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VOLUME 201

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NORTH CAROLINA REPORTS
VOL. 201

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1931
FALL TERM, 1931

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1932

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

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" Eq.	"	45	"
1 Jones Law	"	46	"
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6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
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3 " "	"	56	"
4 " "	"	57	"
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The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

From the 7th to the 62nd volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence, or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63rd to the 79th, both inclusive. From the 80th to the 100th volumes, both inclusive, will be found the opinions of the Court, consisting of three members, from 1879 to 1889. The remaining volumes contain the opinions of the Court, consisting of five members, since that time or since 1889.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1931.
FALL TERM, 1931.

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:

A. A. F. SEAWELL,
WALTER D. SILER.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

FRANK NASH.

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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.
J. PAUL FRIZZELLE	Fifth	Snow Hill.
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.
G. V. COWPER	Kinston.

WESTERN DIVISION

JOHN H. CLEMENT	Eleventh	Winston-Salem
H. HOYLE SINK	Twelfth	Lexington.
A. M. STACK	Thirteenth	Monroe.
W. F. HARDING	Fourteenth	Charlotte.
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T. B. FINLEY	Seventeenth	Wilkesboro.
MICHAEL SCHENCK	Eighteenth	Hendersonville.
P. A. MCELROY	Nineteenth	Marshall.
WALTER E. MOORE	Twentieth	Sylva.

SPECIAL JUDGES

CAMERON F. MACRAE	Asheville.
JOHN H. HARWOOD	Bryson City.

EMERGENCY JUDGE

THOS. J. SHAW	Greensboro.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
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DONNELL GILLIAM	Second	Tarboro.
R. H. PARKER	Third	Henderson.
CLAWSON L. WILLIAMS	Fourth	Sanford.
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JAMES A. POWERS	Sixth	Kinston.
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WOODUS KELLUM	Eighth	Wilmington.
T. A. MCNEILL	Ninth	Lumberton.
W. B. UMSTEAD	Tenth	Durham.

WESTERN DIVISION

CARLYLE HIGGINS	Eleventh	Sparta.
GEO. A. YOUNCE	Twelfth	Greensboro.
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J. W. PLESS, JR.	Eighteenth	Marion.
Z. V. NETTLES	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.

LICENSED ATTORNEYS

FALL TERM, 1931.

List of applicants to whom license to practice law in North Carolina w granted by Supreme Court at Fall Term, 1931:

ADAMS, JUNIUS GREENE, JR.	Asheville.
ALEXNDER, ERNEST RAYMOND	Xannapolis.
ALEXANDER, MARION ROMAINE	Asheville.
ANSCOMBE, FRANCIS CHARLES	Winston-Salem.
BAILEY, STEVE WARREN	Raleigh.
BARNHARDT, LUTHER WESLEY	Raleigh.
BAUGUESS, U. S. GRANT	Jefferson.
BEDDINGFIELD, CLARENCE LEMUEL	Cary.
BERMAN, GUSTAV	Durham.
BLOCK, NORMAN	Greensboro.
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CANNON, EDWARD LEE	Durham.
CARNAGE, FRED JONATHAN	Raleigh.
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COLLINS, EDISON ELISHA	Waxhaw.
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MCCARTHY, PAUL BURLEY.....Winston-Salem.
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ROANE, HENRY.....Winston-Salem.
RUST, FRANK HALE CARPENTER.....Charlotte.
SANDERS, HARRY KENDRICK.....Asheville.
SANDFORD, WARREN FRANCKE, III.....Asheville.
SASSER, ROY MONROE.....Goldsboro.
SCOTT, CLYFFORD GOODMAN.....Durham.
SHANNON, CHARLES JOHN, IV.....Camden, S. C.
SHEPARD, JOHN ALBERT.....Gulfport, Miss.
SIMONS, MACON MCCORKLE.....Statesville.
SIMMS, ROBERT NIRWANA, JR.....Raleigh.
SKEEN, LESTER ERNEST.....Climax.
SMITH, HENRY WINFIELD.....Wilmington.
SMITH, ROBERT LEE.....Bailey.
SPAIN, JACK HOLLAND.....Greenville.
STRINGFELLOW, WILLIAM ARCHIE.....Asheville.
STUKES, JAMES EDWARD.....Charlotte.
SWIFT, CHARLES DAVID.....Greensboro.
TAYLOR, WALTER DEE.....Rocky Mount.
TEACHEY, JOHN ROBERT.....Wilmington.
WARREN, OSTELLE ALVIN.....Gastonia.
WILLIAMS, HARRY CLIFTON.....Wake Forest.
WILSON, EMMETT THORMANN.....Swannanoa.
WRIGHT, ERNEST ATLAS.....High Point.
YOST, LELAND LOWE.....Asheville.

COMITY APPLICANTS.

BRADWAY, JOHN SAEGER.....Pennsylvania.
CHAPMAN, EDGAR TEFFT, JR.....New York.
MCCURDY, JOHN BURFORD.....Georgia.
PIERCE, TRESSIE JEAN.....South Carolina.

SUPERIOR COURTS, SPRING TERM, 1932

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1932—Judge Daniels.

Pasquotank—Jan. 11†; Feb. 15†; Feb. 22* (A); March 21†; May 9† (A) (2); June 6*; June 13† (2).

Beaufort—Jan. 18*; Feb. 22† (2); April 4†; May 9†; May 16*.

Currituck—March 7; May 2†.

Camden—March 14.

Gates—March 28.

