient evidence to warrant an affirmative finding to the second issue and directed the jury to answer the issue in the negative. This instruction is the basis of the appeal.

Undue influence in the execution of a deed is such fraudulent influence as perverts the free exercise of the grantor's will so that the deed does not express his real purpose and desire. The controlling principle is stated in *Myatt v. Myatt,* 149 N. C., 137: "It is true, that to constitute undue influence it is not necessarily required that there should exist moral turpitude or even an improper motive; but if a person, from the best of motives, having obtained a dominant influence over the mind of a grantor, thereby induces him to execute a deed or other instrument materially affecting his rights, which he would not have made otherwise, exercising the influence obtained to such an extent that the mind and will of the grantor is effaced or supplanted in the transaction so that the instrument, while professing to be the act and deed of the grantor, in fact and truth only expresses the mind and will of the third person, the actor who procured the result, such an instrument so obtained is not improperly termed fraudulent. Accordingly, it is held in *Marshall v. Flynn, supra,* 'that the influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made.' "

In our opinion the evidence does not show the exercise of such undue influence on the part of the defendant.

No error.

TAR HEEL HOSIERY MILL v. DURHAM HOSIERY MILLS.

(Filed 16 April, 1930.)

**1. Appeal and Error A d—Appeal will lie from denial of motion to strike out made before time for demurrer or answer.**

A motion by the defendant in writing to strike out irrelevant and immaterial allegations of the complaint made in apt time before the time for filing answer or demurring has expired is not addressed to the discretion of the trial court, but is made as a matter of right, and an appeal from an order denying the motion is not premature and will be considered by the Supreme Court upon its merits. C. S., 537.

**2. Appeal and Error J a—Appeal will lie from interlocutory order affecting substantial rights.**

While ordinarily an appeal will not lie directly from an interlocutory order, it is otherwise if the order affects substantial rights, and an appeal from an order denying defendant's motion to strike out certain allegations of the complaint, made before time for filing answer or demurring has expired, will be considered by the Supreme Court upon its merits.

**3. Pleadings J a—Motion to strike out allegations on ground that irrelevant evidence will thereby be admissible will not be granted.**

The refusal of the trial court to allow a motion made in apt time to strike out certain allegations of the complaint on the ground that the reading of the allegations will prejudice the jury and that the allegations will render admissible irrelevant evidence will not be reversed on appeal, no substantial right of the defendant being affected thereby to his prejudice since the jury will be instructed to find their verdict from the evidence and since all irrelevant evidence will be excluded by the trial court upon objection of the complaining party.

**4. Same—Motion made in apt time to have extraneous and redundant matter stricken from complaint should be allowed.**

A defendant in a civil action has the right to have all extraneous and redundant matter alleged in the complaint stricken out before being called upon to answer or demur, C. S., 506, and the refusal of the trial court of the defendant's motion made in apt time before time, C. S., 537, is error where the allegations objected to are irrelevant or redundant.

APPEAL by defendant from order of *Cranmer, J.*, at November Term, 1929, of DURHAM. Modified and affirmed.

This action was heard on defendant's motion to strike certain allegations from the complaint on the ground (1) that said allegations are irrelevant and immaterial to the cause of action alleged in the complaint; (2) that the reading of said irrelevant and immaterial allegations at the trial in the presence of the jury would be highly prejudicial to defendant, and (3) that the presence of said allegations in the complaint will render admissible at the trial evidence not pertinent to the issues which will be determinative of the rights and liabilities of the parties to this action.

From the order of the court denying its motion, defendant appealed to the Supreme Court.

*Brawley & Gant for plaintiff.*

*Wm. W. Sledge, Jones Fuller and Brooks, Parker, Smith & Wharton for defendant.*

CONNOR, J. Summons was issued and complaint filed in this action on 25 September, 1929. Before the time allowed by law for the filing of a demurrer or of an answer to the complaint had expired, the defendant moved the court to strike certain allegations from the complaint on the ground (1) that said allegations are irrelevant and immaterial to the cause of action alleged in the complaint; (2) that the reading of said irrelevant and immaterial allegations at the trial and in the presence of the jury would be highly prejudicial to the defendant, and (3) that the presence of said allegations in the complaint would render admissible at the trial evidence not pertinent to the issues which will be determinative of the rights and liabilities of the parties to this action. The motion was in writing and was made in apt time. C. S., 537.

The first question presented for consideration by this Court is whether defendant's appeal from the order denying its motion is premature.

It has been held by this Court that a motion by defendant that plaintiff be required by amendment to make certain allegations of his complaint more definite, when the motion was made after demurrer or answer filed, is addressed to the discretion of the court and that its action on the motion is not ordinarily reviewable by this Court on appeal. *Hensley v. McDowell Furniture Co.,* 164 N. C., 148, 80 S. E., 154. This principle is applicable to a motion to strike from the complaint matter which is irrelevant or redundant. Where such motion is made after the defendant has filed a demurrer, or an answer to the complaint, it is addressed to the discretion of the court. No appeal lies from the order of the court, allowing or denying the motion. An exception to the order will be considered by this Court only on an appeal from the final judgment in the action. Where, however, the motion has been made in apt time and in accordance with the provisions of C. S., 537, it is not addressed to the discretion of the court, but is made as a matter of right. The order of the court, whether allowing or denying the motion, in such case, is subject to an appeal to this Court. An appeal from the order, where appellant has duly excepted thereto, will be heard by this Court. It will not be dismissed, but will be considered and decided on its merits. In the instant case, the order having been made on a motion made in apt time, and in accordance with the provisions of the statute, the appeal therefrom is not premature, and will not be dismissed for that reason.

The order in this case, denying the motion of the defendant, is interlocutory. Ordinarily, no appeal lies to this Court from an interlocutory order made in an action pending therein by the Superior Court. An exception to the order, taken in apt time, will be considered on an appeal from the final judgment in the action, when such exception is duly presented on said appeal If, however, an interlocutory order affects a substantial right of a party to the action, and is prejudicial to such right, he may appeal therefrom to this Court, and his appeal will be heard, and decided on its merits. *Skinner v. Carter,* 108 N. C., 106, 12 S. E., 908. If the order does not affect a substantial right of the appellant, his appeal therefrom to this Court will be dismissed. *Warren v. Stancil,* 117 N. C., 112, 23 S. E., 216; *Leak v. Covington,* 95 N. C., 194. In the instant case, if the order from which defendant has appealed, although interlocutory, affects a substantial right of defendant, to its prejudice, its appeal will not be dismissed, but will be considered and decided on its merits.

We are of the opinion that no substantial right of defendant has been impaired or affected to its prejudice, by the refusal of the court to allow its motion on the ground either that the reading of the allegations which defendant contends are irrelevant and immaterial to the cause of action alleged in the complaint, at the trial and in the presence of the jury, will prejudice defendant, or that the presence of such allegations in the complaint will render admissible evidence not pertinent to the issues which will be determinative of the rights and liabilities of the parties to this action. The jury will be instructed by the court to consider only the evidence offered at the trial and to answer the issues in accordance with the facts as they shall find them to be from the evidence. Upon objection by the defendant, the court will exclude evidence which is not pertinent to the issues which will be submitted to the jury. There was no error in the refusal of the court to allow defendant's motion on either of these grounds.

If, however, any of the allegations referred to in defendant's motion are irrelevant or immaterial to the cause of action alleged in the complaint, they should be stricken from the complaint. The complaint should contain a plain and concise statement of the facts which constitute the cause of action upon which plaintiff demands judgment against the defendant. C. S., 506. If matter is alleged therein which is irrelevant, immaterial or redundant, defendant has a right to have same stricken from the complaint and there was error in the refusal of its motion, made in apt time, and in accordance with the provisions of C. S., 537. A defendant when called upon to file a demurrer or an answer to a complaint, has the right to demand that the complaint shall be drawn in accordance with the provisions of the statute, and shall not

contain matter which is irrelevant or redundant. Where the complaint does contain such matter, the statute affords the defendant his remedy.

Upon consideration of the allegations of the complaint, which defendant contends are irrelevant and immaterial, we are of the opinion that the contention cannot be sustained except as to the allegations contained in paragraph 8. These allegations constitute no part of the cause of action alleged in the complaint upon which plaintiff demands judgment against the defendant. There was error in the refusal of the court to strike these allegations from the complaint. There was no error, however, in the refusal to strike out the other allegations. While probably not essential to the cause of action, it cannot be held that as a matter of law they are irrelevant and immaterial.

The order should be modified in accordance with this opinion. As thus modified, the order is

Affirmed.

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STATE v. FRANK SIMMONS, ALIAS "GEECH."

(Filed 16 April, 1930.)

**Criminal Law G e—Testimony in this case should have been excluded under the hearsay rule.**

Where there is evidence that the prisoner on trial for murder was at the time of the killing with another stealing chickens, testimony of a statement made by the other person in the absence of the prisoner that the prisoner had done the killing is incompetent as hearsay, and its admission upon the trial over the objection of the accused is reversible error.

APPEAL by defendant from *Moore, J.*, at November Criminal Term, 1929, of GUILFORD.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one W. T. Bowman.

From an adverse verdict and sentence of death by electrocution entered thereon, the prisoner appeals, assigning errors.

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

*Spencer B. Adams and Wm. E. Comer for defendant.*

STACY, C. J. The evidence on behalf of the State tends to show that on the night of 24 February, 1927, the prisoner and one Perry White were out "chicken thieving"; that they came upon Deputy Sheriff W. T.

Bowman who had secreted himself in the dark watching for prowlers or marauders; and that one of them shot and killed the officer.

Charles Fields was permitted to testify and repeat it several times, over objection of the prisoner, that soon after the shooting he arrested Perry White, who told him that Frank Simmons was the one who did the shooting. The court referred specifically to this evidence in its charge and instructed the jury to consider it.

This evidence was incompetent as against the prisoner, who was not present at the time the statement was made, and should have been excluded on objections duly entered in apt time. *S. v. Green,* 193 N. C., 302, 136 S. E., 729.

It is a rule, too firmly established to admit of debate, that the declaration of a third person, not an agent of the party sought to be affected, made in the absence of such party, is inadmissible as hearsay. *Daniel v. Dixon,* 161 N. C., 377, 77 S. E., 305.

Speaking to the question in *S. v. Lassiter,* 191 N. C., 210, 131 S. E., 577, *Brogden, J.,* delivering the opinion of the Court, said: "The inherent vice of hearsay testimony consists in the fact that it derives its value, not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information." This is the general rule, supported by all the authorities on the subject. There are, of course, certain exceptions to the rule, not now necessary to be considered, as the evidence here complained of falls under none of them. *S. v. Blakeney,* 194 N. C., 651, 140 S. E., 433.

For the error, as indicated, there must be a new trial, and it is so ordered.

New trial.

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STATE v. ABRAHAM L. LUFF.

(Filed 16 April, 1930.)

**Forgery A b—Fraudulent intent is essential element of forgery and exclusion of evidence relating thereto is reversible error.**

Fraudulent intent is an essential element of forgery, and where the defendant, on trial for forgery in raising a check drawn by himself as president of a corporation and another corporate officer for distribution of funds received by the corporation under a fire insurance policy, contends that he raised the check and received the proceeds as attorney-in-fact for his son who held a mortgage on the corporate property destroyed by fire, and that he was advised by an eminent attorney that his son was entitled to the proceeds from the policy, testimony of the attorney to this effect is competent upon the question of fraudulent intent, and its exclusion is reversible error.

STATE *v.* LUFF.

CRIMINAL ACTION, before *Clement, J.*, at August Term, 1929, of MOORE.

The defendant was convicted of the crime of forgery and sentenced to a term of not less than two nor more than three years in the State's prison.

The defendant was the president of the United Talc and Crayon Manufacturing Company, and Joseph Levey was interested in the company and was referred to in the record as Joseph Levey, attorney. There was a building upon the property which was destroyed by fire, and the insurance company paid to the corporation the sum of $5,000 to cover the loss. Levey testified that he and the defendant Luff had an agreement that the insurance money was to be disbursed for the payment of certain agreed items, and that in pursuance of such agreement a check for $245 was drawn in the name of the company and signed by Luff as president, and Levey as attorney. There was further evidence to the effect that after the check was signed Luff raised the check so as to call for $2,245 instead of $245. The bank paid to Luff $2,245 upon said check.

From judgment upon the verdict the defendant appealed.

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

*A. A. F. Seawell, K. R. Hoyle, L. B. Clegg and W. R. Clegg for defendant.*

BROGDEN, J. The defendant contended that the fund of $5,000 deposited to the credit of the corporation belonged to his son, Henry Luff, who had a mortgage upon the property, and that he had a power of attorney from his son authorizing him to contract for and in his behalf.

The record discloses that the defendant consulted Mr. U. L. Spence, an eminent attorney, to ascertain the advice of said attorney as to the ownership of the insurance money or as to who would be entitled to the proceeds thereof. It appeared that the first $5,000 of a certain mortgage indebtedness held by Rachael Levey had been duly assigned to Henry Luff by a paper-writing which was duly recorded. The defendant was advised by his attorney that under the circumstances he was of the opinion that Luff was entitled to the balance of said insurance money after the payment of $1,200 to Anna Luff who held a prior encumbrance securing said sum.

The State objected to the testimony of the attorney, and the evidence was excluded.

The exception of the defendant to the ruling of the court is valid. The excluded evidence was competent upon the question of fraudulent intent

which is an essential element or ingredient of the offense of forgery. *S. v. Shaw,* 92 N. C., 768; *S. v. Cross,* 101 N. C., 770, 7 S. E., 715; *S. v. Wolf,* 122 N. C., 1079, 29 S. E., 841.

The record is voluminous, and there are other exceptions warranting serious consideration, but as the defendant is entitled to a new trial, we deem it unnecessary to discuss them.

New trial.

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H. M. SPARGER, TRUSTEE, AND WORKMEN'S BUILDING AND LOAN ASSOCIATION v. HENRY WOLFE, TRUSTEE, AND J. H. FULTON.

(Filed 16 April, 1930.)

**Mortgages C c—Release by cestui que trust after transfer of note to bona fide purchaser does not affect title of trustee.**

Where the payee of a note secured by a deed of trust on lands constituting a first lien by reason of prior registration, transfers and assigns the notes to another for value, and executes a release for the purpose of giving a junior registered mortgage priority of lien, the title in the first trustee is unaffected by the release executed after the transfer of the notes and the first deed of trust retains its priority, and injunction will not lie to restrain foreclosure under the prior trust deed.

APPEAL by plaintiffs from *Sink, Special Judge,* at January Special Term, 1930, of SURRY. Affirmed.

This is an action to determine which of two deeds of trust has priority—the deed of trust to the defendant, Henry Wolfe, trustee, or the deed of trust to the plaintiff, M. H. Sparger, trustee.

The land described in the complaint was conveyed by the owner to said trustees to secure the payment of his notes described in said deeds of trust.

The deed of trust to the defendant, Henry Wolfe, trustee, was executed and registered prior to the execution and registration of the deed of trust to the plaintiff, M. H. Sparger, trustee.

After the registration of the deed of trust to the defendant, the payee of the note secured thereby executed a release, in writing, of the land conveyed by the said deed of trust, for the purpose, as recited in said release, of making the deed of trust to the plaintiff, M. H. Sparger, trustee, prior to the deed of trust to the defendant, Henry Wolfe, trustee. Prior to the date of said release, the said payee had transferred and assigned the said note, for value, to the defendant, J. H. Fulton, who was then and is now the holder of said note.

The action was heard on the motion of the plaintiffs that a temporary restraining order, enjoining the defendant, Henry Wolfe, trustee, from

selling the land described in the complaint, under the power of sale contained in the deed of trust to him, to be continued to the hearing.

From judgment dissolving said temporary restraining order, plaintiffs appealed to the Supreme Court.

*Carter & Carter for plaintiffs.*
*Folger & Folger for defendants.*

PER CURIAM. The judgment dissolving the temporary restraining order is affirmed.

The release executed by the payee of the note secured by the deed of trust to the defendant, Henry Wolfe, trustee, after the said payee had transferred and assigned the said note, for value, to the defendant, J. H. Fulton, the present holder of the note, has no effect, in law or in equity, upon the title of the trustee to the land conveyed to him by the deed of trust. The defendant, Henry Wolfe, trustee, holds the legal title to the land conveyed to him by the deed of trust as security for the payment of the note described in said deed of trust. As the release is without effect upon the title of the trustee to the land conveyed to him by the deed of trust, the said deed of trust retains its priority over the deed of trust to the plaintiff, M. H. Sparger, trustee, resulting from its prior registration.

Upon the facts admitted in the pleadings, plaintiffs are not entitled to the relief sought by this action. There is no error in the judgment dissolving the temporary restraining order.

Affirmed.

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W. C. WEATHERMAN v. R. J. REYNOLDS TOBACCO COMPANY.

(Filed 16 April, 1930.)

**Negligence D c—Nonsuit is proper where evidence fails to show that plaintiff was injured by negligence of defendant.**

An action to recover damages for a personal injury alleged to have been negligently inflicted will be nonsuited in the absence of evidence tending to show that the plaintiff was injured by the negligence of the defendant as alleged in the complaint. *Owenby v. Power Co.*, 194 N. C., 129, cited and applied.

STACY, C. J., not sitting.

APPEAL by plaintiff from *Schenck, J.*, at February Term, 1930, of FORSYTH. Affirmed.

CARY *v.* TEMPLETON.

This is an action to recover damages for personal injuries sustained by plaintiff, while he was at work as a carpenter in a building under construction by the defendant.

The action was tried in the Forsyth County Court. From judgment dismissing the action as upon nonsuit, at the close of the evidence, plaintiff appealed to the Superior Court of Forsyth County. His only assignment of error on said appeal, was based on his exception to the judgment of the County Court.

From judgment of the Superior Court, overruling his assignment of error, and affirming the judgment of the County Court, plaintiff appealed to the Supreme Court.

*John D. Slawter and Parrish & Deal for plaintiff.*
*Manly, Hendren & Womble for defendant.*

PER CURIAM. The judgment of the Forsyth County Court, dismissing this action, at the close of the evidence, as upon nonsuit, is supported by the decision of this Court in *Owenby v. Power Co.*, 194 N. C., 129, 138 S. E., 529. The evidence did not tend to show any facts upon which defendant could be held liable to plaintiff for damages resulting from his injuries. In the absence of evidence tending to show that plaintiff was injured by the negligence of defendant, as alleged in the complaint, the action was properly dismissed by the Forsyth County Court.

There is no error in the judgment of the Superior Court, affirming the judgment of the County Court. The judgment is

Affirmed.

STACY, C. J., not sitting.

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TOWN OF CARY v. J. M. TEMPLETON, JR.

(Filed 16 April, 1930.)

**Judgments C c—Consent judgment is solemn contract of parties and may not be set aside in absence of fraud or mutual mistake.**

A consent judgment is the solemn contract of the parties entered of record with the consent of the court, and in the absence of fraud or mutual mistake cannot be set aside without the consent of all, and applies to the authorization of a judicial sale under such judgment.

CIVIL ACTION, before *Lyon, J.*, at January Special Term, 1930, of WAKE.

*Clyde A. Douglass for plaintiff.*
*W. Brantley Womble for defendant.*

PER CURIAM. This proceeding involves the confirmation of a judicial sale. A consent judgment was entered authorizing the sale of property. There is no contention that the sale was not properly conducted in full accordance with said judgment. A consent judgment is the solemn contract of the parties entered upon the records of the court with the sanction and approval thereof. *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350; hence, in the absence of fraud or mutual mistake, such a judgment cannot be altered or set aside without the consent of all parties thereto. *Bank v. Mitchell,* 191 N. C., 190, 131 S. E., 656.

The record discloses no error of law warranting a reversal of the judgment, and the same is

Affirmed.

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IN RE B. FRANK HARRIS AND WIFE, MARIE M. HARRIS, v. AMERICAN BANK AND TRUST COMPANY, TRUSTEE (FORMERLY AMERICAN TRUST COMPANY, OF RICHMOND, VIRGINIA), A. M. SCALES, TRUSTEE, FOR PILOT LIFE INSURANCE COMPANY, J. B. HICKS, TRUSTEE, FOR JOEL T. CHEATHAM, J. C. KITTRELL, TRUSTEE, FOR HEIRS OF B. T. BRODIE.

(Filed 23 April, 1930.)

**Mortgages H n — Where no loss is occasioned by resale, depositor of amount therefor is entitled to a refund of the deposit.**

The deposit required by C. S., 2951, is to guarantee against loss in a resale of land under foreclosure sale of a mortgage, and where the clerk of the Superior Court has required of a person placing an advance bid a deposit representing a five per cent increase bid, and in addition a deposit to guarantee compliance with the bid, under the statute, and the lands are resold and bought in by the one making the advance bid, and he refuses to pay the amount because of threatened litigation, and the lands are again resold and bring a surplus over that of the prior resale: *Held,* there has been no loss occasioned by the first resale, and the person making the deposit therefor is entitled to receive it back as against the claim therefor of one holding a note secured by a junior mortgage on the same property.

APPEAL by petitioner, Joel T. Cheatham, from *Small, J.,* at October Term, 1929, of VANCE. Affirmed.

The following judgment was rendered by the court below:

This cause coming on to be heard during the regular civil term of Superior Court of Vance County, October, 1929, all parties being present and represented by counsel. It was agreed in open court that the presiding Judge, Walter L. Small, might find the facts and enter judgment thereon as he might view the law of the case.

Evidence was offered, and upon such evidence and admissions in the pleadings and those made during the hearing, the court finds the following facts:

First. That B. Frank Harris executed deeds of trust securing notes, as follows:

First lien deed of trust to A. M. Scales, trustee, dated 6 February, 1924, Book 99, page 55, for $15,000, for whom and the holder of said bond R. S. McCoin, of Henderson, N. C., was and is attorney, principal and interest as of 29 March, 1929, $15,251.74.

Second lien deed of trust to American Bank and Trust Company, trustee, dated 16 June, 1925, of record Book 127, page 117, for $12,879.66, for whom and holder of bond secured thereby R. S. McCoin, of Henderson, N. C., was and is attorney, balance as of 29 March, 1929, $4,164.24.

Third lien deed of trust to J. B. Hicks, trustee, dated 3 July, 1928, of record Book 151, page 106, for $4,747.75, and as of 29 March, 1929, notes held by S. R. Watson, $4,961.39.

Fourth lien deed of trust to J. C. Kittrell, trustee, dated 22 August, 1928, Book 151, page 139, interest not figured, for whom and also holders of bond J. C. Kittrell, of Henderson, N. C., is attorney. Notes held by estate B. T. Brodie, $10,700.

Second. All of the above liens being past due and unpaid, the American Bank and Trust Company, trustee (formerly American Trust Company, of Richmond, Va.), pursuant to power set forth in deed of trust recorded in Book 127, page 117, and above referred to as 'second lien,' proceeded to advertise the lands therein described for sale on the ..... day of February, 1929, and after due advertisement sold the same on 18 March, 1929, at which time S. R. Watson, who was then the holder of notes secured by the third lien, became the last and highest bidder at the sum of $5,000 and the purchaser to assume the first lien and taxes.

Third. Within ten days of said sale B. Frank Harris, the mortgagor, placed an advanced bid thereon and deposited with the clerk of Superior Court $250, representing five per cent increased bid and $750 in addition thereto to guarantee the performance of his bid, making a total of $1,000 deposited with the clerk of Superior Court of Vance County. Thereupon, the clerk ordered a resale of the property which was duly advertised, and at said sale the property was bid in by B. Frank Harris at the sum of $6,000, purchaser to assume first lien and taxes. This sale was duly reported to the clerk of Superior Court by said trustee. Upon the expiration of ten days, no increased bid having been filed with the clerk of Superior Court, said clerk of Superior Court upon application of the trustee, which application did not contain request for said $1,000 and authority to disburse, ordered the execution and delivery of a good

and sufficient deed to said B. Frank Harris or his assignee upon the compliance of the terms of the sale. The deed was prepared and tendered, said B. Frank Harris and also to his assignee, R. J. Wortham, and refused by them, and both refused to pay for said lands the bid of $6,000, holders of the fourth lien having protested and threatened litigation over right of B. Frank Harris to assign his bid.

Fourth. Immediately thereafter the clerk of the Superior Court ordered the said trustee to advertise said land for a period of thirty days and offer the same for sale upon the same terms and conditions as a former sale; and as required in said deed of trust and by law. In obedience to said order the trustee did offer and sell the same on 3 May, 1929, when and where Joel T. Cheatham, petitioner, who had acquired the S. R. Watson bonds secured by the third deed of trust, became the last and highest bidder at the sum of $4,100 and assuming the first lien and taxes. Said trustee duly reported said sale to the clerk of Superior Court, and within ten days thereof L. R. Gooch filed a five per cent increased bid and deposited the same with the clerk of Superior Court and requested that the said property be readvertised and sold.

Thereupon the clerk ordered said trustee to immediately readvertise said property for fifteen days under the same terms of the former sale. Said trustee readvertised and sold on 1 July, 1929, when and where Joel T. Cheatham became the last and highest bidder at the sum of $6,500 and purchaser assuming the first lien and taxes. Said trustee made due report thereof to the clerk of the Superior Court, and upon the expiration of ten days no increased bid having been filed, the said clerk ordered said trustee upon its application to make, execute and deliver a good and sufficient deed to Joel T. Cheatham upon his compliance with his terms of the sale. The deed was executed and delivered by said trustee to Joel T. Cheatham, who complied with the terms thereof.

Fifth. If the bid of B. Frank Harris, of 15 April, 1929, had been carried out and made good the distribution thereunder would have been as follows:

| | | |
|---|---|---|
| Amount of bid of B. Frank Harris, 4/15/29 | | $6,000.00 |
| Amount due on second mortgage, 4/25/29 | $4,182.28 | |
| Expense of sale to 4/25/29, 5 per cent commission on $6,000 | 300.00 | |
| Court cost (estimated) | 10.00 | |
| Auctioneer's fees | 6.00 | |
| Advertising | 15.00 | |
| | | 4,513.28 |
| Balance to be applied on third mortgage | | $1,486.72 |

The distribution of the proceeds of the final sale of said land to Joel T. Cheatham was as follows:

| | | |
|---|---|---|
| Amount of bid | | $6,500.00 |
| Amount due on second mortgage, 7/10/29 | $4,235.03 | |
| Expense of sale, 5 per cent commission on $6,500 | 325.00 | |
| Advertising | 21.00 | |
| Auctioneer's fee | 12.00 | |
| Court cost | 15.00 | |
| | | 4,608.03 |
| Balance to be applied on third mortgage | | $1,891.97 |

Making the holders of the debt secured by the third deed of trust receive $405.25 more than they would have received if the bid of B. Frank Harris of 15 April, 1929, had been carried out.

After applying the above credit on the notes of the third lien there is a balance due and unpaid thereon of $2,860.29.

Sixth. The deposit made by L. R. Gooch for an advanced bid was returned to him by the clerk of the Superior Court. The deposit of $1,000 by B. Frank Harris being demanded by B. Frank Harris and Joel T. Cheatham was held by the clerk of the court pending the termination of this controversy, and this action was brought by Joel T. Cheatham.

Upon the foregoing facts the court being of the opinion that B. Frank Harris is entitled to the $1,000 deposited by him with the clerk of the Superior Court:

Wherefore, it is ordered, adjudged and decreed that the clerk of the Superior Court of Vance County pay over to B. Frank Harris, or his assignees, the sum of $1,000 deposited by B. Frank Harris, securing an advanced bid on 15 April, 1929, and that the cost of this action be taxed against the petitioner, Joel T. Cheatham.

WALTER L. SMALL, *Judge Presiding.*"

The petitioner made numerous exceptions and assignments of error and appealed to the Supreme Court.

*D. P. McDuffie for Joel T. Cheatham.*
*Perry & Kittrell for B. Frank Harris.*

CLARKSON, J. The question involved: Where a mortgagor placed an advance bid on property under trustee's sale and makes deposit, as required by the clerk, and the property is readvertised and bid in by the mortgagor at the advanced bid, the mortgagor not complying with

the terms of sale, it is ordered resold by the clerk, and at the last resale brings $500 more than the advanced bid made by mortgagor, leaving $405.25 more to be applied to the creditors' notes secured by third deed in trust, does the mortgagor lose the money he deposited in court for the advance bid? We think not.

The controversy again requires the construction of C. S., 2591. This section in regard to other matters has been frequently construed. See *Banking Co. v. Green,* 197 N. C., 534, and cases cited; *Hanna v. Mortgage Co.,* 197 N. C., 184; *Brown v. Sheets,* 197 N. C., 268; *Davis v. Insurance Co.,* 197 N. C., 617. The part of C. S., 2591, relative to the present controversy 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, 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 advertise 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. . . . 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."

B. Frank Harris, who placed an advance bid on the property sold under the second deed of trust, was required by the clerk, under the statute, to deposit with the clerk $250, representing five per cent increased bid and also $750 in addition, to guarantee compliance of his bid. Upon a resale B. Frank Harris was the last and highest bidder at $6,000, and no increase bid having been filed in accordance with the statute a deed was duly tendered to him and his assignee, and they refused to pay for said land, as the holders of the indebtedness secured by the fourth lien protested and threatened litigation over the right of B. Frank Harris to assign his bid. The land was readvertised under the second deed of trust, in accordance with the statute, and at the last resale bid in by Joel T. Cheatham for $6,500, who had purchased the notes secured by the third deed of trust and who assumed the first lien and taxes, and the deed was duly made to him. The last sale to Joel T. Cheatham brought $405.25, after paying expenses, more than the

B. Frank Harris' bid. Joel T. Cheatham claims that the $1,000 deposited by B. Frank Harris should be applied on the notes due him secured by the third deed in trust, balance due on his notes amounting to $2,860.29. We think the claim of Joel T. Cheatham cannot be sustained. The money deposited by B. Frank Harris, under the statute, was a guarantee that there would be no loss occasioned if he be declared the purchaser at the resale; he was so declared and did not comply, but there was no loss, as the property brought more on resale. The land on resale, after paying expenses, brought $405.25 more than B. Frank Harris' bid. After applying the proceeds of Joel T. Cheatham's bid of $6,500 on the second lien and third lien, and after paying expenses, Joel T. Cheatham received a surplus of $405.25 over the $6,000 bid by B. Frank Harris. There was no loss sustained by Joel T. Cheatham, the holder of the notes secured by the third deed in trust. He obtained a deed for the land at the bid he placed on same. He paid $6,500 for the land, and after paying expenses and the second lien and crediting the balance on the third lien, he obtained as a credit on his notes $405.25 more than he would have gotten if B. Frank Harris had complied with his bid. No wrong has been done Joel T. Cheatham and no damage sustained by him, from the facts appearing in this case. Joel T. Cheatham, in law or equity, has no claim to the $1,000, under the facts and circumstances of this case. The judgment below is

Affirmed.

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J. R. OWEN v. SALVATION ARMY, INC., AND ROYAL INDEMNITY COMPANY OF NEW YORK.

(Filed 23 April, 1930.)

**Principal and Surety B a—In this case held: cause of action was stated against surety on bond for private construction.**

Where a surety bond for the erection of a building indemnifies the owner against loss for the failure of the contractor to perform his contract, the owner's allegation in his pleading against the surety that the contractor had failed to perform his contract and that he was damaged in a certain sum thereby is sufficient to state a cause of action against the surety, and its demurrer thereto was properly overruled, there being no stipulation in the bond that the owner should complete the contract as a condition precedent to recovery.

APPEAL by defendant, the Royal Indemnity Company of New York, from order of *McElroy, J.*, at February Term, 1930, of the Superior Court of GUILFORD County. Affirmed.

On 3 July, 1928, plaintiff, J. R. Owen, and defendant, Salvation Army, Inc., entered into a contract in writing, by which plaintiff agreed to make certain additions to a building owned by defendant in the city of Greensboro, and defendant agreed to pay to plaintiff, upon his completion of said additions in accordance with said contract, a stipulated sum of money. Plaintiff agreed to furnish the labor and material required for the construction of said additions.

Plaintiff alleges in his complaint that he has fully performed his part of said contract; that defendant has made certain payments to him on account of said contract, and that there is now due him by defendant on account thereof the sum of $11,716.29.

This action is for the recovery by plaintiff of a judgment against the defendant, Salvation Army, Inc., for the sum of $11,716.29, and interest, and for other relief.

Defendant in its answer to the complaint denies that plaintiff has fully performed his contract with the defendant, and therefore denies that it is indebted to plaintiff as alleged in the complaint.

As ground for affirmative relief, defendant alleges in its further answer, that plaintiff has failed to perform his contract with defendant, as specified therein, and that defendant has suffered damages by reason of such failure, in the sum of $2,342.86.

Defendant demands judgment that plaintiff recover nothing in this action, and that defendant recover of the plaintiff, and of the Royal Indemnity Company, the surety on the bond, filed by him as required by his contract, the sum of $2,342.86.

On motion of the defendant, Salvation Army, Inc., the Royal Indemnity Company of New York, was made a party to the action, and thereafter the said defendant filed its complaint against the said Royal Indemnity Company of New York.

On 30 July, 1928, the plaintiff, J. R. Owen, as principal, and the Royal Indemnity Company of New York, as surety, executed a bond in the sum of $15,000, payable to the defendant, Salvation Army, Inc., conditioned among other things for the faithful performance by the principal of his contract with the obligee, Salvation Army, Inc., dated 3 July, 1928.

In its complaint against the Royal Indemnity Company of New York, filed in this action, the defendant, Salvation Army, Inc., alleges:

"4. That plaintiff failed and refused to perform said contract as he agreed to do. He failed to furnish the materials of the type and quality which he agreed to furnish, and failed and refused to perform said work according to the plans and specifications in many respects, and by reason thereof this defendant was damaged by the plaintiff in the sum of $2,403.25, as this defendant is advised and believes.

"5. That after giving the plaintiff all credits to which he was entitled, the plaintiff is still indebted to this defendant in the sum of $2,342.86, as this defendant is advised and believes, and this defendant is informed and believes that the defendant, the Royal Indemnity Company of New York, is by reason of said bond, liable to this defendant for said sum."

From the order overruling its demurrer in writing, duly filed to the complaint of the defendant, Salvation Army, Inc., the Royal Indemnity Company of New York appealed to the Supreme Court.

*King, Sapp & King, and Thos. J. Hill for Salvation Army, Inc.*

*Hobgood & Vinson and James MacClamroch, Jr., for Royal Indemnity Company of New York.*

CONNOR, J. The bond executed by the plaintiff, J. R. Owen, as principal, and by the Royal Indemnity Company of New York, as surety, and payable to the defendant, Salvation Army, Inc., as obligee, contains clauses as follows:

"Whereas the principal has by means of a written agreement dated 3 July, 1928, entered into a contract with the owner for additions and alterations to Salvation Army Building at 520 South Elm Street, Greensboro, N. C., in accordance with plans prepared by M. L. Alberton, designer, a copy of which agreement is by reference made a part hereof:

Now, therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor and materials, then this obligation shall be null and void; otherwise, it shall remain in full force and effect."

The allegation in the answer or cross-complaint, which is admitted by the demurrer, that the principal in said bond has failed to perform his contract with the obligee, with the result that the obligee has suffered damages in the sum of $2,342.89, is sufficient to constitute a cause of action on which the obligee is entitled to recover of the principal and the surety in said bond. There is no allegation in the complaint of a breach of the bond for which the surety would be liable only as an indemnitor; the absence of such allegation, however, does not render the cross-complaint demurrable. Where there is an allegation in the complaint of a breach of the bond, resulting in damages to the obligee, for

which the surety is liable not as an indemnitor, but as a surety, such allegation is sufficient to constitute a cause of action against both the principal and the surety. In the instant case, there is no provision in the bond or in the contract which requires that the owner shall complete the contract, upon the default of the contractor, as a condition precedent to recovery in an action on the bond. There was therefore no error in the order overruling the demurrer. The order is

Affirmed.

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STATE v. JAMES BRUMFIELD, ALIAS ERNEST BRUMFIELD.

(Filed 23 April, 1930.)

**Criminal Law L a—Appeal in capital cases will be dismissed for failure to prosecute according to Rules of Court, no errors appearing of record.**

Whether the Supreme Court acquires jurisdiction of an appeal in *forma pauperis* from a conviction of a capital felony when the affidavit for leave to appeal fails to state, as required by C. S., 4651, that the "application is in good faith," *quære?* and where the appeal has not been prosecuted as required by the Rules of Court the appeal will be dismissed upon motion of the Attorney-General after an examination of the record for errors appearing upon its face.

MOTION by State to dismiss appeal.

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

STACY, C. J. At the October Criminal Term, 1929, of Union Superior Court, the defendant herein, James Brumfield, was tried upon an indictment charging him with a capital felony, to wit, burglary in the first degree, which resulted in a conviction and sentence of death. From the verdict thus rendered and judgment entered thereon, the defendant gave notice of appeal to the Supreme Court, but this has not been prosecuted as required by the rules. Indeed, as the attempted appeal is in *forma pauperis,* and the affidavit for leave to appeal without giving security for costs fails to state, as required by C. S., 4651, that "the application is in good faith," it may be doubted as to whether we have any jurisdiction to hear the matter. *S. v. Martin,* 172 N. C., 977, 90 S. E., 502. Nevertheless, as the life of the prisoner is involved, we have examined the case and find no error on the face of the record.

The motion of the State must be allowed.

Appeal dismissed.

HETTIE H. SMITH, ADMINISTRATRIX OF JUNIUS HERBERT SMITH, JR., DECEASED, v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 23 April, 1930.)

**1. Master and Servant F h—Dependent awarded damages under secs. 38 and 40 Workmen's Compensation Act is not entitled to award under sec. 29.**

Construing the Workmen's Compensation Act as a whole to effectuate the intent and purpose of the Legislature, it is held that the purpose of the act is to provide compensation for the employee injured in case the injury is not fatal, and for those dependent upon him in case the injury is fatal, and the last clause of section 29 purporting to provide for the personal representative of the deceased is construed to be repugnant to and irreconcilable with the other provisions of the act, and should be disregarded in giving effect to its other provisions, sections 38 and 40 providing in clear language and comprehensive detail for a full legal method of determining compensation for fatal injuries, and where a dependent has been awarded compensation under sections 38 and 40 she is not entitled to the maximum award as administratrix under section 29.

**2. Statutes B a—In construing a statute the spirit of the act will prevail over the letter.**

Where a section of a statute is repugnant to the spirit of the act and cannot be reconciled by reasonable construction with the language of the other sections conveying and establishing the intent of the Legislature, the repugnant section must give way to the spirit of the act, and will be declared void.

CIVIL ACTION, before *Harris, J.*, at February Term, 1930, of GRANVILLE.

This cause was heard by the North Carolina Industrial Commission. The hearing was held 23 September, 1929, and the Industrial Commission found as a fact that Hettie H. Smith, mother of deceased, was the sole partial dependent of the deceased, Junius Herbert Smith, to the extent of $8.00 per week, and made an award in favor of Mrs. Hettie H. Smith as the sole partial dependent against the Carolina Power and Light Company for compensation at the rate of $4.78 per week, payable weekly for a period of 350 weeks, beginning 29 August, 1929, and funeral expenses in the amount of $200.

Subsequent thereto, to wit, on 25 October, 1929, said Mrs. Hettie H. Smith qualified as administratrix of said deceased workman and made application for compensation under the Workmen's Compensation Act as administratrix. Notices were duly issued and a hearing was held on 5 November, 1929. The statement of case, findings of fact, and conclusions of law of the North Carolina Industrial Commission in said cause are as follows:

*Statement of the Case.* Junius Herbert Smith, Jr., met with a fatal accident on 29 August, 1929; the defendants admit that the deceased met with an accident while regularly employed by the defendants, and that the said accident resulting in the death of Junius Herbert Smith, Jr., arose out of and in the course of his employment with the defendant. It is also admitted that the average weekly wage, at the time of the fatal accident, was $18.11.

A hearing in this cause entitled "Junius Herbert Smith, Jr., employee, deceased; J. H. Smith, Hettie Harris Smith, Charlotte H. Smith, Lacy E. Smith, Helen L. Smith, W. Daniel Smith, plaintiffs, *v.* Carolina Power and Light Company, Employer, Self-Insurer, Defendant," was held on 23 September, 1929, before Commissioners Dorsett and Wilson, at Oxford, N. C. Upon hearing in the above-styled case the commission found from all of the evidence that Mrs. Hettie Smith, mother of the deceased, Junius Herbert Smith, Jr., was sole partial dependent. An opinion was filed and an award made to Mrs. Hettie Smith, directing the defendant, Carolina Power and Light Company, to pay compensation at the rate of $4.78 per week for a period of 350 weeks, the funeral expenses not to exceed $200, and the costs of the hearing. No appeal has been perfected from this opinion and award.

Since the date of the hearing, on 23 September, 1929, Mrs. J. H. Smith has been duly qualified as administratrix of the estate of the late Junius Herbert Smith, Jr., deceased. Such qualification is recorded in the office of the clerk of the Superior Court of Granville County, in Book No. 4, Record of Administrators. As administratrix Mrs. Smith, through her able counsel, is contending that the Carolina Power and Light Company, the defendant, pay to her the maximum amount of $6,000, as provided in sections 29 and 41 of the North Carolina Workmen's Compensation Law for death benefits.

The defendant, Carolina Power and Light Company, contends that they have complied with the provisions of the North Carolina Workmen's Compensation Law, in that, they are now paying to Mrs. Hettie Smith as the sole partial dependent of the deceased compensation as called for in an opinion and award directed by this commission, under date of 30 September, 1929, the said opinion and award being based on the hearing conducted by this commission on 23 September, 1929. The defendant introduces as a part of this record the testimony in the first hearing; counsel for the plaintiff objects to the introduction of this testimony; objection was overruled, and exception noted. From the evidence the commission makes the following findings of fact:

*Findings of Fact.* 1. That Junius Herbert Smith, Jr., while regularly employed by the defendant, met with an accident on 29 August, 1929, resulting in his death. The fatal injury by accident arose out of

and in the course of his employment. His average weekly wage was $18.11. Parties, plaintiff and defendant, are bound by the provisions of the North Carolina Workmen's Compensation Law.

2. A hearing was held in the same cause on 23 September, 1929, at Oxford, N. C., and compensation awarded to Mrs. J. H. Smith as the sole partial dependent as provided in section 38 of the North Carolina Workmen's Compensation Law, whereupon an opinion was filed and an award thereupon was made under date of 30 September, 1929, directing the payment by the defendant to Mrs. J. H. Smith as sole partial dependent compensation at the rate of $4.78 per week for a period of 350 weeks, and funeral expenses not to exceed $200, together with the costs of this hearing. There has been no appeal perfected upon the above award of 30 September, 1929.

3. Mrs. J. H. Smith has duly qualified as administratrix of the estate of Junius Herbert Smith, Jr., and as such, is not entitled to recover under sections 29 and 41 of the North Carolina Workmen's Compensation Law, as compensation has been awarded to dependents as provided for in section 38 of the said Compensation Law.

Upon the foregoing findings of fact the commissioner arrived at the following:

*Conclusions of Law.* The determinative questions involved in this case are:

1. The legislative intent as to the amount of compensation benefits payable in case of a deceased employee whose death was caused by accidental injury arising out of and in the course of his employment.

2. To whom such benefits are payable where there are dependents.

3. The manner and time for making such payments.

It is a well recognized principle of law that in the construction of any legislative act the courts endeavor to arrive at the real intent and purpose of the Legislature in adopting the act being considered, to give meaning to every section and word of the act in so far as can consistently be done, and in doing this the act, as a whole, must be scrutinized with the view of making effective every part thereof where this does not violate the clear intent and purpose of the whole. In the case of *Fortune v. Buncombe County Commissioners,* 140 N. C., 322, we find that the Supreme Court has said: "A statute should be construed with reference to its general scope and the intent of the Legislature in enacting it, and in order to ascertain its purposes the courts must give effect to all of its clauses and provisions and must construe ambiguous language in such a sense as will conform to the scope of the act and effectuate its object."

Aside from the written opinions of the courts of the many states construing similar acts as the North Carolina Workmen's Compensation

Act, this act itself volubly expresses the main purpose and intent thereof; the act is entitled, "Workmen's Compensation." Its many sections repeatedly refer to the benefits to the injured employee and his dependents. The act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this act and includes funeral benefits provided herein." (Section 2 k.)

This Commission has published in its Bulletin No. 1, page 7, a portion of an opinion written by *Justice Pitney* of the United States Supreme Court, in *New York Central Railroad v. White,* 243 U. S., 188. This opinion sustains the constitutionality of the New York Compensation Act, and *Justice Pitney* points out the evils which the Compensation Laws remedied as being the conditions that existed in industry with its relations to its injured employee such as to make the injured employee and his dependents a burden upon public or private charity.

There can be no doubt that the Legislature intended that the benefits of the act were to flow to an injured workman if the injury did not produce death, and if death resulted from the injury the benefits were primarily for the benefits of either dependents or partial dependents, and should there be neither then the personal representative should collect the benefits.

By exclusion, except for section No. 29, and section 40, which will be treated separately hereafter, we find that death benefits are payable only to dependents of an injured employee, who were so dependent for three months prior to the accident causing the injury that resulted in death.

The first section of the act in which personal or legal representative is mentioned is section 2(b): "Any reference to an employee, who has been injured, shall when the employee is dead, include also his legal representative, dependents and other persons, to whom compensation may be payable." The compensation payments referred to are provided for only in sections 29, 30, 31, 38, 40.

Section 29, except for the last clause, provides for payment to be made to the injured employee for total disability—which, of course, ceases upon death of the injured employee from causes other than the injury. Bearing upon this and giving light upon this interpretation, we find that section 38 provides: "If death results proximately from the accident and within two years thereafter all while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid subject to the other sections of this act in one of the methods hereinafter provided to the dependents of the employee, etc."

Nothing else appearing than the quotation from sections 29 and 38, the conclusion is inevitable that for cases of total disability to an injured employee the Legislature clearly intended that for compensation for

total disability the payments were to be made to an injured employee, and in case of death proximately caused by the injury while total disability continued and within six years after the accident the payments shall continue to be made to the deceased's dependents from date of last payment to the injured workman.

Section 30 provides for compensation payments for partial incapacity, which cease upon the death of the injured employee, unless it is such a case as would come within the purview of section 38 and within two years after the accident, subsequent payments thereon to be continued to the dependents of the deceased.

Section 31 provides for certain specific payments for injuries and we find that section 37 specifically requires any unpaid balance due under section 31 at the death of the injured shall be paid to the next of kin dependent upon the deceased employee unless death is due to a cause compensable under the act, and the dependents are awarded compensation therefor, whereupon the specific payments are to cease.

Section 38 provides for payments to dependents, if any, of employees, in case of death caused proximately by the accident as set out above.

Section 40 provides for payments to the personal representative of the deceased employee where there are no dependents.

We have shown that except for the last sentence in section 29 and section 40, there is no provision made for compensation payments as referred to in section 2(b) to be made to any persons other than the injured employee and his dependents.

The last clause of section 29 is ambiguous and conflicts with sections 38 and 40; considered alone with the provisions of this section it is meaningless. The section deals with payments to be made to injured employee for total incapacity for work, which total incapacity ceases upon the natural death of the injured employee. To construe it as having any connection with any other portion of this section 29 would be to construe the Legislature as having written into the act a life insurance policy upon the life of injured employee in this State sustaining a temporary or permanent total disability in the amount of $6,000. Such a construction would be wholly at variance with the intent and purposes of the whole act and contrary to public policy.

Since it is clearly the primary intent of the Workmen's Compensation Act of this State and other States to provide for compensation to injured employees or their dependents in case of death of employee from injuries resulting proximately from industrial accidents.

Then, second: In case there are no dependents the compensation shall be computed to its present value and paid to the personal representatives. Substantiating this construction, we find section 38 provides for pay-

ments in case of death proximately caused by accident where there are dependents and section 40 provides for payments in case of death caused by accident where there are no dependents. In as much as the last clause of section 29 is redundant as it appears in connection with any other portion of section 29, and is specific neither as to the question (a) was death caused proximately from accidental injury or not? nor the question (b) was the payment to be made if dependency existed or not?

We must conclude that the clause is merely one of limitations of death benefits to an amount of $6,000, and a general clause as relates to the question, "in case of death the total sum paid shall be $6,000," leaving us to look elsewhere to ascertain the legislative intent as to the specific questions of the beneficiary and amounts where there are dependents or are no dependents, such cases being specifically provided for in sections 38 and 40. In a recent opinion by *Chief Justice Stacy,* in which he dissents from the Court's opinion, in the case of *Boyd v. Brooks,* 197 N. C., 655, is stated this principle: "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 provision that it cannot be executed, it will be declared to be inoperative and void."

Our Supreme Court, in the case of *School Commission v. Alderman,* 158 N. C., page 198, has thus stated the rule of construction in similar cases where there is a conflict between the general clauses and specific clauses as follows:

"The ordinary and accepted rule of interpretation is that when a general intent is expressed in a statute and the act also expresses a particular intent incompatible with the former the particular intent is to be considered in the nature of an exception." 1 Lewis Sutherland on Statutory Constructions (2 ed.), 268.

Considering the foregoing with the rule of our Court, as set out just above, we must conclude that section 38 of the act expresses the legislative intent in such a case as is now before us of a compensable injury resulting in death with the deceased having dependents dependent upon him for support at the time of the accident. The case is dismissed; each party will pay its own costs. J. Dewey Dorsett, Commissioner.

From the foregoing award and conclusions of law the plaintiff, Hettie H. Smith (Mrs. J. H. Smith), administratrix of the deceased, appealed to the full Commission as provided by law. The full Commission concurred in the disposition of the cause made by Commissioner Dorsett, and the plaintiff appealed to the Superior Court of Granville County.

The trial judge approved the award made by the North Carolina Industrial Commission. The pertinent part of the judgment of the Superior Court is as follows:

It is hereby ordered, adjudged and decreed that the findings, opinion, conclusions and award of the North Carolina Industrial Commission be, and the same are hereby approved and affirmed; that said award was properly made under section 38 of said Workmen's Compensation Act, which section deals explicitly and in a complete manner with, and applies to, the instant case; that, the last sentence of section 29 of said act, which provides: "In case of death, the total sum paid shall be $6,000, less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of the deceased," does not apply to the instant case, is in irreconcilable conflict with the provisions of section 38 of said act (subsequent to section 29) is inconsistent with the general intent and purport of said act, and is ineffective and inoperative.

It is further ordered, adjudged and decreed that the defendant recover of the plaintiff its costs of action to be taxed by the clerk, subject, however, to the provision in the award set out in the opinion under date of 14 November, 1929, that "each party paying its own proper costs," as said provision applies to costs accrued at that time.

This, 18 February, 1930.

From the foregoing judgment the plaintiff appealed to the Supreme Court.

*Royster & Royster for plaintiff.*
*Hicks & Stem, L. G. Benford and W. H. Weatherspoon for defendant.*

BROGDEN, J. The Workmen's Compensation Act is built upon two prevailing ideas of compensation and dependency. These ideas are woven into many sections of the statute by clear and explicit legislative declaration. An examination of the act, therefore, discloses a dominant purpose to repair the economic loss sustained by the breadwinner and his dependents, as a result of injury arising in the course of employment. Apparently, the rights of distributees and legatees were not deemed to be of prime importance, if the last clause of the section 29 be excluded from consideration.

The bald question of law presented by the record is whether the last clause of section 29 dominates and directs the interpretation of the act. It is a true saying, and worthy of all acceptation, that "the letter killeth but the spirit giveth life." Indeed, this principle, announced by the world's greatest lawyer, has been recognized and applied to the interpretation of statutes by this Court in the case of *S. v. Scott,* 182 N. C.,

865, 109 S. E., 789. *Walker, J.*, expressed it in this fashion: "The spirit, or reason of the law, prevails over its letter. The meaning of general terms may be restrained by the evident object, or purpose to be attained, and general language may be construed to admit implied exceptions, in order to accomplish what was manifestly intended. It is proper to consider the occasion and the necessity for its enactment, and that construction should be given which is best calculated to advance the object by suppressing the mischief and securing the benefits contemplated. If the purpose, and well ascertained object of a statute, are inconsistent with the exact words, the latter must yield to the controlling influence of the legislative will resulting from a consideration of the whole act." To like effect is the utterance of *Adams, J.*, in *Machinery Co. v. Sellars,* 197 N. C., 30, in these words: "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."

Sections 38 and 40, in clear language and in comprehensive detail, provide a legal method of determining compensation for fatal injuries. The last clause of section 29 is totally repugnant to the definite method of settlement prescribed in sections 38 and 40. Moreover, it cannot be merged or blended either with the spirit of the act or the language employed by the Legislature to convey and establish the intent of the lawmaker. Indeed, it is a sort of legal meteor wandering through legal space without substantial relation to any of the bodies which surround it.

The opinion of Commissioner Dorsett, approved by the trial judge, in our opinion correctly interprets the law, and we so hold.

Affirmed.

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W. T. SMITH ET AL. v. COLLINS-AIKMAN CORPORATION, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 23 April, 1930.)

(For Digest see *Smith v. Light Co., ante,* 614.)

CIVIL ACTION, before *Harris, J.*, 27 January, 1930. From PERSON.

Rosabelle Smith received an injury in the course of her employment, resulting in instant death.

The deceased left a husband and three small children, who, under section 39 of the Compensation Law, are conclusively deemed to be dependents. The insurance carrier offered to settle in accordance with the provisions of section 38 of the Compensation Act. The dependents

refused to accept the offer upon the ground that they were entitled to receive $6,000. A hearing was had and the Industrial Commission awarded a compensation of $7.50 per week for a period of 350 weeks, and in addition thereto, ordered that funeral expenses, not to exceed $200, and all medical bills be paid by the insurance carrier.

From the order so made, the dependents appealed to the full Commission. After considering the matter, the full Commission affirmed the award theretofore made in the cause. Whereupon, the dependents appealed to the Superior Court. The trial judge approved and affirmed the decision and award of the Industrial Commission, and the dependents appealed to the Supreme Court from said judgment.

*C. A. Hall and J. A. Bailey for plaintiffs.*
*Biggs & Broughton for defendants.*

BROGDEN, J. The identical question presented by this appeal was considered and decided in the case of *Hettie H. Smith, Administratrix, v. Carolina Power and Light Co., ante,* 614.

Affirmed.

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ATLANTIC CHRISTIAN COLLEGE v. J. W. HINES, J. C. BRASWELL, AND NORTH CAROLINA BANK AND TRUST COMPANY, EXECUTORS OF J. W. HINES.

(Filed 23 April, 1930.)

**1. Charities A a—In this case held: condition of gift that certain sum in cash or equivalent be raised was complied with.**

The conditions of a gift to an eleemosynary corporation that other subscriptions be raised in a certain amount in cash or securities equivalent to cash by a stated time, is complied with if by the stipulated time other subscriptions in the amount stated have been secured for the purpose in bonds, securities, and promissory notes which could be realized upon and converted into cash in an amount exceeding the amount stipulated as a condition for the gift, and when this is established as a fact upon supporting evidence in the Superior Court, the judgment that the plaintiff recover the amount of the gift will be sustained on appeal.

**2. Same—Burden of proving that conditions of gift had been complied with is upon eleemosynary corporation.**

The burden of proof is on the plaintiff to show that the conditions precedent to a gift to an eleemosynary institution of learning have been performed in its action thereon.

APPEAL by defendants from *Cowper, Special Judge,* at March Term, 1930, of NASH. Affirmed.

The plaintiff is a corporation maintaining and conducting as a religious denomination a college in the city of Wilson under the auspices of the Association of Churches in North Carolina, known as The North Carolina Christian Missionary Convention. With a view to obtaining a substantial endowment for the college the Convention appointed a campaign committee and instructed them to take such steps as their judgment approved for obtaining a substantial permanent endowment. J. W. Hines was a member of the committee. On 3 February, 1927, he made the conditional pledge of a gift to the endowment fund "if and when" the plaintiff complied with the condition which he imposed. The appeal presents for decision the single question whether the plaintiff complied with the condition.

At the hearing Judge Cowper found the facts to be as follows:

1. The plaintiff herein is an eleemosynary corporation, conducting a Grade "A" College at Wilson, N. C., under the auspices of the North Carolina Christian Missionary Convention, a religious denomination of which J. W. Hines, late of Nash County, North Carolina, was a member.

2. J. W. Hines died on or about 13 March, 1928, and the defendants herein, J. W. Hines, J. C. Braswell, and North Carolina Bank and Trust Company, are the executors of his last will and testament.

3. The North Carolina Christian Missionary Convention, at a special meeting held in the town of Greenville, North Carolina, in 1926 appointed a committee known as the campaign committee, to have charge of, on the part of said Convention, the raising for the Atlantic Christian College of a substantial permanent endowment fund.

J. W. Hines was a member of the committee. On 25 October, 1926, the committee entered into a contract with the board of education of the Disciples of Christ (department of endowments) to obtain the services of the board of education of the Disciples of Christ (department of endowments) to assist the committee in obtaining for Atlantic Christian College a substantial permanent endowment fund. This contract contemplated the appointment of a campaign committee by the executive committee of Atlantic Christian College.

Mr. Hines, who was a member of the board of trustees of the college, and a member of its executive committee, was by the said executive committee appointed a member of this campaign committee, which was thereafter known as the crusade committee. Monthly reports of the progress of the effort to raise the endowment were made to the crusade committee thus appointed and this committee passed upon, received and accepted for the college the funds and securities as contemplated by the contract obtained in the campaign, and paid from the funds of the college the expenses incident to the campaign, including the commission thereon.

4. Subscriptions to the endowment fund of Atlantic Christian College reported by the board of education of the Disciples of Christ to the crusade committee at meetings of the said committee, held between 3 February, 1927, and 11 July, 1927, and accepted by the committee, aggregated $211,219.75, exclusive of the subscription of Mr. Hines. He was present at and participated in the deliberations and acts, and personally approved with said committee the progress of the campaign, the payment of the expenses and the payment of the service charges or commissions on gifts and donations, including the payment of one-half of one per cent service charge on the subscription of $100,000 made by the said J. W. Hines.

5. On 3 February, 1927, at the time of the beginning of the campaign under the contract with the board of education of the Disciples of Christ, J. W. Hines made a conditional pledge to the endowment fund of the college, which was in the following words, to wit:

"Wilson, North Carolina, 3 February, 1927.

I will give to Atlantic Christian College five-eighths (5/8) of the capital stock of the Greenville Ice and Coal Company, or if I sell the property, I will give securities arising from the sale of said property up to the amount of one hundred thousand dollars ($100,000) upon the following conditions, to wit:

(1) If and when Atlantic Christian College secured other endowment of two hundred thousand dollars ($200,000) net, cash or securities equivalent to cash, said endowment to be in addition to all endowment the college has as of 1 January, 1927.

(2) Said additional endowment shall have been secured by 1 January, 1930.

(3) If the above conditions are not complied with by 1 January, 1930, then my proposition is void.

(Signed) J. W. HINES."

6. Subsequent to 3 February, 1927, and prior to 31 December, 1929, donations and gifts to its permanent endowment fund were received by the Atlantic Christian College as contemplated in its contract with the board of education of the Disciples of Christ, consisting of cash, stock, bonds, promissory notes, estate notes, pledges for the payment of cash, and other securities, exclusive of the $100,000 conditionally pledged by J. W. Hines, in the aggregate amount of $239,952.34; and the true value and worth of the securities aggregating the said sum of $239,952.34 was, on 1 January, 1930, in excess of $200,000. The value of the securities is found, as a fact, to be in excess of $200,000 by the court, from the evidence before the court as well as from the complaint and answer.

7. On 16 July, 1928, the executors of the last will and testament of J. W. Hines found it desirable and advantageous that the five-eighths interest of the Greenville Ice and Coal Company conditionally given to the Atlantic Christian College, should be administered by some person as trustee for both the college and the executors of Mr. Hines' will, with full power of sale and disposition on the part of the said trustee, and the parties hereto agreed that the same should be transferred to F. P. Spruill, trustee, for the plaintiff herein and the defendants herein, to hold the same or make a sale thereof, and in the event that a sale should be made, that the proceeds thereof should be delivered to Atlantic Christian College under the terms of the contract between J. W. Hines, deceased, and the college, or if the said contract had not been complied with, to deliver the same to the executors of the last will and testament of J. W. Hines.

The trustee sold the five-eighths interest of the Greenville Ice and Coal Company, and received therefor the sum of $100,000, which was by him invested in bonds of the United States of America, and the said bonds are now in the possession of the said F. P. Spruill, trustee, who holds the same as stakeholder. He has filed an appearance herein as appears from the record, stating that he will deliver the bonds in accordance with the judgment of this court.

Upon these facts the following judgment was rendered:

"Upon the foregoing facts, found from the pleadings and the evidence before the court, the court is of the opinion that the Atlantic Christian College, plaintiff herein, is entitled to receive from F. P. Spruill, trustee, discharged from any right, or rightful claim of the executors of the last will and testament of J. W. Hines thereto, the bonds of the United States of America aggregating $100,000, now in the possession of the said F. P. Spruill, trustee, arising from the sale of the five-eighths interest of J. W. Hines in the Greenville Ice and Coal Company; the plaintiff having complied with the terms of the subscription made by J. W. Hines to the Atlantic Christian College under date of 3 February, 1927.

Thereupon, by the court, it is ordered, considered, adjudged and decreed that F. P. Spruill, trustee, deliver to Atlantic Christian College the securities in his possession, to wit:

Bonds of the United States of America of the face value of $100,000, with the dividends accrued since 1 January, 1930, arising from the sale of the five-eighths interest of the late J. W. Hines in the Greenville Ice and Coal Company, freed and discharged of any claim thereto on the part of the executors of the last will and testament of J. W. Hines, the defendants herein, less the premium of $1,468.75 paid in the purchase of said bonds by the executors of the last will and testament of J. W.

Hines, and as to that amount, said Spruill, trustee, shall reserve from interest coupons a sufficient amount to pay, and he is directed to pay, to the executors of the Hines' will the amount of said premium.

This judgment shall be and constitute a voucher on the part of the executors in their administration of the estate of J. W. Hines for the disposition of the interest of J. W. Hines in the Greenville Ice and Coal Company, and the proceeds arising therefrom by his executors subsequent to his death, and a perpetual bar to any other recovery from F. P. Spruill, trustee, on account of the same."

The defendants excepted and appealed.

*W. A. Lucas for plaintiff.*
*W. S. Wilkinson, Jr., for defendants.*

ADAMS, J. It may be seen by reference to the paper signed by J. W. Hines on 3 February, 1927, that his gift to the plaintiff of five-eighths of the capital stock of the Greenville Ice and Coal Company, or of securities in the sum of $100,000, was made dependent upon the precedent condition that the plaintiff should secure by 1 January, 1930, additional endowment funds in the sum of $200,000 net, in cash, or in securities equivalent to cash. It was incumbent upon the plaintiff to show that it had complied with the condition. The record does not contain a list of the securities and they are not open to our inspection; but the material facts appear in the judgment. Prior to 31 December, 1929, gifts in cash, stocks, bonds, promissory notes, estate notes, pledges for the payment of cash, and other securities, exclusive of the $100,000 conditionally pledged by J. W. Hines, aggregating $239,952.34 were received for the permanent endowment fund; and upon an examination of these securities the defendants valued them "at $200,000 or above." It is admitted that friends of the plaintiff executed promissory notes in the net amount of $26,310.71, all of which were solvent, as a guaranty that the plaintiff would receive from the securities mentioned the net sum of $200,000.

Are these securities "equivalent to cash" within the meaning of the testator's conditional gift to the plaintiff? One thing is equivalent to another when it is equal in value, force, meaning, or the like; when it is equal so far as concerns the matter under consideration (New Standard Dictionary), or equal in worth or value, power, defect, import, and the like. Webster's International Dictionary. Under the terms of the contract in *Hassard-Short v. Hardison,* 117 N. C., 61—the plaintiff was to pay the defendant "in cash or its equivalent," and this Court held that these words, without further explanation, meant "anything besides money that defendants might agree to take." The phrase has been con-

strued to signify "something commercially as good as cash, or something that could readily be converted into cash at a fixed price." *Kellogg v. Muller,* 68 Tex., 182, 4 S. W., 361. In *Robinson v. Noble,* 8 Pet. (U. S.), 181, 196, 8 Law Ed., 910, it was held that an agreement to make payment in bank paper "or its equivalent" imposed the duty of making payment in any other notes of equal value.

In the case before us the plaintiff alleged in its complaint and the defendants admitted in their answer that a reputable bank in North Carolina with a strong financial connection and ample ability to perform its contracts has offered to lend the plaintiff $200,000 upon a pledge of the securities; and the trial judge found as a fact from the evidence before him and from the admission of the parties that the value of the securities is in excess of two hundred thousand dollars. The admissions of the parties and the facts set out in the judgment, which we do not review, lead to the conclusion that the securities in question are not only equal in value to $200,000, but are presently available to the plaintiff through the proposed loan. If of equal value and presently available, they are "equivalent to cash" within the terms of the testator's gift. The judgment is

Affirmed.

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W. R. SHEPPARD, TRUSTEE, v. L. B. JACKSON; BLYTHE & SHEPPARD, TRUSTEES, v. L. B. JACKSON.

(Filed 23 April, 1930.)

**1. Parties A a—Trustee of express trust may sue without joinder of cestui que trust.**

Under the provisions of C. S., 449, a trustee of an express trust may sue without joining the one for whose benefit the action is brought, this being an exception to C. S., 446, requiring actions to be brought by the real party in interest.

**2. Appeal and Error J b—Allowance of amendments to pleadings is within discretion of court and not reviewable on appeal.**

In this case amendments to pleadings were allowed by the judge in the court below within his sound discretion, from which no appeal will lie to the Supreme Court.

APPEAL by defendant from *Schenck, J.,* and a jury, at August Special Term, 1929, of HENDERSON. No error.

These two actions were consolidated for the purpose of trial. The plaintiffs brought these actions to recover on two bonds under seal, given by defendant to plaintiffs, one dated 19 September, 1928, for $522.50, due at 90 days; and the other dated 2 November, 1928, for $476.43, due

at 90 days. Interest from date. It was admitted that defendant executed the two bonds sued on.

The defendant's answers are two-fold. He says, first, that the bonds are without consideration and therefore are void, and he says, second, that even if there was a legal consideration for them that he was induced to enter into the contract evidenced by the bonds, that is, signed the bonds and delivered, by reason of fraud perpetrated on him by these plaintiffs.

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

"1. What amount, if any, is the plaintiff, W. R. Sheppard, trustee, entitled to recover of the defendant, L. B. Jackson? Answer: $522.50, plus interest.

2. What amount, if any, are plaintiffs, Blythe & Sheppard, trustees, entitled to recover of the defendant, L. B. Jackson? Answer: $476.43, plus interest."

The court below rendered judgment on the verdict. Defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court.

*Shipman & Arledge for plaintiffs.*
*Joseph W. Little for defendant.*

PER CURIAM. The defendant, at the close of plaintiffs' evidence, and at the close of all the evidence, made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions, and in this we can see no error.

C. S., 446 is, in part, as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided," etc.

C. S., 449: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in whose name, a contract is made for the benefit of another." *Martin v. Mask,* 158 N. C., 436. Plaintiffs are "trustees of an express trust."

The question as to amendment of pleadings is in the sound discretion of the court below. We note defendant's several questions which he contends are involved on this appeal, they do not present any new or novel propositions of law and cannot be sustained.

The issues of fact were determined by the jury under proper instructions by the court below. We find in law

No error.

STATE v. LONNIE PARKER.

(Filed 30 April, 1930.)

1. **Trial E g—Charge correct when construed as a whole will not be held for reversible error.**

The charge of the judge to the jury will be considered as a whole in the same connected way in which it was given, with the presumption that the jury did not overlook any part thereof, and when accordingly it presents the law arising upon the evidence fairly and correctly to the jury, the charge will not be held for reversible error though some of the expressions when standing alone might be regarded as erroneous.

2. **Homicide H c—Instruction in this case held not erroneous.**

Where the evidence upon the trial of a homicide tends to show the defendant guilty of murder in the first or second degree, and the defendant has admitted the killing with a dangerous weapon under circumstances making him guilty of manslaughter at least, a charge of the court to the jury fully defining the three degrees of the homicide and pointing out their constituent elements and distinctive features, and placing upon the State the burden of proving the defendant guilty beyond a reasonable doubt of murder either in the first or second degree, and imposing upon him the burden of satisfying the jury of circumstances sufficient to reduce or mitigate the offense to manslaughter is not erroneous, there being sufficient evidence of the two greater offenses.

3. **Same—Where defendant admits he was aggressor and killed deceased, instruction that he admitted guilt of manslaughter is not error.**

Where the testimony of the prisoner on trial for a homicide is to the effect that he killed the deceased by cutting her throat with a razor after he had provoked her to attack him with a small knife, and that in the fight thus caused he was the aggressor, without evidence on his part of self-defense, the effect of the prisoner's own evidence is to show the offense of manslaughter at least, and the statement in the charge to the jury that prisoner had admitted this degree of the offense is not reversible error.

4. **Homicide E a—Elements necessary to be proven by defendant to show self-defense.**

In order for a prisoner on trial for a homicide to show self-defense, the killing with a deadly weapon being admitted by him, he must show an absence of fault on his part and that the killing was done while he was under actual fear, or had reasonable grounds to fear that his life was in danger or that he was in danger of great bodily harm, and that it was necessary, or that it reasonably appeared to him to be necessary to kill his assailant to save his own life or to protect himself from great bodily harm.

5. **Trial E f—Misstatement of admission of party must be brought to court's attention in apt time or exception will not be considered.**

A misstatement of the admission of a party in the charge to the jury must be brought to the attention of the trial judge in apt time to afford

him an opportunity to correct the same, and an assignment of error based upon an exception thereto is eliminated by the appellant's failure to request a correction or tender a special instruction thereon.

CRIMINAL ACTION tried before *Moore, J.*, at January Term, 1930, of ANSON.

The prisoner was indicted for the murder of his wife, Laura Parker, and was convicted of murder in the first degree. From the sentence of death he appealed, assigning error.

Testifying in his own behalf he gave the following account of the homicide: "I am 20 years old, was born in Union County, and have been living in Anson County twelve years. Have been married about four years. Have no children. Lived on place called Coit Jarman place. Mr. Paul Teal employed me. Tom Tink Leak had charge of the farm. My wife, Laura Parker, and myself lived in a house to ourselves, about 200 yards from where Tom Tink Leak lived. We moved there about a month before crop time. Did not have any trouble when we first moved out there, but about two weeks before her death she had a warrant sworn out for me for hitting her. I was tried before Mr. Gray, and Mr. Waddell paid my fine and costs. I did not go back to live with my wife after the trial, but went to work for Mr. Waddell to work out my fine and costs. Saw Laura in town on Saturday after the trial. We were on friendly terms. Did not see her any more until day she died. I was staying with my mother at night. After seeing Laura in town on Saturday night after the trial I went out in the neighborhood where she was staying, but did not see her. I went to Frank Lomax's house and asked him if he had seen my wife, and if she was at his house. Did not say anything else to him about my wife. On Friday, October 18th, I was at church and saw Laura's brother there. He told me that Tom Tink Leak wanted to see me. On Thursday night I stayed at Ed Horne's house, getting there about ten o'clock. I slept with one of his boys. I had stayed there on Monday night before. Ed lives a little over a mile from where I had lived. On Friday morning Ed told me he would get my wife to pick cotton, and I could talk to her. I told him I did not want to see her. We went to pick cotton, then came back to Ed's and then went to Monroe Leak's to pick cotton. I left Monroe's about eleven o'clock and went over to big road and on down road to my house. I was going to see Tom Tink Leak and find out what he wanted. I went to my house and nobody was there. I had promised my sister who had been washing for me a dress, and I got one of my wife's old dresses out of the house and was going to take it to my sister. Cliff Sullivan lives about two hundred yards from my house. I went on down the road carrying the dress, and went into Cliff's house and got his razor. There was nobody there when I got the razor. I knew where he kept it. I got

the razor so if Tom Tink run on me I would have something. I then went on down the big road, and started to Mr. George Little's quarters, but I turned back and cut through and come back to the road which leads by Tom Tink Leak's house and by my house. After I turned back I tied the dress in front of me like an apron, and as I passed along the road I saw my wife, Laura, and some children in front of the Pearson house. This house sets back from the road. I waved my hand to them, and Laura come across the field and got close to me and stopped and said: 'I didn't know who it was.' We walked on down the road toward the clay hole and talked a good while. I was not mad at her. We was talking about her taking out the warrant for me. After awhile she said she would go back, and she told me she didn't want me any more; that she had another man who would take care of her—she was talking about Tink. She started to leave, and as she did I started to slap her, and we got to scuffling. She had a knife in her hand. In the scuffle we both fell down in the road near the clay hole. In the scuffle my razor fell out of my pocket. She was trying to cut me all the time with her knife. We were both lying on the ground, and I reached around and picked up the razor and cut her. She was cutting at me and I cut her before I knowed what I was doing. I did not mean to kill her. After I cut her I took the knife from her and threw it over in the field on the side of the road. I left her lying on the ground and started off down the road, and I looked back and she was getting up. I saw her fall again, and I went back to where she was and she was dead. I was so scared I hardly knew what I done. I took her and carried her down the road and turned off the road into the field. I don't remember dragging her. I don't remember putting her in a branch nor taking off her clothes nor putting any poles on her. I then went to my mother's house, about five or six miles away. I went past Ed Horne's house, but did not talk to Ed's wife or any other person. Did not tell Mary Fanny Horne that I had on my wife's shoes and that bloodhounds couldn't track me. When I cut her she was still trying to cut me. My thumb was cut while we were in the tussle. Never had talk with Willie McCuller he told about on stand; he was wanting to go with my wife and wanting me to go with his sister. Ed Horne's wife did not go with me, and I did not tell Mr. Tice that I had taken Ed Horne's wife, and I don't remember telling Mr. Tice about cutting my thumb on mowing blade. My wife's hand was cut in the tussle with the razor."

There was evidence tending to show that the deceased had indicted the prisoner for an assault; that for ten days prior to the homicide they had not lived together; that her death occurred on Friday, 18 October, 1929; that on the preceding Monday he had requested one of the witnesses to take her "in the dark somewhere and that would be the end of

her"; that he had said on another occasion that "she didn't treat him right and he was going to fix her"; that he told the wife of one of the witnesses "that he had killed Laura and put her away, and they would never find her," and asked that she would not tell any one she had seen him, because no one had seen him that day except her and Laura; that after arresting the prisoner a deputy sheriff and others examined the premises near the place where the prisoner and his wife had formerly lived; that they found blood in the road near a clay hole a short distance from the home in which the prisoner had lived; that about fifty yards from the clay hole the officer found blood stains on rocks and bushes; that 75 yards away were indications that something had been dragged down the hill from the direction of the clay hole to the woods; that the next morning the naked body of the deceased was found in a pool of water, face down, with logs holding it down so that it was entirely submerged; that her throat was cut and her head almost severed from the body—a hand nearly cut off and four fingers cut across; and that about 30 steps away a woman's clothes covered with trash were found in the hole of a stump.

The prisoner was arrested at his mother's home, seven miles from the place of the homicide.

There was evidence of confessions made by the prisoner. J. F. Tice testified: "He (the prisoner) said that he and his wife got into an argument; that she told him that she did not want to live with him any more, that she had another man who would take care of her. Defendant said that he and his wife got to tussling and they both fell to the ground, and that the razor which he had in his pocket fell to the ground while he was tussling; that his wife tried to cut him with a little knife, tin handle knife, and he picked it up and threw it away and then picked up his razor off the ground and cut her throat; that he then took the knife and threw it in a pasture at the side of the road; that he cut his wife's throat before he realized what he was doing."

Dr. J. M. Covington said: "The defendant told me he had killed his wife, but did not go there for the purpose of killing her; that he went to bring her home, and saw her at a distance and she came to him; that he tried to get her to go home with him and an argument took place; that they got to scuffling and fighting and he cut her throat with the razor."

The assignments of error are set out in the opinion.

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

*Rowland S. Pruette and Barrington T. Hill for prisoner.*

ADAMS, J. The prisoner's assignments of error assail the following parts of his Honor's charge to the jury: 1. "Now, gentlemen, in this

case, as I understand it, and as I understood the admissions of the parties, there are only two questions before you: Whether the defendant is guilty of murder in the first degree or guilty of murder in the second degree; they admit that he would be guilty of manslaughter under the facts proven in this case." 2. . . . and if, according to the admissions, you fail to find him guilty of murder in the first degree, or guilty of murder in the second degree, then you would return a verdict of guilty of manslaughter because that is admitted." 3. "If you fail to find him guilty of murder in the first degree, then you pass to murder in the second degree, and if you find him guilty of murder in the second degree beyond a reasonable doubt it is your duty to say so, and if you fail to find him guilty of murder in the second degree beyond a reasonable doubt, then I instruct you to return a verdict of guilty of manslaughter." 4. . . . "and so that you might know what manslaughter is in passing upon the other degrees, two degrees, I will define it for you. As I charged you, the defendant admits that he is guilty of manslaughter, and perhaps in passing upon that fact you ought to know what manslaughter is to aid you, if it does; so I will give you such information as you may be entitled to as to the other degrees." 5. "Now, the burden is cast on him and he admits he is guilty of manslaughter without offering any defense as to that." 6. "If, however, the deceased assaulted the prisoner, that is, if she laid her hand upon him against his will, or struck or choked him, and the prisoner killed the deceased in the heat of passion and under those circumstances, he would not be guilty of more than the crime of manslaughter, and he admits that." 7. "I have just defined to you so that you might know what manslaughter is, so that it might be some guidance in passing upon the other two degrees of murder that I gave you heretofore, and the instruction as to that remains the same."

These excerpts are not to be treated as instructions detached from and unrelated to other portions of the charge. In *S. v. Exum,* 138 N. C., 599, 619, this Court approved and applied the following quotation from 2 Thompson on Trials: "It (the charge) is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." Thus considered the charge is free from reversible or prejudicial error. The trial judge carefully defined the three degrees of felonious homicide and pointed out respectively their constituent elements and distinctive features. He clearly and repeatedly stated the principle which imposed upon the State the burden of proving beyond a reasonable doubt that the prisoner was guilty of murder in the first or the second degree and which imposed

upon the prisoner, who admitted the killing, the burden of satisfying the jury of circumstances sufficient to reduce or mitigate the offense to manslaughter. In connection with almost every instruction relating to manslaughter he told the jury that as to this offense the prisoner admitted his guilt. This statement is the gravamen of the errors assigned; in fact, it raises the single question which we are called upon to decide.

In considering the exceptions we must bear in mind the important fact that there is no evidence whatever of self-defense. In a prosecution for homicide among the basic elements of self-defense are an absence of fault on the part of the prisoner, actual apprehension and reasonable grounds to apprehend that his life was in danger or that he was in danger of great bodily harm, and that it was necessary or that it reasonably appeared to the prisoner to be necessary to kill the deceased in order to save his own life or to protect himself from bodily harm. *S. v. Crisp,* 170 N. C., 785; *S. v. Baldwin,* 184 N. C., 789; *S. v. Evans,* 194 N. C., 121. None of these elements appears in the evidence; none was testified to by the prisoner.

In the absence of evidence of self-defense, the prisoner, having admitted that he killed his wife, was guilty of murder in the first degree, or murder in the second degree, or manslaughter. The State offered ample evidence to prove murder in the first degree—evidence of express malice, preparation, deliberation and premeditation; and the prisoner's version of the homicide shows him to be guilty, at the least, of manslaughter. He testified that after a conversation between him and his wife she turned to leave him and he struck her; a combat ensued, in which he cut her with the razor and took her life. True, he said she was trying to cut him; but he was the aggressor; he not only entered into the combat willingly; he provoked it. The homicide according to his testimony was certainly nothing less than manslaughter. *S. v. Baldwin,* 152 N. C., 822; *S. v. Kennedy,* 169 N. C., 288; *S. v. Merrick,* 171 N. C., 788; *S. v. Evans,* 177 N. C., 564. The judge could safely have told the jury that the prisoner upon his own testimony was guilty at least of this offense. We do not see how under these conditions the prisoner was prejudiced by the instruction that he admitted he was guilty of manslaughter.

It is manifest, however, that his only hope was to reduce the homicide from murder to manslaughter, and that he did make this admission. Four or five times in charging the jury the judge referred to it. At no time during the progress of the charge or before the verdict was returned did the prisoner's counsel object to the instruction or suggest or intimate that the admission had not been made. In *Barefoot v. Lee,* 168 N. C., 89, the Court remarked in reference to an admission of counsel that if the plaintiffs wished to challenge its correctness they should have called

it to the attention of the court at the proper time, and that it was too late, after verdict, to avail themselves of its incorrectness as a matter of right. The situation is similar to that which arises out of the misstatement of a contention. The trial court is entitled to an opportunity to restate any contention and to correct any erroneous statement of an admission, and failure to request a correction or to give a special instruction on the point eliminates the assignment of error. *S. v. Steele,* 190 N. C., 506, 510. We find

No error.

C. W. GILLIAM, TRUSTEE IN BANKRUPTCY OF JENNINGS MANUFACTURING COMPANY, BANKRUPT, v. T. B. SANDERS.

(Filed 30 April, 1930.)

**1. Judicial Sales A d; Bankruptcy C d—Court ordering sale has jurisdiction of action for damages for failure to comply with bid.**

In proceedings in bankruptcy, the United States District Court has jurisdiction to determine all matters relating to its order for the sale of the bankrupt's property to make assets for distribution among creditors, and pending a case in bankruptcy, one who bids in at the sale is regarded as a party to the extent of making him comply with the terms of the bid, and the remedy to recover damages for his failure to comply with his bid is by motion in the original cause.

**3. Abatement and Revival B b—Remedy to recover for failure to comply with bid is by motion in cause, and separate action will be dismissed.**

Where one has become the last and highest bidder at a sale of the property of a bankrupt under an order of the United States District Court, and fails or refuses to comply with his bid, and the property is resold for an amount less than the original bid, the remedy to recover for the failure to comply with the bid is by a motion in the original cause, and the trustee's action brought therefor in the State court will be dismissed.

APPEAL by plaintiff from *Johnson, Special Judge,* at September Special Term, 1929, of DAVIDSON. Affirmed.

On 4 November, 1927, the Jennings Manufacturing Company, a corporation having its principal office in the town of Thomasville, N. C., was duly adjudged a bankrupt by the District Court of the United States for the Middle District of North Carolina. The plaintiff in this action was thereafter duly appointed trustee of said bankrupt.

Pursuant to an order duly made in said bankruptcy proceeding, on 2 March, 1928, plaintiff offered for sale certain property, both real and personal, belonging to the estate of said bankrupt; the last and highest

bid for said property at said sale was the sum of $25,000. On 13 March, 1928, the said bid was raised by the defendant in this action, who offered to bid the sum of $26,250 for said property, if a resale of the same should be ordered by the court. To secure his bid, if a resale should be ordered, defendant deposited with plaintiff the sum of $1,250.

Upon the report of said sale and of said raised bid to the court, the sale was not confirmed, and the plaintiff was authorized and directed to resell said property, in accordance with the request of defendant. Pursuant to the order of resale, the plaintiff offered said property for sale on 21 March, 1928, when the defendant was declared the last and highest bidder for same in the sum of $26,250. Upon report of this sale to the court, the same was duly confirmed. The plaintiff was ordered and directed to convey said property to the defendant, upon his compliance with his bid.

Thereafter, the plaintiff tendered to the defendant a deed conveying to him the said property. The defendant failed to comply with his bid, and to pay to the plaintiff the sum of $26,250, in accordance therewith. Thereupon, the plaintiff reported to the court the default of the defendant as the purchaser of the property. The court then ordered the plaintiff to notify the defendant that because of his failure to comply with his bid, the property would again be offered for sale, and that if at the resale the highest bid for the same was less than the amount of defendant's bid, the defendant would be required to pay to the plaintiff the deficiency. Pursuant to this order, the plaintiff offered the property for sale on 14 July, 1928, when the last and highest bid for the same was $20,500. This sale was reported to the court, and after notice to the defendant, the same was duly confirmed. The property was thereafter conveyed to the purchaser, who had duly complied with this bid.

The deficiency between the amount of defendant's bid for the property, to wit: $26,250, and the amount for which the property was sold and conveyed, after defendant's default, to wit, $20,500, less the sum of $1,250, the amount deposited by defendant with plaintiff to secure his bid, is $4,500. Plaintiff has been authorized by an order made in the bankruptcy proceeding to sue the defendant to recover this sum. The bankruptcy proceeding is still pending in the District Court of the United States for the Middle District of North Carolina.

This action was begun by plaintiff in the Superior Court of Davidson County, on 29 September, 1929, to recover of the defendant the sum of $4,500, the amount of the deficiency between his bid for the property, and the amount for which the property was sold after his failure to comply with his bid, less the sum of $1,250.

At the close of the evidence for the plaintiff, tending to show the facts as above stated, defendant moved for judgment as of nonsuit. The

court being of opinion that upon the facts disclosed by the evidence, plaintiff is not entitled to recover, rendered judgment dismissing the action.

From the judgment dismissing the action, plaintiff appealed to the Supreme Court.

*P. V. Critcher, Martin & Brinkley and H. R. Kyser for plaintiff.*
*No counsel for defendant.*

CONNOR, J. The trial court was of opinion that upon the facts disclosed by the evidence for the plaintiff, and admitted by defendant's motion for judgment as of nonsuit, the plaintiff cannot maintain this action; that plaintiff's remedy upon these facts is not by an independent action brought in the Superior Court of this State, but by a motion in the bankruptcy proceeding now pending in the District Court of the United States for the Middle District of North Carolina. In accordance with this opinion, judgment was rendered dismissing the action. Plaintiff excepted to the judgment, and on his appeal to this Court contends that there was error in the opinion of the court, in accordance with which the judgment was rendered. This contention cannot be sustained. The judgment dismissing the action is in accord with the decision of this Court in *Marsh v. Nimocks,* 122 N. C., 478, 29 S. E., 840. In the opinion in that case it is said:

"In a proceeding to sell land for assets the court of equity has all the powers necessary to accomplish its purpose, and when relief can be given in the pending action, it must be done by a motion in the cause and not by an independent action. The latter is allowed only when the matter has been closed by a final judgment. If the purchaser fails to comply with his bid, the remedy is by motion in the cause to show cause, etc., and if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. This course is adopted to avoid multiplicity of suits, avoid delay and save costs. *Hudson v. Coble,* 97 N. C., 260, *Pettillo, ex parte,* 80 N. C., 50; *Mason v. Miles,* 63 N. C., 564, and numerous cases cited in them."

Plaintiff's contention that he cannot be given the relief to which he is entitled upon the facts disclosed by the evidence, by the District Court of the United States, in which the bankruptcy proceeding is now pending, and that, therefore, he can maintain this action in the Superior Court of this State, cannot be sustained. The District Court acquired jurisdiction of the defendant for the purpose of enforcing compliance with his bid, when his bid was accepted and the sale to him was confirmed. *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1. In the exercise of its statutory jurisdiction as a court of bankruptcy, the Dis-

trict Court of the United States has jurisdiction "to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as herein otherwise provided," and also "to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title." U. S. C. A., Title 11, section 11, clauses 7 and 15.

"It is well settled that a court of equity has jurisdiction to compel a purchaser at a judicial sale under its decree to complete his purchase according to the terms of the sale. By bidding at the sale, and having his bid accepted, and the property knocked off to him, he subjects himself to the jurisdiction of the court, and becomes a party to the proceedings in which the sale was had and can be compelled by summary proceedings at the suit of any one interested to perform his contract of purchase specifically, by paying the purchase money into court, in whole or in part, and to execute the required securities, as required by the prior decree, and conform to its terms in all other respects." 16 R. C. L., p. 163, sec. 120.

"Where the purchaser at a judicial sale refuses to comply with his bid, the court in which the sale was had will enforce his liability by ordering the property resold at his cost and risk, and charging him with the deficiency between the amount obtained at the resale and the amount of his original bid, and with the expense of the sale. This summary proceeding against a default purchaser to obtain an order of resale at his risk is grounded upon the equitable lien held and controlled by the court as vendor of the property for the benefit of those interested in the proceeds of the sale." 16 R. C. L., p. 167, sec. 122.

Upon the facts disclosed by the evidence for the plaintiff at the trial in the Superior Court, there was no error in the judgment dismissing the action. The judgment is

Affirmed.

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VIRGINIA C. BAILEY, BY HER NEXT FRIEND, JOHN C. BAILEY, JR., v. JOHN A. MCKAY, JOHN A. MCKAY MANUFACTURING COMPANY AND D. R. MCDONALD.

(Filed 30 April, 1930.)