Chowan—April 11.

Perquimans—April 18.

Tyrrell—April 25.

Hyde—May 23.

Dare—May 30.

SECOND JUDICIAL DISTRICT

Spring Term, 1932—Judge Frizzelle.

Washington—Jan. 11 (2); April 18†.

Edgecombe—Jan. 25; March 7; April 4† (2); June 6 (2).

Nash—Feb 1; Feb. 22† (2); March 14; April 25† (2); May 30.

Wilson—Feb. 8*; Feb. 15†; May 16*; May 23†; June 27†.

Martin—March 21 (2); April 18† (A) (2); June 20.

THIRD JUDICIAL DISTRICT

Spring Term, 1932—Judge Grady.

Vance—Jan. 11*; March 7*; March 14†; June 20*; June 27†.

Warren—Jan. 18 (2); May 23 (2).

Halifax—Feb. 1 (2); March 21† (2); May 2*; June 6; June 13†.

Bertie—Feb. 15; May 9 (2).

Hertford—Feb. 29*; April 18‡ (2).

Northampton—April 4 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Harris.

Harnett—Jan. 11*; Feb. 8† (2); April 4† (A) (2); May 9†; May 23*; June 13† (2).

Chatham—Jan. 18; March 7†; March 21†; May 16.

Wayne—Jan 25; Feb. 1†; March 7† (A) (2); April 11; April 18†; May 30; June 6†.

Lee—Feb. 1† (A) (2); March 28 (2).

Johnston—Feb. 22† (2); March 7*; (A); March 14; April 25† (2); June 27*.

FIFTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Cranmer.

Craven—Jan. 11*; Feb. 1† (3); April 11‡; May 16†; June 6*.

Pitt—Jan. 18†; Jan. 25; Feb. 22†; March 21 (2); April 18 (2); May 9 (A); May 23† (2).

Greene—Feb. 29 (2); June 27.

Carteret—March 14; June 13 (2).

Jones—April 4.

Pamlico—May 2 (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Sinclair.

Duplin—Jan. 11† (2); Feb. 1*; March 28† (2); May 30; June 6†.

Lenoir—Jan. 25*; Feb. 22† (2); April 11; May 16† (2); June 13† (2); June 27*.

Sampson—Feb. 8 (2); March 14† (2); May 2 (2).

Onslow—March 7; April 18† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Devin.

Wake—Jan. 11*; Feb. 1†; Feb. 8*; Feb. 15†; March 7*; March 14† (2); March 28† (2); April 11*; April 18† (2); May 2†; May 9*; May 23† (2); June 6*; June 13† (2).

Franklin—Jan. 18 (2); Feb. 22† (2); May 16.

EIGHTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Small.

Brunswick—Jan. 11†; April 11; June 20†.

New Hanover—Jan. 18*; Feb. 8† (2); March 7† (2); March 21*; April 18† (2); May 16*; May 30† (2); June 13*.

Pender—Jan. 25; March 28† (2); May 23.

Columbus—Feb. 1; Feb. 22† (2); May 2 (2); June 27*.

NINTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Barnhill.

Bladen—Jan. 11; March 14*; May 2†.

Cumberland—Jan. 18*; Feb. 15† (2); March 7* (A); March 28† (2); May 9† (2); June 6*.

Hoke—Jan. 25; April 25.

Robeson—Feb. 1* (2); Feb. 29† (2); April 11†; April 18*; May 23† (2); June 13†; June 20*.

TENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Midyette.

Durham—Jan. 11† (3); Feb. 22*; Feb. 29† (A); March 7† (2); March 21† (A); March 28*; April 25† (A); May 2† (2); May 23*; May 30† (A) (3); June 27*.

Person—Jan. 25 (A); Feb. 1†; April 24.

Alamance—Feb. 1† (A); Feb. 29*; April 4†; May 16† (A); May 30† (2).

Granville—Feb. 8 (2); April 11 (2).

Orange—March 21; May 16†; June 13 (2).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Harding.

Forsyth — Jan. 11 (2); Feb. 15† (2); Feb. 29 (A) (2); March 14† (2); March 28*; May 23* (2); June 6† (2); June 27† (A).

Surry—Jan. 18† (A) (2); Feb. 1 (2); March 21† (A) (2); April 25 (2); June 27† (A) (2).

Rockingham—Jan. 25*; Feb. 29† (2); May 16; June 20† (2).

Caswell—April 4; May 9† (A).

Ashe—April 11 (2).

Alleghany—May 9.

TWELFTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Oglesby.

Guilford—Jan. 11† (2); Jan. 25*; Feb. 8† (2); Feb. 22† (A) (2); March 7* (2); March 21† (2); April 4† (A) (2); April 18† (2); May 2*; May 16† (2); June 6† (2); June 20*.

Davidson—Feb. 1*; Feb. 22† (2); April 4† (A) (2); May 9*; May 30†; June 27*.

Stokes—April 4*; April 11†.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Warlick.

Richmond — Jan. 11*; Feb. 8† (A); March 21†; April 11*; May 30† (A); June 20†.

Anson—Jan. 18*; March 7†; April 18 (2); June 13†.

Moore—Jan. 25*; Feb. 15†; March 28† (A) (2); May 23*; May 30†.

Union—Feb. 1*; Feb. 22† (2); March 28†; May 9†.

Stanly—Feb. 8†; April 4; May 16†.

Scotland—March 14†; May 2; June 6.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Finley.