**1. Highways B i—Evidence of negligence in driving on highway held insufficient to disturb judgment of nonsuit.**

Where the entire evidence in an action to recover damages for injuries received by plaintiff from being struck, while crossing a village street, by reason of the alleged negligence of the driver of the defendant's auto-

truck, is to the effect that the plaintiff negligently stepped in front of the truck in such manner as to make the accident unavoidable, except the testimony of the plaintiff's witness, who did not see the accident, that he saw the truck being driven at a speed of forty-five miles an hour, indefinite as to the exact time and the distance from the plaintiff, is insufficient on appeal to disturb the judgment as of nonsuit.

**2. Appeal and Error J d—The burden of showing error is upon the appellant.**

Upon an appeal to the Supreme Court, the burden of showing error in the judgment of the Superior Court is upon the appellant.

APPEAL by plaintiff from *Moore, J.,* at October Term, 1929, of STOKES.

Civil action to recover damages for an alleged negligent injury caused by a Chevrolet truck, owned by John A. McKay Manufacturing Company, and operated at the time by D. R. McDonald, striking the plaintiff, knocking her down and inflicting serious injury, while she was walking diagonally across the main public thoroughfare in the residential section of the village of Walnut Cove.

The plaintiff relies upon the following evidence of S. C. Lewellyn, driver of the school bus, for a reversal of the judgment of nonsuit entered at the close of all the evidence:

"I saw the car approaching that struck Virginia Bailey. I saw it coming down the road here (indicating on map point at cross-road). I have an opinion satisfactory to myself as to how fast the car was going. It was going about forty-five miles an hour. It was going south along the road about forty-five miles an hour. I did not hear the car hit Virginia. I stopped at the filling station to get some gas. Mr. Nelson said there was some one hurt over there."

The evidence for the defendant, that offered directly as well as that elicited on cross-examination, tends to show that the plaintiff, while looking backward or sidewise, stepped on the hard surface, five or six feet in front of the truck, when it was running not more than fifteen miles per hour, and that the accident was unavoidable.

From the judgment of nonsuit plaintiff appeals, assigning errors.

*Efird & Lüpfert and J. D. Humphries for plaintiff.*
*King, Sapp & King for defendants.*

STACY, C. J., after stating the case: The testimony of S. C. Lewellyn, the only evidence upon which the plaintiff relies for a reversal of the judgment of nonsuit, falls short of the desired purpose on appeal, because of its indefiniteness and uncertainty. The distance of the car from the scene of the accident, when the witness saw it and observed its speed, is not stated, nor is it determinable from the record. The plain-

tiff says, however, that the testimony of this witness, with its reasonable inferences and intendments, is sufficient to carry the case to the jury under the principle announced in *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066, and many other cases, while the defendants contend otherwise. We are unable to perceive from the record any error in the judgment.

The burden is on appellant to show error; it is not presumed. *Forester v. Vyne,* 196 N. C., 477, 146 S. E., 146; *Jones v. Candler,* 196 N. C., 382, 145 S. E., 691; *In re Ross,* 182 N. C., 477, 109 S. E., 365.

Affirmed.

W. REUBIN RUDD v. R. L. HOLMES.

(Filed 30 April, 1930.)

**Highways B b—Failure to submit question of whether intersection was obstructed within meaning of C. S., 2621 (46) held erroneous.**

The burden is upon the plaintiff to prove each of the elements necessary to constitute negligence, and where in an action to recover for an injury alleged to have been caused by the defendant's driving an automobile past an obstructed intersection at a speed in excess of fifteen miles per hour, C. S., 2621(46), and the defendant does not admit that the intersection was obstructed, but the testimony of one witness, if believed, would be sufficient to show that the defendant's view was obstructed: *Held,* an instruction which assumes the fact that the intersection was obstructed is reversible error, the question being for the determination of the jury from the evidence.

APPEAL by defendant from *McElroy, J.,* at January Term, 1930, of GUILFORD. New trial.

*H. R. Stanley for plaintiff.*
*John W. Hester and T. Glenn Henderson for defendant.*

ADAMS, J. This is an action for the recovery of damages for personal injury arising out of the collision of automobiles, alleged to have been caused by the negligence of defendant. The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff, and from the judgment the defendant appealed.

The defendant was driving his car on Highway No. 70, which runs north and south, and was going from Greensboro to Reidsville. Three miles and a half north of Greensboro the McKnight mill road intersects with the highway. It extends from the highway in a northeasterly di-

rection. There is a building on each side of the road at its junction with the highway. The plaintiff said that the Andrews store was ten or fifteen feet east of the highway and south of the McKnight road, and that the Lucas filling station was about two hundred and fifty feet down the McKnight road. One of his witnesses said that the Andrews store was about forty feet from the highway, and that a man sitting in a car thirty-five feet from the highway had an open view to the south of about six hundred feet. The defendant testified that as he approached the intersection he was making about forty miles an hour and twenty miles at the time of the collision. The statute provides that the speed of a car must be restricted to fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed, and that a driver's view shall be deemed to be obstructed when at any one time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection. C. S., 2621(46).

His Honor gave the jury this instruction:

"Now, gentlemen of the jury, the court charges you that if the defendant in this case approached the intersecting highway there, and within fifty feet of the intersecting highway was operating his car at a greater rate of speed than fifteen miles per hour, then, gentlemen of the jury, the court charges you that he would be guilty of negligence, and if so operating his car at a greater rate of speed than fifteen miles an hour was the direct and proximate cause of plaintiff's injury, if the plaintiff has satisfied you by the greater weight of the evidence of those facts, that then it would be your duty to answer the first issue Yes."

The defendant excepted on the ground that the instruction assumes as a fact that the defendant's view was obstructed. Whether his view was obstructed was undetermined. The defendant did not admit it, and in his brief the plaintiff says that no witness distinctly testified to it, although the testimony of the plaintiff, Dewey Harris, and J. E. Lucas is sufficient to show, if believed, that the defendant's view was obstructed. The evidence may have been sufficient, but the jury had no opportunity to decide the question. The burden was upon the plaintiff to prove each of the elements necessary to constitute negligence, including the plaintiff's failure to restrict his speed, because when approaching the intersection his view was obstructed.

New trial.

MOUNTAIN PARK INSTITUTE, INC., AND E. H. KOCHTITSKY ET AL., TRUSTEES OF MOUNTAIN PARK INSTITUTE, INC., v. JAMES W. LOVILL AND A. V. WEST, EXECUTORS OF R. L. HAYMORE, DECEASED.

(Filed 30 April, 1930.)

**1. Wills E i—Trustees of estate created by will may bring action to enforce the trust and for construction of will.**

Under a will creating a trust, the trustees under the equitable jurisdiction of the court may maintain a suit against the executors to ascertain their status and to enforce the trust, and incidentally for a construction of the will, and a demurrer upon the ground that only the executors may call upon the court to construe the will will not be sustained.

**2. Appeal and Error A e—Where formal demurrer has not been filled no appeal will lie from order overruling demurrer ore tenus.**

While an appeal will lie from an order sustaining or overruling a formal demurrer which goes to the whole cause of action or the whole defense, if the defendant after filing answer to the complaint demurs *ore tenus* for the assigned reason that the court has no jurisdiction or that the complaint fails to state a cause of action, C. S., 518, the demurrer is treated as a motion in the cause, from the denial of which there is no right of appeal.

**3. Wills E h—In this case held: condition of trust estate was condition subsequent, and trustees were entitled to trust fund.**

Where the executors of a will are directed to provide moneys for an express trust, to be paid over to certain trustees to be used for the maintenance of an educational institution, and the will states that it was the testator's desire that this should be done as soon after his death as possible, with further provision that upon the failure of the institution to carry out its designated purpose, at the end of ten years the trust should terminate and the funds distributed according to the canons of descent, otherwise the trust fund to be made permanent: *Held*, the duties of the executors to pay over the funds as directed is not upon a condition precedent, and the trustees were entitled to the fund before the expiration of the ten-year period, and should the trust terminate, the trustees are bound under the law to make the distribution under the canons of descent.

**4. Same—In this case held: whether trust fund could be made immediately available without sacrificing property was question for court.**

Where the executors of a will are required by its terms to provide a trust fund to be held by specified trustees for a designated purpose, the fund to be raised as soon as possible, without sacrificing the estate, and it appears on the executors' appeal to the Supreme Court that the question has not been decided in the Superior Court as to whether the fund could have thus been made available, a question of fact, as distinguished from an issue of fact, is presented, which will be inquired into by the lower court upon defendant's motion in the present cause.

**5. Wills E a—General rules for construction of wills.**

The law favors the early vesting of estates, and the first taker is ordinarily to be regarded as the primary object of the testator's bounty, and there is a presumption in favor of conditions subsequent rather than conditions precedent.

APPEAL by defendants from *Sink, Special Judge,* at January Term, 1930, of SURRY. Error.

This is a proceeding in which the plaintiffs ask for a construction of the will of Rufus L. Haymore, deceased, and for a decree directing the defendants as his executors to turn over to the plaintiffs, trustees of Mountain Park Institute, the sum of $100,000 to be held by said trustees in trust for the uses and purposes set forth in the will. The controversy involves particularly the third, fourteenth, and nineteenth items, the material parts of which are as follows:

Item 3. "I bequeath the sum of one hundred thousand dollars to the trustees of Park Mountain Institute, in trust for a period of time and for objects and uses as follows: To invest the same in interest bearing securities or in productive real estate and to apply the income thereof for the payment of teachers employed at Park Mountain Institute, Mount Park, Surry County, and any surplus that may remain after the paying of teachers, to be applied to the general expenses of Park Mountain Institute. I hold a certain deed of trust against the property of the said institute, which deed of trust is to be canceled if a school shall be conducted there, in accordance with the provisions of a charter obtained from the State of North Carolina, for a period of ten years. I direct that the income from this trust fund of one hundred thousand dollars be used to pay teachers and general expenses of Park Mountain Institute, as hereinbefore set forth, until this deed of trust is due; and if at that time the said school shall not have been run for a period of ten years, and the said deed of trust is foreclosed, I direct that this trust be closed, and that the fund of one hundred thousand dollars, together with any accrued income that may not have been expended as hereinbefore provided, and any sum arising from the sale of property under the said deed of trust be distributed among my heirs at law in exactly the same manner as the same would descend if this will had not been made—that is, according to the statutes of North Carolina governing the distribution of estates, both real and personal, in case of intestacy. But if the Institute shall be conducted as provided in its charter and the aforesaid mentioned deed of trust shall not be foreclosed, then I direct that this trust fund be then held by the trustees of Park Mountain Institute, and their successors as a permanent trust fund for the uses and objects hereinbefore enumerated."

Item 14. "After the payment of all my just debts in the manner hereinbefore provided for, provision of the trust fund above mentioned, which trust fund I desire to have established as soon as can reasonably be done after my death in order the Park Mountain Institute may begin to receive the benefits therefrom, and payment of all devises and bequests hereinbefore made, I direct my executors to divide my estate into four equal parts, either by partition or by sale, or partition as to part and sale of part," etc.

Item 19. "I direct that my executors make provision for the trust fund hereinbefore established, and that they settle all devises and bequests hereinbefore made, except those mentioned in paragraphs 15, 16, 17, and 18 of my will, as soon as they can do so conveniently and without selling my property at a sacrifice. I will state that I am anxious for the income from the trust fund established for Park Mountain Institute be available as soon after my death as possible in order that the school may continue without interruption and the teachers be paid. I have heretofore supported this institution, and I trust that this gift will enable it to enter upon a larger field of usefulness after my death."

Other items aid in ascertaining the testator's intent as expressed in these three.

The complaint and an amended complaint, the answer and an amended answer were filed, each side making the will a part of its pleading, and the defendants in the amended answer setting up an account showing their dealings with the testator's estate.

When the case came on for hearing the defendants demurred *ore tenus* on the ground that the complaint does not state a cause of action or allege the existence or nonexistence of facts giving the court jurisdiction to proceed to a hearing.

The court overruled the demurrer, and the defendants excepted and gave notice of appeal to the Supreme Court. Thereupon they tendered one issue as to whether they had acted arbitrarily and another as to whether Mountain Park Institute had been conducted up to that time in keeping with its charter. The judge refused to submit the issues to a jury and the defendants excepted. He then entered upon the hearing without objection by any of the parties and after considering the complaint and answers, the will, copies of the original records of accounts, and the admissions of counsel, he found certain facts and gave judgment for the plaintiffs, as appears of record. The defendants excepted and appealed.

*Manly, Hendren & Womble, W. L. Reece and S. P. Graves for plaintiffs.*

*Murray Allen and Folger & Folger for defendants.*

ADAMS, J. The first assignment of error is addressed to the question whether the complaint states a cause of action. The appellants argue that it does not, and that the demurrer *ore tenus* should have been sustained. The proceeding was brought, they say, not by the executors named in the will, but against the executors, the legatees, and the devisees by the plaintiffs who, having no authority or power to administer the testator's estate cannot prosecute a suit to construe the will, or to control the discretion vested in the executors, without at least specifically charging bad faith or arbitrary conduct. This statement is deduced from the proposition that unless an executor voluntarily applies to the court for direction and guidance the court will not generally interpose to control the exercise of his discretion. 25 C. J., 162, sec. 640(e).

It is well settled that an executor upon whom the will casts the performance of a duty may, when he needs instruction, bring a suit in equity to obtain a construction of the will. *Bank v. Alexander,* 188 N. C., 667; *Trust Co. v. Stevenson,* 196 N. C., 29; *Dulin v. Dulin,* 197 N. C., 215. In such case the jurisdiction is incident to that of trusts. Courts of equity do not exercise advisory jurisdiction if no trust has been created, or if the estate is a legal one, or if the question of construction is purely legal. *Tayloe v. Bond,* 45 N. C., 5; *Alsbrook v. Reid,* 89 N. C., 151; *Cozart v. Lyon,* 91 N. C., 282; *Reid v. Alexander,* 170 N. C., 303; *Herring v. Herring,* 180 N. C., 165.

But it does not follow that executors or trustees have the exclusive right to institute suits in which the construction of wills may be involved. Since equity has inherent power as an incident to its jurisdiction of trusts to construe wills to the extent to which trusts are thereby created, beneficiaries under a will, whose interests are founded in a trust relation or whose beneficial right is dependent upon the due performance by an executor of an obligation arising out of a confidence reposed in him by the testator, may bring suit to compel performance of the trust and incidentally to have the will construed. As suggested in *Reid v. Alexander, supra,* the suit would be constituted in a court of equity under the "known and accustomed head" of Equitable Titles, embracing trusts and their administration. 2 Page on Wills, secs. 1401, 1405.

Here the plaintiffs are prosecuting a suit in equity for the enforcement of a trust. They request a construction of the will, not as affording in itself the main relief they seek, but as incident to an equity which they allege entitles them to the beneficial enjoyment of property given them under the will. It is therefore apparent that in overruling the demurrer *ore tenus* the judge made no error.

From this order the defendants had no right of appeal. According to its etymology a demurrer imports that the objecting party will not proceed with the pleading, because no sufficient statement has been

made on the other side, but will await the judgment of the court whether he is bound to answer. Stephen on Pleading, sec. 44. In substance, a demurrer is a formal allegation that the facts as stated in the pleading to which objection is taken, even if admitted, are not sufficient to put the demurring party to the necessity of answering them or proceeding further with the cause. A general demurrer goes to matters of substance while a special demurrer points out particular defects. *Harrington v. McLean,* 62 N. C., 258. It was the settled practice in equity that where a demurrer was put in to the whole bill for causes assigned on the record and these causes were overruled, the defendant was allowed to assign other causes of demurrer *ore tenus,* on the argument. But a demurrer *ore tenus* was not allowed unless there was a demurrer on record. Story's Eq. Pleadings, sec. 464; Beach's Mod. Eq. Practice, sec. 264; *Vanhorn v. Duckworth,* 42 N. C., 261; 21 C. J., 441, sec. 483. "In equity there was what was called a demurrer *ore tenus,* or oral demurrer, which meant that, when the defendant had filed a formal demurrer for certain defects assigned, other causes for demurrer might be assigned orally on the argument; but this would not apply unless a formal demurrer had been filed." McIntosh's N. C. Practice and Procedure, sec. 436.

In our practice all demurrers are special; they must distinctly specify the grounds of objection to the complaint. C. S., 512. The grounds of demurrer are given in section 511. The result is that while an appeal lies from an order sustaining or overruling a formal demurrer which goes to the whole cause of action or the whole defense *(Commissioners v. Magnin,* 78 N. C., 181; *Ramsay v. R. R.,* 91 N. C., 418; *Frisby v. Marshall,* 119 N. C., 570; *Clark v. Peebles,* 122 N. C., 163), if the defendant after filing an answer to the complaint demurs *ore tenus* for the assigned reason that the court had no jurisdiction or that the complaint does not state a cause of action (section 518) the demurrer *ore tenus* is treated as a motion in the cause, from the denial of which there is no right of appeal. "The refusal of motions to dismiss for want of jurisdiction or that the complaint does not state a cause of action, even though they go to the whole action, are not such demurrers as permit an appeal." *Shelby v. R. R.,* 147 N. C., 537. To allow appeals in such cases would admit of infinite delay, abuse and vexation. *Sprague v. Bond,* 111 N. C., 425; *Joyner v. Roberts,* 112 N. C., 111; *Burrell v. Hughes,* 116 N. C., 430. It was suggested in *Joyner's case* that although an appeal may be taken from an order overruling a demurrer there is this protection against abuse, that if the demurrer is frivolous, judgment is at once granted the plaintiff.

Apart from this, the defendants did not insist on an immediate appeal, but forthwith tendered two issues. The first related to the exercise

of the defendants' discretion; the second to the question whether up to the time of the trial the school had been conducted in keeping with the charter. These issues the judge declined to submit to the jury and without objection by any of the parties he considered the pleadings, the will, and the exhibits. We are unable to see that this course was in any way prejudicial to the appellants. As to the second there was no controversy; and as to the first it may be said that substantially all the material facts are shown by the record evidence and the allegations and admissions in the pleadings. Those concerning which there was any controversy raised questions, as distinguished from issues, of fact. Indeed, in the final analysis the controversy was reduced to the single question whether the will, correctly interpreted, created a presently enforceable trust in favor of the plaintiffs. This is the point next to be considered.

The divergence of opinion between the parties is this: The plaintiffs construe the will as disclosing an intent to create in the trustees a vested estate defeasible upon the occurrence of a condition subsequent; the defendants say that a correct interpretation imposes upon them the duty of retaining the trust fund for a period of ten years after the death of the testator, or in any event that they are given a discretion in the matter which in the absence of abuse is not subject to judicial control.

The position of the plaintiffs is in accord with the intent expressed in the will. The testator bequeathed the fund, not to the executors, but to the trustees, in trust for a period of time, at the end of which the legacy is to be held by the trustees as a permanent trust fund, if meantime the institute shall have been conducted as provided in its charter. The trustees are to invest the fund in specific securities and to apply the income to the payment of teachers and the general expenses of the school. The testator directed his executors to make provision for the trust fund as soon as they could conveniently do so without selling his property at a sacrifice. His purpose is expressed in these words: "I will state that I am anxious for the income from the trust fund established for the Park Mountain Institute to be available as soon after my death as possible, in order that the school may continue without interruption and the teachers be paid." That the "period of time" mentioned in the first part of the third item is "a period of ten years" is obvious, as shown by the relation of the two phrases. At the expiration of this time, if the condition be fulfilled, the trust is to be permanent.

The defendants insist that this construction contravenes that part of the third item of the will which provides that if the school shall not have been run for a period of ten years and the deed of trust held by the testator shall be foreclosed, the trust fund, the unexpended income, and any sum arising from the foreclosure of the deed of trust shall be distributed among the testator's heirs at law as in case of intestacy. This

contention rests upon the implication that the executors must make the distribution; but the implication is not true. The statute of distributions designates those among whom the surplus of an estate shall be distributed, and the statute is controlling whether the distribution is to be made by the personal representative or by the trustees of an express trust appointed under the will. In this instance the testator appointed, not only the executors to execute his will, but the trustees to execute an express trust. A distribution of the estate may never be necessary; but if it should be necessary at the expiration of the ten-year period as an incident of the trust, the trustees may be required in the discharge of their trust to distribute the fund under the direction of the court. It is not essential to an administration of the estate that the executors retain the trust fund until the expiration of the ten-year period.

Our construction of the will is fortified by the familiar principle that the law favors the early vesting of estates; that the first taker is ordinarily to be regarded as the primary object of the testator's bounty; and that the presumtion favors conditions subsequent rather than conditions precedent. *Kirkman v. Smith,* 175 N. C., 579; *Taylor v. Taylor,* 174 N. C., 537; 28 R. C. L., 232.

The defense was based chiefly on the alleged right to retain the trust fund for ten years, but the defendants contend that in their discretion they are to determine whether the fund can now be raised without sacrificing the property. Although the testator did not give his executors the unrestrained power to hold the trust fund for ten years, that he did clothe them with a certain discretion in making provision for the fund is not in doubt. It is indicated in the fourteenth and nineteenth paragraphs of the will. But the discretion given them is not unrestricted; it is subject to the supervision of the court and must not be abused or exercised arbitrarily or without due regard to the interests of the beneficiaries. *Keith v. Scales,* 124 N. C., 497; *Trust Co. v. Ogburn,* 181 N. C., 324. The judgment does not specifically determine the question whether the defendants unreasonably or arbitrarily withhold the trust fund from the plaintiffs or whether they withhold it in good faith only because they cannot "make provision for the trust fund" without selling the property at a sacrifice. The trial court may inquire into this matter at the instance of the plaintiffs by a motion in this cause and may determine it as a question of fact without the intervention of a jury and render such judgment as may be necessary to effectuate the testator's purpose in establishing the trust.

Error.

STATE v. WILBUR McLEOD.

(Filed 30 April, 1930.)

1. **Homicide G a—Circumstantial evidence of guilt of murder in first degree held sufficient to be submitted to the jury.**

Evidence tending to show that the deceased was ravished by some one suffering from gonorrhea, and that she died from the assault and choking, with further evidence that the defendant had the disease, and that, while searching for the deceased, witnesses heard some one run away from the direction where the body was found, and that tracks, incapable of identification, were found at the scene of the crime, and that clear, distinct tracks were found nearby corresponding in every particular with the shoes of the defendant, including peculiar marks of the rubber heels, and that the tracks led to the house where the defendant lived, with further evidence that the defendant was familiar with the premises and that he was in the immediate vicinity of the crime on Thursday preceding the homicide on Tuesday in contradiction of his testimony that he had not been in the neighborhood for a period of two weeks, is sufficient to take the case to the jury and to sustain their verdict of guilty of murder in the first degree, and defendant's motion as of nonsuit, C. S., 4643, was properly overruled.

2. **Criminal Law G n—Circumstantial evidence is often an essential instrumentality in the ascertainment of truth.**

Circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but in many cases is quite essential to its establishment.

3. **Criminal Law G p—Testimony of similarity between shoes of defendant and tracks found near scene of crime held competent.**

Where foot tracks found in connection with a crime correspond in every particular with the shoes of the defendant, including a peculiar mark on the rubber heels, evidence of such similarity is competent as tending to identify the accused as the perpetrator of the crime, the probative value of such evidence depending upon the attendant circumstances.

4. **Criminal Law G m—Sufficiency of evidence of guilt to be submitted to the jury.**

In cases where the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of the defendant's guilt and to exclude any other reasonable hypothesis, but the evidence should be submitted to them if there is any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises only a suspicion or conjecture, and it is for the jury to say whether they are convinced from the evidence of the defendant's guilt beyond a reasonable doubt.

5. **Criminal Law I j—Upon motion as of nonsuit the evidence will be considered in the light most favorable to the State.**

The function of the court when considering a motion to nonsuit is to determine the sufficiency of the evidence to support the verdict, it being

the province of the jury to pass upon the weight and credibility of the evidence, and where the evidence viewed in the light most favorable to the State is sufficient to sustain a verdict of guilty, the defendant's motion as of nonsuit should be denied. C. S., 4643.

**6. 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 prosecution 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 jury, it does not of itself create a presumption against him as a matter of law, 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.

BROGDEN, J., dissenting.

APPEAL by defendant from *Midyette, J.*, at May Term, 1929, of LEE.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one Rebecca Matthews.

The evidence on behalf of the State tends to show that on the night of 27 March, 1928, about 11 p.m., Mrs. Rebecca Matthews, a woman 77 or 78 years of age, was dragged from her home a distance of thirty yards to the edge of a field where she was found dead soon after midnight, having been brutally assaulted, choked, manhandled, bruised and ravished by some one with gonorrhea, such as the prisoner had. She died from the assault, shock and choking.

The first witnesses who came to the aid of the 80-year-old husband, himself quite feeble and senile, in searching for his missing wife, heard some one run away from the direction of where the body was found. Toe prints were discovered at the feet of the deceased, apparently made by No. 8 square-toed shoes, such as the defendant wore. Signs of tracks could be seen, but not identified because of the character of the ground, going from the body to a potato patch, a distance of approximately 75 or 100 yards, but here the ground was soft and the tracks became quite distinct and clear. Similar tracks were identified at a number of places along a tortuous course, apparently taken by the murderer, which led to the home of William McLeod, father of the defendant, where the prisoner also lived and was found in bed about 3 or 4 o'clock in the early morning of 28 March, 1928. The shoes which Wilbur McLeod had at that time were freshly polished and corresponded in every particular with the identification made by the measurements and by placing the shoes in a number of the tracks. The prisoner's shoes measured 11½ inches in length. The sole on the right shoe was 6 inches long, while that on the left measured 6¼ inches. They were both 4¼ inches in width. The distance from heel to sole on the left shoe was 2 inches, and the distance from heel to sole on the right shoe was 2¼ inches. The

tracks on the ground showed these identical measurements. They also showed the imprint of rubber heels with peculiar marks, similar to those on the prisoner's shoes. The identification of the tracks as having been made by the defendant's shoes was quite complete.

When arrested, the defendant first told the officers that he had been over to see his aunt that night and had returned about 12 o'clock. Later he said he was in by 11 o'clock; that he slept with his father and that his father was in bed when he came in. The prisoner was then asked where he was from 9 o'clock until he got home. His reply was: "I might have been in earlier than that." The defendant's father, on being asked what time his son came in that night, said: "I went to bed at 9 o'clock and he was in bed then." The defendant started to say something, but the officer told him to "keep quiet." He was nervous and tears came in his eyes.

The prisoner was the only person in William McLeod's house whose shoes could have made the tracks in question. It was also found that he alone of the three negro men in said house who were arrested and examined, was suffering from the particular venereal disease, evidence of which was left on the body of the deceased by the person who raped her.

It was further in evidence that the defendant was familiar with the premises and knew the deceased and her husband. He claimed not to have been in that neighborhood for two weeks prior to the killing, but the State's evidence showed that he was in the immediate vicinity on Thursday preceding the homicide on Tuesday.

The defendant offered no evidence, but lodged a motion at the close of the State's case for judgment as of nonsuit under C. S., 4643. Overruled and exception.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

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

*Young & Young for defendant.*

STACY, C. J., after stating the case: The only question presented is the sufficiency of the evidence to warrant the verdict. It is stronger on the present record than it was on the first appeal, 196 N. C., 542. And it would seem that the evidence in the instant case is fully as strong as that which was submitted to the jury in the following cases: *S. v. Allen,* 197 N. C., 684; *S. v. McKinnon,* 197 N. C., 576; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Melton,* 187 N. C., 481, 122 S. E., 17;

*S. v. Young,* 187 N. C., 698, 122 S. E., 667; *S. v. Griffith,* 185 N. C., 756, 117 S. E., 586; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101; *S. v. Matthews,* 162 N. C., 542, 77 S. E., 302; *S. v. Taylor,* 159 N. C., 465, 74 S. E., 914; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625.

True, the evidence is circumstantial, but circumstantial evidence is, not only a recognized and accepted instrumentality in the ascertainment of truth, but in many cases quite essential to its establishment. *S. v. Plyler,* 153 N. C., 630, 69 S. E., 269.

The evidence as to the identity of the tracks was competent. *S. v. Lowry,* 170 N. C., 730, 87 S. E., 62. Indeed, it may be stated as a general rule that the correspondence of tracks, footprints, or ground marks, found in connection with a crime, with the track, footprint, or shoe mark of one accused of the crime, or with the track, footprint, or shoe mark of his horse, or with the track, tread, or wheel mark of his wagon, buggy, or automobile, is admissible in evidence as tending to identify the accused as the perpetrator of the crime, the probative value of such evidence, of course, depending upon the attendant circumstances. *S. v. Young, supra; S. v. Griffith, supra; S. v. Taylor, supra; S. v. Fain,* 177 N. C., 120, 97 S. E., 716; *S. v. Martin,* 173 N. C., 808, 92 S. E., 597; *S. v. Freeman,* 146 N. C., 615, 60 S. E., 986; *S. v. Hunter,* 143 N. C., 607, 56 S. E., 547; *S. v. Adams,* 138 N. C., 688, 50 S. E., 765; *S. v. Daniels,* 134 N. C., 641, 46 S. E., 743; *S. v. Morris,* 84 N. C., 756; *S. v. Reitz,* 83 N. C., 634; *S. v. Graham,* 74 N. C., 646; Annotation: 31 A. L. R., 204.

Speaking to the subject in *S. v. Spencer,* 176 N. C., 709, 97 S. E., 155, *Walker, J.,* delivering the opinion of the Court, said: "The testimony as to the fitting of the shoe to tracks found where the prisoner had been seen was admissible, as it was a circumstance tending to show identity. . . . This is 'real' evidence, as called by the civilians, and its value as proof is greater or less, according to the circumstances. . . . It is some evidence tending to identify the prisoner as the perpetrator of the crime."

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 may be readily conceded that this is one of the border-line cases. But viewing the evidence in its most favorable light for the State, the accepted position on a demurrer or motion to nonsuit, we are of opinion that it is of sufficient probative value to warrant its submission to the jury. *S. v. Vaughn,* 129 N. C., 502, 39 S. E., 629.

The general rule is, that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a

fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise not, for short of this, the judge should direct a nonsuit or an acquittal in a criminal prosecution. *S. v. Vinson,* 63 N. C., 335. But if the evidence warrant a reasonable inference of the fact in issue, it is for the jury to say whether they are convinced beyond a reasonable doubt of such fact, the fact of guilt. *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644.

The function of the court when considering a motion to nonsuit, is, not to pass upon the weight of the evidence, but to determine its sufficiency to support the verdict. *S. v. King,* 196 N. C., 50, 144 S. E., 518. Or as said in *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30; "The motion to nonsuit requires that we should ascertain merely whether there is any evidence to sustain the allegations of the indictment. The same rule applies as in civil cases, and the evidence must receive the most favorable construction in favor of the State for the purpose of determining its legal sufficiency to convict, leaving its weight to be passed upon by the jury. *S. v. Carmon,* 145 N. C., 481; *S. v. Walker,* 149 N. C., 527; *S. v. Costner,* 127 N. C., 566. The effect of Laws 1913, ch. 73, allowing a motion for nonsuit in a criminal case, was considered in *S. v. Moore,* 166 N. C., 371, *S. v. Gibson,* 169 N. C., 318. Where the question is whether there is evidence sufficient to warrant a verdict, this Court considers only the testimony favorable to the State, if there is any, discarding that of the prisoner. *S. v. Hart,* 116 N. C., 976. The weight of the evidence and the credibility of the witnesses are matters for the jury to pass upon. *S. v. Utley,* 126 N. C., 997."

The accepted rule, it is true, is that, in cases where the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of the defendant's guilt and to exclude any other reasonable hypothesis. *S. v. Matthews,* 66 N. C., 106; *S. v. Melton, supra.* Here, the incriminating evidence, taken in its entirety, if accepted and believed by the jury, would seem to be sufficient to warrant the verdict. *S. v. McLeod, supra.* This is as far as we are permitted to go in considering the defendant's demurrer to the evidence or motion for judgment as in case of nonsuit under C. S., 4643.

The fact that the defendant offered no evidence, but relied upon the legal presumption of innocence and the weakness of the State's case, is not to be taken against him. 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. 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 to the jury. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720.

The rulings in *S. v. Montague,* 195 N. C., 20, 141 S. E., 285, *S. v. Rhodes,* 111 N. C., 647, 15 S. E., 1038, *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329, *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284, and *S. v. Massey,* 86 N. C., 660, are distinguishable, as they were based upon facts essentially different from those appearing on the present record.

A searching scrutiny of the record leaves us with the impression that the case was properly submitted to the jury.

No error.

BROGDEN, J., dissenting: I dissented in the former appeal reported in 196 N. C., 542, for the reason that the evidence "was vague, uncertain and inconclusive as to the vital fact of guilt."

The evidence in the present case is no stronger than that produced at the former hearing.

The only evidence of identity having any probative value at all, is certain tracks found at a distance of 110 or 150 yards from the body. None were found nearer than that.

The defendant lived within a mile or a mile and a quarter of the deceased and had lived there all his life. The purported tracks were traced four or five miles beyond the defendant's house and then doubled back, making in the aggregate a distance of eight or nine miles. The murder was committed about 11:00 or 11:30 at night, and the officers arrived at the home of the defendant about 4:00 in the morning, and he was in bed. At the former hearing, bloodhounds had followed these tracks over the long and circuitous route testified to. When the hounds arrived at the home of the defendant they stopped within thirty feet of the house, and when the defendant was brought out the dogs "did not bay or indicate him in any way." The Court held that the dog evidence was incompetent and a new trial was awarded. In this appeal the witnesses followed the same route the dogs followed in the former appeal. Hence the same evidence is still here, with the dogs left out. The practical result is that the defendant is perhaps convicted upon evidence that the Court has already held to be incompetent and inadmissible.

Moreover, the tracks found in the potato-patch about 150 yards from the body were ordinary tracks made by a broad-toed number 8 shoe. Some of the witnesses at the trial were wearing broad-toed number 8 shoes,

although they testified that they did not make the tracks. The sheriff testified that "any shoe of that make and style would have made the same kind of track."

The defendant sat up with a sick baby of the witness Campbell on Tuesday night preceding the murder on the following Monday. Campbell's house is near the potato-patch referred to, where the tracks were found. There is no evidence that the tracks were fresh or that they were not there before the murder was committed.

Reviewing the entire record, I am of the opinion that the evidence is too thin and too scant to justify the taking of life.

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STATE v. JAMES SPIVEY.

(Filed 7 May, 1930.)

1. **Homicide G a—Evidence of defendant's guilt of murder in the first degree held sufficient.**

   Where there is evidence tending to show that the defendant on trial for a homicide had proposed marriage to the deceased upon condition that she first submit her person to him, and that at night the deceased and the defendant went into the yard to investigate a noise they had heard, and that soon the defendant returned and stated that the deceased had been struck by some one, with further evidence that an ax that had been left at the place of the homicide had been thrown through some bushes and found with blood spots on it, and that the deceased had been killed by a blow from a blunt instrument and had been raped, and that the defendant was the one who had committed the rape, is *held:* sufficient with other evidence to be submitted to the jury and deny defendant's motion as of nonsuit. C. S., 4643.

2. **Criminal Law I g—Error in stating contentions of defendant held harmless when charge construed as a whole.**

   Where the prisoner on trial for murder introduces no evidence and relies upon his motion as of nonsuit, error of the trial court in stating his contentions that the defendant admitted that the deceased's death resulted from a blow with an ax or deadly weapon, will not be held as reversible error when it appears that the court was referring to evidence of a statement made by the prisoner at the time of the crime, and must have been so understood by the jury when considered in its immediate connection and in the light of the whole charge.

3. **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 prosecution may rely upon the presumption of his innocence, which remains with him throughout the whole trial, and introduces no evidence in his own behalf, and though this may not be

without its moral effect on the jury, it does not of itself create a presumption against him as a matter of law, and is not a proper subject of comment by the solicitor in his argument, and the question of his guilt is for the determination of the jury from the evidence, with the burden on the State to prove him guilty beyond a reasonable doubt. C. S., 1799.

APPEAL by defendant from *Barnhill, J.*, at October Term, 1929, of LEE.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one Bettie Spivey.

The evidence on behalf of the State tends to show that on the night of 21 September, 1929, Bettie Spivey was struck on the back of the head with an ax, or some blunt instrument, and died shortly thereafter from the effects of the blow.

The deceased and her sister, Josie Spivey, were entertaining two young men, Willie Morgan and the defendant, James Spivey, on the night in question at the home of their father, who is a tenant farmer living in Lee County. Willie Morgan was calling on Josie Spivey, while the defendant was paying court to the deceased, and had previously proposed to marry her on condition that she surrender her person to him prior to the marriage, but which condition she had declined to meet. The other members of the Spivey family, Silas, the father, and Lillian, a third daughter, had retired for the night, leaving these four young people together in the same room. At about eleven o'clock Bettie Spivey left the room and soon returned with a pair of silk hose, which she showed to the others, and teasingly told James Spivey that they had been given to her by another fellow. When she went to get the stockings, she thought she observed some one in the yard walk past the window, and reported this fact upon her return. The defendant remarked that perhaps it was an officer looking for him. He also claimed to have seen some one pass the window.

As there had been some recent cow stealing in the neighborhood, Bettie Spivey suggested to the defendant that they go out to the barn, which was 30 or 40 yards from the house, to see if her father's cow had been, or was being, molested by any one. For this purpose, she went out of the house, and the defendant followed her, closing the door behind him. About eight or ten feet to the right of the path, going to the barn, was a cedar tree, against which an ax was leaning, which had been left there by one of the girls that afternoon or evening.

Fifteen or twenty minutes after Bettie and James Spivey left the house, the defendant returned, opened the door, and said that some one had knocked Bettie down. Josie hurriedly aroused her father and sister, Lillian, and rushed out to the cow barn. There she found Bettie lying

upon her back, with her head stricken, and bleeding profusely. Her clothes were up above her knees and her legs far apart. James Spivey stated that he stopped at the cedar tree while Bettie went on to the barn lot. He said he heard a lick, "ker-bam-like," looked up and saw two men running off in the direction of L. V. Hale's house, and that there was no time for Bettie to have been criminally assaulted.

Willie Morgan did not go to the barn or stay to ascertain the extent of Bettie's injuries, but left for his home as soon as the defendant announced that she had been hurt. He said he left precipitately because he was afraid to stay. The defendant, on the other hand, remained to render any assistance he could, and did help to carry the deceased in the house, went for the doctor and called the officers.

Within a couple of hours the sheriff and two assistants, as well as the coroner of the county, Dr. J. F. Foster, had arrived at the Spivey home. An investigation and examination showed that the deceased had been raped and hit on the back of the head with some blunt instrument, from which she died almost instantly. There were no bruises on her face or neck. The small ax, which had been left leaning against the cedar tree, could not be found that night, but it was discovered the next morning some distance away, with blood spots on it, apparently having been thrown through a break in the hedge, for when it fell upon the ground it slid about one-half the length of its helve. No tracks were to be found along or about the place where the defendant said he saw two men running. An examination by the coroner of the person of the defendant that night indicated unmistakably that he was the one who committed the rape.

The defendant offered no evidence, but lodged a motion at the close of the State's case for judgment as of nonsuit under C. S., 4643. (Overruled and exception.)

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

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

*Gavin, Teague & Byerly and H. M. Jackson for defendant.*

STACY, C. J., after stating the case: The evidence is amply sufficient to carry the case to the jury. It points unerringly to the prisoner's guilt and apparently excludes every reasonable hypothesis of his innocence. *S. v. McLeod,* 196 N. C., 542, 146 S. E., 409; *S. c., ante,* 649. The State's showing in the instant case is fully as strong, if not stronger, than that in *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625, where a con-

viction was sustained. The following authorities may also be cited in support of the court's action in overruling the defendant's demurrer to the evidence: *S. v. Allen,* 197 N. C., 684; *S. v. McKinnon,* 197 N. C., 576; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Melton,* 187 N. C., 481, 122 S. E., 17; *S. v. Young,* 187 N. C., 698, 122 S. E., 667; *S. v. Griffith,* 185 N. C., 756, 117 S. E., 586; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101; *S. v. Matthews,* 162 N. C., 542, 77 S. E., 302; *S. v. Taylor,* 159 N. C., 465, 74 S. E., 914.

The following excerpt, taken from the charge, forms the basis of one of defendant's exceptive assignments of error, which he stressfully contends entitles him to a new trial.

"He admits that she came to her death on account of a blow on the base of her skull inflicted by some unknown person, that is, he admits that she was struck on the base of the skull with an ax or some other deadly weapon, and that that brought about her death."

The prisoner complains at this instruction because it represents him as making an admission, when, in fact, no admission was made by him and no evidence offered in his behalf.

The court was here stating the contentions of the parties, and what he meant to say, and, we apprehend, did say, within the necessary understanding of the jury, was that, according to the prisoner's own statement, made that night, he heard the blow which caused her to be felled by some unknown person, for, in this immediate connection, the court added: "but (the prisoner) contends that there are no facts or circumstances which show that he was the person that inflicted the blow, and that he is not guilty." We perceive no error in the contention, thus given, when considered in its immediate connection and in the light of the whole charge. *S. v. Parker, ante,* 629.

The remaining exceptions, all of which have been examined with scrutiny and care, are equally untenable, and present no new question of law or one not heretofore settled by a number of decisions.

The fact that the defendant offered no evidence, but relied upon the legal presumption of innocence and the weakness of the State's case, is not to be taken against him. 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. 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 to the jury. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720.

The record discloses no error committed on the trial, hence the verdict and judgment will be upheld.

No error.

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W. L. HENDRICKS v. TOWN OF CHERRYVILLE.

(Filed 7 May, 1930.)

1. **Judgments K b—Where notice of revocation of attorney's authority is not given, judgment may not be set aside for surprise, etc.**

   Where the party to an action employs an attorney who files his pleadings in defense, and afterwards consents to a trial on a certain day under an agreement that the plaintiff would not ask for a recovery exceeding a certain amount, and the trial is accordingly had, the motion of the party to set aside the judgment upon the ground of surprise, excusable neglect, etc., for that the attorney's authority acting therein had been revoked, will be denied when no notice of such revocation had been given to the court or to the adverse party.

2. **Attorney and Client B c—Authority of attorney of record continues until revocation and notice to court or adverse party.**

   Where an attorney of record in an action appears for a party thereto, his employment continues until his authority is revoked and notice of such revocation is given the court or the adverse party.

3. **Trial A b—Knowledge of attorney of date of trial is imputed to client.**

   The knowledge of an attorney for a party that an action against him is placed on the calendar for a certain date is imputed to the party litigant.

APPEAL by defendant from order of *Shaw, J.,* at December Term, 1929, of GASTON. Affirmed.

This action to recover damages resulting from a trespass by defendant upon the lands of the plaintiff, was tried before Shaw, J., and a jury at August Term, 1929, of the Superior Court of Gaston County. Upon the verdict rendered at the trial, there was a judgment that plaintiff recover of the defendant, upon the cause of action alleged in the complaint, the sum of $300, and the costs of the action.

At December Term, 1929, of said court, the action was heard on defendant's motion that said judgment be set aside on the ground that defendant was not present or represented by counsel at the trial at the August Term, 1929, of said court because of its mistake, inadvertence, surprise and excusable neglect, and on the further ground that defendant has a good and meritorious defense to the action.

Upon the hearing of defendant's motion, the judge found that the defendant was represented at the August Term, 1929, of the court by its attorney of record, who had filed its answer to the complaint, and who had entered an appearance in the action as the attorney for the defendant: that said attorney of record had appeared at said term of the court in behalf of the defendant, and had consented that the trial of the action should be continued from the day on which it was set on the calendar for trial to a subsequent day during said term; and that said attorney was not present when the action was called for trial and was tried.

The judge further found that defendant had admitted in its answer to the complaint that it was liable to the plaintiff upon the cause of action alleged therein; and that the only matter in issue between the plaintiff and the defendant was the amount which plaintiff was entitled to recover of defendant as damages for the trespass which defendant had committed on plaintiff's land. The amount demanded in the complaint as such damages was $1,000; the defendant in its answer alleged that the damages did not exceed the sum of $35.00. During the term, defendant's attorney of record informed the attorney for plaintiff and the court that it was agreeable to defendant that the damages should be assessed by the jury at $300. It was agreed by and between the attorney for the plaintiff and said attorney for the defendant, that the action should be tried at said August Term, 1929, of the court, and that the plaintiff would not contend that the jury should answer the issue as to damages in a sum exceeding $300. At the trial evidence was submitted to the jury and upon this evidence the issue involving the amount which plaintiff was entitled to recover was answered "$300." Judgment was rendered accordingly.

Prior to August Term, 1929, the attorney of record for defendant in this action had ceased to be the general attorney of the defendant. No notice had been given to plaintiff's attorney or to the court by the defendant that its attorney of record was no longer its attorney in this action. There was no evidence tending to show that said attorney of record had been notified by defendant that his authority to appear in this action and to represent the defendant therein as its attorney had been revoked. Nor was there evidence tending to show that said attorney had been negligent or unfaithful in the performance of his duties as attorney for defendant in this action.

The judge further found that the judgment rendered on the verdict at the August Term, 1929, of the court was not rendered through the mistake, inadvertence, surprise or excusable neglect of defendant. Upon this finding, the motion of defendant was denied.

From the order denying its motion, the defendant appealed to the Supreme Court.

*W. H. Sanders for plaintiff.*
*A. C. Jones and M. A. Stroup for defendant.*

PER CURIAM. Upon the facts found by the judge, as fully set out in his order, his finding that the judgment rendered on the verdict at the August Term, 1929, of the court, was not rendered through the mistake, inadvertence, surprise or excusable neglect of defendant, was correct. There was, therefore, no error in the order denying defendant's motion that the said judgment be set aside. *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269.

The defendant was represented in this action at the August Term, 1929, of the court by the attorney who had filed its answer, and who had entered an appearance for defendant as its attorney in the action. If the authority of this attorney to represent defendant in this action, as its attorney, had been revoked, no notice of such revocation had been given to the attorney for the plaintiff or to the court. In the absence of such notice, his authority to represent the defendant as its attorney in this action, continued. His knowledge that the action was on the calendar for trial at the August Term, 1929, of the court was imputed to the defendant. The law will not permit the defendant to repudiate its attorney of record after the trial, resulting in a judgment against it. There was no evidence offered at the hearing of defendant's motion tending to show that defendant had not informed its attorney of record that it was agreeable to it that plaintiff's damages should be assessed by the jury at $300; said attorney did not consent to a judgment in this action. He agreed only that the action should be tried at the August Term, 1929, upon plaintiff's agreement that he would not ask the jury to return a verdict in excess of $300. This agreement was complied with. The order is

Affirmed.

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J. LABAN LINEBERGER ET UX. v. C. B. PHILLIPS.

(Filed 7 May, 1930.)

**Wills E b—An unrestricted devise of real estate passes the fee under C. S., 4162.**

A devise of real estate to the testator's son for his own use and benefit with the expressed intent that it should vest in him absolutely with full right to dispose of it, with limitation over should he die without children surviving, if not disposed of by him during his life: *Held,* under the provisions of C. S., 4162, the devise being without clause limiting the estate to one of less dignity, the devisee took a fee-simple title thereto, and could convey a good title to the purchaser.

LINEBERGER *v.* PHILLIPS.

APPEAL by defendant from *Harding, J.*, at March Term, 1930, of GASTON.

Controversy without action submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey an undivided one-half interest in a lot of land to the defendant, duly executed and tendered a deed therefor and demanded payment of the purchase price as agreed, but the defendant declined to accept the deed and refused to make payment, claiming that the title offered was defective.

The sufficiency of the title offered was properly made to depend upon the construction of the following clauses in the will of E. Caldwell Wilson:

"Item III. I will and direct that all the rest and residue of my estate, real, personal and mixed, of every kind and description, whatsoever, including money, notes, stocks in corporations, that is to say, everything that I possess, be divided into two equal parts.

"One part of which I give, devise and bequeath to my son, Laban Lineberger for his own use and benefit. In explanation of this devise and bequest to my said son, Laban, it is my intent and purpose that he shall be vested with the same absolutely and shall have the right to use and dispose of the same or any part thereof as he may see fit so to do, but should he die without child or children surviving him, then and in that case I will and direct that so much of this devise and legacy as may not have been used by my said son, Laban (with the exception of ten thousand dollars, hereinafter in this item disposed of) or which shall not have been disposed of by him, shall be distributed as directed in the next item of this my will."

Pertinent part of the next item: "I will, devise and direct that so much of the devise or bequest provided for in the third item (III) of my will, as may not have been consumed in the use or disposed of by my son, Laban, during his life, as well as the ten thousand dollars or any part thereof provided for the said Katherine W. Lineberger after the same shall have served the purposes for which they are hereby intended, to wit, after the death of my son, Laban and Katherine W., respectively, shall pass to and be devolved upon my brother, John C. Rankin, to be held by him in trust for the use and upon the trust in this item heretofore set forth and declared."

Upon the facts agreed, the court being of opinion that the deed tendered would convey an indefeasible, fee-simple title to an undivided one-half interest in the lot described therein, gave judgment for the plaintiffs in accordance with the agreement under which the controversy was submitted without action, from which the defendant appeals, assigning errors.

*Cansler & Cansler for plaintiffs.*
*A. L. Quickel for defendant.*

STACY, C. J. The case turns on the question as to whether Laban Lineberger acquired an undivided one-half interest in fee, or is able to convey such an interest, in the lands devised to him in items three and four of his father's will.

His Honor correctly held for the plaintiffs. *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626. It is provided by C. S., 4162, that when real estate is 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. Hence, under this statute, an unrestricted devise of real estate passes the fee. *Barbee v. Thompson,* 194 N. C., 411, 139 S. E., 838. Indeed, it is generally necessary that restraining expressions be used to confine a devise to the life of the devisee. *Holt v. Holt,* 114 N. C., 241, 18 S. E., 967.

The learned counsel for the defendant has filed an elaborate brief, analyzing the will in every detail, but we think the judgment below is in keeping with the rights of the parties and the law of the case.

Affirmed.

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## STATE v. HENRY SETZER.

(Filed 7 May, 1930.)

**Criminal Law G e—Testimony in this case should have been excluded under hearsay rule.**

Testimony of the sheriff that a suspect of the crime told him to get the present defendant and "you will be on the right track," not made in the presence of the defendant, is inadmissible as hearsay evidence, and its admission over the objection of the defendant is reversible error.

APPEAL by defendant from *Stack, J.,* at February Term, 1930, of CATAWBA.

Criminal prosecution tried upon an indictment charging the defendant, and another, with breaking and entering the storehouse of one D. P. Drum on 28 November, 1929, with intent to steal the goods and chattels of the owner then being in said storehouse, etc., contrary to C. S., 4235.

Verdict: Guilty.

Judgment: Imprisonment in the State's prison for a term of not less than 18, nor more than 30, months.

Defendant appeals, assigning errors.

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

*R. L. Huffman for defendant.*

STACY, C. J. The sheriff was permitted to testify, over objection of defendant, that one John Burns who had been arrested as a suspect, prior to the defendant, and charged with entering the store and stealing the goods in question, said to him while in his custody: "If you will get Henry Setzer you will be on the right track." This evidence was incompetent as against the defendant, who was not present at the time the statement was made, and should have been excluded. *S. v. Simmons, ante,* 599; *S. v. Green,* 193 N. C., 302, 136 S. E., 729.

The declaration of a third person, not an agent of the party sought to be affected, made in the absence of such party, is inadmissible as hearsay. *S. v. Lassiter,* 191 N. C., 210, 131 S. E., 577; *Daniel v. Dixon,* 161 N. C., 377, 77 S. E., 305.

The error is just one of those mishaps which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Griggs,* 197 N. C., 352, 148 S. E., 547. But the defendant has appealed, and he is entitled to a ruling on the exception.

New trial.

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J. U. McCORMICK, DOING BUSINESS AS CAROLINA THEATRE SUPPLY COMPANY, v. C. T. CROTTS.

(Filed 14 May, 1930.)

**1. Infants B a—Infant may disaffirm contract after filing answer and replevying property in action for purchase price.**

An infant may disaffirm his contract at any time at or before his arriving at full age without liability, upon the restoration of the property, for its use, deterioration, or damages for its detention, and where in an action for the purchase price ancillary proceedings in claim and delivery are instituted, the filing of an answer by the infant without a guardian, and his retention of the property under a replevy bond will not bar him from thereafter setting up the plea of infancy, and upon judgment for the return of the property, the infant is entitled to recover the amount paid by him on the purchase price, and is not liable on the replevy bond for the retention or deterioration of the property while in his possession thereunder.

**2. Replevin C b—Liability of sureties on replevy bond of infant is limited to liability of infant by express terms of bond.**

The sureties on a replevy bond given by an infant in claim and delivery proceedings are not liable for damages beyond the terms of the bond stipulating that their obligation is to answer for the default of the

**principal, on a judgment that may be had against him, and they cannot be held liable in excess of the liability of the infant principal, and where the infant has disaffirmed the contract and bond, the plaintiff is entitled only to judgment for the return of the property, and neither the infant nor the sureties on his bond is liable for deterioration of the property or damages for its detention. C. S., 836.**

APPEAL by defendant from *Stack, J.*, at September Term, 1929, of MONTGOMERY.

Civil action to recover on certain promissory notes and to foreclose chattel mortgage given as security for the payment thereof.

On 15 February, 1925, the plaintiff sold to the defendant, as evidenced by conditional sales contract, "One Superior Machine complete and Snaplite Lens," for use in the Garden Theatre at Biscoe, N. C., and took from the defendant a number of promissory notes secured by said conditional sales contract.

Default having been made in the payment of said notes, or a part of them, this action was instituted 6 October, 1925, with ancillary proceedings in claim and delivery for the property described in the conditional sales contract. The defendant replevied, gave bond under the statute, and held the property. On 31 October, thereafter, the defendant filed answer and set up that the machine and lens were defective and not as represented.

On 1 June, 1927, the defendant informed the court that he was a minor, without general or testamentary guardian, and asked that a guardian *ad litem* be appointed to represent him in this action. This was done. Thereafter, on 5 October, 1927, the guardian *ad litem* filed answer, repudiated the purchase of said machinery on the ground of the defendant's infancy, tendered the property back to the plaintiff, and demanded a return of so much of the purchase price as had already been paid. The plaintiff denied the infancy of the defendant, and upon the issues thus joined, the following verdict was rendered by the jury at the September Term, 1928, Montgomery Superior Court, Hon. John M. Oglesby, judge presiding:

"1. What was the value of the machine described in the complaint at the time it was taken in claim and delivery? Answer: $387.50.

"2. What is the present value of said property? Answer: $87.50.

"3. Is the defendant, C. T. Crotts, a minor? Answer: Yes.

"4. What amount on the notes and contract described in the complaint is still unpaid? Answer: $276.40, with interest due from 15 July, 1925.

"5. What amount has the defendant paid on said property? Answer: $298.20."

Judgment was not signed at the trial term, as the presiding judge was called away for providential reasons, but, by consent, the matter was

submitted to Hon. A. M. Stack, judge presiding at the September Term, 1929, who held that the defendant, by first filing answer and replevying the property in this action, was thereafter estopped from setting up his infancy, and judgment was accordingly entered on the verdict for the plaintiff.

The defendant appeals, assigning errors.

*No counsel appearing for plaintiff.*
*H. M. Robins and J. A. Spence for defendant.*

STACY, C. J., after stating the case: As the defendant was at liberty to avoid the contract in question at any time during his minority, or upon arrival at full age *(Collins v. Norfleet-Baggs,* 197 N. C., 659), we fail to see how he can be estopped from asserting this right by his own acts in filing answer and replevying the property in question prior to the appointment of a guardian *ad litem. Hicks v. Beam,* 112 N. C., 642, 17 S. E., 490; *Tate v. Mott,* 96 N. C., 19, 2 S. E., 176. Even if the matter had gone to judgment, without the appointment of a guardian *ad litem* and during the minority of the defendant, he would still have had his remedy. *Hicks v. Beam, supra.*

Under the principles announced in *Collins v. Norfleet-Baggs, supra.* and other cases, the defendant is entitled to disaffirm the contract and recover the consideration paid by him, with the limitation that he must restore whatever part he still retains of that which came to him under the agreement, but he 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. *Hight v. Harris,* 188 N. C., 328, 124 S. E., 623; *Morris Plan Co. v. Palmer,* 185 N. C., 109, 116 S. E., 261; *Cole v. Wagoner,* 197 N. C., 692; *Millsaps v. Estes,* 137 N. C., 535, 50 S. E., 227; 14 R. C. L., 238.

The judgment, therefore, should be that the defendant recover of the plaintiff the sum of $298.20, the amount paid under the contract, with interest from 6 October, 1925, and that the plaintiff have and recover the property in question in its present condition, but no more. *Morris Plan Co. v. Palmer, supra.*

Nor would it seem that the liability of the sureties on the forthcoming bond should be held to be in excess of the defendant's liability thereunder. The obligation of the sureties on the redelivery bond of the defendant in the instant case is to answer for any default of the principal in said bond, to the extent of $500, for which the infant defendant may be adjudged legally bound. Note, L. R. A., 1917 A, 1191.

According to the terms of the bond (which is not in the exact language of the statute, C. S., 836), it is stipulated "that if the said prop-

erty be returned to the defendant it shall be delivered to the plaintiff, with damages for its deterioration and detention, together with the costs of the action, if such delivery be adjudged and can be had, and if such delivery cannot for any cause be had, that the plaintiff shall be paid such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages, for such taking and detention, together with the cost of this action." *Garner v. Quakenbush,* 188 N. C., 180, 124 S. E., 154; *Hendley v. McIntyre,* 132 N. C., 276, 43 S. E., 824; *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466; *Motor Co. v. Sands,* 186 N. C., 732, 120 S. E., 459; *Randolph v. McGowans,* 174 N. C., 203, 93 S. E., 730; *Wallace v. Robinson,* 185 N. C., 530, 117 S. E., 508.

But the defendant, still being a minor, may disaffirm this obligation, as well as the original one. *Hight v. Harris, supra.* Hence, the extent of the defendant's legal liability is to return so much of the property which came to him under the contract as he still has, without accounting for its use or depreciation while in his possession. *Collins v. Norfleet-Baggs, supra.* The plaintiff is entitled to judgment *de retorno habendo,* and no more. Note 69 L. R. A., 283. The sureties, it will be observed from the tenor of the forthcoming bond, are under obligation to return the property to the plaintiff, "with damages for its deterioration and detention, together with the costs of the action," in case "such delivery (with damages and costs) be adjudged." *Hall v. Tillman,* 110 N. C., 220. Therefore, the liability of the sureties would seem to depend upon an adjudication directing "such delivery," which may not be had against the infant defendant, except as above indicated, simply *de retorno habendo. Hendley v. McIntyre, supra;* 23 R. C. L., 900.

This interpretation of the liability of the sureties on the defendant's forthcoming bond is strengthened by the circumstance that, in case a return of the property cannot for any reason be had, the sureties obligate themselves to pay to the plaintiff "such sum as may be recovered against the defendant" for the value of the property, etc. So that, if the sureties be released where the property cannot for any reason be returned, because, in such event, no recovery can be had against the defendant, it could hardly be said that a recovery of damages for its deterioration and detention was intended where the property is actually returned, though in a damaged condition. To hold otherwise would be to render the sureties liable for the deterioration and detention of the property and exculpate them from all liability in case of its total loss or destruction—a rather anomalous result. 23 R. C. L., 900.

It is true, there are a few exceptions to the general rule that the obligation of a surety is accessorial only, and that whatever discharges a principal discharges a surety. *Jones v. Crosthwaite,* 17 Iowa, 393.

Fraud, deceit, illegality, and the like, which would vitiate the contract of the principal, would also induce the discharge of the sureties, for these affect the character of the obligation. *Smyley v. Head,* 2 Rich. (S. C.), 590; *Nabb v. Koontz,* 17 Md., 283; *Kimball v. Newell,* 7 Hill (N. Y.), 116; *St. Albans Bank v. Dillon,* 30 Vt., 122; *Davis v. Statts,* 43 Ind., 103. But where one becomes a surety for the performance of a promise made by an infant, or a person incompetent to contract, the undertaking may not be purely accessorial, and the surety may be bound while the principal is not—the avoidance of such a contract being regarded as personal to the principal. Brandt on Suretyship, Vol. 1 (3 ed.), 352. Indeed, the disability of the principal, if understood by the parties, may be the very reason for requiring that security be given. *Winn v. Sanford,* 145 Mass., 302; *Yale v. Wheelock,* 109 Mass., 502.

And *Lobaugh v. Thompson,* 74 Mo., 600, may be cited as authority for holding the sureties on a replevin bond liable, while the principal, a *feme covert* under disability, was discharged. A similar suggestion was made in *Long v. Cockrell,* 55 Mo., 93. But in neither of these cases do we find the terms of the bond set out, nor a citation of the provisions of the statute under which it was given. See, also, *Stillwell v. Bertrand,* 22 Ark., 375.

It is the uniform holding of all the courts, however, that the sureties on a replevin or redelivery bond are not to be held beyond the terms of their contract or undertaking. 23 R. C. L., 900. It is upon this ground that we rest our present decision.

As supporting in tendency this position, or by way of analogy, it may be instanced that in *Laffoon v. Kerner,* 138 N. C., 281, 50 S. E., 654, the sureties on a stay bond were relieved from liability when pending the appeal from a justice's judgment and before trial in the Superior Court, the defendant obtained a discharge in bankruptcy from all his debts, including the plaintiff's claim, and interposed same by way of a plea in bar to plaintiff's suit. This was later approved in *Murray v. Bass,* 184 N. C., 318, 114 S. E., 303. See, also, *Fontaine v. Westbrooks,* 65 N. C., 528.

Likewise, in a number of olden cases, it was held that the emancipation of slaves seized in replevin relieved the obligors from their undertaking to return them. *Glover v. Taylor,* 41 Ala., 124; *Green v. Lanier,* 5 Heisk (Tenn.), 662; *Pait v. McCutchen,* 43 Tex., 291.

Nothing was said in *Garner v. Quakenbush,* 187 N. C., 603, 122 S. E., 474 (on rehearing, 188 N. C., 180, 124 S. E., 154), which militates against our present position.

The case may seem to be a hard one, as the plaintiff was not aware of the defendant's minority at the time of the sale, nor does it appear that the sureties knew of his disability at the time of the execution of the

bond, but the dominant purpose of the law in permitting infants to disaffirm their contracts is to protect children and those of tender years from their own improvidence, or want of discretion, and from the wiles of designing men.

The cause will be remanded for judgment in accordance herewith.

Error, and remanded.

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IRA BREWER v. DORA BREWER.

(Filed 14 May, 1930.)

**1. Divorce D c—Grounds for divorce must be alleged with particularity, but in this case held: complaint aided by answer was sufficient.**

The law does not favor divorce and requires that in an action for divorce *a mensa* the plaintiff must state the circumstances of the alleged acts upon which this relief is demanded with particularity of detail; but where demurrer is not at first interposed, and the defendant previously files an answer setting forth such circumstances with the particularity required in such cases, and denies the plaintiff's allegations in respect thereto, the deficiency of the complaint thus being supplied, the pleadings will be liberally construed with a view to substantial justice between the parties, C. S., 535, 549, and a demurrer then interposed on the ground that the complaint fails to state a cause of action will be denied. C. S., 511(6).

**2. Appeal and Error E b—Where evidence is not set out in record, it will be presumed that evidence was sufficient to support verdict.**

Where a party to an action has not objected to the issues submitted by the trial court, and there is no evidence appearing of record on appeal, it will be presumed that there was sufficient evidence on the trial to support the verdict.

**3. Divorce B e—Grounds for divorce a mensa are available to husband.**

The grounds for divorce *a mensa* given by C. S., 1660, are available to the husband as well as to the wife, or as stated by the express language of the statute to "the injured party."

APPEAL by defendant from *Shaw, J.*, and a jury, 6 January, 1930. From CABARRUS. No error.

The allegations of the complaint are to the effect that plaintiff and defendant are citizens and residents of the State of North Carolina, and that plaintiff has been a resident for more than two years next preceding the commencement of this action. That plaintiff and defendant are man and wife, duly married on or about 5 March, 1921; that they lived together as man and wife until about June, 1928, when plaintiff separated himself from defendant for the causes hereinafter set out, and has

since lived separate and apart from her; that he had to separate himself from defendant on account of cruel and barbarous treatment inflicted by defendant on plaintiff, viz.: (1) In the spring of 1925 the defendant inflicted upon plaintiff serious bodily injury by thrusting an ice-pick into his side about two inches in depth. (2) In January, 1928, defendant threw scalding water on plaintiff. (3) In January, 1928, the defendant endangered the life of plaintiff by shooting at him with a pistol. (4) That in June, 1928, defendant maliciously turned the plaintiff out of his home by removing from his home all of his wearing apparel and trunk and depositing them in the back yard.

Plaintiff further alleges that the separation from defendant was without fault on his part, and that the treatment as above set forth was without cause or provocation on his part. Plaintiff prays the custody of the child about four years old, born of the union and divorce *a mensa et thoro.*

The complaint was accompanied by the affidavit as required by the statute.

The defendant in her answer denied the material allegations of the complaint and set up the plea of self-defense in regard to the charges made by defendant, and minutely set forth in detail all the facts, the antecedent and attending circumstances that caused the trouble complained of by plaintiff, and charged that plaintiff was in the wrong and she was not, and explained the wearing apparel and trunk incident. She set up affirmative relief and as a cross-bill against the plaintiff alleged that plaintiff had abandoned her and her infant son and failed to provide her with necessary subsistence according to his means and condition in life, and prayed "That a decree be entered dismissing the alleged cause of action set up in the complaint; that she be given the custody of her said child; that she be awarded alimony as to the court may seem reasonable, and her maintenance while this action is pending, and for costs, including a reasonable attorney's fee; that she be given all other relief to which she may be entitled."

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

"1. Did the defendant by cruel and barbarous treatment endanger the life of the plaintiff? Answer: Yes.

2. Did the defendant offer such indignities to the person of the plaintiff as to render his condition intolerable and life burdensome? Answer: Yes.

3. Did the defendant maliciously turn the plaintiff out of doors? Answer: Yes.

4. Did the plaintiff, on or about the ..... day of May, 1928, abandon the defendant and her infant son and fail to provide them with neces-

sary subsistence, as alleged in paragraph 3 of defendant's further answer and claim for affirmative relief? Answer: No."

Judgment was rendered for plaintiff on the verdict. Defendant assigned errors and appealed to the Supreme Court.

*Armfield, Sherrin & Barnhart for plaintiff.*
*Palmer & Blackwelder and H. S. Williams for defendant.*

CLARKSON, J. The defendant demurred *ore tenus* after the return of the verdict, and before judgment was signed by the court below, on the ground that "the complaint does not state facts sufficient to constitute a cause of action."

C. S., 511(6). C. S., 518, in part, is as follows: "If objection is not taken either by demurrer or answer, the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action."

The law does not favor divorces, and in divorce cases more detail and minuteness is required in the complaint, and it has been held in this jurisdiction that the complaint for divorce from bed and board is insufficient which does not specifically state the circumstances of the alleged acts of cruelty, give time and place and state what was plaintiff's own conduct and that such acts were without provocation or fault on the part of the plaintiff seeking the divorce. *Martin v. Martin,* 130 N. C., 27. See cases referred to in *Davidson v. Davidson,* 189 N. C., at p. 628.

When a defective statement of a good cause of action is alleged, and not a defective cause of action, which is fatal on demurrer, and the complaint is insufficient and a demurrer is filed by the defendant distinctly specifying the grounds of objection under C. S., 512 *(Enloe v. Ragle,* 195 N. C., 38), the court ordinarily allows the plaintiff to amend to cure the defect. In the present action defendant did not demur on either ground, but answered and set forth the antecedent and attending circumstances minutely and in detail that caused the several disturbances alleged by plaintiff, claiming plaintiff and not she was at fault. This was taken to be denied by plaintiff. C. S., 543. She further prayed for affirmative relief and alimony under C. S., 1667.

The cause came on for trial in the court below. The issues were not objected to by defendant. The evidence is not in the record, but it is presumed that both parties to the controversy and others testified before the jury in the court below and all the differences were brought out pro and con in detail, all the antecedent and attending circumstances and causes that brought about the troubles that plaintiff complained of and defendant complained of. *King v. R. R.,* 176 N. C., 301; *Ricks v. Brooks,* 179 N. C., at p. 208-9.

We think the case is distinguishable from the *Martin case, supra,* when considered in the light of the many damaging allegations in the complaint against defendant for divorce, with the allegation that the treatment was without cause or provocation on plaintiff's part, and the "aider" in the answer, and defendant's prayer for affirmative relief; the pleadings will be liberally construed "with a view to substantial justice between the parties." C. S., 535; C. S., 549.

C. S., 1660, is as follows: "The Superior Court may grant divorces from bed and board on application of the party injured, made as by law provided: (1) If either party abandons his or her family; (2) maliciously turns the other out of doors; (3) by cruel and barbarous treatment endangers the life of the other; (4) offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

Defendant in her brief says: "The appellant is unable to find a decision of this Court in any action brought under this section of the statute wherein the husband was the plaintiff in the action; and, while the language of the statute would seem to indicate that it affords relief of this nature to husbands against cruel and barbarous treatment on the part of the wife, yet, the appellant doubts that it was ever intended by the Legislature that this statute should operate in favor of the husband." The statute says on application "of the party injured." According to the verdict of the jury, what the wife did to the husband, in every day parlance was "a plenty." If he was not the "party injured," who could be? The language of the statute is clear and gives the man an equal right which has always been accorded the woman. We find

No error.

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J. L. McGEE v. J. C. WARREN, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF WARREN TRANSFER COMPANY.

(Filed 14 May, 1930.)

**1. Highways B e—Evidence that defendant's negligence in parking truck without lights was proximate cause of injury held sufficient.**

Where in an action to recover damages for an injury received in an automobile accident occurring in another State the evidence tends to show that the automobile in which plaintiff was riding as a guest collided with the tail gate of the defendant's truck which was parked partly across the highway without a tail light in violation of statute of the jurisdiction wherein the accident occurred, and that such negligence was a proximate cause of the injury is sufficient to sustain a verdict in the plaintiff's favor.

**2. Negligence C c; Highways B g—Where plaintiff is mere invitee of driver, negligence of driver will not be imputed to plaintiff.**

Where the plaintiff in an action to recover damages for an injury received in an automobile accident is a mere invitee or passenger in one of the automobiles driven by the owner entirely independently of the plaintiff and not under his control, and there is no evidence that the driver and the plaintiff were engaged in a joint enterprise: *Held*, the negligence of the driver, if any, is not imputed to the plaintiff, and he may recover of the defendant if the defendant's negligence was a proximate cause of the injury.

CIVIL ACTION, before *Shaw, J.*, at October Term, 1929, of MECKLENBURG.

The evidence tended to show that the plaintiff, while riding in an automobile owned and operated by his son, collided with a truck owned by the defendant, between Anderson and Greenville in the State of South Carolina. The collision occurred about 4:40 or 5:00 o'clock in the morning and before daylight. There were no lights on the truck at the time of the collision and the truck was standing still.

The evidence further disclosed that the tail gate of the truck was hanging down. The driver of the automobile offered evidence tending to show that he was keeping a lookout and that the lights on his car were burning. The truck was parked on a curve and he could see twenty or thirty feet ahead and could stop his car at the speed at which he was traveling within fifteen feet. He said: "I saw a great big object in the road and ran thirty feet. I would have missed it had I seen that gate hanging down. I could in plenty of time have got by if there hadn't been a tail gate down. I saw the object about twenty or thirty feet before I got to it. . . . I was running around the curve, and when I got within twenty or thirty feet of the truck I saw it and thought the road was blocked at my first glance, and put on my brakes with the intention of stopping. I merely slowed up and saw an opening and put the gas to her and cut around. I did not increase my speed any. . . . I do not know that I could have stopped my car at the speed I was running if I had applied my brakes when I first saw the truck. . . . If it had not been for the tail gate I could have gotten by; I would have come within three or four feet of it. . . . I could see an object twenty feet ahead of me with my lights without any trouble. I could have seen an object further than fifty feet if it had not been on that curve. I could not see quite as far on the curve. I would hardly think I could see it thirty feet away. I should say I could see it twenty feet. I did not realize what it was, whether it was an automobile, house, or what it was." Another witness, who was traveling in the same direction with plaintiff's car, testified that the truck was not lighted, and

that he would have hit it himself had he not seen the tail light of plaintiff's car when it turned to the left to avoid the truck.

The evidence tended to show that when the driver of the car cut to the left the tail gate of the truck struck the side of the car in which plaintiff was riding and crushed him, by reason whereof he suffered serious and permanent injury.

The evidence further showed that the driver of the car was traveling about twenty or twenty-five miles at the time of the collision. The laws of South Carolina were offered in evidence, fixing a speed limit of forty-five miles an hour and requiring a red tail light upon vehicles used upon the highway. Certain decisions of the Supreme Court of South Carolina were also offered in evidence.

The trial judge presented the question to the jury, based upon the South Carolina statutes and decisions, and also the common law of North Carolina. There was no objection to the charge in this particular.

The jury answered the issues in favor of plaintiff and assessed the damage at $7,500.

From judgment upon the verdict the defendant appealed.

*Stewart, McRae & Bobbitt and Kurtz P. Smith for plaintiff.*

*Hamilton C. Jones, J. Laurence Jones and T. C. Guthrie for defendant.*

BROGDEN, J. The Supreme Court of South Carolina considered the question involved in this appeal in the case of *Lipford v. General Road and Drainage Construction Co.*, 110 S. E., 405. In that case a truck was left standing in the night time without lights. The plaintiff ran into the rear of the standing truck and his automobile was considerably damaged. The defendant moved for a directed verdict upon the ground that there was no proof of negligence and undisputed proof of negligence of plaintiff. However, the court held that the testimony was susceptible of more than one inference as to negligence, and hence an issue of fact was raised which should have been submitted to a jury.

Viewing the question involved, in the light of the decisions of this jurisdiction, the question was properly submitted to the jury. The plaintiff was an invited guest or gratuitous passenger at the time of the collision. There was no evidence that he was engaged in a joint enterprise with the driver or that he had any control whatever of the car or that he failed to perform any duty imposed by law upon him as a guest or gratuitous passenger. This aspect of liability was discussed in the case of *Earwood v. R. R.*, 192 N. C., 27, 133 S. E., 180, where it was held that ordinarily the negligence of a driver will not be imputed to a

guest or occupant of an automobile "unless such guest or occupant is the owner of the car or has some kind of control of the driver. Of course if the negligence of the driver is the sole, only, proximate cause of the injury, the injured party could not recover. This rule is not based upon the idea of contributory negligence on the part of the injured party, but rather upon the idea that the party causing the injury was not guilty of any negligence, which was the proximate cause thereof."

In the case at bar there was ample evidence tending to show negligence upon the part of defendant, and also that there was a causal connection between the negligence of defendant and the injury sustained by the plaintiff. Even if it be assumed that the driver of the car was negligent in failing to keep a proper lookout, in no event could such negligence be imputed to the plaintiff upon the facts and circumstances disclosed by the record. Moreover, it has been held: "As to whether the motorist at a given time was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact," etc. *Williams v. Exp. Lines, ante,* 193. In truth, the *Williams case, supra,* is determinative of the principles of liability involved in this appeal.

No error.

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RALEIGH BANKING AND TRUST COMPANY v. SAFETY TRANSIT LINES, INC.

(Filed 14 May, 1930.)

**1. Landlord and Tenant B a: Corporations G c—Lessee corporation's seal is not required for the validity of a lease.**

It is not required by statute that a lessee corporation should sign a lease, C. S., 1138, applying only to conveyances, and the failure of a lessee corporation to affix its seal to a lease to it of lands necessary to the purpose of its business does not of itself render the lease invalid.

**2. Corporations G c—The president of a corporation is a general agent and has implied authority to lease property for the corporation.**

The president of a corporation, *ex vi termini,* is the general agent of the corporation with the implied authority to lease lands or buildings necessary for the business purposes of the corporation, and an instrument of this character signed by him in his official capacity is sufficient to bind the corporation though he may have had no express authority to do so, and where the lessor has made the lease contract with the corporation through the president, and there is no evidence that he had notice of any limitation of the implied authority of the president to execute the lease in question, he is not bound by any such secret limitation.

**3. Landlord and Tenant B b—In this case held: if signature of other lessees was condition precedent, defendant lessee waived condition.**

Where certain bus lines operating within a city are required by order of the Corporation Commission to establish and operate a union bus station therein for the better accommodation of the public, and one of the bus lines, acting through its president, leases a station to be used by all the bus lines jointly, and assures the lessor that arrangements had been made with other bus lines for their signatures to the lease, and the various companies have used the premises for a union passenger station: *Held*, in an action on the lease contract there is no evidence that the signatures of the other lessees was a condition precedent to the liability of the company executing the lease through its president, and the statement of the president that he had an oral agreement with the other lessees, and the fact that possession was taken by the lessees under the terms of the lease is a waiver of such condition by the company executing the lease.

**4. Appeal and Error E d—Where the record is conflicting, the case will be remanded for sufficient finding of fact.**

Where, in an action on a lease contract brought against the purchaser of the lease at the sale of the insolvent lessee's assets, the record recites that the receiver of the lessee and the purchaser of the assets at the receiver's sale had repudiated the lease contract, it will ordinarily be held as a matter of law that the lease contract had been breached, but where the record is conflicting as to whether the contract had been breached, the case will be remanded for a definite finding of fact.

CIVIL ACTION, before *Harris, J.*, at October Special Term, 1929, of WAYNE.

A jury trial was waived and the trial judge found the facts. The facts so found are substantially as follows:

1. On 12 June, 1925, the Corporation Commission made an order that all motor vehicle carriers operating to, from and through the city of Goldsboro should establish and maintain in said city a union station so centrally located as to best serve the public.

2. On 12 July, 1925, W. A. Royall, a citizen of Goldsboro, and the owner of a certain lot therein, made a proposed contract of lease with the Safety Transit Lines, Inc., Seashore Transportation Company, both North Carolina corporations, George B. Patrick and John A. Vinson, trading as Patrick & Vinson, and Ashley Southerland and Malcolm Southerland, trading as Southerland Brothers, the owners of all bus lines entering the city of Goldsboro.

3. By the terms of said contract Royall proposed to lease to said transportation companies for a period of ten years a certain lot of land owned by said Royall, to be used as a bus station. This lease was signed by S. T. Gresham for and in behalf of Safety Transit Lines, but was not signed by any of the other parties. Gresham was president of the Safety Transit Lines and stated to Royall prior to signing the agree-

ment that the Safety Transit Lines, Inc., "would be responsible for the lease regardless of the other signatures. Gresham, as president of Safety Transit Lines, Inc., also advised Royall that he had made arrangements with the other parties who were using the bus station on the basis of the old bus station." Whereupon Royall did not secure the signatures of other parties using the bus station.

4. The corporate seal of the Safety Transit Lines was omitted from said contract, and it was not attested by the secretary of the corporation. There was no evidence that said Gresham as president was authorized to enter into said contract or execute the same. After the execution of the agreement Royall proceeded to construct on his property a building especially designed as a bus station at an approximate cost of $51,000. Gresham, president of the Safety Transit Lines, Inc., frequently visited the bus station and consulted with Royall and the architect directing its construction. Certain modifications and changes were made in the station under a verbal agreement between Royall and Gresham as president of said corporation, to the effect that the annual rental would be increased by ten per cent by reason of enlarging the building and certain other changes and improvements. The architect's drawings of the changes were submitted to Gresham and approved by him in writing as president of Safety Transit Lines, Inc.

5. Subsequently, to wit, on 22 January, 1929, Royall and wife executed a lease for said bus station to the Safety Transit Lines, Inc., and Seashore Transportation Company, providing for a certain annual rental. This lease was never submitted to or approved by the Seashore Transportation Company or Patrick and Vinson or Southerland Brothers, and was never executed by Seashore Transportation Company. However, said lease was duly executed by Royall and his wife and signed: "Safety Transit Lines, Inc., by S. T. Gresham, President. Attest: S. H. Hassenger." The lease was duly acknowledged by Royall and wife before a notary public, who took the private examination of Mrs. Royall. The following certificate appears on the lease: "North Carolina, County of Wake. This the 23d day of January, 1929, before me, a notary public, personally came S. T. Gresham, who being by me duly sworn, says that he is president of the Safety Transit Lines, Inc., and that the seal affixed to the foregoing instrument in writing is the corporate seal of said company, and that said writing was acknowledged and sealed by him in behalf of said corporation by its authority duly given, and the said S. T. Gresham acknowledged the said writing to be the act and deed of said corporation. Witness my hand and notarial seal, this the 23d day of January, 1929. W. F. Black, Notary Public."

However, the seal of the corporation was not affixed to the foregoing paper-writing, and it was never submitted to the stockholders or direc-

tors of the Safety Transit Lines, Inc., for their approval. Gresham, president of Safety Transit Lines, advised Royall that he wanted the station there and would pay the rent, and that he had a verbal agreement with other bus companies using the bus station for a partial contribution to the expense thereof.

Upon the foregoing the court found that the proposed contract was never completed, and that the paper-writing did not become a contract between the parties or binding upon either party.

6. The court further found that the bus station since its completion has been under the control and management of the four bus companies operating into the city of Goldsboro, and that "under the order and direction of the Corporation Commission the said bus lines verbally agreed to the contract for rental and division of the rent, and that they selected a manager for the bus station, who has had active charge and management thereof since completion and who apportioned and collected the rents from each of said bus companies and paid said rent to said Royall and Graves J. Smith, trustee for said Royall." Thereafter the Safety Transit Lines, Inc., was placed in the hands of receivers, but said receivers immediately after receivership denied any obligations under said contract.

7. The receivers sold the property of the Safety Transit Lines to W. Bond Collins and his associate, Safety Transit Company, and at the same time assigned all title and interest in said lease to Safety Transit Company. Collins and Safety Transit Company are solvent.

8. The court further found that the receivers never acquired an interest in said contract, or that whatever interest the receivers had in said property was assigned to Safety Transit Company. The court further found that if there was a contract existing, there had been no breach of same upon the part of Safety Transit Lines, Inc., or its receivers.

9. The court further found that the reasonable rental value of the bus station during the remaining period of the lease was $125 a month.

Subsequent to 16 September, 1929, the purchaser of Safety Transit Lines, to wit, Safety Transit Company, notified Royall that it denied all liability under the alleged lease if any such lease existed. Royall filed a claim with the receivers of Safety Transit Lines, Inc., for $18,071.10 upon the theory that the total rent for the entire term of the lease would be $33,156; that $959 had been paid, and that the market value of the balance of the term of the lease, which was ten years, was $1,500 per year, amounting, therefore, to $14,125 for the remainder of the term. The receivers declined to accept said claim.

After hearing the evidence and after making the findings of fact as above set out, the trial judge rendered judgment as follows: "Upon the

basis of all the facts as found by the court, the court concludes as a matter of law and fact that the receivers are not indebted to said W. A. Royall and wife and Graves J. Smith, trustee, in any amount on account of the alleged contract."

From the foregoing judgment the plaintiff appealed.

*Kenneth C. Royall and J. N. Smith for plaintiff.*
*William B. Jones and Clyde A. Douglass for receivers.*

BROGDEN, J. The record presents the following questions of law:

1. Is the acceptance of the lease by Safety Transit Lines, Inc., void by reason of the fact that the corporate seal was not affixed thereto?

2. Was Gresham, president of Safety Transit Lines, authorized to consent to said lease?

3. Did the Safety Transit Lines, Inc., ratify said lease by taking possession of the property and using the same until the receivership?

4. Did the failure of Seashore Transportation Company to sign the lease release the obligation of Safety Transit Company?

No statute of this State has been called to our attention requiring a lessee to sign the lease. The provisions of C. S., 1138 apply to conveyances, and it has never been held in this jurisdiction that the assent of a lessee to the terms of the lease is a conveyance. Hence, the failure to affix the corporate seal to the acceptance of the lease by the lessee would not seem to be vital. Indeed, it was held in *Mershon v. Morris*, 148 N. C., 48, 61 S. E., 647, that: "The ancient rule that a corporation could act only by its seal has been greatly relaxed in later times, if, indeed, not wholly abrogated." In discussing the absence of a seal upon a title retaining contract for personal property in *Mershon v. Morris, supra*, this Court said: "There was no necessity for the corporate seal. For the varied transactions of a business or manufacturing corporation it would be impracticable to require every letter, order, contract, note, check or draft to have the corporate seal attached." Even if the corporate seal be affixed it is only prima facie evidence that it was so affixed and that the conveyance was executed by proper authorities. *Duke v. Markham*, 105 N. C., 131, 10 S. E., 1017; *Edwards v. Supply Co.*, 150 N. C., 173, 63 S. E., 740; *Chatham v. Realty Co.*, 174 N. C., 671, 94 S. E., 447.

The court finds that Gresham as president of Safety Transit Lines, Inc., had no express authority to assent to the lease or sign said lease agreement. There is no finding that said president had no implied authority to accept said lease or that Royall, the lessor, had notice of any lack of such authority. The president of a corporation is *ex vi termini* its general agent. *Davis v. Ins. Co.*, 134 N. C., 60, 45 S. E.,

955; *Bank v. Oil Co.*, 157 N. C., 302, 73 S. E., 93; *Cardwell v. Garrison*, 179 N. C., 476, 103 S. E., 3. In the *Cardwell case, supra*, there was a resolution passed by the directors that no contract or valuable papers should be valid without the signature of the secretary and treasurer. The president endorsed notes of the corporation to the plaintiff. The court said: "This being true, the legal title to these notes would, in our opinion, pass by the endorsement of the president of the company, notwithstanding the resolution of the directors establishing limitations upon his powers. Such endorsement being within the scope of his apparent powers, and coming under the accepted and wholesome rule that a principal who has clothed his agent with apparent authority to do an act may not repudiate such authority, and the effect of it by reason of private instructions or limitations uncommunicated or unknown to the other party."

Again in *Morris v. Basnight*, 179 N. C., 298, 102 S. E., 389, in discussing a contract to convey land, signed by the secretary, the Court said: "The contract to convey is sufficient in form, and having been executed by the general manager of the company, apparently within the course and scope of his powers, and in the line of the company's business, is prima facie binding on the company. And, if it were otherwise, the company having acquired the plaintiff's interest in his father's land and the timber thereon under and by virtue of the act of the secretary and general manager, are concluded on this question. They will not be allowed to accept and hold the benefits of the agreement and repudiate the authority of the agent by whom it was made."

In the case at bar the president of the Safety Transit Lines was dealing with the plaintiff for a period of six months. The company was required to join in the erection of a bus station. The act of the president was, therefore, in line with the company's business, and the negotiations for the lease were in furtherance of such business. Indeed, it appeared that the company was required to secure a bus station by order of the Corporation Commission, and hence the president in so acting was discharging for his corporation a duty duly imposed by lawful authority. Under these circumstances and in the absence of notice to the plaintiff of any limitations upon the general power of the president, it cannot be held that the contract was not binding upon the defendant, Safety Transit Lines, Inc.

It is also suggested that the other bus companies did not sign the acceptance of the lease or lease agreement. However, it is further found as a fact that Gresham, president of Safety Transit Lines, Inc., stated to the plaintiff, Royall, "that he had a verbal agreement with other bus companies using the bus station for a partial contribution of the expense thereof."

Moreover, the court further found as a fact "that the said bus station is now and has been since its completion under the control and management of the four bus companies operating in the city of Goldsboro; that under the order and direction of the Corporation Commission the said bus lines verbally agreed to contract for rental and division of the rent." There is no evidence or finding that the contract between the plaintiff and Safety Transit Lines, Inc., was conditioned upon the signature of other parties. Clearly, the aforesaid statement of Gresham was a waiver of the signature of other parties so far as the Safety Transit Lines, Inc., is concerned; and the further fact that possession of the bus station was taken under and in accordance with the terms of said paper writing would of itself constitute a waiver of such signature.

The court found as a fact that there had been no breach of contract upon the part of Safety Transit Lines, Inc., or its receivers. The court also found as a fact that "the receivers at no time indicated a purpose or desire to take over said contract or to ratify or be bound by the terms of the same, but on the contrary, immediately after the receivership, denied any obligation thereunder."

The court also found as a fact that the assignee or purchasers of the lease at the receiver's sale, to wit, Safety Transit Company, also repudiated the lease and refused to assume any responsibility thereunder. Ordinarily the positive repudiation of a lease or denial of liability thereunder would work a breach thereof as a matter of law. However, the findings with respect to this particular phase of the case are inconsistent and conflicting, and we are unable to determine the merits of the question of law involved upon the present state of the record; and for this reason we are minded to remand the cause to the Superior Court of Wayne County in order that it may be specifically and definitely determined whether there has been a breach of the lease by the Safety Transit Lines, Inc., or its receiver or the purchaser of the lease at the receiver's sale. *Fullenwider v. Rendleman,* 196 N. C., 251.

There is no finding that the amount of damages claimed by the plaintiff is based upon an erroneous theory or not supported by both the law and the facts. Therefore, we do not discuss this phase of the case. Apparently the claim is based upon the theory of damages approved by this Court in *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12.

Remanded.

STATE v. NORVELL SATTERFIELD.

(Filed 14 May, 1930.)

**1. Homicide C a—Definition of involuntary manslaughter.**

Involuntary manslaughter at common law is the unintentional killing of a human being without malice by an unlawful act not amounting to a felony or by an act naturally dangerous to human life, or by negligently doing a lawful act, or negligently failing or omitting to perform a duty imposed by law.

**2. Same—Violation of statute enacted for public safety which is proximate cause of death is sufficient for conviction of manslaughter.**

The violation of a statute enacted for the purpose of protecting the public traveling on the public highways of the State is in itself sufficient for a conviction of manslaughter if the violation is in causal relationship with the injury or a proximate cause thereof.

**3. Same—Where evidence does not show that defendant's negligence was proximate cause of death nonsuit is proper.**

The manifest object of C. S., 2621(63) is to protect the public by requiring the driver of an automobile upon the public highways of the State to stop and ascertain the circumstances and conditions at highway intersections, particularly with reference to traffic, with a view of determining whether in the exercise of due care he may go upon the intersecting highway with reasonable safety to himself and others, and where the defendant in a prosecution for manslaughter fails to stop, but has knowledge of the conditions and has an unobstructed view of the highway for a long distance, and there is no evidence tending to show that he had violated any other statute or that he was negligent in any other respect, the evidence alone that he had violated the statute in the respect stated is insufficient to take the case to the jury, there being no evidence that the violation of the statute was a proximate cause of the death or in causal relation thereto, and defendant's motion as of nonsuit, made in apt time, should have been granted.

**4. Same—Proximate cause must be shown beyond a mere chance or casualty.**

Where a conviction of involuntary manslaughter is sought for the failure to observe a positive duty imposed by statute with reference to the driving of automobiles upon the State highways (C. S., 2621(63), Michie), the question of proximate cause must be shown beyond a mere chance or casualty.

APPEAL by defendant from *Shaw, J.*, at December Term, 1929, of GUILFORD. Reversed.

Defendant was convicted of manslaughter arising out of the alleged negligent operation of an automobile, resulting in the death of Mrs. Alice Johnson. The defendant, as required by the statute, moved to dismiss the action as in case of nonsuit. Denied. Exception.

The evidence most favorable to the State tended to show the facts to be as follows:

The accident occurred approximately three-quarters of a mile outside the corporate limits of the city of Greensboro on highway No. 10. At the place of the accident the highway is intersected or crossed by a road, the name of which on one side of the highway is the Pinecroft road, and on the other Lathamtown road. At the place of intersection No. 10 has a hard surface 30 feet wide according to one witness and 40 feet wide according to another. On each side there are dirt shoulders about 10 feet in width. The Pinecroft road has a hard surface about 18 feet in width, with slight dirt shoulders. The collision took place between a White Motor Bus and a car driven by the defendant. The bus left High Point going in the direction of Greensboro at 8:30 or 8:40 in the morning. The weather was cold; it was raining and sleeting; there was ice on the highway. The driver of the bus said "there was ice in spots in the road." It was a 22-passenger bus and carried six or seven passengers at the time of the injury. It had a windshield wiper which was in use. It was traveling about 25 or 30 miles an hour. As it approached the intersection referred to, a car driven by the defendant came out of the Pinecroft road into highway No. 10, turned in the direction of Greensboro, straightened out, and was a few feet in front of the bus. The speed of the car was estimated by one witness for the plaintiff at less than 15 miles an hour, and by another at 25 or 30 miles an hour. The bus overtook the car, the right fender of the bus striking the left fender of the car; the bus swerved to the left, skidded, went about 75 feet, crossed a ditch three to six inches deep, ran up an embankment, and turned on its right side. Mrs. Johnson, who was a passenger on the bus, suffered injuries from which she died a short time afterwards.

A person coming into highway No. 10 on the Pinecroft road can see No. 10 at a distance estimated at from 100 to 180 yards. On the right side of the Pinecroft road there was a regulation stop sign and the defendant did not bring his car to a full stop before entering the highway.

The State contends that the defendant is guilty of involuntary manslaughter; the defendant contends that he is not guilty of any offense.

The jury returned a verdict of manslaughter, and from the judgment pronounced the defendant appealed.

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

*Brooks, Parker, Smith & Wharton for defendants.*

ADAMS, J. In deciding whether the conviction and judgment can be sustained, we must consider the evidence as having been accepted by the

jury, with all its legitimate inferences. Thus considered does the evidence make a case of involuntary manslaughter?

This offense consists in the unintentional killing of one person by another without malice (1) by doing some unlawful act not amounting to a felony or naturally dangerous to human life; or (2) by negligently doing some act which in itself is lawful; or (3) by negligently failing or omitting to perform a duty imposed by law. These elements are embraced in the offense as defined at common law. Wharton, Homicide, 7; 1 Crim. Law (11 ed.), 622; 1 McClain on Crim. Law, 303, sec. 335; Clark's Crim. Law, 204. The definition includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent way, and from the negligent omission to perform a legal duty. For the present purpose we may lay aside the common-law doctrine of culpable negligence in the performance of a lawful act and the common-law doctrine of unintentional homicide caused by an unlawful act not forbidden or made unlawful by any statute. Examples of the latter class may be found in decisions which from early times have maintained the elementary principle that if a person drives a vehicle on a highway recklessly or at an unusually rapid speed and runs over another and kills him he may be guilty of manslaughter. *Rex v. Walker,* 171 Eng. Rep., 1213. The prosecution of the case before us was conducted upon the theory of an alleged breach of a positive injunction of the following statute:

"The State Highway Commission with reference to State highways and local authorities with reference to highways under their jurisdictions are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. That no failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts of the case in determining whether the plaintiff in such action was guilty of contributory negligence." P. L. 1927, ch. 148, sec. 21; C. S. (Michie), sec. 2621(63).

The defendant admits that on the Pinecroft road there was a "stop-sign," or sign notifying drivers to come to a full stop, and that he did not observe this warning.

Sometimes responsibility for death turns upon the question whether the unlawful act is *malum in se* or *malum prohibitum,* as in *S. v. Horton,* 139 N. C., 588; but in *S. v. McIver,* 175 N. C., 761, the Court said: "It is, however, practically agreed, without regard to this dis-

tinction, that if the act is in 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." In that case it was held that the motion for nonsuit was properly denied because there was evidence that the defendant had driven the vehicle in breach of a positive law and with such recklessness as was sufficient to make him guilty independently of a violation of the statute or ordinance. The principle there announced was approved in *S. v. Gash,* 177 N. C., 595, in which, upon the same grounds, a conviction of manslaughter was sustained. In *S. v. Gray,* 180 N. C., 697, the Court upheld a similar conviction, not only because the defendant was guilty under the common-law doctrine of unintentional homicide caused by reckless driving, but because he disregarded the positive mandate of a statute. While the conviction of the defendant in *S. v. Rountree,* 181 N. C., 535, was maintainable upon the ground of his culpable negligence at common law, the Court reaffirmed the principle stated in *McIver's case* and remarked that if the defendant was operating his machine in disregard of the statute he was engaged in an unlawful act.

To make a case of culpable negligence at common law it is necessary, under our decisions, to show a higher degree of negligence than is required to establish negligent default in a civil action *(S. v. Tankersley,* 172 N. C., 955); but if a person does an act which is in breach of a positive law designed to prevent injury to the person, which is likely to produce death or great bodily harm, and which proximately causes death, . . . such person is guilty of manslaughter. *S. v. McIver, supra; S. v. Gray, supra.*

There is ample evidence of the defendant's disregard of the statute; his failure to obey the law was the negligent omission of a legal duty. *Ledbetter v. English,* 166 N. C., 125. But this was not sufficient in itself to warrant his conviction. There are yet to be considered the elements of causal relation and, indeed, of proximate cause; for mere proof of a negligent act does not establish its causal relation to the injury; and evidence of causal relation is not necessarily proof of proximate cause. *Hudson v. R. R.,* 142 N. C., 198. The cause of an injury may be proximate or remote. To hold a person criminally responsible for a homicide his act must have been a proximate cause of the death. Wharton on Homicide, 31; *S. v. Preslar,* 48 N. C., 421. It need not have been the direct cause; it may have been an indirect cause; but no person can be guilty of homicide unless the act is his, actually or constructively. Clark's Crim. Law, 155; *Commonwealth v. Campbell,* 83 Am. Dec., 705.

We are not concerned with the question of negligent default in a civil action, as in *Fowler v. Underwood,* 193 N. C., 402, but with the con-

stituent elements of involuntary manslaughter. In their application to the defendant's negligent act these elements call for a construction of C. S., 2621(63); for in determining whether the death of Mrs. Johnson was proximately caused by the defendant's disobedience of the law we must ascertain the evils the statute is designed to prevent.

It provides that the driver's failure to stop in obedience to the sign shall be unlawful. Whether this provision is apparently out of line with another provision of the same statute we need not pause to consider. The manifest object of the provision is to create a situation in which the driver of a motor vehicle shall have opportunity to inform himself of circumstances and conditions, particularly in reference to traffic, with a view to determining whether in the exercise of due care he may go upon the intersecting highway with reasonable safety to himself and others. If the defendant approached the intersection without coming to a full stop and yet had knowledge of all the conditions which literal obedience to the statute would have disclosed, his failure to stop cannot be imputed to him as such criminal negligence as would justify a conviction of manslaughter. As we read the evidence this is the exact situation. Stopping his car at the sign would not have enabled him to acquire any additional information. He knew the condition of both highways—their width and their hard surfaces coated with ice. From the Pinecroft road his view up the main highway was unobstructed for a distance of five hundred and forty feet, and it would not have been expanded by his stopping at the sign. He saw the bus; he knew all he would have known had he stopped. Conceding, then, that a person may unlawfully kill another by doing an act which is in violation of a statute designed to prevent injury to the person and which is likely to result in death or bodily harm, we are of opinion that the evidence in this case fails to show such proximate causal relation between the breach of the statute and the death of Mrs. Johnson as is essential to a prosecution for involuntary manslaughter. We have reached this conclusion independently of any consideration of various other conditions which may have contributed to the accident.

It is said that if the defendant had observed the statute the collision would not have occurred, because the bus would have passed in advance of the car; but inseparable from this position is the idea of mere chance or casualty and not of the exercise of judgment or due care. As we have pointed out, the object of the statute is not to delay or impede travel, but to prevent travelers on the highways of the State from carelessly and blindly rushing into situations which menace danger—not to retard the progress of those who are traveling with knowledge of surrounding conditions.

The defendant's breach of the statute we have quoted is the only ground upon which the State relies to sustain the judgment of the trial court. It is not contended that he violated any other statute or that he drove his car recklessly or with culpable negligence after going by the sign.

The motion to dismiss the action should have been granted.

Judgment reversed.

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RALPH FESPERMAN v. W. O. PRATT.

(Filed 14 May, 1930.)

**Master and Servant C b—Where employer furnishes means of descent and employee chooses to use other means, employer is not liable.**

Where the plaintiff, employed by the defendant to work on a building under construction, is injured by falling therefrom while using a rope to descend from the roof, when the employer had provided a step-ladder for the purpose of ascent and descent, and the rope had been provided to draw lumber to the roof: *Held*, the employer is not liable for the injury caused by the failure to use the safe means provided for ascent and descent from the building.

APPEAL by plaintiff from *Harwood, Special Judge,* at November Term, 1929, of CABARRUS. Affirmed.

Action to recover damages for personal injuries caused, as alleged in the complaint, by the negligence of defendant in failing to provide reasonably safe means by which plaintiff could descend from the roof of a building on which he was at work as an employee of defendant.

From judgment dismissing the action as of nonsuit, at the close of the evidence for the plaintiff, plaintiff appealed to the Supreme Court.

*H. S. Williams for plaintiff.*
*Hartsell & Hartsell for defendant.*

PER CURIAM. Plaintiff was at work as an employee of defendant on the roof of a building in the course of construction. Defendant had provided a ladder by means of which plaintiff and other employees of defendant, at work on the roof of the building, could ascend and descend from the place at which they were required to work. Plaintiff instead of using this ladder, undertook to descend from the roof by means of a rope which defendant had provided for drawing lumber and other material from the ground to the roof. This rope was not fastened to the roof, and plaintiff fell to the ground and was injured.

The judgment dismissing the action upon the ground that the evidence for the plaintiff failed to show that his injuries were caused by the negligence of defendant, as alleged in the complaint, is in accord with the decision of this Court in *Bennett v. Powers,* 192 N. C., 599, 135 S. E., 535. It is said in the opinion in that case that "where an employer has by the exercise of ordinary care provided reasonably safe means by which his employee can get to and from the place of his work, and the employee knows of such means, having previously used the same, but voluntarily chooses another and hazardous way, not provided by the employer, the employer cannot be held liable for damages resulting from an injury sustained by the employee, caused by the conditions chosen by him without authority from or notice to the employer."

There is no error in the judgment. It is

Affirmed.

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BESSIE BEGNELL v. SAFETY COACH LINE, INC., AND CAROLINA COACH COMPANY.

(Filed 21 May, 1930.)

**Corporations G c—In this case held: allegations and evidence were insufficient to hold vendee corporation liable for debts of vendor.**

The fact that one corporation has purchased and taken a conveyance of the property of another corporation does not alone make the vendee liable for the debts of the vendor, and where, in an action against the vendor and vendee corporation to recover damages alleged to have been negligently inflicted by the vendor prior to such conveyances, it is not alleged or proven that the vendor was insolvent or that the conveyance was made to hinder, delay or defraud creditors, or that there had been a merger or consolidation of the corporations, or that the vendee had agreed to assume the liabilities of the vendor, or that the vendee was a new corporation organized to take over and operate the business of the vendor, or that the vendor has ceased to exist as a corporation: *Held,* the vendee may not be held liable to the plaintiff for injuries sustained from the alleged negligence of the vendor, and C. S., 1138, does not alter this result, its effect, if applicable, being to render the conveyance void as to the plaintiff, who could then levy on the property under execution on a judgment against the vendor, and C. S., 1013, applying only to the sale in bulk of a large part or the whole of a stock of merchandise.

APPEAL by defendant, Carolina Coach Company, from *Devin, J.,* at September Term, 1929, of DURHAM. Reversed.

This is an action to recover damages for personal injuries sustained by the plaintiff while she was riding as a passenger in a bus owned and operated by the defendant, Safety Coach Line, Inc., and caused by the negligence of the driver of the bus, an employee of said defendant.

The action was begun by summons issued on 19 March, 1925, and duly served thereafter on the defendant, Safety Coach Line, Inc. The said defendant is a corporation duly organized under and by virtue of the laws of the State of North Carolina. At the time the plaintiff was injured, the said defendant was engaged in the business of operating passenger busses from Raleigh to Durham and other points over the highways of this State. Plaintiff was injured on 23 October, 1924, when the bus in which she was riding as a passenger from Raleigh to Durham overtook and collided with an automobile traveling on the State highway in the same direction as that in which the bus was traveling. The collision was caused by the negligent manner in which the driver, an employee of the defendant, was operating the bus. Plaintiff's injuries and her resulting damages were caused by the negligence of the defendant, Safety Coach Line, Inc.

After the commencement of the action, and while the same was pending, on motion of plaintiff, the Carolina Coach Company was made a party defendant in the action, by a summons issued on 19 May, 1926, and duly served thereafter on said defendant. No cause of action was alleged in the original complaint filed on 12 April, 1925, against the said Carolina Coach Company. In the amended complaint filed on 9 August, 1926, after the said company had been made a defendant, the allegations of the original complaint are affirmed, and it is further alleged:

"2. That the Carolina Coach Company is a corporation created, organized and existing under and by virtue of the laws of the State of North Carolina, with its principal office and place of business in the city of Raleigh; that it is engaged in operating motor busses and carrying passengers for hire.

3. That on or about 24 November, 1925, the Safety Coach Line, Inc., disposed of all of its busses, tools, equipment, rights in and to a lease on the above station in Raleigh, all franchise, right or rights which the company may have had by reason of its operation of its line of busses in Greensboro, by good-will, trade name, advertising and other rights of which the Safety Coach Line, Inc., may have been possessed, except accounts receivable. Said bill of sale included seven coaches. That said property was thereby conveyed to the Carolina Coach Company.

4. That the sale by the Safety Coach Line, Inc., of all of its property to the Carolina Coach Company constituted a transfer of all of its tangible assets.

5. That the Carolina Coach Company is now the owner and operator of the property owned and operated by the Safety Coach Line, Inc., at the time of the matters complained of in the original complaint."

The allegations contained in paragraphs 2 and 3 of said amended complaint are admitted in the answer filed by the Carolina Coach Company on 7 September, 1926; the allegations contained in paragraphs 4 and 5 of said complaint are denied in said answer. In its answer, the said Carolina Coach Company admitted that "it is now the owner and operator of some of the property formerly owned and operated by the Safety Coach Line, Inc." It alleges that it paid to the said Safety Coach Line, Inc., a full and fair consideration for said property. It specifically denied that in the purchase of said property it assumed any of the liabilities, contractual or otherwise, of the said Safety Coach Line, Inc. It alleged that at the time it purchased said property from the Safety Coach Line, Inc., the said Safety Coach Line, Inc., was and that it is now solvent, and has property sufficient to pay any judgment which the plaintiff may recover in this action against said Safety Coach Line, Inc., upon the cause of action alleged in the original complaint.

At the trial there was evidence tending to sustain the allegations of the original complaint upon which plaintiff demanded judgment that she recover of the defendant, Safety Coach Line, Inc., damages for the injuries which she had sustained. No exceptions were taken by the defendant, Safety Coach Line, Inc., with respect to the evidence, or to the instructions of the court in its charge to the jury. The only evidence offered by the plaintiff in support of the allegations of the amended complaint filed after the defendant Carolina Coach Company was made a party to the action, was paragraphs 2 and 3 of said amended complaint, with the corresponding paragraphs of the answer of said defendant, in which the allegations of said paragraphs are admitted. No evidence was offered by the defendant, Carolina Coach Company, pertinent to the allegations of the amended complaint.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff injured by the negligence of the Safety Coach Line, Inc., as alleged in the complaint? Answer: Yes.

2. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $4,400.

3. Is the defendant, Carolina Coach Company, liable for the payment of said sum? Answer: Yes."

From judgment on the verdict that the plaintiff recover of the defendants, Safety Coach Line, Inc., and Carolina Coach Company, the sum of $4,400, with interest thereon from 9 September, 1929, and the costs of the action, the defendant, Carolina Coach Company, appealed to the Supreme Court.

*Victor S. Bryant and C. V. Jones for plaintiff.*

*Smith & Joyner and McLendon & Hedrick for defendant.*

CONNOR, J. The defendant, Carolina Coach Company, on its appeal to this Court, contends that there was error on the trial of this action in the Superior Court, (1) in that the judge overruled its demurrer *ore tenus* to the complaint as amended after said defendant was made a party to the action, for that the facts stated therein are not sufficient to constitute a cause of action upon which the plaintiff is entitled to recover of said defendant, C. S., 511(6); C. S., 518; (2) in that the judge refused to allow its motion at the close of all the evidence that the action as against said defendant be dismissed as of nonsuit, C. S., 567; and (3) in that the judge in his charge instructed the jury that upon the admissions in the pleadings, which were the only evidence offered at the trial pertinent to said issue, the jury should answer the third issue, "Yes."

The question thus presented for decision is whether upon the facts alleged in the amended complaint, admitted by both the demurrer and the answer, the defendant, Carolina Coach Company, is liable as a matter of law to the plaintiff for the damages sustained by her and caused by the negligence of the defendant, Safety Coach Line, Inc. The plaintiff contends that the defendant, Carolina Coach Company, is liable to her for such damages, because after the commencement of the action, and while the same was pending, the defendant, Safety Coach Line, Inc., by a bill of sale, conveyed to the said Carolina Coach Company all of its busses, tools and equipment, and also all its franchises, rights in and to the lease on the bus station at Raleigh, and rights to operate its busses in Greensboro.

It is not alleged in the complaint, and there was no evidence at the trial tending to show that at the time of the conveyance the Safety Coach Line, Inc., was insolvent, or that said conveyance was made with intent to hinder, delay or defraud the plaintiff or other creditors of the Safety Coach Line, Inc.; nor is there allegation or proof that there was in law or in fact a merger or consolidation of the Safety Coach Line, Inc., with the said Carolina Coach Company; nor is there allegation or proof that the Carolina Coach Company assumed or agreed to assume any of the liabilities of the Safety Coach Line, Inc., whether arising out of contract or otherwise. There is neither allegation nor proof that the defendant Carolina Coach Company was a new corporation, organized for the purpose of taking over and operating the property of the Safety Coach Line, Inc., or that said Safety Coach Line, Inc., has ceased to exist as a corporation. In the absence of such allegations in the complaint, there was error in the refusal of the judge to sustain the demurrer. As there was error in the refusal to sustain the demurrer, it follows, of course, that there was error in the refusal of defendant's motion for judgment dismissing the action as against it as of nonsuit, and in the instruction with respect to the third issue. The fact that one

corporation has purchased and taken a conveyance of the property of another corporation does not alone make the vendee liable for the debts of the vendor.

In *McAlister v. Express Company,* 179 N. C., 556, 103 S. E., 129, it is said: "The cases which hold that a new corporation must pay the debts of the original one are those where there was a reorganization, consolidation, amalgamation, or union, and the new company is subjected to liability for the debts and torts of the old company upon the ground of an implied assumpsit, or of fraud, or under the trust fund doctrine, or because, by reason of the facts and circumstances, the complete absorption of the old company and its assets, including its franchise, being the leading and controlling one, it is completely substituted in its place and thereby becomes the debtor to its creditors." We think it manifest that this principle does not apply in the instant case. The facts stated in the amended complaint are not sufficient to constitute a cause of action against the defendant, Carolina Coach Company. *Askew v. Hotel Co.,* 195 N. C., 456, 142 S. E., 590.

The judgment against the defendant, Carolina Coach Company, cannot be sustained under the provisions of C. S., 1138. At most these provisions, if applicable, would render the conveyance void, with the result that although the property conveyed by the defendant, Safety Coach Line, Inc., to the Carolina Coach Company, is in the possession of the latter, it is subject to levy and sale under execution issued on the judgment in this action in favor of the plaintiff and against the defendant, Safety Lines, Inc. Upon the facts alleged in the amended complaint, and shown by the evidence, the Carolina Coach Company is not liable to the plaintiff for damages resulting to her from injuries caused by the negligence of the defendant, Safety Coach Company. If the conveyance of the property is void, because of the provisions of C. S., 1138, the Carolina Coach Company acquired no title to the property by reason of the conveyance, as against the plaintiff. It does not follow, however, that for this reason, the Carolina Coach Company became liable to the plaintiff for her damages.

It is manifest, we think, that C. S., 1013, has no application in the instant case. This statute applies only to a sale in bulk of a large part or the whole of a stock of merchandise. The property conveyed by the defendant, Safety Coach Line, Inc., to the defendant, Carolina Coach Company was not merchandise within the meaning of the statute. *Swift & Co. v. Tempelos,* 178 N. C., 487, 101 S. E., 8.

For error in overruling its demurrer *ore tenus,* the judgment against the defendant, Carolina Coach Company, must be

Reversed.

E. C. WEST v. NORA HINTON JACKSON AND HUSBAND, TOM JACKSON, ET AL.

(Filed 21 May, 1930.)

**Mortgages C c—Index of mortgage on land held by entireties under "J. H. and wife" held sufficient.**

Where the husband and wife mortgage their lands held by the entireties and the mortgage is indexed and cross-indexed under "J. H. and wife," the name of the wife not appearing on the index although it appeared on the mortgage deed: *Held*, the index is sufficient to put a reasonable man upon inquiry which would have disclosed the facts, and upon the husband's death and the wife's remarriage, a mortgage given by the wife and her second husband is subject to the first mortgage, and the subsequent mortgagee is charged with notice thereof, and he may not restrain the first mortgagee from foreclosing his mortgage on the ground of insufficient indexing, C. S., 3561, although the name of the wife should have appeared on the index.

CIVIL ACTION, before *Barnhill, J.*, at November Term, 1929, of HARNETT.

H. T. Lee and wife conveyed a certain tract of land in Harnett County to Jesse Hinton and wife, Nora Hinton, constituting an estate by entirety. Thereafter Jesse Hinton and wife, Nora Hinton, secured a loan through J. C. Clifford, an attorney of Dunn, North Carolina, and to secure the note evidencing said loan, executed and delivered a deed of trust to said Clifford, trustee, which deed of trust was duly recorded in Book of Deeds 205, page 232, in the office of the register of deeds for Harnett County. Thereafter, on or about 2 June, 1924, Jesse Hinton died. Subsequently on or about 10 February, 1925, Nora Hinton applied to the plaintiff for a loan of $400. The plaintiff alleges that he examined the records of Harnett County and found no lien or encumbrance indexed or cross-indexed in the name of Nora Hinton, and thereupon made the loan for $400. Thereafter, in December, 1926, Nora Hinton married the defendant, Tom Jackson. The note secured by the deed of trust to J. C. Clifford, trustee, was not paid and in the spring of 1927 said Clifford advertised the property for sale under and by virtue of the terms of said deed of trust.

The plaintiff instituted this action to restrain the sale, alleging that the Clifford deed of trust was not properly indexed and cross-indexed, and that his deed of trust for $400 was a prior lien upon the premises. The record discloses that the deed from Lee and wife to Jesse Hinton and wife was indexed and cross-indexed, "Jesse Hinton and wife," without naming the wife. The deed of trust from Jesse Hinton and wife to J. C. Clifford, trustee, was also indexed and cross-indexed in the name of "Jesse Hinton and wife," the name of the wife not appearing upon the index or cross-index.

Issues were submitted to the jury and by peremptory instructions of the court answered in favor of defendants, the trial judge being of the opinion that the indexing and cross-indexing was a sufficient compliance with the statute.

From judgment rendered upon the verdict, the plaintiff appealed.

*James Best for plaintiff.*
*Clifford & Williams for defendants.*

BROGDEN, J. Was the indexing and cross-indexing of the Clifford deed of trust, "Jesse Hinton and wife" a sufficient compliance with the statute?

The statute, C. S., 3561, requires in substance that the indexes of recorded instruments required to be kept by the register of deeds "shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees," etc.

The construction of this statute produces two divergent theories. Upon one hand it is asserted that as indexing and cross-indexing is an essential part of registration and essential thereto and since such indexing is statutory, the statute should be complied with to the exact letter. Upon the other hand, it is insisted that the underlying philosophy of all registration is to give notice, and that hence the ultimate purpose and pervading object of the statute is to produce and supply such notice. Therefore, if the indexing and cross-indexing upon a given state of facts is insufficient to supply the necessary notice, then such indexing ought to fail as against subsequent purchasers or encumbrancers. Nevertheless, it is a universally accepted principle that "constructive notice from the possession of the means of knowledge will have the effect of notice, although the party was actually ignorant, merely because he would not investigate. It is well settled that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all the inquiry would have disclosed." *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949; *Bridgers v. Trust Co., ante,* 494. This prinicple of law received the sanction of this Court in *Ely v. Norman,* 175 N. C., 294, 95 S. E., 543. In that case the Court quoted with apparent approval from the Supreme Court of Iowa to the effect "that an index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found."

The authorities upon various aspects of indexing and cross-indexing are assembled in a note in 63 A. L. R., p. 1057, *et seq.*

It must be conceded that the indexing and cross-indexing of the deed of trust in the case at bar is not a strict compliance with the statute, and

the registers of deeds throughout the State should doubtless set out on the index and cross-index the name of the wife. There are perhaps hundreds of deeds of trust in the State indexed and cross-indexed in the same manner employed in the present case, and we are not inclined to strike down these instruments as a matter of law, particularly when there was sufficient information upon the index and cross-index to create the duty of making inquiry. In *Heaton v. Heaton,* 196 N. C., 475, 146 S. E., 146, the Court held that if the wife was the actual owner of the property and had joined with her husband in a mortgage thereon that if the name of the wife did not appear upon the index or cross-index, the registration was invalid. It must be observed, however, that in the *Heaton case* there was absolutely no information or entry sufficient to put a person of reasonable prudence upon inquiry.

The record in the case at bar discloses that the name of the wife, Nora Hinton, actually appeared in the deed from Lee and wife to Jesse Hinton and wife, Nora Hinton. In abstracting the title of Nora Hinton the first inquiry would necessarily be, where did Nora Hinton get the land? The record would have disclosed that Nora Hinton and her husband, Jesse Hinton, were tenants by the entirety. The records would have further disclosed that Jesse Hinton and wife had executed a deed of trust to Clifford, trustee.

Upon the whole record we are of the opinion, and so hold, that the judgment was correct.

Affirmed.

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CARL C. DURHAM v. T. HOLT LAIRD AND WIFE, MARGUERITE GOODE LAIRD. DOCKET NO. 14406.

CARL C. DURHAM v. T. HOLT LAIRD AND WIFE, MARGUERITE GOODE LAIRD. DOCKET NO. 14407.

(Filed 21 May, 1930.)

**1. Actions C a: Appeal and Error J b—Refusal to consolidate actions as matter in discretion will be affirmed in absence of abuse.**

Where two actions between the same parties upon the same subject-matter are brought, one to recover damages for personal injuries caused by the alleged negligence of the defendant, and the other to recover damages to property resulting from the same act, the refusal of the trial court to consolidate the two actions as a matter in his legal discretion will be affirmed on appeal, there being nothing of record to indicate an abuse of the discretion.

**2. Appeal and Error E h—Question as to whether second of two actions could be maintained not presented on record in this case.**

Where two actions are brought for the recovery of damages between the same parties relating to the same negligent act, one as to personal

injury and the other as to property damage, and no motion to dismiss is made in the latter, as to it the question as to whether the action would lie is not presented on appeal.

CIVIL ACTION, before *McElroy, J.*, at February Term, 1930, of GUILFORD.

On 11 November, 1929, the plaintiff instituted two civil actions against the defendants. The summonses in both actions were served on 16 November, 1929. The first suit is designated as Docket No. 14406, and the second suit is designated as Docket No. 14407.

Complaint was filed in No. 14406, alleging that on 8 May, 1929, the plaintiff was injured in an automobile collision due to the negligence and carelessness of defendants and resulting in serious and permanent injuries, for which plaintiff demanded damages in the sum of $10,000.

In No. 14407 the plaintiff alleged that his automobile was greatly damaged in an automobile collision occurring on 8 May, 1929, and due to the negligence and carelessness of defendants, for which plaintiff demanded judgment in the sum of $2,000.

The defendants filed an answer in No. 14406 denying negligence, pleading contributory negligence and alleging a counterclaim for damages sustained by the defendants due to the negligence of plaintiff. The defendants also specifically pleaded the pendency of No. 14407 in bar of recovery.

In case No. 14407, which may be designated as the case for recovery of property damage, the defendant also answered denying negligence, pleading contributory negligence, alleging counterclaim, and also pleaded the pendency of case No. 14406 as a bar to recovery.

The plaintiff filed replies to the answers alleging in substance that in the suit for property damage, to wit, No. 14407, "a portion of which damage the insurance company of North America became subrogated by reason of the payment of collision damages, and of necessity this action for said personal property damage was brought in the name of the plaintiff, and the plaintiff denies that the pendency of such action is a bar to this action."

The plaintiff made a motion, after due notice, to consolidate the two actions. After hearing the motion the trial judge entered the following order: "It is thereupon considered, ordered and adjudged by the court in its discretion that the said motion to consolidate be, and the same is hereby denied."

From the foregoing judgment the plaintiff appealed.

*D. Newton Farnell, Jr., and Frazier & Frazier for plaintiff.*

*R. M. Robinson for defendants.*

BROGDEN, J. The sole question of law presented by this appeal is whether the trial judge had the power in his discretion to refuse to consolidate the actions.

The cause discloses substantially the following fact setting: A plaintiff brings two suits on the same day, against the same defendants for damages growing out of an automobile collision. In one suit the plaintiff seeks to recover damages for personal injury, and in the other suit compensation for property damage growing out of said collision. The defendants, among other things, plead the pendency of each suit as a bar to the other, and the plaintiff replies that in the suit for property damage the Insurance Company of North America is subrogated to a portion of such damage.

In determining the legal aspect of consolidation the general rule is that the trial judge has the power to consolidate actions involving the same parties and the same subject-matter if no prejudice or harmful complications will result therefrom. This salutary power is vested in the judge in order to avoid multiplicity of suits, unnecessary costs and delays, and as a protection against oppression and abuse. *Blount v. Sawyer,* 189 N. C., 210, 126 S. E., 512; *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171; *Rosenmann v. Belk-Williams Co.,* 191 N. C., 493, 132 S. E., 282.

Whether the order of consolidation is entirely discretionary and not reviewable on appeal is an open question in this jurisdiction. *Wilder v. Greene,* 172 N. C., 94, 89 S. E., 1062. The whole subject is discussed with singular clearness and accuracy in McIntosh on North Carolina Practice and Procedure, pp. 536-539, where all the pertinent authorities in this State are assembled. However, if two consecutive actions are brought, involving the same parties and the same subject-matter, and the second action cannot be maintained, then in such event, consolidation is not proper. *Mfg. Co. v. Tirney,* 130 N. C., 612, 41 S. E., 871.

On the present state of the record we are not concerned with the question as to whether the action for property damage would lie because there is no motion to dismiss, upon the principle announced in *Underwood v. Dooley,* 197 N. C., 100. The trial judge based his refusal to consolidate the actions upon his discretion, and we cannot say, as a matter of law, from an inspection of the record, that such order constituted an abuse of discretion—particularly in view of the well established principle that there is a presumption in favor of the validity of a judgment. And, therefore, we are constrained to affirm the decree of the trial court.

Affirmed.

E. A. BUCKNER v. C. I. T. CORPORATION.

(Filed 21 May, 1930.)

**1. Principal and Agent A d: Trial B b—Introduction of receipt reciting agency before proof of agency held not error in this case.**

The declarations of an alleged agent are incompetent to prove agency, but the order in which evidence may be introduced is a matter within the discretion of the trial court unless it is obvious that prejudice may result, and where the plaintiff introduces a receipt from the alleged agent containing a recital of the agency, and evidence of the agency is later offered without objection: *Held*, the defendant was not prejudiced by the order of the introduction of the evidence, and his exception based thereon will not be sustained on appeal.

**2. Principal and Agent A d—Evidence in this case held sufficient to establish prima facie fact of agency.**

Where there is evidence that an alleged agent has repeatedly collected money upon debts owed to the alleged principal, the inference is permissible that an agreement to this effect has been made, and the evidence is sufficient to make out a prima facie case of agency *aliunde* the declaration of the agent.

APPEAL by defendant from *Harris, J.*, at Special September Term, 1929, of BUNCOMBE.

In December, 1928, the plaintiff bought a Whippet sedan from Asheville Overland-Knight, Inc., at the price of $803.16. He paid $243, and gave the seller his note for $560.16, payable in twelve equal installments of $46.68, together with a retained title contract. On 19 January, 1929, he paid the seller the amount due and took a receipt therefor, which recited payment for the C. I. T. Corporation. The seller (Asheville-Overland-Knight, Inc.), thereafter made an assignment for the benefit of its creditors to the Wachovia Bank and Trust Company. The defendant claims to be a holder of the note and contract in due course.

The following verdict was returned:

1. Was the Asheville Overland-Knight, Inc., the agent for the purpose of collecting money for the C. I. T. Corporation on 19 January, 1929?

Answer: Yes.

2. Did the Asheville Overland-Knight, Inc., receive from E. A. Buckner on 19 January, 1929, the sum of $540 as the agent for the C. I. T. Corporation?

Answer: Yes.

Judgment for plaintiff and appeal by defendant.

*Harkins & Van Winkle for appellant.*

ADAMS, J. The plaintiff recovered a judgment for the cancellation of his note and of the retained title contract and for the delivery to him of the unencumbered title to the sedan. It therefore becomes necessary to determine whether the appllant's exceptions present good cause for a new trial or a reversal or modification of the judgment.

The receipt referred to in the statement of facts recites the plaintiff's payment to Asheville Overland-Knight, Inc., of $540 "for C. I. T. Corporation." The appellant excepted for the assigned reason that this recital is a declaration of agency made by the agent and was inadmissible at least until agency had been established prima facie by other evidence. The declarations of an alleged agent, whether written or verbal, are, of course, incompetent to prove agency. *Realty Co. v. Rumbough,* 172 N. C., 741; *Arndt v. Insurance Co.,* 176 N. C., 652. But the order in which evidence may be introduced is a matter within the discretion of the judge unless it is obvious that prejudice may result; and as evidence of agency was afterwards offered without objection, we do not see how the defendant was prejudiced by the receipt. The fourth exception presents the same question.

Several exceptions were taken to evidence tending to show that for some years Asheville Overland-Knight, Inc., had regularly collected money from its customers for the defendant. From the testimony it was permissible to draw the conclusion that an agreement to this effect had been made by the two companies and that Asheville Overland-Knight, Inc., was, as the plaintiff contended, an agent for the collection of the note assigned by it to the defendant.

We find no error in the court's refusal to dismiss the action or in the instruction given the jury. All the evidence for the plaintiff tended to show agency, and the only evidence introduced by the defendant was the retained title contract and certain paragraphs in the pleadings.

No error.

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G. W. BUCHHOLZ v. THE H. K. FERGUSON COMPANY ET AL.

(Filed 21 May, 1930.)

**Bill of Discovery B a—Order for examination of adverse party affirmed under the facts of this case.**

Where on defendant's appeal from an order made upon plaintiff's motion for the examination of the former before a commissioner to procure evidence for drafting the complaint, it appears that the order was issued after careful consideration, and there is nothing to indicate an effort on the part of the plaintiff to set a dragnet for the defendant or to harass or annoy him, the order will be affirmed on appeal.

BUCHHOLZ *v.* FERGUSON.

APPEAL by defendants, The H. K. Ferguson Company and American Enka Corporation, from *Johnson, Special Judge,* at November Special Term, 1929, of BUNCOMBE.

Civil action pending in the Superior Court of Buncombe County.

The H. K. Ferguson Company, as contractor, and the plaintiff, as subcontractor for the brick and masonry work, erected a factory for the American Enka Corporation at Enka, N. C. Plaintiff contends that he is entitled to collect from defendants a large sum for labor and work performed and materials furnished and used in the construction of said factory building. Under the terms of the contract between the plaintiff and the principal contractor, an alleged arbitration was had, resulting in an award for the plaintiff. The validity of this award is denied by The H. K. Ferguson Company and the American Enka Corporation. For the purpose, therefore, of determining whether the plaintiff should base his action upon the purported arbitration award, or upon the original contract, he filed a duly verified petition and motion in the cause and obtained an order directing certain officers and agents of the appealing defendants to appear before a commissioner for examination by the plaintiff to enable him to procure information for the drafting of his complaint. From this order the said defendants appeal, assigning error.

*Anderson & Howell and Carter & Carter for plaintiff.*

*Bernard, Williams & Wright for defendants, Ferguson Company and American Enka Corporation.*

STACY, C. J. It has been suggested in a number of cases that an order for examination, such as the plaintiff seeks, should not be issued except after careful consideration and scrutiny, which seems to have been made in the instant case. *Bailey v. Matthews,* 156 N. C., 78, 72 S. E., 92. We have found nothing on the record to indicate any effort on the part of the plaintiff to set a dragnet for the defendants, or to annoy or harass them. *Bell v. Bank,* 196 N. C., 233, 145 S. E., 241; *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 403. But should this appear later on the examination, the parties will still be entitled to protection as suggested in *Ward v. Martin,* 175 N. C., 287, 95 S. E., 621.

A perusal of the record leaves us with the impression that the order was judiciously entered.

Affirmed.

MARY W. BOHANNON v. VIRGINIA TRUST COMPANY.

(Filed 21 May, 1930.)

**Venue A a—In this case held: action affected interests in realty and change of venue to county wherein land is situate was proper.**

Where the plaintiff has obtained a temporary order restraining the defendant mortgagee from foreclosing his mortgage, and defendant makes a motion, before the time for hearing, to remove the cause for trial to county wherein the land is situate, the motion is properly allowed, it appearing that the effect of the action is to redeem land from a mortgage or deed of trust, involving the interests or rights of the parties in the mortgaged premises. C. S., 463.

APPEAL by plaintiff from *Stack, J.*, at February Term, 1930, of CATAWBA.

Civil action to restrain sale of land under deed of trust, for an accounting, and to redeem.

Plaintiff, resident and citizen of Catawba County, brings this action in the county of her residence against the Virginia Trust Company, a foreign corporation, for the purpose of restraining a sale of land situate in Buncombe County on which the defendant holds a deed of trust as surety for a loan, payment of which the plaintiff assumed when she purchased the land. The plaintiff and her predecessors having defaulted in the payment of said debt, the trustee advertised the property for sale under the power contained in the deed of trust, and the plaintiff in her complaint filed 11 December, 1929, prays for a "restraining order . . . for an accounting . . . and for such other and further relief as may be just and proper."

A temporary restraining order was obtained by the plaintiff, returnable before Hon. A. M. Stack at the courthouse in Monroe, 2 January, 1930, requiring the defendant to appear and show cause, if any it had, why the same should not be made permanent.

After due notice to the plaintiff, and before time for answering had expired, the defendant, on 16 January, 1930, and before a hearing on the temporary restraining order had been held, duly entered a motion to have the cause transferred to Buncombe County for trial as the proper venue for said action.

This motion was allowed, and from the order transferring the cause to Buncombe County for trial, the plaintiff appeals, assigning errors.

*A. A. Whitener and Louis A. Whitener for plaintiff.*

*Bourne, Parker & Jones for defendant.*

STACY, C. J., after stating the case: This action is, in effect, one to redeem land from a mortgage or deed of trust, and necessarily calls for the determination, in some form, of the rights or interests of the parties therein. The proper venue, therefore, is Buncombe County where the land is situated. C. S., 463. The order of removal was correctly entered. *Vaughan v. Fallin,* 183 N. C., 318, 111 S. E., 513; *Councill v. Bailey,* 154 N. C., 54, 69 S. E., 760.

*Causey v. Morris,* 195 N. C., 532, 142 S. E., 783, strongly relied upon by the defendant, is not at variance with, but in support of, this position.

Affirmed.

MARY W. BOHANNON v. VIRGINIA TRUST COMPANY.

(Filed 21 May, 1930.)

**1. Appeal and Error D a—Appeal from order or judgment stays further proceedings in lower court in respect thereto pending appeal.**

Where a temporary restraining order has been entered in a cause, and thereafter an order has been issued removing the cause to another county for trial, and an appeal is taken from the order of removal, the appeal stays all further proceedings in the lower courts upon the matter appealed from or upon matters embraced therein, and an order dissolving the temporary order, made pending the appeal by a special judge at chambers in the county to which the action was removed is improvidently entered, the court having no jurisdiction until the determination of the appeal involving the right of removal. C. S., 655.

**2. Evidence A a: Judges A b—Special judge is without authority to hear motions in a cause when not commissioned to hold term of court.**

Judicial notice may be taken of the fact that a certain person is a special judge appointed by the Governor under authority of chapter 137, Public Laws of 1929, and unless such special judge has been duly commissioned to hold and was holding the courts of the district at the time, he is without authority to hear and determine a motion to dissolve a temporary restraining order, but where the record is silent as to whether he was so commissioned at the time of hearing the motion the Supreme Court will omit any definite ruling on this ground.

APPEAL by plaintiff from *MacRae, Special Judge,* at Chambers in Asheville, 13 February, 1930. From BUNCOMBE.

After this cause had been removed from Catawba County to Buncombe County for trial, and while an appeal from said order was pending, the defendant lodged a motion before "Hon. Cameron F. MacRae, judge presiding in the Nineteenth Judicial District," to dissolve the temporary restraining order, originally entered in the cause and made

returnable before Hon. A. M. Stack at Monroe, N. C., but upon which no hearing had been held or ruling made.

The plaintiff, in apt time, objected to the jurisdiction and authority of MacRae, Special Judge, to make or enter any order affecting the rights of the plaintiff, which objection was overruled, and an order was entered 13 February, 1930, by "His Honor, Cameron F. MacRae, judge presiding and holding the courts of the Nineteenth Judicial District, at his Chambers in the city of Asheville," dissolving and dismissing said temporary restraining order. Plaintiff appeals, assigning errors.

*Louis A. Whitener and A. A. Whitener for plaintiff.*
*Bourne, Parker & Jones for defendant.*

STACY, C. J., after stating the case: The order, here challenged, was improvidently entered because an appeal had been taken from the order removing the cause to Buncombe County for trial, and this stayed "all further proceedings in the court below upon the judgment appealed from, or upon the matters embraced therein." C. S., 655; *Pruett v. Power Co.,* 167 N. C., 598, 83 S. E., 830.

But for the order of removal, which was challenged by the appeal therefrom, the Superior Court of Buncombe County was without jurisdiction to hear the matter. Hence, the very question sought to be determined by the appeal from the order of removal was the right of the Superior Court of Catawba County to transfer the cause to Buncombe County for trial. *McRae v. Commissioners,* 74 N. C., 415.

Nothing was said in *Huntley v. Express Co.,* 191 N. C., 696, 132 S. E., 786, which militates against our present position, for the decision in that case was made to rest upon other statutes and other laws.

Again, judicial notice may be taken of the fact that Hon. Cameron F. MacRae is one of the special judges appointed by the Governor under authority of chapter 137, Public Laws 1929, and unless he had been duly commissioned to hold, and was holding, court in Buncombe County or the courts of the Nineteenth Judicial District at the time the judgment was signed, which purports to have been rendered "at Chambers," he was also, for this reason, without authority to determine the matter. *Greene v. Stadiem,* 197 N. C., 472, 149 S. E., 685. The record is silent as to whether he held such commission, and we, therefore, omit any definite ruling on this ground.

Error.

STATE v. JOHN JONES.

(Filed 21 May, 1930.)

1. **Criminal Law G d—Testimony of deaf mute in this case held competent.**

Upon the trial for a homicide, testimony of a deaf mute that he saw the defendant take the arm of the deceased "and make like to cut him" is competent with other testimony to like effect and as substantive evidence.

2. **Criminal Law L e—Question calling for hearsay evidence which is not answered will not be held for reversible error.**

Where a question asked by the solicitor of a physician calls for hearsay evidence, it will not be held for reversible error if the question is not answered and it does not appear what the answer would have been.

APPEAL by defendant from *Schenck, J.*, at January Term, 1930, of BUNCOMBE. No error.

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

*W. A. Sullivan and R. R. Reynolds for defendant.*

ADAMS, J. Four defendants were indicted for the murder of Claude Gentry. Sam Jones and W. C. Jones were discharged when the action as to them was dismissed, Ed Swan was acquitted, and John Jones was convicted of manslaughter. From the judgment pronounced the latter appealed.

There are only two assignments of error. F. G. Hembry testified without objection that he was present when the fatal wound was inflicted and saw the defendant knock the deceased backward, get on top of him, and cut him with a knife in the stomach or side. A deaf mute afterwards testified that he saw the defendant take the arm of the deceased and "make like to cut him." To the last statement the defendant excepted. This testimony corroborated Hembry and was itself substantive evidence; it was therefore properly admitted.

Dr. Mooneyhan was asked whether in his presence the deceased said who cut him. The proposed testimony was not *res gestæ*, but the narrative of a transaction, and was not a dying declaration. It was hearsay.

Moreover, it does not appear what the answer would have been. There is

No error.

HARVEY MORRIS, ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS OF THE Y. AND B. CORPORATION, v. THE Y. AND B. CORPORATION.

(Filed 21 May, 1930.)

1. **Trial D a—On motion of nonsuit all evidence should be taken in the light most favorable to the plaintiff.**

On defendant's motion as of nonsuit the evidence and every reasonable intendment therefrom is to be regarded in the light favoring the establishment of the plaintiff's cause of action, whether the evidence be that introduced by either the plaintiff or the defendant or elicited from the defendant's witnesses. C. S., 567.

2. **Trial H b—Findings of fact by court under agreement are as conclusive as verdict when supported by evidence.**

Upon the agreement of the parties that the trial judge hear the evidence and find the facts in controversy, the findings so made are as conclusive as the verdict of the jury would have been when the findings are supported by the evidence.

3. **Corporations G a—In this case held: unauthorized transaction made by president was voidable only, and was ratified by the corporation.**

Where a duly passed resolution of the board of directors of a corporation gives general authority to its president to borrow money and mortgage the corporate property for the purpose, and the president, in order to meet the requirements of the lender, has had certain corporate property deeded to him and has personally given a mortgage thereon to the lender and then reconveyed the property to the corporation which assumed the indebtedness, and the entire proceeds of the loan is turned over to the corporation which uses the funds to take up a valid corporate mortgage on the same lands and for the general business of the corporation, the president receiving no personal benefit from the transaction: *Held*, the mere fact that the directors had not given the authority to the president to make the particular transaction does not render it void, but voidable only, and the act of the corporation in so receiving the benefits is a ratification thereof, and the notes in the hands of a purchaser in due course for value without notice are valid, and upon the insolvency of the corporation such purchaser's claim to the extent of the value of the mortgage lien is superior to the claims of general unsecured creditors.

4. **Receivers E b—In this case held: unauthorized mortgage was ratified by corporation and constituted preferred claim against receiver.**

Where the president of a corporation having general authority to borrow money for the corporation has certain corporate property transferred to him and gives a mortgage thereon to a lender and reconveys the property to the corporation which assumes the indebtedness and receives the full benefit of the transaction with knowledge of its board of directors, and the notes thus secured come into the hands of an innocent purchaser for value without notice: *Held*, upon the insolvency of the corporation, the holder of the notes secured by the registered mortgage is entitled to a preference to the extent of the value of the mortgage lien as against the general creditors of the corporation.

**5. Subrogation A a—Where corporation borrows funds to pay off prior valid corporate mortgage, lender is subrogated to rights of prior mortgagee.**

Where a corporation borrows money through the unauthorized act of its president and uses the funds so obtained to take up an existing valid corporate mortgage on its property, equity will subrogate the lender to the rights of the prior mortgagee, and upon the insolvency of the corporation, the lender's claim is superior to the claims of the general unsecured claims against the corporation.

APPEAL by W. J. Shuford, receiver, from *Stack, J.*, at March Term, 1929, of MECKLENBURG. No error.

This was an action brought by plaintiff on behalf of himself and all other creditors of the Y. & B. Corporation to have a receiver appointed for the Y. & B. Corporation. W. J. Shuford was appointed receiver on 30 November, 1927.

The Guardian Life Insurance Company of America, a corporation of New York State, filed a claim with the receiver of the Y. & B. Corporation for the payment of certain indebtedness, totaling $50,000 and interest, alleging that it was secured by deed of trust on certain land of the Y. & B. Corporation. The material allegations of the complaint: J. A. Yarborough and wife, Josephine Yarborough, made and executed a certain note for $50,000 on 28 April, 1927, to the Home Real Estate and Guaranty Company of Charlotte, N. C., and to secure the payment of the same executed a deed of trust to P. C. Whitlock and J. Arthur Henderson, trustees for the Home Real Estate and Guaranty Company, on certain real estate therein described, on the corner of East Fourth and South Caldwell streets in the city of Charlotte, N. C. The same was duly recorded in the office of the register of deeds for Mecklenburg County on 3 May, 1927, Book 650, of Deeds, p. 19, and "That the property described in said deed of trust and given as security for said loan was, at the time said note and deed of trust were executed, the property of the Y. & B. Corporation and was immediately prior to the execution of said note and deed of trust conveyed to the said J. A. Yarborough and said Y. & B. Corporation in order that he might obtain said loan thereon for the benefit of the said corporation, and that when said loan was made the proceeds thereof were paid to the Y. & B. Corporation and said corporation immediately took a conveyance from J. A. Yarborough and wife back to it for said property and in the deed of conveyance assumed the payment of said $50,000 note, and that it has been from the time said loan was made, and still is, liable for the payment thereof. That the Home Real Estate and Guaranty Company immediately transferred and assigned said note without recourse to the National Mortgage Corporation of New York, which company furnished the money with which to make said loan. That on 12 May,

1927, before the maturity of any part of said note, the National Mortgage Company, for value, transferred and assigned said note, together with all its rights in and under the deed of trust securing the same, to this claimant, the Guardian Life Insurance Company of America, which company took said notes before maturity, for value, and without notice of any defects or infirmities therein and is still the owner and holder thereof. That no part of said note, principal or interest has been paid, although the first installment of $2,500 fell due on 28 April, 1928, and that there is now due and owing to this claimant on account thereof the sum of $50,000 with interest at the rate of 6 per cent per annum from and after 28 October, 1927, with interest on $1,500 unpaid interest since 28 April, 1928. That said deed of trust constitutes, as claimant is advised, informed and believes, a first lien on the property described therein for the payment of said indebtedness and that said claimant is entitled to have its claim allowed as a preferred claim to the extent of the value of the property described in said deed of trust and to have said property sold and the proceeds applied toward the payment thereof."

W. J. Shuford, receiver, on 4 September, 1928, and 15 December, 1928, in his reports, after setting forth the reasons, disallowed the claim as a lien on the real estate before mentioned, but allowed it as an unsecured claim against the corporation. Exception was duly made by the Guardian Life Insurance Company of America. The case came on for hearing before Stack, J., and the following stipulations of counsel appear in the record, duly signed by them: "It is stipulated in this case by counsel for both parties that a jury trial be waived and the presiding judge find the facts." The findings of fact and conclusions of law made by the court below were in favor of the Guardian Life Insurance Company of America. Judgment was rendered by the court below in favor of the Guardian Life Insurance Company of America.

The receiver requested the court below to find certain facts, setting them forth, which was refused. Exceptions and assignment of errors were duly made. The receiver duly excepted to the findings of fact and conclusions of law by the court below. Numerous exceptions and assignments of error were made by the receiver and appeal taken to the Supreme Court. The necessary facts will be set forth in the opinion.

*Whitlock, Dockery & Shaw for Guardian Life Insurance Company of America.*

*E. B. Cline, Preston & Ross and Tillett, Tillett & Kennedy for W. J. Shuford, Receiver.*

CLARKSON, J. The main points relied upon by the receiver are: "1. That the attempt by J. A. Yarborough to convey corporation property to himself individually, without any authority from the corporation

and without the knowledge of any director of the corporation was absolutely void and passed no title whatsoever to himself individually. 2. That even if it should be held that the deed was not void, but only voidable, nevertheless under the circumstances in this case the deed of trust should be declared void upon several separate and distinct grounds."

On the other hand, the Guardian Life Insurance Company of America contends that the questions involved are: "The deed from Y. & B. Corporation to its President, J. A. Yarborough, dated 28 April, 1927, was not void, but was voidable, and the burden was on the claimant to show that it was either authorized or ratified by the corporation and that the transaction was fair, open and free from undue advantage and fraud. 2. Having received and used the proceeds of the loan, for its corporate purposes, the corporation is estopped to repudiate the acts of its officers in procuring the loan for it."

The receiver, at the close of the evidence for the Guardian Life Insurance Company of America, and at the close of all the evidence, moved for judgment as in case of nonsuit. C. S., 567. The court overruled these motions and in this we think there was no error. We think the controversy hinges on the question whether there was sufficient evidence to support the findings of fact.

It is the well 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 his 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 he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Abel v. Dworsky,* 195 N. C., 867.

It is also well settled in this jurisdiction that controversies on issues of fact are determinable by a jury, and if there is any competent evidence on the issue the weight thereof is for the jury. It was agreed in the present controversy that the court below should find the facts.

In *Eley v. R. R.,* 165 N. C., at p. 79, we find: "A jury trial being waived, the findings of fact by the judge are as conclusive as the verdict of a jury, when there is evidence to support them *(Matthews v. Fry,* 143 N. C., 285)." *In the Matter of Assessment against Railroad,* 196 N. C., 756; *Colvard v. Dicus, ante,* 270. From the findings of fact in the court below we think the contentions of the Guardian Life Insurance Company of America must be sustained.

The facts found by the court below, and we think there was evidence to support same, were to the effect: That the Y. & B. Corporation had borrowed $30,000 from the American Trust Company on 7 March, 1927, and had made a deed of trust to T. E. Hemby, trustee for the American

Trust Company, on the land in controversy on the corner of East Fourth and Caldwell streets in the city of Charlotte, N. C. The deed in trust was duly recorded. The president of the Y. & B. Corporation, J. A. Yarborough, to take up this loan was desirous of borrowing an additional sum on the same property and paying off that lien, an application was made to the Home Real Estate and Guaranty Company of Charlotte, N. C. Sundry loans had been made by this corporation for the Penn Mutual Life Insurance Company, and in every instance the title to the property had to be transferred to an individual and a lien given on the property by the individual, and the property reconveyed to the corporation and it assumed the payment of the indebtedness. The law firm of Whitlock, Dockery & Shaw, represented the Home Real Estate and Guaranty Company in its legal matters. Application for the loan of the Y. & B. Corporation was turned over to Henry C. Dockery, a member of the firm. Supposing that it was a Penn Mutual Life Insurance Company loan, he prepared a resolution that the Y. & B. Corporation deed the property to J. A. Yarborough and he and his wife then sign the note and deed of trust to the Home Real Estate and Guaranty Company, of Charlotte, N. C., for the loan of $50,000, and then deed it back to the corporation and it assume the lien. All of which was done. A resolution embodying these facts was given J. A. Yarborough for the directors to pass and was returned to Dockery, the certificate signed by the secretary of the Y. & B. Corporation, as passed by the board of directors with the corporate seal attached. The truthfulness of this resolution was relied upon in making the loan and also a resolution of 13 September, 1926, certified by the assistant secretary of the Y. & B. Corporation bearing the seal of the corporation. That resolution, in part, is as follows.: "Be it resolved, that the officers of the corporation be, and they are hereby, authorized and empowered to borrow money to be used in the business of the corporation, in such amounts and at such times as they may, in their best judgment, deem proper, and to give the notes or other evidences of indebtedness of the corporation in evidence thereof, and secure the same by pledge of personal property or choses in action or by mortgage or deed of trust conveying personal or real property owned by the corporation."

In the deed made back to the Y. & B. Corporation by J. A. Yarborough and wife, on 29 April, 1927, is the following: "Except the lien of a deed of trust executed by J. A. Yarborough and wife to P. C. Whitlock and J. Arthur Henderson, trustees, dated 28 April, 1927, securing $50,000, *which said indebtedness the party of the second part hereby assumes and agrees to pay as part of the consideration for this conveyance.*" The papers carrying out the transactions were in due form and immediately recorded. That the $50,000 note and deed of trust securing

same were duly transferred and assigned by the Home Real Estate and Guaranty Company to the National Mortgage Company of New York, for value and without recourse, except as set out in the contract between National Mortgage Corporation and Home Real Estate and Guaranty Company, dated 29 April, 1926, and that the Home Real Estate and Guaranty Company forwarded to said National Mortgage Corporation the original note, the original deed of trust to secure said note, with the certificate of register of deeds showing 3 May, 1927, to be the date it was filed for record, the opinion of Whitlock, Dockery & Shaw that said deed of trust constituted a valid first lien on said real property, the financial statement of J. A. Yarborough showing his net worth to be $226,800 and the appraisal of said real property. National Mortgage Corporation, relying upon the validity of said deed of trust as a first lien on said real property, and the opinion of Whitlock, Dockery & Shaw that it constituted a valid first lien on said property, and upon the truthfulness of the financial statement of J. A. Yarborough, and upon the appraisal of said real property purchased said note and security from Home Real Estate and Guaranty Company, and paid to it as a consideration therefor the sum of $50,000 on 11 May, 1927. That Y. & B. Corporation on 11 May, 1927, received from Home Real Estate and Guaranty Company through a check endorsed by J. A. Yarborough the sum of $50,000 for the said note of J. A. Yarborough and Josephine Yarborough, secured by said deed of trust, the sum of $30,010 thereof having been applied to the payment, satisfaction and cancellation of a note for $30,000 owed by Y. & B. Corporation to the American Trust Company, of Charlotte, N. C., and to the cancellation of a deed of trust on said real estate from said Y. & B. Corporation to T. E. Hemby, trustee, securing the payment of said $30,000 note and interest and the remainder of said loan having been immediately received by Y. & B. Corporation, less brokerage and commissions, and placed to its credit in the American Trust Company, of Charlotte, N. C., and used by the Y. & B. Corporation in the ordinary course of its business. That the National Mortgage Corporation, after receiving said note and deed of trust from the Home Real Estate and Guaranty Company, sold the same to the Guardian Life Insurance Company, and on 12 May, 1927, transferred and assigned said note and deed of trust to the said Guardian Life Insurance Company for $50,000, and that the said Guardian Life Insurance Company has been ever since the said transfer and is now the bona fide owner and holder of said note and the security therefor. That at the time of the payments by the National Mortgage Corporation and the Guardian Life Insurance Company, neither of them had any actual knowledge that the said loan was made for the benefit of the Y. & B. Corporation, and said payments were made by them in the belief that

the note and deed of trust were the individual note and deed of trust of J. A. Yarborough and Josephine Yarborough, his wife, but both of said corporations were charged with notice of whatever the records in the register's office in Mecklenburg County would disclose as to the title of said real estate of Y. & B. Corporation described in the deed of trust received from J. A. Yarborough and whatever is referred to in the deed of trust itself. The deed from Y. & B. Corporation to J. A. Yarborough, the deed of trust from J. A. Yarborough and Josephine Yarborough, his wife, to P. C. Whitlock and J. Arthur Henderson to secure the payment of the note for $50,000, payable to Home Real Estate and Guaranty Company and the deed from J. A. Yarborough and wife, Josephine Yarborough, to Y. & B. Corporation, each of which were filed for record 3 May, 1927, were freely and openly made in good faith, and without actual or constructive fraud, and J. A. Yarborough derived no personal benefit from the transaction, but the Y. & B. Corporation received the full benefit of the loan. That W. J. Shuford, receiver of the Y. & B. Corporation, on 15 December, 1927, paid the first semi-annual installment of interest on said loan in full and his action was thereafter reported to the Superior Court of Mecklenburg County. That on 4 June, 1928, the receiver filed a petition in said cause requesting the court to make an order allowing him to pay the second installment of interest, which fell due on 28 April, 1928, and also the first installment of principal which fell due on the same date. That the resolution, in part heretofore set forth, was duly passed at a duly called and properly constituted meeting of the board of directors of the Y. & B. Corporation, held on 13 September, 1926, as shown by the minutes of the corporation. That the resolution in reference to this loan was not passed at a duly called and properly constituted meeting of the board of directors of the Y. & B. Corporation, held on 30 April, 1927. That in reality no meeting was held at that time and no such resolution was passed by the directors, but the certified copy of such resolution was presented to the attorneys of the lender and a copy thereof spread on the minutes of the corporation. That the action of the officers of the Y. & B. Corporation in borrowing said money from the Home Real Estate and Guaranty Company and securing same by a deed of trust on the property at the corner of South Caldwell and East Fourth streets in the city of Charlotte was acquiesced in by said corporation, and it received and enjoyed the full benefit of the $50,000, which had been obtained by the apparent authority of its officers, if not by the real authority of the directors. That the directors of said corporation left the management of its business largely in the hands of J. A. Yarborough, its president, and particularly left to him the business of securing funds for the corporation. That by deed of trust, dated 6 October, 1927, registered in

Book 678, page 300, Y. & B. Corporation conveyed to H. C. Alexander, trustee, to secure an indebtedness of $15,000 due to Industrial Loan and Investment Bank, in which deed of trust the Y. & B. Corporation recognized the deed of trust to P. C. Whitlock and J. Arthur Henderson, on the same property securing said note of $50,000, payable to Home Real Estate and Guaranty Company filed for record 3 May, 1927, to be a valid first deed of trust on said real property. On 6 October, 1927, a resolution on the minutes of the Y. & B. Corporation authorized the officers to borrow $15,000 from The Industrial Loan and Investment Bank of Charlotte, N. C., by deed of trust on the property in controversy. In said resolution is the following: "The said deed of trust to be a lien thereon subject only to the deed of trust dated 28 April, 1927, registered in Book 650, at page 19, to P. C. Whitlock and J. Arthur Henderson, trustees, securing the payment of an indebtedness of $50,000 upon the terms therein provided. N. J. Orr, being first sworn, says: 1. That the board of directors of the Y. & B. Corporation at the principal office of the corporation, at a meeting duly called and convened 6 October, 1927, all of the members of said board of directors being present in person, by unanimous vote adopted a resolution of which the foregoing is a copy. 2. That he is the secretary of the Y. & B. Corporation. 3. That the foregoing is a true and exact copy of the resolution adopted by the board of directors at the time and place aforesaid as the same appears in the minute book containing a record of the meeting of the board of directors of the Y. & B. Corporation. This the 7th day of October, 1927. N. J. Orr (Seal). The Y. & B. Corporation, Charlotte, N. C. (Sworn to and subscribed before me this 7 October, 1927. Thos. C. Hayes, N. P. My Commission expires 28 February, 1929 (Seal).)" That the Y. & B. Corporation in accepting and having recorded the deed of reconveyance by J. A. Yarborough and wife, in assuming the payment of the $50,000 deed of trust in said deed, in receiving the $50,000 and using same for corporate purposes, and particularly in using $30,000 of the money in paying off the American Trust Company deed of trust on this same property, by recognizing this $50,000 deed of trust in giving a later deed of trust on the same property, and by other acts, ratified the acts of J. A. Yarborough in this matter. That the Y. & B. Corporation, in resorting to the three conveyances instead of a direct trust deed in borrowing the money, did so in order to meet the requirements of the lender who would not lend money to a corporation on its mortgage or deed of trust, and that in this transaction neither the borrower nor lender did so to evade the Consolidated Statutes of North Carolina, sections 1138, 1140 or the public policy of the State. The three conveyances are equivalent to a mortgage by the Y. & B. Corporation and, therefore, would be subject to the rights of judgment creditors, if any,

under those sections. From the findings of fact by the court below, supported by the evidence, we think, under all the facts and circumstances of this action, the transactions complained of by the receiver were not void, and if only voidable were ratified by the Y. & B. Corporation.

In *Mfg. Co. v. Bell,* 193 N. C., at p. 371, the following principle is laid down: "The controlling principles of law with respect to validity of deeds made by a corporation to its officers or directors may be summarized as follows: 1. The conveyance of the property must be authorized by the corporation or ratified by it. 2. The law presumes that such conveyances are invalid and imposes upon the purchaser the burden of establishing that the purchase is fair, open and free from imposition, undue advantage, actual or constructive fraud. 3. Such conveyances will not be declared void as a matter of law, but it is a question for the jury to determine upon all the evidence as to whether the vitiating elements enter into the particular transaction."

The court below found the facts, and there is evidence to support the findings, that the conveyances were not only authorized by the Y. & B. Corporation, but ratified by it. That the Guardian Life Insurance Company, the claimant, was the bona fide owner and holder of the $50,000 note and deed in trust securing same. That the transaction was freely and openly made in good faith, the corporation receiving full value, and there was no actual or constructive fraud; that the transactions were ratified by the Y. & B. Corporation and Yarborough derived no personal benefit from the loan, but the Y. & B. Corporation was benefited.

We think that the principle as to estoppel against innocent third persons is correctly stated and supported by abundant authority in Fletcher's Cyc. Corp., Vol. 3, part sec. 1894, p. 3081-2: "It is doubtless true that where a contract is executory, it cannot be specifically enforced nor can an action for damages for breach thereof be brought, where it was authorized at an irregular meeting of the directors, unless it has been duly ratified, or the acts of the stockholders are such as to constitute an estoppel. But where the contract has been executed by the other party thereto, a different question arises. In such a case the rule laid down in a former chapter as to the effect of the informalities in executing a corporate contract governs, and it is held that the corporation which has received the benefits of the contract cannot set up that the director's meeting which authorized it was irregular in some respects. The rule is that illegality or irregularity in a directors' meeting cannot be set up to defeat the rights of innocent third persons dealing with the corporation, since, in the absence of notice to the contrary, they have a right to assume that the proceedings were legal and regular—that notice was given, that a quorum was present, that the meeting was called

in the mode prescribed by the charter or by-laws, etc. Thus, want of notice of a special meeting to one or more directors does not affect the validity of acts or contracts of the corporation at such a meeting, so far as third persons dealing with the corporation are concerned, since they have a right to assume that the meeting was regular. In other words, one dealing with a corporation cannot be affected by a failure of the corporate agents to observe the rules and regulations enacted for the internal management of the corporate affairs, especially where such regulations are contained in by-laws as distinguished from those contained in statutes or the charter, on the theory already noticed in a preceding chapter that mere informalities cannot be availed of by the corporation where the other party to the contract has performed his part of the contract. However, there may be constructive notice of the defects."

In *Clowe v. Pine Product Co.,* 114 N. C., at p. 309, we find the following: "It was held in *Curtis v. Piedmont Co.,* 109 N. C., 401, that this statute was applicable to executory and not executed contracts. And this upon the sound doctrine that the defense of *ultra vires* will not avail when the contract itself has been in good faith fully performed by the other party, and the corporation has had the full benefit of the contract. 2 Beach Pr. Cont., section 424." *Mershon v. Morris,* 148 N. C., 49; *Mfg. Co. v. Buggy Co.,* 152 N. C., 633; *Bank v. Oil Co.,* 157 N. C., 302.

In *Paper Co. v. Chronicle,* 115 N. C., at p. 145, the law is stated: "It is well settled that corporations, other than railroad corporations, have a general power to mortgage their property, unless there is some provision in their charters expressly prohibiting or regulating this right. 'The right to mortgage is a natural result of the right to incur an indebtedness.' Cook on Stock and Stockholders, 760-779. Even where the charter provides as to how the assent of the stockholders is to be given, and this is not strictly followed, 'such a provision is regarded as intended for the protection and security of the stockholders, and in the absence of fraud and objection upon their part, defects in the proceeding by which the assent is given cannot be made to invalidate the mortgage, unless they are of such a substantial character that the giving of the assent cannot be inferred. . . . Other corporate creditors cannot raise this objection to the mortgage.' Cook, *supra,* note 2, and the authorities cited."

In *Edwards v. Supply Co.,* 150 N. C., at p. 172-3, it is held: "It would have been otherwise if at the time the money was authorized to be borrowed the company had authorized the mortgage to be executed to secure its officers, who agreed to sign the note as endorsers. In such case the money received would have balanced the debt secured and would have paid off that amount of prior debts to others or would otherwise have

aided the business of the company. Such arrangements are often necessary, and when bona fide are valid. *Banking Co. v. Lumber Co.,* 91 Ga., 624, cited and approved; *Hill v. Lumber Co.,* 113 N. C., 179."

In *Morris v. Basnight,* 179 N. C., at p. 301-2, it is written: "The contract to convey is sufficient in form, and, having been executed by the general manager of the company, apparently within the course and scope of his powers, and in the line of the company's business, is prima facie binding on the company. *Bank v. Oil Mill,* 157 N. C., 302; *Clowe v. Imperial Pine Product Co.,* 114 N. C., 304. And, if it were otherwise, the company having acquired the plaintiff's interest in his father's land and the timber thereon under and by virtue of the act of the secretary and general manager, are concluded on this question. They will not be allowed to accept and hold the benefits of the agreement and repudiate the authority of the agent by whom it was made. *McCracken v. R. R.,* 168 N. C., 62-67; *Sprunt v. May,* 156 N. C., 388; *Watson, Trustee, v. Mfg. Co.,* 147 N. C., 469; 10 Cyc., 1073." *Cardwell v. Garrison,* 179 N. C., 476; *Bank v. Bank, ante,* 477; *Banking & Trust Co. v. Safety Transit Lines, ante,* 675.

In *Trust Co. v. Rose,* 192 N. C., at p. 678, the matter is thus stated: "The vice-president and cashier had the power, without special authority of the board of directors, to execute the bond, and to transfer and assign the notes, to be held solely for the purpose of saving harmless the sureties on the bond. The bank received the benefit accruing from the transaction *(Trust Co. v. Trust Co.,* 188 N. C., 766). The transfer and assignment of the notes were entirely free from any taint of fraud, bad faith or undue advantage *(Everett v. Staton, ante,* 216); defendants, although officers and directors of the bank, had no personal interest, and received no personal benefit from the transactions *(Everett v. Staton, ante,* 221)."

As to the question of ratification and estoppel, the following is found in 4 Fletcher Cyc. Corp., sec. 2178, p. 3378, *et seq:* "If the officers of a corporation or other persons assume to act for the corporation without any authority at all, or if they exceed their authority or act irregularly, and the act is one which could have been authorized in the first instance by the stockholders, board of directors or subordinate officers, as the case may be, it may be expressly or impliedly ratified by them, and thus be rendered just as binding, except as to intervening rights of third persons, as if it had been authorized when done, or done regularly. In this respect a corporation is subject to substantially the same rules as a natural person. A corporation 'is governed, like an individual, by the same principles as to the ratification of the acts of its agents and as to estoppel *in pais.*' Not only may acts in excess of the authority of a corporate officer or agent be ratified, but also informal or irregular

acts of corporate officers or agents. If an act or contract of a corporate officer or agent is beyond the scope of his authority, or is invalid because of informalities making the act or contract voidable but not void, the corporation has two courses open to it. If it desires not to be bound thereby, it may escape liability by promptly repudiating the act or contract, after notice thereof, and, if benefits have been received, returning them or otherwise placing the other party in *statu quo*. If it desires to ratify the contract, it may either expressly ratify it or impliedly ratify it by conduct. . . . (p. 3389.) And knowledge upon the part of the corporation will be presumed from slight circumstances where it has had the benefit of the contract. . . . (p. 3403-4.) But, as in case of ratification by a natural person, it may by parol, or may be implied from the conduct of the corporation, or of officers having authority to ratify, in accepting the benefits, with knowledge of the facts, or otherwise treating or recognizing the contract or act as binding; and under some circumstances it may be implied from a mere failure to repudiate or disaffirm the same. As in case of a ratification by an individual, the ratification may be express or implied. If implied, it may result from (1) accepting and retaining the benefits of the act or contract, (2) silence or acquiescence, or (3) other affirmative acts showing an adoption of the act or contract. There need not be any formal action of the board of directors, and the ratification need not be express nor shown by vote or resolution of the board of directors. . . . (p. 3411-15). As a general rule, if a corporation, with knowledge of the facts, accepts or retains the benefit of an unauthorized contract or other transaction by its officers or agents, as where it receives and uses or retains money or property paid or delivered by the other party, or accepts the benefit of services, etc., it thereby ratifies the contract or other transactions, or will be estopped to deny ratification. This rule is based upon the doctrine of ratification *in toto*, under which a principal must either ratify the whole transaction or repudiate the whole. He cannot separate the transaction and ratify the part that is beneficial to him, repudiating the remainder; but if he, of his own election and with full knowledge, accepts and retains the benefit of an unauthorized transaction, he must also accept the part that is not beneficial and will be held to have ratified the whole." *Greenleaf v. R. R.*, 91 N. C., 33; *Lewis v. R. R.*, 95 N. C., 179; *Hill v. R. R.*, 143 N. C., 539; *Watson v. Mfg. Co.*, 147 N. C., 469; *Bank v. Drug Co.*, 152 N. C., 142; *Anderson v. Corp.*, 155 N. C., at p. 135; *Phillips v. Land Co.*, 176 N. C., 514.

The case of *Duke v. Markham*, 105 N. C., 131, relied on by the receiver is not applicable to the facts in this case. In that case the assent to the mortgage was expressed elsewhere than at a meeting and no corporate seal was attached to the mortgage. The probate was also insuffi-

cient and did not authorize registration and was ineffectual to pass title as against creditors. The mortgage was invalid, being void. It is further said in the case of *Duke v. Markham, supra,* at p. 136: "It is true the common seal is prima facie evidence that a deed or contract is the act of the company, and that the seal has been affixed by authority, though it is competent to go behind the seal and show that it was not affixed by legally exercised authority of the company. In this case there was no common seal of the company attached. While a seal is not essential to the validity of a chattel mortgage, in the absence of the company's seal there is no presumption of its being the corporation's act, and it devolved upon the party relying upon the mortgage to show that the agent or officer had authority to execute it. . . . (p. 137.) The receipt and use of the money is not of itself, as we have seen, a sufficient ratification by the corporation. But it is immaterial here whether there was a subsequent ratification or not. Ratification would be good between the corporation and the mortgagee, but would not validate, as to other creditors, a mortgage which was invalid when registered." *O'Neal v. Wake County,* 196 N. C., 184, is in relation to counties making contracts, and this is regulated by statute.

It will be noted that $30,000 of the $50,000 was used to pay off a lien to T. A. Hemby, trustee, for the American Trust Company. The doctrine of subrogation is invoked by the claimant, Guardian Life Insurance Company.

In *Pub. Co. v. Barber,* 165 N. C., at p. 487-8, it is said: "The doctrine is one of equity and benevolence, and, like contribution and other similar equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice." *Jeffreys v. Hocutt,* 195 N. C., 339.

In *Morgan v. Gollehon,* 149 S. E., at p. 486 (Va.), speaking to the subject, *Prentis, C. J.,* said: "The weight of authority, however, as is shown in the note to 5 Pomeroy's Equity Jur. (2 ed.), p. 5193, sec. 2347, and the modern cases support the view that subrogation is generally allowed where the loan was made by one who took a security from the borrower which turned out to be invalid," citing numerous authorities.

In 25 R. C. L., subrogation, part sec. 26, p. 1343, we find: "It is well settled that where the security given for the loan which is used to pay off an encumbrance turns out to be void, although the person taking it expected to get good security, he will be subrogated to the rights of the holder of the lien which the money advanced is used to pay; and that in such case the person advancing the money cannot be regarded as a stranger or volunteer, there being no intervening equity to prevent."

The receiver contends that this deed in trust to T. A. Hemby, trustee, was also invalid, but from the facts found by the court below and the position here taken, we cannot so hold. The temporary arrangement to cancel the $30,000, so that the $50,000 could be obtained, does not affect the right of subrogation from the facts in this case.

Even in the case of *Duke v. Markham, supra,* it was held "that the common seal is prima facie evidence that a deed or contract is the act of the company and that the seal has been affixed by authority, though it is competent to go behind the seal and show that it was not affixed by legally exercised authority of the company." This prima facie evidence was for the court below to consider, as the agreement was to the effect that the facts were to be found by the court below. The receiver made numerous exceptions and assignments of error to the effect that the findings of the court below were not supported by any evidence in the case, but that every such finding of fact was contrary to the evidence. That the court below from the evidence should find certain facts setting them out, that every conclusion of law found by the court below was not warranted by the facts and contrary to law. All of which from the position here taken we cannot subscribe to. These exceptions and assignments of error cannot be sustained.

We think the court below had sufficient evidence to find that the claimant was a bona fide purchaser for value, without notice of any defects in this transaction; that the transaction was not void but voidable; that it was authorized and ratified; that the matter was freely and openly made in good faith, without actual or constructive fraud, and that the corporation received full value.

It is well settled in *R. R. v. Comrs.,* 188 N. C., at p. 267: "A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made the necessary effort to learn the truth of the matters affecting his interests. *Wynn v. Grant,* 166 N. C., p. 45." *Mills v. Kemp,* 196 N. C., at p. 314. We do not think this principle applicable in this case.

The receiver representing the general creditors, we do not think, can complain. The general creditors no doubt in giving credit trusted this corporation which now appears woefully insolvent. Those who give credit to corporations and others should do so with due care and upon thorough investigation. It appears from the findings of the court below, supported by evidence, that the claimant here and those through whom it claims relied upon the resolution of the Y. & B. Corporation and corporate conveyances in due form, approved by attorneys of unquestioned ability and integrity, that it would have a first lien on the property in

controversy as a security for its loan. The transactions being in good faith and free from fraud and ratified; the Y. & B. Corporation receiving full value, claimant was looking to the security and loaned the money on the faith of the security—the general creditors did not look to any security. From the findings of fact the loan transaction was carried out in good faith and without fraud, the Y. & B. Corporation receiving full value—the $50,000.

From the findings of fact in this case by the court below, supported by evidence, it would be contrary to equity for the court to allow the receiver of the Y. & B. Corporation to retain the $50,000, which the corporation received the benefit of, and avoid the lien now held by a bona fide purchaser for value without notice, made in good faith and without fraud and prima facie regular and valid—the resolution in due form giving authority. The conveyances were duly executed and recorded in accordance with law and afterwards ratified. This is a contest between an innocent third party and the corporation, upon an executed contract—the corporation receiving the benefit. A court of equity is not disposed to disturb an executed contract, where the person or corporation has received full value, where the transaction is bona fide, free from fraud and where there is no mutual mistake. This is not a contest between the members of the corporation.

We may add that this Court has thoroughly considered this action for a long time, recognizing its importance. We find in law

No error.

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HARVEY MORRIS, ON BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS AND CREDITORS OF THE Y. AND B. CORPORATION, v. THE Y. AND B. CORPORATION.

(Filed 21 May, 1930.)

1. **Trial D a: Evidence B a—Prima facie case is sufficient to take issue to the jury, the burden of proof remaining on the plaintiff.**

   Where the plaintiff's evidence makes out a prima facie case the issue is for the jury, and its affirmative finding is sufficient in law, the burden of proof remaining on the plaintiff throughout the trial.

2. **Trial E g—Where the charge of the court construed as a whole contains no material or prejudicial error, a new trial will not be awarded.**

   A charge of the court to the jury will not be held for reversible error for which a new trial will be awarded if the error in the charge when construed contextually as a whole is not material and does not deprive the appellant of a substantial right.

**3. Appeal and Error J d—Appellant must show that he was deprived of substantial right in order to be entitled to a new trial.**

Upon appeal to the Supreme Court the presumption is against the appellant, and he must show that he has been deprived of a substantial right in the Superior Court to be entitled to a new trial.

APPEAL by W. J. Shuford, receiver, from *Stack, J.*, and a jury, at March Term, 1929, of MECKLENBURG. No error.

This is an action brought by plaintiff on behalf of himself and all other creditors of the Y. & B. Corporation to have a receiver appointed for the Y. & B. Corporation. W. J. Shuford was appointed permanent receiver on 30 November, 1927. The Industrial Loan and Investment Bank of Charlotte, N. C., filed a claim with the receiver of the Y. & B. Corporation for the payment of a certain note dated 6 October, 1927, for $15,000, alleging that it was secured by deed of trust to H. C. Alexander, trustee, on certain land in Charlotte, N. C., on the corner of Fourth and Caldwell streets, "subject only to a prior lien thereon consisting of a deed of trust dated 28 April, 1927, registered in Book 650, at page 19, said registry, from J. A. Yarborough and wife, Josephine Yarborough, to P. C. Whitlock and J. Arthur Henderson, securing a principal indebtedness of $50,000 with 6 per cent interest thereon in accordance with the terms of said deed of trust."

The sum of $600 has been paid on said note. W. J. Shuford, on 10 August, 1928, in his report, after setting forth the reasons disallowed the claim as a lien on the real estate before mentioned, but allowed it as an unsecured claim against the Y. & B. Corporation.

Exception was duly made by the Industrial Loan and Investment Bank. The case came on for hearing before Stack, J., and a jury.

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

"1. Did J. A. Yarborough, as president and treasurer, and N. J. Orr, as secretary, obtain for the Y. & B. Corporation from the Industrial Loan and Investment Bank the sum of $15,000 upon the note, deed of trust and certificate designated as plaintiff's Exhibits A, B and C? Answer: Yes (by consent).

2. Was $7,004.80 of said loan applied to the payment and cancellation of a note described in a deed of trust on the Y. & B. Corporation's property, and $2,051.23 applied in payment of the 1926 city taxes of the Y. & B. Corporation, and the balance, less interest and expenses, deposited by Y. & B. Corporation to its account in the First National Bank of Charlotte? Answer: Yes (by consent).

3. Did the directors of the Y. & B. Corporation on 13 September, 1926, adopt a resolution as appears on pages 75 and 76 of the Minute

Book of said corporation, authorizing the said officers of the Y. & B. Corporation to borrow money in such a way, and at such times as in their judgment deemed best and secure same by mortgages or deeds of trust on the property of the corporation? Answer: Yes.

4. If so, were notices given to all of the directors in accordance with the by-laws that such a resolution would be presented for consideration at that meeting? Answer: Yes.

5. If so, was a quorum of directors present at such meeting? Answer: Yes.

6. Did the directors of the Y. & B. Corporation on 6 October, 1927, adopt a resolution as set out in plaintiff's Exhibit C? Answer: Yes.

7. If so, were notices given to all of the directors as required by the by-laws of the corporation, that such resolution would be presented to the meeting? Answer: Yes.

8. If such meeting was held, was a quorum of directors present? Answer: Yes.

9. Did the president and secretary of the Y. & B. Corporation represent to the plaintiff bank that the resolution as set out in plaintiff's Exhibit C, had been adopted by the directors of said corporation; and if so did the plaintiff rely upon such representation, and was said representation, if made, a material inducement to the making of the loan of $15,000 to the Y. & B. Corporation? Answer: Yes.

10. Did the president and secretary of the Y. & B. Corporation from time to time, prior to 6 October, 1927, mortgage or assume to mortgage the corporate property for the purpose stated in said mortgages? Answer: Yes.

11. If so, were any of the said mortgages executed without any special authority? Answer: Yes.

12. If the said officers executed mortgages, or attempted to execute mortgages on corporate property without authority, did the directors have actual notice of the execution of any such mortgages? Answer: No."

Judgment was rendered on the verdict in favor of the Industrial Loan and Investment Bank. The receiver made numerous exceptions and assignments of error and appealed to the Supreme Court.

*Stewart, McRae & Bobbitt for Industrial Loan and Investment Bank.*

*E. B. Cline, Preston & Ross and Tillett, Tillett & Kennedy for W. J. Shuford, receiver.*

CLARKSON, J. The court below denied the motion of W. J. Shuford, receiver, for judgment as in case of nonsuit. C. S., 567. In this we see no error.

In *Jeffrey v. Mfg. Co.*, 197 N. C., 725-6, the law is stated as follows: "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 fails 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.'"

Taking the charge as a whole, we think no prejudicial or reversible error is shown on this aspect. *In re Ross*, 182 N. C., at p. 478, we find the following: "It is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. Our system of appeals, providing for a review of the trial court on questions of law, is founded upon sound public policy, and appellate courts will not encourage litigation by reversing judgments for slight error, or for stated objections, which could not have prejudiced the rights of appellant in any material way. *Burris v. Litaker*, 181 N. C., 376; *In re Eden's Will, ante*, 398, and cases there cited. Again, 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. *In re Smith's Will*, 163 N. C., 464; *Lumber Co. v. Buhmann*, 160 N. C., 385; *Albertson v. Terry*, 108 N. C., 75."

We think the issues answered in favor of the Industrial Loan and Investment Bank sufficient to sustain the judgment. The assignments of error on the part of the receiver were not material and if errors were not prejudicial or reversible. For the reasons given in the companion case in which the Guardian Life Insurance Company of America was claimant, we think the judgment of the court below should be sustained. We find in law

No error.

WADE O. CONRAD, EMPLOYEE, v. COOK-LEWIS FOUNDRY COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 21 May, 1930.)

1. **Master and Servant F b—Injuries from accident in course of, and arising out of employment are compensable under Workmen's Compensation Act.**

   The Workmen's Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising out of it.

2. **Same—Definition of "accident" within meaning of Workmen's Compensation Act.**

   The word "accident" within the meaning of the Workmen's Compensation Act is defined to be an unlooked for or untoward event which is not expected or designed by the person who suffers the injury, and the mere fact that the injury is the result of a wilful and criminal assault of a fellow-servant does not of itself prevent the injury from being accidental.

3. **Same—Definition of words "out of and in the course of the employment" as used in the Workmen's Compensation Act.**

   In construing the Workmen's Compensation Act the words "out of and in the course of the employment," used in connection with injuries compensable thereunder, is not to be determined by the rules controlling in negligent default cases at common law, but an accidental injury is compensable thereunder if there is a causal relation between the employment and injury, if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which ought to have been foreseen or expected.

4. **Same—Injury inflicted by fellow-servant after altercation arising out of and in the course of employment is compensable.**

   Where in a proceeding under the Workmen's Compensation Act the evidence tends to show that the employee was a moulder in the employer's foundry, and that he struck his negro assistant with a shovel after the assistant had spoken words to him he deemed insulting, whereupon the assistant left the employment and returned and shot the claimant while he was doing his work, causing permanent injury, is sufficient within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment."

5. **Appeal and Error E a—Where record is silent as to material fact at issue, cause will be remanded for definite determination thereof.**

   Where in proceedings under the Workmen's Compensation Act there is no finding or adjudication in reference to the contention of the employer that the claimant's injury was occasioned by his wilful intention to injure his assailant, a fellow-servant, the cause will be remanded for a definite determination of the question.

APPEAL by American Mutual Liability Insurance Company, carrier, from *Lyon, Emergency Judge*, at November Civil Term, 1929, of GUILFORD. Remanded.

This is a proceeding brought by the plaintiff under the Workmen's Compensation Act to recover compensation for permanent disability alleged to have been caused by the infliction of personal injury.