Mecklenburg—Jan. 11*; Feb. 8† (3); Feb. 29*; March 7† (2); April 4† (2); May 2† (2) May 16*; May 23† (2); June 13*; June 20†.

Gaston—Jan. 18*; Jan. 25† (2); March 14* (A); March 21† (2); April 25*; May 23† (A) (2); June 6*.

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Schenck.

Cabarrus—Jan. 11 (2); Feb. 29†; April 25 (2).

Montgomery—Jan. 25*; April 11† (2).

Iredell—Feb. 1 (2); March 14†; May 23 (2).

Rowan—Feb. 15 (2); March 7†; May 9 (2).

Randolph—March 21† (2); April 4*.

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge McElroy.

Cleveland—Jan. 11; March 28 (2).

Catawba—Jan. 18† (2); Feb. 8 (2); May 9† (2).

Lincoln—Jan. 25 (A); Feb. 1†.

Burke—Feb. 22; March 14† (2); June 6 (2).

Caldwell—Feb. 29 (2); May 23† (2).

Watauga—April 11 (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Moore.

Alexander—Feb. 22.

Yadkin—Feb. 29*; May 16† (2).

Wilkes—March 7 (2); June 6† (2).

Davie—March 21; May 23† (A).

Mitchell—April 11 (2).

Avery—April 25*; May 2†.

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Clement.

McDowell — Jan. 11*; Feb. 22† (2); June 13 (3).

Henderson—Jan. 18 (2); March 7 (2); May 2† (2); May 30† (2).

Yancey—Feb. 1†; March 21 (2).

Rutherford—Feb. 8† (2); May 16 (2).

Transylvania—April 4 (2).

Polk—April 18 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1932—Judge Sink.

Buncombe—Jan. 11† (2); Jan. 25; Feb. 1† (2); Feb. 15; Feb. 29 (A); March 7† (2); March 21; April 4† (2); April 18; May 2† (2); May 16; May 30; June 6† (2); June 20 (2).

Madison — Feb. 22; March 28; April 25; May 23.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1932—Judge Stack.

Graham—Jan. 11† (A) (2); March 21 (2); June 6† (2).

Haywood—Jan. 11† (2); Feb. 8 (2); May 9† (2).

Cherokee—Jan. 25† (2); April 4 (2); June 20† (2).

Jackson—Feb. 22 (2); May 23† (2).

Swain—March 7 (2).

Macon—April 18 (2).

Clay—May 2; May 9 (A).

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

Fayetteville, third Monday in March and September. ELSIE CAMERON THOMPSON, 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.
B. H. CRUMPLER, Assistant United States District Attorney, Clinton.
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

CHAS. A. JONAS, United States Attorney, Asheville (Lincolnton).
FRANK C. PATTON, Assistant United States Attorney, Charlotte (Morganton).
THOS. A. MCCOY, Assistant United States Attorney, Asheville.
J. M. HOYLE, Assistant United States Attorney, Charlotte.
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

SPRING TERM, 1931

J. R. FINLEY, EXECUTOR OF J. T. FINLEY, DECEASED, AND MISS ANNIE M. FINLEY, ADMINISTRATRIX, C. T. A., OF MISS CLARA M. FINLEY, DECEASED, v. S. G. FINLEY, MRS. MARY GORDON GREENLEE POLLARD, HARVEY GREENLEE, MRS. ELLA OGILVIE, W. W. FINLEY AND MISS ANNIE E. FINLEY, HEIRS-AT-LAW AND DEVISEES OF J. T. FINLEY AND CLARA M. FINLEY, BOTH DECEASED.

(Filed 20 May, 1931.)

1. **Pleadings D d—Want of jurisdiction or failure of complaint to state cause of action may be taken advantage of by demurrer at any time.**

   A demurrer *ore tenus* to the complaint on the grounds that it fails to allege a cause of action or that the court does not have jurisdiction may be made at any time, even after answer has been filed, or even in the Supreme Court on appeal. C. S., 518.

2. **Wills E i: Appeal and Error A e—Where action for construction of will presents only moot question the action will be dismissed.**

   The Court will not construe the provisions of a will in an action brought by an executor unless for the purpose of aiding him in the administration of the estate, and where suit is brought by an executor to settle a dispute among the devisees as to the quality of the estate devised, and the lands have already been sold and the proceeds are in the hands of the executor for distribution, the action and the appeal from the judgment of the lower court will be dismissed.

APPEAL by the defendant, S. G. Finley, from *Grady, J.*, at October Term, 1930, of WILKES. Dismissed.

This is an action for the purpose of determining the quality of the estate which was devised to each of the devisees named in the last will and testament of J. T. Finley, deceased, in the lands owned by the testator at his death.

J. T. Finley died on 12 May, 1926, leaving a last will and testament, which has been duly probated and recorded in the office of the clerk of the Superior Court of Wilkes County. The pertinent provisions of his said last will and testament are as follows:

"I give and bequeath all of my property, real and personal, of every nature whatsoever, as follows:

"One-sixth to my sister, Clara Finley; one-sixth to my sister, Annie Finley; one-sixth to my brother, J. R. Finley; one-sixth to my brother, S. G. Finley; one-sixth to my niece, Mary Gordon Greenlee; one-sixth to my niece, Ella Ogilvie; and upon the death of either of said devisees, without heirs, their part to go to the other devisees above named, or their heirs, provided, however, that my sisters, Clara and Annie Finley, shall have for their joint lives, and for the life of the survivor, the rents from my brick garage on C. Street, North Wilkesboro, N. C., with fifty feet front and one hundred and forty feet deep, taxes and upkeep to be paid from rent.

"I appoint my brother, J. R. Finley, executor of this my last will and testament, and my wish is that no bond be required of him."

The plaintiff, J. R. Finley, as executor of said last will and testament, has practically completed the administration of the estate of his testator, and has paid to each of the legatees named therein his or her share of the personal property owned by the testator at his death, and bequeathed to said legatees by said last will and testament.

The plaintiff, J. R. Finley, acting under a power of attorney, executed by the devisees named in the last will and testament of his testator, has sold and conveyed the real estate owned by his testator at his death, and devised to said devisees by said last will and testament. He now has in hand funds and securities derived from the sale of said real estate, to be distributed among the said devisees in accordance with their respective interests therein. Since the execution of said power of attorney, and the sale of said real estate, a controversy has arisen among the said devisees with respect to the quality of the estate which each one of them took under the provisions of the last will and testament of J. T. Finley, deceased. This action was instituted by the plaintiff, J. R. Finley, as executor of the last will and testament of J. T. Finley, deceased, and by the administratrix, *c. t. a.*, of Miss Clara Finley, who has died since the death of J. T. Finley, for the purpose of having the court to determine the quality of the estate which each of the devisees named in said last will and testament took in the real estate devised to them under and by virtue of the provisions thereof.

When the action was called for hearing, a trial by jury was waived by all the parties. On the facts found by the court it was ordered, considered and adjudged that each of the devisees named in the last will and testament of J. T. Finley took an estate in fee simple in the share of the real estate devised to him or to her by said last will and testament, and an absolute title to the share of the personal property bequeathed to him or her thereby. It was ordered that J. R. Finley, executor of J. T. Finley, deceased, and Miss Annie M. Finley, administratrix, *c. t. a.*, of Miss Clara M. Finley, administer their respective estates in accordance with the judgment of the court.

From this judgment the defendant, S. G. Finley, appealed to the Supreme Court.

Charles G. Gilreath for plaintiffs.
Frank D. Hackett and Eugene Trivette for defendant, S. G. Finley.

CONNOR, J. After the appeal from the judgment of the Superior Court in this action had been docketed in this Court the defendant, S. G. Finley, moved that both the appeal and the action be dismissed, for the reason that the facts alleged in the complaint are not sufficient to constitute a cause of action of which the Superior Court of Wilkes County had jurisdiction. This motion was in effect a demurrer *ore tenus* to the complaint on these grounds. The defendant by filing an answer to the complaint in the Superior Court did not waive his right to demur *ore tenus* to the complaint on the ground that the court had no jurisdiction of the action and that the complaint does not state facts sufficient to constitute a cause of action. C. S., 518.

It is too well settled to require the citation of authorities that the want of jurisdiction and the failure of the complaint to state facts sufficient to constitute a cause of action on which the plaintiff is entitled to relief, cannot be waived and may be taken advantage of by demurrer *ore tenus* to the complaint at any time, even after answer filed, and even in the Supreme Court, after an appeal has been docketed in said Court from a judgment of the Superior Court in the action. *Power Company v. Peacock*, 197 N. C., 735, 150 S. E., 510.

It appears from the allegations of the complaint in the instant case that the plaintiff, J. R. Finley, as executor of the last will and testament of J. T. Finley, deceased, has practically completed the administration of the estate of his testator. He has paid to each of the legatees named therein his or her share of the personal property owned by the testator at his death, and bequeathed to him or to her by the said last will and testament. He seeks no advice from the court as to the performance of his duties as executor. After his qualification as executor, the devisees

named in the last will and testament of his testator, executed a power of attorney by which they authorized and empowered the said J. R. Finley to sell and convey the land devised to them by the testator. He now has in hand the proceeds of sales made by him under this power of sale. A controversy has arisen among the devisees as to whether each devisee took an indefeasible estate in his or her share of the land devised by said last will and testament, or whether he or she took only a defeasible fee in his or her share. This controversy involves a construction of the provisions of the last will and testament. The plaintiff, J. R. Finley, as executor, however, has no interest in this controversy; he has no duty to perform as executor, which requires a determination of the question involved in the controversy.

In *Mountain Park Institute v. Lovill,* 198 N. C., 642, 153 S. E., 114, it is said: "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."

In *Heptinstall v. Newsom,* 146 N. C., 504, 60 S. E., 516, both the appeal to this Court and the action were dismissed. This was an action brought by one of the devisees of the testator against such of the other devisees as were *in esse,* for the purpose of obtaining a construction of the will as to devises of real estate, and to determine what estates some of the devisees took under the will. *Brown, J.,* writing the opinion for the Court, says: "We cannot recognize the regularity of this proceeding nor the jurisdiction of the court to entertain it. It seems to be predicated upon the idea that a court of equity has a sweeping jurisdiction in reference to the construction of a will, which, under the authorities, is an erroneous one. *Tyson v. Tyson,* 100 N. C., 368; *Cozart v. Lyon,* 91 N. C., 282. The jurisdiction in matters of construction is limited to such as are necessary to the present action of the Court. The Court will not undertake to construe a devise in a proceeding of this character, for the rights of devisees are purely legal and must be adjudged when a cause of action arises."