The proceeding was commenced on 28 August, 1929. On 10 September, 1929, the parties appeared before Matt H. Allen, Commissioner, and on 28 September he made an award. His findings of fact are as follows:

1. That on 20 July, 1929, at about 9 o'clock a.m., the plaintiff was injured as the result of an accident which arose out of and in the course of his employment.

2. That as a result of his injury the plaintiff has been totally disabled within the meaning of the North Carolina Workmen's Compensation Act, is now so disabled and that total disability will in all probability continue for some time.

3. That the injury sustained by the plaintiff is of such a nature that total disability may be followed by a more or less extended period of partial disability. Dr. J. L. Sowers, who attended the plaintiff, having testified that the plaintiff had a large gun-shot wound in his right side, the wound being about two inches deep and about one inch in diameter, and that about two-thirds of the plaintiff's lung is compressed and not in use, and that the plaintiff will never be able to use all of his lung.

4. That the plaintiff and the defendants are bound by the provisions of the North Carolina Workmen's Compensation Act.

Upon the facts he made this award:

1. That the accident which resulted in injury to the plaintiff arose in the course of his employment, as the plaintiff was engaged in the performance of the duties required by his employment at the time of the accident.

2. That there was a causal connection between the accident and the employment of the plaintiff in that the plaintiff, as an incident to his employment, had a right to require that his assailant, a colored fellow-workman, treat him with proper respect.

3. That there having been a causal connection between the accident and the employment, the accident arose out of the employment.

4. That the accident arose out of and in the course of the employment, and the parties, plaintiff and defendant, having been subject to the provisions of the North Carolina Workmen's Compensation Act, the plaintiff is entitled to compensation for his injury.

It is, therefore, ordered that an award be made against the defendants, and each of them, to pay to the plaintiff compensation for total dis-

ability beginning from 19 July, 1929, and continuing during total disability for a period not to exceed four hundred weeks, at the rate of $18 per week, payable weekly, and that the defendants pay for medical and surgical services and hospital bills. That this cause be retained for further hearing to determine the extent of permanent partial disability, if any.

His award was thereafter reviewed by the full commission and affirmed. The carrier appealed to the Superior Court and Judge Lyon modified the award by limiting the compensation to $6,000, and affirmed it in all other respects. He gave judgment accordingly and the carrier appealed to the Supreme Court upon error assigned.

*King, Sapp & King for appellant.*
*Walser & Walser for appellee.*

ADAMS, J. The claimant and a colored man named Dolly Squires were employees of the Cook-Lewis Foundry Company—the plaintiff a moulder and Squires a helper. They engaged in a conversation pertaining to their work, and Squires addressed to the claimant language deemed by the latter to be insulting. The claimant then struck Squires with a shovel. Squires left the shop, went to the employer's office, and received his wages. About half an hour later he went back to the shop, put the barrel of a shotgun through a hole in the wall, and shot the plaintiff in the back, thereby inflicting serious and permanent injury.

The Workmen's Compensation Law prescribes conditions under which an employee may receive compensation for personal injury. Section 2(f) declares that "injury and personal injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except when it results naturally and unavoidably from accident." The condition antecedent to compensation is the occurrence of an (1) injury by accident (2) arising out of and (3) in the course of the employment.

Was the injury suffered by the claimant an injury by accident? In construing the word "accident" as used in the Compensation Act we must remember that we are not administering the law of negligence. Under that law an employee can recover damages only when the injury is attributable to the employer's want of due care; but the act under consideration contains elements of a mutual concession between the employer and the employee by which the question of negligence is eliminated. "Both had suffered under the old system, the employer by heavy judgments, . . . the employee through old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where

in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it." *Stertz v. Industrial Ins. Commission,* 91 Wash., 588, 158 Pac., 256.

The result was that the Compensation Law discarded the theory of fault as the basis of liability and conferred an absolute right of compensation on every employee who is injured by an "accident arising out of and in the course of the employment." *Smith v. Light Co., ante,* 614. The word "accident," as used here, has been defined as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury. Annotation—Workmen's Compensation, L. R. A., 1916A, 227; *Furst Kerber Cut Stone Co. v. Mays,* 144 N. E. (Ind.), 857. In *Garrett v. Gadsden Cooperage Co.,* 96 So. (Ala.), 188, it is said that the courts, looking at the matter from the workman's viewpoint and construing the legislative intent as being, on economic grounds, to provide compensation for employees against personal injury not expected or designed by them, have adopted a meaning deemed necessary to give effect to the broad legislative purpose. Accordingly, while the decisions are not uniform, it is generally held that the mere fact that an injury is the result of the wilful or criminal assault of a third person does not prevent the injury from being accidental. *Re McNicol,* L. R. A., 1916A, 306 and note; *Strasmas v. Rock Island Coal Min. Co.,* 15 A. L. R., 576; *Pinkerton Nat. Detective Agency v. Walker,* 35 A. L. R., 557; *Anderson v. Security Bldg. Co.,* 40 A. L. R., 1119.

It follows from what precedes that the meaning of the phrase "out of and in the course of the employment" is not to be determined by the rules which control in cases of negligent default at common law; for one of the purposes of the recent act is to increase the right of employees to be compensated for injuries growing out of their employment. *Sundine's Case,* 218 Mass., 1, L. R. A., 1916A, 318. The words "out of" refer to the origin or cause of the accident and the words "in the course of" to the time, place, and circumstances under which it occurred. *Raynor v. Sligh Furniture Co.,* 146 N. W., 665; *Hills v. Blair,* 148 N. W., 243. There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. *Baum v. Industrial Commission,* 288 Ill., 516, 6 A. L. R., 1242. The decisions of various courts contain practical illustrations of the principle. For example, a claimant was foreman in a shoe factory; an employee who had been repairing machines approached the claimant in a dark room, placed his arms about the claimant's neck and drew his head

against a lead pencil which injured the claimant's eye. *Markell v. Daniel Green Felt Shoe Co.,* 221 N. Y., 493, 116 N. E., 1060. Likewise an employee while engaged in his work was struck in the eye by a missile thrown by a fellow-servant. *Leonbruno v. Champlain Silk Mills,* 229 N. Y., 470, 13 A. L. R., 522. Again, a workman was injured in a quarrel with another over interference with his work. *Pekin Cooperage Co. v. Industrial Commission,* 285 Ill., 31, 120 N. E., 530. In these cases the injury was held to be by accident arising "out of" the employment. *Socha v. Cudahy Packing Co.,* 13 A. L. R. (Neb.), 513.

An accident arising "in the course of" the employment is one which occurs while "the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing"; or one which "occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed." *Bryant v. Fissell,* 84 N. J. L., 72, Anno Cas., 1918B, 764; *Marchiatello v. Lynch Realty Company,* 94 Conn., 260, 108 At., 799. One of the risks involved in the employment is the liability of injury inflicted by fellow-servants. *Anderson v. Security Bldg. Co., supra.* So it has been stated as a general proposition that the phrase "out of and in the course of the employment" embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business. Annotation—Workmen's Compensation, 1916A, 41; *Darleth v. Roach & Seeber Co.,* 36 A. L. R., 472.

In *Leonbruno v. Champlain Silk Mills, supra,* the New York Court of Appeals used this language: "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow-workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk."

These principles applied to the facts in the present case lead to the conclusion that the injury arose out of and in the course of the employment. But, even so, the appellant finally makes this contention: Even if the claimant sustained "injury by accident arising out of and in the course of the employment," he is not entitled to compensation because his injury was occasioned by his wilful intention to injure Squires—*i. e.,* that his assault on Squires occasioned the assault which resulted in his own injury. Sec. 13. On this point the burden of proof

is upon him who claims the exemption under this section; but as there is no finding or adjudication in reference to the contention the cause is remanded for a definite determination of the question whether the claimant's injury was occasioned by his wilful intention to injure his assailant.

Remanded.

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STATE v. B. C. JAYNES.

(Filed 28 May, 1930.)

1. **Intoxicating Liquor A a: Constitutional Law B a—State may enact more stringent laws in regard to prohibition than Volstead Act.**

   Under the inherent powers the State retains in matters not delegated to the Federal Government, the State may enact a statute more stringent than the Federal Statute relating to intoxicating liquor when not in conflict with the Eighteenth Amendment to the Federal Constitution or with Federal statutes, although the State law was enacted to conform to the Federal Statute.

2. **Intoxicating Liquor C c—Possession of property designed for manufacture of intoxicants is unlawful under C. S., 3411(d).**

   In the interpretation of C. S., 3411(d), making it unlawful to possess any property "designated" for use in manufacturing intoxicating liquor, the word "designated" is construed to mean "designed," and so used it is held in this case that evidence of the defendant's guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a distillery is immaterial under the language of the statute.

3. **Same—Charge of possession of property designed for manufacture of intoxicants is not charge of an attempt to commit a crime.**

   An indictment charging the defendant with a violation of C. S., 3411(d), in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime.

4. **Criminal Law K b—Prayer for judgment may not be continued over objection of defendant.**

   Where the verdict finds a defendant guilty of a criminal offense, prayer for judgment may not be continued over the objection of the defendant.

BROGDEN, J., dissents.

APPEAL by defendant from *Oglesby, J.*, at November Term, 1929, of CALDWELL.

Criminal prosecution tried upon an indictment charging the defendant with having in his possession "certain utensils and contrivances, to wit, distilling outfit, jars, jugs, worm, beer, malt, barrels, etc., de-

signed and intended for the use in the unlawful manufacture of intoxicating liquors," contrary to the provisions of 3 C. S., 3411(d).

The evidence for the State tends to show that on the afternoon of 7 February, 1928, two officers of Caldwell County were out in the woods looking for a still; they found the defendant about 300 yards from his house; he had a spade digging a place in the side of a branch, while near by was a big sheet-iron vessel with a wooden bottom in it, "a big sheet-iron distillery," as the witness described it, about three feet deep, holes punched in the top to nail a head on, capacity apparently 100 gallons. On seeing the officers, the defendant ran away and did not return until about three hours thereafter.

The defendant testified that the receptacle he had was intended for use in watering his tobacco plants; that it was unfit for distilling purposes; that the branch, so called, was only a drain and had no water in it at the time; that he did not run from the officers; and that he was not preparing or intending to make any liquor.

Motion for judgment as in case of nonsuit; overruled; exception.

Verdict: Guilty.

Judgment: "Prayer for judgment continued two years upon condition that the defendant pay a fine of $50.00 and the costs, and upon further condition that he does not violate the prohibition laws and upon further condition that he does not take a drink." Objection and exception.

Defendant appeals, assigning errors.

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

*W. A. Self and Newland & Townsend for defendant.*

STACY, C. J., after stating the case: The second sentence of 3 C. S., 3411(d) is as follows: "It shall be unlawful to have or possess any liquor or property designated for the manufacture of liquor intended for use in violating this article, or which has been so used, and no property rights shall exist in any such liquor or property." The word "designated," appearing herein, was evidently intended for "designed," and may be so regarded. *S. v. Bell,* 184 N. C., 701, 115 S. E., 190. We omit any consideration of the clause, "or which has been so used," as it is unnecessary to decide its meaning or validity on the present appeal.

While it does not appear that the Volstead Act, 41 U. S. Statutes at Large, 305, contains a provision exactly like the one under which the defendant has been indicted *(Danovitz v. U. S.,* decided 5 May, 1930), and notwithstanding the Turlington Act, ch. 1, Public Laws 1923, was ostensibly adopted "to make the State law conform to the National law

in relation to intoxicating liquor," nevertheless it is the generally accepted view that the several States may legislate more stringently on the subject than the Congress has done. *S. v. Lassiter, ante,* 352, This power existed in the States prior to the adoption of the Eighteenth Amendment and the passage of the Volstead Act, and such power is still preserved to them under the Tenth Amendment to the Constitution of the United States. *S. v. Harrison,* 184 N. C., 762, 114 S. E., 830.

It is true that in the instant case the defendant's evidence, if believed, would have warranted an acquittal, but the State's evidence, considered in its most favorable light, the accepted position on a motion to nonsuit, was apparently sufficient to carry the case to the jury. In this respect, we find no error. The defendant is not charged with an attempt to commit a crime *(S. v. Addor,* 183 N. C., 687, 110 S. E., 650), but with having in his possession certain utensils designed and intended for use in the unlawful manufacture of intoxicating liquor. The fact that they had not been completely assembled or arranged for the purpose would seem to make no difference under the language of the statute.

The form of the judgment would seem to be objectionable. *S. v. Gooding,* 194 N. C., 271, 139 S. E., 436; *S. v. Schlichter,* 194 N. C., 277, 139 S. E., 448. Prayer for judgment may not be continued over the defendant's objection. *S. v. Burgess,* 192 N. C., 668, 135 S. E., 771. Here the defendant did object to its continuance. Hence, the judgment, as entered, will be stricken out and the cause remanded for a valid judgment.

Error, and remanded.

BROGDEN, J., dissenting.

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SARA C. G. BECHTEL v. JOHN N. BOHANNON AND WIFE, MARY W. BOHANNON, B. B. BIBLE AND HIS WIFE, MARY BIBLE, AND KESTER WALTON, TRUSTEE.

(Filed 28 May, 1930.)

**1. Pleadings D a—Demurrer should not be sustained where plaintiff is entitled to any relief upon the complaint.**

A demurrer *ore tenus* to a complaint should not be sustained if upon the facts alleged in the complaint the plaintiff is entitled to any relief as a matter of law. C. S., 518.

**2. Cancellation of Instruments A b—Grantee is not entitled to set aside deed for misrepresentations as to encumbrances made to another.**

The purchaser of lands at a foreclosure sale of a mortgage may not have his deed set aside for fraudulent representations as to encumbrances

made to the mortgagee by the mortgagor, in order to be entitled to such relief it is required that he allege that such representations were made to him with the intent that he should rely thereon.

**3. Deeds and Conveyances C f—Grantor covenanting against encumbrances is estopped from setting up claim against purchaser from grantee.**

Where the grantor of lands covenants in his deed that the title is free and clear from encumbrances he is estopped from setting up a prior mortgage lien thereon in his own favor as against his grantee or those claiming under him, and a demurrer to the complaint of the purchaser from the grantee alleging these facts should be overruled, and the plaintiff is entitled to have the grantor permanently restrained from enforcing his lien and have the lien removed as a cloud upon his title in the event of a verdict in his favor. C. S., 1743.

APPEAL by plaintiff from *Finley, J.*, at December Term, 1929, of BUNCOMBE. Reversed.

From judgment dismissing the action, plaintiff appealed to the Supreme Court.

*Joseph W. Little for plaintiff.*

*A. A. Whitener and Louis A. Whitener for defendants.*

CONNOR, J. After answer filed, setting up defenses to plaintiff's recovery in this action on the merits, defendants demurred *ore tenus* to the complaint, for that the facts stated therein are not sufficient to constitute a cause of action. Upon the hearing, the demurrer was sustained. C. S., 518. From judgment dismissing the action, plaintiff appealed to this Court. If upon the facts alleged in the complaint, plaintiff is entitled, as a matter of law, to any relief, the judgment must be reversed. *S. v. Trust Co.*, 192 N. C., 246, 134 S. E., 656.

Plaintiff has failed to state in her complaint facts sufficient to constitute a cause of action upon which she is entitled to recover of defendant for false and fraudulent representations with respect to the title to the land described in the complaint. She alleges that the defendant, John N. Bohannon, falsely and fraudulently represented to John A. Bechtel, her husband, that the land described in the complaint was free and clear of encumbrances. This representation was made, however, to the said John A. Bechtel as an officer and agent of the LaFayette Development Company, a corporation, during negotiations between the said John N. Bohannon and the said John A. Bechtel resulting in the sale and conveyance of the said land by the defendants, John N. Bohannon and his wife, and B. B. Bible and his wife, to the LaFayette Development Company. Plaintiff thereafter purchased the land at a foreclosure sale made by the trustee in a deed of trust by which the said LaFayette

Development Company had conveyed the said land to secure the payment of certain indebtedness. She does not allege that any representations were made to her or to any one acting in her behalf, by the defendants or by any one of them with respect to encumbrances on the land, at the time she purchased the same at the sale made by the trustee. Defendants are not liable to plaintiff because of representations alleged to have been made to John A. Bechtel while he was acting as an officer and agent of the LaFayette Development Company, although these representations were thereafter communicated by the said John A. Bechtel to the plaintiff, prior to her purchase of the land. An essential element of a cause of action for the recovery of damages for false and fraudulent representations is that the representations alleged to be false and fraudulent were made with intent that the plaintiff shall act upon them. *Corley Co. v. Griggs,* 192 N. C., 171, 134 S. E., 406. In the absence of an allegation that the representations were made by the defendant with intent that plaintiff shall act upon them, the complaint is subject to demurrer on the ground that the facts stated therein are not sufficient to constitute a cause of action.

However, in her complaint, plaintiff alleges that in their deed conveying the land to the LaFayette Development Company, the defendants, John Bohannon and B. B. Bible, covenanted with the said company, its successors and assigns that the said land was then free and clear of encumbrances. At the date of said deed, there was on record a deed of trust executed by the defendant, B. B. Bible, conveying to the defendant, Kester Walton, trustee, an undivided one-half interest in said land to secure the payment of a note payable to the defendant, John N. Bohannon. By virtue of said deed of trust, the said John N. Bohannon had a lien on said land for the payment of said note. Having covenanted in his deed to the LaFayette Development Company that the land conveyed thereby was free and clear of encumbrances, the defendant, John N. Bohannon, is estopped as against the plaintiff, who is now the owner of the land, claiming under the LaFayette Development Company, to assert that he has a lien on the land for the payment of his note. Upon the facts alleged in the complaint and admitted by the demurrer, plaintiff is entitled to judgment that the defendant, John N. Bohannon, be permanently enjoined and restrained from causing the land to be sold under the power of sale contained in the deed of trust to the defendant, Kester Walton, trustee, or from otherwise causing said land to be sold for the payment of his note. The said deed of trust is a cloud upon the title of the plaintiff to said land, which she is entitled to have removed. C. S., 1743. *Plotkin v. Bank,* 188 N. C., 711, 125 S. E., 541.

"A grantor of land with full covenants of warranty is estopped to claim any interest in the granted premises. And where he holds a prior

mortgage on the premises, he can assert no rights as mortgagee against his grantee." 10 R. C. L., p. 677, and cases cited in the notes.

The judgment sustaining the demurrer and dismissing the action is reversed, to the end that the action may be tried on the issues arising upon the complaint and answer. Whether defendants are entitled to an order, as prayed for in their answer, that John A. Bechtel and the LaFayette Development Company be made parties plaintiff in this action is not presented on this appeal. We hold only that there was error in the judgment sustaining the demurrer and dismissing the action. For this error the judgment is

Reversed.

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D. S. ELIAS v. BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY ET AL.

(Filed 28 May, 1930.)

**Process B c—Judgment that clerk should not order publication in a certain paper without finding that it was most likely to give notice held error.**

There being no specific requirement of statute that an order for the publication of summons state that the paper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served," a judgment that the clerk be restrained from ordering publication in a certain paper without such finding in the order is beyond the terms of the statute and would seem to be discriminatory, and on appeal the judgment will be modified; an order for publication of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been made, without specific adjudication in the order to that effect. C. S., 485.

APPEAL by defendants from *MacRae, Special Judge,* at January Term, 1930, of BUNCOMBE.

Civil action to restrain the defendants from proceeding with certain tax sales, as being contrary to law and involving needless expenditure of public funds.

It was conceded on the argument that the irregularities complained of had all been remedied since the hearing in the Superior Court and that the board of commissioners of Buncombe County and the clerk of the Superior Court have no further interest in the matter.

But the Advocate Printing Company contends that the following provision of the judgment is unduly restrictive of its rights and should be modified:

"2. That the said J. B. Cain, clerk of the Superior Court, as aforesaid, be further restrained and forever enjoined from issuing any orders

of any date authorizing and directing the publication of summonses in any action by the board of county commissioners of Buncombe County against delinquent taxpayers of said county in the *Asheville Advocate*, a publication issued by the Advocate Printing Company, without first finding as a fact and designating in his order of publication that said *Asheville Advocate* is the paper most likely to give notice to the person to be served."

The plaintiff, on the other hand, contends that the judgment, in its entirety, accords with the statute.

*Bourne, Parker & Jones and J. H. Cathey for plaintiff.*
*Don C. Young for county commissioners.*
*Joseph W. Little for defendant, Advocate Printing Company.*

STACY, C. J., after stating the case: It is provided by C. S., 485, that where service of summons is to be had by publication the "order must direct the publication in one or two newspapers to be designated as most likely to give notice to the person to be served." But there is no specific requirement of the statute that such finding shall appear in the order of publication.

The fact that one or more newspapers is designated for the publication of summons ought to carry a presumption of the requisite statutory finding and determination without a specific adjudication in the order to that effect. *Guilford v. Georgia Co.*, 109 N. C., 310, 13 S. E., 861. When a court of record assumes to act, there is a presumption in favor of the rightfulness of its decrees. Hence, to require that such finding be embodied in the order when the publication is to be made in the *Asheville Advocate* and not when it is to be made in some other newspaper, would seem to be somewhat discriminatory and beyond the terms of the statute. To this extent, the judgment will be modified. Otherwise it is affirmed.

Modified and affirmed.

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W. R. FRANCIS v. MORTGAGE SECURITY CORPORATION OF AMERICA, UNION TRUST COMPANY OF MARYLAND, AND THE INSURED MORTGAGE BOND CORPORATION OF NORTH CAROLINA.

(Filed 28 May, 1930.)

**1. Trial D b—It is error to direct a verdict upon conflicting evidence.**

Where in an action to recover for services rendered there is a direct conflict in the evidence as to whether the plaintiff was employed by the defendant the issue is for the determination of the jury, and it is error to direct a verdict thereon in the plaintiff's favor.

**2. Attachment H b—Where property is attached, third person may intervene and assert title thereto.**

Where property attached in an action is claimed by a stranger to the proceeding, such claimant may intervene and assert his title thereto. C. S., 829, 840.

APPEAL by defendant and intervener from *Schenck, J.*, at November Term, 1929, of HAYWOOD.

Civil action by plaintiff to recover of the defendant, Mortgage Security Corporation of America, a foreign corporation, the sum of $860 for legal services alleged to be due by contract which is denied by the defendant.

Service of summons was sought to be obtained by publication and by attachment of funds belonging to the defendant. The Union Trust Company of Maryland, trustee, undertook to intervene in its fiduciary capacity and claim the funds attached. This petition was dismissed at the October Term, 1929, Harwood, Special Judge presiding, but said intervener was allowed to take the funds upon the execution of a replevin or forthcoming bond.

On the hearing at the November Term, the action was nonsuited as to the Insured Mortgage Bond Corporation of North Carolina, for want of service. The intervener again asked to be permitted to come in and set up claim to the funds attached, which right was denied because of the previous dismissal of its petition, and the plaintiff announced his willingness to release the defendant, Mortgage Security Corporation of America, from any judgment *in personam*.

The following issue was thereupon submitted to the jury and instructed by the court, if they believed the evidence, to answer it in favor of the plaintiff:

"What amount, if any, is the plaintiff, W. R. Francis, entitled to recover of the funds attached herein, or from the bondsman on the replevy bond herein filed?"

From a judgment rendered only against the bond of the intervener and the funds attached, the defendant, Mortgage Security Corporation of America, and intervener, Union Trust Company of Maryland, trustee, appeal, assigning errors.

*Alley & Alley and Jos. E. Johnson for plaintiff.*
*J. E. Wilson and James E. Rector for defendant and intervener.*

STACY, C. J., after stating the case: There is a direct conflict in the evidence as to whether the plaintiff was employed by the Mortgage Security Corporation of America, and the issue, as framed (conceding its sufficiency), necessarily called for a determination of this question. Hence it was error to direct a verdict thereon in plaintiff's favor.

Likewise, we think the rulings against the intervener were too restrictive of its rights. When property is attached, which is claimed by a stranger to the proceeding, such claimant may intervene and assert his title thereto. C. S., 829 and 840; *Bulluck v. Haley, ante,* 355.

There are other exceptions appearing on the record, worthy of consideration, but as a new trial must be awarded as to both appellants, we shall not consider them now. They may not arise on another hearing.

New trial.

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KING SMITH v. KITCHEN LUMBER COMPANY ET AL.

(Filed 28 May, 1930.)

**Master and Servant C c—In this case held: evidence of master's negligence in failing to provide proper assistants was sufficient to go to jury.**

It is the duty of the employer to provide his employee with reasonably safe means and methods of work such as proper assistants for performing his task, and where the evidence in an action by an employee to recover for an injury tends to show that the employee was engaged with another in moving logs with peaveys to a declivity to slide them down to the skidder, and that he had informed the foreman of the employer that he needed four or five helpers to do the work, which the employer failed to furnish, and that the employee while attempting to move a log with one helper was injured as a result of their not being able to hold the log, which rolled toward them, and that while attempting to dodge the log the employee's eye was put out by a limb: *Held,* the evidence was sufficient to be submitted to the jury, and defendant's motion as of nonsuit should have been denied.

APPEAL by plaintiff from *Moore, J.,* at January Term, 1930, of GRAHAM.

Civil action to recover damages for an alleged negligent injury caused by a limb striking plaintiff's left eye and putting it out, while engaged in ball-hooting logs for the defendant.

The record discloses that on 2 October, 1928, and for sixty days prior thereto, the plaintiff was in the employ of the defendant "nosing, bumping and ball-hooting logs," which means "rounding the ends, cutting off knots and limbs, and taking peaveys and handling the logs, moving them and getting them to the place where they will slide endways down the hill or mountain themselves."

During the morning of the day of the injury, plaintiff and one Ernie Hollifield had cut 18 or 20 logs, and trimmed them up ready for sliding down the mountain where the skidder could get them. That afternoon the foreman, Oliver Orr, directed the plaintiff and his helper, Ernie

Hollified, to ball-hoot the logs which they had cut that morning. Just before that time, the plaintiff had told the foreman that they needed four or five men to handle the logs, but he did not furnish any more. Also, they were using No. 9 peaveys, which were quite heavy and large, when No. 5 was the size in general and common use.

While thus engaged, plaintiff, with his single helper, tried to start a log, about 16 feet long and 24 inches in diameter, when the log, being too heavy for the two to handle, took the peaveys, slued around, rolled back, and as plaintiff was trying to get away from the danger of being hit by the log, it caught a limb which brushed his left eye, putting it out.

Plaintiff testified: "When the log slued around, it rolled back on us and took the peaveys from our hands. We were not men enough to hold the peaveys, and roll it into the route we had prepared for it, and when it took the peaveys from us and was rolling on us, I turned my head to dodge, and that limb caught me. It slued around from the route we had for it because we did not have help enough to hold it or turn it. Just before that time when Oliver Orr was helping me handle logs, I told him we should have four or five men to handle logs, but he did not furnish any more. The place at which we were working was rough, brushy, steep land, and rocky."

Judgment of nonsuit was entered on the theory that plaintiff and his helper were both experienced men, and that plaintiff necessarily assumed the risk of his injury, but plaintiff testified he had been working on this particular job only about sixty days. Plaintiff appeals, assigning error.

*Morphew & Morphew and A. Hall Johnston for plaintiff.*
*R. L. Phillips for defendants.*

STACY, C. J., after stating the case: Considering that it is as much the duty of the master to exercise care in providing the servant with reasonably safe means and methods of work, such as proper assistants for performing his task, as it is to furnish him a safe place and proper tools and appliances, we see no distinguishing difference in principle between the instant case and *Bradford v. English,* 190 N. C., 742, 130 S. E., 705, and *Pigford v. R. R.,* 160 N. C., 93, 75 S. E., 860. The judgment of nonsuit, therefore, entered herein, will be reversed on authority of these recent decisions.

Reversed.

HERBERT SPILLMAN COOK, BY HIS NEXT FRIEND, F. W. COOK, v. A. B. EDWARDS.

(Filed 28 May, 1930.)

**Evidence F c—Admission of father made before his appointment as next friend is not admissible against infant plaintiff.**

Where a father qualifies as next friend and brings action for his infant child to recover damages of the defendant for negligently running his automobile upon the child, evidence of the admissions of the father made before his appointment as next friend are not admissible against the infant plaintiff, and their admission over the objection of the plaintiff is reversible error.

CIVIL ACTION, before *Clement, J.*, at November Term, 1929, of ANSON.

The plaintiff, at the time of his injury, was an infant about three and one-half years old, and the father of said infant was duly appointed as next friend to prosecute an action for damages against the defendant.

The evidence tended to show that about 4:30 o'clock on the afternoon of 28 January, 1929, the plaintiff was run over and injured by an automobile owned and operated by the defendant. The injury occurred in the residential portion of the town of Lilesville. There was evidence tending to show that the defendant stated that as he was proceeding down the street he saw an approaching car and "I knew I had to hit the child or the car. I hit the child." The defendant denied making any such statement and offered evidence tending to show that the child jerked loose from some one who was holding his hand and suddenly ran into the side of defendant's automobile, and that the injuries received were not due to any negligence on the part of defendant, but solely to the sudden and unanticipated conduct of the child.

Issues of negligence and damages were submitted to the jury, and the jury answered the issue of negligence against the plaintiff.

From judgment upon the verdict plaintiff appealed.

*McLendon & Covington, O. M. Litaker and Walter Clark for plaintiff.*
*M. W. Nash for defendant.*

BROGDEN, J. The defendant was asked the following question on direct examination: (Q.) "What did Mr. Cook say to you with reference to this accident?" (A.) "He expressed regret that it happened, and I told him the reason I was in Lilesville, and he asked me not to let the accident have any effect on me moving to Lilesville and for me to come right on over; that he realized it was an unavoidable accident."

The foregoing evidence was admitted over the objection of plaintiff, and the ruling of the court is assigned as error.

W. C. Cook was the father of plaintiff and afterwards was appointed next friend to prosecute the suit for and in behalf of plaintiff. Therefore, the question of law presented is whether the admission of a parent before he is appointed next friend to prosecute an action for a minor child is admissible in evidence.

The general rule is thus expressed in 22 C. J., 353, section 408: "Admissions of a guardian *ad litem* or next friend are not competent to affect the interest of the person whom the declarant represents in the action." Our court has adopted the same view of the law, stated as follows, in *Coble v. Coble,* 82 N. C., 339: "The admission therefore of a guardian, or of an executor or administrator made before he was completely clothed with that trust, or of a *prochein ami* made before the commencement of the suit, cannot be received either against the ward or infant in the one case, or against himself as the representative of the heirs, devisees and creditors in the other." *Neff v. Cameron,* 18 A. L. R. (N. S.), 320; *Strother v. R. R.,* 123 N. C., 197, 31 S. E., 386; *Daugherty v. Taylor,* 140 N. C., 446, 53 S. E., 296; *Shuford v. Cook,* 169 N. C., 52, 85 S. E., 142, 1 R. C. L., 486, sec. 22.

Applying these established principles to the facts, it is apparent that the admission of the next friend of the infant plaintiff, made before his appointment, to the effect that the injury was the result of "unavoidable accident" was inadmissible and incompetent, and the objection to such admission is sustained.

New trial.

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L. J. COOK v. J. HERBERT HORNE.

(Filed 28 May, 1930.)

**Highways B a: B g—Whether plaintiff was guilty of contributory negligence in passing car on highway held question for the jury.**

Where the evidence in an action to recover damages for an injury sustained in an automobile collision tends to show that the plaintiff's car collided with the car of the defendant which was driven without lights in violation of C. S., 2615, while the plaintiff was attempting to pass another car, and that the collision occurred 20 or 30 feet beyond the beginning of a white line on the highway and 65 or 70 feet before a slight curve, and that the plaintiff's vision was unobstructed for a distance of 750 or 900 feet at the point of the accident: *Held,* a judgment as of nonsuit entered on the theory that the plaintiff was guilty of contributory negligence in attempting to pass a vehicle upon the crest of a grade or upon a curve in the highway in violation of C. S., 2621(55), is error, the question of proximate cause being for the determination of the jury.

COOK *v.* HORNE.

CIVIL ACTION, before *Sink, Special Judge,* at February Term, 1930, of SURRY.

The plaintiff offered evidence to the effect that on 6 September, 1928, while traveling from Dudley in Wayne County, North Carolina, toward Goldsboro in said county, he sustained certain personal injuries by reason of a collision with a car driven by the defendant. The plaintiff's version of the collision was to the effect that, while he was attempting to pass a Ford car, traveling in the same direction, the defendant, operating a car without lights and after dark, collided with the car driven by plaintiff. Upon cross-examination it appeared that at the point of the wreck or collision there was a white line in the highway which had been placed therein by the State Highway Commission; that plaintiff's car was twenty or thirty feet beyond the point where the white mark began. This white mark was visible. There was testimony in behalf of plaintiff from a witness named Nunn that "there was no curve where the wreck occurred." The plaintiff attempted to pass the car in front before reaching the white line, but before he had passed said car it appears that he was twenty or thirty feet beyond the point where the white line began. There was further testimony to the effect that the plaintiff before passing had an unobstructed vision for a distance of 750 or 900 feet, and that he saw no light from any approaching car, and in an effort to pass the car in front was struck by the unlighted car of defendant while in the act of passing.

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

*E. C. Bivens for plaintiff.*
*Folger & Folger for defendant.*

BROGDEN, J. The judgment of nonsuit was apparently entered upon the theory that plaintiff was operating his car in violation of C. S., 2621(55), in that he was attempting to pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in the highway, and in so doing had driven to the left side of the center line on the highway upon such curve. The evidence of plaintiff, however, was to the effect that there was a slight curve 75 or 80 feet beyond the point where the white line or mark commenced. Hence it was contended for the plaintiff that there was no violation of the statute. Moreover, the rights of the parties are not to be determined upon the facts and circumstances disclosed by the record, solely upon the theory that the plaintiff is barred of recovery as a matter of law by reason of crossing the white line before the act of passing was completed. The evidence discloses that the defendant was operating his automobile in violation of C. S., 2615, in that the same was being driven at night without

lights. The act of defendant in so operating his automobile was negligence *per se*. This state of facts raises the question of proximate cause which should have been submitted to the jury under proper instructions from the court. *DeLaney v. Henderson-Gilmer Co.*, 192 N. C., 647, 135 S. E., 791; *Franklin v. R. R.*, 192 N. C., 717, 135 S. E., 874; *Radford v. Young*, 194 N. C., 747, 140 S. E., 806; *Whitaker v. Car Co.*, 197 N. C., 83.

Reversed.

P. J. LISKE v. W. L. WALTON.

(Filed 28 May, 1930.)

**Highways B b: B g—Question of whether plaintiff was guilty of contributory negligence which was proximate cause held for jury.**

Where the evidence in an action to recover damages for an injury received in an automobile collision at an intersection of public highways tends to show that the defendant stopped his car not over four feet beyond the point of intersection and that the plaintiff was driving his car at a speed in excess of that allowed by law: *Held*, the evidence of contributory negligence was sufficient to be submitted to the jury, and the question of contributory negligence and proximate cause is for their determination.

CIVIL ACTION, before *Stack, J.*, at November Term, 1929, of ROWAN.

The plaintiff offered evidence tending to show that his car was being driven by his wife, in a careful and prudent manner down Fulton Street in the city of Salisbury, and that the defendant drove into said highway from Wiley Avenue at a reckless, dangerous and unlawful rate of speed in disregard of a stop sign. The plaintiff also offered evidence tending to show that after the collision the defendant stated: "I will admit I was in the wrong. Go ahead and settle it and keep it quiet." The defendant offered evidence tending to show that he approached the intersection of Wiley Street at a speed of not more than fifteen miles an hour, and that the plaintiff's car was approaching the intersection "coming at a terrible rate of speed about fifty feet from me, and I stopped dead still and cut my car to the left as far as I could." The defendant further testified that the bumper of his car was not over four feet in the intersection at the time of the collision. There was other testimony that the plaintiff's car was approaching the intersection at a speed of forty or forty-five miles an hour.

The defendant's version of his conversation with the plaintiff after the collision was entirely different from that testified to by the plaintiff.

Issues of negligence and damages were submitted to the jury and answered in favor of plaintiff, who recovered $300.

From judgment upon the verdict the defendant appealed.

*W. V. Harris and Clyde E. Gooch for plaintiff.*
*Rendleman & Rendleman for defendant.*

BROGDEN, J. The court charged the jury as follows: "The defendant sets up contributory negligence and alleges that the plaintiff's wife was guilty of contributory negligence. The court does not recall any evidence that would warrant you in passing on such issue, and therefore does not submit an issue as to that." The defendant in apt time tendered an issue as to contributory negligence which was refused, and to the refusal of the court to submit an issue of contributory negligence and to the charge as set out, the defendant excepted and assigned the same as error.

*Stacy, C. J.*, writing in *Davis v. Jeffreys*, 197 N. C., 712, said: "Contributory negligence, such as will defeat a recovery in an action like the present, is a negligent act of plaintiff, which concurring and coöperating with the negligent act of defendants, thereby becomes the real, efficient, and proximate cause of injury, or the cause without which the injury would not have occurred." There is no essential difference between negligence and contributory negligence, except that in actions like the present one, the negligence of plaintiff is called contributory negligence. *Moore v. Iron Co.*, 183 N. C., 438, 111 S. E., 776. If the testimony of defendant is to be accepted, the plaintiff's car was approaching the intersection at a rapid rate of speed and in violation of the statute. Under our system of determining disputed issues it is for the jury to say whether the plaintiff was guilty of negligence and whether such negligence coöperated or concurred with the negligence of defendant, if any, as a proximate cause of the injury complained of.

We are of the opinion that there was sufficient evidence of contributory negligence to be submitted to the jury.

New trial.

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W. E. McCORD v. HARRISON-WRIGHT COMPANY.

(Filed 28 May, 1930.)

**1. Master and Servant C b—Employer is liable for injuries from simple tool where he has failed to have it repaired after notice.**

While an employer is not ordinarily required to inspect simple tools used by an employee in the course of the employment as he is in the case of complicated tools, it is his duty to repair a simple tool after he has notice of a defect therein, and where an employee has given notice to the employer by notice to its *alter ego* or vice-principal of a dangerous condition of a simple tool and called attention to its need of repair, and the *alter ego* has promised to repair the tool, but has failed therein, and there

is evidence of a causal connection between the injury and the defect in the tool, the question of actionable negligence is for the determination of the jury.

**2. Master and Servant C f—In this case held: question of assumption of risk was for the jury.**

An employee assumes the risks of his employment generally incident thereto and not the specific negligence of the defendant, and where a simple tool is furnished the employee to do the work and the employee warns the *alter ego* of the principal of its dangerous condition and need of repair, and the *alter ego* promises to remedy the defect, but fails therein, the question is for the jury as to whether the danger therefrom was so open, obvious and imminent that a man of ordinary prudence would not have continued in the employment under the circumstances.

**3. Evidence K a—Opinion evidence as to danger of simple tool held not to invade province of jury and was competent.**

Where a chisel is used for cutting the bitulithic pavement on a city street for the purpose of laying pipe in the ground thereunder, and the injury in suit is alleged to have resulted from the failure of the defendant to repair the top of the chisel which was battered and shivered as the result of sledge hammer blows required in its use, testimony of the plaintiff that the chisel should have been dressed up "because it was dangerous," is in substance that if the chisel remained in this condition there was danger that slivers of steel would be severed from the sledge hammer blows upon its head, and is a "short-hand statement of a collective fact" and is an exception to the general rule excluding an expression of opinion, and its admission in evidence is not reversible error.

**4. Evidence D f—Evidence of happening of event like one causing injury held competent under circumstances and evidence in this case.**

While ordinarily evidence that an injury occurred at another time is not competent in an action to recover damages for a negligent injury, it is otherwise where the essential conditions of the events are substantially alike, and in this case *held:* that the short lapse of time between the events is not a sufficient ground for a new trial.

APPEAL by defendant from *Moore, Special Judge,* at December Special Term of MECKLENBURG. No error.

On 26 July, 1926, the defendant, a corporation, was engaged in cutting trenches and laying conduit pipes on Morehead Street in the city of Charlotte for the Southern Bell Telephone Company. The plaintiff was an employee of the defendant and had charge of a squad of men. In order to lay the pipes it was necessary to cut through the bitulithic pavement and for this purpose the defendant furnished the plaintiff steel chisels or cutters about eighteen inches long and one inch and a half in diameter. It was alleged that the tops of the chisels had been hammered until they had become frayed, dangerous, and unsafe; that the plaintiff had requested the defendant to have the chisels dressed and put in suitable condition for the work he had to do and the defendant negligently failed to do so; that one of the men got a chisel or cutter

and held it in position and two other men struck it with heavy sledge hammers; that a small fragment of steel flew from the head of the chisel and struck the plaintiff's right eye while he was standing near by directing the work and practically destroyed the sight of the injured eye. The plaintiff alleged that his injury was due to the negligence of the defendant in failing to provide an air compressor drill and in providing a cutter which was worn, frayed, and unsuitable for the work which the plaintiff was required to do.

The defendant denied all allegations of negligence and pleaded contributory negligence and assumption of risk in bar of the plaintiff's recovery.

The jury returned a verdict for the plaintiff on all the issues, assessing damages. From the judgment rendered the defendant appealed upon error assigned in its exceptions.

*J. D. McCall, E. T. Cansler and M. C. Moysey for plaintiff.*
*John M. Robinson and Hunter M. Jones for defendant.*

ADAMS, J. It is contended by the defendant that the evidence of negligence is insufficient; that the plaintiff assumed the risk of his injury, and that for these reasons, or indeed, for either of them, his motion for nonsuit should have been allowed. It is said that the chisel referred to was a simple tool and, if defective, that its defect was obvious and as easily discoverable by the plaintiff as by the defendant.

In *Hicks v. Manufacturing Co.*, 138 N. C., 319, the Court declared it to be the duty of an employer of labor to supply his employees, in the exercise of proper care, with machinery, implements, and appliances suitable for their work and to keep such machinery in good condition so far as it can be done by the exercise of due care and diligence. The duty of furnishing tools and appliances, as thus stated, was approved in *Mercer v. R. R.*, 154 N. C., 399, in which it was said that while this duty applies alike to simple and complicated tools, the authorities agree that after performing this duty the law does not impose the same obligation with reference to the two classes. The employer must inspect complicated tools; but if a simple tool becomes defective from use it is the employee's duty to inform the employer so that the defect may be remedied or a new tool furnished.

There is evidence that the plaintiff did this. Allen was superintendent; Fonville was general superintendent. They gave the plaintiff instructions. Fonville told him to turn over to Dulin, another employee, such tools as needed repair. The day before the injury the plaintiff requested Dulin to take the cutters and have them dressed, suggesting the necessity of prompt action. Dulin promised, but failed to do so. The tool was defective; the defect was known to Dulin, whose

duty it was to make the repair; and there is evidence that the defect was the proximate cause of the plaintiff's injury. Under these circumstances the first issue could not properly be withdrawn from the jury. *Reid v. Rees' Sons Co.*, 155 N. C., 230; *Mincey v. R. R.*, 161 N. C., 467; *Rogerson v. Hontz*, 174 N. C., 27; *King v. R. R., ibid.*, 39; *Gaither v. Clement*, 183 N. C., 450.

The appellee differentiates the cases on which the appellant relies. In *Clement v. Cannon Mills, ante*, 43, there was no evidence of a defect in the appliance; in *Martin v. Highland Park Manufacturing Co.*, 128 N. C., 264, the defect was latent, in which event, as pointed out in *Mercer's case, supra*, there is ordinarily no liability; in *Morris v. R. R.*, 171 N. C., 533, the glancing of a hammer used in driving a spike in a cross-tie was the accidental cause of the injury; and in *Winborne v. Cooperage Co.*, 178 N. C., 88, the plaintiff found an ax belonging to the defendant and with ample opportunity to know the handle was loose used the ax several days without requesting a better tool.

Upon the evidence in the case we are not justified in holding as a matter of law that the action should be dismissed on the ground that the plaintiff assumed the risk of his injury. At the time he was injured the plaintiff was engaged in directing the work of three other men. This was his duty. They were to cut a ditch ten feet long through bitulithic pavement on a side street for the purpose of laying cables for the telephone company. It was necessary to hasten the work in order to keep the street open for traffic. The plaintiff marked the outside lines and stood six or eight feet away to see that the sides of the ditch, when cut, followed the marked lines.

The plaintiff assumed the ordinary risks incident to his employment, but not such as were attributable to the defendant's negligence, unless he continued to work under conditions that were so obviously and imminently dangerous that a man of reasonable prudence, exercising such prudence, would not have incurred the risk of injury. He had the promise of Dulin that the repair would be made and was expressly instructed by his superior officer to go to Dulin when repairs were needed. Whether with knowledge that the chisel had not been repaired a prudent man would have gone on with the work was a matter for the jury to determine. *Medford v. Spinning Co.*, 188 N. C., 125; *Jones v. Taylor*, 179 N. C., 293; *Howard v. Wright*, 173 N. C., 339.

In answer to a question as to the way in which the head of the chisel was to be dressed the plaintiff said, "It was supposed to be cut off and dressed up, too, because it was dangerous." To sustain its exception to the answer the appellant relies on *Marshall v. Telephone Co.*, 181 N. C., 292. That case was decided upon the familiar principle that it is the duty of the employer to use due care in providing for his em-

ployee a reasonably safe place in which to work, and that the answer of the witness was in effect an answer to the issue. Moreover, the answer may be said to have involved a matter of science. But not so here. The witness had previously testified without objection to the "beaten" and "hammered" condition of the "top of the cutter." The substance of his testimony was that if this condition remained there was danger that slivers of steel would be severed from the chisel by the pounding of the hammer. This was the "shorthand statement of a fact," or the statement of a "composite fact" which the Court recognized in *Marshall's case* as an exception to the general rule excluding an expression of opinion. It was a matter of observation and common knowledge, and could have had only slight, if any effect, in aiding the jury. *Powell v. R. R.*, 178 N. C., 243; *Brewer v. Ring*, 177 N. C., 476; *Monds v. Dunn*, 163 N. C., 108; *Alley v. Pipe Co.*, 159 N. C., 328.

The appellant excepted to testimony that about thirty minutes after the plaintiff was injured another workman engaged in the same work and using the same implements was hit by a piece of steel. As a rule evidence that one event occurred at a particular time is not admissible to show that another event occurred at another time. *McNeill v. R. R.*, 130 N. C., 256. But such evidence is generally admissible if the two events are so closely related as to point with reasonable certainty to identity of cause and not merely to similarity in certain particulars. The distinction is noted in *Conrad v. Shuford*, 174 N. C., 719. On this principle it was held that evidence of other occurrences is competent where the essential conditions of the events are similar. *Perry v. Manufacturing Co.*, 176 N. C., 68; *Dail v. Taylor*, 151 N. C., 285; *Harrell v. R. R.*, 110 N. C., 215; *Dorsett v. Manufacturing Co.*, 131 N. C., 254. The source of injury in the two cases was evidently the same and the lapse of a few minutes between the events is not cause for a new trial.

We have considered the appellant's exceptions to the instructions given the jury on the issues of negligence, contributory negligence, and assumption of risk and have discovered no reversible error.

No error.

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## IN RE WILL OF W. T. YELVERTON.

(Filed 28 May, 1930.)

**1. Trial B e—Mistrial should be awarded where appellant would be injured although incompetent evidence should be withdrawn from jury.**

While error will not ordinarily be held on appeal when the trial court withdraws incompetent evidence from the jury and instructs it not to

consider it, incompetent evidence may not be withdrawn without ordering a mistrial where the inadvertence is protracted and injury would result to the appellant by such action.

2. **Trial B c—Objection to withdrawal of incompetent evidence held not to be waiver of objection entered to its admission—"Waiver."**

Where incompetent evidence has been introduced upon the trial over objection duly made, and the evidence remains with the jury for a considerable time, and it is apparent their verdict would be influenced by such evidence, although the party introducing such evidence offers to withdraw it: *Held*, the objection of the adverse party to its withdrawal upon the ground that it would deprive him of his objection to its admission, will not be held as a waiver of his objection to its admission, a waiver being a voluntary relinquishment of a known right, implying an election to forego some advantage which might have been otherwise insisted upon.

3. **Trial E h—Whether the giving of additional instructions was error under circumstances of this case not decided on state of record.**

The question as to whether additional instructions given at the request of the jury after a night of deliberation of the case in the absence of the attorneys and the court stenographer constituted error is not decided, the record being silent as to whether the instructions were given before or after the court had opened for the day's session and its present decision being unnecessary.

4. **Wills D h—Evidence in this case held incompetent on issue of mental capacity.**

Where in caveat proceedings the question as to undue influence has been eliminated from the case and a mass of evidence to the effect that the testator had expressed a desire when admittedly sane not to make a will and as to a controversy among the sons of the deceased as to how the estate should be administered has been allowed to remain before the jury on the question of mental capacity, the evidence is incompetent upon the issue, and it necessarily affecting the verdict, a new trial will be awarded.

APPEAL by propounders from *Grady, J.*, at October Term, 1929, of WAYNE.

Issue of *devisavit vel non*, raised by a caveat to the will of W. T. Yelverton, late of Wayne County, based upon alleged mental incapacity and undue influence.

Harrison Yelverton, son of the deceased and one of the caveators, testified, over objection of propounders, that on a number of occasions he talked with his brother Paul, administrator *c. t. a.* of his father's estate and one of the propounders, relative to the mental condition of their father, and repeatedly told him that, in his opinion, he was not mentally capable of making a will, after suffering a stroke of paralysis. The witness related in detail the numerous conversations he had with his

brother, continuing over a period of years, which evidence covers several pages in the record and was brought sharply to the attention of the jury.

The following evidence of the witness was likewise the subject of objection: "I have heard my father say since I was a young boy that he never expected to make a will. He said: 'They are never fair or satisfactory; children are dissatisfied and the law will settle it fairly.' Before he was paralyzed and after my mother's death, he said he didn't want a will, but wanted his property divided equally among his children without a will."

Further, the witness was allowed to testify, over objection, that after his father's death he protested to the clerk against the appointment of his brother Paul as administrator. "I told the clerk that I wouldn't want Paul or Ed to be administrator; I would rather have some outsider to administer. My brothers, Ed, Leslie, Paul and myself got together one night, and I said something about an administrator and Paul said, 'That has all been settled,' and I said, 'But not yet,' and he said, 'I have qualified.' Ed objected to that, as well as to the will, and Ed said, 'I shall dissent from the will if I am the only one,' and Paul said, 'That is your privilege.' "

Mrs. W. T. Turlington testified, over objection of propounders, that statements and declarations similar to those made by Harrison Yelverton to his brother Paul were also made to her. The competency of this evidence was likewise the subject of sharp debate.

At the close of all the evidence, the court stated that no issue of undue influence would be submitted to the jury; whereupon the caveators requested that the testimony of Harrison Yelverton and Mrs. Turlington, relative to Harrison Yelverton's opinion of his father's inability to make a will, which had been admitted over objection of propounders, be stricken out and withdrawn from the jury's consideration. To this procedure the propounders objected, and "upon this objection being made, the court refused to strike out the testimony and withdraw same from the jury."

From a judgment sustaining the caveat, on a finding of mental incapacity, the propounders appeal, assigning errors.

*Langston, Allen & Taylor and Dickinson & Freeman for propounders.*
*K. C. Royall, J. Faison Thomson and Teague & Dees for caveators.*

STACY, C. J. It is the contention of the propounders that the declarations of Harrison Yelverton, son of the alleged testator and one of the caveators, and the conversations he had with Paul Yelverton, another son and administrator *c. t. a.* of the deceased, relative to the mental

condition of their father, were not against the interest of said caveator, but decidedly in his favor, and, for this reason, were incompetent and should have been excluded. *McDonald v. McLendon,* 173 N. C., 172, 91 S. E., 1017; *In re Fowler,* 156 N. C., 340, 72 S. E., 357; *Linebarger v. Linebarger,* 143 N. C., 229, 55 S. E., 709; *Enloe v. Sherrill,* 28 N. C., 212. They likewise contend, and for the same reason, that the testimony of Mrs. Turlington was incompetent and objections thereto should have been sustained.

In reply, the caveators say that, conceding the incompetency of this evidence, when they offered to withdraw it at the close of the case, the propounders lost the exceptions which they had previously taken, or waived them, by objecting to having the evidence withdrawn or stricken out. *Wilson v. Mfg. Co.,* 120 N. C., 94, 26 S. E., 629.

It is undoubtedly approved by our decisions that the trial court may correct a slip in the admission of isolated or single points of evidence by withdrawing such evidence at any time before verdict and instructing the jury not to consider it. *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807; *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260; *Cooper v. R. R.,* 163 N. C., 150, 79 S. E., 418; *Parrott v. R. R.,* 140 N. C., 546, 53 S. E., 432. But this may not be done, without ordering a mistrial, where the inadvertence is protracted and injury would result to the appellant by such action. *Gattis v. Kilgo,* 131 N. C., 199, 42 S. E., 584. "When we can see that the appellant has been really injured by such action, we will always order a new trial"—*Brown, J.,* in *Parrott v. R. R., supra.* Compare, also, *S. v. Bryant,* 189 N. C., 112, 126 S. E., 107; *Stamper v. Commonwealth,* 188 Ky., 538; *S. v. Hopkins,* 50 Vt., 316; *People v. Sweeny,* 304 Ill., 502; *S. v. Marvin,* 197 Iowa, 443.

On this phase of the case, therefore, the principal question presented resolves itself into an interpretation of the record. The evidence was admittedly incompetent; objection was duly made at the time of its admission; caveators offered to withdraw it at the close of the case, but propounders objected on the ground that it had been before the jury for two days or for a considerable length of time, necessarily leaving a hurtful impression, and that to strike it out then would deprive them of their exceptions already taken, while the caveators, for all practical purposes, would still have the benefit of such evidence. *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232. Under these circumstances, the court refused to strike out the evidence, and it was allowed to remain before the jury.

It may be said with assurance that the propounders did not intend to waive their original exceptions, for one of the reasons why they objected to having the evidence stricken out at the close of the case was to preserve the exceptions which they had theretofore taken. A waiver is a

voluntary relinquishment of a known right and implies an election to forego some advantage which otherwise might be insisted upon. *Mfg. Co. v. Building Co.*, 177 N. C., 103, 97 S. E., 718, 27 R. C. L., 904. It seems that the trial court took this view of the matter, as he allowed the original exceptions to remain in the record in settling the case on appeal, and it is not stated that the refusal to strike out the evidence was based on any supposed waiver, or withdrawal of the original objections. Hence, if we treat this evidence as having been admitted over objections, duly preserved, its incompetency is not seriously questioned.

But, without placing our decision on this ground alone, the overshadowing objection to the validity of the trial would seem to be that when the issue of undue influence was eliminated from the case, a mass of incompetent evidence was allowed to remain before the jury which necessarily affected the verdict on the issue of alleged mental incapacity. The mere fact that the alleged testator had expressed a desire, when admittedly sane, to leave no will, because he thought the law would settle his estate fairly, could hardly be considered, on the present record, as evidence of mental incapacity at a later date, when a paper-writing, purporting to be a will, was executed in due form as such. *In re Will of Brown*, 194 N. C., 583, 140 S. E., 192, at page 597. Nor would the controversy among the sons of the deceased, after their father's death, as to how the estate should be administered and by whom, seem to have any bearing on the question of testamentary capacity. Yet all this evidence was before the jury, and presumably considered by it, on the issue of alleged mental incapacity.

The record contains another exception which was the subject of earnest debate before us. After considering the case over night, the jury, on the following morning, asked the court for further instructions on the question of testamentary capacity, which the court gave in the absence of counsel on both sides and in the absence of the court stenographer. The record is silent as to whether this occurred before or after the court had opened for the day's session. For this reason, and because it is unnecessary presently to decide the question, we omit any definite ruling on the exception, but call attention to what is said on the subject in McIntosh's North Carolina Practice and Procedure at page 647.

For the error, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. H. W. CALDWELL, SHERIFF, AND REID MOTOR COMPANY.

(Filed 28 May, 1930.)

**Evidence D d—Identity of person talking over phone was established by evidence and testimony of conversation should have been admitted.**

Where there is evidence that a witness requested the long-distance operator in the telephone exchange to connect the witness with the telephone in the office of the plaintiff in a nearby city, and that some one responded, saying that he was speaking from the office of the plaintiff, that he was unable to give the information requested by the witness, but that he would have the plaintiff's bookkeeper call the witness as soon as the bookkeeper came in, whereupon the witness gave his telephone number and town, and that later in the morning the witness was informed by the telephone operator that the bookkeeper in the office of the plaintiff was calling him, and that he then had a conversation over the long-distance telephone with a person who represented himself to be the bookkeeper in the office of the plaintiff, who informed the witness as to the identity of an article sold by the plaintiff which was later verified: *Held*, the identity of the person as the bookkeeper of the plaintiff was sufficiently established by the evidence, and testimony of the conversation by the witness, being otherwise competent, should have been admitted in evidence.

APPEAL by defendants from *Harwood, Special Judge,* at November Special Term, 1929, of CABARRUS. New trial.

Action to recover from defendants possession of a truck described in the complaint, upon the allegation that plaintiff is the owner and entitled to the immediate possession of the same. This allegation is denied in the answer.

The truck was seized by the defendant sheriff of Cabarrus County the day before the commencement of this action, and taken by him from the possession of one Zeb Cruse, under an execution issued on a judgment in favor of the defendant, Reid Motor Company, and against the said Zeb Cruse.

The determinative question involved in the issue raised by the pleadings is whether the plaintiff had sold the truck described in the complaint to the said Zeb Cruse prior to the date on which it was seized by the sheriff and taken from his possession.

The issue submitted to the jury was answered as follows: "Is the plaintiff the owner and entitled to the immediate possession of one International Truck S L 36, 1½ tons, Chassis No. 61887 D, Engine No. 4 S. G. 12906, as alleged in the complaint? Answer: Yes."

From judgment that plaintiff is the owner of the truck described in the complaint, and that it recover of defendants possession of the same, defendants appealed to the Supreme Court.

*Hartsell & Hartsell for plaintiff.*
*Armfield, Sherrin & Barnhardt for defendants.*

CONNOR, J. This action was begun on 4 June, 1929. On 3 June, 1929, the defendant, H. W. Caldwell, sheriff of Cabarrus County, by virtue of an execution in his hands, issued on a judgment in favor of the defendant, Reid Motor Company, and against one Zeb Cruse, had levied upon and taken into his possession the truck described in the complaint. At the date of said levy and seizure, the truck was in the possession of the said Zeb Cruse, in the town of Concord, N. C.

On the trial in the Superior Court, plaintiff contended that at the date of its seizure by the said sheriff, plaintiff was the owner of said truck; that it had delivered the said truck to the said Zeb Cruse some time prior thereto, upon his agreement with it that he would use the truck for a short time, and would then advise plaintiff, at its office in Charlotte, N. C., whether or not he wished to purchase the truck; and that at said date, the said Zeb Cruse had not purchased the truck, or advised plaintiff with respect to whether or not he had decided to purchase it.

Plaintiff further contended that it did not sell the truck to Zeb Cruse until after the commencement of this action and until after the truck had been taken from the possession of defendants and delivered to it, pursuant to the writ of claim and delivery issued in the action.

There was evidence at the trial tending to sustain the contentions of the plaintiff.

The defendants contended, on the contrary, that plaintiff had sold and delivered the truck to Zeb Cruse prior to the date on which it was seized by the sheriff, and that, therefore, plaintiff was not the owner of the truck or entitled to its possession at the date of the commencement of this action. In support of this contention, defendants offered as evidence the testimony of a witness, who offered to testify that on 30 May, 1929, he had a conversation over the telephone from his office in Concord, N. C., with the bookkeeper of plaintiff at its office in Charlotte, N. C., in which the said bookkeeper stated to the witness that plaintiff had sold the truck described in the complaint to Zeb Cruse prior to the date of said conversation. This testimony, upon the objection of plaintiff, was excluded as evidence, on the ground that there was no evidence tending to identify the person with whom the witness had the conversation over the telephone as the bookkeeper of plaintiff, in its office at Charlotte, N. C. Defendants excepted to the exclusion of the testimony, and on their appeal to this Court assign same as error, for which they contend they are entitled to a new trial. This contention must be sustained.

There was evidence tending to show that during the morning of 30 May, 1929, the witness requested the long-distance operator in the telephone exchange to connect the telephone in his office at Concord, N. C., with the telephone in the office of the plaintiff at Charlotte, N. C.; that within a few moments some one responded, saying that he was speaking from the office of plaintiff at Charlotte, N. C.; the witness then asked the person who had responded to his call, whether or not the plaintiff had sold a truck to Zeb Cruse of Concord within the last few days; the person speaking replied that he did not know, but that as soon as the bookkeeper, who was then in the office, came in, he would have him call the witness and give him the information which he desired; the witness thereupon requested that the bookkeeper call his telephone number—220—at Concord.

Later in the morning of the same day the witness was called to the telephone in his office at Concord, and informed by the telephone operator that the bookkeeper in the office of plaintiff, in Charlotte, N. C., was calling him. He then had a conversation over the long-distance telephone with a person who represented himself to be the bookkeeper in the office of plaintiff, in Charlotte, N. C. In this conversation the person speaking informed the witness that the plaintiff had sold to Zeb Cruse a truck with engine number 4 S. G. 12906, and had taken a mortgage on the truck to secure the purchase price. The witness subsequently saw the truck which the sheriff seized under the execution and took from the possession of Zeb Cruse. Its engine number was 4 S. G. 12906.

This evidence was sufficient, we think, to identify the person with whom the witness had the conversation as the bookkeeper in the office of plaintiff, in Charlotte, N. C. It was, therefore, error to exclude the testimony of the witness as to the conversation which he had over the telephone with a person who had called witness, in accordance with his request, and who represented himself to be the bookkeeper in the office of the plaintiff. In *S. v. Burleson, ante,* 61, 150 S. E., 628, we said: "The testimony of a witness that he had a conversation with another person over the telephone, is admissible where the identity of the other person is established by evidence. The conversation, if otherwise competent, should not be excluded as evidence, because it was had over the telephone, when the identity of the person talking to the witness is established. In the absence of evidence tending to identify the person with whom the witness had the telephone conversation, evidence as to the conversation should be excluded."

The instant case is distinguishable from *Mfg. Co. v. Bray,* 193 N. C., 350, 137 S. E., 151. In that case the witness had been called to the telephone by a person who represented himself to be the defendant. There was no evidence tending to identify the person speaking as the

defendant. Testimony as to the conversation was properly excluded as evidence. In the instant case, there were facts and circumstances tending to show that the person who called the witness in accordance with his request, was the identical person he represented himself to be. There was error in the exclusion of testimony as to the conversation between the witness and the person who, there was evidence tending to show, was the bookkeeper of plaintiff, in its office at Charlotte, N. C. For this error the defendants are entitled to a

New trial.

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D. F. WRIGHT ET AL. v. W. J. WRIGHT ET AL.

(Filed 28 May, 1930.)

1. **Wills F d—Where property of a devisee is devised by the will the devisee is put to his election between his property and the devise.**

   The doctrine of election under a will applies where a testator devises his property to a beneficiary and assumes to devise to another property belonging to the first devisee, in which case the devisee, if he accepts the devise with knowledge of all the facts, is thereby precluded from asserting title to that part of his own property which was devised to another.

2. **Same—In this case held: will did not attempt to dispose of property of devisee, and devisee was not put to his election thereunder.**

   Where after the execution of his will the testator gives his son certain specific farming implements which the son takes possession of during the life of the testator, and the will devises certain lands to the son and bequeaths the household and kitchen furniture and the "remainder" of the personalty to his other children, and at his death the testator owned personal property other than the household and kitchen furniture: *Held*, the will does not attempt to dispose of the property given the son, the "remainder" including only the personalty other than the personalty given the son and specifically bequeathed to the other children, and the gift to the son operates as an ademption by so much of the legacy bequeathed to the other children, and the son is not put to his election under the will between the personalty given him and the land devised to him by the will.

PROCEEDING for the partition of land heard by *Johnson, Special Judge,* at December Term, 1929, of CLEVELAND. Petitioners appealed. No error.

R. H. Wright died in March, 1925, leaving a will. In the third item he devised (subject to the life estate of his wife, Amanda Wright) two tracts of land to his son, William J. Wright. The tracts contain respectively 60 acres and 9 acres. In the fifth item the testator, after bequeathing his household and kitchen furniture to his daughters, gave the remainder of his personal property to all of his children "except

William J. Wright, who is to receive nothing other than the two tracts of land hereinbefore mentioned."

William J. Wright claims to be the owner by gift from his father of the following personal property: a McCormick binder, a wheat drill, a cane mill and boiler, a cider mill, a log saw with motor, a stalk cutter, a cultivator, a plow, a scythe and cradle, and a wagon body. He alleges that the testator was unable to pay the taxes, and in order to be relieved of the burden gave him this property, and that he has since owned it and listed it for taxation.

In response to the issues the jury found that the petitioners and the defendants are not tenants in common of the land and that W. J. Wright is the owner thereof in fee.

The assignments of error raise the question whether W. J. Wright was forced to an election under the will, the petitioners contending that if he took the personal property he elected not to take the land devised to him, and that the real estate was therefore subject to partition.

Judgment for respondent and appeal by petitioners.

*D. Z. Newton and J. C. Newton for appellants.*
*B. T. Falls for appellee.*

ADAMS, J. The appeal presents the questions whether W. J. Wright was compelled to exercise an election between accepting the land devised to him and taking the personal property purporting to be bequeathed to others, and whether he is estopped to claim the land by having refused to give up the personal property. It is admitted that R. H. Wright, the testator, after the execution of his will gave to W. J. Wright all the articles in controversy and that the donee was the owner and in possession of this property at the death of the testator and at the death of the life tenant, Amanda Wright. The will was executed 23 January, 1920; the property was delivered to the donee in 1922; the testator died in March, 1925. The effect of the gift was to withdraw the property from the operation of the devise and to vest it in the son. If property is devised and subsequently alienated it does not go to the devisee, because the testator can devise or bequeath only the property he owns at the time of his death. 1 Page on Wills, sec. 456; Schouler on Wills, sec. 427; C. S., 4136, 4165. The failure of the bequest under these circumstances is more like the ademption of a legacy than the technical revocation of a devise. Page on Wills, *supra; McRainy's Executors v. Clark,* 4 N. C., 698; *S. c.,* 6 N. C., 317.

In the sense used in equity jurisprudence, election has been defined as the obligation imposed on a party to choose between two alternative rights or claims in cases when there is a clear intention of the person

from whom he derives one that he should not enjoy both. Eaton on Equity, 161. The appellants invoke the aid of this doctrine. They say the respondent cannot hold both the land and the personal property, and must make an election between the two. The particular phase of the doctrine to which they advert is this: Where a person devises his property to a beneficiary and assumes to devise to another property belonging to the first devisee and the devisee of the testator's property accepts the devise with knowledge of all the facts he is thereby precluded from asserting title to that part of his own property which was devised to another. *Sigmon v. Hawn,* 87 N. C., 450; *Syme v. Badger,* 92 N. C., 706; *Allen v. Allen,* 121 N. C., 328; *Tripp v. Nobles,* 136 N. C., 99.

We are of opinion that the fifth item of the will, taken in connection with the evidence, does not necessarily purport to dispose of the articles given to the respondent; and if not the appellants' position cannot be maintained. There is evidence that these articles and the household and kitchen furniture were not all the personal property owned by the testator at the time of his death. The bequest to his other children would therefore include the remaining property. In *Gray v. Williams,* 130 N. C., 53, it is said that before a donee can be put to an election his own property which is professed to be conveyed must be described in the instrument itself with such certainty that the donee may know his own property by the description given. It was shown in *Field v. Eaton,* 16 N. C., 283, that the defendant, William Eaton, claimed title to a slave as a gift from his father. Some time after the date of the alleged gift his father made a will bequeathing the slave to his son. In a subsequent clause he bequeathed the same slave to his daughter Harriet. To his son he devised other property, consisting of lands and slaves. In the will the slave in question was identified by name. It was held that as William claimed under the will and the will in express terms purported to convey title to the slave he could not accept and reject the same instrument. The turning point of the decision in *Allen v. Allen, supra,* was the fact that R. J. Allen, the vendee in the deed, qualified as executor of his father's estate—the court holding that his qualification as executor was an election to take under the will. The same conclusion was announced in *Treadaway v. Payne,* 127 N. C., 436, in which the defendant Payne, who claimed under a deed from the testator, was held to an election because he had probated the will, made an inventory of the estate, stated his receipts and disbursements, and executed the duties of executor. These decisions, cited by the appellant, are therefore not decisive in the present case. We find

No error.

E. T. CHANDLER v. JOHN S. CONABEER, TRADING AS CONABEER MOTOR COMPANY.

(Filed 28 May, 1930.)

1. **Appeal and Error J c—Findings of fact by judge of general County Court are binding on appeal when supported by evidence.**

   Where the judge of a general County Court finds the facts, and his judgment is affirmed on appeal to the Superior Court, upon appeal to the Supreme Court the findings of fact of the County Court are binding when supported by the evidence, a jury trial not being required.

2. **Chattel Mortgages G b—Fact that chattel mortgage was not registered is immaterial when third person is not purchaser for value.**

   Where in order to refinance his automobile the owner induces the plaintiff to use his name in the refinancing papers, and assigns the title to him, and the original owner later executes a mortgage on the car to secure another indebtedness due the plaintiff, and the plaintiff pays the installments under the refinancing mortgage, the original owner being permitted to retain possession of the car and deal with it as his own: *Held*, upon the original owner's delivery of the car to another, in pursuance of a transaction between them, the fact that the mortgage was not registered at the time of the delivery to the third person is immaterial in the absence of evidence that such third person was a purchaser for value from the mortgagor, and the judgment that the mortgagee was the owner of the car and entitled to its immediate possession will be affirmed on appeal.

APPEAL by defendant from *Sink, Special Judge,* at April Term, 1930, of BUNCOMBE. Affirmed.

This is an action to recover of defendant possession of an automobile. The action was tried in the General County Court of Buncombe County, before Weaver, J., without a jury.

From the judgment on the facts found by the judge of the General County Court, defendant appealed to the Superior Court of Buncombe County. On this appeal the judgment was affirmed.

From the judgment of the Superior Court, affirming the judgment of the General County Court, defendant appealed to the Supreme Court.

*Lane, Cathey & McKinney for plaintiff.*
*Lee & Lee for defendant.*

CONNOR, J. At the trial in the General County Court the judge found the following facts:

"1. That on or about 18 December, 1928, one A. T. Dallas, being then the owner of a certain Oakland coupe, described in the pleadings, refinanced the same with Allport Motor Company, and not having suffi-

cient credit himself induced the plaintiff to use his name in refinancing said car, and the original certificate of title from the Revenue Department of the State of North Carolina to Dallas was assigned to the plaintiff on or about 18 December, 1928, and left in the files of the Allport Motor Company with instructions to send to the State Department for the issuance of a new title in the name of the plaintiff, which was finally accomplished on 4 September, 1929.

2. That the said Dallas being indebted to the plaintiff, on or about 18 January, 1929, executed and delivered to the plaintiff a mortgage on said Oakland automobile, securing $864, which mortgage was not recorded until 8 August, 1929.

3. That A. T. Dallas was permitted to continue to use the car and the same continued in his possession until 6 May, 1929.

4. That the plaintiff paid the installments on the refinancing mortgage as they matured.

5. That the plaintiff authorized the said A. T. Dallas to deal with the car as his own, allowing him to sell it if he could, provided plaintiff should be paid all amounts due him.

6. That on or about 6 May, 1929, in pursuance of a transaction negotiated by Dallas and E. O. Mitchell, salesman for the defendant, Conabeer Motor Company, the said Dallas delivered to the defendant the automobile in question stating at the time to defendant's agent that he could not deliver title, but that title would have to be obtained from the plaintiff.

7. That the value of the Oakland automobile at the time of delivery to the defendant was $600, and it is agreed by the parties that the same has not materially deteriorated since.

8. That at the time of the institution of this action the plaintiff had not delivered title to the defendant, and the defendant had not satisfied the debt claimed by Chandler against A. T. Dallas."

Upon the foregoing facts, it was adjudged by the General County Court that the plaintiff, E. T. Chandler, is the owner and entitled to the immediate possession of the Oakland coupe described in the complaint. Defendant excepted to the judgment, and on his appeal to the Superior Court assigned as error the refusal of the court to dismiss the action as upon nonsuit, at the close of all the evidence. On his appeal to this Court defendant contends that there was error in the refusal of the judge of the Superior Court to sustain his assignment of error, and in the judgment affirming the judgment of the General County Court. Neither of these contentions can be sustained.

There was evidence at the trial in the General County Court sufficient to support the findings of fact made by the judge of said court. These findings of fact are, therefore, conclusive for all purposes in this action.

*Colvard v. Dicus Bros., ante,* 270, 151 S. E., 191; *Holmes Electric Co. v. Carolina Power & Light Co.,* 197 N. C., 766, 150 S. E., 621; *Eley v. R. R.,* 165 N. C., 78, 80 S. E., 1064. It appears from these facts that plaintiff is the owner and entitled to the possession of the automobile by virtue of the chattel mortgage executed by A. T. Dallas on 18 January, 1929. *Hinson v. Smith,* 118 N. C., 503, 24 S. E., 541.

The fact that the mortgage was not registered at the date of the delivery of the automobile to the defendant by the mortgagor, in the absence of a finding that the defendant is a purchaser for value, is immaterial. *Music Store v. Boone,* 197 N. C., 174, 148 S. E., 39. There was no evidence at the trial from which the judge could have found that defendant is a purchaser of the automobile for value from the mortgagor, or from one claiming under the mortgagor as a purchaser for value.

There is, therefore, no error in the judgment of the Superior Court affirming the judgment of the General County Court. The judgment is Affirmed.

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A. W. STANTON v. SELIGMAN, WILLIAMS & BALL, AND F. W. WILLIAMS.

(Filed 28 May, 1930.)

**Deeds and Conveyances F a—In this case held: grantor in unregistered timber deed could not hold grantee's vendee liable for purchase price.**

Where the grantor in a timber deed does not reserve title to secure the purchase price to be paid at certain intervals, and the grantee enters and cuts timber under the unregistered deed and sells the severed timber to another, the purchaser of the cut timber from the grantee is not liable to the grantor upon being notified by him after he had paid the purchase price to the grantee that the grantee had not paid the grantor therefor.

CIVIL ACTION, before *Moore, Special Judge,* at October Term, 1929, of PASQUOTANK.

At the conclusion of the evidence a motion of nonsuit was sustained and the plaintiff excepted and appealed.

*Aydlett & Simpson for plaintiff.*
*Ehringhaus & Hall for defendants.*

PER CURIAM. On 1 June, 1927, the plaintiff sold to D. P. White "all the pine and gum timber on the farm which the party of the first part now owns in Tyrrell County," together with "all the piling, pine and

gum timber which is now cut down and standing, measuring twelve inches and up at the base." The contract further provided that payments were to be made "one-half of sale price on each lot when delivered to barge or tug unless otherwise agreed to until the one thousand dollars is paid."

This timber deed was not recorded and no lien for the unpaid purchase price was reserved upon the timber. White began cutting timber and sold the timber cut to the defendants who paid him the purchase price. Before the timber was moved plaintiff notified the defendants that he had not been paid, and the defendants declined to pay the plaintiff upon the ground that they had already paid White.

Upon the present state of the record, we are of the opinion that the judgment of nonsuit was properly entered.

Affirmed.

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BILLYE BOYD COLLETT v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 6 June, 1930.)

**1. Railroads D b—It is the duty of an engineer to give signal of train's approach to public crossing.**

An engineer in control of a moving train is charged with the duty of giving some signal of the train's approach to a public crossing, and if he fails to give such warning which is the proximate cause of injury the railroad company is liable to the person injured.

**2. Same—Evidence of negligent failure to give signal at crossing and evidence of contributory negligence held properly submitted to jury.**

Where in an action against a railroad company to recover for injuries sustained in a collision at a public crossing there is evidence tending to show that defendant's train approached the crossing where the accident occurred without giving any warning of its approach; that the plaintiff was driven in her automobile by her chauffeur who stopped, looked and listened before attempting to cross the tracks; that the night was dark and rain was falling; that the driver crossed the tracks slowly, and on account of the conditions there did not see the approaching train until within three feet of the track, and could not stop the car in time to avoid the accident, with conflicting evidence on each point: *Held*, the evidence was properly submitted to the jury on the issues of negligence, contributory negligence and damages.

**3. Trial D a—Conflicting testimony of plaintiff's witnesses does not entitle defendant to nonsuit.**

Conflicting testimony of the plaintiff's own witnesses does not justify the withdrawal of their testimony, their credibility being for the jury, and in viewing the testimony in the light favorable to the plaintiff it is sufficient, the defendant's motion as of nonsuit is properly denied.

COLLETT *v.* R. R.

APPEAL by defendants from *Finley, J.*, at April Term, 1930, of CHEROKEE. No error.

Civil action to recover damages for personal injury alleged to have been caused by the negligence of the defendants. The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. Judgment on the verdict. Appeal by defendants.

On the occasion complained of the plaintiff owned a Chevrolet coupe, in which she and her chauffeur, Mabel Rogers, were traveling. The plaintiff lives near Andrews. On the morning of 31 December, 1929, she and Mabel Rogers went to Murphy and about eight or nine o'clock in the evening, on their return to Andrews, approached the place of the accident. At this place there are the main line of the Southern Railway and three spur or side tracks. One siding and the narrow-gauge road are on the Murphy side of the main line and a side track leading to the plant of the Extract Company is on the other side. There is some evidence that the view is obstructed as one approaches the main line from the direction of Murphy; there is evidence to the contrary. The coupe had arrived at the main line when the occupants saw the train; they alighted; and the train struck the car, hurled it against the plaintiff, and caused her serious personal injury. Other facts are stated in the opinion.

*A. Hall Johnston and Alley & Alley for plaintiff.*
*Thomas S. Rollins and Dillard & Hill for defendants.*

ADAMS, J. The defendants assign as error the denial of their motion for nonsuit at the conclusion of the evidence. They contend (1) that they were not negligent; (2) that the plaintiff's injury was caused solely by the negligence of her driver; and (3) if in any view of the evidence they were negligent, the negligence of the plaintiff, who owned the car and directed its operation, proximately contributed to the injury. On all these questions the evidence is conflicting. There is evidence tending to show that the coupe approached the railway track between eight and nine o'clock at night; that it was dark; that rain was falling; that the driver brought the car to a full stop at the "stop" sign; that the occupants of the car looked and listened for the train; that the car was "just creeping" when it approached the narrow-gauge track; that it continued to move slowly toward the main line of the railway; that when the driver reached a point from which she could see up the main track the front of the car was within three feet of the roadbed; that "on account of conditions there" it was impossible to get a clear view of the main track "until the car gets that close"; and that the driver was blinded by an arc light situated one hundred yards from the crossing. There is evidence tending to show that the train ran from the station

to the public crossing, a quarter of a mile, without ringing the bell or sounding the whistle. On this point there is both negative and positive testimony. Mabel Rogers was positive: "There wasn't any whistle blowing or bell for the crossing. I didn't say I didn't hear any; I said there wasn't any." She testified that the coupe was within three feet of the main track when she and the plaintiff first saw the train: "I was almost on the track before I saw the train and before I saw the light of the train. I was looking all the time." She testified that it was impossible to stop the car after she saw the train before going upon the track.

Considered most favorably for the plaintiff *(Goss v. Williams,* 196 N. C., 213), this evidence unquestionably tends to show negligence on the part of the defendants. An engineer in control of a moving train is charged with the duty of giving some signal of its approach to a public crossing; if he fails to perform this duty the railway company is deemed to be negligent; and if as a proximate result of such negligence injury is inflicted the company is liable in damages. *Russell v. R. R.,* 118 N. C., 1098, 1108; *Perry v. R. R.,* 180 N. C., 290; *Moseley v. R. R.,* 197 N. C., 628.

The defendants' motion for nonsuit on the ground that there is no evidence of their negligence was therefore properly denied. It is no less obvious that we are precluded from holding as an inference of law that either the plaintiff or the driver of the car neligently contributed to the plaintiff's injury. Whether either of them did so was a question for the jury. It cannot be denied that there is abundant evidence in contradiction. Indeed, it cannot be denied that there are inconsistencies, if not direct conflicts, in the testimony of one or two witnesses introduced by the plaintiff. But while these apparent inconsistencies may have affected the credibility of the witnesses they would not have justified the withdrawal of their testimony from the jury. This principle is maintained in a number of our cases. *Ward v. Mfg. Co.,* 123 N. C., 248, 252; *Shell v. Roseman,* 155 N. C., 90; *Christman v. Hilliard,* 167 N. C., 4; *Bank v. Brockett,* 174 N. C., 41; *Harris v. Insurance Co.,* 193 N. C., 485; *Evans v. Cowan,* 194 N. C., 273; *Stevens v. Rostan,* 196 N. C., 314. We find

No error.

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STATE v. JIM WISHON.

(Filed 6 June, 1930.)

**1. Homicide A a—In this case held: admission of testimony of threats against the deceased was not error.**

Testimony of threats against the deceased made by the defendant two years prior to the homicide may be received in evidence as corroborative testimony of evidence of threats made thereafter, and where the defend-

ant admits he had "words" with the deceased, and that the killing occurred at the first subsequent meeting between him and the deceased, the admission of such testimony will not be held for reversible error on the defendant's appeal from a conviction of murder in the second degree, the testimony being evidence of premeditation and deliberation constituting murder in the first degree of which the defendant was acquitted.

**2. Criminal Law I g—Inadvertence in charge held not to constitute reversible error where jury could not have been misled thereby.**

Where in a charge to the jury upon a prosecution for homicide the court inadvertently uses the word "choked" in defining legal provocation which would reduce the crime from murder in the second degree to manslaughter, when the defendant had testified that the deceased assaulted him with a knife, the inadvertence will not be held for reversible error when it is apparent that the jury were not misled thereby and a definite application of the principal to the facts of the case was later made by the court.

**3. Homicide E a—Charge of the court on the law of self-defense held not to contain reversible error.**

Where in stating the general principles of the law of self-defense the court does not accurately instruct the jury as to the defendant's duty to retreat, the charge will not be held for reversible error where in applying the principles to the evidence the court correctly charges that the defendant could stand his ground if he was without fault and if the deceased attacked him with a knife and put him in fear of great bodily harm or death, and if the defendant had reasonable grounds for such fear.

APPEAL by defendant from *Harwood, Special Judge,* at August Term, 1929, of MACON. No error.

The defendant was convicted of murder in the second degree. Late in the afternoon, on 9 July, 1929, the defendant and the deceased met each other in a public road. The defendant was walking; the deceased was riding a mule. The defendant admitted that when they met he shot and killed the deceased with a pistol, but contended that the deceased assaulted him with a knife. He contended that he had killed the deceased in self-defense. Evidence relevant to the exceptions is set out in the opinion.

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

*R. D. Sisk, J. N. Moody and Edwards & Leatherwood for defendant.*

ADAMS, J. The deceased as the overseer of a public road cut down a chestnut tree on the defendant's land. A witness for the State testified that after the tree had been cut and about two years before the homicide he heard the defendant say, "I guess Mr. Solesbee (the deceased) thinks it is all over, but I will get him some time or another." The de-

fendant excepted on the ground that the threat was too remote to be admissible. Joe Teague, another witness for the State, testified that about a year before the trial the defendant said in his presence that "Pink Solesbee (the deceased) had done him damage cutting timber, and he was going to get even with him one way or another." The defendant admitted he "had had words" with the deceased concerning the tree, and testified that the homicide occurred at their first subsequent meeting.

In *S. v. Howard,* 82 N. C., 624, threats made twelve months before the homicide were held to be competent. Afterwards, in reference to the question whether threats made two years before the homicide should be admitted, the Court remarked, "We might hesitate to admit evidence of threats to kill the deceased, made two years before the homicide, if they stood alone, without evidence of intermediate and recurring threats." In the present case there is evidence of an intermediate threat made within the time specified in *S. v. Howard.* Evidence of the threat first made is competent at least in corroboration. *S. v. McDuffie,* 107 N. C., 885. The defendant's admission that he killed the deceased raised a presumption of malice. His threats were evidence of premeditation and deliberation; but he was not convicted of the capital felony. In *S. v. Shouse,* 166 N. C., 306, it was said: "But these threats were offered to show premeditation, deliberation, and previous express malice, necessary to convict of murder in the first degree. *S. v. Tate,* 161 N. C., 280. They were practically irrelevant, unnecessary and harmless, as the prisoner was acquitted of the capital felony." In the admission of evidence relating to the defendant's threats there is, therefore, no error.

In defining the legal provocation which will reduce murder in the second degree to manslaughter, the judge told the jury that mere words, however abusive, would not mitigate the homicide, but that an assault would; that there was legal provocation if the deceased laid hands upon the defendant against his will, or struck at him, or choked him. An exception was taken because there was no evidence that the defendant was choked. But he testified that the deceased was in the act of assaulting him with a knife when the shot was fired; this was legal provocation, and the inadvertent use of the word "choke" could not have misled the jury to the prejudice of the defendant, especially when a definite application of the principle restricted the provocation to the alleged assault with a knife.

In stating the law of self-defense as an abstract principle the trial judge did not accurately point out the distinction between the necessity of retreating in the case of an ordinary assault *(S. v. Blevins,* 138 N. C., 669), and the right of a person to stand his ground when he apprehends and has reasonable grounds to apprehend that he is about

to suffer great bodily harm or loss of life (*S. v. Clark,* 134 N. C., 698); but in applying the principle to the evidence he accurately instructed the jury in these words: "If the prisoner was without fault and the deceased, Pink Solesbee, assaulted him with a knife, and by reason of such assault the prisoner actually apprehended and had reasonable grounds to apprehend that his life was in danger or that he was in danger of great bodily harm, and it appeared to him to be reasonably necessary to shoot the deceased, he was not required as a matter of law to retreat or withdraw from the combat, but could stand his ground and, if necessary, even pursue his assailant and take his life in the protection of his own life or to save his person from serious injury." *S. v. Dills,* 196 N. C., 457. For this reason the twelfth exception is overruled. The remaining assignments are without merit. We find

No error.

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J. T. DONOHO, ADMINISTRATOR OF W. J. NESBITT, v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 6 June, 1930.)

**Evidence D b—Testimony of transaction with deceased held incompetent as being by a party interested in the event.**

In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time: *Held,* the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under C. S., 1795, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result.

APPEAL by plaintiff from *Finley, J.,* at November Term, 1929, of BUNCOMBE. New trial.

The plaintiff's intestate, W. J. Nesbitt, from time to time deposited money with the defendant and received from the defendant certificates of deposit payable to him or to his order. He suffered a stroke of paralysis and for several years was unable to transact any business or to attend to his affairs. He died 31 July, 1927. The plaintiff qualified as his administrator and brought suit against the defendant to recover the money on deposit, alleged to aggregate several thousand dollars. The defendant alleged that the total amount of the deposits never exceeded $3,210.03, and that the intestate had authorized the withdrawal of all the funds represented by the certificates except the sum of $800.

During the trial the defendant was permitted, subject to the plaintiff's exception, to prove by J. E. Nesbitt, a son of the intestate, that on 9 March, 1923, the intestate deposited $600 in the savings department of the defendant, told the bank officials that the witness was his son, and instructed them to recognize his son's signature to his vouchers and to let him have the money upon his signing them; also that the defendant opened an account with the witness and had him to sign his name on a card. The defendant paid the money in controversy to J. E. Nesbitt.

The question is whether in the admission of this evidence there is reversible error.

*Alfred S. Barnard for appellant.*
*Bourne, Parker & Jones for appellee.*

ADAMS, J. Upon the trial of an action a party or a person interested in the event shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person concerning a personal transaction or communication between the witness and the deceased person. C. S., 1795.

Conceding that the transaction occurred between the plaintiff's intestate, the witness, and the bank officials, we are confronted with the question whether the testimony of J. E. Nesbitt was improperly admitted. If we adhere to former decisions of this Court we must hold that it was. The witness was interested in the event of the action. He was called by the defendant; his testimony was favorable to the defendant; it was favorable to himself. If he was not authorized to withdraw the money from the bank, he nevertheless received it, and would be liable to the plaintiff for the amount wrongfully withdrawn. He might be liable to the defendant. A judgment in favor of the defendant would procure direct benefit to the witness. This is one test of his interest in the event. *Fertilizer Co. v. Rippy,* 124 N. C., 643, 646. The result will be the same if the transaction be treated as a communication between the intestate and the defendant. Though not a party to the action he was under the circumstances of this case disqualified to testify. *Wilson v. Featherston,* 122 N. C., 747; *Witty v. Barham,* 147 N. C., 479; *Harrell v. Hagan,* 150 N. C., 242; *Grissom v. Grissom,* 170 N. C., 97. The fact that Nix was present when the transaction took place and afterwards testified at the trial is immaterial. "The law is explicit that the one party shall not testify if the other cannot, and this without reference to the presence of third parties at the time of the transaction, unless the representative is himself examined in his own behalf, or the testimony of the deceased person is introduced as to the same trans-

action." *Smith v. Moore,* 142 N. C., 277, 284. In *Peacock v. Stott,* 90 N. C., 518, and in *Johnson v. Townsend,* 117 N. C., 338, it was shown that the deceased has been jointly interested with another person who was present at the time of the transaction, and who survived.