It does not appear in the instant case that any cause of action has arisen which requires or would justify the court in rendering a judgment by which the rights of the parties would be determined. Indeed, it does appear that if and when a cause of action shall arise which may

require a judicial construction of the provisions of the last will and testament of J. T. Finley, deceased, with respect to the quality of the estate which each of the devisees took in the land devised, persons not now *in esse,* and purchasers of said land claiming under parties to this action, may be necessary parties.

The appeal and the action are

Dismissed.

WILLIE ATKINSON v. CORRIHER MILLS COMPANY.

(Filed 20 May, 1931.)

1. Master and Servant C b—Duty to provide reasonably safe ingress and egress does not extend to land of another over which employer has no control.

The principle requiring an employer to provide his employees a reasonably safe place to work extends to providing them reasonably safe ingress and egress to and from their work, but does not extend to providing such ingress and egress over the lands of a third party over which the employer has no supervision or control.

2. Same—Held: Evidence disclosed that injury resulted from condition of land under exclusive use and control of another and nonsuit was proper.

Evidence that a railroad company had a right of way for a spur track into the defendant's mill, that the right of way was under the exclusive use and control of the railroad company, and that the injury in suit occurred off the defendant's premises when the plaintiff stepped upon soft dirt on the railroad company's right of way as she was leaving her work in the defendant's mill, is held, insufficient to take the case to the jury upon the issue of defendant's negligence, and its motion as of nonsuit should have been sustained.

CIVIL ACTION, before *Moore, J.,* at October Term, 1930, of MECKLENBURG.

The plaintiff instituted this action against the defendant to recover for personal injury sustained on or about 30 April, 1929. The defendant operates a mill and owns certain residences in which the operatives live. Plaintiff lived in one of these houses. The mill bought a tract of land and erected its mill thereon. The premises occupied by the mill was enclosed by a wire fence. The Southern Railway Company owns a spur track which enters the enclosure of the mill through a gate of said fence. The easement or right of way of the railroad company is 200 feet in width. The spur or switch track branches off from the main line

and runs along the mill building outside the wire fence and near thereto, through the gates of the mill. There was a path near the mill gate extending across the railway track to the home of employees, which had for many years been used by employees in going to and fro from work.

The plaintiff narrates her injury as follows: "After I had completed my work on the night of 30 April, 1929, and was coming out of the mill other people left the mill through the gate at the time I started out. . . . I found the gate open. I came out the gate and started down to this track and about the first step I took with my right foot the ground was soft there; it gave way and I hit the ground. . . . I had to get outside the fence before I could go across that track. . . . I passed out the gate, walked along the track for the length of the gate and then started down from the track. . . . I fell just as I stepped off the first track, that is the spur track. . . . I came out of the mill, walked along the spur track, passed through the gate and walked along the spur track a distance of that gate and then stepped down from the spur track towards the main line of the Southern. That was the direction I was going. I was injured between the spur track and the main line of the Southern Railway. I was not hurt as I stepped off the iron rail. I mean just as I stepped off that bank there. The bank was right even with the cross-ties. The soft ground that I stepped on gave way and then is when I fell. . . . In stepping off the spur track on other soft dirt, which gave way, it is about five or six feet to the level ground. . . . There was a path there. The path is just opposite the gate. It was wide enough to walk down. . . . It looked like it had been used very much. It was a piece of embankment. It was the path that gave way. As I put my foot down there the soft dirt gave way. . . . It is twenty feet from the bottom of that embankment which I spoke of to the first main line track. . . . It was about five o'clock 30 April, 1929. It was kinder between dark and daylight. . . . I have been out that place that I call a path twice a day for seven or eight months. . . . I could see the path. I could see the path, but I did not see all the rough places in it. I knew it was washed out. I knew the path was rough. I couldn't notice all the details in it that morning. I looked for them as best I could. The thing that made me fall was the soft dirt gave way."

There was uncontradicted evidence that the spur track was installed by the railway company and under its control, and that the defendant never assumed any maintenance or control over the path crossing the railway tracks.

The evidence tended to show that the plaintiff has sustained a permanent injury.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded a recovery of $2,200.

From judgment upon the verdict the defendant appealed.

E. A. Hilker and H. L. Taylor for plaintiff.
J. Laurence Jones and W. C. Davis for defendant.

BROGDEN, J. Is an employer liable for the injury of an employee sustained upon the premises of a third party while returning home from work, and using a frequented path across the property of such third party?

The defendant owned the land over which the Southern Railway had an easement of 200 feet in width. The right of way, at the time of the injury, was used exclusively for railroad purposes and the spur track entering the enclosure of the mill was installed by the railway company and subject to its exclusive control. The plaintiff used this spur track in returning to her home after working hours and in attempting to follow a path down the embankment of the spur track, the soft earth gave way and she was thrown and injured.

The duty of an employer to exercise ordinary care in providing proper approaches to the place of work and proper facilities for ingress and egress has been frequently considered by the various courts of the country. This Court has recognized and defined the duty in several cases, notably: *Elliott v. Furnace Co.*, 179 N. C., 142, and *Bennett v. Powers*, 192 N. C., 599. The *Elliott case* stated the proposition in these words: "It is the fully established principle with us that an employer of labor, in the exercise of reasonable care, is required to provide for his employee a safe place in which to do his work, and our decisions hold that the obligation extends to the approaches to it when they are under the employer's control and in the reasonable scope of this duty." The *Bennett case* states the proposition in the following language: "The rule that it is the employer's duty to use ordinary care to furnish his employee with a reasonably safe place for his work, is not restricted to the identical situs of the labor, but extends to the exercise of ordinary care to see that the means of egress and ingress provided by the employer or customarily used by the employee in going to and from his work on the premises of the master, and that the ways so provided or so used in passing from one part of the premises to another, in the course of his employment, are reasonably safe." See, also, *Kelly v. Power Co.*, 160 N. C., 283.

The foregoing cases, however, involve injuries sustained by employees upon the premises used and controlled by the employer, and hence do not present the exact question of law involved in this appeal. The

general aspect of the rule of law pertinent to the facts in the case at bar was discussed and applied by *Connor, J.*, in *Crawford v. Michael-Bivens, Inc.*, 199 N. C., 224. The opinion says: "The general rule of the law imposing upon the defendant this duty was not applicable, however, in the instant case, while plaintiff was at work, temporarily, on the premises of the New Way Laundry, for the reason that the place at which plaintiff was required to work was not under the control of said defendant." That is to say, that ordinarily the ownership, use, and control of the premises is the usual test of liability. This conclusion is supported by the decisions of many courts of final jurisdiction, to wit: Connecticut, Tennessee, Alabama, Kentucky, Massachusetts, Minnesota, Michigan, Pennsylvania, West Virginia; *Channon v. Sanford Co.*, 40 Atlantic, 462; *Cash v. Casey-Hedges Co.*, 201 S. W., 347; *Seminole Graphite Co. v. Thomas*, 87 Southern, 366; *Gillespie's, Ex'rs., v. Howard*, 294 S. W., 154; *Hughes v. Malden & Melrose Gaslight Co.*, 47 N. E., 125; *Lingren v. Williams Bros. Boiler Co.*, 127 N. W., 626; *Penner v. Vinton*, 104 N. W., 385; *Israel v. Lit Bros.*, 94 Atlantic, 136; *Wilson v. Valley Improvement Co.*, 73 S. E., 64. The general principle was tersely expressed in the headnote of an opinion written by *Justice Holmes* in the *Hughes case, supra*, "where the servant was injured by the caving in of a trench neither dug nor controlled by the master, evidence that the servant made no examination, but relied on the master for his safety is immaterial." Some of the courts have recognized and applied exceptions to the rule, where abnormal conditions prevail or where the menace of the premises of the third party was so open and obvious as to impute notice of impending danger to the employer. This line of exceptions was discussed by the Supreme Court of Tennessee in the case of *Cash v. Casey-Hedges Co., supra.*

Moreover, in the case at bar, no duty of inspecting the path where plaintiff was injured, was imposed upon the defendant by virtue of the fact that the defendant had no use or control over the spur track, the embankment thereto, or the main line track of the railway company. As long as the railway company had the right to use the land for railway purposes and was then in the present use and occupancy of such land for such purpose, the defendant was thereby deprived of control over the premises. Upon the whole record, therefore, the Court is of the opinion that the motion for nonsuit should have been allowed.

Reversed.

O. A. KIRKMAN, EXECUTOR, AND LULA B. KIRKMAN, EXECUTRIX OF THE ESTATE OF O. A. KIRKMAN, DECEASED, v. C. C. STOKER AND WIFE, CORA C. STOKER, INDUSTRIAL BANK OF RICHMOND AND POINTER REALTY COMPANY.

(Filed 20 May, 1931.)

1. Statutes C b—Where statutes can be reconciled by reasonable construction doctrine of repeal by implication does not apply.

Where a special law relating to a particular locality such as cities or towns in a certain county is passed as to interests, etc., allowed the purchaser at a tax sale of lands, and a general law of State-wide application is later passed upon the same subject-matter, the general law will not modify or repeal the special one unless such modification or repeal is provided for by express words or arises from necessary implication, but where the two statutes can be reconciled by reasonable construction the rule of repeal by implication does not apply.

2. Taxation H d—Purchaser at tax sale held entitled to interest under law in effect at the time, the relative statutes not being in conflict.

Under the provisions of a special act relating to the method for collection of taxes by a city, remedy was given in the nature of an action for debt to foreclose tax liens on lands in any court of competent jurisdiction, the act making no reference to payment of interest, costs, or attorney's fee, the only reference being the provision that 25% should be paid by the owner if he should redeem the land within a year, and such provision being inapplicable to the facts in the present case; the general law regulating the sale of land for taxes provided that the purchaser of a tax sale certificate should be entitled to certain interest, costs, commissions and attorney's fee upon the foreclosure of the tax sale certificate, *Held:* the general and special acts are not in conflict as to the allowance of interest, costs, and attorney's fee, and the rate of interest should be determined by the statute in force at the time of the sale.

APPEAL by Industrial Bank of Richmond, defendant, from *Finley, J.*, at March Term, 1931, of GUILFORD. Affirmed.

O. A. Kirkman, Sr., the original plaintiff, brought suit to foreclose a certificate of sale of real estate for the nonpayment of taxes assessed against the property of C. C. Stoker in the city of High Point for 1926, but according to the public records the Industrial Bank of Richmond and the Pointer Realty Company are the present owners of the property.

The tax was not paid, and the plaintiff, O. A. Kirkman, Sr., after the expiration of fourteen months and within eighteen months from the date of the certificate of sale, brought suit in the Municipal Court of the city of High Point to foreclose his certificate in conformity with section 8037 of the North Carolina Code of 1927 (P. L. 1927, ch. 221)

and the amendments thereto. P. L. 1929, ch. 204 and ch. 334. The notice was published in a newspaper as ordered by the clerk of the court. The summons was issued and the complaint was filed on 2 June, 1930, and on 28 July, 1930, the Industrial Bank of Richmond filed a motion admitting the facts alleged in the complaint, but denying the conclusions of law therein stated. The plaintiff died pending the proceeding and his executor and executrix were made parties plaintiff.