For error in the admission of evidence, there must be a

New trial.

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W. B. ELLIS v. CLARA N. ELLIS ET AL.

(Filed 6 June, 1930.)

**1. Appeal and Error A d—Appeal will lie from the granting of a motion to strike out paragraphs of complaint affecting a substantial right.**

An appeal will lie from the denial, and conversely the granting of a motion to strike out certain irrelevant or redundant matter from the complaint when the order affects a substantial right of the appellant. C. S., 537.

**2. Pleadings J a—Granting of motion to strike out certain redundant matter from complaint held not erroneous in this case.**

Where the trial court has allowed the plaintiff to file an amendment to the complaint to be confined to certain phases of the controversy or to allegations as to certain and specific matters, the plaintiff must confine himself to the restrictions under which he is permitted to amend or the trial judge may order stricken therefrom any further matters or any allegations that are irrelevant or redundant and not in conformity with the statute, C. S., 506, requiring a plain and concise statement of the cause of action without unnecessary repetition, and the granting of the defendant's motion to strike out certain parts of the amended complaint will be sustained on appeal if the complaint is sufficient in its allegations after the portions objected to have been stricken out to present every phase of the controversy.

CIVIL ACTION, before *Finley, J.,* at November Term, 1929, of FORSYTH.

The plaintiff instituted this action to set aside a consent judgment rendered March Term, 1925, of the Superior Court of Forsyth County. The consent judgment was considered by this Court in *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350. At the November Term, 1929, Judge McElroy, upon the request of plaintiff, permitted him to "file an amended or substituted complaint, which shall be limited in its allegations to the presentation of two issues, to wit, first, with respect to setting aside the consent judgment of the March Term, 1925, and second, the delivery of deed dated 12 March, 1925, from Clara N. Ellis to W. B. Ellis, etc." Thereafter the plaintiff filed an "amended and substitute complaint" containing twenty allegations and covering approximately twenty-six pages of the record. In apt time and before answering the

defendants duly made a motion to strike from said complaint certain allegations upon the ground that such allegations were "irrelevant, incompetent and impertinent." The trial judge heard the motion and ordered that "all the allegations contained in paragraphs 2, 3, 8, 9, 14, and 17" be stricken out, and it was further adjudged that certain designated portions of paragraphs 4, 6 and 16 be stricken out.

From the foregoing judgment the plaintiff appealed.

*John A. Hendricks for plaintiff.*
*Parrish & Deal and Manly, Hendren & Womble for defendants.*

BROGDEN, J. The denial of a motion made in apt time to strike from a complaint irrelevant and redundant matter affects a substantial right and is appealable. Conversely the granting of such motion is not such an interlocutory order as to foreclose review by the appellate court. *Hosiery Mills v. Hosiery Mills, ante,* 596. C. S., 537.

A complaint is the story of the cause or causes of action which the statute requires to be told in "a plain and concise statement . . . without unnecessary repetition." C. S., 506. As to what constitutes "unnecessary repetition" is often times a vexing problem which can only be solved by an examination of the pleading involved and bearing in mind the ultimate and determinative facts to be proved at the trial. In the case at bar "the amended and substituted complaint" was limited by the judge granting the order to the presentation of two issues; first, with respect to setting aside the consent judgment; and, second, the delivery of deed in controversy. The plaintiff attacked the consent judgment upon the broad ground that he was induced by means of duress to sign the decree. This duress, as he alleges, resulted from various causes, principally the fear of lunacy proceedings and the physical and mental exhaustion incident to a long and grueling cross-examination. It must be conceded that the plaintiff is entitled to allege and prove, if he can, all relevant matters surrounding the signing of said consent judgment. Nevertheless a careful examination and inspection of the complaint discloses many extraneous matters, not pertinent to the issues specified in the order permitting the amendment. The allegations stricken out by order of the trial judge included certain thumb-nail sketches of plaintiff's life and business transactions many years ago, with certain lunacy proceedings in New York and in Davie County, together with allegations of alleged trickery practiced upon the plaintiff in a divorce case between the plaintiff and his wife. We do not see the present relevancy of the allegations stricken from the complaint, to the issues as limited and defined in the order permitting the amendment. This Court held in *Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501, that if an amendment is not in accordance with the terms imposed by the judge author-

izing and permitting it, then the trial judge may strike out such portions thereof as fail to comply with the order. Moreover, it has also been held that pleadings should not be interlarded with "unavailing epithets and with matters that have no bearing whatever on the controversy." *Newsom v. Newsom,* 40 N. C., 122. The authorities bearing upon the subject may be found in McIntosh on North Carolina Practice and Procedure, page 378, section 371.

We are of the opinion and so hold that the allegations left in the complaint after striking out the allegations specified, are sufficiently broad and comprehensive to enable the plaintiff to present every phase of his attack upon the judgment complained of, and hence we find no reversible error in the judgment rendered.

Affirmed.

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ENDICOTT-JOHNSON CORPORATION v. JENNIE B. SCHOCHET AND S. I. BLOMBERG.

(Filed 6 June, 1930.)

**Account, Action on, C a—Itemized statement sworn to by plaintiff's treasurer held admissible under C. S., 1789.**

An itemized, verified statement of an account is an *ex parte* statement and the statute governing its admission, C. S., 1789, must be strictly complied with, and the person who verifies the account, being treated as a witness *pro tanto* must be competent to testify as a witness in respect to the account if called upon at the trial, but where an itemized statement of account offered at the trial is verified by the treasurer of the plaintiff corporation who declares in his affidavit that "he is familiar with the books and business" of the plaintiff, it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. *Nall v. Kelly,* 169 N. C., 717, cited and distinguished.

CIVIL ACTION, before *MacRae, Special Judge,* at January Term, 1930, of BUNCOMBE.

The plaintiff instituted an action against the defendants to recover the sum of $2,349.58 for goods sold and delivered. The defendants had purchased goods, wares and merchandise from time to time on open account and there was a balance due of $2,349.58. The defendants contended that the goods were delivered to Schochet and that the defendant Blomberg had guaranteed one invoice and only one.

The plaintiff offered in evidence a verified itemized statement of the account in the following language: "Be is remembered that on 18 August, 1929, before me, Harold A. Schaff, a notary public in and for

the said county of Broome, personally came Bruce L. Babcock, who being by me duly sworn, deposes and says:

That he resides in the city of Binghamton, Broome County, New York, and is the treasurer of Endicott-Johnson Corporation, a corporation organized and existing under the laws of the State of New York, having its principal office and place of business in said village of Endicott, and is duly authorized to make this affidavit; that he is familiar with the books and business of said Endicott-Johnson Corporation; that the attached statement of account against S. I. Blomberg and Mrs. Jennie B. Schochet is just and correct; that the goods and merchandise represented by the items therein contained were respectively sold and delivered to the said person, firm or corporation, at his, their, its special instance and request, and upon the dates therein stated; that no payments have been made thereon and there are no offsets thereto except as in said account stated; that the balance thereof amounting to $2,349.58 is justly due and owing to said Endicott-Johnson Corporation besides interest thereon from ....."

Attached to the affidavit was a statement of account.

The defendant objected to the introduction of the itemized statement and the court excluded it.

Two issues were submitted to the jury as follows:

1. "Is the defendant, Jennie B. Schochet, indebted to the plaintiff? If so, in what amount?"

2. "Is the defendant, S. I. Blomberg, indebted to the plaintiff? If so, in what amount?"

The jury answered the first issue "$2,349.58," and the second issue "No."

From the judgment upon the verdict plaintiff appealed.

*Jos. W. Little and T. W. Lipscomb for plaintiff.*
*Bernard, Williams & Wright for defendants.*

BROGDEN, J. The trial judge excluded the verified statement offered by plaintiff apparently upon the theory that it was not in the proper form. C. S., 1789, was enacted for the purpose of facilitating the proof of claims specified in the statute. As an itemized verified statement of account is only an *ex parte* statement, the courts have held that the statute should be strictly construed. *Nall v. Kelly,* 169 N. C., 717, 86 S. E., 627. Furthermore, the person who verifies the account is to be treated as a witness *pro tanto,* and hence the verification must be made by a person who would be a competent witness if called at the trial to testify with respect to the transaction.

The original record in *Worthington v. Jolly,* 174 N. C., 266, 93 S. E., 776, discloses an affidavit as follows: "T. J. Worthington, being duly

sworn, says that he is one of the plaintiffs, and that the foregoing account against Titus Jolly is correct and just, and that the same was the goods delivered to Edgar Summerell upon the order of Titus Jolly, and that he is now due $90.59 upon said account." The said affidavit was approved by this Court.

The affidavit in the case at bar is almost in the identical language of the one in *Lloyd v. Poythress,* 185 N. C., 180, 104 S. E., 166. There were two dissenting opinions in that case, but no attack was made upon the regularity of the affidavit. Indeed, an examination of all the opinions filed would indicate that the evidence was in proper form, but that the person who made the affidavit was not otherwise qualified to testify concerning the transaction.

The defendants rely upon *Nall v. Kelly, supra.* While there are certain expressions in that case that apparently support the defendants' contention, an examination of the opinion discloses that the competency as a witness, of the person making the affidavit was the real question in the case. Furthermore, there was nothing to indicate that the plaintiff in the case had any personal knowledge of the transaction. In the case at bar the person making the affidavit declares therein "that he is familiar with the books and business of said Endicott-Johnson Corporation." Hence it cannot be said as a matter of law that the affiant had no personal knowledge of the transaction.

We are of the opinion and so hold, that the verified itemized statement was admissible in evidence.

New trial.

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WILEY B. BROWN v. POSTAL TELEGRAPH-CABLE COMPANY AND LEONIDAS LOWE.

(Filed 6 June, 1930.)

**1. Trial E c—Where requested instructions are substantially given it is sufficient.**

A general charge given by the judge to the jury substantially embodying special instructions requested is sufficient, it not being required that the exact language of the special instructions requested be used.

**2. Trial E c—Court must state evidence in plain manner and explain law arising thereon, and must not express opinion as to sufficiency of proof.**

It is required of the court in his charge to the jury that he state in a plain and correct manner the evidence in the case and explain the law applicable thereto without expressing an opinion as to whether a fact at issue is fully or sufficiently proven. C. S., 564.

**3. Appeal and Error E b—Where evidence is not set out in record the application of the law thereto by the court is presumed correct.**

The application of the law to the evidence in the case in the instruction of the court to the jury is presumed correct on appeal where the evidence or admitted facts do not appear in the record.

**4. Master and Servant D c; D d—Questions of negligence of employee and contributory negligence of third person injured held for jury.**

Where, in an action to recover damages from a telegraph company for an alleged negligent personal injury to the plaintiff caused by the defendant's messenger boy, riding a bicycle, running into the plaintiff while delivering telegrams, the evidence is conflicting as to whether the messenger boy or the plaintiff was violating a traffic regulation of the city at the time of the injury, the questions of the defendant's actionable negligence and the plaintiff's contributory negligence and proximate cause are for the jury.

APPEAL by defendants from *MacRae, Special Judge,* and a jury, at January Term, 1930, of BUNCOMBE. No error.

This is an action for actionable negligence brought by plaintiff against the defendants for damages for injuries sustained. It is alleged by plaintiff that defendant, Leonidas Lowe, was a messenger boy in the employ of defendant company. That in the course of his employment and when on duty, while riding a bicycle and violating certain safety zone ordinances of the city of Asheville, he negligently ran into the plaintiff, seriously injuring him. That plaintiff was crossing Patton Avenue when he was run into, at the time he had the right to cross and while complying with the safety zone ordinances. That the negligence of Lowe was the proximate cause of the injury. The defendants denied negligence and pleaded contributory negligence. The defendants also set forth that the collision and injury was the result of an accident.

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

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

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. What amount, if any, is the plaintiff entitled to recover? Answer: $7,500."

The evidence introduced by the plaintiff and defendants was pro and con on the issues of negligence and contributory negligence. On the measure of damage there is no exception or assignment of error. The court below rendered judgment on the verdict. Defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

*Sanford W. Brown and J. E. Swain for plaintiff.*
*W. A. Fitts and Merrimon, Adams & Adams for defendants.*

CLARKSON, J. The main contentions of defendants were to the effect that the court below did not give instructions prayed for by the defendants. That the charge impinged and did not comply with C. S., 564. To comply with the statute, it is incumbent on the judge in the charge to the jury that he express no opinion as to whether a fact is fully or sufficiently proven—that is the province of the jury. It is further required that the judge shall state in a plain and correct manner the evidence and declare and explain the law applicable to the facts. It is also well settled that requests for instructions need not be given literally. If the charge as a whole includes substantially the prayers for instruction it is sufficient. The evidence is not in the record. We think from the record before us the court below fully complied with the statute.

In *Felmet v. Express Co.*, 123 N. C., at p. 501, we find: "Instructions of law given by the court to the jury must be founded on some phase of the evidence or on the admitted facts when there is to be an application of the law to facts admitted or found by the jury, and unless there appears in the statement of the case on appeal the admitted facts or the evidence upon which instructions were asked, we cannot tell whether the instructions are merely theoretical propositions of law or not." *James v. R. R.*, 121 N. C., 530.

In the charge in which the court below quotes the evidence and sets forth the contentions, we can see no prejudicial or reversible error.

It may not be amiss to quote what *Mr. Justice Walker* said for the Court in *Withers v. Lane*, 144 N. C., at p. 191: "The judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." *Starling v. Cotton Mills*, 171 N. C., at p. 222.

The questions for the jury to determine in this action were simple and not complicated. It narrowed itself down to a question of fact as to whether the messenger boy was negligent in violating the safety zone ordinances; if so, he and the company, his employer, as he was about his master's business, were guilty of negligence, if their negligence was the proximate cause of plaintiff's injury. On the other hand, if plaintiff violated the safety zone ordinances, and that was the proximate

cause of the injury, plaintiff was guilty of contributory negligence and could not recover. It seems that there is no contest over the charge as to damages.

In *Davis v. Long,* 189 N. C., at p. 137, it is said: "The case is not complicated as to the law or facts. The jurors are presumed to be men 'of good moral character and sufficient intelligence.' They could easily understand the law as applied to the facts." In the judgment we find No error.

JOHN C. HUTCHINS v. MAYNARD MANGUM AND WIFE, JULIA A. MANGUM.

(Filed 6 June, 1930.)

**Pleadings B a, I a—Answer in this case held to raise issue of fact and motion for judgment on pleadings was properly denied.**

Where the plaintiff in an action to declare a forfeiture of a life estate by defendant for failure to pay taxes, C. S., 7982, moves for judgment on the pleadings for the alleged failure of the defendant's answer to raise an issue of fact, the motion is properly disallowed by the trial court when the answer of the defendant is sufficient. A motion in the Supreme Court by defendant to be allowed to amend will not be passed upon, but will be left to the discretion of the court below. C. S., 537.

BROGDEN, J., not sitting.

APPEAL by plaintiff from *Cranmer, J.,* 7 November, 1929. From DURHAM. Affirmed.

The judgment of the court below is as follows:

"This cause coming regularly on to be heard upon the call of the entire civil issue docket pursuant to an order made by E. H. Cranmer, judge holding the courts of the Tenth Judicial District of North Carolina, at the September Term of the Superior Court of Durham County, and upon the call of the above-entitled action the plaintiff having moved for judgment upon the pleadings for that: First, the answer filed by the defendant, Julia A. Mangum, does not raise a material issue of fact; second, prior to the filing of the answer by Julia A. Mangum, she failed to execute and deposit the bond, as required by law.

That the plaintiff was represented at the hearing upon the motion by McLendon & Hedrick, and the defendant, Julia A. Mangum, was represented by Brawley & Gantt, and that the interpleader, Byrd Brothers & Pickett, was represented by Bryant and Jones, and that the defendant, Maynard Mangum, was not represented by counsel and has filed no answer to the complaint; that upon the reading of the pleadings and

after hearing argument of counsel for plaintiff and counsel for defendant, upon motion of the plaintiff, the court being of the opinion that the answer filed by the defendant, Julia A. Mangum, raised a material issue of fact for the jury:

It is therefore considered, ordered and adjudged:

1. That the court in its discretion hereby permits and allows the defendant, Julia A. Mangum, fifteen days from 7 November, 1929, to file bond with clerk of the Superior Court, as required by law, with sufficient surety and in an amount to be approved by the said clerk.

2. That the plaintiff's motion for judgment upon the pleadings be and the same is hereby disallowed, and that the said cause stand for trial on the docket in its regular order."

*McLendon & Hedrick for plaintiff.*
*Brawley & Gantt for defendant, Julia A. Mangum.*

CLARKSON, J. The only question of law involved: Is there a material issue of fact raised by the answer filed by the defendant, Julia A. Mangum?

The action is to forfeit the alleged life estate of Julia A. Mangum for failure to pay taxes. C. S., 7982. We think the answer raises a question of fact.

C. S., 519, is as follows: "The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

Defendant contends that she has complied with the statute. "This defendant's answer is in exact compliance with the second clause of the first paragraph of said section 519."

The latter part of section 537 is as follows: "When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

The motion is addressed to the discretion of the court below. The court below has a right *ex mero motu* to direct that the pleading shall be more explicit. The motion in this Court made by defendant to amend the answer we do not pass on, but leave it to the discretion of the court below.

Affirmed.

BROGDEN, J., not sitting.

J. C. COLVIN, ADMINISTRATOR OF TOM COLVIN, v. KITCHEN LUMBER COMPANY ET AL.

(Filed 6 June, 1930.)

**Master and Servant D b—Evidence that shooting of plaintiff was done by employee while acting within scope of his employment held sufficient.**

Upon evidence tending to show that the defendant's employee killed the deceased while the employee was acting within the scope of his employment in preventing persons objectionable to the employer from coming upon or remaining upon the employer's premises, and that the killing was unlawful and felonious, is held sufficient to be submitted to the jury upon the issue of the employer's liability for the wrongful death, and a judgment dismissing the action at the close of the plaintiff's evidence is erroneous.

APPEAL by plaintiff from *Moore, J.,* at January Term, 1930, of GRAHAM. Reversed.

This is an action to recover damages for the wrongful death of plaintiff's intestate.

From judgment dismissing the action at the close of the evidence for the plaintiff, plaintiff appealed to the Supreme Court.

*Morphew & Morphew and R. L. Phillips for plaintiff.*
*T. M. Jenkins for defendants.*

CONNOR, J. On 8 November, 1927, Robert Blair, an employee of the defendant lumber company, shot and killed Tom Colvin, plaintiff's intestate, while the said Tom Colvin was on the premises of the said lumber company. There was evidence tending to show that the homicide was unlawful, wrongful and felonious, as alleged in the complaint.

Defendants contend that there was no evidence tending to show that the homicide was committed by the said Robert Blair while acting within the scope of his authority as an employee of the defendant company, or under the orders of the defendant, Jim Moore, his foreman, and that therefore there was no error in the judgment. We are of the opinion, however, that there was evidence sufficient to sustain the allegations of the complaint to the effect that Robert Blair, when he shot and killed plaintiff's intestate was acting within the scope of his authority as an employee of defendant lumber company, and under the orders of his foreman, the defendant, Jim Moore. The judgment is, therefore, reversed.

It is admitted in the answers filed by the defendants, that at the time he shot and killed plaintiff's intestate, Robert Blair was engaged in the performance of his duties as an employee of the defendant lumber

company. There was evidence tending to show that among these duties was that of preventing persons who were objectionable to said defendant from coming upon or remaining on defendant's premises; that the said Robert Blair had ordered Tom Colvin, who had come to defendant's camp to get medicine from the physician employed by defendant, to leave the premises, and that he shot and killed him because he did not leave promptly. There was evidence elicited from plaintiff's witnesses on cross-examination, tending to show that Tom Colvin was armed with a shot gun, and was accompanied by his brother, when he went upon defendant's premises; there was no evidence, however, tending to show that he had assaulted Robert Blair, or had been disorderly prior to the shooting.

"Where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, it has been said that the doubt will be resolved against the master because he set the servant in motion, at least to the extent of requiring the question to be submitted to the jury for determination." 39 C. J., 1284. See *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145.

There was error in the judgment dismissing the action. For this error the judgment is

Reversed.

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## CHARLES HUTCHINS v. TAYLOR-BUICK COMPANY.

(Filed 6 June, 1930.)

**Bailment A a—Proof that property was left with bailee in good condition and its destruction by fire establishes prima facie case for jury.**

The leaving of an automobile for storage at a garage for hire establishes the relation of bailor and bailee, and where there is evidence that the car was received in good condition and was destroyed by fire, a prima facie showing of negligence is made out which is sufficient to go to the jury although the bailee offers evidence in rebuttal tending to show that the fire resulted from a faulty wiring in the car itself.

APPEAL by plaintiff from *MacRae, Special Judge,* at January Term, 1930, of YANCEY.

Civil action to recover damages for an alleged negligent injury to plaintiff's automobile caused by fire while stored in the defendant's garage.

The record discloses that the plaintiff, while attending the Legislature of 1929, stored his automobile, intermittently or for a short time, at the defendant's garage in the city of Raleigh, and paid the regular charges therefor. On the night of 22 January, or 1 February, about the

hour of 11 p.m., the plaintiff returned his car to the defendant's garage after having the same out during the late afternoon and the early part of the night, and turned it over to the defendant's agent as he had customarily done on other occasions. The car was in good operating condition at that time. One hour and thirty-five minutes later, the attendant at the defendant's garage called the plaintiff over the telephone and notified him that his automobile had been burned.

Plaintiff hurried to the garage and found his car in the center of the second floor, still smoking, and was informed that the fire department had just left. The car was practically destroyed by fire. Other cars were in the garage, but they were not injured.

The man in charge of the garage told the plaintiff that he detected the odor of burning rubber and searched everywhere, upstairs, down stairs, and all around, and was unable to locate the fire until he finally discovered it under the hood of plaintiff's car, which he pushed from where it was stored, between two other cars, to the center of the garage floor and called the fire department to put out the fire, as it was too big at that time for him to manage alone with the extinguishers and sand buckets at hand. The plaintiff's car was the only one burned in the defendant's garage that night.

Defendant contends that, under all the evidence, the fire must have come from a short-circuit in the wiring system of plaintiff's car, and that the prima facie case was rebutted. Plaintiff replies by saying that the question was one for the jury.

From a judgment of nonsuit the plaintiff appeals, assigning error.

*Watson & Fouts for plaintiff.*
*Pou & Pou and Winborne & Proctor for defendant.*

STACY, C. J., after stating the case: The appeal presents the single question as to whether the facts of the instant case bring it within the principle announced in *Beck v. Wilkins,* 179 N. C., 231, 102 S. E., 313, or the rule applied in *Morgan v. Bank,* 190 N. C., 209, 129 S. E., 585. We think the case is controlled by the decisions in *Beck v. Wilkins, supra,* and *Hanes v. Shapiro,* 168 N. C., 24, 84 S. E., 33.

The relation of plaintiff and defendant was that of bailor and bailee. Ordinarily the liability of a bailee for the safe return of the thing bailed is made to depend upon the presence or absence of negligence. In proving this, the bailor has the laboring oar, but it has been held in a number of cases that a prima facie showing of negligence is made out when it is established that the bailee received the property in good condition and failed to return it, or returned it in a damaged condition. *Trustees v. Banking Co.,* 182 N. C., 298, at page 305, 109 S. E., 6.

In the absence of some fatal admission or confession, as against a demurrer to the evidence, or motion to nonsuit, a prima facie showing carries the case to the jury. *Jeffrey v. Mfg. Co.*, 197 N. C., 724, 150 S. E., 503; *Speas v. Bank*, 188 N. C., 524, 125 S. E., 398.

Reversed.

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A. P. ROBERTS v. GREENSBORO-FAYETTEVILLE BUS COMPANY ET AL.

(Filed 6 June, 1930.)

**Appeal and Error C a—Order that appellant's proposed statement of case, filed after expiration of time, be stricken from papers held not error.**

Where the appellant has failed to serve his case on appeal in the time given therefor, the granting of the appellee's motion by the court below to strike the appellant's proposed statement of the case from the papers in the cause does not effect a dismissal, but where it appears from an examination of the record upon appellant's motion for *certiorari* that there is no error on the face of the record, the order of the court below will be affirmed.

APPEAL by defendants from *McElroy, J.*, at March Term, 1930, of GUILFORD.

Civil action to recover damages for an alleged wrongful injury caused by a collision between plaintiff's automobile and a bus, owned by the corporate defendant and operated at the time by John Rich, said collision occurring at the intersection of Whittington and South Elm streets in the city of Greensboro on the morning of 19 January, 1929.

The case was tried at the January Term, 1930, Guilford Superior Court, which resulted in a verdict and judgment for the plaintiff, the judgment being signed on 18 January, the last day of the term, and from which the defendants gave notice of appeal to the Supreme Court.

By consent, and with the court's approval, the defendants were allowed thirty days within which to prepare and serve statement of case on appeal, and the plaintiff was allowed fifteen days thereafter to file exceptions or counter-statement of case.

The defendants served their statement of case on appeal on plaintiff's counsel 18 February, 1930, more than thirty days after the adjournment of the term of court at which the case was tried; no counter-statement of case was served or exceptions filed by plaintiff; and on 24 February plaintiff lodged a motion before Hon. Clayton Moore, Special Judge, to strike the defendants' purported statement of case on appeal from the file of the papers in the cause. This motion was continued and heard by Hon. P. A. McElroy, before whom the case was tried, who

allowed the same 5 March, 1930, and ordered that the said purported satement of case on appeal served by the defendants after the time for service thereof had expired, be stricken from the files. In the meantime, on 4 March, the defendants filed their statement of case on appeal in the clerk's office.

From the order, striking said purported statement of case from the files, the defendants duly excepted and appealed.

*Frazier & Frazier and A. J. Moreau for plaintiff.*
*Jno. W. Hester and F. Glenn Henderson for defendants.*

STACY, C. J., after stating the case: The order striking the defendants' purported statement of case on appeal from the file of the papers in the cause is supported by the decision in *Hicks v. Westbrook,* 121 N. C., 131, 28 S. E., 188. This, however, did not entitle the plaintiff to a dismissal of the appeal. *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713. *Non constat,* an examination of the defendants' purported statement of case on appeal, filed here with application for *certiorari,* fails to convince us that, on the defendants' own showing, reversible error was committed on the trial of the cause. Hence, it further appearing that no error exists on the face of the record proper, the judgment will be affirmed. *McNeill v. R. R.,* 117 N. C., 642, 23 S. E., 268. It would seem, therefore, that, irrespective of the procedural questions raised by the appeal, the same result would have followed, had the case been presented without them.

Affirmed.

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D. L. McKOY v. A. F. CRAVEN.

(Filed 6 June, 1930.)

**Negligence D d—Where issue of contributory negligence is answered in defendant's favor the plaintiff is not entitled to recover.**

Where the issue of negligence and contributory negligence arise in an action for damages to the plaintiff's automobile, there being no issue as to the last clear chance, the plaintiff is not entitled to judgment where the jury answers both issues in the affirmative and awards damages.

APPEAL by plaintiff from *Shaw, J.,* at January Term, 1930, of IREDELL. No error.

The verdict was as follows:

1. Was the plaintiff's car damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

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

What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $50.00.

It was thereupon adjudged that the plaintiff take nothing by his action and that the defendant recover his costs.

*Zeb V. Turlington for plaintiff.*
*Raymer & Raymer for appellee, Albert L. Storr.*

ADAMS, J. The plaintiff and the defendant were equally in fault. If one can recover so can the other. Thus there would be "mutual faults and mutual recoveries, which would contradict the saying that 'law is the perfection of reason.'" *Herring v. R. R.*, 32 N. C., 402. It is settled by the decisions of this Court that the plaintiff is not entitled to damages upon the verdict. *Baker v. R. R.*, 118 N. C., 1015; *Sasser v. Lumber Co.*, 165 N. C., 242; *Carter v. R. R., ibid.*, 244, 255; *Holton v. Moore, ibid.*, 549. It will be noted that there is no issue as to the last clear chance. *Gunter v. Wicker*, 85 N. C., 310; *Edge v. R. R.*, 153 N. C., 212. The appellant cites *Wood v. Jones, ante*, 356; but in that case the second issue was whether the defendant, not the plaintiff, had by his own negligence contributed to his injury. A new trial was given because the verdict was indefinite.

No error.

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SAM KASSLER v. J. H. TINSLEY AND JERRY JEROME.

(Filed 6 June, 1930.)

**1. Pleadings E a—Where copy of answer containing counterclaim is not served on plaintiff its allegations are to be dealt with as denied.**

Under the provisions of chapter 18, Public Laws of 1924, the allegations in an answer constituting a counterclaim are to be considered and dealt with as denied where a copy of the answer containing the counterclaim is not served on the plaintiff.

**2. Judgments K c—Where answer containing counterclaim has not been served on plaintiff, judgment by default thereon should be set aside.**

Where a copy of an answer containing a counterclaim is not served on the plaintiff, the allegations going to make up the counterclaim are to be considered as denied, chapter 18, Public Laws of 1924, and where judgment by default and inquiry has been entered on the counterclaim for plaintiff's failure to plead thereto, the plaintiff's motion to set aside such judgment should be allowed.

APPEAL by plaintiff from *MacRae, Special Judge,* at December Term, 1929, of TRANSYLVANIA.

Civil action to recover on two promissory notes. Summons issued and complaint filed 22 July, 1927. Defendants answered 27 July, 1927, denied liability and set up a counterclaim for $6,800.

The answer of defendants, containing said counterclaim, was not served on plaintiff or his attorneys (so stated in the agreed statement of case on appeal), and no answer, demurrer, or reply to the counterclaim was filed by the plaintiff; whereupon on 12 September, 1927, judgment by default and inquiry was entered against the plaintiff, and in favor of defendants, on said counterclaim.

Thereafter, at the December Term, 1929, Transylvania Superior Court, plaintiff moved to set aside the judgment by default and inquiry previously entered on the counterclaim, on the ground that no copy of the answer containing said counterclaim, was ever served on the plaintiff or his attorneys, and therefore, under chapter 18, Public Laws, Extra Session, 1924, such counterclaim is deemed denied. Motion disallowed, and plaintiff appeals.

*Galloway & Martin and Ralph H. Ramsey, Jr., for plaintiff.*
*No counsel appearing for defendants.*

STACY, C. J., after stating the case: It was held in *Lumber Co. v. Welch,* 197 N. C., 249, 148 S. E., 250, construing chapter 18, Public Laws, Extra Session, 1924, that, unless a copy of the answer containing a counterclaim is served on the plaintiff or his attorney, the allegations going to make up such counterclaim are to be considered and dealt with as denied. Hence, under authority of the *Welch case,* it would seem that the plaintiff's motion is well founded.

Reversed.

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J. O. PLOTT COMPANY v. H. K. FERGUSON CONSTRUCTION COMPANY ET AL.

(Filed 6 June, 1930.)

**1. Appeal and Error E a—Where the record does not contain the complaint in the action the appeal will be dismissed.**

It is required by the rules of practice in the Supreme Court that the complaint be made a part of the record proper in all cases, Rule 19, section 1, and where on appeal the record contains only a synopsis of the complaint the appeal will be dismissed.

**2. Appeal and Error A e—Where record does not squarely present the question of the constitutionality of a statute it will not be decided.**

The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so incomplete that it may not be determined that the constitutionality of a statute is squarely presented, the question will not be decided.

APPEAL by plaintiff from *Schenck, J.*, at March Term, 1930, of BUNCOMBE.

*John H. Cathey for plaintiff.*
*Bernard, Williams & Wright for defendant, Deposit Company.*

STACY, C. J. It appears from the statement of case on appeal, which constitutes the entire record sent to this Court, that the constitutionality of chapter 613, Public-Local Laws, 1927, is sought to be presented for decision. But as only a synopsis of the complaint has been sent up, we are not in position to say that the question is squarely presented. We are disposed to think that it is not. At any rate, no error appears on the face of the record. Appellate courts never anticipate questions of constitutional law in advance of the necessity of deciding them; nor do they venture advisory opinions on such questions. *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

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 send up the necessary parts of the record proper. *Schwarberg v. Howard,* 197 N. C., 126, 147 S. E., 741.

Appeal dismissed.

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IN THE MATTER OF LAFAYETTE BANK AND TRUST COMPANY OF FAYETTEVILLE, N. C.

(Filed 6 June, 1930.)

**Banks and Banking J b—Upon sale of property of insolvent bank the purchase price must be paid to the Corporation Commission.**

Where the Corporation Commission takes possession of the assets of an insolvent bank under the provisions of 3 C. S., 218(c), it is a statutory receiver and it is required by statute to collect the assets of the bank and to distribute them to the creditors and depositors, and the court having jurisdiction is without power to authorize the sale of an insolvent bank's

property in bulk to purchasers under an agreement that the purchasers organize another bank and pay to it the purchase price for distribution to the creditors and depositors and thus relieve the Commission of its duty to collect and distribute the assets. As to whether the court might authorize the sale of the assets in bulk is not decided, though it would seem that under the statutory provision that he shall make such order as in his discretion will best serve the parties interested he has the power to authorize a sale in bulk, which would not be reviewable on appeal except on the ground of abuse of discretion.

APPEAL by the petitioner, the Corporation Commission of North Carolina, from order of *Sinclair, Resident Judge,* of the Superior Court for the Ninth Judicial District. Affirmed.

This is a proceeding begun and prosecuted under the provisions of C. S., 218(c), for the liquidation of the LaFayette Bank and Trust Company, an insolvent corporation organized under the laws of this State, and, prior to its insolvency, engaged in the banking business at Fayetteville, Cumberland County, North Carolina.

After the Corporation Commission had taken possession of the assets and business of said insolvent corporation, pursuant to the provisions of the statute, and after it had filed the inventory required by its provisions, and while it was engaged in the administration of the estate of said corporation, the said Commission filed its petition before the resident judge of the Superior Court for the Judicial District in which the place of business of said corporation is located, praying that the said judge make an order authorizing and empowering the said Commission to sell the assets of said insolvent banking corporation, then in its possession, upon the terms and conditions set out in said petition.

Upon the hearing of said petition, an order was made as follows:

"This cause coming on to be heard before his Honor, N. A. Sinclair, Resident Judge of the Ninth Judicial District, in which is located Cumberland County, and being heard upon the petition of the Corporation Commission, and the court finding as a fact:

First: That on 13 January, 1930, the Corporation Commission of the State of North Carolina took possession of the LaFayette Bank and Trust Company, of Fayetteville, North Carolina, under and by virtue of the provisions of section 218(c) of the Consolidated Statutes, and now has the assets of said bank in its hands for liquidation under the provisions of said act; and,

Second: That at the time the Corporation Commission took possession of the assets they totaled $572,307.70, with a total liability to depositors of $450,749.65, and a total of bills payable $2,238.55, which said liabilities are still outstanding and to be liquidated out of the assets which came into the hands of the Corporation Commission on 13 January, 1930; and,

Third: That interested parties in the city of Fayetteville propose to organize the LaFayette Bank and purchase in bulk the assets of the LaFayette Bank and Trust Company, and pay for said assets the sum set out in Exhibit A, attached to the petition, making said payments according to the terms of said exhibit; and,

Fourth: That the creditors, including depositors of said bank, those representing a total of $321,023.51, have signed the agreement attached to the petition and marked Exhibit A, and those representing $139,726.12 have not signed said agreement attached to the petition and marked Exhibit A; and,

Fifth: That by the terms of the agreement the LaFayette Bank proposes to purchase in bulk from the Corporation Commission of the State of North Carolina the assets of the LaFayette Bank and Trust Company and pay the creditors of the LaFayette Bank and Trust Company seventy per cent in equal monthly installments of ten per cent, and thirty per cent in stock in the LaFayette Bank; and,

Sixth: That in addition to the stock to be purchased with thirty per cent of the deposits and claims of the LaFayette Bank and Trust Company, additional amount in cash is to be paid in for the capital stock of the LaFayette Bank so as to total $100,000 capital stock account; and,

Seventh: That the Corporation Commission, in accordance with the requirements of the Exhibit A, has approved the agreement and method employed by the LaFayette Bank in organizing and in proposing to purchase the assets of the LaFayette Bank and Trust Company; and,

Eighth: That the Corporation Commission recommends the approval of said sale and purchase according to the terms of the agreement and in accordance with the facts hereinbefore set out; and,

Ninth: That as to the creditors, including depositors of the LaFayette Bank and Trust Company who have not signed the agreement attached to the petition and marked Exhibit A, the sale of the assets and liquidation of the claims of the LaFayette Bank and Trust Company in a way and manner set out in the petition, including the exhibit attached thereto and marked Exhibit A, is to the best interest of the creditors of said bank, including the depositors and including those creditors and depositors who have failed to sign the agreement attached to the petition and marked Exhibit A; and,

Tenth: That in the opinion of the court the sale of the assets to the LaFayette Bank and the discharge by it of the claims of the creditors of the LaFayette Bank and Trust Company in the way and manner set out in the petition, including the agreement attached thereto and marked Exhibit A, will be to the benefit of the creditors, including the depositors of the LaFayette Bank and Trust Company, and will net to them a

greater or as great a return as would be possible in liquidation by the Corporation Commission; and,

Eleventh: That the creditors, including the depositors, are not parties to this action, it being an *ex parte* action to secure from the court approval of the sale of the assets of the LaFayette Bank and Trust Company in accordance with the terms hereinbefore set out, said creditors, including depositors not having been notified of the presentation of this petition and have not been served with summons or notice in the action pending in the Superior Court of Cumberland County under the provisions of section 218(c); and,

Twelfth: That the provisions of subsection 7 of 218(c) do not authorize and empower the sale in bulk of the assets of a banking institution taken possession of by the Corporation Commission for the purpose of liquidation under and by virtue of the provisions of section 218(c), Consolidated Statutes.

Now, therefore, the motion of the Corporation Commission for order approving the sale of the assets of the LaFayette Bank and Trust Company to the LaFayette Bank for the purpose of permitting the LaFayette Bank to discharge the claims or liabilities of the LaFayette Bank and Trust Company in accordance with the terms of the agreement attached to the petition is hereby denied.

N. A. SINCLAIR, *Judge*, etc."

Exhibit A, attached to the petition, and referred to in the order, is as follows:

"EXHIBIT A.

North Carolina—Cumberland County.

7 February, 1930.

For value received we, the undersigned, each for himself being depositor in the LaFayette Bank and Trust Company, hereby agree to purchase with thirty per cent of our deposits now in the said bank stock in the new bank to be known as the LaFayette Bank, at a par value of ten dollars per share.

Subject to the following conditions:

First. That, when the new bank is opened it shall have a capital stock of not less than $100,000.

Second. We further agree that the remainder of our deposit shall be available to us only in equal monthly installments of ten per cent, but nothing in this agreement shall prevent any new deposits made by us from being available to us in the usual manner of banking practice.

All of which is subject to the approval of the Corporation Commission.

The foregoing agreement is signed after full knowledge and understanding of its contents."

The petitioner, the Corporation Commission, duly excepted to the order made by Judge Sinclair, and appealed therefrom to the Supreme Court.

*I. M. Bailey and Robert H. Dye for appellant.*

CONNOR, J. Chapter 113, Public Laws of North Carolina, session 1927, now C. S., 218(c), is entitled "An act to amend section 218(c) of Volume 3 of the Consolidated Statutes, relating to the method of liquidating banks." It is provided by subsection 22 of said act that "no bank created under the Banking Act, or the Industrial Banking Act, and under the supervision of the Corporation Commission, shall be liquidated in any other way or manner than that provided herein." All banks, doing business under the laws of this State, whether public or private, are by statute under the supervision and general control of the Corporation Commission, C. S., 1035, subsection 7. Therefore, no State bank can be liquidated, voluntarily or involuntarily, otherwise than as provided by this statute. C. S., 218(a), providing for the voluntary liquidation of a bank, insofar as it is in conflict with the statute is superseded by its provisions.

For the purpose of liquidation, either voluntary or involuntary, the Corporation Commission is authorized and empowered by the statute, either upon its own initiative, in certain cases (subsection 1), or pursuant to resolution of a majority of the board of directors of the bank (subsection 2), to take possession of the assets and business of any bank doing business in this State, and subject to its supervision and general control. In either case the Corporation Commission, upon taking possession of the assets and business of any bank, is authorized, through the Chief State Bank Examiner, or through its duly appointed agent, to convert its assets, real and personal, into money, by the collection of all debts due the bank, or with the approval of the judge of the Superior Court for the district in which the bank has its principal place of business, by the sale of its property, real or personal, subsection 7. All funds belonging to the estate of the bank, and collected by the Commission shall be deposited from time to time in such bank or banks as the Commission shall select, and shall be subject to the check of the Chief State Bank Examiner, in the name of the Corporation Commission, subsection 15. Claims of depositors or other creditors of the bank must be filed with the Corporation Commission within the time specified by the Commission, which shall be not less than ninety days from the date of notice given by publication in a newspaper pub-

lished in the county in which the bank was doing business at the time the Commission took possession of its assets and business, subsection 10. At any time after the expiration of the date fixed by the Chief State Bank Examiner, or by the duly appointed agent of the Commission, for the presentation of claims against the bank, the Commission may declare, and out of the funds on hand, after paying expenses and debts which have priority, shall pay dividends to the depositors and other creditors of the bank whose claims have been allowed by the Commission. Dividends shall be declared and paid when and as often as the funds on hand, subject to the payment of dividends, are sufficient to pay ten per cent on all claims entitled to share in such dividends, subsection 14. When the assets of the bank have been fully administered, the Corporation Commission is required by the statute to file in the office of the clerk of the Superior Court of the county in which the proceeding for the liquidation of the bank is pending, a full and complete report of all its transactions in said proceeding. Upon the filing of this report, the Corporation Commission shall be discharged from all further liabilities by reason of the liquidation of the bank, subsection 18. In the event any funds or assets belonging to the bank remain in its hands, after the payment of all expenses and all claims against the bank, provision is made in the statute for the payment of said funds or the delivery of said assets to an agent or agents of the stockholders to be distributed among them, according to their respective interests, subsection 19. The statute provides in detail for a full and complete liquidation of the assets of a bank which have been taken over by the Corporation Commission, pursuant to its provisions, to the end that the rights of depositors and other creditors, and of stockholders may be fully protected. Under the provisions of the statute, the Corporation Commission is a statutory receiver, with full authority to liquidate State banks, whose assets and business have been taken into its possession for that purpose. When the Corporation Commission has taken possession of the property, real or personal, of a State bank, the statute contemplates that it shall retain possession of said property, until the Commission has fully administered the same, in accordance with its provisions, and in order to accomplish its purposes.

With respect to the sale of the property of the bank, real and personal, which has come into the possession of the Corporation Commission by virtue of the statute, it is provided in subsection 7 that the Chief State Bank Examiner, or the duly appointed agent of the Commission "by motion in the pending action (see subsection 3) and upon authority of an order of the presiding or resident judge of the district, may sell, compromise, or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on

such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond, or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion, shall enter his order as in his discretion will best serve the parties interested."

When a sale of property, real or personal, belonging to the estate of the bank, and in the possession of the Corporation Commission, has been made, under an order of the judge of the Superior Court, having jurisdiction, the purchase money must be paid to and collected by the Corporation Commission or by the Chief State Bank Examiner, or by the duly appointed agent of the Commission. When thus collected, the money paid for the property sold becomes a part of the fund in the hands of the Commission, available for the payment of its expenses, incurred in the proceeding, and of dividends to depositors and other creditors. The judge is without power under the statute to authorize the Corporation Commission to surrender possession of or to transfer said property to a third party, without a provision in his order that the purchase money for the property shall be paid to and collected by the Corporation Commission, or by the Chief State Bank Examiner, or by the duly appointed agent of the Commission.

In the instant case, there is a proposal by interested parties in the city of Fayetteville that they will purchase the assets of the LaFayette Bank and Trust Company, now in the possession of the Corporation Commission for purposes of liquidation, under the statute, transfer same to a bank to be organized by them, and pay to each depositor or other creditor of the LaFayette Bank and Trust Company a certain percentage of his claim. There is no error in the order of Judge Sinclair denying the petition of the Corporation Commission for an order authorizing the Commission to accept this proposal. By its terms, the Corporation Commission would be relieved of any further duty to the depositors, creditors, or stockholders of the LaFayette Bank and Trust Company, and would be deprived of any power to protect their interests in the property which it had taken into his possession under the provisions of the statute.

We do not discuss or decide the question presented on this appeal as to whether under the provisions of subsection 7, C. S., 218(c), the judge has the power to authorize a sale of the assets of a bank, in the possession of the Corporation Commission for purposes of liquidation, in bulk. It would seem, however, that as the statute provides that the judge shall make such order as in his discretion will best serve the parties interested, he has the power to authorize such sale. When an order

has been made by the judge in the exercise of the discretion vested in him by the statute, his order is not reviewable by this Court, on appeal, except upon the ground that there has been an abuse of such discretion.

As we find no error in the order of Judge Sinclair, the same is

Affirmed.

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FIDELITY TRUST COMPANY, GUARDIAN OF ELEANOR LOUISE GIBBS, DOROTHY R. GIBBS AND FLORENCE P. GIBBS, v. W. C. WALTON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF NELLIE STANDART CARR, DECEASED.

(Filed 6 June, 1930.)

1. **Guardian and Ward G a—Procedure of foreign guardian to obtain possession of ward's property in hands of executor in this State is under C. S., 2195.**

   A guardian in another State of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of C. S., 2195; C. S., 4021, relating to property in the hands of a trustee residing in this State, is not applicable.

2. **Executors and Administrators E c—Where it is to the interests of the legatees, court may authorize transfer of stock to them instead of cash.**

   Where a testator bequeaths the residue of her personal property to the children of her brother, and the personalty consists of stocks and bonds the value of which in money is definite and determinable, and, in an action by the guardian of the legatees to obtain possession of the property, the court having jurisdiction finds as a fact that it is to the interests of the legatees that the executor transfer to the guardian the specific stocks and bonds for the use of each according to his proportionate share instead of reducing the personalty to cash, the court has the power to authorize a settlement by the executor with the guardian by the transfer of specific stocks and bonds, and a receipt by the guardian according to the order is a complete discharge of the liability of the executor as directed by the order of court.

APPEAL by defendant from *Moore, J.*, at May Term, 1930, of HENDERSON. Affirmed.

This is a special proceeding begun by petition filed in the Superior Court of Henderson County, before the clerk.

Upon the facts alleged in the petition, which was duly verified, plaintiff prays the court to make an order directing the defendant executor to deliver to the petitioner, as guardian, personal property bequeathed to its wards by his testatrix in her last will and testament, duly probated and recorded in Henderson County, North Carolina, to the end

that same may be removed by the petitioner from this State to the State of Pennsylvania, where its wards reside, and where the petitioner has been duly appointed and has duly qualified as their guardian.

The facts alleged in the petition are admitted in the verified answer of the defendant, who prays that such order shall be made in this proceeding as shall fully protect him, in the event that he shall be directed to pay over to the petitioner the personal property bequeathed to its wards in the last will and testament of defendant's testatrix.

From the order made by the clerk of the Superior Court, defendant appealed to the judge of said court.

Upon the hearing of said appeal, judgment was rendered as follows:

"This cause coming on to be heard at Hendersonville, North Carolina, before his Honor, Walter E. Moore, judge of the Superior Court, holding by exchange the courts of the Eighteenth Judicial District, the resident judge of said district being absent from the district, upon appeal by defendant from an order of the clerk in this cause dated 6 May, 1930, directing the removal and transfer by the defendant to the petitioner of certain funds and property as prayed in the petition; and all matters and questions in this proceeding being now heard and considered upon the pleadings, stipulation of counsel, and the entire record, the court finds and adjudges as follows:

1. That, the petitioner, Fidelity Trust Company, a corporation, is the guardian in the State of Pennsylvania, of Eleanor Louise Gibbs, Dorothy R. Gibbs and Florence P. Gibbs, minor children of Ralph W. Gibbs, having been duly appointed as such guardian by the proper court, to wit, the Orphans' Court of Alleghany County, Pennsylvania, where said minors reside, and having duly qualified in said court as such guardian.

2. That, Nellie Standart Carr, late of Henderson County, North Carolina, died leaving a last will and testament appointing the defendant, W. C. Walton, executor, and that the said last will and testament of the said Nellie Standart Carr, deceased, has been duly admitted to probate before the clerk of the Superior Court of Henderson County, North Carolina, and the said W. C. Walton has duly qualified in said court as executor of said will.

3. That, the only portions of said will relating to, or affecting the matters under consideration in this proceeding are Items 21 and 22, which read as follows:

'Item XXI. I give and bequeath to Dorothea Gibbs, daughter of Herbert Gibbs, and to Dorothy Gibbs, daughter of Ralph W. Gibbs, share and share alike, all of my flat sterling silver not otherwise stipulated.

'Item XXII. I give and bequeath to the children then living of Herbert R. Gibbs and of Ralph W. Gibbs, equally, share and share alike,

the rest and residue of my estate, each to receive the income thereof only, until coming of age.'

4. That, under Item 22 of the will of the said Nellie Standart Carr quoted above, each of the ten residuary legatees therein referred to acquired a vested interest in one-tenth of the residuary estate of the said testator.

5. That, the children of Herbert Gibbs referred to in Item 22 of said will are six in number, and that the children of Ralph W. Gibbs referred to in said item of said will are four in number, three of the said children of the said Ralph W. Gibbs being the wards of said petitioner hereinbefore named, to wit, Eleanor Louise Gibbs, Dorothy R. Gibbs, and Florence P. Gibbs.

6. That, the said wards of said petitioner are each the owners of one-tenth of the residuary estate of the said Nellie Standart Carr.

7. That, it is to the best advantage of said wards that their portions of the capital stock of the Cleveland Trust Company referred to in said petition be paid and turned over in kind, instead of the same being reduced to cash by the executor.

8. That, of the 410 shares of said stock of said Cleveland Trust Company mentioned in the petition, the said three wards, or their duly qualified representatives, would each be entitled to forty-one shares.

9. That, the petitioner is duly represented before the court by Merrimon, Adams & Adams, attorneys of Asheville, North Carolina, and that the appearance of the said petitioner before this court is, and is recognized as an appearance not only as guardian in the State of Pennsylvania of said wards, but also as an appearance as next friend of said wards, representing their interests generally.

10. That, this proceeding as brought by the petitioner under sections 2195 and 2196 of the Consolidated Statutes, is the proper procedure for the removal of the funds and property described in the petition in this cause; that the bond given by the petitioner as guardian for its said wards in the State of Pennsylvania is a proper and sufficient bond, sufficient as well in the ability of the sureties as in the sum mentioned therein to secure all the estate of said wards wherever situated, and said bond is approved by the court.

11. That, the petitioner, as guardian in Pennsylvania of the said three minor children of Ralph W. Gibbs is now entitled to receive and receipt for the portion of the funds and property mentioned in the complaint which was left by said will to said minors.

It is, therefore, on motion of Merrimon, Adams & Adams, attorneys for plaintiff, ordered, adjudged and decreed by the court that the defendant, W. C. Walton, as executor of the will of Nellie Standart Carr, deceased, be, and he is hereby directed to transfer, turn over and deliver

forty-one shares of the said capital stock of the said Cleveland Trust Company to the said Fidelity Trust Company, as guardian of Eleanor Louise Gibbs, and forty-one shares of said stock to the said Fidelity Trust Company as guardian of Dorothy R. Gibbs, and forty-one shares of said stock to the said Fidelity Trust Company as guardian of Florence P. Gibbs; and the said executor is authorized and directed to execute such instruments of writing as may be necessary to have the proper transfers of said stock made by the said Cleveland Trust Company. The said executor is further authorized and directed to deliver to the said petitioner as guardian of the said Dorothy Gibbs, her share of the silverware as bequeathed to her in said will.

It is further ordered, adjudged and decreed that the receipt of the said Fidelity Trust Company for any and all funds, stock and property turned over to it by the defendant as executor as herein directed, shall be a full and complete discharge to said executor as to any funds, stock or property so transferred as fully to all intents and purposes as if the said three minor children of Ralph W. Gibbs were of full age, and had received and receipted for the same in their own proper persons.

It is further ordered that the petitioner shall pay the costs of this proceeding.

This 7 May, 1930. WALTER E. MOORE, *Judge Presiding.*"

From said judgment defendant appealed to the Supreme Court.

*Merrimon, Adams & Adams for plaintiff.*
*G. H. Valentine for defendant.*

CONNOR, J. The defendant in this proceeding is the executor of a will which has been duly probated and recorded in this State. He is now engaged in the administration of the estate of his testatrix in accordance with the provisions of said will, and subject to the jurisdiction of the courts of this State. On his appeal to this Court from the judgment of the Superior Court directing him to deliver to the petitioner, as guardian of its wards, who are nonresidents of this State, personal property bequeathed to them by said will, to the end that said property may be removed by the petitioner from this State to the State of Pennsylvania, where said wards reside, and where the petitioner has duly qualified as their guardian, the defendant suggests that the relief sought in behalf of said nonresident wards can be had only under the provisions of C. S., 4020, *et seq.;* that such relief cannot be had in this proceeding which was begun under the provisions of C. S., 2195, *et seq.* We are of opinion that this proceeding, upon the facts alleged in the petition, was properly begun under the provisions of C. S., 2195, *et seq.*, and that

there was no error in the judgment of the Superior Court to that effect. The petitioner was well advised as to the procedure by which it has sought relief upon the facts alleged in its petition. Its wards reside in the State of Pennsylvania; they are entitled to personal property now in this State; this personal property is in the hands of defendant, the executor of the testatrix, by whose will the said property was bequeathed to said wards. The property is not vested in a trustee residing in this State, who holds the same for beneficiaries residing in another State. C. S., 4020, *et seq.*, are not applicable to the facts of this case. The procedure in this case conforms to the requirements of C. S., 2195, *et seq.*, and is approved. *Cilley v. Geitner,* 183 N. C., 528, 111 S. E., 866.

The only other question raised by the defendant on his appeal to this Court, and presented for decision, is whether there was error in the order of the judge of the Superior Court that the defendant as executor transfer, turn over and deliver to the petitioner as guardian, for each of its wards, forty-one shares of the capital stock of the Cleveland Trust Company of Cleveland, Ohio, in settlement of the interest of said ward in the total number of shares of said capital stock, in his hands, under item 22 of the last will and testament of Nellie Standart Carr. The defendant suggests that it is his duty as executor to convert the 410 shares of said capital stock which are bequeathed by said item to the residuary legatees referred to therein, into money, and to pay to each of said legatees his share in money and not in stock. While ordinarily it is the duty of an executor to convert personal property, which passes under a residuary clause in a will, to two or more legatees, share and share alike, into money, and to pay to each of said legatees his share in money and not in property, where, as in the instant case, the property to be distributed consists of stocks or securities whose value in money at the date of the settlement can be readily ascertained, and the court having jurisdiction of the administration of the estate, finds that it is to the best interest of all the legatees that their shares be paid in stock or securities, rather than in money, the court has the power to authorize the executor to settle with the legatees, by transferring and delivering to each of said legatees stock or securities of the value in money of his share, rather than by paying to him money derived from the sale by the executor of the stocks or securities. *University v. Borden,* 132 N. C., 477, p. 502, 44 S. E., 47, 1007, 24 C. J., 485, sections 1313 and 1314. Such settlement made by the executor with the legatees, pursuant to an order of the court, will fully protect the executor against any and all claims thereafter made by the legatees or those claiming under him.

The fact that the legatees are minors at the date of the settlement is immaterial, where the settlement is made with their guardian or guardians, and is approved by the court having jurisdiction of the administration of the estate. Such settlement will protect the executor from any and all claims thereafter made by said legatees or by any one in their behalf, or claiming under them. Where the guardian in accepting said settlement acts in good faith, and with the approval of the court having jurisdiction of the estate of his ward, he will likewise be protected under the law of this State. See *Sheets v. Tobacco Co.*, 195 N. C., 149, 141 S. E., 355.

We find no error in the judgment of the Superior Court. Defendant is amply protected by its provisions. The judgment is

Affirmed.

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MAGGIE SCOTT v. WESTERN UNION TELEGRAPH COMPANY, LAMBETH REALTY COMPANY, AND ROY WILLIAMS.

(Filed 6 June, 1930.)

**1. Negligence C a; Master and Servant C g, D d—In this case held: contributory negligence of plaintiff barred his right to recover.**

Where in an action against an employer and a messenger boy and the telegraph company employing the messenger boy, the plaintiff's evidence tends to show that her intestate was employed to operate an elevator, and that he left the elevator at the ground floor for a few minutes, and that during his absence the messenger boy moved it to another floor, and that the intestate, hearing the elevator bell ring, ran down a lighted corridor and jumped into the empty shaft without looking when the danger was obvious and could have been easily ascertained: *Held*, the plaintiff's own evidence establishes the negligent failure of the intestate to exercise due care for his own safety, and his failure to do so being a proximate cause of the injury, he is barred from recovering from any of the defendants, and the alleged negligence of the employer in failing to provide a safety device for the elevator, and the action of the messenger boy in moving the elevator, will not warrant a recovery, and the defendant's motion as of nonsuit is properly allowed.

**2. Negligence D c—Where contributory negligence is a proximate cause of the injury nonsuit is proper.**

It is not necessary that the contributory negligence of the plaintiff be the sole proximate cause of the injury in order to bar his right to recover, but it is sufficient if his contributory negligence is one of the efficient, proximate causes of the injury, and where the plaintiff's own evidence establishes such contributory negligence a nonsuit is proper, although the burden of proving contributory negligence is upon the defendant.

SCOTT *v.* TELEGRAPH COMPANY.

APPEAL by plaintiff from a judgment of nonsuit given by *Sink, Special Judge,* at March Term, 1930, of MECKLENBURG. Affirmed.

Action for the recovery of damages for personal injury resulting in death. The Lambeth Realty Company owned a building in Charlotte known as the Builders Building and employed Henry Scott, plaintiff's intestate, to operate one of the elevators. On 13 April, 1929, about three o'clock in the afternoon, Scott brought the elevator to the first floor of the building. One side of the corridor on the first floor is occupied by a smoke shop or lunch room, and between the elevator and the smoke shop there is a hallway. At the rear of the smoke shop is a door which affords access along the corridor to the elevator shaft. After stopping the elevator Scott left it unattended, with the door open and the light burning, and went to the smoke or lunch room, distant 35 or 40 feet, to get a sandwich. While he was away the defendant, Roy Williams, a messenger of the Western Union Telegraph Company, came into the building, and seeing no one attending the elevator, he got in it and moved it to an upper floor. Scott was in the lunch room about two minutes. Hearing the ringing of the elevator bell, he hurried along the corridor towards the elevator shaft. The elevator had not returned to the first floor; the enclosure was open; the bell was ringing. Scott "came right out of the smoke shop . . . and straight on down and run in the elevator shaft." He fell to the basement, and when a witness went there he found him "dead or dying." The injury he suffered caused his death.

The plaintiff contends:

1. That the defendant, Roy Williams, was guilty of actionable negligence in moving the elevator to an upper floor, without shutting the elevator door or enclosure, leaving the elevator shaft at the first floor open and unattended.

2. That the defendant telegraph company is liable for the aforesaid negligent conduct of Roy Williams, its messenger boy, because at the time he was acting within the scope of his employment and in furtherance of his employer's business.

3. That the defendant, Lambeth Company, was guilty of actionable negligence in that it failed to equip its said elevator with an appliance known, approved and in general use on 13 April, 1929, an "electric interlock," which makes it impossible to move an elevator from a floor at which it is stopped unless and until the outer enclosure is first shut and fastened.

The defendants contend:

1. That the plaintiff's intestate was guilty of contributory negligence which bars the plaintiff's recovery.

2. The Western Union Telegraph Company contends that it is not liable for the negligence of Roy Williams because he was acting outside the scope of his employment and not in furtherance of his employer's business.

3. The Lambeth Realty Company contends that if it was negligent, its negligence was not the proximate cause of the injury.

*D. B. Smith and Stewart, McRae & Bobbitt for plaintiff.*

*Francis R. Stark and Tillett, Tillett & Kennedy for Western Union Telegraph Company.*

*J. Laurence Jones and Ralph V. Kidd for Lambeth Realty Company.*

ADAMS, J. The judgment of nonsuit, we take it, was based upon the theory that the contributory negligence of the intestate bars the plaintiff's recovery of damages. Upon no other principle can we sustain the judgment in behalf of all the defendants. As the burden of showing contributory negligence ordinarily rests upon the defendants, we must decide whether the plaintiff's evidence establishes this defense. If it does, the judgment must be affirmed.

In *Covington v. Furniture Co.*, 138 N. C., 374, the Court, quoting Labatt, 333, gave the following statement of the rule which controls in the present case: "The general rule of law is 'that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by any one else, and when the servant has as good an opportunity as the master or any one else of seeing what the danger is, and is permitted to do his work in his own way and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for the injuries received in consequence of the condition of things which constituted the danger. If the servant is injured it is from his own want of care. . . . The rule is especially applicable when the danger does not arise from the defective condition of the permanent ways, works, or machinery of the master, but from the manner in which they are used, and when the existence of the danger could not well be anticipated but must be ascertained by observation at the time.'"

The intestate was grown, married, and experienced in the operation of electric elevators. The danger to which he was exposed was obvious; it was as easily discernible by himself as by any other person; he was permitted to do his work in his own way; it was his duty to make use of his faculties; and if he had done so he would have avoided the danger and have prevented the injury. In returning from the lunch room not only did he run, according to the testimony of an eye-witness he "jumped into the elevator shaft and got killed." The way was open;

the corridor was "quite light." The law does not impose on the employer any duty to take better care of his employee than the latter should take of himself. *Pigford v. R. R.*, 160 N. C., 93, 101. Indeed, without the employer's knowledge the employee rushed voluntarily and heedlessly into a place of unconcealed danger from which an attentive glance would no doubt have saved him.

In the application of this principle to varying facts in suits for the recovery of damages for injury or death resulting from a fall in an elevator shaft, the weight of authority is in support of the judgment rendered by the trial court. Several of the leading cases are cited in the briefs. Instead of entering into an elaborate discussion of them we need only say that the facts disclosed by the plaintiff's evidence justify the conclusion of the trial court. The reason is thus stated in *Kauffman v. Machine Shirt Co.*, 140 Pac., 15. "Nor is the situation helped by the allegation that when he returned the elevator and shaft were to all appearance in the same condition in which he left them. There is no statement that he looked or that if he had looked there was any physical reason why he could not have seen that the elevator had been moved. In the absence of any such showing, the court must assume that 'to look was to see,' and that if he had looked he must have noticed the danger. One may not thus heedlessly disregard the commonest precautions for his own safety."

The basic principle of this decision is upheld in *Murry v. Earl*, 128 At., 436; *Poindexter v. Paper Co.*, 84 Mo. App., 352; *Gallagher v. Snellenburg*, 60 At., 307; *Sodomka v. Cudahy*, 163 N. C., 809; *Stanwood v. Clancey*, 75 At., 295; *Johnson v. Washington Route*, 209 Pac., 1100.

The intestate's negligence need not have been the sole proximate cause of the injury; if his negligence was one of the proximate causes the plaintiff is not entitled to judgment against the defendants or either of them. *Lunsford v. Mfg. Co.*, 196 N. C., 510. The motion for nonsuit was made at the close of the plaintiff's evidence; and as this evidence shows contributory negligence on the part of the intestate the plaintiff cannot recover. *Nowell v. Basnight*, 185 N. C., 142; *Foard v. Power Co.*, 170 N. C., 48. The conduct of the intestate, from which only one inference can reasonably be drawn, brings the plaintiff's case within the principle adhered to in *Royster v. R. R.*, 147 N. C., 347; *Williams v. Mfg. Co.*, 180 N. C., 64; *Pope v. R. R.*, 195 N. C., 67. Judgment is

Affirmed.

RANEY CLINE MOTOR COMPANY v. MRS. W. D. RASH.

(Filed 6 June, 1930.)

**1. Intoxicating Liquor F a—Innocent lienors are protected by the Federal Statute where car transporting intoxicants is seized and sold.**

The provisions of the Internal Revenue Act relating to the seizure and sale of property used in transporting intoxicating liquor on which the tax had not been paid is superseded by the mandatory provisions of section 26 of the National Prohibition Law, prescribing that the liens of innocent lienors attach to the proceeds of the sale of the property sold under the seizure in accordance with the priority of like liens after the expenses of storing the property, fee for the seizure and the costs of the sale are retained.

**2. Same—In this case held: vendor under conditional sale contract was entitled to possession of property for sale under the contract.**

In this case *held:* the vendor of an automobile under a title retaining contract of sale was entitled to possession of the automobile for the purpose of selling it under the terms of the contract as against his vendee who had repurchased the car after its seizure and sale under the provisions of the Federal Internal Revenue Act.

APPEAL by defendant from *Stack, J.,* at November Term, 1929, of ROWAN. Affirmed.

Action for the possession of an automobile under a conditional sales contract, heard on an agreed statement of facts in substance as follows:

1. On 4 August, 1928, the defendant purchased from the plaintiff a Chevrolet roadster and executed a conditional sales contract on the car to secure the payment of $420 in twelve monthly installments of $35.

2. The defendant made default, leaving due the plaintiff $280 with interest from 4 January, 1929.

3. After the registration of the conditional sales contract the car was seized by the Prohibition Division of the United States Government while in use for removing and concealing illicit whiskey in violation of section 3296 of the Internal Revenue Act, and was thereafter libelled and sold under section 3450. When seized the car was in the possession of and operated by one Roosevelt Taylor without the defendant's consent. At the trial in the District Court of the United States for the Middle District of North Carolina the plaintiff did not interplead; nor did it interplead when the car was sold under the order of condemnation.

4. The plaintiff and the defendant were present at the sale and the defendant became the highest bidder for the car at $296, and the Government of the United States executed to her a bill of sale for it and the State of North Carolina executed to her a certificate of title. When

the car was seized by the prohibition officers the defendant owned it and held a certificate of title from the State, showing a lien to the plaintiff.

5. The conditional sales contract was duly registered in the office of the register of deeds of Rowan County. It has not been canceled, and the defendant is due the plaintiff on the contract $280 with interest from 4 January, 1929.

6. The order of condemnation recites the seizure not only of the car, but of 55 gallons of illicit whiskey, removed and concealed, on which the tax had not been paid; the issuance of a warrant of arrest according to the prayer of the libel; the seizure of the car, and the absence of an answer or interplea. It was adjudged that the car be condemned and forfeited to the United States; that it be sold by the marshal; that the storage be paid from the appropriation set apart for that purpose; and that the proceeds of the sale be deposited with the Treasurer of the United States.

Upon the agreed facts Judge Stack adjudged that the defendant is indebted to the plaintiff in the sum of $280 with interest from 4 January, 1929, and that the plaintiff is entitled to the possession of the car for the purpose of selling it under the terms of the contract. The defendant excepted and appealed from the judgment.

*John C. Busby, W. T. Shuford and R. C. Jennings for appellant.*
*Hudson & Hudson for appellee.*

ADAMS, J. The defendant bought from the plaintiff a Chevrolet roadster and secured the purchase price by a conditional sales contract, duly registered, on which there is due the plaintiff $280, with interest from January, 1929. The plaintiff is therefore entitled to the possession of the car for the purpose of selling it unless the title retained by the plaintiff was annulled by the proceedings in the District Court of the United States for the Middle District of North Carolina.

In determining whether the car was forfeited we must bear in mind the following facts: (1) The Federal Prohibition Administrator for the Eighth Prohibition Division seized the car and fifty-five gallons of whiskey on which a tax was due and payable under section 600 of the Revenue Act of 1921 (42 Stat., 285; U. S., Compiled Sts., Cum. Sup., 1925, sec. 5986 e); (2) the untaxed whiskey was removed and concealed in violation of the Internal Revenue Law (R. S., sec. 3450; U. S. Compiled Sts., sec. 6352); (3) it is alleged by the defendant and admitted by the plaintiff that the car was engaged in the transportation of illicit whiskey on which the tax had not been paid.

Roosevelt Taylor, who had possession of the car and was transporting the liquor, was arrested (and afterwards prosecuted) and the car was

seized, as we interpret the record, under section 26 of the National Prohibition Act. 41 Stat., 315; U. S. Compiled Sts., 10138½ mm. The proceedings in the District Court were prosecuted under the provisions of the Internal Revenue Act. R. S., 3450, *supra;* U. S. Comp. Sts., 6352, *supra.* This section does not protect the interests of innocent lienors. *Goldsmith Grant Co. v. United States,* 254 U. S., 505, 65 Law Ed., 376. Section 26 of the National Prohibition Act, *supra,* does protect such interests. It provides that when the commissioner or any of his assistants shall discover any person in the act of transporting intoxicating liquor, in violation of law, in an automobile or other vehicle it shall be his duty to seize the liquor, to take possession of the vehicle, and to arrest the person in charge of it. Upon conviction of the offender the liquor shall be destroyed and the vehicle sold. The proceeds of the sale shall be applied to the expenses of keeping the property, the fee for the seizure, the cost of the sale, and the payment of all liens according to their priorities; and all liens shall be transferred from the property to the proceeds of the sale.

The question for decision is whether proceedings for the forfeiture of an automobile seized under section 26 of the National Prohibition Act, as one used for the unlawful transportation of intoxicating liquor, may be prosecuted under the Internal Revenue Act. R. S., 3450, *supra;* U. S. Compiled Sts., 6352, *supra.* A negative answer is given in a decision of the Supreme Court of the United States announced 19 May, 1930. *Richbourg Motor Co. v. United States; Davies Motors, Inc., v. United States.* In the opinion in these two cases the Court said: "By paragraph 5 of the Willis-Campbell Act of 23 November, 1921, ch. 134, 42 Stat., 222, 223, all laws relating to the manufacture, taxation and traffic in intoxicating liquors and penalties for their violation, in force when the National Prohibition Act was adopted, were continued in force except such provisions as are 'directly in conflict with any provision of the National Prohibition Act.' In *United States v. One Ford Coupe,* 272 U. S., 321, it was held that there was no such direct conflict between paragraph 26 and paragraph 3450 as to preclude the forfeiture of the interest of an innocent lienor under the latter, where the intoxicating liquor was concealed in the seized vehicle with intent to defraud the government of the tax, and where it did not appear that there was transportation of the liquor. In *Port Gardner Investment Co. v. United States,* 272 U. S., 564, and in *Commercial Credit Co. v. United States,* 276 U. S., 226, it was held that prosecution and conviction of the offender for the transportation of intoxicating liquor under the Prohibition Act barred forfeiture of the seized vehicle under paragraph 3450, since the disposition of the vehicle after the conviction, prescribed by section 26, is mandatory. These cases left undetermined the question

now presented, whether, under section 26, the mere arrest of the person discovered in the act of transportation, and the seizure of the transporting vehicle, bar the forfeiture under section 3450." After saying that the language of section 26 is in form mandatory throughout, the Court reached this conclusion: "It is plain that, whenever the vehicle seized by the arresting officer is discovered in use in the prohibited transportation, literal compliance with these requirements would compel the forfeiture under section 26, with the consequent protection of the interests of innocent lienors. To that extent section 26, if interpreted to exact such compliance, is in direct conflict with the forfeiture provisions of section 3450, and supersedes them whenever any person within the provisions of section 26 is discovered 'in the act of transporting intoxicating liquors in any vehicle' which liquor is 'removed, deposited, or concealed with intent to defraud the United States' of the tax."

The result is that the proceedings under section 3450 did not, under the facts of this case, interfere with the interests of the plaintiff as an innocent lienor of the property. The judgment is

Affirmed.

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S. N. BUCKNER v. CLYDE MAYNARD, W. L. MAYNARD, CARRIE BROWN AND HUSBAND, FRANK BROWN, LAURA MAYNARD, LEE MAYNARD, LEWIS MAYNARD AND SAM RIDDLE, MINORS, BY THEIR NEXT FRIEND, WALTER MAYNARD, AND D. R. FOUTS, COMMISSIONER.

(Filed 6 June, 1930.)

1. **Deeds and Conveyances C c—Where intent of grantor as expressed in deed is to convey to R. and her children, they take as tenants in common.**

   While ordinarily and standing alone an estate conveyed by deed to "R. and children, her bodily heirs and assigns," would carry a fee-simple estate to R., it will not so operate when taking the deed in its entirety, the intent of the grantor is ascertained to convey the lands to R. and her children as tenants in common, and such intent is in conformity with like expressions used in the other material and relevant portions of the deed.

2. **Same—In this case held: deed expressed intent to convey to R. and her children as tenants in common.**

   Where a conveyance of lands by the grantor uses the words in the premises to "R. and her children" in the witnesseth clause "convey to the said R. and her children, her bodily heirs and assigns": *Held*, the words "bodily heirs" refers to "children," and the terms thus reconciled express the intent of the grantor to vest the estate in R. and her children as tenants in common, and the children take a vested interest in the lands so conveyed.

BUCKNER *v.* MAYNARD.

APPEAL by defendants from *Harding, J.*, YANCEY Superior Court, heard at Marion, N. C., on 17 February, 1930, making a restraining order in this action permanent. Reversed.

This is an action; the controversy is over sixteen acres of land in Cane River Township, Yancey County, N. C. The action is to restrain D. R. Fouts, commissioner, and the other defendants who claim the land as tenants in common, from a sale of the land in an action brought for partition.

On 18 November, 1912, James Buckner and Sarah Ann Buckner made a deed to the land—pertinent portions of the deed: (a) "This deed made this 18 November, 1912, by James Buckner and Sarah Ann Buckner, of Madison County, and State of North Carolina, of the first part, *to Eller Riddle and her children,* of Yancey County and State of North Carolina, of the second part, (b) Witnesseth: That the said James Buckner and Sarah Ann Buckner, in consideration of fifty dollars ($50) to ..... paid by Eller Riddle, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell and convey to the said *Eller Riddle and children,* her bodily heirs and assigns, . . . (c) To have and to hold the aforesaid tract of land after the death of James Buckner and Sarah Ann Buckner. . . . To have and to hold the aforesaid tract or parcel, . . . and all privileges and appurtenances thereto belonging to the said ..... heirs and assigns, to ..... only use and behoof forever." The deed also indicates that a blank form was filled in and the covenants usually in a deed were crossed out.

The plaintiff claims title under a deed from Eller Riddle and husband James Riddle to Jeter Buckner, dated 16 September, 1918, conveying a fee-simple title to the land, and subsequent conveyances.

Defendants claim under a partition proceeding to sell the land for division as children of Eller Riddle, there being eight, and Eller Riddle and the parties who had a life estate being dead—D. R. Fouts, under the proceeding having been appointed commissioner to sell the land.

From a judgment permanently restraining defendant D. R. Fouts, commissioner, and the children of Eller Riddle from selling the land, defendants except, assign error and appeal to the Supreme Court.

*Chas. Hutchins for plaintiff.*
*Watson & Fouts for defendants.*

CLARKSON, J. We think the only question for our decision is whether the deed from James Buckner and Sarah Ann Buckner vested a fee-simple title in Eller Riddle, or an estate as tenants in common in Eller Riddle and her children. We think an estate vested as tenants in common in Eller Riddle and her children.

There is no question under our authorities that standing alone the language under the witnesseth clause "do grant, bargain, sell and convey to the said Eller Riddle and children her bodily heirs and assigns" would convey a fee simple. *Harrington v. Grimes,* 163 N. C., 76.

In the *Harrington case, supra,* the deed in the premises was (a) "to N. J. Buckner and her bodily heirs" in the witnesseth clause (b) "convey to said N. J. Buckner and her bodily heirs and assigns" habendum clause (c) "and her bodily heirs and assigns" warranty clause (d) "covenant with the said N. J. Buckner and her bodily heirs and assigns." In that case at p. 79, it is said: "But no such intent can be gathered from this instrument, nor does it contain any words or expressions to qualify or affect the ordinary meaning of the words 'bodily heirs' in connection with the estate limited to N. J. Buckner, and the deed, as stated, has been properly held to convey to such grantee an estate in fee simple." Under the law prior to C. S., 1734, the deed conveying the land to "her bodily heirs" would have conveyed a fee tail, which, under the statute, *supra,* was converted into a fee simple. We think the cases of *King v. Stokes,* 125 N. C., 514; *Acker v. Pridgen,* 158 N. C., 337, and *Puckett v. Morgan,* 158 N. C., 344, are more controlling than the *Harrington case, supra.*

In the *Puckett case, supra,* at p. 348, is the following: "In the will now under consideration, we think the testator Pace has so explained and qualified the use of the words 'her bodily heirs' as to plainly indicate that he meant the children or issue of his daughter Martha, and that the words are not employed in their legal or technical sense as representing heirs in general, but only as descriptive of a certain class of heirs."

In *Ellington v. Trust Company,* 196 N. C., p. 755, it is written: "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.*" *Boyd v. Campbell,* 192 N. C., 398.

In ascertaining the intent of the testator, we think an estate vested as tenants in common in Eller Riddle and her children. We construe the entire will to sense the intent (1) In the premises the conveyance purports to be to *"Eller Riddle and her children."* (2) In the witnesseth clause *"convey to the said Eller Riddle and children* her bodily heirs and assigns." The words "her bodily heirs" we think have reference to "and children" and affects the ordinary technical meaning "her bodily heirs." This construction would reconcile with the clear language in the premises. The words were used as *descriptio personæ* and not in

their technical sense. The habendum clause is left blank and the warranty clause is stricken out. We think the better interpretation is that the land vested in "Eller Riddle and her children." This at least is clear language in the premises, and the other part of the deed can be reconciled with this construction. Twice in the deed (1) "Eller Riddle and her children" (2) "Eller Riddle and children," etc.

*Martin v. Knowles,* 195 N. C., 427, is easily distinguishable from the present case.

In *Tate v. Amos,* 197 N. C., at p. 161, citing numerous authorities, is the following: "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." The judgment below is

Reversed.

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G. F. MOOREFIELD v. R. L. ROSEMAN ET AL.

(Filed 6 June, 1930.)

**Fraudulent Conveyances C e—Joinder of beneficiaries in deeds of trust in action to set aside the deeds as fraudulent is not misjoinder.**

In an action by a judgment creditor to set aside alleged fraudulent conveyances of property by deeds of trust and mortgages as made to hinder delay and defraud him in the collection of his judgment under execution, the joinder therein of the grantees and beneficiaries in the deeds is not objectionable as a misjoinder, C. S., 456, and demurrer to the complaint alleging such conveyances entered on the ground of misjoinder of causes and parties, and that it failed to state a cause of action is properly overruled.

APPEAL by defendants from *Stack, J.,* at November Term, 1929, of ROWAN. Affirmed.

This is an action to have certain transfers of personal property and certain conveyances of land by mortgages and deeds of trust, made by defendant R. L. Roseman to his codefendants, declared void as against the plaintiff, a judgment creditor of said defendant, for that same were made with intent to hinder, delay and defraud plaintiff in the collection of his judgment.

From judgment overruling demurrers to the complaint, defendants appealed to the Supreme Court.

*P. S. Carlton and R. Lee Wright for plaintiff.*
*Rendleman & Rendleman for defendants.*

PER CURIAM. At February Term, 1929, of the Superior Court of Rowan County, in an action begun in said court on 15 August, 1928, plaintiff recovered of the defendant, R. L. Roseman, a judgment for the sum of $725 as damages resulting from an assault committed on plaintiff by said defendant. The said judgment has not been satisfied, notwithstanding executions have been issued against both the property and the person of the defendant. The execution against the property of the defendant was returned unsatisfied; the defendant has procured his discharge from the execution against his person by taking the oath prescribed by statute for insolvent debtors. C. S., 1631.

In this action plaintiff alleges that at the commencement of the action in which plaintiff recovered judgment against the defendant, R. L. Roseman, the said defendant was the owner of considerable property, both real and personal; that during the pendency of said action, in anticipation of plaintiff's recovery therein, and with intent to hinder, delay and defraud the plaintiff, the said defendant transferred his personal property and conveyed his real estate by mortgages and deeds of trust to certain of his codefendants; that the defendants to whom he transferred his personal property paid nothing therefor, and that the alleged indebtedness secured by the mortgages and deeds of trust, was and is, wholly or in part, fictitious. Upon the allegations of his complaint, plaintiff prays judgment that said transfers and said mortgages and deeds of trust be declared void, to the end that the personal property and the real estate transferred and conveyed thereby may be subjected to the payment of his judgment.

Plaintiff moved that the beneficiaries named in the mortgages and deed of trust be made parties defendant. This motion was allowed. It was ordered that plaintiff have thirty days within which to have summons served on new parties.

There was no error in the judgment overruling the demurrer for that the facts stated in the complaint are not sufficient to constitute a cause of action, or for that several causes of action have been improperly united. The facts stated in the complaint constitute a cause of action against the defendant, R. L. Roseman; the other defendants are necessary parties for a complete determination of the action. C. S., 456. The judgment is

Affirmed.

STATE v. WILLIAM MITCHELL.

(Filed 6 June, 1930.)

**Criminal Law L e—Error, if any, in excluding testimony intended to impeach State's character witnesses held not reversible error.**

In this case *held:* defendant's exception to the exclusion of testimony sought to be elicited on cross-examination from certain of the State's witnesses who had testified to the good character of another State witness and to the character of the deceased, offered as tending to impeach such character witnesses, if it be conceded that the testimony was competent for this restricted purpose, its exclusion cannot be held for reversible error.

APPEAL by the defendant from *Stack, J.,* at March Term, 1930, of BURKE. No error.

This is a criminal action in which the defendant was tried on an indictment for murder, and convicted of manslaughter.

From judgment on the verdict, that defendant be confined in the State's prison at hard labor for a term of not less than twelve nor more than eighteen years, defendant appealed to the Supreme Court.

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

*Avery & Patton, S. J. Ervin and S. J. Ervin, Jr., for defendant.*

PER CURIAM. There was no error on the trial of this action for which the defendant is entitled to a new trial.

The only assignments of error on his appeal to this Court are based on his exceptions to the exclusion of testimony sought to be elicited on the cross-examination of witnesses for the State who had testified that the general character of another witness for the State was good, and that the deceased did not have a general reputation as a dangerous man. This testimony was offered as evidence tending to impeach these witnesses, and not as evidence upon the issue to be determined by the jury. If it be conceded that the testimony was admissible for the restricted purpose for which it was offered, we cannot hold that its exclusion was reversible error.

The conflicting evidence tending to sustain the verdict, and also in support of defendant's plea of self-defense, was submitted to the jury under a charge to which there were no exceptions. The judgment must be affirmed. We find

No error.

C. S. MUNRO v. CAROLINA RUBBER COMPANY AND JUSTUS COLLINS.

(Filed 6 June, 1930.)

**Pleadings D a—Demurrer should be overruled if the allegations of the complaint are sufficient to any extent to allege cause of action.**

Where a complaint to any extent states a cause of action, or sufficient facts can be gathered therefrom, its allegation taken to be true, a demurrer thereto should be overruled.

APPEAL by defendants from *Stack, J.*, at September Term, 1929, of ROWAN. Affirmed.

*R. Lee Wright for plaintiff.*
*John C. Busby and W. T. Shuford for defendants.*

PER CURIAM. The defendants demurred to the complaint. The court below overruled the demurrer. The defendant excepted, assigned error and appealed to the Supreme Court. We think the demurrer should have been overruled.

On a demurrer we consider only the sufficiency of the allegations set forth in the complaint. For the purpose of the demurrer the allegations are taken to be true. A demurrer cannot be sustained to a complaint if in any portion or to any extent it presents a cause of action, or if sufficient facts can be fairly gathered therefrom. On this aspect we think the demurrer should have been overruled. The judgment below is

Affirmed.

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GEORGE E. NISSEN COMPANY v. W. M. NISSEN.

(Filed 6 June, 1930.)

**Appeal and Error A d—Appeal from order allowing amendments to pleadings which does not affect a substantial right will be dismissed.**

Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. C. S., 638.

APPEAL by defendant from *Finley, J.*, at November Term, 1929, of FORSYTH. Appeal dismissed.

*Parrish & Deal for plaintiff.*
*Efird & Liipfert, John M. Robinson, Fred S. Hutchins and Hunter M. Jones for defendant.*

PER CURIAM. The court below in its discretion allowed the plaintiff to amend its complaint. The defendant excepted, assigned error and appealed to this Court. We think the appeal premature and fragmentary.

C. S., 638: "An appeal may be taken from every judicial order or determination of a judge of a Superior Court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

"The rule generally stated is that appeals are intended to present for review the whole case, and a party can preserve his rights by taking exceptions and bringing them forward on final hearing, unless the order affects a substantial right which would be put in jeopardy by a delay.' McIntosh N. C. Prac. & Proc., p. 776. *Smith v. Miller,* 155 N. C., 242; *Penn-Allen Cement Co. v. Phillips,* 182 N. C., 437; *Leroy v. Saliba,* 182 N. C., 757; *Contracting Co. v. Power Co.,* 195 N. C., 649; *Hosiery Mill v. Hosiery Mills, ante,* 596; *Ellis v. Ellis, ante,* 767.

In the present action the amendment to the complaint does not affect such a substantial right that defendant is allowed under the statute to appeal from. The defendant attempts to jump over the stile before he gets to it.

For the reasons given

Appeal dismissed.

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WINNIE WITHERS BLACK v. C. O. BLACK.

(Filed 27 November, 1929.)

APPEAL by defendant from *Sink, Special Judge,* at September Special Term, 1929, of MECKLENBURG.

Application for alimony without divorce.

From an order awarding an allowance, the defendant appeals, assigning errors.

*Whitlock, Dockery & Shaw for plaintiff.*

*T. L. Kirkpatrick and Stewart, McRae & Bobbitt for defendant.*

PER CURIAM. The allegations of the complaint, which the judge finds to be true for the purposes of his order, are sufficient to warrant an

allowance for the wife's necessary subsistence and counsel fees as authorized by C. S., 1667, as amended by chapter 123, Public Laws 1921, and chapter 52, Public Laws 1923.

It would serve no useful purpose to set out the facts in detail. See *Byerly v. Byerly,* 194 N. C., 532, 140 S. E., 158; *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9; *Price v. Price,* 188 N. C., 640, 125 S. E., 264; *Allen v. Allen,* 180 N. C., 465, 105 S. E., 11.

The order will be upheld.

Affirmed.

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M. F. TEETER v. J. B. LINKER.

(Filed 4 December, 1929.)

APPEAL by plaintiff from *MacRae, Special Judge,* at March Special Term, 1929, of CABARRUS.

Civil action tried upon the following issues:

"1. In what amount, if anything, is the defendant indebted to the plaintiff? A. (by court): $6,200, subject to credit on notes and interest according to terms of notes and subject to amount allowed for counterclaim as of date of summons.

"2. In what amount, if anything, is the plaintiff indebted to the defendant because of his counterclaim? A. $3,000."

From a judgment on the verdict in favor of the plaintiff for $3,365.75 with interest from 18 March, 1929, the plaintiff appeals, assigning errors.

*Hartsell & Hartsell for plaintiff.*

*H. S. Williams, Palmer & Blackwelder and Armfield, Sherrin & Barnhardt for defendant.*

PER CURIAM. The record contains a number of exceptions which were the subject of earnest debate before us, and while some of them are not altogether free from difficulty, a careful perusal of the entire case leaves us with the impression that substantial justice had been accorded the parties, and that the result of the trial ought not to be disturbed.

The verdict and judgment will be upheld.

No error.

VASTENIA BAKER HUNSUCKER v. NORCOTT MILLS COMPANY.

(Filed 4 December, 1929.)

APPEAL by defendants from *Stack, J.*, at August Term, 1929, of CABARRUS. No error.

*H. S. Williams for the plaintiff.*
*Armfield, Sherrin & Barnhardt and W. H. Beckerdite for defendants.*

PER CURIAM. Plaintiff brought suit to recover damages for personal injury alleged to have been inflicted through the negligence of the defendants. The material allegations of the complaint were denied by the answer. The two issues of negligence and damages were answered in favor of the plaintiff who recovered judgment upon the verdict. The only two questions presented by the appeal are (1) whether an issue as to contributory negligence should have been submitted to the jury, and (2) whether the action should have been dismissed as in case of nonsuit. We are of opinion that upon each of these questions the ruling of the trial court was correct and that the action has been disposed of in substantial compliance with the requirements of the law.

We find no error justifying a new trial.

No error.

CUTTER REALTY COMPANY v. ERNEST ELLISON.

(Filed 11 December, 1929.)

APPEAL by defendant from *Shaw, Judge,* at the regular October Term, 1929, of MECKLENBURG. Affirmed.

*Stewart, McRae & Bobbitt for plaintiff.*
*Taliaferro & Clarkson for defendant.*

PER CURIAM. It was admitted by counsel upon the argument that the disposition of this appeal shall be controlled by *DeLaney v. Hart, ante,* 96. Judgment

Affirmed.

L. A. JAMES AND WALTER JAMES v. WESTERN CAROLINA POWER COMPANY.

(Filed 11 December, 1929.)