Judgment was rendered in the municipal court and an appeal was taken to the Superior Court. The question was whether the charter of the city or the general law regulating the foreclosure of certificates controls the method of procedure. In the Superior Court it was adjudged that the general law controls. The Industrial Bank of Richmond excepted and appealed.

R. T. Pickens for appellant.
James B. Lovelace and L. J. Fisher, Jr., for appellees.
Roberson, Haworth & Reece for City of High Point.

ADAMS, J. On 3 December, 1928, the property was sold for the nonpayment of taxes and a certificate of sale was given to O. A. Kirkman, Sr., the testator of the plaintiffs. The statute then in force provided that the certificate of sale should bear interest at the rate of 20 per cent per annum on the entire amount of taxes and the sheriff's cost for a period of twelve months from the date of sale and thereafter at the rate of 10 per cent per annum until paid or until the final judgment was rendered, and that the cost, including "one reasonable attorney's fee for the plaintiff," should be taxed as in other civil actions. N. C. Code, 1927, sec. 8037.

The judgment of the Superior Court awarded interest on this basis and taxed in the costs against the defendants an attorney's fee and the sum of four dollars for the publication of the notice. The appellant contends that the sale should have been conducted in the way prescribed by the city charter and that the judgment should be reversed.

The charter of the city of High Point provides two methods of collecting taxes. P. L. 1909, ch. 395. Section 28, subsection 5, authorizes collection by distress and sale, but this method was not pursued in the present case, and need not now be analyzed. Section 29, subsection 7, lays down an additional remedy by a civil action in the nature of an action of debt by which liens for taxes on real estate may be foreclosed in any court having jurisdiction, but the section contains no specific reference to the payment of interest, cost, or an attorney's fee. The only reference to the payment of interest is in section 28, subsection 7, in which it is provided that the owner of land sold under the provisions of the city charter may redeem the land within one year after the sale

by paying to the purchaser the sum paid by him and 25 per cent on the amount of taxes and expenses; but this section is not applicable to the sale under consideration.

The general law regulating the sale of real property for taxes is contained in N. C. Code, 1927, sec. 8010 *et seq.* When such sale is made the sheriff, or other person who is by law authorized to collect taxes, either State or municipal (sec. 7974), shall give to the purchaser a written certificate of sale. Sec. 8024. The holder of the certificate is given the right to foreclose the sale by civil action, "and this shall constitute his sole right and only remedy to foreclose the same." Section 8028. The purchaser has a lien on the real estate for the amount of the purchase money and all interest, penalties, costs, and charges allowed him by law, the lien being similar to that of a mortgage. Sections 8036, 8037. He may have judgment for a sale to satisfy whatever sums may be due him on the certificate and for taxes and assessments paid, which were a lien upon the property. His only remedy is an action in the nature of an action to foreclose a mortgage. Prior to the amendment of 1929 the certificate bore interest as heretofore stated. Costs, commissions, and an attorney's fee are allowed. Section 8037.

The briefs contain the citation of authorities dealing with the question whether the city charter was repealed by the subsequent enactment or amendment of statutes which are a part of the general law, in regard to the collection of taxes. We have no disposition to impair the principle that when the provisions of a general law applicable to the entire State are repugnant to the provisions of a previously enacted special law applicable to a particular locality only, the enactment of the general law does not operate to repeal or modify the special law, unless such modification or repeal is provided for by express words or arises by necessary implication. *Montieth v. Commissioners,* 195 N. C., 71; *Felmet v. Commissioners,* 186 N. C., 251; *Kornegay v. Goldsboro,* 180 N. C., 441. Cases arise in which the general law excludes the special. *R. R. v. Gaston County,* 200 N. C., 780.

But it is not necessary to apply this principle in the present case because with respect to this proceeding the general law and the city charter are not, in our opinion, totally repugnant. Section 28, subsections 5 and 7, apply to sales for taxes in which the purchaser before receiving a deed from the collector must await the owner's right to redeem the land within one year after the sale by paying to the purchaser the sum paid by him and 25 per cent on the amount of taxes and expenses. Section 29, subsection 7, was manifestly intended to authorize the collection of taxes due the city. By virtue of this section all taxes due the city may be collected as therein provided by a civil action in the nature of an action of debt and the lien may be foreclosed in any court

having jurisdiction. The same provision applies to assessments for street improvements. In such action the city may become the purchaser, and if the description of the property in the city assessment rolls shall be insufficient the city may make the description good in its pleadings and have a judgment of foreclosure. It follows that the plaintiffs, who held a certificate of sale, had the right to enforce the lien against the real estate described in it as in case of a mortgage and to collect the cost, penalty, and attorney's fee as provided by the general law. The rate imposed is to be determined by the statute which was in force when the sale was made. Judgment

Affirmed.

W. A. ROUSSEAU ET AL. v. W. A. BULLIS ET AL.

(Filed 20 May, 1931.)

Appeal and Error A e—Where question presented for review has become moot or academic the appeal will be dismissed.

Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only a moot question, and will be dismissed.

APPEAL by defendants from *Sink, J.*, at Chambers, Lexington, 10 April, 1931. From WILKES.