APPEAL by defendant from *Lyon, Emergency Judge,* at July Special Term, 1929, of BURKE. No error.

*Avery & Patton for plaintiffs.*

*W. S. O'B. Robinson, John M. Mull, S. J. Ervin and S. J. Ervin, Jr., for defendant.*

PER CURIAM. In their complaint, the plaintiffs allege that they are the owners of a tract of land in Burke County containing 60½ acres, more or less, and that a small stream or natural water course flows through several acres of the lowlands and runs into Upper Creek, and that Upper Creek empties into Catawba River. They allege that the defendant in 1925 constructed a dam across Catawba River and has since operated a hydro-electric plant for the purpose of manufacturing and selling electricity; that in consequence of the construction of the dam the water has been ponded upon the land of the plaintiffs, which has thereby been permanently injured. They demand judgment against the defendant for actual and permanent damages done to their premises and for such other relief as they may be entitled to. The defendant filed an answer denying the material allegations of the complaint and alleged that it is authorized by its charter to construct and maintain a dam or dams upon Catawba River. It pleaded the right of eminent domain under the laws of the State, requested that plaintiff's damages, if any, be permanently assessed, and demanded that upon payment of such damages it be given the right, privilege and easement to continue the maintenance and operation of its plant as it is now located and constructed.

The court submitted the following issue: "What permanent damages, if any, are the plaintiffs entitled to recover of the defendant for and on account of the construction, maintenance and operation of the dam of the defendant at Rhodhiss?" The issue was answered in favor of the plaintiffs and their damages were assessed. Judgment was rendered upon the verdict for the amount of their recovery and it was adjudged that satisfaction of the judgment should transfer, convey to, and vest in the defendant, its successors and assigns, the right, privilege, and easement to continue the maintenance and operation of its dam and plant at or near Rhodhiss as now located and constructed. To the judgment awarded the defendant excepted and appealed therefrom to the Supreme Court.

We have considered the exceptions argued orally and in the appellant's brief and have concluded that they do not present any sufficient ground for granting a new trial. Several of the exceptions were abandoned on the argument and we are of opinion that those which were relied upon do not, in view of the defendant's answer, the charge to the jury, the verdict, and the judgment, entitle the defendant to another hearing. We find

No error.

JOHN BURGIN v. GEORGE DOUGHERTY, AND ROBERT COLEMAN, MINOR, BY D. W. HARRISON, GUARDIAN AD LITEM.

(Filed 11 December, 1929.)

APPEAL by defendant, Dougherty, from *Johnson, Special Judge*, at June Term, 1929, of BUNCOMBE. No error.

*J. Scroop Styles for plaintiff.*
*Zeb. F. Curtis for defendant Dougherty.*

PER CURIAM. This is a proceeding for the partition of real estate. The plaintiff alleges, and it is not denied, that Spencer Burgin was the owner in fee of the land in controversy. He died leaving surviving him his widow, Jane Burgin, who has a dower interest in the land, and the plaintiff and his (Spencer's) daughter, Mary Burgin Dougherty. On 10 June, 1920, Mary Burgin Dougherty and her husband, George Dougherty, the appellant, legally adopted the defendant Robert Franklin Coleman as their child and heir at law. Mary Burgin Dougherty died leaving no child of her own, and it is alleged that Robert Franklin Coleman is her only heir. Answers were duly filed by the defendants and upon the trial only one issue was submitted to the jury, and in response it was found that the plaintiff is the owner and entitled to a one-half undivided interest in and to the land described in the complaint. Thereupon judgment was rendered for the plaintiff and the defendant Dougherty excepted and appealed.

We have examined all the exceptions of the appellant and are of opinion that the case has been tried in substantial compliance with the law. The only exceptions which require special notice are those relating to the exclusion of evidence offered by the appellant tending to show general reputation in the community as to the maternity of the plaintiff. This evidence was rejected on the ground that such relation must be established by evidence tending to show reputation in the

family of the parties concerned. *Ashe v. Pettiford,* 177 N. C., 132; *Turner v. Battle,* 175 N. C., 219; *Erwin v. Bailey,* 123 N. C., 628. See, also, *Jelser v. White,* 183 N. C., 126. We are of opinion that the exceptions to the instruction given the jury are not such as to require another trial.

No error.

J. W. PLESS v. SOUTHERN RAILWAY COMPANY.

(Filed 11 December, 1929.)

APPEAL by plaintiff from *Harwood, Special Judge,* at July Term, 1929, of MCDOWELL.

Civil action to recover damages for an alleged negligent injury to plaintiff's automobile when it struck defendant's train on 10 May, 1926, at a crossing near the village of Tate Springs, Tenn.

The usual issues of negligence, contributory negligence and damages were submitted to the jury, the first of which was answered in favor of the defendant, and from the judgment entered thereon, the plaintiff appeals, assigning errors.

*W. T. Morgan and Pless & Pless for plaintiff.*

*Sidney S. Alderman, Winborne & Proctor and Ervin & Ervin for defendant.*

PER CURIAM. 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. *Herman v. R. R.,* 197 N. C., 718.

No error.

CORRIE WILLIAMS, ADMINISTRATRIX OF CLAUDE WILLIAMS, v. BEMIS LUMBER COMPANY.

(Filed 18 December, 1929.)

APPEAL by plaintiff from *McElroy, J.,* at June Term, 1929, of GRAHAM. Affirmed.

*T. M. Jenkins and A. Hall Johnston for plaintiff.*

*R. L. Phillips for defendant.*

PER CURIAM. This action was instituted by the plaintiff to recover damages of the defendant for the alleged negligent infliction of personal injury resulting in the death of her intestate. At the conclusion of the evidence judgment of nonsuit was rendered and the plaintiff excepted and appealed.

The judgment must be affirmed. The evidence considered in the light most favorable to the plaintiff is not sufficient to sustain a judgment against the defendant. The record presents nothing more than familiar and established principles in the law of negligence and a repeated application of these principles to evidence is deemed to be unnecessary.

Judgment affirmed.

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REMUS WIMBS v. TALLASSEE POWER COMPANY.

(Filed 18 December, 1929.)

APPEAL by defendant from *McElroy, J.*, at June Term, 1929, of GRAHAM.

Civil action to recover damages for the alleged negligent failure of defendant, in the exercise of ordinary care, to furnish plaintiff, an employee, a sufficient number of competent helpers when he was ordered by the defendant to carry a heavy iron culvert, or drain pipe, 12 feet long, 10 inches in diameter, weighing about 600 pounds, up a steep mountain side and without providing proper implements for the work.

Upon denial of liability, the usual issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of the plaintiff.

From the judgment rendered thereon, the defendant appeals, assigning errors.

*T. M. Jenkins for plaintiff.*

*S. W. Black and R. L. Phillips for defendant.*

PER CURIAM. 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 no sufficient reason has been made manifest for disturbing the verdict and judgment, which accordingly, will be upheld.

No error.

## TOM LEWIS v. BABCOCK LUMBER AND LAND COMPANY.

(Filed 30 December, 1929.)

APPEAL by defendant from *McElroy, J.*, at June Term, 1929, of GRAHAM. No error.

Action to recover damages for personal injury sustained by plaintiff while at work as an employee of defendant.

From judgment on the verdict establishing defendant's liability, and assessing plaintiff's damage at $3,000, defendant appealed to the Supreme Court.

*R. L. Phillips and T. M. Jenkins for plaintiff.*

*A. Hall Johnston for defendant.*

PER CURIAM. Defendant's assignments of error based on its exceptions to the ruling of the court on its objections to evidence offered by plaintiff, and to the instruction of the court with respect to such evidence, cannot be sustained.

The evidence tending to show that defendant was negligent as alleged in the complaint, and that such negligence was the proximate cause of plaintiff's injury was properly submitted to the jury. The judgment is affirmed.

No error.

## L. M. COLEMAN v. STATE HIGHWAY COMMISSION.

(Filed 30 December, 1929.)

APPEAL by defendant from *McElroy, J.*, at April Term, 1929, of CLAY. No error.

*Moody & Moody, D. Witherspoon and Edmund B. Norvell for plaintiff.*

*Charles Ross and J. B. Gray for defendant.*

PER CURIAM. This was a special proceeding before the clerk of the Superior Court of Clay County for an assessment of damage done plaintiff's land by the defendant's appropriation of soil and gravel in the construction of a highway. The issues were answered in favor of the plaintiff, and from the judgment rendered the defendant appealed. We find no error in the exclusion of evidence, and there was no such evidence of general or special benefits as would entitle the defendant to the rejected issue on this point.

No error.

J. O. BUSICK AND W. H. GENTRY, TRADING AS D. W. BUSICK'S SON, v. W. M. COLLINS.

(Filed 22 January, 1930.)

CIVIL ACTION, before *MacRae, Special Judge,* at February Term, 1929, of ROCKINGHAM.

The plaintiff instituted an action against the defendant to recover the sum of $279.20 for goods sold and delivered to members of the family of defendant. The defendant denied liability upon the account, and the cause was heard before the recorder, who rendered judgment for the plaintiff. Thereupon the defendant appealed to the Superior Court.

At the conclusion of the evidence the trial judge dismissed the action, and the plaintiff appealed.

*Brown & Trotter for plaintiff.*
*No counsel for defendant.*

PER CURIAM. The verified itemized statement offered in evidence was competent. *Wright Co. v. Green,* 196 N. C., 197, 145 S. E., 16.

Furthermore, the itemized statement was not objected to at the time it was offered and admitted.

Irrespective of the itemized statement, there was testimony, which, if true, tended to establish the liability of defendant.

Reversed.

MRS. ELIZABETH BERRY v. INTER-CAROLINA MOTOR BUS COMPANY.

(Filed 22 January, 1930.)

APPEAL by defendant from *Sink, Special Judge,* and a jury, at April Term, 1929, of MECKLENBURG. No error.

This was an action for actionable negligence brought by plaintiff against defendant for injuries received when a passenger in defendant's bus, which left the highway. The defendant denied negligence and set up the defense of contributory negligence. The defendant further introduced evidence to the effect that plaintiff's injury was not caused by defendant; that her injury was from other causes.

The plaintiff testified, in part: "I am the plaintiff in this action. On 24 April, 1928, I came to Charlotte, North Carolina, from Greer, South

Carolina, where I had been to see my sick mother. I paid my fare, and on the other side of King's Mountain the bus in which I was riding started around a closed car, which did not sufficiently yield the road, and when the bus went out on the dirt off the pavement the bank gave way. The bus plowed along the bank and went down the fill until it reached level ground, when it sank down in the soft dirt, when it gave a sudden jerk back and forth and tilted, but did not turn over. The sudden jerk strained my foot. I had my feet against the seat in front of us and held with my hand. My leg struck the seat in front of us in two places between the knee and ankle. I got out of the bus. At this time I did know that I was hurt, but I did not think it would amount to anything much, but when I got on my feet it began to ache and hurt, and when I reached Charlotte my left ankle was swollen up," etc.

There was further evidence on the part of plaintiff to the effect that she was permanently injured, and plaintiff's contention was also to the effect that it was caused by defendant's negligence and not other causes.

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

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

2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $5,000."

*L. Laurence Jones and J. L. DeLaney for plaintiff.*
*John W. Hester for defendant.*

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence, defendant moved for judgment as in case of nonsuit. C. S., 567. These motions were overruled, and in this we think there was no error.

We have read the record and the well prepared briefs of the able counsel with care. The court below gave defendant's prayers for instructions. We think, from the facts in this case, the issues were the proper ones to have been submitted to the jury.

We see no error in the admission or exclusion of evidence during the trial, or in the charge of the court below. There is no new or novel proposition of law presented by the record. It was mainly a question of fact for the jury to determine. They have answered the issues in favor of plaintiff. In a case of this kind, we have jurisdiction only to review upon appeal any decisions of the court below "upon any matter of law or legal inference." We find in law

No error.

LUCY MERCER v. KNIGHTS OF KING SOLOMON, C. P. RICH, GRAND ENDOWMENT SECRETARY OF THE KNIGHTS OF KING SOLOMON.

(Filed 26 February, 1930.)

APPEAL by defendants from *Cranmer, J.*, at November Term, 1929, of EDGECOMBE. No error.

*R. T. Fountain for plaintiff.*
*J. A. Edgerton and T. T. Thorne for defendant.*

PER CURIAM. The plaintiff alleged that Joyner Battle died 2 July, 1927; that he had been a member of the lodge known as the "Pride of Rocky Mount," Lodge No. 8, Knights of King Solomon, and that on 21 December, 1924, the Knights of King Solomon issued a mutual benefit certificate of insurance on the life of said Joyner Battle in the sum of $300, the amount of which was to be paid upon the death of said Joyner Battle to Lucy Mercer, beneficiary therein named.

The defendants answered denying liability. The jury found that the plaintiff was entitled to recover the sum of $325 with interest from 23 September, 1927. Judgment was rendered accordingly, and the defendants excepted and appealed.

We are of opinion that the case was tried in substantial compliance with the requirements of law and the record discloses no error which entitles the defendants to a new trial.

No error.

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J. J. YOUNG v. CENTRAL OIL AND FERTILIZER COMPANY.

(Filed 5 March, 1930.)

APPEAL by defendant from *Lyon, Emergency Judge*, at October Term, 1929, of JOHNSTON. No error.

Action to recover the value of cotton seed sold and delivered by plaintiff to defendant.

From judgment on the verdict that plaintiff recover of the defendant the sum of $277.35, and the costs of the action, defendant appealed to the Supreme Court.

*J. R. Williams and Wellons & Wellons for plaintiff.*
*Abell & Shepard and Biggs & Broughton for defendant.*

PER CURIAM. We find no error in the trial of this action in the Superior Court.

There was evidence in support of affirmative answers to the issues submitted to the jury. This evidence was submitted to the jury under instructions which are free from error. The judgment is affirmed.

No error.

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THE AMERICAN APPRAISAL COMPANY v. W. B. BLADES ET AL.

(Filed 5 March, 1930.)

APPEAL by defendants from *Midyette, J.*, at September Term, 1929, of CRAVEN.

Civil action to recover the sum of $1,778.47 for professional services in making an appraisal of the properties of Morehead Bluffs, Inc., located on Bogue Sound, near Morehead City, N. C., at the instance of the defendants.

A jury trial was waived, and by agreement, the judge found the facts and rendered judgment accordingly.

From a judgment in favor of plaintiff, the defendants appeal, assigning errors.

*D. L. Ward and D. L. Ward, Jr., for plaintiff.*
*Whitehurst & Barden for defendants.*

PER CURIAM. The case presents no more than a disputed issue of fact. This has been determined in favor of the plaintiff.

No error.

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ELLIOTT RADIO COMPANY v. ETHEL M. HAYNES.

(Filed 19 March, 1930.)

APPEAL by plaintiffs from *Nunn, J.*, at November Term, 1929, of WAKE. No error.

This is an action to recover upon a contract in writing by which defendant guaranteed the payment of the account of the Radio Corporation of Virginia with the plaintiffs for merchandise thereafter to be sold and delivered.

Defendant contends that no credit has been extended to the Radio Corporation of Virginia by the plaintiffs since the date of said contract and that therefore plaintiffs are not entitled to recover in this action.

From judgment on the verdict that plaintiffs recover nothing of defendant by this action, plaintiffs appealed to the Supreme Court.

*T. D. Parish for plaintiffs.*
*J. C. Little for defendant.*

PER CURIAM. There was no error in the trial of this action. The judgment is affirmed.

No error.

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CITY OF WILMINGTON v. R. A. PARSLEY.

(Filed 26 March, 1930.)

APPEAL by respondent from *Grady, J.*, at December Term, 1929, of NEW HANOVER.

Proceeding for condemnation of land, tried upon the following issue:

"1. What damages, if anything, is the defendant entitled to recover of the plaintiff for the rights, privileges and easements taken by it, and injuries to his remaining lands by the construction of new Third Street, as shown on the blue print? Answer: "$2,500."

The respondent, feeling aggrieved at the smallness of the damages awarded, appeals from the judgment entered on the verdict, assigning errors.

*John J. Burney for petitioner.*
*Bryan & Campbell for respondent.*

PER CURIAM. A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the decisions on the subject, and that no serious harm has come to the respondent in the particulars pointed out by his exceptions. *Wade v. Highway Commissioners*, 188 N. C., 210, 124 S. E., 193; *Elks v. Commissioners*, 179 N. C., 241, 102 S. E., 414.

The verdict and judgment will be upheld.

No error.

## IN THE MATTER OF THE LAST WILL AND TESTAMENT OF H. P. WHITSETT.

(Filed 2 April, 1930.)

APPEAL by propounder from *Cranmer, J.*, at September Term, 1929, of ALAMANCE. No error.

This is a caveat to the probate of a paper-writing as the last will and testament of H. P. Whitsett, deceased.

The issues submitted to the jury were answered as follows:

"1. Was the execution of the paper-writing purporting to be the last will and testament of H. P. Whitsett procured by the fraud and undue influence of Walter P. Moser? Answer: Yes.

2. Did H. P. Whitsett, at the time of the execution of the said paper-writing, to wit, 7 May, 1926, have sufficient mental capacity to execute a will? Answer: No.

3. Is the paper-writing propounded and every part thereof, the last will and testament of H. P. Whitsett? Answer: No."

From judgment in accordance with the verdict, the propounder appealed to the Supreme Court.

*C. A. Hall and Coulter, Cooper & Carr for propounder.*
*Julius C. Smith and J. Dolph Long for caveators.*

PER CURIAM. The assignments of error on this appeal are based upon exceptions to the rulings of the court upon objections to the admission and rejection of testimony offered as evidence, and to instructions in the charge of the court to the jury. They cannot be sustained. There was no error upon the trial and the judgment is affirmed.

No error.

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## EARL THOMAS, BY HIS NEXT FRIEND, E. G. McCULLOUGH, v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY.

(Filed 23 April, 1930.)

APPEAL by plaintiff from *Clement, J.*, at October Term, 1929, of STANLY.

Civil action by plaintiff, clerk in the defendant's grocery store, to recover for an injury sustained on 6 April, 1928, while he was cutting a piece of cheese for a customer with a dull, long-bladed and short-handled knife, which slipped and caused him to cut his finger—later becoming

infected—said knife having been used by plaintiff for the same purpose for about six months.

From a judgment of nonsuit entered at the close of plaintiff's evidence the plaintiff appeals, assigning errors.

*O. J. Sikes and G. Hobart Morton for plaintiff.*
*I. R. Burleyson for defendant.*

PER CURIAM. We perceive no valid reason for disturbing the judgment of nonsuit. The principles and authorities applicable and pertinent are discussed in *Gaither v. Clement,* 183 N. C., 450, 111 S. E., 782, and *Wright v. Thompson,* 171 N. C., 88, 87 S. E., 963.

Affirmed.

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BEULAH STEWART SADLER v. ISRAEL SCHWARTS ET AL.

(Filed 30 April, 1930.)

APPEAL by defendants from *Sink, Special Judge,* at January Special Term, 1930. From MECKLENBURG.

Civil action to recover damages for an alleged negligent injury caused by a collision between a Chrysler automobile, in which plaintiff was riding, and a truck belonging to the defendants and operated at the time by an employee.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning errors.

*C. A. Cochran and John M. Robinson for plaintiff.*
*J. Laurence Jones for defendants.*

PER CURIAM. The case presents no new question of law and the record contains no reversible error. Hence, the verdict and judgment will be upheld.

No error.

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ARTHUR DAVIDSON v. McDONALD SERVICE COMPANY, INC.

(Filed 14 May, 1930.)

APPEAL by defendant from *Sink, Special Judge,* at February Special Term of MECKLENBURG. No error.

*B. G. Watkins and John M. Robinson for plaintiff.*
*Ralph V. Kidd and C. H. Gover for defendant.*

PER CURIAM. The defendant's assignments of error present no sufficient cause for reversing the judgment or granting a new trial.
No error.

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STATE v. MARGARET GRIEVAS.

(Filed 14 May, 1930.)

CRIMINAL ACTION, before *Lyon, J.*, at December Term, 1929, of LENOIR.

*Attorney-General Brummitt and Assistant Attorney-General Nash for the State.*
*O. H. Allen for defendant.*

PER CURIAM. The defendant was charged with a violation of the prohibition law. There was sufficient evidence to be submitted to the jury. An examination of the record and brief discloses
No error.

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V. C. V. SHEPHERD v. GULF REFINING COMPANY.

(Filed 21 May, 1930.)

APPEAL by plaintiff from *Harding, J.*, at November Term, 1929, of HENDERSON.
Civil action to enforce specific performance of an alleged contract to sell land.
There was a judgment of nonsuit, and the plaintiff appeals.

*Ewbank, Whitmire & Weeks for plaintiff.*
*Kitchin & Kitchin, Galloway & Galloway and Shipman & Arledge for defendant.*

PER CURIAM. The nonsuit was entered on the theory that the plaintiff had failed to show a contract in writing, or any memorandum or

note thereof, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized, which described the property with sufficient definiteness to admit of identification as required by C. S., 988. In this we find no error.

Affirmed.

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MARY LOUISE MACRAE AND CHARLES B. MACRAE v. COMMERCE UNION TRUST COMPANY.

(Filed 21 May, 1930.)

APPEAL by defendant from *Sink, Special Judge,* at April Term, 1930, of BUNCOMBE. Remanded.

*Alfred S. Barnard for appellant.*
*J. M. Horner, Jr., for appellees.*

PER CURIAM. The cause is remanded with direction to make the ultimate beneficiaries parties to the proceeding. *Hamilton v. Henderson,* 197 N. C., 353.

Remanded.

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CORBITT TRUCK COMPANY v. W. H. AVERETT ET AL.

(Filed 28 May, 1930.)

CIVIL ACTION, before *Devin, J.,* at October Term, 1929, of GRANVILLE.

The plaintiff instituted this action against the defendants, alleging that the defendants were partners, and that on or about 17 October, 1927, it sold a passenger bus to the defendant, W. H. Averett, and that in purchasing said bus the said Averett was acting for and in behalf and as agent for the partnership. The defendant denied partnership.

The trial judge submitted the following issue to the jury: "Were the defendants, Valeria Averett and John W. Hester, partners of the defendant, W. H. Averett, and, as such, jointly liable for the purchase of the bus, as alleged in the complaint?"

The jury answered the issue "No."

From judgment upon the verdict the plaintiff appealed.

*Hancock & Taylor and Gatling, Morris & Parker for plaintiff.*
*Thornwell Lanier for defendants.*

PER CURIAM. The case was tried upon the sole theory that the defendants were partners. The law of partnership as applied to the facts was accurately defined and expounded by the trial judge. The evidence warranted the submission of the cause to the jury, and the verdict of the jury determines the merits of the controversy.

No error of law is disclosed and the judgment is affirmed.

No error.

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JOHN W. WALKER v. EDITH MAE WALKER.

(Filed 28 May, 1930.)

APPEAL by defendant from *Finley, J.*, at April Term, 1930, of CHEROKEE. Affirmed.

*Dillard & Hill and Moody & Moody for plaintiff.*
*J. D. Mallonee and D. Witherspoon for defendant.*

PER CURIAM. The plaintiff brought suit to annul his marriage with defendant, and to this end set out three causes of action in his complaint. The defendant demurred for misjoinder of causes and her demurrer was overruled.

The judgment is affirmed. *Hoke v. Glenn*, 167 N. C., 594; *Trust Co. v. Wilson*, 182 N. C., 166; *S. v. Trust Co.*, 192 N. C., 246; *Griffin v. Baker, ibid.*, 297; *S. v. McCanless*, 193 N. C., 200.

Affirmed.

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J. M. HONBARRIER, J. A. LINGLE AND J. H. FRICK, v. W. M. MCCOMBS, P. J. LYERLY AND C. R. YOST.

(Filed 6 June, 1930.)

APPEAL by plaintiffs from *Shaw, J.*, at March Term, 1930, of ROWAN. Affirmed.

*J. M. Waggoner for plaintiffs.*
*C. P. Barringer for defendants.*

PER CURIAM. This is a petition of defendants for a writ of recordari and supersedeas. C. S., 630. The court below heard the petition, found the facts, and rendered a judgment or order that the writ of recordari and supersedeas issue. Upon an inspection of the entire record, we see no error in the judgment or order of the court below. The judgment is

Affirmed.

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CONTINENTAL MORTGAGE COMPANY v. CITIZENS BANK AND TRUST COMPANY ET AL.

(Filed 6 June, 1930.)

APPEAL by defendants from *Schenck, J.*, at March Term, 1930, of BUNCOMBE. Affirmed.

*Arledge & Taylor for appellants.*
*Heazel, Shuford & Hartshorn for appellee.*

PER CURIAM. The demurrer filed by the defendants admits all the allegations of the complaint, among which is an allegation that the defendants are indebted to the plaintiff in a stated amount. The judgment overruling the demurrer is

Affirmed.

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ELIZABETH WILLIAMS v. J. A. PATLA, TRUSTEE, ET AL.

(Filed 6 June, 1930.)

APPEAL by defendants from *Finley, J.*, at October Term, 1929, of BUNCOMBE.

Civil action to quiet title and to remove a cloud therefrom.

There was a judgment for the plaintiff, from which the defendants appeal, assigning errors.

*Bourne, Parker & Jones and Thomas J. Rickman for plaintiff.*
*Weaver & Patla for defendants.*

PER CURIAM. No reversible error has been pointed out by appellants, hence the judgment will not be disturbed.

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2. Where one has become the last and highest bidder at a sale of the property of a bankrupt under an order of the United States District Court, and fails or refuses to comply with his bid, and the property is resold for an amount less than the original bid, the remedy to recover for the failure to comply with the bid is by a motion in the original cause, and the trustee's action brought therefor in the State court will be dismissed. *Gilliam v. Sanders*, 635.

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the plaintiff, it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. *Endicott-Johnson Corp. v. Schochet*, 770.

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AGRICULTURE.

D Agricultural Liens (see, also, Landlord and Tenant C c).

1. The lien of a laborer upon a crop relates back to the time of the commencement of the work, and by the express provisions of the statute his lien is preferred to all other liens filed thereafter, C. S., 2472, 2480, 2488, and where notice is filed according to C. S., 2470, and the laborer has perfected his lien, it is superior to an agricultural lien and chattel mortgage upon the same crop executed and filed after the commencement of the work, but before notice of the laborer's lien, and C. S., 2471, relating to priority of payment of liens according to priority of notice filed with a justice of the peace or clerk, has no application. *White v. Riddle*, 511.

APPEAL AND ERROR (In criminal cases see Criminal Law L; appeals from county courts see Courts B e; from justices courts see Justices of the Peace E).

A Nature and Grounds of Jurisdiction of Supreme Court.

c *Right to Appeal from Judgment Sustaining or Overruling Demurrer*

1. While an appeal will lie from an order sustaining or overruling a formal demurrer which goes to the whole cause of action or the whole defense, if the defendant after filing answer to the complaint demurs *ore tenus* for the assigned reason that the court has no jurisdiction or that the complaint fails to state a cause of action, C. S., 518, the demurrer is treated as a motion in the cause, from the denial of which there is no right of appeal. *Mountain Park Institute v. Lovill*, 642.

d *Final Judgment and Premature Appeals*

1. A motion by the defendant in writing to strike out irrelevant and immaterial allegations of the complaint made in apt time before the time for filing answer or demurring has expired is not addressed to the discretion of the trial court, but is made as a matter of right, and an appeal from an order denying the motion is not premature and will be considered by the Supreme Court upon its merits. C. S., 537. *Hosiery Mill v. Hosiery Mills*, 596.

2. An appeal will lie from the denial, and conversely the granting of a motion to strike out certain irrelevant or redundant matter from the complaint when the order affects a substantial right of the appellant. C. S., 537. *Ellis v. Ellis*, 767.

3. Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. C. S., 638. *Nissen Co. v. Nissen*, 808.

e *Moot or Abstract Questions*

1. Where the county board of education has submitted to the board of county commissioners the amount to be included in the budget for a six months term of public schools, and upon a joint session of the two boards the clerk of the court has met with them as arbitrator (C. S., 5608), and decided for the board of education, and on appeal the judge of the Superior Court has accordingly directed an issue, and pending appeal has entered an order for a tax levy to take care of the debt service and a current expense fund for the schools, C. S., 5609, and on appeal to the Supreme Court it appears that the tax has been accordingly collected and applied to the support of the schools, and the six months term has almost expired: *Held*, the appeal presents an abstract question unnecessary to decide, and *held, further*, in any view of the record there was no error. *Board of Education v. Commissioners of Johnson*, 430.

C Requisites and Proceedings for Appeal.

a *Filing and Service of Case on Appeal*

1. Where the appellant has failed to serve his case on appeal in the time given therefor, the granting of the appellee's motion by the court below to strike the appellant's proposed statement of the case from the papers in the cause does not effect a dismissal,

APPEAL AND ERROR C—*Continued.*

but where it appears from an examination of the record upon appellant's motion for *certiorari* that there is no error on the face of the record, the order of the court below will be affirmed. *Roberts v. Bus Co.*, 779.

D Effect of Appeal.

*a Powers and Proceedings of Lower Court*

1. Where a temporary order has been entered in a cause, and thereafter an order has been issued removing the cause to another county for trial, and an appeal is taken from the order of removal, the appeal stays all further proceedings in the lower courts upon the matter appealed from or upon matters embraced therein, and an order dissolving the temporary order, made pending the appeal by a special judge at chambers in the county to which the action was removed is improvidently entered, the court having no jurisdiction until the determination of the appeal involving the right of removal. *Bohannon v. Trust Co.*, 702.

E Record.

*a Matters to be Shown by Record and Necessary Parts of Record Proper*

1. In order to confer jurisdiction on the Supreme Court on appeal the record must show exception to the judgment and appeal therefrom and notice to the appellees either in open court or within the time prescribed by statute, C. S., 641, 642, Const., Art. IV, sec. 8, and where this does not appear of record the appeal will be dismissed. *R. R. v. Brunswick County*, 549.

2. It is required by the rules of practice in the Supreme Court that the complaint be made a part of the record proper in all cases, Rule 19, section 1, and where on appeal the record contains only a synopsis of the complaint the appeal will be dismissed. *Plott v. Construction Co.*, 782.

*b Matters Not Set Out in Record Deemed Without Error*

1. The charge of the judge to the jury is assumed to be correct on appeal when it is not set out in the record. *West v. Mining Co.*, 150; *Hawkins v. Lumber Co.*, 475.

2. Where a party to an action has not objected to the issues submitted by the trial court, and there is no evidence appearing of record on appeal, it will be presumed that there was sufficient evidence on the trial to support the verdict. *Brewer v. Brewer*, 669.

3. The application of the law to the evidence in the case in the instruction of the court to the jury is presumed correct on appeal where the evidence or admitted facts do not appear in the record. *Brown v. Telegraph Co.*, 771.

*c Form and Requisites of Transcript*

1. Where the appellant has failed to make a concise statement of the evidence according to the Rules of Practice in the Supreme Court, but gives the entire evidence in the form of questions to and answers of the witnesses, taken from the stenographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee. *Casey v. R. R.*, 432.

APPEAL AND ERROR E—*Continued.*

*h Matters Presented for Review Upon Record*

1. Where two actions are brought for the recovery of damages between the same parties relating to the same negligent act, one as to personal injury and the other as to property damage, and no motion to dismiss is made in the latter, as to it the question as to whether the action would lie is not presented on appeal. *Durham v. Laird*, 695.

2. The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so incomplete that it may not be determined that the constitutionality of a statute is squarely presented, the question will not be decided. *Plott v. Construction Co.*, 782.

F Exceptions and Assignments of Error.

*a Necessity of Exceptions*

1. Where the charge of the Superior Court judge is not excepted to upon the issue of the measure of damages, the discussion in appellant's brief upon the subject will not be considered on appeal. *Redmon v. Roberts*, 161.

2. Assignments of error on appeal must be based upon exceptions appearing of record or they will not be considered. *R. R. v. Brunswick County*, 549; *Miller v. Insurance Co.*, 572.

3. Exception to the admission of evidence will not be considered on appeal where it appears that evidence of like nature, effect and character had been previously admitted without objection. *Thompson v. Buchanan*, 278.

*b Form and Requisites*

1. Exceptive assignments of error according to the Rules of Practice in the Supreme Court must appear in the record on appeal or the case will be dismissed. *Matthews v. Jones*, 476.

J Review (Instructions will be reviewed as a whole see Trial E g).

*a Of Interlocutory Orders*

1. While ordinarily an appeal will not lie directly from an interlocutory order, it is otherwise if the order affects substantial rights, and an appeal from an order denying defendant's motion to strike out certain allegations of the complaint, made before time for filing answer or demurring has expired, will be considered by the Supreme Court upon its merits. *Hosiery Mill v. Hosiery Mills*, 596.

*b Of Matters Within Discretion of Court*

1. In this case amendments to pleadings were allowed by the judge in the court below within his sound discretion, from which no appeal will lie to the Supreme Court. *Sheppard v. Jackson*, 627.

2. The refusal of the trial court to consolidate the two actions as a matter in his legal discretion will be affirmed on appeal, there being nothing of record to indicate an abuse of the discretion. *Durham v. Laird*, 695.

APPEAL AND ERROR J—*Continued.*

*c Of Findings of Fact*

1. Upon a motion to set aside a purported service of process and to dismiss the action, the findings of fact of the trial court in relation thereto, supported by the evidence, are not subject to review on appeal. *Tinker v. Rice Motors, Inc.*, 73.

2. Upon jury trial being waived under an agreement that the judge should find the facts, his judgment thereon is conclusive on appeal when the evidence supports the facts upon which the judgment was entered. *Colvard v. Dicus*, 270.

3. Findings of fact of referee approved by trial court are conclusive on appeal when no exceptions are made thereto. *Bank v. Graham*, 530.

4. Where the judge of a general County Court finds the facts, and his judgment is affirmed on appeal to the Superior Court, upon appeal to the Supreme Court the findings of fact of the County Court are binding when supported by the evidence, a jury trial not being required. *Chandler v. Conabeer*, 757.

*d Burden of Showing Error*

1. Upon an appeal to the Supreme Court, the burden of showing error in the judgment of the Superior Court is upon the appellant. *Bailey v. McKay*, 638.

2. Upon appeal to the Supreme Court the presumption is against the appellant, and he must show that he has been deprived of a substantial right in the Superior Court to be entitled to a new trial. *Morris v. Y. & B. Corp.*, 719.

*e Harmless or Cured Error*

1. Where certain letters are erroneously admitted in evidence, and the trial court, before they have been read and before the jury has any knowledge of their contents, withdraws them from evidence and instructs the jury not to consider them, the incident could not have influenced the jury to the prejudice of the objecting party and it will not be held for reversible error. See, also, Trial B e 2. *Sentelle v. Board of Education*, 389.

2. A delay of a few days beyond the time ordered to file a bill of particulars will not justify the finding of reversible error on appeal when the bill has been filed for a sufficient time before the trial to make the delay unprejudicial or harmless. *Casey v. R. R.*, 432.

3. Where certain evidence has been introduced on the trial without objection the complaining party may not successfully except to the introduction of other evidence of substantially the same character. *Thompson v. Buchanan*, 278; *Bridgers v. Trust Co.*, 494.

4. Where the plaintiff is not entitled to recover of a surety in any event, the refusal of the trial court to submit issues as to the surety's liability, tendered by the plaintiff and based on his exceptions to the referee's report, is not error, the answers to the issues being immaterial. *Bank v. Graham*, 530.

5. Assignments of error arising on an issue found in the appellant's favor will not be sustained on appeal. *Newton v. Brasfield*, 536.

APPEAL AND ERROR J—*Continued.*

*g Questions Necessary to Determination of Cause*

1. Where by a liberal construction of the allegation of the complaint the relief sought is based on breach of an oral contract to adopt and the breach of an oral contract to give the plaintiff an equal share of the intestate's property, and the plaintiff can recover on the contract to devise, on appeal it is unnecessary to discuss the effect of the oral contract to adopt. *Redmon v. Roberts*, 161.

2. Where on appeal error is found in the trial court's refusal to grant a motion as of nonsuit upon an issue, the Supreme Court may reverse the judgment without discussing assigned errors of law relating to the trial of the issue. *Nissen v. Baker*, 433.

K Determination and Disposition of Cause.

*a Remand.*

1. Where the record is conflicting or is silent as to a material fact, the case will be remanded for a definite finding of fact. *Trust Co. v. Transit Lines*, 675; *Conrad v. Foundry Co.*, 723.

*d Modification and Affirmance*

1. Where a judgment has been correctly rendered as to the amount of an account due by the defendant to the plaintiff, but the interest according to the judgment appears to have been awarded from the wrong date, upon consent of the parties as to the correct amount of the interest, the judgment will be accordingly modified and affirmed on appeal. *Youngblood v. Taylor*, 6.

2. Where a judgment appealed from correctly awards a recovery in a sum stated, but erroneously includes an amount which may readily be ascertained, it is not necessary to award a new trial on appeal, and the judgment will be modified and affirmed. *Construction Co. v. Journal*, 273.

3. Where a certain and definite item of damages has been erroneously included in the judgment upon the verdict of the jury, the case may be remanded to the Superior Court for the rendition of a judgment less the erroneous amount if the appellee consents thereto, otherwise a new trial of the issues affected thereby will be had before a jury. *Sentelle v. Board of Education*, 389.

APPEARANCE.

A General Appearance.

*a Acts Constituting General Appearance and Effect Thereof*

1. Where an action is begun in a general County Court of one county and the defendant is served with summons in another county, and appears and demurs to the complaint on the ground that it failed to state a cause of action for an amount within the jurisdiction of the Superior Court, and thereafter makes a special appearance and moves to strike out the service because the action was within the jurisdiction of a justice of the peace, and that therefore the County Court could not issue summons outside the county: *Held*, by appearing and demurring to the complaint the defendant waived his right to object to the service, and the County Court

APPEARANCE—*Continued.*

acquired jurisdiction whether the action was within the jurisdiction of the Superior Court or the court of a justice of the peace. *Crafford v. Ins. Co.*, 269.

ARREST—Killing of officer making arrest see Homicide B a 2, 4; E a 4: False arrest see False Imprisonment A b.

ASSUMPTION OF RISKS see Master and Servant C f.

ATTACHMENT.

A Nature and Grounds.

*b Nonresident Defendant*

1. In an action to recover a judgment for breach of contract attachment against the defendant's property situated in this State may be issued when it is made to appear that the defendant is a nonresident of this State. *Farmers Federation v. Lockman*, 77.

2. Where the complaint and affidavit in attachment in an action allege that the defendant is a nonresident of this State, which the defendant does not deny either in his answer or affidavit, it is sufficient to support a finding of fact by the trial court that the defendant was a nonresident of this State, and the fact that the defendant owned a home here in which he and his family spent a part of their time is not inconsistent therewith. C. S., 798, 799. *Ibid.*

E Levy, Lien, Custody and Disposition of Property.

*c Sale of Property Pending Determination of Action*

1. An intervener obtaining the possession of property attached by giving a replevy bond may not sell part of the property, such sale not being made as provided by C. S., 812, and claim the right to pay for the part sold and return the balance thereof. *Bullock v. Haley*, 355.

H Claims by Third Persons.

*a Right of Third Persons to Intervene*

1. Interveners in attachment may contest with the plaintiff the issues of their ownership of the property but not the regularity of the attachment or the validity of the seizure of the property thereunder. *Bullock v. Haley*, 355; *Francis v. Mortgage Co.*, 735.

ATTORNEY AND CLIENT.

B Retainer and Authority.

*c Revocation of Authority*

1. Where an attorney of record in an action appears for a party thereto, his employment continues until his authority is revoked and notice of such revocation is given the court or the adverse party. *Hendricks v. Cherryville*, 659.

AUTOMOBILES—Negligent driving see Highways B, homicide through negligent driving see Homicide C: Filling stations see Municipal Corporations H b: Service of process on nonresident auto owner in action for negligence see Process B e.

BAIL.

B In Criminal Prosecutions.

*d Requisites and Sufficiency of Recognizances and Bonds*

1. A promise, made over a telephone to a justice of the peace, to sign a bail bond or enter into a recognizance for one for whom a warrant of arrest has been issued, and which the promisees later refuse to execute, is invalid as a bail bond or as a recognizance, and in the Superior Court in an action on the magistrate's certificate to this effect the plea of *nul tiel* record by the supposed sureties will be sustained. *S. v. Myrick*, 490.

BAILMENT.

A Duties and Liabilities of Bailee.

*a Presumption of Liability from Destruction of Property*

1. The leaving of an automobile for storage at a garage for hire establishes the relation of bailor and bailee, and where there is evidence that the car was received in good condition and was destroyed by fire, a prima facie showing of negligence is made out which is sufficient to go to the jury although the bailee offers evidence in rebuttal tending to show that the fire resulted from a faulty wiring in the car itself. *Hutchins v. Taylor Buick Co.*, 777.

BANKRUPTCY.

C Assignment, Administration, and Distribution of Bankrupt's Estate.

*c Preferences by Bankrupt*

1. A preference given a creditor which can be set aside under the provisions of the Federal Bankruptcy Act must be one made within four months preceding the filing of the petition, when the debtor is insolvent, with knowledge by the creditor or information sufficient to put him upon inquiry that will lead to knowledge of the debtor's insolvency, and by which such creditor will receive a larger per cent of his debt than others in the same class or which will diminish or deplete the bankrupt's assets. *Bridgers v. Trust Co.*, 494.

2. Where there is conflicting evidence as to whether the preferences alleged to have been made by a bankrupt diminished or depleted his assets, it being contended by the creditor that they were made from the sale of collateral hypothecated to secure the debt more than four months preceding the filing of the petition in bankruptcy, the issue should be submitted to the jury. *Ibid.*

3. Actual notice of the creditor of the insolvency of a bankrupt is not required to set aside a preference under the provisions of the Federal Bankruptcy Act, but the creditor is required to exercise ordinary care to ascertain the facts, and where he has sufficient knowledge to put him upon inquiry he is chargeable with all the facts which such inquiry would have disclosed, and in this case *held:* evidence of such knowledge was sufficient to be submitted to the jury. *Ibid.*

*d Sale of Property of Bankrupt*

1. In proceedings in bankruptcy, the United States District Court has jurisdiction to determine all matters relating to its order for the

BANKRUPTCY C—*Continued.*

sale of the bankrupt's property to make assets for distribution among creditors, and pending a case in bankruptcy, one who bids in at the sale is regarded as a party to the extent of making him comply with the terms of the bid, and the remedy to recover damages for his failure to comply with his bid is by motion in the original cause. *Gilliam v. Sanders*, 635.

*e Actions By or Against Trustee*

1. The trustee in bankruptcy has the burden of showing that payments on a preëxisting debt made by a bankrupt within four months prior to the filing of the petition in bankruptcy diminished or depleted the assets of the bankrupt, and where there is conflicting evidence as to whether the bankrupt's estate was thereby diminished or depleted an issue is raised for the determination of the jury. *Bridges v. Trust Co.*, 494.

BANKS AND BANKING.

C Functions and Dealings (Estoppel of bank and officers from pleading defense of *ultra vires* see Corporations G b 1).

*b Representation of Bank by Officers and Employees* (Bonds of officers see Principal and Surety B d)

1. The cashier of a bank has no implied authority to use the funds of the bank for his personal or private use, and an agreement between him and another that such other should give his note to the bank for an amount due him by the cashier and that the cashier would pay it upon maturity is not binding upon the bank in the absence of authorization by its board of directors. C. S., 221(n). *Bank v. Clark*, 169.

2. Where one enters into an agreement with an officer of a bank whereby the officer was to use the bank's funds for the payment of a personal debt, he is put upon inquiry as to the authority of such officer to make the agreement, or whether the governing body of the bank had given its sanction thereto. *Ibid.*

3. Where the contractor for the erection of a residence for the cashier of a bank has given his note to the bank for the amount due him by cashier, with the understanding that the cashier was to pay it upon maturity, and there is evidence that the contractor inquired at the bank several times and was informed that the note had been paid, when in fact it had been kept by the bank and used by it as collateral, the question is for the jury as to whether the bank in its suit on the note is estopped to set up the fact that the note had not been paid, or deny the cashier's authority to enter the agreement, there being further evidence that thus lulled into feeling secure the contractor had lost his right of statutory lien upon the residence erected for the cashier. *Ibid.*

I Insolvency and Receivership.

*b Possession, Sale, Management, and Distribution of Assets by Corporation Commission*

1. Where the Corporation Commission takes possession of the assets of an insolvent bank under the provisions of 3 C. S., 218(c), it is a statutory receiver and it is required by statute to collect the assets

BANKS AND BANKING—*Continued.*

of the bank and to distribute them to the creditors and depositors, and the court having jurisdiction is without power to authorize the sale of an insolvent bank's property in bulk to purchasers under an agreement that the purchasers organize another bank and pay to it the purchase price for distribution to the creditors and depositors and thus relieve the Commission of its duty to collect and distribute the assets. As to whether the court might authorize the sale of the assets in bulk is not decided, though it would seem that under the statutory provision that he shall make such order as in his discretion will best serve the parties interested he has the power to authorize a sale in bulk, which would not be reviewable on appeal except on the ground of abuse of discretion. *In re Trust Co.*, 783.

BARBERS.

A Control and Regulation of the Trade (See, also, Constitutional Law G b; License tax on, see Taxation B c 1).

*a Barbers and Barber Shops Within Provisions of Statute Regulating Trade*

1. Construing chapter 119, Public Laws of 1929, it is *held:* that its provisions apply to proprietor barbers, as in this case the owner and operator of a one-chair barber shop. *S. v. Lockey*, 551.

BASTARDS.

B Custody and Support.

*b Contracts of Putative Father for Support*

1. A contract made by the father of an illegitimate child with the mother thereof for support and maintenance of such child is not contrary to public policy, but is a valid and enforceable agreement supported by sufficient consideration. *Redmon v. Roberts*, 161.

2. A contract made by the father of an illegitimate child with the mother of such child for its support, maintenance, and education is not contrary to public policy and is valid and enforceable by the child for whose benefit it was made. *Conley v. Cabe*, 298.

3. Where the estate of the father of an illegitimate child is sued by the child upon a contract made by the deceased with the mother of such child for its maintenance, support and education, the measure of damages recoverable against the estate upon sufficient proof on the contract is a reasonable amount, taking into consideration the conditions and standing of the plaintiff in the community, for the support and maintenance and education of the child during minority, less such sums as may have been paid by the father during his lifetime for this purpose. *Ibid.*

BILL OF DISCOVERY.

B Examination of Adverse Party.

*a Right thereto in General*

1. Where on defendant's appeal from an order made upon plaintiff's motion for the examination of the former before a commissioner to procure evidence for drafting the complaint, it appears that the order was issued after careful consideration, and there is nothing

BILL OF DISCOVERY—*Continued.*

to indicate an effort on the part of the plaintiff to set a dragnet for the defendant or to harass or annoy him, the order will be affirmed on appeal. *Buckholz v. Ferguson*, 699.

BILLS AND NOTES.

A Requisites and Validity.

*a Consideration*

1. Allegation in the complaint that the widow, according to the request of her husband since deceased, has given a written promise to pay his defalcations to the promisee out of the moneys to be derived by her as beneficiary under a policy of life insurance of the husband, without agreement on the part of the promisee not to make claim against the husband's estate, or without other advantage to the promisor or disadvantage to the promisee, both the estate and the widow being insolvent, the written instrument not being a negotiable instrument, there is no prima facie case alleged that will import a consideration for the writing and the other allegations tending only to show a *nudum pactum*, the defendant's demurrer thereto is good. *Building and Loan Assn. v. Swaim*, 14.

2. The provisions of C. S., 3005, that a preëxisting debt is sufficient consideration for a promissory note does not apply when the note in question is not negotiable within the meaning of the negotiable instrument law, and the debt was not contracted by the maker, and where the nonnegotiable note is given by a widow for the defalcation of her husband without consideration, it must be alleged and shown that she knowingly accepted profit, advantage or benefit from the transaction. *Ibid.*

3. In order to hold the widow personally liable for the preëxisting debts of her deceased husband on her nonnegotiable note given by her for their payment, there must be a new consideration given her for forbearance to proceed against his estate, etc. *Ibid.*

B Negotiability and Transfer.

*c Negotiation in due Course before Maturity*

1. A demand note to be negotiated in due course must be negotiated within a reasonable time after its date, and where the purchaser has acquired it six months after date it is not within a reasonable time, and he will not be regarded as a holder in due course, and a payment or settlement between the original parties will discharge those liable thereon, as against the rights of such purchaser, and the question of whether there should be contribution among the cosureties does not arise. C. S., 2978, 3034. *Trust Co. v. Hedrick*, 374.

D Construction and Operation.

*b Liabilities of Parties* (Parol evidence as to payment see Evidence J a 1, 2; Comaker paying judgment on note not entitled to assignment of judgment see Judgments P a 1)

1. Where the directors of a corporation sign a negotiable instrument on the back thereof as endorsers, C. S., 3044, the holder may not show by parol that they signed as comakers, or guarantors, or sureties. *Wrenn v. Cotton Mills*, 89.

BILLS AND NOTES D *b—Continued.*

2. Where the payee of a note, at the time he agrees to lend a sum of money to a Massachusetts Trust, and at the time he accepts a note of the trust signed by the trustees, knows that by expressed provisions in the Declaration and Indenture of Trust that the trustees were exempt from personal liability for debts of the trust, the payee is estopped from contending that the trustees are personally liable on the note. As to whether owners of a beneficial interest in a Massachusetts Trust are liable as partners or whether such a trust is contrary to public policy, is not presented on the record and not decided. *Roberts v. Syndicate*, 381.

3. Where the plaintiff seeks to hold the trustees of a Massachusetts Trust personally liable on a note signed by them as trustee the burden of proof is on the plaintiff. *Ibid.*

4. The negotiable instrument law fixes the liability of the parties on a negotiable instrument, and where a party signs a note as maker, C. S., 2977, he is primarily liable thereon to a holder in due course, and he may not claim to be secondarily liable as an accommodation endorser (C. S., 3009), contrary to the express terms of the instrument as against a holder who acquires for value before maturity, and his position that he was discharged by an extension of time of payment given to another whose name appears on the instrument as endorser is not meritorious. *Mayers v. Bank*, 542.

5. Where the one primarily liable on a negotiable note for which one secondarily liable has given as additional security a mortgage on lands, and the holder for value before maturity has recovered judgment against those liable on the note, and then has bought in the land mortgaged as additional security at a tax sale and has received from the sheriff a tax deed therefor: *Held*, the one primarily liable upon the instrument has no equity of subrogation or otherwise to require the holder of the instrument to apply as a credit on the note the value of the land for which he received the tax deed, the mortgagor of the land not appealing from the judgment of the lower court. *Ibid.*

c *Extension of Time for Payment*

1. Where endorsers on a note waive defenses based upon an extension of time for payment, the waiver imports a legal extension, or an agreement which fixes a definite time when payment is to be made, and where no legal extension is shown by the evidence the waiver will not operate to prevent the endorsers from pleading the statute of limitations in the holders' action to recover against them on the note. *Wrenn v. Cotton Mills*, 89.

2. While ordinarily an extension of time granted the maker of a note will discharge the sureties from liability thereon, this principle does not apply when the sureties have agreed thereto or have signed the note specifying that such extension will not operate to discharge them from liability, and when the creditor at the time of granting the extension expressly reserves his rights against the sureties. *Walters v. Rogers*, 210.

3. Maker of note is not discharged by extension of time to a party secondarily liable thereon. *Mayers v. Bank*, 542.

BILLS AND NOTES—*Continued.*

I Checks (Forgery of, see Forgery).

*f Criminal Responsibility for Issuing Worthless Checks*

1. A postdated check given for a past due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. Chapter 62, Public Laws of 1927. *S. v. Crawford*, 522.

BOUNDARIES see Deeds and Conveyances D.

BREAKING AND ENTERING see Burglary.

BROKERS.

C Duties and Liabilities to Principal.

*a Representations as to Stock*

1. Where, in an action for damages for failure to receive stock purchased by the plaintiff through the defendant brokers cum-dividend, the evidence tends only to show that the agent of the local brokers represented that the stock bought then would be cum-dividend when in fact it was ex-dividend, and there is no allegation of fraud and the plaintiff had not offered to rescind the contract of purchase: *Held*, in the absence of evidence that the price of the stock purchased had not been reduced by the amount of the dividend, a judgment as of nonsuit should have been allowed, the plaintiff having failed to show any damage arising from the negligence of the local brokers. *Folger v. Clark*, 44.

BURGLARY AND BREAKING AND ENTERING OTHERWISE THAN BURGLARIOUSLY.

C Prosecution and Punishment.

*d Sufficiency of Evidence*

1. In this case *held:* evidence of defendant's guilt of unlawfully and feloniously breaking and entering a barber shop and repair shop, with intent to steal, and with the larceny of certain articles of personal property, was sufficient to be submitted to the jury, and defendant's motion as of nonsuit was properly overruled. C. S., 4643. *S. v. Burleson*, 61.

BUSINESS TRUSTS—Liability of trustees on trust note see Bills and Notes D b 2.

BUS LINES—Negligence of drivers see Highways B; Accommodation for Negroes see Corporation Commission A c 1.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

A Right of Action and Defenses.

*b Fraud*

1. The purchaser of lands at a foreclosure sale of a mortgage may not have his deed set aside for fraudulent representations as to encumbrances made to the mortgagee by the mortgagor, in order to be

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

entitled to such relief it is required that he allege that such representations were made to him with the intent that he should rely thereon. *Bechtel v. Bohannon*, 730.

CARRIERS (Negligence of bus drivers see Highways B; negligence in operating trains see Railroads D).

B Carriage of Goods.

*e Delay in Transportation or Delivery*

1. Where damages only are sought in an action against a railroad company for failure to transport and deliver a shipment in a reasonable time, evidence in behalf of the plaintiff that the shipment in question was delayed beyond the ordinary time required, and that damages resulted therefrom is sufficient to take the case to the jury and to deny the defendant's motion as of nonsuit, the deductible time allowed by the penalty statute, C. S., 3516, applies to actions brought to recover the penalty given by the statute and not to actions for damages only. *Tally v. R. R.*, 492.

CHARITIES—Subscriptions for, see Subscriptions.

CHATTEL MORTGAGES (Priority of farm laborer's lien thereto see Agriculture D a 1).

G Transfer of Property by Mortgagor.

*b Rights and Liabilities of Parties*

1. Where in order to refinance his automobile the owner induces the plaintiff to use his name in the refinancing papers, and assigns the title to him, and the original owner later executes a mortgage on the car to secure another indebtedness due the plaintiff, and the plaintiff pays the installments under the refinancing mortgage, the original owner being permitted to retain possession of the car and deal with it as his own: *Held*, upon the original owner's delivery of the car to another, in pursuance of a transaction between them, the fact that the mortgage was not registered at the time of the delivery to the third person is immaterial in the absence of evidence that such third person was a purchaser for value from the mortgagor, and the judgment that the mortgagee was the owner of the car and entitled to its immediate possession will be affirmed on appeal. *Chandler v. Conabeer*, 757.

CHECKS—Criminal liability for issuing worthless, see Bills and Notes I f.

CITIES AND TOWNS see Municipal Corporations.

CLAIM AND DELIVERY see Replevin.

CLASS LEGISLATION see Constitutional Law G.

COMPROMISE AND SETTLEMENT see Accord and Satisfaction.

CONFESSION see Criminal Law G 1.

CONDITIONAL SALES—Right of vendor upon confiscation of mortgaged property see Intoxicating Liquor F a.

CONSOLIDATED STATUTES (for convenience in annotating).

SEC.

99, 100. Action on claim against executor is barred if not brought within six months from rejection of claim by executor. *Batts v. Batts*, 395.

160. In action for wrongful death brought by nonresident for death occurring in another state our statute applies. *Tieffenbrun v. Flannery*, 397. Where it appears that action was brought within one year judgment denying nonsuit will be upheld. *Harper v. Bullock*, 448.

218(c), Vol. III. Upon sale of property of insolvent bank purchase price must be paid to and distributed by Corporation Commission. *In re Trust Co.*, 783.

221(n). Bank officer does not have implied authority to use bank funds for personal liability. *Bank v. Clark*, 169.

415. Judgment as of nonsuit on merits of case bars subsequent action on same cause of action on substantially same evidence. *Hampton v. Spinning Co.*, 235. But is not a bar when the evidence is not substantially identical. *Midkiff v. Ins. Co.*, 568; *Chappell v. Ebert*, 575.

441. Where there is no legal extension of time for payment of note, statute runs from its maturity. *Wrenn v. Cotton Mills*, 89. Whether fraud should have been discovered three years before commencement of action held question for jury. *R. R. v. Hegwood*, 309.

446, 449. Trustee of express trust may sue without joinder of *cestui que trust*. *Sheppard v. Jackson*, 627.

452, 1744, 1745. Where contingent interests of children living and unborn are represented by guardian *ad litem* they are bound by foreclosure proceedings of tax certificate. *Hines v. Williams*, 420.

454, 2513. A wife may maintain an action against her husband for a negligent injury. *Earle v. Earle*, 411.

456. Joinder of beneficiaries in deeds of trust in action to set aside the deeds as fraudulent is not misjoinder. *Moorefield v. Roseman*, 805.

458, 3041, 3166. Husband and wife are jointly and severally liable on note given for purchase price of land held by entireties, and upon payment of note by one the other is liable to contribution. *Trust Co. v. Black*, 219.

463. Action held to affect interest in realty and change of venue to county wherein land is situate was proper. *Bohannon v. Trust Co.*, 701.

464, 471. Action to recover tax wrongfully collected is removable to Wake County subject to power of court to change venue. *McFadden v. Maxwell*, 223.

485. Judgment that clerk should not order publication in a certain paper without finding that it was the one most likely to give notice held error. *Elias v. Comrs. of Buncombe*, 733.

500. Action on note secured by mortgage and to set aside deed of the mortgagor is not one affecting title to realty. *Threlkeld v. Land Co.*, 186.

511. Action will be dismissed for misjoinder of parties and causes but will be divided for misjoinder of causes. *Shuford v. Yarborough*, 5; *Shemwell v. Lethco*, 346. Complaint in action for divorce aided by answer held sufficient. *Brewer v. Brewer*, 669.

CONSOLIDATED STATUTES—*Continued.*

SEC.

515, 599. Upon appeal from overruling of demurrer defendant has ten days to file answer after Superior Court receives certificate of Supreme Court affirming judgment. *Shuford v. Yarborough*, 5.

518. Demurrer should not be sustained if plaintiff is entitled to any relief upon the complaint. *Bechtel v. Bohannon*, 730. Where formal demurrer has not been filed no appeal will lie from judgment overruling demurrer *ore tenus*. *Mountain Park Institute v. Lovill*, 642.

537. Appeal will lie from denial of motion to strike out made before time for demurring or answering. *Hosiery Mill v. Hosiery Mills*, 596. Appeal will lie from granting of motion to strike out when affecting substantial right. *Ellis v. Ellis*, 767.

564. Instruction in this case held to comply with statute. *S. v. Sawyer*, 459. Court must state evidence, explain law, and express no opinion. *Brown v. Telegraph Co.*, 771.

567. On motion of nonsuit all evidence should be taken in light favorable to plaintiff. *Morris v. Y. & B. Corp.*, 705. Evidence of master's negligence held sufficient: *Frady v. Quarries Co.*, 207, *Farr v. Power Co.*, 247; *Gibson v. Cotton Mills*, 267; *Darden v. Lassiter*, 427. Held insufficient: *Smith v. Lumber Co.*, 457.

614, 618, 3309. Comaker of note is jointly and severally liable thereon, and upon paying less than half of judgment on note is not entitled to assignment of judgment. *Jones v. Rhea*, 190.

638. Appeal from order allowing amendments to pleadings which does not affect substantial right will be dismissed. *Nissen v. Nissen*, 808.

641. In order to confer jurisdiction on Supreme Court record must show exception to Superior Court judgment and appeal therefrom. *R. R. v. Brunswick County*, 549.

655. Appeal from order of judgment stays further proceedings in lower court in respect thereto pending appeal. *Bohannon v. Trust Co.*, 702.

660. Where appeal from justice's court has not been docketed according to provisions of statute dismissal is proper. *Drafts v. Summey*, 69.

699, *et seq.* Mortgagor has neither statutory nor equitable right to improvements as against mortgagee. *Layton v. Byrd*, 466.

798, 799. Finding that defendant was nonresident held supported by the evidence. *Farmers Federation v. Lockman*, 77.

812. Sale not being made according to statute, party is not entitled to sell part of property held under replevy bond and pay for part sold and return remainder. *Bullock v. Haley*, 355.

829, 840. Where property is attached third person may intervene and assert title thereto. *Francis v. Mortgage Corp.*, 734.

836. Liability of surety on replevy bond is limited to liability of principal. *McCormick v. Crotts*, 664.

987. Promise to save surety on note harmless held original agreement not falling within provisions of statute. *New Bern v. Fisher*, 385.

CONSOLIDATED STATUTES—*Continued.*

SEC.

988. Lease for three years to take effect in the future comes within provisions of statute. *Investment Co. v. Zindel*, 109.

992. Does not apply where description is too vague for identification by parol. *Katz v. Daughtrey*, 393.

1009. In absence of notice of fraud registration determines priority of deeds of trust and mortgages. *Threlkeld v. Land Co.*, 186.

1334 (20). Where suit to restrain issuance of bonds is not brought within thirty days after notice validity of bonds will be upheld. *Kirby v. Comrs. of Person*, 440.

1660. Grounds for divorce *a mensa* are available to the husband. *Brewer v. Brewer*, 669.

1667. Instruction as to "indignities to the person" and "intolerable condition" held not erroneous. *Rodman v. Rodman*, 137.

1724. Judge has discretionary power to remand the cause to the appraisers or retain it for trial in the Superior Court. *Light Co. v. Reeves*, 404.

1743. Where grantor is estopped from setting up encumbrance by his covenant against encumbrances, encumbrance in his favor may be removed as cloud upon title. *Bechtel v. Bohannon*, 730.

1789. Itemized statement sworn to by plaintiff's treasurer held admissible under the statute. *Endicott-Johnson Corp. v. Schochet*, 769.

1795. Provisions of statute may be waived by adverse party. *Andrews v. Smith*, 34. Statute applies to person interested in event whether parties or not. *Honeycutt v. Burleson*, 37. Inchoate right of dower is interest in event within meaning of statute. *Ibid.* Mother of illegitimate child suing estate of father on contract for support is not party in interest within meaning of statute. *Conley v. Cabe*, 298. Witness held not party interested in event. *R. R. v. Hegwood*, 309. Witness held to be interested in event. *Donoho v. Trust Co.*, 765.

1799. Where defendant does not testify the question of guilt is for the jury under the presumption of innocence. *S. v. McLeod*, 649; *S. v. Spivey*, 655.

2195, 4021. Procedure of foreign guardian to obtain possession of ward's property in this State is under 2195, and 4021 is not applicable. *Trust Co. v. Walton*, 790.

2314, 2335. Where juror is qualified to serve during one week of a term he is not qualified to serve during another. Motion to quash. *S. v. Barkley*, 349.

2347, 2480, 2481. Lessee of mortgagor is not entitled to emblements as against purchaser at foreclosure sale. *Collins v. Bass*, 99.

2472, 2480, 2488, 2471. Farm laborer's lien relates back to time of commencement of work and is superior to liens filed thereafter. *White v. Riddle*, 511.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2615. Violation of statute is negligence, and question of whether violation was proximate cause held for jury. *Cook v. Horne*, 739.

2621 (46). Failure to submit question of whether intersection was obstructed within meaning of statute held error. *Rudd v. Holmes*, 640.

2621 (55). Question of whether contributory negligence of plaintiff in violating statute was proximate cause held for jury. *Cook v. Horne*, 739.

2621(63). Violation of statute must be proximate cause of death in order to convict of manslaughter. *S. v. Satterfield*, 682.

2621 (77) (94). Evidence of defendant's negligence in parking without lights held sufficient. *Williams v. Express Lines*, 193.

2776(r). Zoning ordinance cannot be collaterally attacked in prosecution for violation. *S. v. Roberson*, 70.

2805, 2830, 2831, 2881. Contract with city not made in accordance with statutory provisions is void, but recovery may be had on *quantum meruit*. *Realty Co. v. Charlotte*, 264.

2830. City may not plead that contract was void because of failure to comply with statute where the contract has been executed and nothing remains but payment of consideration by city. *Indemnity Co. v. Perry*, 286.

2900. Statute modified by chapter 142, Private Laws of 1929 in regard to election and appointment of school commissioners of Charlotte. *Goode v. Brenizer*, 217.

2951. Where no loss is occasioned by resale, depositor of amount therefor is entitled to a refund of the deposit. *Harris v. Trust Co.*, 605.

2977, 3009. One signing note as maker is primarily liable thereon to holder and he may not claim to be accommodation endorser and is not discharged by extension of time for payment. *Mayers v. Bank*, 542.

2978, 3034. Purchaser of demand note six months after its date is not a holder in due course. *Trust Co. v. Hedrick*, 374.

3005. Does not apply to nonnegotiable note. *Building & Loan Assn. v. Swaim*, 14.

3044. Where parties sign note as endorsers, holder may not show different liability by parol evidence. *Wrenn v. Cotton Mills*, 89.

3411, Vol. 3. Act is valid and will be liberally construed. *S. v. Hickey*, 46; *S. v. Lassiter*, 352; *S. v. Jaynes*, 728.

3494, 3497. Corporation Commission has power to require bus lines to provide equal separate accommodations for races. *Corp. Comm. v. Interracial Comm.*, 317.

3516. Applies to actions brought to recover the statutory penalty and not to actions for damages only. *Talley v. R. R.*, 492.

3561. Index of mortgage on land held by entireties under "J. H. and wife" held sufficient, *West v. Jackson*, 693.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3762. County highway commission could discontinue section of road without giving notice under statute under facts of this case. *Hinnant v. Power Co.*, 293.

4144. Evidence that holographic will was found among valuable papers: held sufficient. *In re Will of Stewart*, 577.

4162. An unrestricted devise of real estate passes the fee under the statute. *Lineberger v. Phillips*, 661.

4200. Evidence of guilt of murder in first degree held sufficient. *S. v. Evans*, 82; *S. v. Macon*, 483.

4643. Evidence of breaking and entering otherwise than burglariously held sufficient. *S. v. Burleson*, 62. Evidence of defendant's guilt of entering into conspiracy held insufficient. *S. v. Wrenn*, 260. Evidence of defendant's guilt of murder held sufficient. *S. v. McLeod*, 649; *S. v. Spivey*, 655.

4651. Whether Supreme Court acquires jurisdiction where the affidavit for leave to appeal in *forma pauperis* fails to state that application is made in good faith, *quere? S. v. Brumfield*, 613.

5415. Issue of acceptance of school building by county superintendent should be submitted in action on contract for construction. *Chapman-Hunt Co. v. Board of Education*, 111.

5429. County board of education has power to employ school janitor rather than school committee. *Wiggins v. Board of Education*, 301.

5585, 5586, 5595, 5617, Vol. 3. County commissioners may not usurp right of board of education to purchase its supplies. *Board of Education v. Walter*, 325.

7925. Tax list-taker does not have authority to list property for owner and sign owner's name thereto. *Phillips v. Kerr*, 252.

7980. Where assessment of property for taxes has not been made at time of foreclosure, proceeds from sale are not liable for tax. *Chemical Co. v. Brock*, 342.

8034. Statute does not apply where tax deed is void because property had not been listed for taxes, and deed is only presumptive proof that property had been listed. *Phillips v. Kerr*, 252.

CONSPIRACY.

B Criminal Conspiracy.

*a Elements of the Crime*

1. In order to constitute a conspiracy it is required that two or more persons agree together and form the intent to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and neither the consummation of the intent nor any overt act in furtherance of the conspiracy is necessary, and while the criminal character of a combination or agreement may be inferred from facts and circumstances, such facts and circumstances must point unerringly to that end. *S. v. Wrenn*, 260.

CONSPIRACY B—*Continued.*

*b Evidence*

1. Where, in a prosecution for criminal conspiracy the evidence is that one of the defendants was the president of a bank negotiating notes for the county board of education and the county board of road commissioners, and that he was also president of a certain construction company, and that the second defendant was a stockholder in the construction company, and was also county superintendent of roads, and that the third defendant was the chairman of the board of education, and that the first defendant, regarded as a man of high character procured from the other defendants notes of the board of education and of the board of road commissioners to be used to renew outstanding notes of these bodies and raised them and used the funds in his bank and for the construction company without the knowledge or consent of the codefendants who received no benefit: *Held*, the evidence is insufficient to convict the latter named codefendants of criminal conspiracy, and their motions as of nonsuit should have been allowed. C. S., 4643. *S. v. Wrenn*, 260.

CONSTITUTION (for convenience in annotating).

ART.

I, sec. 2. Sovereign people have approved State Prohibition Law. *S. v. Hickey*, 46.

I, sec. 11. Provision that defendant may not be compelled to give evidence against self does not apply to physical facts. *S. v. Hickey*, 46.

IV, sec. 8. On appeal to Supreme Court record must show exception to Superior Court judgment and appeal therefrom in order to confer jurisdiction on the Supreme Court. *R. R. v. Brunswick County*, 549.

V, sec. 3; VII, sec. 9. Where tax levy is uniform and *ad valorem* objection to expenditure under valid legislative authority is untenable. *Leonard v. Sink*, 114.

IX, sec. 3. Local statute requiring submission of issuance of bonds to voters does not apply to bonds for necessary school term. *Julian v. Ward*, 480.

X, sec. 7. Money received by widow as beneficiary of husband's life insurance is not available to creditors of husband's estate. *Building & Loan Asso. v. Swaim*, 14.

CONSTITUTIONAL LAW (Construction of statutes as to constitutionality see Statutes A e; constitutional requirements and restrictions on taxation see Taxation A c; reserved right of State to legislate in regard to intoxicating liquor see Intoxicating Liquor A a 2; "Full Faith and Credit" see Judgments L c).

C Police Power (of cities see Municipal Corporations H).

*b Regulation of Trades and Professions*

1. Chapter 119, Public Laws of 1929, known as the Barber's Act, requiring the examination of barbers of the State by a board appointed by the Governor, and prescribing certain sanitary standards for barber shops, relates to the public health and is constitutional as a valid exercise of the police power of the State. *S. v. Lockey*, 551.

CONSTITUTIONAL LAW—*Continued.*

F Right of Accused not to be Compelled to Testify Against Self.

*a Nature, Scope and Effect of Constitutional Provision in Regard Thereto in General*

1. Upon the trial of the defendant for violating the prohibition law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the State constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions, and the Fifth Amendment to the Federal Constitution applying only to the Federal Government. *S. v. Hickey*, 45.

G Privileges and Immunities and Class Legislation.

*a Accommodation of Races by Public Service Corporations*

1. The Corporation Commission is given plenary power by statute to require bus lines operating between points within the State in carrying passengers for hire, which are public-service corporations, to provide indiscriminatory separate accommodations for the carriage of white and negro passengers, and for their separate accommodations at the bus stations, the working out of the plans or details for the purpose being vested largely within the discretion of the Commission, and where this is done without racial discrimination it is not objectionable as being in contravention of Thirteenth and Fourteenth Amendments to the Federal Constitution. *Corporation Commission v. Interracial Commission*, 317.

*b Statutes Applying to Specific Groups or Classes*

1. The classification of barbers made by chapter 119, Public Laws of 1929, in accordance with the population of the cities and towns wherein they conduct their business (section 23) is not an arbitrary or unreasonable one either as relating only to certain persons among the taxpayers or to only certain individuals among the barbers themselves in accordance with the population of the cities and towns in which they carry on their business, and the act bears equally on all of the class and is available to all barbers who are qualified and desire to come under its provisions, and the act is not a discrimination forbidden by the State Constitution nor by the Fourteenth Amendment to the Federal Constitution. *S. v. Lockey*, 551.

J Searches and Seizures.

*a Nature, Scope and Effect of Federal and State Provisions in Regard Thereto in General*

1. The provisions of the Federal Constitutional Amendment, Art. IV, securing to the people the right of safety and protection of their persons and property against unreasonable searches and seizures, and providing that no warrant should be issued except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized, are not restrictive of the powers of the State, and apply solely to the Federal Government. *S. v. Hickey*, 45.

2. Where an officer sees a person leave his automobile with his appearance indicating that he had something concealed on his person and

CONSTITUTIONAL LAW J—*Continued.*

reasonably giving the impression that the person was carrying intoxicating liquor, the officer may immediately arrest and search such person, and where a half-gallon of liquor is found on the person of the defendant the action of the officer does not violate the provisions of Article I, section 11, of the State Constitution. *Ibid.*

CONTRACTS (Insurance contracts see Insurance; *quasi*-contracts see *Quasi*-Contracts; contracts of infants see Infants B, of cities see Municipal Corporations F; novation see Novation; specific performance see Specific Performance; subscriptions for charities see Subscriptions).

A Requisites and Validity.

*g Contracts Working Fraud on Courts*

1. Where under the terms of a contract certain creditors and stockholders of an insolvent corporation in the hands of a receiver agree to procure the sale by the receiver of the corporate property to the defendants for a sum sufficient to pay the costs of receivership and the liabilities of the corporation other than to the plaintiffs, and the defendants agree to buy in the property and to organize a corporation with a paid in capital stock in a certain amount and to issue to the plaintiffs stock in such corporation to an agreed amount, upon the procurement of the sale by the receiver and its confirmation by the court, and the release by the plaintiffs of their claims against the receiver as stockholders and creditors, and the payment of all other claims and costs by the receiver: *Held*, the contract was not founded upon an agreement to work a fraud on the receiver and the court, and the defendants may not maintain that it was void as against public policy on this ground. *Harris v. Comolli*, 133.

F Actions for Breach.

*b Necessity of Performance, Tender, or Readiness to Perform*

1. Where a contract is entered into whereby a bank, in anticipation of insolvency, agrees to transfer all of its assets to another bank, and give bond with its directors as sureties to indemnify the transferee bank against loss in case the liabilities exceed the assets, and the transferee bank agrees to pay off all liabilities, and the contract contains an agreement, incidental to the main purpose of the contract and not considered by the parties as a substantial part of the consideration therefor, whereby the transferee bank agrees to maintain a branch bank in the locality, subject to the approval of the Corporation Commission: *Held*, in an action on the bond given in accordance with the contract it is not necessary for the transferee bank to allege performances of the incidental agreement. *Bank v. Bank*, 477.

CONVERSION—Allowance of interest in actions for see Interest B a.

CORPORATION COMMISSION (Sale and management of property of insolvent bank see Banks and Banking I b).

A Jurisdiction and Powers.

*c Power to Require Public-Service Corporations to Provide Equal Accommodations for Races*

1. The Corporation Commission is given plenary power by statute to require bus lines operating between points within the State in

CORPORATION COMMISSION—*Continued.*

carrying passengers for hire, which are public-service corporations, to provide indiscriminatory separate accommodations for the carriage of white and negro passengers, and for their separate accommodations at the bus stations, the working out of the plans or details for the purpose being vested largely within the discretion of the Commission, and where this is done without racial discrimination it is not objectionable as being in contravention of Thirteenth and Fourteenth Amendments to the Federal Constitution. *Corporation Commission v. Interracial Commission*, 318.

CORPORATIONS (Service of process on foreign, see Process B d; banking corporations see Banks and Banking; taxation of franchise and property see Taxation B b.

A Incorporation and Organization.

*a Grant of Right to Incorporate by, and Supervisory Powers of State*

1. Statutory authority is necessary to create a corporation or to merge or consolidate existing corporations, and the State retains visitorial and supervisory powers over corporations created, consolidated, or merged under its sanction. *Coach Co. v. Hartness*, 524.

C Directors.

*c Duties and Liabilities*

1. Where the president of a real estate corporation fraudulently converts the funds of its customers to the use of the corporation over a long period of time, and the directors know of, or should have discovered such fraud on the part of their officer by the exercise of reasonable diligence in the performance of their duties, an action will lie by the persons thus defrauded against the directors. *Minnis v. Sharpe*, 364.

D Stocks.

*d Transfer of Stock*

1. Where the owner of certificates of stock in a corporation endorses them in blank, and they are purchased by a third person, the purchaser has the right to have the shares he has thus purchased canceled on the books of the corporation and new certificates issued to him, and where it appears that such purchaser paid the reasonable value of the shares at the time, in good faith, without knowledge or notice of fraud in the procurement of the seller's endorsement in blank, it is immaterial whether the corporation issuing the new shares had notice of the fraud, or mistakenly advised the seller that the shares had not been transferred at the time the seller advised the corporation not to transfer them, and the seller may not recover of the corporation for so transferring the shares, or against the purchaser. *Green v. Furniture Lines*, 104.

G Corporate Powers and Liabilities.

*b Ultra Vires Acts and Contracts*

1. Where a bank transfers all of its assets to another bank and gives bond with its directors as sureties to indemnify the transferee bank against loss in case the liabilities exceed the assets, and the transferee bank agrees to pay off all liabilities of the transferer bank: *Held*, upon the execution of the agreement by the transferee bank,

CORPORATIONS G—*Continued.*

neither the stockholders nor the creditors of the transferer bank can complain, and the transferer bank and its sureties, having received the benefit of the contract, are estopped in an action on the bond to set up the defense that contract was *ultra vires* the transferee bank. (See, also, Municipal Corp. F e.) *Bank v. Bank*, 477.

*c Representation of Corporation by Officers and Agents*

1. The president of a corporation, *ex vi termini*, is the general agent of the corporation with the implied authority to lease lands or buildings necessary for the business purposes of the corporation, and an instrument of this character signed by him in his official capacity is sufficient to bind the corporation though he may have had no express authority to do so, and where the lessor has made the lease contract with the corporation through the president, and there is no evidence that he had notice of any limitation of the implied authority of the president to execute the lease in question, he is not bound by any such secret limitation. *Trust Co. v. Transit Lines*, 675.

2. Where a duly passed resolution of the board of directors of a corporation gives general authority to its president to borrow money and mortgage the corporate property for the purpose, and the president, in order to meet the requirements of the lender, has had certain corporate property deeded to him and has personally given a mortgage thereon to the lender and then reconveyed the property to the corporation which assumed the indebtedness, and the entire proceeds of the loan is turned over to the corporation which uses the funds to take up a valid corporate mortgage on the same lands and for the general business of the corporation, the president receiving no personal benefit from the transaction: *Held*, the mere fact that the directors had not given the authority to the president to make the particular transaction does not render it void, but voidable only, and the act of the corporation in so receiving the benefits is a ratification thereof, and the notes in the hands of a purchaser in due course for value without notice are valid, and upon the insolvency of the corporation such purchaser's claim to the extent of the value of the mortgage lien is superior to the claims of general unsecured creditors. *Morris v. Y. & B. Corp.*, 705.

*e Contracts and Liabilities*

1. It is not required by statute that a lessee corporation should sign a lease, C. S., 1138, applying only to conveyances, and the failure of a lessee corporation to affix its seal to a lease to it of lands necessary to the purpose of its business does not of itself render the lease invalid. *Trust Co. v. Transit Lines*, 675.

2. The fact that one corporation has purchased and taken a conveyance of the property of another corporation does not alone make the vendee liable for the debts of the vendor, and where, in an action against the vendor and vendee corporation to recover damages alleged to have been negligently inflicted by the vendor prior to such conveyances, it is not alleged or proven that the vendor was insolvent or that the conveyance was made to hinder, delay or defraud creditors, or that there had been a merger or consolidation of the corporations, or that the vendee had agreed to assume the lia-

CORPORATIONS G—*Continued.*

bilities of the vendor, or that the vendee was a new corporation organized to take over and operate the business of the vendor, or that the vendor has ceased to exist as a corporation: *Held*, the vendee may not be held liable to the plaintiff for injuries sustained from the alleged negligence of the vendor, and C. S., 1138, does not alter this result, its effect, if applicable, being to render the conveyance void as to the plaintiff, who could then levy on the property under execution on a judgment against the vendor, and C. S., 1013, applying only to the sale in bulk of a large part or the whole stock of merchandise. *Begnell v. Coach Co.*, 688.

H Insolvency and Receivers (Contract of receiver for sale of corporate property held not fraud on court see Contracts A g 1; insolvent banks see Banks and Banking I).

*b Assets and Choses in Action Passing to Receiver*

1. Where the directors of a corporation are directly liable to third persons dealing with it arising from the defalcation or mismanagement of its officers, it is not a cause of action arising only to the corporation that passes to the receiver upon its insolvency, requiring the permission of the court to maintain it. *Minnis v. Sharpe*, 364.

*c Claims Against Receiver and Order of Payment*

1. Where the president of a corporation having general authority to borrow money for the corporation has certain corporate property transferred to him and gives a mortgage thereon to a lender and reconveys the property to the corporation which assumes the indebtedness and receives the full benefit of the transaction with knowledge of its board of directors, and the notes thus secured come into the hands of an innocent purchaser for value without notice: *Held*, upon the insolvency of the corporation, the holder of the notes secured by the registered mortgage is entitled to a preference to the extent of the value of the mortgage lien as against the general creditors of the corporation. *Morris v. Y. & B. Corp.*, 705.

J Consolidation and Merger of Corporations.

*a Distinction Between Consolidation and Merger*

1. Whether the union of two corporations is a merger or consolidation is not determined by appearance of a merger from the retention of the name of one and the abandonment of the name of the other, nor the use of the word "merger" in the statute under which the union is accomplished when it is apparent that it is not used in its technical sense, but the provisions of the statute under which the union is accomplished controls, whether it provides for a merger in the technical sense or whether it provides for a consolidation.

COUNTIES (Taxation by, see Taxation; County Property not subject to taxation see Taxation B a 1; County highways see Highways C, Courts see Courts B, Schools see Schools).

A Governmental Powers and Functions.

*a Nature of County Governments and Powers in General*

1. A county is a governmental agency of the State and an integral portion of the general administration of State policy. *O'Berry v. Mecklenburg County*, 357.

COUNTIES—*Continued.*

E Fiscal Management, Public Debt, and Application of Revenue.

*d Application of County Funds to its Municipalities under Legislative Authority*

1. Where by authority of statute a board of road commissioners for a county has been created with full charge of the roads of a county and by later act the sheriff of the county is directed to pay to the cities and towns of the county fifty per cent of all taxes levied and collected for road purposes in such towns, to be held by their respective treasurers and expended upon their own streets and roads, and by a later act the board of county road commissioners is abolished and their duties fixed upon the county commissioners, with provision that "all taxes and other funds applicable to the roads of the county that may be collected in the future shall be deposited with the county treasurer": *Held*, construing the various acts *in pari materia*, there is no repugnancy between the act abolishing the county road commissioners and the act providing that the municipalities receive a part of the revenue for road purposes, and it is the duty of the county treasurer to pay to the municipalities the fifty per cent of such revenue according to the terms of the statute. *Leonard v. Sink*, 114.

COURTS (Supreme Court see Appeal and Error; Justice's courts see Justices of the Peace; Removal of causes to Federal, see Removal of Causes; Venue see Venue).

B 'County Courts.

*e Appeals from County Courts*

1. On an appeal from a County Court created by chapter 520, Public-Local Laws of 1915, amended by chapter 18, Public-Local Laws of 1925, to the Superior Court, a "statement of case on appeal" is necessary, and where the appellant fails to serve his case on appeal, the appeal is subject to dismissal unless some error appears on the face of the record proper, and where it appears from the record that the action was dismissed in the County Court upon the plea of *res judicata* for that an action between the same parties on the same subject-matter had been nonsuited on its merits and there is no finding that the evidence in the second action was substantially the same, the judgment of the Superior Court remanding the cause to the County Court for trial will be affirmed on appeal to the Supreme Court. *Chappell v. Ebert*, 575.

COVENANTS see Deeds and Conveyances C g.

CRIMINAL LAW (Grand Jury see Grand Jury; Bail see Bail B).

G Evidence in Criminal Cases (Evidence of particular crimes see Particular Titles of Crimes; right of accused not to be compelled to testify against self see Constitutional Law F).

*a Presumptions and Burden of Proof*

1. A defendant in a criminal prosecution 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 jury, it does not of itself create a presumption against him as a matter of law, and the question of his

CRIMINAL LAW G—*Continued.*

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. McLeod*, 649; *S. v. Spivey*, 655.

*c Character Evidence*

1. 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. Trogdon*, 167.

*d Materiality and Competency in General*

1. Where a defendant in a criminal action depends upon proving an alibi by showing by his witness that at the time the offense was committed that he was at her house in a different place, and, in contradiction of the testimony of such witness, an officer arresting the defendant testifies that on the night of the arrest he called up the telephone number of the residence of this witness and that a female voice answered and said that she was in the residence called for, but was not the person asked for, but that she would call her sister, who was such person, and then another female voice answered, identified herself, and said the defendant had not been in her house: *Held*, sufficient evidence that the witness herself had answered the phone and was competent as evidence tending to contradict her testimony to the contrary. *S. v. Burleson*, 61.

2. Upon the trial for a homicide, testimony of a deaf mute that he saw the defendant take the arm of the deceased "and make like to cut him" is competent with other testimony to like effect and as substantive evidence. *S. v. Jones*, 704.

*e Hearsay Evidence*

1. Where there is evidence that the prisoner on trial for murder was at the time of the killing with another stealing chickens, testimony of a statement made by the other person in the absence of the prisoner that the prisoner had done the killing is incompetent as hearsay, and its admission upon the trial over the objection of the accused is reversible error. *S. v. Simmons*, 599.

2. Testimony of the sheriff that a suspect of the crime told him to get the present defendant and "you will be on the right track," not made in the presence of the defendant, is inadmissible as hearsay evidence, and its admission over the objection of the defendant is reversible error. *S. v. Setzer*, 663.

*l Confessions*

1. Where evidence is taken upon the *voir dire* as to the competency or voluntariness of the confession of the prisoner charged with murder, the prisoner, at his own request, is entitled to be heard as to the voluntariness of the confession, and a denial of the right will be held for reversible error as denying to the prisoner the benefit of his own testimony and as impelling him to take the stand upon the trial to deny its voluntariness. *S. v. Blake*, 547.

CRIMINAL LAW G—*Continued.*

*m Weight and Sufficiency*

1. A conviction of larceny may not be had upon evidence which creates only a conjecture or suspicion that the defendant had committed the offense. *S. v. Battle*, 379.

2. In cases where the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of the defendant's guilt and to exclude any other reasonable hypothesis, but the evidence should be submitted to them if there is any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises only a suspicion or conjecture, and it is for the jury to say whether they are convinced from the evidence of the defendant's guilt beyond a reasonable doubt. *S. v. McLeod*, 649.

*n Circumstantial Evidence*

1. Circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but in many cases is quite essential to its establishment. *S. v. McLeod*, 649.

*p Evidence of Identity*

1. Where foot tracks found in connection with a crime correspond in every particular with the shoes of the defendant, including a peculiar mark on the rubber heels, evidence of such similarity is competent as tending to identify the accused as the perpetrator of the crime, the probative value of such evidence depending upon the attendant circumstances. *S. v. McLeod*, 649.

I Trial (In prosecutions of particular crimes see Particular Titles of crimes).

*g Instructions*

1. An introductory statement by the trial court in his instruction to the jury in a prosecution for murder that he would not take up the time of the jury to read from his notes of the testimony in the case in the absence of request of counsel is not error when he has nevertheless stated the evidence in a plain and correct manner and declared and explained the law arising thereon, C. S., 564, and judgment upon the verdict of guilty of murder in the first degree will be sustained when the record is free from error. *S. v. Sawyer*, 459.

2. Where the prisoner on trial for murder introduces no evidence and relies upon his motion as of nonsuit, error of the trial court in stating his contentions that the defendant admitted that the deceased's death resulted from a blow with an ax or deadly weapon, will not be held as reversible error when it appears that the court was referring to evidence of a statement made by the prisoner at the time of the crime, and must have been so understood by the jury when considered in its immediate connection and in the light of the whole charge. *S. v. Spivey*, 655.

*j Nonsuit in Criminal Cases*

1. The function of the court when considering a motion to nonsuit is to determine the sufficiency of the evidence to support the verdict, it

CRIMINAL LAW I—*Continued.*

being the province of the jury to pass upon the weight and credibility of the evidence, and where the evidence viewed in the light most favorable to the State is sufficient to sustain a verdict of guilty, the defendant's motion as of nonsuit should be denied. C. S., 4643. *S. v. McLeod*, 649.

K Judgment and Sentence.

*b Suspended Judgments and Suspended Execution of Judgments*

1. Where a defendant in a criminal action is found guilty and is sentenced for a certain time in jail, suspending execution of the sentence for thirty days with a provision that at the end thereof capias to issue under the direction of the solicitor if the defendant were found within the State: *Held*, the essential part of the judgment is the punishment and the time the sentence should begin is directory, and the court may thereafter (in this case a period of four years) upon its own initiative direct the execution of the sentence theretofore imposed. Cases of suspended judgments and prayers for judgment continued distinguished. *S. v. McAfee*, 507.

2. Where the verdict finds a defendant guilty of a criminal offense, prayer for judgment may not be continued over the objection of the defendant. *S. v. Jaynes*, 728.

L Appeal in Criminal Cases.

*a Prosecution of Appeals Under Rules of Court*

1. An appeal *in forma pauperis* by a defendant convicted of a capital felony will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the rules of Court regulating appeals, after an examination of the record for errors appearing on its face. *S. v. Stanley*, 308; *S. v. Brumfield*, 613.

*c Review*

1. Exceptions in a criminal action to the rulings of the court with respect to the admission of evidence as to an alibi relied on will not be held for error when all defendant's evidence tending to establish the alibi was submitted to the jury. *S. v. Burleson*, 61.

2. Where a question asked by the solicitor of a physician calls for hearsay evidence, it will not be held for reversible error if the question is not answered and it does not appear what the answer would have been. *S. v. Jones*, 704.

3. In this case *held:* defendant's exception to the exclusion of testimony sought to be elicited on cross-examination from certain of the State's witnesses who had testified to the good character of another State witness and to the character of the deceased, offered as tending to impeach such character witnesses, if it be conceded that the testimony was competent for this restricted purpose, its exclusion cannot be held for reversible error. *S. v. Mitchell*, 807.

CROPS see Landlord and Tenant C c; Laborer's lien on, see Agriculture.

CURTESY—Sufficient estate to enforce specific performance against, see Specific Performance B a 1.

DAMAGES—In condemnation proceedings see Eminent Domain C e; allowance of interest see Interest.

DAVIDSON COUNTY—Application of road funds see Counties E d 1.

DEATH.

B Actions for Wrongful Death (Negligence resulting in death see Master and Servant C; Highways B; Homicide C).

*a Limitation of Actions therefor*

1. C. S., 160, giving the right of action for a wrongful death to the administrator of the deceased confers a right not existing at common law, and the provision that the action be brought within one year is a condition annexed to the cause of action and also a statute of limitation in regard thereto, and an action brought against a resident defendant by a nonresident plaintiff for a wrongful death occurring in another State is controlled by our statute prescribing the time within which such action can be brought and not a general statute of the State in which the death occurred which allows a longer period. *Tiffenbrun v. Flannery*, 397.

2. Where, in an action to recover damages for a wrongful death, the date of the death is admitted in the pleadings and summons bears date of issuance within one year therefrom, and these matters affirmatively appear in the record on appeal, the presumption is that the evidence was properly before the jury and the judgment of the trial court denying defendant's motion as of nonsuit, entered on the ground that the action was barred by the statute, will be upheld. C. S., 160. *Harper v. Bullock*, 448.

DEEDS AND CONVEYANCES (Cancellation of for fraud see Cancellation of Instruments A b; Fraudulent as to creditors see Fraudulent Conveyances; Deed of gift void for failure to register see Partition B a 1).

A Requisites and Validity.

*h Undue Influence*

1. In order to set aside a deed for fraud or undue influence the plaintiff must show that the instrument did not express the real purpose and desire of the grantor, but was an expression of the mind and will of a third person in substitution thereof, and although moral turpitude or improper motive is not necessary, in this case *held:* the evidence of undue influence was insufficient and a directed verdict on the issue was free from error. *Owens v. Rothrock*, 594.

C Construction and Operation.

*c Estates and Interests Created*

1. While ordinarily and standing alone an estate conveyed by deed to "R. and children, her bodily heirs and assigns," would carry a fee-simple estate to R., it will not so operate when taking the deed in its entirety, the intent of the grantor is ascertained to convey the lands to R. and her children as tenants in common, and such intent is in conformity with like expressions used in the other material and relevant portions of the deed. *Buckner v. Maynard*, 802.

2. Where a conveyance of lands by the grantor uses the words in the premises to "R. and her children" in the witnesseth clause "convey

DEEDS AND CONVEYANCES C—*Continued.*

to the said R. and her children, her bodily heirs and assigns": *Held*, the words "bodily heirs" refers to "children," and the terms thus reconciled express the intent of the grantor to vest the estate in R. and her children as tenants in common, and the children take a vested interest in the lands so conveyed. *Ibid.*

*f Warranties and Covenants*

1. Where the grantor of lands covenants in his deed that the title is free and clear from encumbrances he is estopped from setting up a prior mortgage lien thereon in his own favor as against his grantee or those claiming under him, and a demurrer to the complaint of the purchaser from the grantee alleging these facts should be overruled, and the plaintiff is entitled to have the grantor permanently restrained from enforcing his lien and have the lien removed as a cloud upon his title in the event of a verdict in his favor. *Bechtel v. Bohannon*, 730.

*g Restrictions*

1. Where the Court finds upon facts agreed that restrictions in deeds in a development were not enforceable by the owners of other lots therein for the reason that the subdivision was not developed or mapped by the developing company in accordance with a general plan or scheme, and that the restrictions were not enforceable by the developing company or any one claiming under it, for the reason that the developing company, a corporation, had been dissolved, his judgment that the owner in the subdivision could transfer his lot to another free from the restrictions, except as to one applicable to all the lots, will be upheld on appeal. *DeLaney v. Hart*, 96.

2. The mere fact that a development company has made and registered a map of lands showing its division into streets and lots of a certain size, and has conveyed some of the lots by deeds referring to the map and containing restrictions as to the size of the lots, is not alone sufficient evidence of a general scheme or plan to include the remaining lots within the restrictive clauses of the conveyances or to create a right or easement in the absence of express or implied covenants to this effect, and an order restraining the development company from dividing and selling the remaining lands into lots of a smaller size will not lie. *Stephens Co. v. Binder*, 295.

3. Where, in an action against a grantor and a State institution purchasing land from him, the complaint alleges that the grantor sold the plaintiff lots in a development by deed containing a restrictive covenant against negro occupancy and covenanted that other lots in the development would be sold by deeds containing like restrictions, according to a registered map, and that the grantor sold the State institution lots in the development by deed not containing the restriction and that the institution was planning to erect a school for negroes thereon, and the plaintiff seeks to recover damages therefor from the grantor, and attaches funds in the hands of the State institution: *Held*, the recorded map of the tract is insufficient alone to show a general scheme for development, and in the absence of an admission by the institution, or a finding upon competent evidence that the lots purchased by it were in-

DEEDS AND CONVEYANCES C—*Continued.*

cluded in a general scheme, it is not bound by the restriction, and the complaint states a cause of action against the grantor, and the demurrer thereto was properly overruled. As to whether the State institution is bound by the restriction is not presented on this appeal. *Eason v. Buffaloe*, 520.

D Description and Boundaries.

*c Sufficiency of Description and Parol Evidence of Identification*

1. A deed which fails to describe with certainty the property sought to be conveyed, does not fix a beginning point or any of the boundaries, and contains no reference to anything extrinsic by reference to which the description could be made certain, is too vague and indefinite to admit of parol evidence of identification, and it being impossible to identify the land sought to be conveyed, the deed is inoperative, C. S., 992, not applying to such cases. *Katz v. Daughtrey*, 393.

*d Declarations as to Boundaries*

1. Hearsay evidence of declarations of a decedent as to the location of certain lines and corners of a tract of land in order to be competent must be of declarations made *ante litem motam* by a declarant dead when the evidence is offered and disinterested at the time they were made. *Thompson v. Buchanan*, 278.

2. Where the owner of lands has parted with his title testimony as to his subsequent declarations against the interest of those claiming under him is incompetent, but where evidence of like nature, effect and character has been admitted without objection, exception to the admission of such evidence will not be sustained on appeal. *Ibid.*

3. Evidence of declarations of an adjoining owner of lands in dispute as to boundaries and corners is admissible unless made in his own interest, and under the facts of this appeal *held:* the reference to the matter under exception was too meagre upon which to award a new trial. *Ibid.*

F Timber Deeds.

*a Rights and Liabilities of Parties under Deed of Standing Timber*

1. Where the defendants entered upon lands of the plaintiff and committed trespass in cutting and removing trees growing thereon under an unauthorized contract made with the plaintiff's tenant-at-will, the defendants knowing of the tenancy and that their grantee did not claim the land adversely to the plaintiff, and no facts are shown to estop the plaintiff, he may maintain his action for damages, and a judgment of the trial court dismissing the action is erroneous. *Rogers v. Stephens*, 132.

2. Where the grantor in a timber deed does not reserve title to secure the purchase price to be paid at certain intervals, and the grantee enters and cuts timber under the unregistered deed and sells the severed timber to another, the purchaser of the cut timber from the grantee is not liable to the grantor upon being notified by him after he had paid the purchase price to the grantee that the grantee had not paid the grantor therefor. *Stanton v. Seligman*, 759.

DEMURRER see Pleadings D.

DISCOVERY see Bill of Discovery.

DIVORCE.

B Grounds for Divorce.

*e Grounds for Divorce a Mensa*

1. The grounds for divorce *a mensa* given by C. S., 1660, are available to the husband as well as to the wife, or as stated by the express language of the statute to "the injured party." *Brewer v. Brewer*, 669.

D Jurisdiction, Proceedings and Relief.

*c Pleadings*

1. The law does not favor divorce and requires that in an action for divorce *a mensa* the plaintiff must state the circumstances of the alleged acts upon which this relief is demanded with particularity of detail; but where demurrer is not at first interposed, and the defendant previously files an answer setting forth such circumstances with the particularity required in such cases, and denies the plaintiff's allegations in respect thereto, the deficiency of the complaint thus being supplied, the pleadings will be liberally construed with a view to substantial justice between the parties, C. S., 535, 549, and a demurrer then interposed on the ground that the complaint fails to state a cause of action will be denied. *Brewer v. Brewer*, 669.

*e Instructions*

1. A statement made in the charge of the judge to the jury in an action of the wife against her husband for permanent alimony that he could not specifically explain when the condition of the wife would become intolerable, is not error, when taken in relation to other parts of the charge it appears that he has in substance charged the jury that both parties might become angry and say and do things that they should not have said or done, but that such intermittent acts would not necessarily be sufficient to constitute a cause of action for divorce, leaving it for the jury to determine whether the "indignities" under the evidence was sufficient. *Rodman v. Rodman*, 137.

DRAINAGE DISTRICTS.

C Duties and Liabilities of District.

*a Duties and Liabilities in Respect to Condition and Maintenance of Dams*

1. Where in an action against a drainage district the evidence discloses that in a prior action the district was ordered to maintain certain temporary dams until permanent dams could be erected in order to prevent the overflow of waters from a canal, and that such temporary dams were washed away, causing injury to the plaintiff's land from overflow water, an instruction to the jury that the defendant's liability was to be determined by their finding from the evidence whether or not defendant was negligent in failing to restore and maintain the temporary dams pending the erection of permanent dams, as required by the former judgment, is not error. *Dunbar v. Drainage Comrs.*, 487.

ELECTION see Wills F d.

EMBLEMENTS see Landlord and Tenant C c.

EMINENT DOMAIN (Zoning ordinances as taking of property without compensation see Municipal Corporations H b 1, 3).

A Nature and Extent of Power.

*b Extent of Power in General*

1. The right to take private property for public use is governed by statute, and the statutes under which this right arises are to be strictly construed. *Light Co. v. Reeves*, 404.

C Proceedings to Condemn and Assess Compensation.

*e Measure and Amount of Damages*

1. In proceedings to condemn lands of a private owner for the erection of an electric power transmission line, it is required of the jury of view to fix the damages to the owner for the lands to be taken together with peculiar damages to his contiguous lands resulting therefrom, less any special benefits accruing to him by reason thereof. *Light Co. v. Reeves*, 404.

*f Appeal to, and Disposition of Cause in Superior Court*

1. Where the petitioner in condemnation proceedings and the owner of the land sought to be condemned both except to the report of the appraisers and appeal from the confirmation of the report by the clerk to the Superior Court, it is within the discretion of the trial judge to remand the case for another appraisal for errors committed by the appraisers in making the award or for ambiguity in their report, or to retain the entire case for a jury trial and determination in the latter court, C. S., 1724, and his refusal to remand the case will not be held for error. *Light Co. v. Reeves*, 404.

EMPLOYER AND EMPLOYEE see Master and Servant.

EQUITY—Subrogation see Subrogation; Bill of Discovery see Bill of Discovery.

ESTATES see Deeds, Wills, Party Walls, Partition.

ESTOPPEL (Estoppel by judgment see Judgments L).

A By Deed (By covenant against encumbrances see Deeds C f 1).

*a Creation and Operation in General*

1. Where the owner of land adjoining a bank building has been induced by the receiver of the bank to give a release of his claim to an easement in an alleyway which had been closed by the bank under an agreement that a certain sum of money was to be placed in escrow and used to pay damages pending the determination of the rights of the parties: *Held*, the plaintiff is not estopped by his deed from bringing action against the receiver for the damages sustained by him by reason of the closing of the alleyway, the bank having received the benefit of the agreement. *Fleishman v. Burrowes*, 514.

ESTOPPEL—*Continued.*

C Equitable Estoppel.

*a Nature and Essentials of Equitable Estoppel*

1. Equitable and legal estoppels agree in that they preclude a person from showing the truth in an individual case; but legal estoppel shuts out the equity and justice of the individual case in its operation, while equitable estoppel prevents a person from asserting his rights under a technical rule of law when his conduct has been such as in good conscience should prevent him from alleging and proving the truth. *Bank v. Winder*, 18.

2. The intent to mislead is not an essential element in the doctrine of equitable estoppel *in pais*, nor is fraud and representation in all cases requisite, and the acts, conduct, and even silence of the party sought to be estopped may be adequate. *Ibid.*

3. Estoppel by misrepresentation differs from estoppel by record, by deed, or by contract, in that it is not mutual, but applies when the representation of a material fact is false and should have been known as such to the party making it, and was calculated to, and did deceive another, causing him to suffer loss. *Bank v. Clark*, 169.

4. The doctrine of equitable estoppel is entirely distinct from the presumption of an ouster created by continuous adverse possession for a period of twenty years. *Thomas v. Conyers*, 229.

*b Acts and Transactions Operating as Estoppels In Pais* (Acts estopping corporations from pleading defense of *ultra vires* see Corporations G b 1)

1. Where the owner of personal property clothes another with the *indicia* of title, or allows him to appear as the owner, or as having the power of disposition, an innocent third person dealing with the apparent owner, and who has been deprived of his rights thereby, will be protected under the equitable doctrine of estoppel *in pais*. *Bank v. Winder*, 18.

2. Where one having an inherited interest in diamonds gives the possession of the diamonds to his brother, and permits the wife of the latter to wear them as her own for years without claiming them, and after a separation from her husband she hypothecates them at a bank for the security of her personal note given for borrowed money, the evidence is sufficient to be submitted to the jury as to whether the bank in lending her the money was reasonable in relying upon or inferring the fact that all the diamonds were her own, and estop her brother-in-law from showing to the contrary in an action by the bank to subject the diamonds to the payment of her note. *Ibid.*

3. Where the heirs at law of a deceased owner of lands have accepted and gone into possession of their parts of land under separate deeds executed by the deceased, but kept by him in a bank without delivery until found by his executrices after his death and by them recorded: *Held*, the heirs at law are estopped by their acts and conduct, and are bound by the terms and conditions of their deeds which they have accepted from thereafter successfully claiming that the partition by parol was invalid. *Thomas v. Conyers*, 229.

ESTOPPEL C—*Continued.*

4. The equitable owner of lands under a trust created by payment of the consideration for the lands would be estopped by his acts and representations, made to a creditor of the holder of the legal title, that the legal title was absolute, from asserting his equity against such creditor when the creditor has acted upon the representations to the prejudice of his rights. *Nissen v. Baker*, 433.

5. Where a creditor of a holder of the legal title to lands under a registered deed contends that he was induced to let credit to such holder by misrepresentations of the owner of the equitable title the legal title was absolute, and the only evidence of such misrepresentations on the part of the equitable owner was that the holder of the legal title was his secretary and agent and had represented that he held the absolute title, but that at the time he made the representations he was acting for himself and not the equitable owner: *Held*, evidence of misrepresentations by the owner of the equity was insufficient to be submitted to the jury and motion as of nonsuit on the issue of estoppel should have been granted. *Ibid.*

EVIDENCE (In criminal cases see Criminal Law G; in particular actions or by persons in particular relationships see Particular Titles; reception of, see Trial B; on motion to nonsuit see Trial D a; declarations as to boundaries see Deeds and Conveyances D b).

A Judicial Notice.

*a Matters of Which Judicial Notice will be Taken*

1. Judicial notice may be taken of the fact that a certain person is a special judge appointed by the Governor under authority of chapter 137, Public Laws of 1929. *Bohannon v. Trust Co.*, 702.

D Relevancy, Materiality and Competency in General.

*b Testimony as to Transactions or Communications with Decedent or Lunatic*

1. The provisions of C. S., 1795, prohibiting testimony of transactions and communications with a deceased person, by a party in interest, may be waived by the adversary party. *Andrews v. Smith*, 34.

2. Where an administrator brings proceedings under the provisions of C. S., 900, *et seq.*, to examine a defendant to discover assets of the estate of the deceased, the administrator waives the provisions of C. S., 1795, prohibiting testimony of transactions or communications with decedent, and the testimony thus taken may be introduced by the defendant in his own behalf. *Ibid.*

3. The provisions of C. S., 1795, excluding testimony of transactions and communications with a deceased person by a party in interest, are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action. *Honeycutt v. Burleson*, 37.

4. The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of C. S., 1795, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased. *Ibid.*

EVIDENCE D—*Continued.*

5. The mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, is not a party interested in the event of the action whose evidence on the trial is excluded under the provisions of C. S., 1795. *Conley v. Cabe*, 298.

6. The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, is not incompetent as falling within the provisions of C. S., 1795, prohibiting testimony as to transactions or communications with a decedent by a party in interest, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action. *R. R. v. Hegwood*, 309.

7. In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time: *Held*, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under C. S., 1795, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result. *Donoho v. Trust Co.*, 766.

*c Facts in Issue and Relevant to Issues*

1. In proceedings to enjoin a sale under foreclosure of a deed of trust where the plaintiff introduces evidence tending to show that he had not received the loan for which the deed of trust was given, the ledger of the bank, identified as a record of the lender, with the bank showing two items for the same amount of the loan charged against the lender on the day that the borrower deposited a like amount with the bank: *Held*, the ledger sheet was properly excluded in the absence of evidence from which the jury could find that one of the items charged to account of the lender was paid to the borrower, it having no probative force upon the fact of payment in issue, and being irrelevant and immaterial. *Peebles v. Idol*, 56.

*d Testimony as to Telephone Conversations*

1. Testimony of a witness that he had had a conversation with another person over the telephone is admissible, if otherwise competent, where the identity of the other person is established by evidence. *S. v. Burleson*, 61.

2. Where there is evidence that a witness requested the long-distance operator in the telephone exchange to connect the witness with the telephone in the office of the plaintiff in a nearby city, and that some one responded, saying that he was speaking from the office of the plaintiff, that he was unable to give the information requested by the witness, but that he would have the plaintiff's bookkeeper call the witness as soon as the bookkeeper came in, whereupon the wit-

EVIDENCE D—*Continued.*

ness gave his telephone number and town, and that later in the morning the witness was informed by the telephone operator that the bookkeeper in the office of the plaintiff was calling him, and that he then had a conversation over the long-distance telephone with a person who represented himself to be the bookkeeper in the office of the plaintiff, who informed the witness as to the identity of an article sold by the plaintiff which was later verified: *Held*, the identity of the person as the bookkeeper of the plaintiff was sufficiently established by the evidence, and testimony of the conversation by the witness, being otherwise competent, should have been admitted in evidence. *Harvester Co. v. Caldwell*, 751.

*f Testimony Impeaching, Contradicting or Corroborating Witness*

1. In impeaching a witness, testimony as to previous statements he had made material and relevant to his cause of action which were inconsistent with his testimony on the stand, is competent as tending to weaken his credibility, and the exclusion of such testimony by the trial court entitles the defendant to a new trial. *Clay v. Connor*, 200.

2. Where the plaintiff and the cashier of a bank have testified that the plaintiff had transferred certain funds on deposit in the bank, the introduction in evidence for the purpose of corroborating their testimony of a memorandum, testified by the cashier to be a bank record and a correction of deposit, is not reversible error. *Sentelle v. Board of Education*, 389.

*g Facts Within Knowledge of Witness*

1. Where a question is asked the plaintiff as a witness in his own behalf "what was your understanding?" of a contract material to the controversy, "what was the agreement?" and it appears that the answer was to the fact of agreement, the admission of evidence thus adduced will not be held for error as relating to the understanding of the witness. *Fleishman v. Burrowes*, 514.

*h Similar Facts or Transactions*

1. While ordinarily evidence that an injury occurred at another time is not competent in an action to recover damages for a negligent injury, it is otherwise where the essential conditions of the events are substantially alike, and in this case *held:* that the short lapse of time between the events is not a sufficient ground for a new trial. *McCord v. Harrison-Wright Co.*, 743.

F Admissions.

*c By Parties or Others Interested in Event*

1. Where a father qualifies as next friend and brings action for his infant child to recover damages of the defendant for negligently running his automobile upon the child, evidence of the admissions of the father made before his appointment as next friend are not admissible against the infant plaintiff, and their admission over the objection of the plaintiff is reversible error. *Cook v. Edwards*, 738.

*e Admission in Pleadings and Admissibility of Pleadings in Evidence*

1. Where the plaintiff in the action has offered in evidence certain allegations of the complaint and admissions in the answer, it is compe-

EVIDENCE F—*Continued.*

tent for the defendant to introduce all paragraphs of the answer in which such admissions were explained or modified, but not of extraneous matter. *Bridgers v. Trust Co.*, 494.

I Documentary Evidence.

*b Accounts, Ledgers, Books, etc.* (Verified accounts see Account, Action on C a 1)

1. In proceedings to enjoin a sale under foreclosure of a deed of trust where the plaintiff introduces evidence tending to show that he had not received the loan for which the deed of trust was given, the ledger of the bank, identified as a record of the lender, with the bank showing two items for the same amount of the loan charged against the lender on the day that the borrower deposited a like amount with the bank: *Held*, the ledger sheet was properly excluded in the absence of evidence from which the jury could find that one of the items charged to account of the lender was paid to the borrower, it having no probative force upon the fact of payment in issue, and being irrelevant and immaterial. *Peebles v. Idol*, 56.

2. Where in an action against the administrator of the plaintiff's deceased auditor of expenditures it is alleged that the deceased had the power, in the absence of his superior, to initiate and sign vouchers of the plaintiff and that the deceased, in the absence of his superior, initiated and signed two vouchers to a fictitious firm, endorsed them, and embezzled the proceeds collected therefrom, the introduction of the original record vouchers entered in the regular course of business by the deceased in his handwriting and under his immediate control, and proved to have come from the proper depository are admissible in evidence as verified regular entries, the original observer being dead. *R. R. v. Hegwood*, 309.

J Parol Evidence Affecting Writings (As to identification of lands see Deeds and Conveyances D c; as to liabilities of makers and indorsers see Bills and Notes D c)

*a Explaining, Modifying, or Varying Terms of Written Instrument*

1. Where the owner of lands receives purchase-money notes for the balance of the purchase price of lands, and gives his notes to the selling agent for his commissions for making the sale, in the agent's action upon the notes so given him it may be shown by parol that the commissions were to be paid only upon the amount of actual cash the owner received from the lands, especially when the notes themselves bear evidence of such agreement. *Stockton v. Lenoir*, 148.

2. Where the purchase-money note secured by mortgage is given for the balance of the purchase price of lands it may be shown by parol evidence that it was contemporaneously agreed between the parties that the maker of the note was to be discharged upon his conveyance of the lands to another who was to pay the consideration and who were the real parties to the contract and for whom the maker of the note was acting, the parol evidence not tending to vary the terms of the written instrument, but being solely as to the method of payment contemplated by the parties. *Justice v. Coxe*, 264.

EVIDENCE—*Continued.*

K Expert Testimony.

*a Conclusions and Opinions of Witnesses in General*

1. Where a chisel is used for cutting the bitulithic pavement on a city street for the purpose of laying pipe in the ground thereunder, and the injury in suit is alleged to have resulted from the failure of the defendant to repair the top of the chisel which was battered and shivered as the result of sledge hammer blows required in its use, testimony of the plaintiff that the chisel should have been dressed up "because it was dangerous," is in substance that if the chisel remained in this condition there was danger that slivers of steel would be severed from the sledge hammer blows upon its head, and is a "short-hand statement of a collective fact" and is an exception to the general rule excluding an expression of opinion, and its admission in evidence is not reversible error. *McCord v. Harrison-Wright Co.*, 743.

*b Subjects of Expert Testimony*

1. Where an expert witness testifies that he had examined X-ray pictures of the injury, taken under his supervision, and that he had later lost them, it is competent for him to testify from memory as to what the pictures disclosed in regard to the injury in corroboration of his previous testimony as to what he had discovered upon his examination of the injury, and the admission of such testimony is not an admission of the X-ray pictures as substantive evidence, and an objection thereto on this ground cannot be sustained. *Welch v. Coach Line*, 130.

M Character Evidence (In criminal cases see Criminal Law G c).

*a General Rules Governing Admissibility*

1. In an action by the wife against her husband for awarding of permanent alimony under the provisions of C. S., 1667, where the defendant asks the wife's character witness questions to establish his own good character, he thereby places his own character in evidence, and a question asked a witness as to the general reputation of the defendant as being "mean to his wives" is not error when the witness has testified that he knew the general reputation of the husband. *Rodman v. Rodman*, 137.

N Weight and Sufficiency (On motion to nonsuit see Trial D a).

*b Sufficiency in General*

1. Where the insured has testified as to the facts that would, if found in his favor by the jury, entitle him to recover certain damages as indemnity against loss from sickness under the terms of the policy, and also as to a basis of fact for damages excluded by the terms of the policy, it is for the jury to determine under proper instructions upon the weight of the evidence the essential facts at issue. *Metts v. Insurance Co.*, 197.

EXECUTION.

B Property Subject to Execution (Estate by Entireties see Husband and Wife G a 3).

*c Interests, Rights and Equities*

1. Where an insolvent legatee and coexecutor under a will distributes part of his legacy to himself with the consent of the other executor,

EXECUTION—*Continued.*

and uses such funds in making improvements upon his wife's separate real property with her consent, a judgment creditor of the legatee may follow such funds and recover from the wife to the extent that her land was enhanced in value by the improvements, but not to the extent of the moneys so expended, and he acquires a judgment lien on the separate property of the wife so improved. *Winchester-Simmons Co. v. Cutler*, 331.

EXECUTORS AND ADMINISTRATORS (Right to bring action for construction of will see Wills E i 1).

B Assets, Appraisal and Inventory.

*a Assets of Estate*

1. Money received by the widow as beneficiary under the life insurance policy of her deceased husband is not available to the creditors of his estate. Article X, section 7. *Building and Loan Assn. v. Swaim*, 14.

D Allowance and Payment of Claims (Contracts for support of illegitimate child see Bastards).

*a Liability of Estate for Services Rendered Deceased*

1. The value of services gratuitously rendered to a deceased person preceding his death are not recoverable against his estate, and while in certain family relationships these services are presumed to be gratuitous, this may be overcome by proof of an agreement to pay, or of facts and circumstances permitting the inference that payment was intended upon the one hand and expected on the other, in which case recovery may be had upon a *quantum meruit*. *Nesbitt v. Donoho*, 147.

*c Medical and Funeral Expenses*

1. Where the husband has voluntarily paid for medical services rendered his deceased wife, without any expectation at the time that he would be reimbursed out of money belonging to the estate of his wife, and in the absence of a contract to that effect, the expenses so paid are to be regarded as his own debt and the executor of the wife should reject a claim therefor. *Batts v. Batts*, 395.

*f Limitation of Actions on Claims Against Estate*

1. While the statute classifies funeral expenses as a debt of the estate, C. S., 93, the amount due therefor cannot be regarded as a legacy in this State, and where a husband who has paid the funeral expenses of his wife makes claim therefor upon her executor and the claim is rejected, and is not referred in accordance with C. S., 99, an action on the claim is barred by his failure to bring it within six months from the time of its rejection by the executor. C. S., 100. *Batts v. Batts*, 395.

E Sales and Distribution of Estate.

*b Payment of Legacies and Settlement of Amounts Due Estate by Legatees*

1. Where a legatee under a will is also a debtor of the estate it is the right and duty of the executor of the will to retain from his share as legatee whatever amount may be due by him to the estate by prior debt or by reason of matters growing out of the settlement,

EXECUTORS AND ADMINISTRATORS—*Continued.*

and a judgment creditor of the legatee may not complain that he was thus precluded from collecting his debt. *Winchester-Simmons Co. v. Cutler*, 331.

2. Where a testator bequeaths the residue of her personal property to the children of her brother, and the personalty consists of stocks and bonds the value of which in money is definite and determinable, and, in an action by the guardian of the legatees to obtain possession of the property, the court having jurisdiction finds as a fact that it is to the interests of the legatees that the executor transfer to the guardian the specific stocks and bonds for the use of each according to his proportionate share instead of reducing the personalty to cash, the court has the power to authorize a settlement by the executor with the guardian by the transfer of specific stocks and bonds, and a receipt by the guardian according to the order is a complete discharge of the liability of the executor as directed by the order of court. *Trust Co. v. Walton*, 790.

EXPERT TESTIMONY see Evidence K b.

FALSE IMPRISONMENT.

A Nature and Elements.

*a In General*

1. False imprisonment is depriving one of his liberty without legal process, and malicious prosecution is a prosecution founded upon legal process, but maintained maliciously and without probable cause. *Rhodes v. Collins*, 23.

*b Arrest and Imprisonment*

1. Where the uncontroverted evidence in an action for false arrest or imprisonment is to the effect that the defendants procured from a justice of the peace a warrant for the arrest of the plaintiff and accompanied the process officer who made the arrest and took the plaintiff before the magistrate, and that the plaintiff was required to and gave bond for his appearance, it is not error for the court to instruct the jury that if they believed the evidence to answer the issue as to the false arrest in the affirmative. *Rhodes v. Collins*, 23.

*c Without Legal Process.*

1. Slander of a man is not a criminal offense under our law, and where a warrant for arrest has been procured from a justice of the peace who erroneously issues it, and the parties charged have been arrested and have given bond for their appearance, the warrant under which the arrest was made is void and the plaintiff in a civil action for false arrest thereunder may recover such actual damages as he may have sustained, and the question of good faith in the procurance of the warrant may bear upon the measure of damages, but is not a defense to the action. *Rhodes v. Collins*, 23.

FALSE PRETENSE—Issuing worthless check see Bills and Notes I f.

FEDERAL COURTS—Removal of causes to, see Removal of Causes.

FEDERAL EMPLOYERS' LIABILITY ACT see Master and Servant E.

FILLING STATIONS see Municipal Corporations H b.

FOOD.

A Liability of Manufacturer or Vendor for Injury to Consumer.

*b Condition and Preservation of Food*

1. Where, in an action to recover damages for the wrongful death of the plaintiff's intestate, the evidence tends to show that the intestate became sick after purchasing and eating wieners bought from the defendant, and that she complained of pains in her stomach and that she continued to grow worse until her death about two weeks later, and that the wieners were made in part of rotten meat, and that another in company with the intestate was also made sick from eating wieners bought at the same time, with medical expert testimony to the contrary that death did not result from eating the wieners: *Held*, the evidence that death was the proximate result of the defendant's negligence was sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit. *Harper v. Bullock*, 448.

FORGERY.

A Nature and Elements of the Crime.

*a Execution or Alteration of Writing Purporting to be Act of Another*

1. In order to constitute forgery there must be an execution or alteration of a paper-writing so as to make the writing of its alteration purport to be the act of another person, and where the writing alleged to be a forgery is an endorsement of a check in the name of the payee per procuration or as agent without authority, and the one so signing receives the money thereon and fails or refuses to pay it to the payee, the offense is not forgery and the defendant's motion as of nonsuit should be granted. As to the nature of the offense, the question is not presented on this appeal and not decided. *S. v. Lamb*, 423.

*b Fraudulent Intent*

1. Fraudulent intent is an essential element of forgery, and where the defendant, on trial for forgery in raising a check drawn by himself as president of a corporation and another corporate officer for distribution of funds received by the corporation under a fire insurance policy, contends that he raised the check and received the proceeds as attorney-in-fact for his son who held a mortgage on the corporate property destroyed by fire, and that he was advised by an eminent attorney that his son was entitled to the proceeds from the policy, testimony of the attorney to this effect is competent upon the question of fraudulent intent, and its exclusion is reversible error. *S. v. Luff*, 600.

FRAUD (Cancellation of instruments for, see Cancellation of Instruments; conveyances fraudulent as to creditors see Fraudulent Conveyances; in procuring release from tort liability see Torts c b).

A Deception Constituting Fraud.

*b Duty of Purchaser to Ascertain Facts*

1. Where the evidence discloses that the purchaser of a second-hand automobile had equal means of information with the seller as to the age and running condition of the car, and that the purchaser was not prevented from making a full and thorough examination

FRAUD—*Continued.*

of the car before the contract of purchase was entered into: *Held*, the purchaser may not successfully maintain an action for fraud for representation as to its age or running condition. *Bennett v. Whippett-Knight Co.*, 98.

FRAUDS, STATUTE OF.

A Promise to Answer for Debt or Default of Another.

*a Applicability and Defenses*

1. Where in order to provide a line of credit at the bank for his son the father, without his son's knowledge, and before the transactions, promised another that he would save him harmless if he would endorse his son's notes, and thereafter the promisee signs the son's notes as surety and is required to pay them: *Held*, the promise was an original agreement and does not fall within the provisions of the Statute of Frauds, and is enforceable by the promisee though not in writing nor signed as the statute requires. *New Bern v. Fisher*, 385.

B Contracts Affecting Real Estate.

*a Leases*

1. Where the owner of land agrees to erect a certain kind of building thereon for a proposed lessee, and makes a parol lease for the rental of the property for three years to take effect upon the completion of the building: *Held*, the lease for three years to take effect in the future comes within the provisions of the Statute of Frauds, and where in an action thereon the lessee denies the contract of lease and pleads the statute, he may not be held liable unless it was executed in writing, or some memorandum thereof made and signed by the party to be charged therewith or by some other person by him duly authorized. *Investment Co. v. Zindel*, 109.

J Pleading, Evidence and Trial.

*a Right to Plead Statute; Estoppel*

1. Where the father of an illegitimate child contracts with its mother to devise to such child a share of his estate equal to the share of his legitimate children, and in consideration thereof the mother gives up the custody of the child and forbears to take legal action against him, in an action by such child to recover damages against the estate of the deceased father for breach of the contract to devise: *Held*, the contract was supported by sufficient consideration, and the deceased father having received the benefits of the contract his personal representative will not be allowed to plead the Statute of Frauds. *Redmon v. Roberts*, 161.

FRAUDULENT CONVEYANCES.

C Remedies of Creditors and Purchasers.

*e Parties, Process and Pleadings*

1. In an action by a judgment creditor to set aside alleged fraudulent conveyances of property by deeds of trust and mortgages as made to hinder, delay and defraud him in the collection of his judgment under execution, the joinder therein of the grantees and beneficiaries in the deeds is not objectionable as a misjoinder, C. S., 456,

FRAUDULENT CONVEYANCES—*Continued.*

and demurrer to the complaint alleging such conveyances entered on the ground of misjoinder of causes and parties, and that it failed to state a cause of action is properly overruled. *Moorefield v. Roseman*, 805.

GARNISHMENT—Garnishment of employer in another state defense in action for salary see Judgments L c 1.

GIFTS—Subscriptions for educational institution see Subscriptions A a 1.

GRAND JURY.

A Nature and Constitution of Grand Juries.

*a Selection and Qualification of Jurors*

1. Where a juror is qualified to serve on the grand jury for a certain week of the term of the criminal court, C. S., 2314, he is not qualified to serve for a different week, and he may not participate in the finding of a true bill upon an indictment during the week of the term for which he was not qualified, and in such cases the accused may successfully move to quash the bill of indictment if he makes a motion therefor when he is arraigned to answer, and before the jury has been empaneled to try his case. C. S., 2335. *S. v. Barkley*, 349.

GUARDIAN AND WARD.

C Custody and Care of Ward's Estate and Person.

*b Control and Custody of Property*

1. A guardian in another State of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of C. S., 2195; C. S., 4021, relating to property in the hands of a trustee residing in this State, is not applicable. *Trust Co. v. Walton*, 790.

HEALTH see Constitutional Law C b 1.

HIGHWAYS.

B Use of Highway and Law of the Road (Homicide through negligent driving see Homicide C).

*a Right Side of Road and Law in Passing Other Cars*

1. Where the evidence discloses that the accident in suit occurred when the driver of the car in which the plaintiff's intestate was riding as a guest attempted to pass a car parked on the highway, and that it was struck by the bus on the side of the road properly and lawfully occupied by the bus, with conflicting evidence as to the speed of the bus, and that when the bus stopped it was almost entirely off the hard surface, and that it stopped within its length, and that after the accident the parked car was about the rear of the bus: *Held*, the sole proximate cause of the accident was the improvident attempt of the driver of the car in which the intestate was riding to pass the parked car, and a judgment as of nonsuit was properly entered. *Burke v. Coach Co.*, 8.

2. Where there is no allegation in the complaint in an action to recover damages for the negligent killing of plaintiff's intestate that the

HIGHWAYS B—*Continued.*

defendant's bus which collided with an automobile in which the intestate was riding as a passenger was on the wrong side of the road in violation of statute, the testimony of a witness upon this point is insufficient to deny defendant's motion as of nonsuit when taken in its related parts it tends to show to the contrary. *Ibid.*

3. Section 12 (a), ch. 148, Public Laws of 1927, was enacted for the protection of the public upon the roads and highways of the State, and its violation is negligence *per se* entitling the person injured to his damages when there is a causal connection between the negligent act and the injury complained of. *Wolfe v. Coach Line*, 140.

4. Where there is evidence tending to show that the plaintiff's injury was caused by the driver of the defendant's bus on the highway in failing to clear the automobile of the plaintiff after endeavoring to pass it, after signal, when going in the same direction where the road was amply wide, and to the contrary that the driver of the plaintiff's car, just as the bus was passing, turned into the bus, causing the injury, the issues of negligence, contributory negligence, and damages is properly submitted to the jury under correct instructions from the court. *Ibid.*

5. Where the evidence in an action to recover damages for an injury sustained in an automobile collision tends to show that the plaintiff's car collided with the car of the defendant which was driven without lights in violation of C. S., 2615, while the plaintiff was attempting to pass another car, and that the collision occurred 20 or 30 feet beyond the beginning of a white line on the highway and 65 or 70 feet before a slight curve, and that the plaintiff's vision was unobstructed for a distance of 750 or 900 feet at the point of the accident: *Held*, a judgment as of nonsuit entered on the theory that the plaintiff was guilty of contributory negligence in attempting to pass a vehicle upon the crest of a grade or upon a curve in the highway in violation of C. S., 2621(55), is error, the question of proximate cause being for the determination of the jury. *Cook v. Horne*, 739.

*b Intersecting Highways and Speed at Intersections*

1. The burden is upon the plaintiff to prove each of the elements necessary to constitute negligence, and where in an action to recover for an injury alleged to have been caused by the defendant's driving an automobile past an obstructed intersection at a speed in excess of fifteen miles per hour, C. S., 2621(46), and the defendant does not admit that the intersection was obstructed, but the testimony of one witness, if believed, would be sufficient to show that the defendant's view was obstructed: *Held*, an instruction which assumes the fact that the intersection was obstructed is reversible error, the question being for the determination of the jury from the evidence. *Rudd v. Holmes*, 640.

2. Where the evidence in an action to recover damages for an injury received in an automobile collision at an intersection of public highways tends to show that the defendant stopped his car not over four feet beyond the point of intersection and that the plaintiff was driving his car at a speed in excess of that allowed by law: *Held*, the

HIGHWAYS B—*Continued.*

evidence of contributory negligence was sufficient to be submitted to the jury, and the question of contributory negligence and proximate cause is for their determination. *Liske v. Walton*, 741.

*c Speed on Highways*

1. On appeal an instruction of the trial court to the jury will be considered with the evidence in the case, and an instruction that it is negligence as a matter of law for a person to drive a car on the highway at such rate of speed that the car cannot be stopped within the distance which the driver is able to see an object on the highway in front of him, is not held erroneous where the evidence discloses that the driver could have seen the wagon, which he hit, at a distance of one thousand feet. *Welch v. Coach Line*, 130.

*e Parking on Highways and Parking Lights*

1. Negligence in parking an automobile on a public highway in violation of C. S., 2621(66), to be actionable must be a proximate cause of the injury in suit, and where the plaintiff fails to show by his evidence that such violation was a proximate cause of his injury, a judgment as of nonsuit is properly allowed. *Burke v. Coach Co.*, 8.

2. Where in an action to recover damages for an injury received in an automobile accident occurring in another State the evidence tends to show that the automobile in which plaintiff was riding as a guest collided with the tail gate of the defendant's truck which was parked partly across the highway without a tail light in violation of statute of the jurisdiction wherein the accident occurred, and such negligence was a proximate cause of the injury is sufficient to sustain a verdict in the plaintiff's favor. *Williams v. Express Lines*, 193; *McGee v. Warren*, 672.

*g Contributory Negligence*

1. Where there is evidence tending to show that the driver of the plaintiff's car turned into the defendant's bus as the latter, after signalling, was passing the plaintiff's car, both going in the same direction, and *per contra*, an instruction to the jury to the effect that the plaintiff cannot recover if the defendant has satisfied them by the greater weight of the evidence that the plaintiff was guilty of contributory negligence and that such contributory negligence was the proximate cause or one of the proximate causes of the injury in suit, is not error. *Wolfe v. Coach Line*, 140.

2. In this case where the defendant had parked its car on a dark night upon the side of the highway without a tail light, and there is a reasonable inference that under the existing conditions the plaintiff could not have seen the truck in time to have avoided the injury, in the exercise of ordinary care, the question of contributory negligence upon the issue is for the determination of the jury. *Williams v. Express Lines*, 193.

3. Evidence in this case that the plaintiff suddenly ran in front of the defendant company's bus is held sufficient to sustain an affirmative answer to the issue of contributory negligence and bar a recovery. *Newton v. Brassfield*, 536; *Bailey v. McKay*, 638.

HIGHWAYS B—*Continued.*

4. Where the plaintiff in an action to recover damages for an injury received in an automobile accident is a mere invitee or passenger in one of the automobiles driven by the owner entirely independently of the plaintiff and not under his control, and there is no evidence that the driver and the plaintiff were engaged in a joint enterprise: *Held*, the negligence of the driver, if any, is not imputed to the plaintiff, and he may recover of the defendant if the defendant's negligence was a proximate cause of the injury. *McGee v. Warren*, 672.

5. Contributory negligence, in order to bar a recovery, must be a proximate cause of the injury, which is ordinarily for the determination of the jury. *Cook v. Horne*, 739; *Liske v. Walton*, 741.

*i Evidence and Nonsuit*

1. Where in an action to recover damages for the killing of plaintiff's intestate alleged to have been negligently caused by the driver of an automobile, it is required that the negligence complained of must have been a proximate cause of the injury, and where the plaintiff fails to show by his evidence that such negligence was a proximate cause of his injury, a judgment as of nonsuit is properly allowed. *Burke v. Coach Co.*, 8.

2. Where a passenger in a bus operated by a coach line has been injured in a collision between the bus and an automobile going in the opposite direction, driven negligently from one side of the road to the other, and there is evidence that the bus was exceeding the statutory speed limit, or was operated at such a speed as to endanger life, limb and property, and that the injury to the plaintiff would not have occurred except for the excessive speed of the bus: *Held*, the violation of the legal speed limit is negligence, and not merely evidence of negligence, and when the proximate cause of the injury is actionable, and the coach line may not escape liability therefor on the ground that the car with which the bus collided was also negligently driven, and a judgment as of nonsuit is properly denied. *Lancaster v. Coach Line*, 108.

3. Where the entire evidence in an action to recover damages for injuries received by plaintiff from being struck, while crossing a village street, by reason of the alleged negligence of the driver of the defendant's auto-truck, is to the effect that the plaintiff negligently stepped in front of the truck in such manner as to make the accident unavoidable, except the testimony of the plaintiff's witness, who did not see the accident, that he saw the truck being driven at a speed of forty-five miles an hour, indefinite as to the exact time and the distance from the plaintiff, is insufficient on appeal to disturb the judgment as of nonsuit. *Bailey v. McKay*, 639.

C County Highways (Application of Davidson County road fund see Counties E d 1).

*a Powers of County Highway Commission*

1. Where a county highway commission is given authority by statute "to abandon any existing county road or convert it into a cartway" and "to change or relocate any existing road, and add any new

HIGHWAYS C—*Continued.*

roads," and the power thus given is limited by an amendment adding the words "as now given county commissioners by statute" after the word "cartway": *Held*, the limitation of the amendment refers only to "abandonment" and conversion into a "cartway," and the county highway commission is given power to make a change in an old road by discontinuing a short section thereof without giving notice required of county commissioners by C. S., 3762, but such discontinuance will be restrained until adequate access to a cemetery along the discontinuance is provided. *Hinnant v. Highway Commission*, 293.

HOMICIDE.

A Homicide in General.

*a Degrees and Elements of Homicide*

1. Where the evidence upon the trial of a homicide tends to show the defendant guilty of murder in the first or second degree, and the defendant has admitted the killing with a dangerous weapon under circumstances making him guilty of manslaughter at least, a charge of the court to the jury fully defining the three degrees of the homicide and pointing out their constituent elements and distinctive features, and placing upon the State the burden of proving the defendant guilty beyond a reasonable doubt of murder either in the first or second degree, and imposing upon him the burden of satisfying the jury of circumstances sufficient to reduce or mitigate the offense to manslaughter is not erroneous, there being sufficient evidence of the two great offenses. *S. v. Parker*, 629.

B Murder.

*a Murder in the First Degree*

1. Flight is not evidence of premeditation and deliberation. *S. v. Evans*, 82.

2. Testimony of threats against the deceased made by the defendants two years prior to the homicide may be received in evidence as corroborative testimony of evidence of threats made thereafter. *S. v. Wishon*, 762.

3. The premeditation and deliberation preceding the killing of another necessary to constitute murder in the first degree does not depend upon the length of time between the formation of intent to kill and the execution of that intent, and where the evidence tends to show that the prisoner was violating the prohibition law, had armed himself with a concealed weapon, and, when apprehended by an officer, tried to hide his liquor and get away, and when notified of the purpose of his arrest, whipped out his pistol with his right hand, which had been under his overalls for quite a while, and shot and killed the officer: *Held*, the evidence of premeditation and deliberation was sufficient to warrant a verdict of murder in the first degree. C. S., 4200. *S. v. Evans*, 82.

4. If the prisoner kills simultaneously with the formation of the intent to kill there is no premeditation, but if he weighs the purpose to kill long enough to form a fixed design which he executes at a subsequent time, however soon or remote, there is sufficient pre-

HOMICIDE B—*Continued.*

meditation and deliberation, and in determining the question of premeditation and deliberation it is proper for the jury to consider the conduct of the prisoner before and after, as well as at the time of, the homicide. *Ibid.*

5. Where in a prosecution for murder there is evidence tending to show that the defendant knew that he was wanted by officers of the law and that the deceased, in company with other officers, inquired for the defendant at the house where he was staying and were told that the defendant was at the barn when in fact he was in the house, and that the defendant stepped out of the house, saw the officers, went back into the house and fired the fatal shot with a pistol from a crack in the door, with evidence to the contrary that he did not shoot until he had been shot at by the officers while he was attempting to escape: *Held*, the evidence of premeditation and deliberation was sufficient to be submitted to the jury, C. S., 4200, and the refusal to give the defendant's prayer for an instruction that he could not be found guilty of murder in the first degree was not error. C. S., 565. *S. v. Macon*, 483.

6. Evidence of defendant's guilt of murder in the first degree held sufficient. *S. v. Parker*, 629; *S. v. McLeod*, 649; *S. v. Spivey*, 655.

C Manslaughter.

*a Negligence or Culpability of Defendant*

1. Involuntary manslaughter at common law is the unintentional killing of a human being without malice by an unlawful act not amounting to a felony or by an act naturally dangerous to human life, or by negligently doing a lawful act, or negligently failing or omitting to perform a duty imposed by law. *S. v. Satterfield*, 682.

2. The violation of a statute enacted for the purpose of protecting the public traveling on the public highways of the State is in itself sufficient for a conviction of manslaughter if the violation is in causal relationship with the injury or a proximate cause thereof. *Ibid.*

3. The manifest object of C. S., 2621(63) is to protect the public by requiring the driver of an automobile upon the public highways of the State to stop and ascertain the circumstances and conditions at highway intersections, particularly with reference to traffic, with a view of determining whether in the exercise of due care he may go upon the intersecting highway with reasonable safety to himself and others, and where the defendant in a prosecution for manslaughter fails to stop, but has knowledge of the conditions and has an unobstructed view of the highway for a long distance, and there is no evidence tending to show that he had violated any other statute or that he was negligent in any other respect, the evidence alone that he had violated the statute in the respect stated is insufficient to take the case to the jury, there being no evidence that the violation of the statute was a proximate cause of the death or in causal relation thereto, and defendant's motion as of nonsuit, made in apt time should have been granted. *Ibid.*

4. Where a conviction of involuntary manslaughter is sought for the failure to observe a positive duty imposed by statute with reference

HOMICIDE C—*Continued.*

to the driving of automobiles upon the State highways (C. S., 2621(63), Michie), the question of proximate cause must be shown beyond a mere chance or casualty. *Ibid.*

E Excusable or Justifiable Homicide.

*a Self-Defense*

1. One without fault in bringing on the affray may kill in defense of himself or his family when he believes it to be necessary to prevent death or great bodily harm, and has a reasonable ground for the belief under the facts and circumstances as they appear to him, the jury to determine the reasonableness of the belief upon which he acts. *S. v. Glenn*, 79; *S. v. Parker*, 629.

2. In the exercise of the right of self-defense more force must not be used than is reasonably necessary under the circumstances, and if excessive force is used the party charged is guilty of manslaughter at least, but the law does not require juries to measure with exactness and nicety the amount of force used if one is really acting in self-defense. *S. v. Glenn*, 79.

3. Upon evidence tending to show that the defendant was in a room 12 x 14 feet at the back of a store with only one door as an entrance, through which the deceased came and angrily said to the defendant that he was tired of him, and added while reaching for his pistol, "Damn you, I will kill you," resulting in a struggle in which the deceased was shot and killed: *Held*, reversible error for the judge to charge the jury that if the assault on the defendant was not felonious the defendant would be required to retreat before he would be justified in taking the life of the other, there being no avenue open to the defendant. *Ibid.*

4. Where the defendant in a prosecution for murder contends that he shot the deceased in self-defense after the deceased had wounded him while attempting to arrest him without a warrant, and all the evidence tends to show that the defendant shot the deceased before the deceased or any of his companions had informed him of their purpose to arrest him; that neither the deceased nor any of his companions had attempted to arrest the defendant prior to that time, and there is evidence that the defendant shot after premeditation and deliberation: *Held*, it was immaterial that the officers had no warrant for the defendant's arrest, and the refusal to instruct the jury as to the lawfulness of the arrest was not error, and *held further*, there was ample evidence that the officers had reasonable grounds for arresting the defendant without a warrant, C. S., 4544, and an instruction that the jury might find the defendant guilty of murder in the first or second degree, or of manslaughter, or acquit him, was not error. *S. v. Macon*, 483.

5. Where in stating the general principles of the law of self-defense the court does not accurately instruct the jury as to the defendant's duty to retreat, the charge will not be held for reversible error where in applying the principles to the evidence the court correctly charges that the defendant could stand his ground if he was without fault and if the deceased attacked him with a knife and put him in fear of great bodily harm or death, and if the defendant had reasonable grounds for such fear. *S. v. Wishon*, 762.

HOMICIDE—*Continued.*

G Evidence of Homicide in General.

*a Weight and Sufficiency*

1. Evidence of defendant's guilt of murder in the first degree held sufficient. *S. v. Parker*, 629; *S. v. McLeod*, 649; *S. v. Spivey*, 655.

*d Relevancy and Materiality and Competency*

1. In a prosecution of a husband for the murder of his wife evidence that he failed to provide or help purchase a coffin and clothes for the burial of the wife is incompetent as evidence of his guilt of her murder when it appears from uncontradicted evidence that the husband was out of a job and without means at the time, and an instruction to the jury that it might consider this circumstance in so far as it related to the defendant's attitude toward his wife and so far as the jury thought it threw light upon what the defendant did to his wife is reversible error, and the judgment of second degree murder will be set aside and a new trial ordered on appeal. *S. v. Birkman*, 545.

2. Where the defendant admits he had "words" with the deceased, and that the killing occurred at the first subsequent meeting between him and the deceased, the admission of such testimony will not be held for reversible error on the defendant's appeal from a conviction of murder in the second degree, the testimony being evidence of premeditation and deliberation constituting murder in the first degree of which the defendant was acquitted. *S. v. Wishon*, 762.

H Trial.

*c Instructions in Homicide Cases in General*

1. Where the testimony of the prisoner on trial for a homicide is to the effect that he killed the deceased by cutting her throat with a razor after he had provoked her to attack him with a small knife, and that in the fight thus caused he was the aggressor, without evidence on his part of self-defense, the effect of the prisoner's own evidence is to show the offense of manslaughter at least, and the statement in the charge to the jury that prisoner had admitted this degree of the offense is not reversible error. *S. v. Parker*, 629.

2. Where in a charge to the jury upon a prosecution for homicide the court inadvertently uses the word "choked" in defining legal provocation which would reduce the crime from murder in the second degree to manslaughter, when the defendant had testified that the deceased assaulted him with a knife, the inadvertence will not be held for reversible error when it is apparent that the jury were not misled thereby and a definite application of the principle to the facts of the case was later made by the court. *S. v. Wishon*, 762.

HUSBAND AND WIFE (Divorce see Divorce).

B Rights, Duties and Liabilities (Widow's liability on note given for husband's defalcation see Bills and Notes A a 1, 2, 3).

*d Wife's Right to Maintain Action In Tort Against Husband*

1. An action by the wife against her husband for a negligent injury will lie in the courts of this State, C. S., 454, 2513, and after summons has been duly served and a verified complaint filed in accord-

HUSBAND AND WIFE B—*Continued.*

ance with statute, a judgment by default and inquiry may be entered against the husband upon his failure to answer. 3 C. S., 597(a). *Earle v. Earle*, 411.

*f Living Expenses and Necessaries of Wife*

1. Where the husband has voluntarily paid for medical services rendered his deceased wife, without any expectation at the time that he would be reimbursed out of money belonging to the estate of his wife, and in the absence of a contract to that effect, the expenses so paid are to be regarded as his own debt and the executor of the wife should reject a claim therefor. *Batts v. Batts*, 395.

G Property.

*a Rights and Liabilities in, and Incidents of Estates by Entireties*

1. Where the husband purchases lands and takes title to himself and wife by entireties, and they execute a mortgage on the lands to secure the balance of the purchase price, and the husband dies leaving a will from which his wife dissents: *Held*, as between the wife and the executor of the husband they are liable as joint makers of the note, each for half thereof unaffected by the wife's dissent from the will, although she takes title to the whole of the lands as the survivor. *Trust Co. v. Black*, 219.

2. Where the husband and wife are joint makers of a note secured by their mortgage for the balance of the purchase price of lands held by them by entireties, their liabilities on the note are joint and several, C. S., 458, 3041, 3166, and upon the payment of the note by one of them the other may be held liable for contribution, the incidents of the estate not being incidents of the note. *Ibid.*

3. Under judgment against a husband and wife upon their joint note given for the balance of the purchase price of lands held by them by entireties, execution may be issued against the land so held. *Ibid.*

ILLEGITIMATE CHILD see Bastards.

IMPROVEMENTS.

A Right of Tenant in Common to Improvements or Compensation therefor.

*a Upon Partition or Foreclosure of Land*

1. While C. S., ch. 12, Art. 29, does not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made if this can be done without prejudice to the interests of his cotenants, but this equitable principle does not apply as between mortgagor and mortgagee. *Layton v. Byrd*, 466.

INDEPENDENT CONTRACTOR see Master and Servant D a.

INDEX—of mortgages see Mortgages C c 3.

INDICTMENT—Quashing for improperly constituted grand jury see Grand Jury A a 1.

"INDIGNITIES" see Divorce D e 1.

INFANTS.

B Contracts.

*a Validity and Disaffirmance*

1. An infant may disaffirm his contract at any time at or before his arriving at full age without liability, upon the restoration of the property, for its use, deterioration, or damages for its detention, and where in an action for the purchase price ancillary proceedings in claim and delivery are instituted, the filing of an answer by the infant without a guardian, and his retention of the property under a replevy bond will not bar him from thereafter setting up the plea of infancy, and upon judgment for the return of the property, the infant is entitled to recover the amount paid by him on the purchase price, and is not liable on the replevy bond for the retention or deterioration of the property while in his possession thereunder. *McCormick v. Crotts*, 664.

INJUNCTIONS (Violation of ordinance may not be enjoined see Municipal Corporations H e 3).

D Preliminary and Interlocutory Injunctions.

*b Continuing, Modifying or Dissolving*

1. Ordinarily a restraining order will be continued to the hearing when it is made to appear that thereby no harm will result to the defendant and that the plaintiff might suffer great injury if it is dissolved. *Cullins v. State College*, 337; *Blades v. Simmons*, 444.

INSTRUCTIONS see Trial E.

INSURANCE (Surety bonds see Principal and Surety).

D Insurable Interest.

*a In Real Property*

1. The life estates of tenants in common in a lot upon which a house is situated is an insurable interest in the house, and a policy of fire insurance issued thereon is valid and enforceable. *Houck v. Ins. Co.*, 303.

E The Contract in General.

*b Construction and Operation*

1. Where a policy of fire insurance is ambiguously expressed and capable of two reasonable interpretations, the interpretation more favorable to the insured will be adopted by the court. *Bennett v. Ins. Co.*, 174.

2. In construing a contract of fire insurance the courts are at liberty to consider the purpose of the contract in securing the interest of the mortgagee when that purpose necessarily and plainly appears from a perusal of the entire writing, and, where there are somewhat inconsistent provisions, that construction will be adopted which, while not giving effect to all provisions, will at the same time plainly tend to carry out the clear purpose and intent of the written instrument. *Ibid.*

3. A policy of insurance indemnifying against loss caused by specified accidents will stand as the contract of the parties, merging all prior

INSURANCE E—*Continued.*

parol agreements therein, until reformed for fraud or mutual mistake, which must be established by the plaintiff by clear, cogent, and convincing proof. *Burton v. Ins. Co.*, 498.

*c Reformation of Insurance Contracts*

1. In order to reform a contract of accident insurance for fraud or mistake it is necessary for the plaintiff in the suit to allege and prove the fraud or mistake and have issues passed upon by the jury, and where the action is founded only on the allegation and evidence of the fraud and deceit without the necessary prayer for, and issue on reformation, the plaintiff may not recover for an injury from an accident not covered by the policy, and the courts will at most place the parties in *statu quo* by reimbursing the plaintiff for the premium paid with interest. *Burton v. Ins. Co.*, 498.

G Transfer of Policy.

*a Transfer by Agreement*

1. Where an insurance company consents to the transfer of the policy by the insured to another who is a tenant in common for life with him, the company is estopped to deny the validity of the transfer. *Houck v. Ins. Co.*, 303.

J Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Subsequent.

*d Failure to Give Notice of Accident and Claim for Damages* (Insurer may not have judgment against insured set aside for surprise for failure to give notice see Judgments K a 1)

1. The condition in a policy of accident insurance that notice of an accident covered by the policy be given the insurer immediately in writing will be construed to mean with reasonable promptness, or to impose upon the insured the duty to exercise reasonable diligence in giving the required notice, measured by his ability and opportunity to act in the premises, and a forfeiture of the policy for failure to comply strictly with such provision will not be declared where the notice given complies substantially with the spirit and meaning of the contract. *Mewborn v. Assurance Corp.*, 156.

2. Where notice of an accident covered by the policy of insurance is given the insurer two months and a half after the accident and a month and four days after the extent of the injury is known, and there is evidence tending to show that the mind of the insured was so affected by the accident that he was incapable of giving notice, and that the notice was given in time for the insurer to protect itself so that neither the risk nor the rights of the insurer were jeopardized by the delay: *Held*, the question of whether the notice given was a sufficient compliance with the condition of the policy requiring immediate written notice of an accident was for the determination of the jury under the facts and circumstances of the case. *Ibid.*

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy.

*a Knowledge of Violation of and Agreements Waiving Conditions*

1. Where the agent of the insurer, with full knowledge that the insured were tenants in common for life in the property upon which appli-

INSURANCE K—*Continued.*

cation for insurance is made, and after the request of the insured that a policy be issued protecting all interests in the property, issues a policy for the insurer providing that the policy should be void if the insured was not the sole and unconditional owner: *Held*, the knowledge of the agent will be imputed to the company issuing the policy and accepting the full premium, and it will be held to have waived the provisions in the policy as to ownership. *Houck v. Ins. Co.*, 303.

2. 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 the payment of the premium, the knowledge of the agent is imputed to the insurer and constitutes a waiver of the provision against explosives, and in this case *held:* evidence of such knowledge by the agent soliciting the policy was sufficient to be submitted to the jury and sustain their verdict in plaintiff's favor, and under the facts and circumstances of this case it was immaterial that the policy issued was signed by the partner of the soliciting agent and written by a stenographer in their office. *Midkiff v. Ins. Co.*, 568.

3. Where an insurance company through its agents issues a policy of group insurance knowing at the time of a rule of the union of which the group were members, which rule was recognized by the employer, whereby if an employee did not work another worker could be substituted in his place, provided that he work at least one day out of a period of ninety days, or if the insurer with knowledge of such substitute rule receives premiums and by its acts, conduct, transactions or declarations treats the policy as still in force, the insurer waives a provision in regard to employees covered by the policy to the contrary, and in this case *held:* there was sufficient evidence of such knowledge and waiver on the part of the insurer or its agents to have been submitted to the jury, and defendant's motion as of nonsuit should not have been granted. *Smith v. Ins. Co.*, 578.

*b Retention of Premium*

1. The surety on the bond of a contractor for the erection of a building does not necessarily waive his right to avoid the contract for fraud by retaining the premium paid to it during the litigation until the alleged fraudulent procurement of the bond can be determined. *Glass Co. v. Hotel Corp.*, 166.

N Persons Entitled to Proceeds and Liability of Insurer (Amount payable to beneficiary not available to creditors of estate see Executors and Administrators B a 1).

*c Under Loss Payable Clauses*

1. Where under the statutory standard form of a policy of fire insurance certain policies are taken out with a loss payable clause in favor of the mortgagee, with provision that no act or neglect of the owner with regard to the property shall invalidate the insurance as to the interest of the mortgagee, the evident intent of the policy is

INSURANCE N—*Continued.*

for the protection of the mortgagee, and where the owner has taken out other policies of insurance on the same property with other companies without the knowledge of the mortgagee, the company issuing the policy with the loss payable clause in favor of the mortgagee is not entitled to pro rate a loss thereunder with the other company, and is liable for the full amount of the loss. *Bennett v. Insurance Co.*, 174.

*d Owners of Fee and Estates Less than Fee*

1. Where a policy of fire insurance is issued to tenants in common for life for the benefit of themselves and the remaindermen, the tenants in common for life may recover the full value of the policy, after loss, as trustees of the remaindermen. *Houck v. Insurance Co.*, 303.

R Accident and Health Insurance.

*c Period of Disability*

1. Under the provisions of the policy of health insurance indemnifying the insured from loss resulting from such disability as would result in continuous and total loss of business time during "the continuance of disability as defined above until such time as the insured engages in a gainful occupation": *Held*, the policy is not income insurance, and the loss insured against is that which the insured should sustain from the continuous loss of business time based upon the conditions thus expressed, and does not entitle the insured to recover thereon for his inability to obtain an employment such as he may desire after the termination of disability covered by the policy. *Metts v. Insurance Co.*, 197.

S Property Damage Insurance.

*a Construction of Policy as to Risks Covered*

1. Where in an action on a policy of insurance covering loss to property from windstorms there is evidence tending to show that a windstorm and snow caused the loss to the insured, the fact that snow was a contributing cause does not preclude a recovery, it being ordinarily sufficient if the cause designated in the policy was the dominant, efficient cause of the loss, and the question of whether the windstorm was the dominant and efficient cause is for the determination of the jury, and an instruction to the effect that if the snow was a contributing cause the plaintiff could not recover is reversible error. *Miller v. Insurance Assn.*, 572.

INTEREST (Modification of judgment awarding incorrect amount of interest see Appeal and Error K d 1).

B Upon What Claims Interest is Allowable.

*a Actions for Conversion or Wrongful Destruction of Property*

1. In tort actions for conversion interest is allowable in the discretion of the jury, and where the jury has failed to award interest the plaintiff's contention that he is entitled thereto cannot be sustained. *White v. Riddle*, 511.

2. Where the plaintiffs, insurers of the shipper, bring action on a subrogation receipt and assignment from the shipper, to recover damages for the negligent burning of cotton by the carrier, and the

INTEREST—*Continued.*

jury awards damages without interest thereon: *Held*, the awarding of interest for a tortious or wrongful destruction of property is within the discretion of the jury, and the plaintiffs are not entitled thereto as a matter of law, except from the time of the judgment. *Insurance Co. v. R. R.*, 518.

INTERVENORS—In attachment see Attachment H.

INTOXICATING LIQUOR (Searches and Seizures see Constitutional Law J).

A Validity and Construction of Prohibition Act.

*a Validity and Construction in General*

1. Under the inherent powers the State retains in matters not delegated to the Federal Government, the State may enact a statute more stringent than the Federal Statute relating to intoxicating liquor when not in conflict with the Eighteenth Amendment to the Federal Constitution or with Federal statutes, although the State law was enacted to conform to the Federal Statute. *S. v. Hickey*, 45; *S. v. Lassiter*, 352; *S. v. Jaynes*, 728.

2. Our prohibition act was passed in pursuance of Article I, section 2, of the State Constitution providing that all political power is vested in and derived from the people, and the approval of the people of this statute as expressed in the elections requires a liberal construction of the statute to carry out its intention as gathered from its related parts and clearly expressed. *S. v. Hickey*, 45.

*c Construction as to "Intoxicating" Liquor*

1. Where a defendant is indicted for violating our State prohibition law, evidence that he had in his possession one-half gallon of "liquor" is interpreted as being an intoxicating beverage having the prohibited quantity of intoxicant, or containing more than one-half of one per centum of alcohol by volume, when there is no evidence to the contrary. *S. v. Hickey*, 45.

B Possession.

*b Possession and Possession as Evidence of Violation of Other Provisions of Prohibition Law*

1. Where upon the trial of the defendant for the violation of the Conformity Act there is testimony of an officer that he took from defendant, after he left his automobile and was entering a building, a half-gallon jar of liquor, the defendant introducing no evidence: *Held*, the evidence was sufficient to support a charge that if the evidence satisfied the jury beyond a reasonable doubt of the defendant's guilt of possession and transporting, the jury should answer those issues in the affirmative. *S. v. Hickey*, 45.

C Manufacture.

*c Possession of Property Designed for Manufacture*

1. In the interpretation of C. S., 3411(d), making it unlawful to possess any property "designated" for use in manufacturing intoxicating liquor, the word "designated" is construed to mean "designed," and so used it is held in this case that evidence of the defendant's guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted

INTOXICATING LIQUOR C—*Continued.*

to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a distillery is immaterial under the language of the statute. *S. v. Jaynes*, 728.

2. On indictment charging the defendant with a violation of C. S., 3411(d), in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime. *Ibid.*

E Purchase.

*a Provisions as to Purchase in General*

1. The State in its inherent and reserved power preserved to it by the Tenth Amendment to the Federal Constitution may enact valid laws relating to prohibition when not in conflict with the Eighteenth Amendment to the Federal Constitution, and our State statute, C. S., 3411(b), making the purchase of intoxicating liquor a criminal offense is valid and enforceable. *S. v. Lassiter*, 352.

F Forfeitures and Confiscations.

*a Rights and Claims of Lienors*

1. The provisions of the Internal Revenue Act relating to the seizure and sale of property used in transporting intoxicating liquor on which the tax had not been paid is superseded by the mandatory provisions of section 26 of the National Prohibition Law, prescribing that the liens of innocent lienors attach to the proceeds of the sale of the property sold under the seizure in accordance with the priority of like liens after the expenses of storing the property, fee for the seizure and the costs of the sale are retained. *Motor Co. v. Rash*, 799.

2. In this case *held:* the vendor of an automobile under a title retaining contract of sale was entitled to possession of the automobile for the purpose of selling it under the terms of the contract as against his vendee who had repurchased the car after its seizure and sale under the provisions of the Federal Internal Revenue Act. *Ibid.*

ISSUES see Trial F.

JUDGES.

A Rights, Powers and Duties (Power to change venue see Venue C).

*b Powers of Special Judges*

1. Unless such special judge has been duly commissioned to hold and was holding the courts of the district at the time, he is without authority to hear and determine a motion to dissolve a temporary restraining order, but where the record is silent as to whether he was so commissioned at the time of hearing the motion the Supreme Court will omit any definite ruling on this ground. *Bohannon v. Trust Co.*, 702.

JUDGMENTS (Execution on, see Execution; judgments in criminal cases see Criminal Law K).

D Judgments by Default.

*b By default and Inquiry*

1. Where a copy of an answer containing a counterclaim is not served on the plaintiff, the allegations going to make up the counterclaim

JUDGMENTS D—*Continued.*

are to be considered as denied, chapter 18, Public Laws of 1924, and where judgment by default and inquiry has been entered on the counterclaim for plaintiff's failure to plead thereto, the plaintiff's motion to set aside such judgment should be allowed. *Kassler v. Tinsley*, 781.

K Attack and Setting Aside Judgments.

*a Parties Who May Attack Judgment and Grounds in General*

1. A consent judgment is the solemn contract of the parties entered of record with the consent of the court, and in the absence of fraud or mutual mistake cannot be set aside without the consent of all, and applies to the authorization of a judicial sale under such judgment. *Cary v. Templeton*, 604.

*b Setting Aside for Surprise, Excusable Neglect, etc.*

1. In order to set aside a judgment by default and inquiry on the ground of mistake, inadvertence, surprise or excusable neglect, C. S., 600, the mistake or surprise, etc., must be on the part of the party making the motion to set aside, and where the judgment is obtained against an insured by the person negligently injured by him, and the policy of accident insurance expressly provides that the insurer shall not be liable to the person injured until after the return of execution against the insured unsatisfied, the insurer may not make a motion to have the judgment against the insured set aside for the surprise, excusable neglect, etc., of the insurer caused by failure of the insured to give notice of the accident and send all process and pleadings to the insurer under the terms of the policy. *Earle v. Earle*, 411.

2. Where the party to an action employs an attorney who files his pleadings in defense, and afterwards consents to a trial on a certain day under an agreement that the plaintiff would not ask for a recovery exceeding a certain amount, and the trial is accordingly had, the motion of the party to set aside the judgment upon the ground of surprise, excusable neglect, etc., for that the attorney's authority acting therein had been revoked, will be denied when no notice of such revocation had been given to the court or to the adverse party. *Hendricks v. Cherryville*, 659.

L Operation of Judgments as Bar to Subsequent Actions.

*a Judgments as of Nonsuit*

1. Where a cause of action has been heard under the pleadings upon evidence and a judgment as of nonsuit therein has been entered for insufficiency of the evidence to establish it, and the judgment is not appealed from, but remains upon the trial docket of the Superior Court unimpeached, another action between the same parties on the same cause of action and upon substantially the same evidence is barred by the former judgment which as to the second action is *res judicata*, C. S., 415. *Hampton v. Spinning Co.*, 235.

2. It is not enough to sustain a plea of *res judicata* that a former action between the same parties on the same subject-matter was nonsuited on its merits, but, in addition, the evidence in the second action must be substantially the same as in the first in order for the judgment in the first to be a bar to the second. *Midkiff v. Insurance Co.*, 568; *Chappell v. Ebert*, 575.

JUDGMENTS L—*Continued.*

*c Foreign Judgments*

1. Where a corporation does business in this State and in another State, and is a citizen of both, and has been garnished there for salary of an employee residing in this State after personal service on it and service by publication on the employee according to the law of the other State, and has been required to pay a valid judgment in the proceedings there, in an action brought by the employee here the judgment of the other State will be given full faith and credit under the provisions of the Federal Constitution, Art. IV, sec. 1, and is a bar to the action brought here, though the plaintiff in the former action may have originally proceeded in either jurisdiction. *Watson v. R. R.*, 471.

P Assignment.

*a Right of Party Paying Judgment to Assignment*

1. Where a note has been reduced to judgment against its two co-makers, and one of them pays more than half thereof, and after execution is issued for the remainder the other pays the balance due and has the judgment assigned to a trustee for his benefit, and bids in the property at the execution sale on the lands of the first judgment debtor: *Held*, the judgment debtors were jointly and severally liable on the judgment, and the debtor paying less than half thereof may not maintain that he was liable as surety contrary to the record, and he was not entitled to the assignment, and his title as purchaser at the execution sale is not good as against a subsequent purchaser from the first judgment debtor, and, the amount of the purchase price at the sale being repaid to him as the assignee of the judgment creditor, he has suffered no loss, and an instruction directing a verdict in his favor in his action to be declared the owner of the lands is reversible error. C. S., 614, 618, 3309. *Jones v. Rhea*, 190.

JUDICIAL SALES—of bankrupt see Bankruptcy C d.

JURY (Grand jury see Grand Jury).

C Right to Trial by Jury.

*b Preservation and Waiver of Right to Jury Trial*

1. The failure of a party to except to an order for compulsory reference and to file exceptions in apt time to particular findings of fact by the referee when the report is unfavorable and to tender issues on the exceptions and demand a jury trial thereon will be deemed a waiver of his right to trial by jury. C. S., 573. *Booker v. Highlands*, 282.

2. Where a party excepts to an order for compulsory reference and the referee's report is not wholly favorable to either party and both file exceptions to the findings of fact by the referee, and the objecting party tenders determinative issues based upon his exceptions and demands a trial by jury thereon, it is not required that he retender issues based on facts pointed out in other set of exceptions filed by the adverse party in order to preserve his right to trial by jury. *Ibid.*

JUSTICES OF THE PEACE.

E Appeals from Justices' Courts.

*a Procedure in General*

1. Where an appeal from the justice of the peace has been dismissed in the Superior Court for failure to docket the appeal therein as required by C. S., 660, the judgment of the Superior Court will be sustained by the Supreme Court on further appeal thereto. As to whether the magistrate's judgment is void on its face is not presented or decided on this appeal. *Drafts v. Summey*, 69.

LABORERS' AND MATERIALMEN'S LIENS (Liabilities on construction bonds see Principal and Surety B; farm laborers' lien see Agriculture D a).

B Proceedings to Perfect and Form of Claim of Lien.

*c Notice and Lien of Subcontractor*

1. A subcontractor or material furnisher for a building, in order to hold the owner liable for the amount of his claim, is required to give, in apt time, notice to the owner showing an itemized, detailed statement of the claim or materials furnished, except when the contract is entire and complete for a gross sum such specific itemization is not required, and when such notice has not been given he will be regarded as a stranger to the building contract between the owner and the contractor and may not maintain an action against the owner. *Construction Co. v. Journal*, 273.

C Operation and Effect of Lien.

*a Amount and Extent of Lien*

1. Where the contract for the erection of a building has been abandoned because of the owner's failure to make payments thereunder according to its terms, and a new agreement has been entered into by the parties under which the contractor agrees to complete the building upon the owner's agreement to pay certain additional charges, and the contractor furnishes a statement under the new agreement showing the amounts due for specified items and providing that "there may be some additional charges and credits which may affect the above statement, in which event an additional statement will be rendered," and it appears that the amount of a certain subcontract was omitted from the statement, and that the subcontractor may not hold the owner responsible therefor because of failure to give the required notice: *Held*, the contractor may maintain his action against the owner upon the agreement for the amount due on the subcontract. *Construction Co. v. Journal*, 273.

LANDLORD AND TENANT (Farm laborers' lien see Agriculture).

B Leases in General (Signature and seal of corporation not necessary to validity of lease of lands to it see Corporations G e 1; leases within statute of frauds see Frauds, Statute of, B a).

*b Construction and Operation*

1. Where certain bus lines operating within a city are required by order of the Corporation Commission to establish and operate a union bus station therein for the better accommodation of the public, and one of the bus lines, acting through its president, leases a station to be

LANDLORD AND TENANT B—*Continued.*

used by all the bus lines jointly, and assures the lessor that arrangements had been made with other bus lines for their signatures to the lease, and the various companies have used the premises for a union passenger station: *Held,* in an action on the lease contract there is no evidence that the signatures of the other lessees was a condition precedent to the liability of the company executing the lease through its president, and the statement of the president that he had an oral agreement with the other lessees, and the fact that possession was taken by the lessees under the terms of the lease is a waiver of such condition by the company executing the lease. *Trust Co. v. Transit Lines,* 675.

C Rights and Liabilities of Parties Upon Termination of Tenancy.

*c Emblements*

1. The right of the lessee of the mortgagor to the crops for the year in which they are planted as against the purchaser at the foreclosure sale of a prior registered mortgage rests at common law unaffected by statute, and the doctrine of emblements as against a remainderman and the statutes passed in regard to those furnishing money or material for the growing crops are not applicable. C. S., 2347, 2480, 2481. *Collins v. Bass,* 99.

D Terms for Years.

*e Termination by Operation of Law*

1. Under the evidence tending to show that a lessee of a store tendered the keys to the lessor, who refused them, and later mailed the keys to the lessor with a letter to the effect that the lessee had given up the leased premises and hoped the lessor would then accept the keys, and the lessor kept the keys without further comment or communication: *Held,* the question of whether the lessor had accepted the surrender of the leased premises is determinable by the jury alone, and an instruction that the lessor might recover as a matter of law for the unexpired term of the lease less any sum he might have realized by the exercise of ordinary diligence in leasing or renting the property to others, is error entitling the defendant to a new trial. *Westall v. Supply Co.,* 112.

LIBEL AND SLANDER (Arrest for slander constituting false imprisonment see False Imprisonment A c 1).

A Words and Acts Actionable and Liability therefor.

*a Words Actionable Per Se*

1. A publication claimed to be defamatory should be considered in the sense in which those who heard it would ordinarily understand it, and the circumstances of the utterance and the hearers' knowledge of facts influencing their understanding of the words are pertinent, and where the words spoken by the defendant thus considered permit the inference that he intended and was understood to charge the plaintiff with having uttered a criminal slander and added that the plaintiff should be put on the roads: *Held,* if such be the meaning of the language used the words employed by the defendant are actionable *per se. Castelloe v. Phelps,* 454.

LIBEL AND SLANDER—*Continued.*

B Privileged Communications.

*b Qualified Privilege*

1. In this case *held:* defendant's plea of qualified privilege in that the words claimed to be defamatory were spoken by him as a member of the board of trustees of a public school during a meeting cannot defeat plaintiff's right to go to the jury. *Castelloe v. Phelps*, 454.

D Actions for Libel and Slander.

*e Trial*

1. Where the words used by the defendant are capable of two constructions, one defamatory and the other not, it is for the jury to determine which of the two meanings was intended and understood by those by whom they were heard, taking into consideration the facts and circumstances of the utterance, and in an action thereon defendant's motion as of nonsuit should have been denied. *Castelloe Phelps*, 454.

LICENSES—Lisense tax see Taxation B c; B e 1.

LIMITATION OF ACTIONS (Actions under Federal Employers Liability Act see Master and Servant E d; actions for wrongful death see Death B a; actions against executor see Executors and Administrators D f).

B Computation of Period of Limitation.

*a Accrual of Right of Action*

1. Where the endorsers of a note waive notice of dishonor and defenses based on an extension of time for payment, and there is no agreement for an extension to a definite time, there is no legal extension of time, and where more than five years elapse from the time of the last payment on, and maturity of the notes, the three-year statute of limitations, C. S., 441, will bar the holders' action to recover against the endorsers on the note. *Wrenn v. Cotton Mills*, 89.

2. A partnership terminates upon the death of one of the partners, C. S., 3277, and where an open, mutual and current account has existed between the partnership and another and the surviving partner continues to run the partnership and enters items on the account, which are not necessary to the winding up of the partnership affairs, such acts after the termination of the partnership are not partnership acts and the statute of limitations will run on the account due the terminated partnership from the last item entered thereon before the death of the deceased partner. *Reel v. Boyd*, 214.

3. Where an obstruction diverting the natural flow of surface water is entirely upon the defendant's land and the trespass upon the plaintiff's land resulting therefrom is intermittent, an instruction that the plaintiff could recover any damage done her property within three years prior to the action is not error. *Gibbs v. Mills*, 417.

*b Demand, Notice, Fraud, and Ignorance of Cause of Action or Mistake*

1. Where a *cestui que trust* seeks to establish a trust estate in the property held in trust against the trustee taking deed therefor, and to

LIMITATION OF ACTIONS B—*Continued.*

force an accounting for rents and profits therefrom, the mere fact of demand on the trustee therefor will not terminate the trust relationship and the statute of limitations and lapse of time have no application during the continuance of the fiduciary relationship, and the *cestui que trust* is not barred from maintaining his rights. *Sorrell v. Sorrell*, 460.

E Pleading, Evidence, Trial and Review.

*c Issues for Jury as to Limitation*

1. Where in an action on an implied contract for the reasonable worth of articles received, the three-year statute of limitations will bar recovery, and where the statute is pleaded and there is conflicting evidence as to the time the articles were gotten by the defendant, the question as to whether the claim is barred by the statute is a question for the jury, and a directed verdict thereon will be held for reversible error. *Griffith v. English*, 66.

2. Where, in an action against the administrator of a deceased to recover sums embezzled by the deceased, the defendant pleads the three-year statute of limitations, and there is evidence that the fraud practiced on the plaintiff by the deceased was not and, in the exercise of due diligence, could not have been discovered by the plaintiff three years before the commencement of the action, the question is properly submitted to the jury, and their finding in favor of the plaintiff will be upheld. C. S., 441(9). *R. R. v. Hegwood*, 809.

LIS PENDENS.

A Nature, Scope and Necessity for Notice of Lis Pendens.

*a Actions Affecting Title to Realty*

1. Where the mortgagee of lands brings an action to recover on the note secured by the mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action is not one affecting the title to land within the meaning of C. S., 500, and the judgment of the lower court canceling and removing the notice of *lis pendens* from the records will be affirmed on appeal. *Threlkeld v. Land Co.*, 186.

*b Description and Land Affected by Notice*

1. One having the right to file notice of *lis pendens* upon lands of a certain acreage and description is not entitled to file *lis pendens* on a much larger acreage in which in a subsequent transaction of conveyance it has been included. *Threlkeld v. Land Co.*, 186.

LOGS AND LOGGING see Deeds and Conveyances F.

MALICIOUS PROSECUTION see False Imprisonment A a 1.

MANDAMUS—To compel approval of warrants for school supplies see Schools and School Districts C a 1.

MASSACHUSETTS TRUST see Bills and Notes D b 2.

MASTER AND SERVANT.

C Masters' Liability for Injury to Servant (Release from liability see Torts C b).

*a Nature and Extent of Liability in General*

1. Where the evidence of the plaintiff discloses the mere fact of injury a nonsuit is properly entered, negligence not being ordinarily presumed from the mere fact of injury. *King v. Power Co.*, 86; *Weatherman v. Tobacco Co.*, 603.

*b Tools Machinery and Appliances and Safe Place to Work*

1. Where there is evidence in a personal injury suit that the plaintiff was ordered to tighten certain nuts on a piece of power-driven machinery operated by pulley belts, and was given a wrench for the purpose, and that the wrench slipped from a nut, throwing the plaintiff's arm against the belt and injuring him: *Held*, in the absence of evidence tending to show a defect either in the wrench or the nut or that the plaintiff had not been furnished a reasonably safe place to work, the doctrine of "simple tools and appliances" applies, and the evidence is insufficient to take the case to the jury, it being required that the plaintiff under the circumstances use due care for his own safety, and a judgment as of nonsuit should have been entered. *Clement v. Mills Co.*, 43.

2. Where there is evidence tending to show that the plaintiff was ordered by the general manager of the defendant to operate a power-driven circular saw, in which work the employee was inexperienced, and that there were no guards to the saw and that it imperfectly revolved or wobbled when running, and that obstruction on the floor prevented the employee from standing in front of the saw while operating it, and that he was not warned of the danger: *Held*, the evidence of the employer's negligence in failing to furnish the employee reasonably safe and suitable tools and appliances and a reasonably safe place to work, and in failing to warn and instruct the employee, was sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit. *Robbins v. Upholstery Co.*, 75.

3. While an employer is not held to the liability of an insurer of the safety of his employees, he is required in the exercise of ordinary care to furnish them a reasonably safe place to do the work required of them, by the means and methods that are approved and in general use at places of like kind and character. *West v. Mining Co.*, 150.

4. Where in an action to recover for the negligent killing of the plaintiff's intestate there is evidence tending to show that the intestate was killed by being caught by a piece of timber at the fourth level of defendant's mine while the intestate was riding in a car from one level to another in the performance of his duties, that the timber at the fourth level was lower than the timbers at the other levels, there being only about three inches clearance between the car and the timber, that there was no means of signalling the engineer operating the hoisting machinery at the surface of the mine to stop the car, that the track was uneven and came up in a hump where the injury occurred, that defendant's *alter ego* knew

MASTER AND SERVANT C *b—Continued.*

that the timber was dangerous; that there was no light at the fourth level, and that other mines of like character used enclosed cars: *Held*, sufficient to be submitted to the jury on the question of whether the defendant exercised reasonable care to provide a reasonably safe place to work. *Ibid.*

5. Evidence tending to show that the plaintiff's intestate was required to oil certain machinery while in motion on an uncovered platform seven by ten feet, elevated one hundred feet from the ground, and that the leg of the plaintiff's intestate was caught between the unguarded running gear and a timber of the platform, resulting in his fatal injury: *Held*, the evidence was sufficient to take the case to the jury upon the question as to whether the master had exercised due care under the circumstances to furnish his servant a reasonably safe place to work. *Frady v. Quarries Co.*, 207.

6. Evidence tending to show that plaintiff's intestate, employed by the defendant, was engaged in doing fine grading at the bottom of a ditch 7 feet deep and 21 inches wide, the sides of which were saturated with wafer from recent rains which seeped in and had to be pumped out, that there had been cave-ins prior to the accident in suit, that quicksand had been encountered at one place in digging the ditch, that defendant's foreman had ordered braces to be placed in the ditch every 8 feet, in accordance with the usual method of doing such work, but that plaintiff's intestate was not employed to put in the braces, and that shortly after defendant's foreman had gone to lunch the sides of the ditch, where no braces had been put in for 18 or 20 feet, caved in, causing the injury to plaintiff's intestate resulting in death: *Held*, the evidence was sufficient to overrule defendant's motion as of nonsuit, and the submission of the case on the usual issues, on the theory of defendant's duty, in the exercise of due care, to furnish a reasonably safe place to work and reasonably safe means and appliances, and plaintiff's intestate's assumption of ordinary obvious risks, was proper. *Darden v. Lassiter*, 427.

7. Where, in an action by an employee to recover of his employer damages for the latter's failure to furnish, in the exercise of due care, a reasonably safe place to work and reasonably safe appliances and equipment therefor, the evidence tends only to show that the plaintiff, experienced in such work, used an empty nail keg to stand on to inspect lumber from the higher side of a truck and was injured by falling therefrom, when the inspection could have been made from the lower side while standing on the dock, that the defendant had neither furnished nor instructed the use of the nail keg, and there is no evidence that it was the defendant's duty to furnish any appliance or that plaintiff had requested any: *Held*, the evidence was insufficient to show any breach of duty to the plaintiff, and defendant's motion as of nonsuit should have been allowed. *Smith v. Lumber Co.*, 457.

8. Where the plaintiff, employed by the defendant to work on a building under construction, is injured by falling therefrom while using a rope to descend from the roof, when the employer had provided a step-ladder for the purpose of ascent and descent, and the rope

MASTER AND SERVANT C *b—Continued.*

had been provided to draw lumber to the roof: *Held*, the employer is not liable for the injury caused by the failure to use the safe means provided for ascent and descent from the building. *Fesperman v. Pratt*, 687.

9. While an employer is not ordinarily required to inspect simple tools used by an employee in the course of the employment as he is in the case of complicated tools, it is his duty to repair a simple tool after he has notice of a defect therein, and where an employee has given notice to the employer by notice to its *alter ego* or vice-principal of a dangerous condition of a simple tool and called attention to its need of repair, and the *alter ego* has promised to repair the tool, but has failed therein, and there is evidence of a causal connection between the injury and the defect in the tool, the question of actionable negligence is for the determination of the jury. *McCord v. Harrison-Wright Co.*, 742.

*c Methods of Work, Rules and Orders*

1. Where the evidence tends to show that the master, through his vice-principal, ordered his experienced servant to clean hangers by standing on top of a step-ladder in close proximity to running machinery, it is sufficient to be submitted to the jury on the question of the master's negligence in an action for an injury resulting therefrom, and the question of the assumption of the risks by the servant is for the determination of the jury upon consideration of whether the danger was so open, obvious and imminent that a man of ordinary prudence would not have continued in the employment and incurred them. *Mills v. Mfg. Co.*, 145.

2. Where, in an action by an employee against his employer to recover damages for a negligent injury, the evidence tends to show that the employee was required to hook huge rocks by a cable so that they might be hoisted by a powerful derrick, and that the master, in the exercise of his nondelegable duty to provide a reasonably safe place to work, had placed a watchman on a hill to transmit signals from the employee to the engineer operating the derrick, the employee and the operator of the derrick not being in sight of each other, and that the watchman negligently signalled the operator of the derrick without first receiving his signal from the employee, and that the operator of the derrick started hoisting the rock hooked by the employee before the employee could get safely out of the way, and that he was injured while attempting to run clear of the danger: *Held*, the evidence was sufficient to have been submitted to the jury and to overrule defendant's motion as of nonsuit. C. S., 567. *Farr v. Power Co.*, 247.

3. It is the duty of the employer to provide his employee with reasonably safe means and methods of work such as proper assistants for performing his task, and where the evidence in an action by an employee to recover for an injury tends to shows that the employee was engaged with another in moving logs with peaveys to a declivity to slide them down to the skidder, and that he had informed the foreman of the employer that he needed four or five helpers to do the work, which the employer failed to furnish, and that the

MASTER AND SERVANT C—*Continued.*

employee while attempting to move a log with one helper was injured as a result of their not being able to hold the log, which rolled toward them, and that while attempting to dodge the log the employee's eye was put out by a limb: *Held*, the evidence was sufficient to be submitted to the jury, and defendant's motion as of nonsuit should have been denied. *Smith v. Lumber Co.*, 736.

*d Warning and Instructing Servant*

1. Evidence that the defendant's fourteen-year-old uninstructed employee was injured while at work on a folding machine by the knife thereof as it passed across the machine cutting off his finger, that the fact as to how the machine operated was apparent and known to him, but that he was not instructed or warned of the danger incident thereto raises an issue as to the defendant's actionable negligence to be determined by the jury, and defendant's motion as of nonsuit thereon should have been denied. C. S., 567. *Gibson v. Cotton Mills*, 267.

*e Acts or Negligence of Fellow-Servant*

1. In an action by an employee to recover damages from his employer for a personal injury caused solely by the negligence of another employee, the presumption of law is that the employer has properly performed his duty in employing his workers and is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant. *Shorter v. Cotton Mills*, 27.

2. An employer impliedly contracts that he will engage the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and where the master has had express notice of the unfitness of an employee to safely perform the duties intrusted to him, the master is culpably negligent in continuing to employ such servant, and is responsible in damages to another employee who has been injured as a result of the unfitness of the servant. *Ibid.*

3. Where the evidence in an action against the master for injuries inflicted by a fellow-servant shows that on the morning of the day the plaintiff, an employee of the defendant, was injured he complained to his overseer of the carelessness and incompetency of a fellow-servant, he had done all that he was required to do under the circumstances, and viewing the evidence in the light most favorable to the plaintiff, it must be assumed that his complaints were made in good faith, and it is sufficient evidence of express notice to the master to be submitted to the jury. *Ibid.*

4. Where in an action by an employee to recover damages for a negligent injury the evidence is conflicting as to whether the explosion of the barrel resulting in the injury in suit was caused by the negligent act of a foreman or a fellow-servant, the submission of the question to the jury is proper, and judgment upon their answer to the issue of the defendant's negligence in the negative will be sustained. *Falls v. Cotton Mills*, 227.

5. Where an employer, in the exercise of his nondelegable duty to provide his employee a reasonably safe place to work, places a watchman where he can see both the employees hooking huge rocks by

MASTER AND SERVANT C—*Continued.*

cable to be lifted by a derrick and the operator of the derrick, the operator of the derrick and the employee hooking the rocks not being in sight of each other, the duty of the watchman being to signal the operator of the derrick when the employee was ready for the derrick to hoist a rock he had hooked: *Held*, upon an injury being inflicted upon the employee by reason of the watchman signalling the operator of the derrick before the employee had signalled him that he was ready, the employer may not escape liability on the ground that the watchman was a fellow-servant, and an instruction that under these circumstances the watchman would be a vice-principal is proper. *Farr v. Power Co.*, 247.

*f Assumption of Risks*

1. In order to establish the defense of assumption of risk it is not sufficient to show that the employee worked on knowing the danger, but the question must be determined whether the danger was so obvious that a man of ordinary prudence would have quit the employment rather than have incurred it, and is ordinarily a question for the jury. *Shorter v. Cotton Mills*, 27; *Robbins v. Upholstery Co.*, 75; *Mills v. Mfg. Co.*, 145; *West v. Mining Co.*, 150; *McCord v. Harrison-Wright Co.*, 742.

2. A servant is not prima facie chargeable with the assumption of an extraordinary risk, or a risk which may be obviated by the employer in the exercise of reasonable care. *West v. Mining Co.*, 150.

*g Contributory Negligence of Servant*

1. Contributory negligence of the servant and assumption of risk by him are ordinarily questions for the determination of the jury, and in this case *held:* defendant's motion as of nonsuit should have been overruled. *Robbins v. Upholstery Co.*, 75.

2. Where an employee engaged in hooking rock with a cable to be hoisted by a derrick is suddenly placed in imminent peril by reason of the employer's vice-principal negligently signalling the engineer operating the derrick to hoist the rock before the employee could get clear of the rock being hoisted: *Held*, the employee's act in running from the danger over slippery rocks, resulting in a fall causing the injury in suit, will not be held as a matter of law to be contributory negligence barring his recovery, and the submission of the question to the jury upon the appropriate issue is proper. *Farr v. Power Co.*, 247.

3. Where the servant's own evidence discloses contributory negligence barring recovery a nonsuit is properly granted. *Scott v. Telegraph Co.*, 795.

D Master's Liability for Injury to Third Persons.

*a Work of Independent Contractor*

1. The delegation of a duty under contract must be inherently dangerous in order for the lettor of the contract to be liable for an injury inflicted upon an employee of the independent contractor in the performance of the work thereunder, and an inherent danger is one that is inherent to the performance of the contract itself and not a danger that might result from carelessness in the performance. *Wright v. Utility Co.*, 204.

MASTER AND SERVANT D—*Continued.*

2. The owner of a building is not liable in damages to an employee of an independent contractor injured while engaged in painting the building under the independent contract therefor. *James v. Peanut Co.*, 380.

*b Scope of Employment*

1. Upon evidence tending to show that the defendant's employee killed the deceased while the employee was acting within the scope of his employment in preventing persons objectionable to the employer from coming upon or remaining upon the employer's premises, and that the killing was unlawful and felonious, is held sufficient to be submitted to the jury upon the issue of the employer's liability for the wrongful death, and a judgment dismissing the action at the close of the plaintiff's evidence is erroneous. *Colvin v. Lumber Co.*, 776.

2. Where under the terms of a lease the lessee was to use the lessor's automobile truck only during the day, the lessor is not liable in damages to a third person for an injury caused by defective lights thereon while the lessee was driving the truck at night in violation of the terms of the agreement. *Jones v. Stancil*, 541.

*c Negligence of Servant and Contributory Negligence of Person Injured*

1. Where, in an action to recover damages from a telegraph company for an alleged negligent personal injury to the plaintiff caused by the defendant's messenger boy, riding a bicycle, running into the plaintiff while delivering telegrams, the evidence is conflicting as to whether the messenger boy or the plaintiff was violating a traffic regulation of the city at the time of the injury, the questions of the defendant's actionable negligence and the plaintiff's contributory negligence and proximate cause are for the jury. *Brown v. Telegraph Co.*, 771.

2. Where in an action against an employer for an injury inflicted by his employee the plaintiff's own evidence discloses contributory negligence barring recovery a nonsuit is proper. *Scott v. Telegraph Co.*, 795.

E Federal Employers' Liability Act.

*b Nature, Grounds and Extent of Master's Liability Under the Act*

1. Where the defendant in an action to recover damages for a wrongful death is a logging road, the fellow-servant rule does not apply, and contributory negligence is considered in mitigation of damages by the jury. *Hawkins v. Lumber Co.*, 475.

*d Time Within Which Action Thereunder Must be Brought*

1. The Federal Employers' Liability Act, providing that no action should be brought thereunder unless commenced within two years from the day from which the cause of action accrued, does not permit an extension of time specified by reason of infancy or other disability, and an action not brought within the time prescribed will be dismissed. *Link v. R. R.*, 78.

MASTER AND SERVANT—*Continued.*

F Workmen's Compensation Act.

*b Injuries Compensable Thereunder*

1. The Workmen's Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising out of it. *Conrad v. Foundry Co.*, 723.

2. The word "accident" within the meaning of the Workmen's Compensation Act is defined to be an unlooked for or untoward event which is not expected or designed by the person who suffers the injury, and the mere fact that the injury is the result of a wilful and criminal assault of a fellow-servant does not of itself prevent the injury from being accidental. *Ibid.*

3. In construing the Workmen's Compensation Act the words "out of and in the course of the employment," used in connection with injuries compensable thereunder, is not to be determined by the rules controlling in negligent default cases at common law, but an accidental injury is compensable thereunder if there is a causal relation between the employment and injury, if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which ought to have been foreseen or expected. *Ibid.*

4. Where in a proceeding under the Workmen's Compensation Act the evidence tends to show that the employee was a moulder in the employer's foundry, and that he struck his negro assistant with a shovel after the assistant had spoken words to him he deemed insulting, whereupon the assistant left the employment and returned and shot the claimant while he was doing his work, causing permanent injury, is sufficient within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment." *Ibid.*

*h Amount of Recovery Thereunder and Persons Entitled Thereto*

1. Construing the Workmen's Compensation Act as a whole to effectuate the intent and purpose of the Legislature, it is held that the purpose of the act is to provide compensation for the employee injured in case the injury is not fatal, and for those dependent upon him in case the injury is fatal, and the last clause of section 29 purporting to provide for the personal representative of the deceased is construed to be repugnant to and irreconcilable with the other provisions of the act, and should be disregarded in giving effect to its other provisions, sections 38 and 40 providing in clear language and comprehensive detail for a full legal method of determining compensation for fatal injuries, and where a dependent has been awarded compensation under sections 38 and 40 she is not entitled to the maximum award as administratrix under section 29. *Smith v. Light Co.*, 614.

MATERIALMEN'S LIENS see Laborers' and Materialmen's Liens.

MECHANICS' LIENS see Laborers' and Materialmen's Liens.

MORTGAGES (Mortgagee's right to insurance proceeds under loss payable clause see Insurance N c).

A Requisites and Validity.

*c Acknowledgment*

1. The pecuniary interest which disqualifies a notary public from taking the acknowledgment and privy examination of a husband and wife to their mortgage of lands is an interest in the lands conveyed, and does not include his interest in the transaction as a member of the firm securing the loan upon a commission. *Investment Co. v. Wooten*, 452.

C Construction and Operation.

*c Lien and Priority; Registration*

1. Where the grantor of lands claims a lien under a mortgage given for the balance of the purchase price, but has neglected to have it registered until the lands had been conveyed by registered mortgage, no notice, in the absence of fraud, can supply that of registration under our statute, C. S., 3309, and the purchase-money mortgage is subject to the prior registered encumbrance, and where the holder of the purchase-money mortgage does not allege that the subsequent mortgagee had notice of fraud and was not an innocent purchaser for value, his prayer to have his purchase-money mortgage declared a prior lien cannot be granted. C. S., 1009. *Threlkeld v. Land Co.*, 186.

2. Where the payee of a note secured by a deed of trust on lands constituting a first lien by reason of prior registration, transfers and assigns the notes to another for value, and executes a release for the purpose of giving a junior registered mortgage priority of lien, the title in the first trustee is unaffected by the release executed after the transfer of the notes and the first deed of trust retains its priority, and injunction will not lie to restrain foreclosure under the prior trust deed. *Sparger v. Wolfe*, 602.

3. Where the husband and wife mortgage their lands held by the entireties and the mortgage is indexed and cross-indexed under "J. H. and wife," the name of the wife not appearing on the index although it appeared on the mortgage deed: *Held*, the index is sufficient to put a reasonable man upon inquiry which would have disclosed the facts, and upon the husband's death and the wife's remarriage, a mortgage given by the wife and her second husband is subject to the first mortgage, and the subsequent mortgagee is charged with notice thereof, and he may not restrain the first mortgagee from foreclosing his mortgage on the ground of insufficient indexing, C. S., 3561, although the name of the wife should have appeared on the index. *West v. Jackson*, 693.

*d Property and Interests Subject to Mortgage*

1. Where a party buys the interest of all the tenants in common in lands and becomes the sole owner thereof, and places improvements upon the land, such improvements are subject equally with the land itself to the lien of a registered mortgage placed upon the land by one of the tenants in common prior to the conveyance, and the improvements inure to the benefit of the mortgagee and to the purchaser at the foreclosure sale, and ignorance of the grantee of the

MORTGAGES C—*Continued.*

tenants in common of the prior, registered mortgage does not affect the rights of the parties, the registered mortgage being notice not only of the existence of the mortgage, but also of all it contained. See, also, Mortgages H m 1. *Layton v. Byrd*, 466.

*e Liability of Parties*

1. One to whom title to lands is conveyed upon payment of part of the purchase price with money furnished by another, and who gives his note secured by a mortgage to the grantor for the balance, and who receives no benefit from the transaction, under an agreement that the mortgagor was to be discharged from liability upon his conveyance to the one furnishing a part of the purchase price: *Held*, the mortgagor acquires only the naked title in trust which he may be compelled to convey to the real beneficial party upon his assumption of the mortgage debt, and upon his transfer of the property to him is not liable to the mortgagee thereon. *Justice v. Coxe*, 263.

2. Where partners in a real estate business own certain lands which one of the partners trades with a third person for other lands, and receives a deed in which the plaintiff's mortgage on the lands is expressly assumed, the deed being made to one partner with the consent of the other for the benefit of them both, and there is evidence that each thereafter spoke of the mortgage debt as a partnership liability: *Held*, the evidence is sufficient to be submitted to the jury as to whether the mortgage was a partnership liability upon which both were liable, and the motion as of nonsuit of the partner for whose benefit the other took title should have been overruled. *Leftwich v. Franks*, 289.

F Transfer of Mortgaged Property.

*b Liability of Purchaser of Equity of Redemption*

1. Where the owner of lands sells to another by deed in which, as a part of the purchase price, the grantee expressly assumes prior encumbrances on the land, and in payment of the balance of the purchase price pays the grantor a sum of money and executes a deed of trust securing notes for the remainder, and upon the grantee's default in the payment of some of the notes secured by the prior encumbrances, the grantor pays them, and later his deed of trust is foreclosed: *Held*, as between the grantor and the grantee the relation of principal and surety existed as to the prior encumbrances, and the grantor may recover against the grantee the sums paid by him in discharge thereof, and where the grantor has bought in the property at the foreclosure of his own deed of trust and accepts the deed of the trustee made subject to prior encumbrances, the grantee may not set up as a counterclaim or set-off in the grantor's action to recover the deficiency the amount he has paid on the notes secured by the prior encumbrances. *Green v. Elias*, 256.

H Foreclosure (Right to foreclosure against estate by entireties see Husband and Wife G a 1, 2; payment of taxes out of proceeds see Taxation D a 1).

*k Deficiency and Personal Liability*

1. Where the grantor of lands takes a deed of trust from the grantee to secure the balance of the purchase price, and the deed of trust is foreclosed and the grantor bids in the property at the foreclosure

MORTGAGES H—*Continued.*

sale for an amount less than the full amount secured by his deed of trust, in his suit against the grantee to recover the deficiency a judgment in his favor for the amount secured by his deed of trust and the costs of foreclosure less the amount paid by him at the foreclosure sale is proper. *Green v. Elias*, 256.

*m Title, Rights and Liabilities of Purchaser*

1. Where the mortgagee has not entered upon the mortgaged lands after the maturity of the note secured by the mortgage, or where the crops are severed before entry, he is not entitled to the crops; but otherwise where there is no reservation of the growing crops by the mortgagor, and the mortgagee has entered upon the land; and where the mortgagor under a prior registered mortgage has leased the lands, and the mortgage has been foreclosed, the purchaser at the foreclosure sale is entitled to the growing crops and the immediate possession of the mortgaged premises, the lessee being regarded as having only acquired the rights of the mortgagor, and as tenant-at-will of the mortgagee after the maturity of the debt. See, also, Mortgages C d. *Collins v. Bass*, 99.

2. Where the purchaser of lands at a foreclosure sale of a deed of trust takes title subject to registered encumbrances prior to the deed of trust foreclosed, he does not thereby assume personal liability for the prior encumbrances, but takes title subject thereto, but he may not contest the validity of the prior encumbrances nor the amount secured thereby. *Green v. Elias*, 256.

*n Deposit and Resale*

1. The deposit required by C. S., 2951, is to guarantee against loss in a resale of land under foreclosure sale of a mortgage, and where the clerk of the Superior Court has required of a person placing an advance bid a deposit representing a five per cent increase bid, and in addition a deposit to guarantee compliance with the bid, under the statute, and the lands are resold and bought in by the one making the advance bid, and he refuses to pay the amount because of threatened litigation, and the lands are again resold and bring a surplus over that of the prior resale: *Held*, there has been no loss occasioned by the first resale, and the person making the deposit therefor is entitled to receive it back as against the claim therefor of one holding a note secured by a junior mortgage on the same property. *Harris v. Trust Co.*, 605.

*p Setting Aside Sale for Fraud or Irregularities*

1. Where a deed of trust on land is executed to secure payment of two notes, given to different creditors, providing for the sale of the land at auction by the trustee upon default in payment of principal or interest on the notes it secured after advertisement according to law, upon the execution of the power of sale by the trustee according to the terms of the deed and the bidding in of the property by the wife of the mortgagee and daughter-in-law of the trustee: *Held*, the sale will not be set aside in a suit by one of the creditors secured by the deed, there being no evidence of fraud upon which the sale is sought to be set aside. *Lumber Co. v. Waggoner*, 221.

2. There is a presumption in favor of the regularity of the execution of the power of sale in a deed of trust or mortgage. *Ibid.*

MUNICIPAL CORPORATIONS (Counties see Counties).

E Torts of Municipal Corporations.

*e Condition and Use of Public Buildings and Lands*

1. Where there is evidence tending to show that the private owner of a building left part of the building wall standing in an unsafe condition after the building had been condemned by the city building inspector, and that the city had constructed a retaining wall contiguous thereto, but had failed to construct weep holes therein so that the waters from the lands of the private owner were ponded back on his lands and seeped through the ground and sobbed and softened the foundations on the building wall so that after a heavy rain it fell over into the city market place and injured the plaintiff: *Held*, the evidence discloses joint negligence on the part of the city and the private owner, and the injury therefrom could have been reasonably anticipated, and is sufficient to sustain the verdict of the jury against them as joint *tort-feasors*, and that there was no primary and secondary liability between them, and defendants' motion as of nonsuit was properly denied. C. S., 567. *Bonapart v. Nissen*, 180.

F Contracts of Municipal Corporations (Bonds for public construction see Principal and Surety B b).

*a Manner and Form of Making and Validity of Municipal Contracts*

1. The statutes prescribing the manner and form of making a contract by a city must be strictly complied with, and where the governing body is composed of several commissioners and the statutes prescribe that contracts with the city over a certain sum should be made by the governing body after advertising for bids, and that the contract be executed in writing and drawn or passed upon by the city attorney, a parol contract made with the commissioner of public works providing for the reimbursement of a realty company of the amount to be spent by it on a sewerage system is not binding on the city, and the realty company may not recover from the city in its action thereon. *Realty Co. v. Charlotte*, 564.

*c Ratification*

1. A municipal corporation is not bound by the action of its governing body in ratifying a contract which the governing body could not have made in the first instance or which was made without compliance with statutory provisions which are mandatory with respect to the manner of making such contracts, and where a contract for the repayment to a realty company of the amount to be expended by it in constructing a sewerage system was not made in compliance with the statutes, the action of the city governing body in making a part payment of the amount so expended by the realty company is not binding on the city as a ratification of the contract. *Realty Co. v. Charlotte*, 564.

*d Recovery Upon Quantum Meruit from Municipal Corporation*

1. Where one of the commissioners of a city has made a parol agreement to repay a realty company the money it should expend in constructing a sewerage system within the corporate limits, and afterwards the city has incorporated the system so constructed into its general municipal sewerage system and collected a sewer tax from owners of lots using such system, although the original agreement is void

MUNICIPAL CORPORATIONS F—*Continued.*

for failure to conform to the mandatory statutory provisions in regard to the making of contracts by a city, the realty company may recover from the city upon a *quantum meruit* the reasonable and just value of the sewerage system thus taken over by the city. *Realty Co. v. Charlotte*, 564.

*e Ultra Vires or Improperly Executed Contracts*

1. Where a contract with a corporation has been fully performed by both parties and nothing remains to be done but the payment of the consideration by the corporation, the plea of *ultra vires* is not available to the corporation; and where a contractor for the construction of certain municipal improvements has given a surety bond to insure his faithful performance, etc., and has completed the work under the contract, he may not, in an action by the surety to recover the premium due on the surety bond, set up the plea that the contract with the city was void for failure to comply with C. S., 2830, with regard to the advertisement for bids. *Indemnity Co. v. Perry*, 286.

H Police Power.

*a Nature and Extent of Power and Validity of Police Regulations in General*

1. An ordinance passed under provision of statute, purporting to fall within the police powers as to health, safety, etc., is subject to judicial review by the courts, and the expressed purpose of the ordinance in this respect is not controlling on the courts. *MacRae v. Fayetteville*, 51.

*b Zoning Ordinances*

1. In proceedings for mandamus to compel a city, through its building inspector, to issue a permit for the erection of a gasoline filling station, an ordinance making it unlawful to erect such a station nearer than 250 feet to any residence within the corporate limits provided that the ordinance shall not apply to such stations already erected, is held void, it appearing that many stations had been erected and that the effect of the enforcement of the ordinance would be to give a monopoly to the stations already erected, and that the ordinance was not uniform in its application, and that to prohibit the building of the station in suit would be to deprive the owner of his property rights. *MacRae v. Fayetteville*, 51.

2. Gasoline filling stations built and maintained under the provisions of law are not nuisances *per se*, but are of public necessity, and they may not be prohibited for purely aesthetic reasons, and where an ordinance is not uniform, fair and impartial in its application, it will be held void. *Ibid.*

3. Private property cannot be taken for private purposes, but only for those purposes which are public in their nature upon the payment of just compensation, and an ordinance regulating the erection of gasoline filling stations within the limits of a city that has the effect of confiscating the property of an owner is void. *Ibid.*

4. Where subsequent to and pending proceedings in mandamus to compel a city to issue a permit for a filling station under an existing ordinance, the city has passed a general zoning ordinance, the

MUNICIPAL CORPORATIONS H—*Continued.*

latter will not be considered in the absence of information upon which the courts may determine as to whether the later ordinance was reasonable under the facts presented for determination. *Ibid.*

5. A town ordinance which attempts to prohibit the erection of gasoline filling stations within three hundred feet of the public schools of a town is void when there are already filling stations therein within the restricted area, the ordinance not being uniform in its application, and having the effect of giving the filling stations already erected a monopoly, and the plaintiff is entitled to mandamus to compel the issuance of a permit for a filling station on his land within the area, and his right to this relief is not affected by a third ordinance requiring that the filling stations already erected be removed by a certain date in the future, the owners of the existing filling stations not being parties to the action and their right to operate said filling stations after the date fixed not being before the Court. *Burden v. Ahoskie*, 92.

*e Violation and Enforcement of Police Regulations*

1. Where the building inspector of a city, under authority of a zoning ordinance, refuses to issue a permit for the erection of a building to be used for a store and filling station, and the owner appeals to the board of adjustment, which affirms the decision of the building inspector, the remedy of the owner to test the validity of the ordinance is by proceedings in the nature of a *certiorari* to have the question decided by the Superior Court, with right of appeal to the Supreme Court, and he may not erect a building without a permit and in violation of the ordinance and collaterally attack the validity of the ordinance in a prosecution against him for its violation, and evidence relating to the reasonableness of the ordinance is properly excluded in the prosecution for its violation. 3 C. S., 2776(r) *et seq. S. v. Roberson*, 70.

2. The board of adjustment of a city having power to hear and decide appeals from any order or decision of an administrative official charged with the enforcement of any zoning ordinance passed under the provisions of 3 C. S., 2776(r) is a *quasi*-judicial body, and its decisions are subject to review by the Superior Courts by proceedings in the nature of *certiorari*, 3 C. S., 2776(x), and a decision of the board is not subject to collateral attack. *Ibid.*

3. Where a city makes the violation of its ordinances in regard to the erection and maintenance of gasoline filling stations within a prescribed zone a criminal offense, and an alleged violator of the ordinance has been acquitted by a court of competent jurisdiction, equity will not afford injunctive relief at the suit of the city to restrain the continued violation of the ordinance by the person acquitted, the question as to the rights of the adjacent property owners not being presented. *Elizabeth City v. Aydlette*, 585.

J Actions Against Municipal Corporations.

*b Charter Provisions as to Time Within Which Notice and Claim for Damages Must be Given*

1. Where it appears upon the face of the complaint in an action against a city for damages that notice and claim of damages had not been

MUNICIPAL CORPORATIONS J—*Continued.*

given in the time required by the city charter as a prerequisite to the right of action, a judgment as of nonsuit is properly entered. *Biggs v. Asheville*, 272.

MURDER see Homicide.

NEGLIGENCE (Of auto driver see Highways B; of master see Master and Servant C; of vendor of food see Food A; of cities see Municipal Corporations E; of drainage district see Drainage Districts C a; of bailee see Bailment A; in operating trains see Railroads D; in operating busses see Highways B; homicide through negligence see Homicide C; release from liability for negligent injury see Torts C b.

A Acts or Omissions Constituting Negligence.

*c Condition and Use of Lands and Buildings*

1. Where there is evidence tending to show that the private owner of a building left part of the building wall standing in an unsafe condition after the building had been condemned by the city building inspector, and that the city had constructed a retaining wall contiguous thereto, but had failed to construct weep holes therein so that the water from the lands of the private owner were ponded back on his lands and seeped through the ground and sobbed and softened the foundations on the building wall so that after a heavy rain it fell over into the city market place and injured the plaintiff: *Held*, the evidence discloses joint negligence on the part of the city and the private owner, and the injury therefrom could have been reasonably anticipated, and is sufficient to sustain the verdict of the jury against them as joint *tort-feasors*, and that there was no primary and secondary liability between them, and defendants' motion as of nonsuit was properly denied. C. S., 567. *Bonapart v. Nissen*, 180.

2. Evidence that a customer in a merchandising establishment received the injury in suit as a result of slipping and falling on the oiled floor of an aisle at a place where there was an unusual accumulation of oil, tending to show that the oil was improperly or negligently applied, and that such condition existed for more than a week is sufficient to take the case to the jury on the question of whether the condition had existed for such length of time as should have been discovered by the exercise of ordinary care. *Bowden v. Kress*, 559.

*e Res Ipsa Loquitur* (See, also, Master and Servant C a)

1. The doctrine of *res ipsa loquitur* does not apply to an injury received by a customer or invitee in a store building caused by the customer's slipping and falling on the oiled floor of the store. *Bowden v. Kress*, 559.

C Contributory Negligence (on highway see Highways B g; of servant see Master and Servant C g).

*a Of Persons Injured in General*

1. Where in an action against an employer and a messenger boy and the telegraph company employing the messenger boy, the plaintiff's evidence tends to show that her intestate was employed to operate an elevator, and that he left the elevator at the ground floor for a few

NEGLIGENCE C—*Continued.*

minutes, and that during his absence the messenger boy moved it to another floor, and that the intestate, hearing the elevator bell ring, ran down a lighted corridor and jumped into the empty shaft without looking when the danger was obvious and could have been easily ascertained: *Held*, the plaintiff's own evidence establishes the negligent failure of the intestate to exercise due care for his own safety, and his failure to do so being a proximate cause of the injury, he is barred from recovering from any of the defendants, and the alleged negligence of the employer in failing to provide a safety device for the elevator, and the action of the messenger boy in moving the elevator, will not warrant a recovery, and the defendant's motion as of nonsuit is properly allowed. *Scott v. Telegraph Co.*, 795.

*c Imputed Negligence*

1. Where the plaintiff in an action to recover damages for an injury received in an automobile accident is a mere invitee or passenger in one of the automobiles driven by the owner entirely independently of the plaintiff and not under his control, and there is no evidence that the driver and the plaintiff were engaged in a joint enterprise: *Held*, the negligence of the driver, if any, is not imputed to the plaintiff, and he may recover of the defendant if the defendant's negligence was a proximate cause of the injury. *McGee v. Warren*, 673.

D Actions.

*c Nonsuit*

1. Whether the violation of an ordinance or statute is a proximate cause of the injury in suit is ordinarily a question for the jury, but where there is no evidence of causal connection between the negligence and the injury it is a question for the court, and in such cases the granting of defendant's motion for judgment as of nonsuit is proper. *Hendrix v. R. R.*, 142; *Burke v. Coach Co.*, 8.

2. Where in an action for damages for a negligent injury the plaintiff's evidence discloses contributory negligence barring his recovery, the plaintiff has proved himself out of court, and defendant's motion as of nonsuit is properly allowed. *Hendrix v. R. R.*, 142; *Wolfe v. Coach Line*, 140; *Scott v. Telegraph Co.*, 795.

3. Contributory negligence of the plaintiff will not be held to bar recovery as a matter of law when an inference in his favor is permissible from the evidence. *Williams v. Express Lines*, 193; *Cook v. Horne*, 740.

4. An action to recover damages for a personal injury alleged to have been negligently inflicted will be nonsuited in the absence of evidence tending to show that the plaintiff was injured by the negligence of the defendant as alleged in the complaint. *Weatherman v. Tobacco Co.*, 603.

*d Verdict and Judgment*

1. Where the issue of negligence and contributory negligence arise in an action for damages to the plaintiff's automobile, there being no issue as to the last clear chance, the plaintiff is not entitled to judgment where the jury answers both issues in the affirmative and awards damages. *McKoy v. Craven*, 780.

NONSUIT see Trial D a.

NOVATION.

A Nature and Requisites of Novation.

*a Extinguishment of Old Debt and Creation of New*

1. Where the sureties on a note agree by the terms of the note that an extension of time granted to maker would not discharge them from liability thereon, the taking by the payee of a mortgage expressly providing that it was additional security to the note and granting an extension of time for payment cannot be construed as a novation, and the sureties are not released thereby, the word novation implying the extinguishment of an existing debt and the creation of a new one. *Walters v. Rogers*, 210.

PARENT AND CHILD—Father's contract to support illegitimate child see Bastards B b, statute of frauds may not be pleaded in action on see Frauds, Statute of J a.

PARTIES (Misjoinder of, see Pleadings D b; removal of causes for fraudulent joinder see Removal of Causes).

A Parties Plaintiff.

*a Persons Who May or Must Sue*

1. Under the provisions of C. S., 449, a trustee of an express trust may sue without joining the one for whose benefit the action is brought, this being an exception to C. S., 446, requiring actions to be brought by the real party in interest. *Sheppard v. Jackson*, 627.

*b Joinder and Substitution*

1. Where the cause of action is not changed or the rights of the defendant prejudiced it is not error for the trial court to permit the real party in interest voluntarily to be substituted as plaintiff in the action during the progress of the trial and after the jury had been empaneled, and proceed with the trial of the action. *Gibbs v. Mills*, 417.

PARTITION (Right of tenant in common to improvements upon partition see Improvements A a).

A Action for Partition.

*b Decree and Parties and Matters Concluded Thereby*

1. Where, under a devise for life to the children of the testator with remainder to his grandchildren to be held in common by them until the youngest shall arrive at the age of 21 years, the holders of the life estates and devisees of age of the remainder in common obtain a consent decree for the partial partition: *Held*, the testamentary postponement of the partition not being void, the partial partition is adverse to the grandchildren not of age or not *in esse*, and they are not bound by the proceedings, and the commissioner appointed to sell the land for partition cannot give a good fee-simple title. *Greene v. Stadiem*, 445.

B Partition by Acts of Parties.

*a Parol Partition*

1. Where before his death the deceased owner of lands has made deeds to separate pieces or tracts of land to each and all of his children,

PARTITION B—*Continued.*

and more than two years thereafter, and after his death, his executrices under a will disposing of his other lands and containing a residuary clause, have found the deeds and had them recorded, and the grantees after the recording of the deeds have entered each upon his or her respective parts as set out in the deed to him or her, exercised the right of absolute ownership, leased, collected rents and paid taxes, and have been parties to legal proceedings wherein they have regarded themselves as owners under the deeds: *Held,* though the deeds of gift are invalid because not registered within two years, the transactions operate as a parol partition of the lands, accepted and acquiesced in by the parties, and they are equitably estopped by their acts and conduct from maintaining that the deeds, or any of them, are invalid. *Thomas v. Conyers,* 229.

PARTNERSHIP.

D Rights and Liabilities as to Third Persons.

*a Representation of Firm by Partner and Creation of Partnership Liability Thereby*

1. Where partners in a real estate business own certain lands which one of the partners trades with a third person for other lands, and receives a deed in which the plaintiff's mortgage on the lands is expressly assumed, the deed being made to one partner with the consent of the other for the benefit of them both, and there is evidence that each thereafter spoke of the mortgage debt as a partnership liability: *Held,* the evidence is sufficient to be submitted to the jury as to whether the mortgage was a partnership liability upon which both were liable, and the motion as of nonsuit of the partner for whose benefit the other took title should have been overruled. *Leftwich v. Franks,* 289.

F Death of Partner.

*a Effect of Death and Subsequent Transactions*

1. A partnership terminates upon the death of one of the partners, C. S., 3277, and where an open, mutual and current account has existed between the partnership and another and the surviving partner continues to run the partnership and enters items on the account, which are not necessary to the winding up of the partnership affairs, such acts after the termination of the partnership are not partnership acts and the statute of limitations will run on the account due the terminated partnership from the last item entered thereon before the death of the deceased partner. *Reel v. Boyd,* 214.

PARTY WALLS.

B Rights and Liabilities of Adjoining Owners.

*a Costs of Construction*

1. Where the owner of lands builds a party wall partly upon his own lands and partly on the lands of the adjacent owner, and the latter builds to and uses the same: *Held,* equity implies that he will pay for such use one-half the cost of constructing the wall, although no express contract has been made concerning it, and upon the accidental destruction of the wall all easements therein terminate. *George v. Smathers,* 212.

PENDING ACTION see Abatement and Revival B; notice of, see Lis Pendens.

PERPETUITIES see Wills E d 1.

PLEADINGS (In actions for divorce see Divorce D c; bill of discovery see Bill of Discovery, in particular actions see Particular Titles to Actions; admissibility of pleadings in evidence see Evidence F e).

A Complaint.

*c Amendments to Pleadings*

1. In this case amendments to pleadings were allowed by the judge in the court below within his sound discretion, from which no appeal will lie to the Supreme Court. *Sheppard v. Jackson*, 627.

C Counterclaim.

*c Effect, Service, and Subsequent Pleadings*

1. Under the provisions of chapter 18, Public Laws of 1924, the allegations in an answer constituting a counterclaim are to be considered and dealt with as denied where a copy of the answer containing the counterclaim is not served on the plaintiff. *Kassler v. Finley*, 781.

D Demurrer (Right to appeal from judgment overruling, see Appeal and Error A c).

*a Statement of Cause of Action*

1. Under our liberal practice and procedure the plainttiff will not be held down to a technical position of the defendant as to the allegations in the complaint where the plaintiff has been permitted by the court in its discretionary power to file a reply which fully sets out the agreement of the parties, and the overruling of a demurrer will not be disturbed on appeal. *Fleishman v. Burrowes*, 514.

2. Where a complaint to any extent states a cause of action, or sufficient facts can be gathered therefrom, its allegation taken to be true, a demurrer thereto should be overruled. *Bechtel v. Bohannon*, 730; *Munro v. Rubber Co.*, 808.

*b Misjoinder of Parties and Causes of Action*

1. Upon demurrer, when it appears from the complaint that there is a misjoinder of both parties and causes of action, the action will be dismissed, C. S., 511, but where it only appears that there is a misjoinder of causes, the case will be retained and the several causes divided into as many actions as may be necessary for the proper disposition of the case. C. S., 516. *Shuford v. Yarborough*, 5.

2. Where new parties to an action are made who demur upon the ground of misjoinder of parties and causes of action as to them, the demurrer will be sustained and the cause of action demurred to will be dismissed if it appears upon the pleadings liberally construed that the demurrer is well taken. C. S., 511, 535. *Shemwell v. Lethco*, 346.

3. Where the plaintiff, a receiver of an insolvent corporation, seeks to enjoin the defendant from interfering with the collection of certain accounts of the insolvent which the defendant claims as purchaser, under contract, and by consent order it is agreed that the plaintiff

PLEADINGS D—*Continued.*

collect the accounts and that each party reserves his rights as to the proceeds, and thereafter the plaintiff files an amended complaint alleging that the contract of purchase of the accounts by the defendant was a subterfuge for the charging of usury and demands the statutory penalty: *Held,* the amended complaint stated facts sufficient to constitute a cause of action, and there was no misjoinder of causes. *Bundy v. Credit Co.*, 339.

*d When Demurrer May Be Entered and Effect of Failure to Demur*

1. Where the complaint is objectionable as a defective statement of a good cause of action the defendant waives the defect by failing to demur and by answering its allegations and pleading to the merits. *Sentelle v. Board of Education*, 389.

*e Subsequent Pleadings*

1. Where a demurrer to an action upon the ground of misjoinder of parties and causes of action has been overruled in the Superior Court and the judgment of the Superior Court is affirmed in the Supreme Court, the demurring party has the statutory right to file an answer at any time within ten days after the Superior Court has received the certificate of the opinion of the Supreme Court, of which statutory right the Superior Court cannot deprive him, C. S., 515, and it is error for the trial court in overruling the demurrer to require the defendant to file an answer at a fixed time, there being no finding that the demurrer was frivolous. C. S., 599. *Shuford v. Yarborough*, 5.

I Motions.

*a For Judgment on Pleadings*

1. A motion for judgment on the pleadings is properly refused when the complaint states a good cause of action. *Sentelle v. Board of Education*, 389.

2. Where the plaintiff in an action to declare a forfeiture of a life estate by defendant for failure to pay taxes, C. S., 7982, moves for judgment on the pleadings for the alleged failure of the defendant's answer to raise an issue of fact, the motion is properly disallowed by the trial court when the answer of the defendant is sufficient. *Hutchins v. Mangum*, 774.

*b To Strike Out*

1. The refusal of the trial court to allow a motion made in apt time to strike out certain allegations of the complaint on the ground that the reading of the allegations will prejudice the jury and that the allegations will render admissible irrelevant evidence will not be reversed on appeal, no substantial right of the defendant being affected thereby to his prejudice since the jury will be instructed to find their verdict from the evidence and since all irrelevant evidence will be excluded by the trial court upon objection of the complaining party. *Hosiery Mill v. Hosiery Mills*, 596.

2. A defendant in a civil action has the right to have all extraneous and redundant matter alleged in the complaint stricken out before being called upon to answer or demur, C. S., 506, and the refusal of

PLEADINGS I—*Continued.*

the trial court of the defendant's motion made in apt time before time, C. S., 537, is error where the allegations objected to are irrelevant or redundant. *Ibid.*

3. Where the trial court has allowed the plaintiff to file an amendment to the complaint to be confined to certain phases of the controversy or to allegations as to certain and specific matters, the plaintiff must confine himself to the restrictions under which he is permitted to amend or the trial judge may order stricken therefrom any further matters or any allegations that are irrelevant or redundant and not in conformity with the statute, C. S., 506, requiring a plain and concise statement of the cause of action without unnecessary repetition, and the granting of the defendant's motion to strike out certain parts of the amended complaint will be sustained on appeal if the complaint is sufficient in its allegations after the portions objected to have been stricken out to present every phase of the controversy. *Ellis v. Ellis*, 767.

POLICE POWER see Constitutional Law C, Municipal Corporation H.

PRIMA FACIE CASE see Trial D a 2.

PRINCIPAL AND AGENT.

A The Relation.

*a Creation, Establishment and Existence of the Relationship*

1. The fact of agency must be proven *aliunde* the admissions of the agent. *Bank v. Sklut*, 589.

2. The declarations of an alleged agent are incompetent to prove agency, but the order in which evidence may be introduced is a matter within the discretion of the trial court unless it is obvious that prejudice may result, and where the plaintiff introduces a receipt from the alleged agent containing a recital of the agency, and evidence of the agency is later offered without objection: *Held*, the defendant was not prejudiced by the order of the introduction of the evidence, and his exception based thereon will not be sustained on appeal. *Buckner v. C. I. T. Corp.*, 698.

3. Where there is evidence that an alleged agent has repeatedly collected money upon debts owed to the alleged principal, the inference is permissible that an agreement to this effect has been made, and the evidence is sufficient to make out a prima facie case of agency *aliunde* the declaration of the agent. *Ibid.*

C Rights and Liabilities as to Third Parties (Refusal to ratify sale of clerk creates obligation on *quantum meruit* see *Quasi*-Contracts A a 1).

*b Powers of Agent*

1. Where there is evidence tending to show that the defendants as partners authorized their alleged agent to purchase furs and hides without furnishing the money to pay for them, and that in the course of business the agent gave numerous personal checks therefor which were covered by his drafts on the alleged principals which were paid by them, in an action by the bank accepting the drafts, to recover on later drafts which the defendants refused to pay,

PRINCIPAL AND AGENT C—*Continued.*

denying the agency and partnership, the evidence of agency and of express or implied authority to execute and negotiate the drafts on the principals is held sufficient to be submitted to the jury and sustain the verdict in plaintiff's favor. *Bank v. Sklut*, 589.

2. Agency being proven, admissions by the agent relating to the business at hand are admissible against the principal when the admissions may be deemed a part of the *res gestæ*. *Ibid.*

*d Wrongful Acts of Agent*

1. Where one of two innocent persons must suffer by the fraud or deceit of another, he who first reposes the confidence must bear the loss. *Bank v. Clark*, 169.

*e Undisclosed Agency*

1. While the declarations, made by a third party dealing with the agent, that it did not care who the principal was or that it was satisfied with the credit of the agent is evidence, but not conclusive, against the liability of the principal, in this case *held:* there was sufficient evidence of the principal's liability to be submitted to the jury. *Bank v. Sklut*, 589.

PRINCIPAL AND SURETY (Performance of incidental agreement not necessary in action on bond see Contracts F b 1; surety on note see Bills and Notes; surety for debt of another see Frauds, Statute of A b).

B Nature and Extent of Liability of Surety (Surety's liability on replevy bond see Replevin C b).

*a Bonds for Private Construction*

1. A surety bond given the owner for the construction of a road over his land will be construed with the contractor's bond given the owner, and where the surety expressly agrees to liability for all material used therein, and the bond expressly indemnifies them against loss for which they may recover against the surety under a contract made for their benefit, though they are not specifically named therein, and defenses of the surety which may be available against the owner are not available against such materialmen in their action to recover for material furnished by virtue of the contractual provisions in their behalf. *Foundry Co. v. Construction Co.*, 177.

2. Where a surety bond for the erection of a building indemnifies the owner against loss for the failure of the contractor to perform his contract, the owner's allegation in his pleading against the surety that the contractor had failed to perform his contract and that he was damaged in a certain sum thereby is sufficient to state a cause of action against the surety, and its demurrer thereto was properly overruled, there being no stipulation in the bond that the owner should complete the contract as a condition precedent to recovery. *Owen v. Salvation Army*, 610.

*b Bonds for Public Construction*

1. Where a contract with a city provides for the construction of certain water and sewer improvements, and the contract further provides for the construction of additional similar work if ordered by the

PRINCIPAL AND SURETY B—*Continued.*

city council, all in accordance with plans and specifications attached, and the contractor gives bond with express reference to the contract with provision that the rate of premium for the indemnity expressly provided for in the bond would apply to the extra or additional work if subsequently ordered by the city: *Held*, upon further similar work being done under the same specifications, etc., by order of the city council, the question of whether such work was done under the original contract is for the jury, the surety being liable on the bond for the additional work if done under the original contract and being entitled to recover from the contractor the additional premium therefor. *Indemnity Co. v. Perry*, 286.

*d Bonds of Corporate or Private Officers and Agents*

1. Under an express stipulation in a bond indemnifying an employer against loss through the dishonesty of his employee, that if the employer settled or compromised such loss without the consent of the surety the surety bond was to become void from the beginning, a settlement by the employer with the employee in violation of the provisions releases the surety from liability. *Bank v. Graham*, 530.

2. Where a cashier of a bank misappropriates funds of the bank, and the defalcation is discovered by the assistant cashier, who has succeeded to the duties of the cashier, and the latter effects a settlement with the former without the surety's consent, by which the defalcation is made good and the proceeds turned over into the assets of the bank, such settlement is regarded as a settlement or compromise by the bank of a loss which might have become the basis of a claim against the surety and renders the surety bond void in accordance with an express provision therein it should be void if settlement were made without the surety's consent, and the fact that the assistant cashier had not called the defalcation and settlement to the attention of the directors of the bank is immaterial. *Ibid.*

PRIVILEGES AND IMMUNITIES see Constitutional Law G.

PROCESS (Waiver of service by general appearance see Appearance A a).

B Service of Process.

*c Service by Publication*

1. There being no specific requirement of statute that an order for the publication of summons state that the paper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served," a judgment that the clerk be restrained from ordering publication in a certain paper without such finding in the order is beyond the terms of the statute and would seem to be discriminatory, and on appeal the judgment will be modified; an order for publication of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been made, without specific adjudication in the order to that effect. *Elias v. Comrs. of Buncombe*, 733.

PROCESS B—*Continued.*

*d Service upon Foreign Corporations*

1. The local bookkeeper of a nonresident corporation, whose sole duty is to collect the defendant's account here, who is not an officer or director of the corporation, and who is without managing or supervisory authority and not clothed with discretion by his principal, is not an agent of the corporation on whom valid service of process on the corporation can be made. *Tinker v. Rice Motors*, 73.

*e Service upon Nonresident Auto Owners in Actions for Negligence*

1. The statute which provides that a nonresident by using the highways of the State, will be deemed to have appointed the Commissioner of Revenue as his agent for the service of process is not remedial or curative, but affects a substantial right, and the appointment of the Commissioner thereunder is contractual, and the statute is not to be given retroactive effect, and service of process thereunder in an action accruing before the effective force of the statute is void. *Ashley v. Brown*, 369.

QUASI-CONTRACTS (Recovery on *quantum meruit* against city see Municipal Corporations F d; liability of estate for services rendered deceased see Executors and Administrators D a).

A Implied Promise to Pay (For half cost of party wall see Party Walls B a 1).

*a Promise to Pay Implied from Acts of Parties*

1. Where a clerk in a store without authority from his employer, sells certain of his employer's goods for a debt personally owed by him to the purchaser or his agent, and the employer refuses to ratify the transaction and seeks to hold the purchaser liable for the purchase price: *Held*, there was no "meeting of the minds" between the purchaser and the employer, and the employer's right to recover is on an implied contract for their reasonable worth, *quantum meruit*, on the day he got the goods. *Griffith v. English*, 66.

RACES see Constitutional Law G a 1.

RAILROADS (Liability as carriers see Carriers).

D Operation.

*b Accidents at Crossings*

1. Where in violation of a city ordinance making it a misdemeanor for a railroad company to obstruct a street of the town with its freight train for more than three minutes at a time, and a person attempting to cross the cars of the freight train was injured by his foot being caught between the bumpers of the cars when the train started, the violation of the ordinance by the railroad company is negligence *per se*, but not actionable since not a proximate cause of the injury, and nothing else appearing in an action to recover damages, a motion for judgment as of nonsuit upon the evidence is properly allowed. *Hendrix v. R. R.*, 142.

2. An engineer in control of a moving train is charged with the duty of giving some signal of the train's approach to a public crossing, and if he fails to give such warning which is the proximate cause of injury the railroad company is liable to the person injured. *Collett v. R. R.*, 760.

RAILROADS D—*Continued.*

3. Where in an action against a railroad company to recover for injuries sustained in a collision at a public crossing there is evidence tending to show that defendant's train approached the crossing where the accident occurred without giving any warning of its approach; that the plaintiff was driven in her automobile by her chauffeur who stopped, looked and listened before attempting to cross the tracks; that the night was dark and rain was falling; that the driver crossed the tracks slowly, and on account of the conditions there did not see the approaching train until within three feet of the track, and could not stop the car in time to avoid the accident, with conflicting evidence on each point: *Held*, the evidence was properly submitted to the jury on the issues of negligence, contributory negligence and damages. *Ibid.*

RECEIVERS—of corporations see Corporations H; of banks see Banks and Banking I b.

RECEIVING STOLEN GOODS.

D Trial.

*d Verdict*

1. Where the defendant is tried on three separate counts: (1) with feloniously breaking into a railroad car in violation of C. S., 4237, (2) with larceny of certain goods therefrom, (3) with receiving stolen goods with knowledge that they had been stolen, C. S., 4250: *Held*, an acquittal on the first two counts and conviction on the third is not a contradictory verdict as a matter of law, or objectionable on the ground that the doctrine of recent possession applied equally to all counts, there being sufficient evidence to sustain the verdict of guilty on the third count. *S. v. Brown*, 41.

REFERENCE.

C Report and Findings.

*b Findings and Exceptions*

1. Unexcepted to findings of fact by a referee are conclusive both in the Superior Court and in the Supreme Court on appeal. *Bank v. Graham*, 530.

D Trial Upon Exceptions (Preservation of right to jury trial see Jury C a).

*a Admissibility of Evidence and Proceedings before Referee and Other Evidence*

1. While a trial by jury upon issues submitted on exceptions to the findings of the referee is upon the record of the proceedings before the referee, it does not include his findings or conclusions, but only the evidence taken before him signed by the witnesses and certified as the statute requires; and where after the filing of the report an amendment is allowed by the court on matters not included in the reference of the case, additional evidence may be introduced on the matters in the amendment. *Booker v. Highlands*, 282.

REFORMATION—of insurance contract see Insurance E c.

REGISTRATION—of mortgages see Mortgages C c; of chattel mortgages see Chattel Mortgages G b 1.

RELEASE—From tort liability see Torts C b.

REMOVAL OF CAUSES.

C Citizenship of Parties.

*b Separable Controversy and Fraudulent Joinder*

1. Upon a petition for removal of a cause from the State to the Federal Court on the ground of separate controversy the allegations of the complaint are controlling upon the question as to whether the cause is joint or separable, and where the facts alleged in the complaint set forth the duty and breach of duty by each of the defendants, and that such breach proximately caused the injury in suit, the complaint alleges a joint tort and the petition will be denied. *Hart v. Mfg. Co.*, 1.

2. A petition for removal of a cause from the State to the Federal Court on the ground of fraudulent joinder must allege facts which lead unerringly to, or rightly engender and compel the conclusion that the joinder is fraudulent as a matter of law, and a mere traverse of the facts alleged in the complaint is insufficient, and such fraudulent joinder cannot be established where by the settled law of the State in which the action is brought, and in which it arose, both defendants are jointly liable. *Ibid.*

3. Where the plaintiff in her complaint alleges that she was injured by the negligence of the nonresident defendant in failing to provide a reasonably safe entrance to its store and the negligence of the resident manager in failing to maintain the same in a reasonably safe condition, over which the resident manager had control for his employer, a joint and not a severable tort is alleged as to both defendants and the petition of the nonresident defendant for removal from the State to the Federal Court upon the ground of separable controversy should be denied. *Feaster v. McLelland Stores Co.*, 31.

4. Where the complaint alleges that the negligence of the resident and nonresident defendants concurred in causing the injury in suit, a joint tort is alleged, and it will not be considered as separable because in some respects the allegations of negligence alleged against the nonresident defendant may be of matters of which the resident defendant was only partially responsible, and it will not be held a fraudulent joinder to prevent the removal of the cause from the State to the Federal Court. *Ibid.*

5. Where it is alleged in the complaint that the resident defendant was employed by his codefendant as a foreman, and that the plaintiff's injuries were caused by the joint tort of the defendants, and the allegation that the resident defendant was an employee of his codefendant is not denied in the petition for removal, a mere denial of the allegations upon which the cause of action is founded is not sufficient to sustain the contention that the joinder of the resident defendant was fraudulent, and the petition for removal of the cause from the State to the Federal Court is properly denied. *Frizell v. Mica Co.*, 128.

6. Where the petition for the removal of a cause from the State to the Federal Court alleges with particularity that the resident defendant was not an employee of the nonresident defendant, and that the

REMOVAL OF CAUSES C—*Continued.*

plaintiff knew of this fact and joined him as a defendant fraudulently for the sole purpose of preventing a removal, the petition for removal should have been granted. *Matthews v. Lumber Co.*, 129.

7. Where it appears in a petition for the removal of a cause from the State to the Federal Court that one of the resident defendants was a mere fellow-servant and that the nonresident defendant was an independent contractor doing work thereunder for the other resident defendant, and that the work under the contract was not inherently dangerous: *Held*, where the amount involved was sufficient and the proper procedure followed the petition of the nonresident defendant for the removal of the cause from the State to the Federal Court for diversity of citizenship was properly allowed. *Wright v. Utility Co.*, 204.

REPLEVIN; CLAIM AND DELIVERY (In attachment see Attachment E c 1).

C Liabilities on Bonds and Undertakings.

*b Liability of Surety*

1. The sureties on a replevy bond given by an infant in claim and delivery proceedings are not liable for damages beyond the terms of the bond stipulating that their obligation is to answer for the default of the principal, on a judgment that may be had against him, and they cannot be held liable in excess of the liability of the infant principal, and where the infant has disaffirmed the contract and bond, the plaintiff is entitled only to judgment for the return of the property, and neither the infant nor the sureties on his bond is liable for deterioration of the property or damages for its detention. *McCormick v. Crotts*, 664.

RES IPSA LOQUITUR see Negligence A e.

RES JUDICATUR see Judgments L.

RESTRICTIONS—In deeds see Deeds and Conveyances C g.

RULE IN SHELLEY'S CASE see Deeds and Conveyances C c 1, 2.

SALES—Rights of vendor under conditional sales contract upon confiscation of property see Intoxicating Liquor F a.

SCHOOLS AND SCHOOL DISTRICTS (Bonds for, see Taxation A a 2).

C Contracts and Liabilities.

*a For School Supplies*

1. Where the board of education of a county has issued warrants for the payment of supplies purchased for the public schools of the county out of funds duly appropriated for the purpose by the board of county commissioners as the statutes provide, it is the duty of the county accountant to approve them for payment, and upon his refusal to do so *mandamus* will lie. Public Laws of 1927, ch. 146, sec. 3. *Board of Education v. Walter*, 325.

D Government and Officers.

*a Election and Appointment of Officers*

1. The act of the Legislature, chapter 142, Private Laws of 1929, amending chapter 78, Private Laws of 1923, providing for the election and

SCHOOLS AND SCHOOL DISTRICTS D—*Continued.*

appointment of the school commissioners of a certain city has the effect of modifying C. S., 2900, and the board of school commissioners should be elected or appointed, in case of vacancy, according to the provisions of chapter 78, Private Laws of 1923, as amended by the act of 1929. *Goode v. Brenizer*, 217.

*b Powers of County Boards of Education in General*

1. Under the provisions of 3 C. S., 5429, the county board of education is authorized to select and employ janitors for a school building in a local tax district in preference to one appointed by the district school committee for the same position. *Wiggins v. Board of Education*, 301.

2. The board of education of a county is required in its large discretion to provide suitable supplies for the public schools of the county out of funds provided by taxation by the county commissioners in the manner prescribed by statute, and when funds have been provided as the statutes direct the purchases by the county board of education within its appropriation are to be paid upon its voucher out of the funds so appropriated, and the board of county commissioners may not usurp the power of the board of education to make such purchases under a resolution consolidating purchases of supplies for all departments of the county government under the provisions of chapter 146, Public Laws of 1927, the county board of education not being a department of the county government within the intent and meaning of the act. 3 C. S., 5585, 5586, 5595, 5617. *Board of Education v. Walter*, 325.

3. Under the constitutional provisions and the statutes enacted with regard to the subject, it is the policy of this State to guard with jealous care its school system from partisan strife. *Ibid.*

*c Duties and Liabilities of School Officers*

1. Where the board of education of a county forces the county superintendent, by threats of criminal action, to make a settlement according to an accountant's report which he maintains is erroneous, and there is sufficient evidence to be submitted to the jury of an agreement that such payment by the superintendent should not preclude him from afterwards attacking the settlement for errors and irregularities: *Held*, in the superintendent's action alleging errors in the settlement and seeking to recover the moneys wrongfully paid the defendant's motion as of nonsuit is properly denied. *Sentelle v Board of Education*, 389.

SEARCHES AND SEIZURES see Constitutional Law J.

SERVICE see Process.

SPECIFIC PERFORMANCE.

B Contracts Enforceable Specifically.

*a Contracts Affecting Land*

1. Where in a contract by a husband and wife to convey lands of the wife the wife's privy examination is not taken, the interest of the

SPECIFIC PERFORMANCE B—*Continued.*

husband as tenant by the curtesy *initiate* is sufficient to support an action for specific performance against him so far as his interest is concerned. *Colwell v. O'Brien*, 228.

STATUTES (Table of statutes construed see Consolidated Statutes; statute of frauds see Frauds, Statute of; statute of limitations see Limitation of Actions).

A Enactment, Requisites and Validity.

*e Constitutionality in General*

1. An act of the General Assembly will not be held unconstitutional unless clearly so. *Leonard v. Sink*, 114.

B Construction and Operation.

*a General Rules of Construction*

1. General statutes do not bind the sovereign unless the sovereign is expressly mentioned therein. *O'Berry v. Mecklenburg County*, 357.

2. Where a statute is adopted in our State from another State or country, as a general rule, it is to be construed in accordance with the interpretation given it by the State or country from which it is adopted, especially when the statute itself does not express any intention to the contrary. *Ashley v. Brown*, 369.

3. Where a section of a statute is repugnant to the spirit of the act and cannot be reconciled by reasonable construction with the language of the other sections conveying and establishing the intent of the Legislature, the repugnant section must give way to the spirit of the act, and will be declared void. *Smith v. Light Co.*, 614.

*b Retroactive Statutes*

1. A statute which is not remedial or curative, but which affects a substantial right will not be construed as retroactive or retrospective unless it expressly provides therefor, or by construction it is necessary to so regard it to carry out the legislative intent. *Ashley v. Brown*, 369.

*c Criminal Statutes*

1. It is a rule of universal acceptance that criminal statutes should be strictly construed. *S. v. Crawford*, 522.

C Repeal and Revival.

*a Repeal or Modification by Enactment*

1. Ordinarily an act of the Legislature will be construed as a modification of a former general act as to the appointment and election of municipal officers when otherwise it would be meaningless. *Goode v. Brenizer*, 217.

*b Repeal by Implication*

1. A later act of the Legislature will not be construed to repeal a former act thereof by implication where, construing the two *in pari materia*, there is no repugnancy between the two, and when repugnant in part, then only to the extent of those parts that are clearly repugnant when construed with the view to make them reconcilable by reasonable interpretation. *Leonard v. Sink*, 114.

SUBROGATION (Maker of note not subrogated to rights of payee see Bills and Notes D b 5).

A Right to Subrogation.

*a Right Thereto by Person Paying Debt on Which He is Not Primarily Liable*

1. Where a corporation borrows money through the unauthorized act of its president and uses the funds so obtained to take up an existing valid corporate mortgage on its property, equity will subrogate the lender to the rights of the prior mortgagee, and upon the insolvency of the corporation, the lender's claim is superior to the claims of the general unsecured claims against the corporation. *Morris v. Y. & B. Corp.*, 705.

SUBSCRIPTIONS.

A Requisites, Validity and Enforcement.

*a Compliance of Condition as to Amount to be Raised by Subscriptions*

1. The conditions of a gift to an eleemosynary corporation that other subscriptions be raised in a certain amount in cash or securities equivalent to cash by a stated time, is complied with if by the stipulated time other subscriptions in the amount stated have been secured for the purpose in bonds, securities, and promissory notes which could be realized upon and converted into cash in an amount exceeding the amount stipulated as a condition for the gift, and when this is established as a fact upon supporting evidence in the Superior Court, the judgment that the plaintiff recover the amount of the gift will be sustained on appeal. *Atlantic Christian College v. Hines*, 622.

2. The burden of proof is on the plaintiff to show that the conditions precedent to a gift to an eleemosynary institution of learning have been performed in its action thereon. *Ibid.*

SUMMONS see Process.

TAXATION.

A Constitutional Requirements and Restrictions.

*a Necessity of Submitting Bond Issue to Voters*

1. The maintenance of a hospital is not a necessary governmental expense for which a municipality may levy a tax within or in excess of the constitutional limitation except by a vote of the people under special legislative authority, and while the city may with funds on hand purchase equipment for one donated to it, its payment of its note given to a bank for money borrowed for this purpose in anticipation of the collection of taxes by the city will be restrained. *Nash v. Monroe*, 306.

2. Where the board of county commissioners of a county, acting as an administrative agency for the State, order, in accordance with statutory procedure, the issuance of bonds to provide funds for the purchase of sites for, and the erection of, schoolhouses necessary to carry out the constitutional mandate for a six months term of public school for children between the ages of six and twenty-one years, Const., Art. IX, it is not required that the question of the issuance of such bonds be submitted to the vote of the electorate, and a

TAXATION A—*Continued.*

public-local act, forbidding the commissioners of the county to issue bonds without first submitting the matter to a vote of the people, does not apply to such bonds, but only to local matters. *Julian v. Ward*, 480.

*c Uniform Rule and Ad Valorem*

1. Where the tax of a county upon its property for road purposes is uniform and *ad valorem*, Art. V, sec. 3; Art. VII, sec. 9, an act that segregates fifty per cent of such taxes collected from the cities and towns of the county to be repaid to them and used by them for street purposes, limiting their expenditure therefor to the amount so received, is not in contravention to the organic law, the municipalities being local agencies of the State for such purposes and the distribution of the funds being reasonable and within the legislative discretion with which the courts will not interfere. *Leonard v. Sink*, 114.

*g Suits to Restrain Issuance of Bonds or Attacking Validity of Levy*

1. Where the board of county commissioners have under ordinance duly passed and hearing thereon had are about to issue bonds for the necessary purpose of erecting a jail, etc., contrary to the restrictions of the County Finance Act limiting the amount of bonds for other than school purposes to an amount not to exceed five per cent of the property valuation, a suit to restrain the issuance of the bonds is required by the express terms of the statute, C. S., 1334(20) to be commenced within thirty days after the publication of the required notice and order of the issue, and a suit instituted after the time prescribed cannot be maintained and the validity of the bonds will be upheld. The question of whether the statute is strictly one of limitation or a condition annexed to the cause of action is immaterial. *Kirby v. Commissioners of Person*, 440.

2. The section of Municipal Finance Act, Public Laws of 1927, relating to the restriction on taxation, and the section relating to the time in which proceedings may be brought attacking an authorized levy of tax or issuance of bonds are to be construed in *pari materia*. *Ibid.*

B Liability of Persons and Property.

*b Corporate Franchises, Stock and Property*

1. Where two public-service corporations enter into an agreement for their union and the continuance of the business under the name of one with the combined assets of both, and file their application therefor with the Secretary of State, the statute under which the union is accomplished controls as to whether the union is a merger in the technical sense or a consolidation, and where the statute provides for converting the shares of stock of the old corporations into stock of the "new corporation," and for the surrender to and cancellation by the "new corporation" of the stock of the old ones: *Held*, the statute provides for the creation of a new corporation by consolidation, and the new corporation created thereunder is liable for the franchise tax imposed by chapter 36, Public Laws of 1929. *Coach Co. v. Hartness*, 524.

TAXATION B—*Continued.*

*c License Taxes*

1. The fees prescribed for barbers who are subject to the provisions of chapter 119, Public Laws of 1929, are for the expenses and enforcement of the act, which is necessary to the public health and welfare, and not an annual occupation tax imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by the Barber's Act, and assessment of the fees thereunder is constitutional. *S. v. Lockey*, 551.

*e State, County and Municipal Property and Functions*

1. A county purchasing gasoline for use by it in trucks and automobiles in the discharge of its governmental function of maintenance of its highways is not a "distributor" within the purview of chapter 93, Public Laws of 1927, imposing an excise tax upon distributors of gasoline, since general statutes do not bind the sovereign unless the sovereign is expressly mentioned, and under the express language of the statute the Legislature could not have intended to include counties thereunder since counties could not be subject to the procedure for its enforcement nor liable for the penalty for its evasion. *O'Berry v. Mecklenburg County*, 357.

C Levy and Assessment.

*b Listing of Property for Taxation*

1. Under a statute providing that the owner shall list his land for taxes under oath, or, in certain cases by an agent, or upon his failure therein the chairman of the board of commissioners shall list the description and valuation of the property, no authority is given the list-taker of the township to act for the owner, and in such instance the sheriff's deed to the lands to the purchaser at a tax sale does not pass title as against the owner or those claiming under him, and this result is not varied by C. S., 7925, making it the duty of the list-taker to be constantly on the lookout for unlisted property, the authority to list the property so found being confined to the chairman of the board of commissioners alone. *Phillips v. Kerr*, 252.

2. A sheriff's deed for the sale of lands for taxes is but presumptive proof that the property had been listed for taxes as the statute requires, and may be rebutted. C. S., 8034. *Ibid.*

D Lien and Priority.

*a Date on Which Lien Attaches and Persons Liable for Payment*

1. Construing C. S., 2815, providing that the lien for taxes attaches to realty annually on the first of May, with C. S., 7980, requiring the one selling lands under foreclosure sale of a mortgage or deed of trust to pay all taxes then assessed against the property out of the proceeds, it is *held:* where the taxes have not been assessed nor the tax rate ascertained under the provisions of the County Fiscal Control Act until after the foreclosure sale has been made, the proceeds or surplus from the foreclosure sale are not subject to the payment of the taxes, and the lien of a judgment creditor of the mortgagor is payable out of the surplus from the sale without deducting the amount of the taxes, and the taxes later assessed

TAXATION D—*Continued.*

attach to the land in the hands of the purchaser at the foreclosure sale, although they attach to the land as of the first of May. *Cemical Co. v. Brock*, 342.

E Enforcement and Recovery of Taxes.

*c Actions to Recover Taxes Wrongfully Collected*

1. License taxes assessed by the Commissioner of Revenue are assessed and payable in his office in Wake County, and where a person who has paid a license tax so assessed demands its refund and brings action to recover the amount paid on the ground that the tax was wrongfully assessed against him, his cause of action arose in Wake County, and where the suit is brought in the court of another county it is removable to Wake County upon motion of the Commissioner, C. S., 464, subject to the power of the court to change the place of trial as provided by C. S., 471. *McFadden v. Maxwell*, 223.

2. Ordinarily when an action is based on statutory authority the statute must be strictly complied with, but in this case the question of whether the plaintiff complied with C. S., 7979, and could maintain his action to recover a tax illegally levied, is not decided, the record not containing an exception to the judgment and appeal therefrom. *R. R. v. Brunswick County*, 549.

H Tax Deeds.

*a Tax Sales, Parties, Process, Procedure and Judgment*

1. Under the provisions of chapter 334, Public Laws of 1929, amending the procedure for the sale of lands for taxes as theretofore provided by statute (C. S., 8038, Art. 14, amended by Public Laws of 1927, etc.), requiring that the deed shall convey the real estate in fee to the purchaser at the foreclosure sale for taxes free from any claims of the taxpayer, his wife, the husband or any other person whether or not such person's claims are disclosed by the record, it is *held:* that where the lands so sold are subject to a life estate with contingent remaindermen over, involving the contingent interests of children living and unborn, and all interests are properly before the court either in person or by guardian *ad litem*, and have been legally represented, the judgment is binding upon all of the parties, and the purchaser gets good title to the property thereunder in fee simple absolute as against all parties having a vested or contingent interest. C. S., 452, 1744, 1745. *Hines v. Williams*, 420.

*b Requisites and Validity of Tax Deeds*

1. It is required to a valid sheriff's deed under a sale of land for taxes that the property shall have been listed for taxation according to the statute applicable at the time thereof. *Phillips v. Kerr*, 252.

2. C. S., 8034, providing that no person shall be permitted to question the title to lands acquired under a sheriff's deed without first showing that he or the person under whom he claims had title to the property at the time of the sale does not apply when the sheriff's deed is void for the failure of the listing of the property as required by statute. *Ibid.*

TELEPHONES—Testimony of conversations over see Evidence D d, Criminal Law G d 1.

TENANTS IN COMMON—Right of tenant to improvements upon partition see Improvements A a.

TORTS (Of cities see Municipal Corporations E).

C Release from Liability.

*b Fraud in Procuring Release*

1. Where upon a material consideration an injured employee had signed a release of all claims he might have as a result of the injury, in order to set it aside in an action for damages subsequently brought it must be shown that the release was obtained by fraud; and where the evidence tends only to show that the plaintiff executed the release upon the advice of an attorney he had employed for the purpose, and that the representations relied on were only the opinion of the defendant's physician who attended the plaintiff, that the injury was not permanent, without evidence that the opinion was made in bad faith, and that through later developments it was discovered that the injury was permanent, the evidence of fraud is insufficient to be submitted to the jury, and the plaintiff's motion as of nonsuit should have been allowed. *Pass v. Rubber Co.*, 123.

2. The amount of consideration paid for a release from liability for a negligent injury, to be evidence of fraud in the procurement of the release, must be so grossly inadequate as to compel the conclusion that it was practically nothing, and where it is the payment of five hundred dollars for an injury to an arm with expense of treatment, etc., the fact that the jury had awarded damages in the sum of two thousand dollars will not be held sufficient evidence of fraud in the procurement of the release under the facts of this case. *Ibid.*

TRESPASS—Limitation of actions for see Limitation of Actions B a 3.

TRIAL (In criminal cases see Criminal Law I; Right to trial by jury see Jury C).

A Calendar, Time of Trial, and Notice.

*b Knowledge of Time of Trial*

1. The knowledge of an attorney for a party that an action against him is placed on the calendar for a certain date is imputed to the party litigant. *Hendricks v. Cherryville*, 659.

B Reception of Evidence.

*b Order of Proof*

1. The declarations of an alleged agent are incompetent to prove agency, but the order in which evidence may be introduced is a matter within the discretion of the trial court unless it is obvious that prejudice may result, and where the plaintiff introduces a receipt from the alleged agent containing a recital of the agency, and evidence of the agency is later offered without objection: *Held*, the defendant was not prejudiced by the order of the introduction of the evidence, and his exception based thereon will not be sustained on appeal. *Buckner v. C. I. T. Corp.*, 698.

TRIAL B—*Continued.*

c *Objections and Exceptions*

1. Exception to the admission of evidence will not be considered on appeal where it appears that evidence of like nature, effect and character had been previously admitted without objection. *Thompson v. Buchanan*, 278; *Bridgers v. Trust Co.*, 494.

2. Where incompetent evidence has been introduced upon the trial over objection duly made, and the evidence remains with the jury for a considerable time, and it is apparent their verdict would be influenced by such evidence, although the party introducing such evidence offers to withdraw it: *Held*, the objection of the adverse party to its withdrawal upon the ground that it would deprive him of his objection to its admission, will not be held as a waiver of his objection to its admission, a waiver being a voluntary relinquishment of a known right, implying an election to forego some advantage which might have been otherwise insisted upon. *In re Will of Yelverton*, 746.

e *Withdrawal of Evidence*

1. Where erroneous evidence has been admitted to the consideration of the jury under exception, it is the duty of the trial court to withdraw it from the evidence, but where he withdraws such evidence and fails to instruct the jury not to consider it in making up their verdict, it constitutes reversible error. *Sentelle v. Board of Education*, 389.

2. While error will not ordinarily be held on appeal when the trial court withdraws incompetent evidence from the jury and instructs it not to consider it, incompetent evidence may not be withdrawn without ordering a mistrial where the inadvertence is protracted and injury would result to the appellant by such action. *In re Will of Yelverton*, 746.

D Taking Case or Question from Jury.

a *Nonsuit* (Judgment of, as bar to subsequent action see Judgments L a; in actions for negligent injury see Negligence D c, Highways B i)

1. On defendant's motion as of nonsuit the evidence and every reasonable intendment therefrom is to be regarded in the light favoring the establishment of the plaintiff's cause of action, whether the evidence be that introduced by either the plaintiff or the defendant or elicited from the defendant's witnesses. C. S., 567. *Morris v. Y. & B. Corp.*, 705.

2. Where the plaintiff's evidence makes out a prima facie case the issue is for the jury, and its affirmative finding is sufficient in law, the burden of proof remaining on the plaintiff throughout the trial. *Morris v. Y. & B. Corp.*, 719; *Hutchins v. Taylor-Buick Co.*, 777.

3. Conflicting testimony of the plaintiff's own witness does not justify the withdrawal of their testimony, their credibility being for the jury, and in viewing the testimony in the light favorable to the plaintiff it is sufficient, the defendant's motion as of nonsuit is properly denied. *Collett v. R. R.*, 760.

TRIAL D—*Continued.*

*b Directed Verdict*

1. A directed verdict should not be given on conflicting evidence. *Griffith v. English*, 66; *Jordan v. Hatch*, 539; *Francis v. Mortgage Co.*, 734.

E Instructions.

*c Form and Sufficiency*

1. Instructions in a personal injury case as to concurrent negligence are not required when the question is not raised by the pleadings or the contentions of the parties. *Jordan v. Hatch*, 539.

2. It is required of the court in his charge to the jury that he state in a plain and correct manner the evidence in the case and explain the law applicable thereto without expressing an opinion as to whether a fact at issue is fully or sufficiently proven. C. S., 564. *Brown v. Telegraph Co.*, 771.

*d Applicability to Pleadings and Evidence*

1. An instruction which ignores elements of negligence arising upon the evidence in a personal injury case, as an independent, complete and positive rule of law, is reversible error, and the principle of contextual interpretation, as where a correct instruction has been given on the material elements omitted, is not available to make the instruction complained of harmless error. *Allen v. Cotton Mill*, 39.

*e Requests for Instructions*

1. A general charge given by the judge to the jury substantially embodying special instructions requested is sufficient, it not being required that the exact language of the special instructions requested be used. *Rodman v. Rodman*, 137; *Jordan v. Hatch*, 539; *Brown v. Telegraph Co.*, 771.

2. The refusal of the trial judge to fully give instructions requested that contain the law arising from the evidence is reversible error, and the requirement is not met by his partially giving them when his omissions are of material matters. *Metts v. Ins. Co.*, 197.

3. A misstatement of the admission of a party in the charge to the jury must be brought to the attention of the trial judge in apt time to afford him an opportunity to correct the same, and an assignment of error based upon an exception thereto is eliminated by the appellant's failure to request a correction or tender a special instruction thereon. *S. v. Parker*, 629.

*g Construction and General Rules Upon Review*

1. *Held*, in this case that the use by the judge in his charge to the jury of the word "testimony," instead of the word "evidence," upon the quantity of proof required of the plaintiff, was not prejudicial to the defendant. *Peebles v. Idol*, 56.

2. Where in an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendants, the judge in his charge to the jury states the respective contentions of the

TRIAL E—*Continued.*

parties, and then correctly charges the law arising from the evidence in the case, construing the charge as a whole it will not be held as reversible error that in his statement of the contentions of the parties he did not refer to the element of proximate cause, having given it in his charge as to the law. *Bonapart v. Nissen*, 180.

3. A charge upon the measure of damages recoverable for a wrongful death will not be held for reversible error when correct except to the use of the words "present value and pecuniary net worth of the deceased" when it appears that he had correctly charged elsewhere that it was the present value "or" pecuniary worth, etc., and it appears from the verdict that the jury did not misunderstand the law thereon. *Frady v. Quarries Co.*, 207.

4. The charge of the judge to the jury will be considered as a whole in the same connected way in which it was given, with the presumption that the jury did not overlook any part thereof, and when accordingly it presents the law arising upon the evidence fairly and correctly to the jury, the charge will not be held for reversible error though some of the expressions when standing alone might be regarded as erroneous. *Thompson v. Buchanan*, 278; *Ins. Co. v. R. R.*, 518; *S. v. Parker*, 629; *Morris v. Y. & B. Corp.*, 719.

*h Additional Instructions and Redeliberation*

1. The question as to whether additional instructions given at the request of the jury after a night of deliberation of the case in the absence of the attorneys and the court stenographer constituted error is not decided, the record being silent as to whether the instructions were given before or after the court had opened for the day's session and its present decision being unnecessary. *In re Will of Yelverton*, 746.

F Issues.

*a Form and Sufficiency of Issues*

1. Where issues of negligence, contributory negligence, and damages are submitted to the jury in a personal injury action, and the jury answers the first two in the affirmative and awards damages, a new trial will be awarded on appeal if it appears, in the light of the record, that the second issue was ambiguous. *Wood v. Jones*, 356; *Corl v. Cannon*, 418.

G Verdict.

*d Impeaching Verdict*

1. Jurors will not be heard to impeach a verdict after it has been rendered to and received by the court. *Newton v. Brassfield*, 536.

H Trial by Court by Agreement.

*b Findings of Fact* (Review of, see Appeal and Error J a)

1. Upon the agreement of the parties that the trial judge hear the evidence and find the facts in controversy, the findings so made are as conclusive as the verdict of the jury would have been when the findings are supported by the evidence. *Morris v. Y. & B. Corp.*, 705.

TRUSTS (Trust estates see Wills E h).

A Creation, Existence and Validity (Party taking title for benefit of another under agreement to transfer held naked trust see Mortgages C e 1).

*b Resulting and Constructive Trusts*

1. Where one pays the consideration for a tract of land conveyed to another there is a trust created in favor of the one so paying the consideration, who may enforce his equity upon proper proof not only against the holder of the legal title but against all persons other than purchasers for value without notice, unless he is estopped by his conduct or representations from setting up his claim. *Nissen v. Baker*, 433.

2. While a grantor may not engraft a parol trust on his own deed to lands in the absence of fraud, undue influence, etc., fraud is presumed in a deed from a *cestui que trust* to a trustee, and where a party enters into possession of lands under a power of attorney to rent and manage the property for the owner, and the owner gives the deed in question in pursuance of a general scheme or agreement in order to liquidate the indebtedness on the property and prevent foreclosure, a fiduciary relationship exists between the parties and the grantor may engraft a parol trust upon the lands without allegation or evidence of actual fraud, and the statute of limitations does not run during the fiduciary relationship. *Sorrell v. Sorrell*, 460.

F Termination of Trusts.

*c Termination by Trustee*

1. The law will not ordinarily permit a trustee to terminate the trust relationship in order that he may personally acquire title or ownership of the property impressed with the trust. *Sorrell v. Sorrell*, 460.

ULTRA VIRES see Corporations G b; Municipal Corporations F e.

UNDUE INFLUENCE see Deeds and Conveyances A h.

USURY.

C Pleading, Evidence and Trial.

*a Sufficiency of Allegations to State Cause of Action for Usury*

1. Where the plaintiff, a receiver of an insolvent corporation, seeks to enjoin the defendant from interfering with the collection of certain accounts of the insolvent which the defendant claims as purchaser, under contract, and by consent order it is agreed that the plaintiff collect the accounts and that each party reserves his rights as to the proceeds, and thereafter the plaintiff files an amended complaint alleging that the contract of purchase of the accounts by the defendant was a subterfuge for the charging of usury and demands the statutory penalty: *Held*, the amended complaint stated facts sufficient to constitute a cause of action, and there was no misjoinder of causes. *Bundy v. Credit Co.*, 339.

VENUE (Of action to recover tax see Taxation E c 1).

A Nature or Subject of Action.

*a Interest in Realty*

1. Where the plaintiff has obtained a temporary order restraining the defendant mortgagee from foreclosing his mortgage, and defendant makes a motion, before the time for hearing, to remove the cause for trial to county wherein the land is situate, the motion is properly allowed, it appearing that the effect of the action is to redeem land from a mortgage or deed of trust, involving the interests or rights of the parties in the mortgaged premises. *Bohannon v. Trust Co.*, 701.

C Change of Venue.

*a Convenience of Parties and Witnesses*

1. Where an action in the nature of a creditors' bill and for the appointment of a receiver is brought in the county wherein the defendant resides, and a temporary receiver is therein appointed, upon the hearing at chambers in another county wherein the temporary receivership is made permanent, an order removing the cause to the county of the hearing for the convenience of a large number of creditors is improvidently made, and that part of the judgment will be stricken out on appeal. *Drug Co. v. Patterson*, 548.

WAIVER see Trial B c 2; of provisions of C. S., 1795, as to transactions with decedent see Evidence D b 1).

WATERS AND WATERCOURSES—Limitation of action for wrongful diversion of, see Limitation of Actions B a 3; liability of drainage districts for see Drainage Districts C a.

WILLS (When statute of frauds may not be pleaded in action on contract to convey see Frauds, Statute of J a 1).

C Requisites and Validity.

*d Holographic Wills*

1. Evidence that a paper-writing propounded as a holographic will was found after the testator's death in a locked drawer in his desk among other papers and effects, bank books, check books, etc., in an envelope on the back of which, in the testator's handwriting, it was designated as his last will and testament, with evidence that the testator had been advised that it would operate as his will if found among his valuable papers and that the testator regarded the papers among which it was found as valuable: *Held*, the evidence that the paper-writing was found among the testator's valuable papers was sufficient to sustain a verdict in the propounders' favor upon the issue of *devisavit vel non*. C. S., 4144. *In re Will of Stewart*, 577.

D Probate and Caveat of Wills.

*a Actions Attacking Validity of Wills in General*

1. A will probated in common form will stand until set aside in a direct proceeding, but where the probate is attacked in a suit to remove a cloud upon title to lands, and objection is not made that the action is a collateral attack upon the will, and trial has been accordingly

WILLS D—*Continued.*

had, a decree of the court that the will was revoked by the subsequent marriage of the testator and that the deed tendered by the plaintiff conveyed a good title, will be upheld. *Moore v. Moore*, 510.

*h Evidence in Caveat Proceedings*

1. Where in caveat proceedings the question as to undue influence has been eliminated from the case and a mass of evidence to the effect that the testator had expressed a desire when admittedly sane not to make a will and as to a controversy among the sons of the deceased as to how the estate should be administered has been allowed to remain before the jury on the question of mental capacity, the evidence is incompetent upon the issue, and it necessarily affecting the verdict, a new trial will be awarded. *In re Will of Yelverton*, 746.

E Construction and Operation of Wills.

*a General Rules for Construction of Wills*

1. The law favors the early vesting of estates, and the first taker is ordinarily to be regarded as the primary object of the testator's bounty, and there is a presumption in favor of conditions subsequent rather than conditions precedent. *Mountain Park Institute v. Lovill*, 642.

*b Estates and Interests Created*

1. A devise of real estate to the testator's son for his own use and benefit with the expressed intent that it should vest in him absolutely with full right to dispose of it, with limitation over should he die without children surviving, if not disposed of by him during his life: *Held*, under the provisions of C. S., 4162, the devise being without clause limiting the estate to one of less dignity, the devisee took a fee-simple title thereto, and could convey a good title to the purchaser. *Lineberger v. Phillips*, 661.

*d Vested and Contingent Estates and Interests*

1. A testamentary provision prohibiting or postponing partition of devised lands for a definite time or during the minority of the devisees is not regarded as a restraint on alienation or a limitation repugnant to the fee, and is generally upheld. *Greene v. Stadiem*, 445.

2. The law favors the early vesting of estates. *Mountain Park Institute v. Lovill*, 642.

*f Designation of Devisees and Legatees and their Respective Shares*

1. Where a testator at the time of making a will has a brother and two sisters living and one brother dead, and the surviving brother predeceases the testator, and the will devises the testator's lands, after a life estate, to his "nearest heirs," these words will be construed to devise the remainder to all of his heirs as ascertained by the canons of descent, and the children of the deceased brothers are entitled to share in the estate *per stirpes*. *Cox v. Heath*, 503.

2. Where a will creates a trust estate to be held for the benefit of a legatee during his life, and at his death to be held for the benefit of his wife and children, and at the death of his wife the trust to be terminated and the funds to be divided among his children or

WILLS E—*Continued.*

their heirs, and if no children, to be divided among his brothers and sisters or their heirs: *Held*, upon the death of the first taker unmarried leaving brothers and sisters living and children of deceased brothers and sisters, the personal property held in trust should be divided among the surviving brother and sisters and the children of the deceased brothers and sisters *per stirpes*. *Empie v. Empie*, 562.

*h Estates in Trust*

1. Where the trustees of a trust estate created by will are directed to invest and reinvest the residue of the estate and hold the same in trust and pay the widow three-fourths of the income and pay one-fourth to the testator's daughter, the trust estate to continue during the life of the widow and for a period of not less than ten years from the date of the testator's death, and then the corpus be distributed to his four children, including the daughter, or their children *per stirpes* in case of death of the testator's children: *Held*, by the express and unambiguous language of the will, the trust estate does not terminate within the ten-year period from testator's death, and where the widow has died during this period, the three-fourths of the income she received under the will, there being no other disposition of such income, should be kept and reinvested by the trustees as an accumulation of the corpus of the trust estate until the specified life of the trust, and then divided in accordance with the distribution specified in the will. *Trust Co. v. Thorner*, 241.

2. Where the executors of a will are directed to provide moneys for an express trust, to be paid over to certain trustees to be used for the maintenance of an educational institution, and the will states that it was the testator's desire that this should be done as soon after his death as possible, with further provision that upon the failure of the institution to carry out its designated purpose, at the end of ten years the trust should terminate and the funds distributed according to the canons of descent, otherwise the trust fund to be made permanent: *Held*, the duties of the executors to pay over the funds as directed is not upon a condition precedent, and the trustees were entitled to the fund before the expiration of the ten-year period, and should the trust terminate, the trustees are bound under the law to make the distribution under the canons of descent. *Mountain Park Institute v. Lovill*, 642.

3. Where the executors of a will are required by its terms to provide a trust fund to be held by specified trustees for a designated purpose, the fund to be raised as soon as possible, without sacrificing the estate, and it appears on the executors' appeal to the Supreme Court that the question has not been decided in the Superior Court as to whether the fund could have thus been made available, a question of fact, as distinguished from an issue of fact, is presented, which will be inquired into by the lower court upon defendant's motion in the present cause. *Ibid.*

*i Actions to Construe*

1. The courts of the State have jurisdiction to hear and determine an action to construe a will, and the construction of the will may be

WILLS E—*Continued.*

given by the court in caveat proceedings after the determination of the validity of the will in favor of the propounders. *London v. Pelchenan*, 225.

2. Under a will creating a trust, the trustees under the equitable jurisdiction of the court may maintain a suit against the executors to ascertain their status and to enforce the trust, and incidentally for a construction of the will, and a demurrer upon the ground that only the executors may call upon the court to construe the will will not be sustained. *Mountain Park Institute v. Lovill*, 642.

F Rights and Liabilities of Devisees and Legatees (Retention of amount due estate by legatee see Executors and Administrators E b 1; right of judgment creditor to follow legacy used for improvements to wife's land see Execution B c 1).

*d Election*

1. The doctrine of election under a will applies where a testator devises his property to a beneficiary and assumes to devise to another property belonging to the first devisee, in which case the devisee, if he accepts the devise with knowledge of all the facts, is thereby precluded from asserting title to that part of his own property which was devised to another. *Wright v. Wright*, 754.

2. Where after the execution of his will the testator gives his son certain specific farming implements which the son takes possession of during the life of the testator, and the will devises certain lands to the son and bequeaths the household and kitchen furniture and the "remainder" of the personalty to his other children, and at his death the testator owned personal property other than the household and kitchen furniture: *Held*, the will does not attempt to dispose of the property given the son, the "remainder" including only the personalty other than the personalty given the son and specifically bequeathed to the other children, and the gift to the son operates as an ademption by so much of the legacy bequeathed to the other children, and the son is not put to his election under the will between the personalty given him and the land devised to him by the will. *Ibid.*

WITNESSES—Incompetency of testimony as to transactions with decedent see Evidence C b; testimony impeaching witness see Evidence D f; character evidence see Evidence M, Criminal Law G c; expert witness see Evidence K; competency of deaf mute see Criminal Law G d 2.

WORKMEN'S COMPENSATION ACT see Master and Servant F.

WRONGFUL DEATH see Death.

ZONING ORDINANCES see Municipal Corporations H b.