Civil action to restrain the defendants from holding a municipal election in the town of North Wilkesboro on 5 May, 1931, pursuant to resolution adopted by the municipal authorities 18 March, 1931, and to obtain possession of the registration books for said town. Counter-action to enjoin the plaintiffs from proceeding to hold an election in the town of North Wilkesboro on 5 May, 1931, pursuant to resolution adopted by board of elections of Wilkes County 28 March, 1931, under authority of House Bill 179, General Assembly of North Carolina, ratified 13 March, 1931.

By act of the General Assembly, ratified 13 March, 1931, the control of all primaries and elections held in the cities and towns of Wilkes County is taken from the municipal authorities and placed under the county board of elections. The plaintiffs have proceeded under this act. The defendants, deeming said act to be unconstitutional, were proceeding under the old law.

The material portions of the order from which the defendants appeal are as follows:

"1. That J. B. McCoy, appointed registrar of the board of town commissioners of the town of North Wilkesboro to hold the city primary

and election and other town officials, are hereby ordered to deliver to James M. Anderson, registrar appointed by the county board of elections for county of Wilkes and State aforesaid, the registration books of the qualified voters of the town of North Wilkesboro, or that the books be delivered to W. A. Rousseau, chairman of the county board of elections of the county of Wilkes, and all other records in his custody pertaining to city primary and election of said town.

"2. It is further ordered that the respondents or defendants above named, and each of them, their agents, servants and representatives be, and are hereby restrained and enjoined from holding the primary and election of the town of North Wilkesboro under and by virtue of resolutions adopted by the town board of commissioners on 18 March, 1931, and they are further restrained and enjoined from doing any act or issuing any order that may interfere with election officials appointed by county board of elections, to wit, J. M. Anderson, registrar, Jeter Blackburn and Robert Brame, judges, from holding the city primary and election as called by the county board of elections 28 March, 1931, and that they be restrained from doing any act that may be an interference with said election officials appointed by election board on said date."

Defendants appeal, assigning errors.

Eugene Trivette and J. A. Rousseau for plaintiffs.

Jones & Brown, J. H. Whicker, F. D. Hackett, and Manly, Hendren & Womble for defendants.

STACY, C. J. It was conceded on the argument that the election which the defendants, in their counter-action, seek to enjoin, was held 5 May, 1931. Hence, as the gravamen of the cross-action, or the act therein sought to be restrained, is now *fait accompli,* or a fact accomplished, or "water in the mill-tail," to quote an expressive phrase from the late *Chief Justice Hoke,* it would serve no useful purpose to moot an academic question. *Rasberry v. Hicks,* 199 N. C., 702; *Glenn v. Culbreth,* 197 N. C., 675, 150 S. E., 332; *Kilpatrick v. Harvey,* 170 N. C., 668, 86 S. E., 596; *Sullivan v. Swain,* 199 N. C., 819.

Where it appears that the act sought to be enjoined has already been done, the practice of appellate courts is to dismiss the appeal, on the principle that it is not worth while to "lock the stable door after the steed is stolen."

To illustrate: In *Harrison v. New Bern,* 148 N. C., 315, 62 S. E., 305, the plaintiff sought to enjoin agents of the defendant city from cutting down a tree. The temporary restraining order was dissolved, and pending the appeal, the tree was cut down. The action was dismissed, as there was nothing upon which an injunction could operate.

Again, in *Moore v. Monument Co.*, 166 N. C., 211, 81 S. E., 170, it was said: "As the monument has been erected, the Court will not entertain an appeal to determine the correctness of the ruling dissolving the restraining order."

Under the authorities cited, the appeal will be dismissed.

Appeal dismissed.

J. C. BIGHAM v. MRS. C. C. FOOR AND OREN D. HALL.

(Filed 20 May, 1931.)

1. Appeal and Error J c—Findings of fact supported by evidence are conclusive on appeal.

Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the Superior Court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal.

2. Process B c—Statute relating to service on nonresident auto owners is valid.

Our statute, chapter 75 Public Laws of 1929, relating to service on nonresident automobile owners in civil actions, is constitutional and valid.

3. Appeal and Error K c—A per curiam decision of the Supreme Court has same authority as any other opinion of the Court.

A *per curiam* opinion of the Supreme Court stands upon the same footing as those containing a more extended discussion or more numerous citations of authority.

APPEAL by defendant from *Moore, J.*, at October Term, 1930, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury, caused by a collision in the city of Charlotte 10 July, 1929, between a truck driven by the plaintiff and Mrs. C. C. Foor's automobile driven at the time by Oren D. Hall.

Service of summons was had upon the Commissioner of Revenue of North Carolina, as agent of the alleged nonresident defendant, Mrs. C. C. Foor, under chapter 75, Public Laws 1929. The defendant entered a special appearance and moved to dismiss for want of proper service, on the ground that she was a resident of the State of North Carolina at the time of the collision and, therefore, not amenable to process under the act of 1929.

The judge found that the defendant, Mrs. C. C. Foor, was a resident of South Carolina; that she and her husband were domiciled in

Charleston; that they came to North Carolina for a temporary sojourn during the summer of 1929, and returned to their home immediately thereafter; that the defendant's automobile was being operated at the time, and during the whole time she was in the State, under licenses, as evidenced by plates on the car, of the city of Charleston and State of South Carolina; that no North Carolina license was secured by the defendant for operating her automobile over the highways of this State during her stay here; and that in law and in fact the defendant was a nonresident of the State at the time of the collision. Whereupon the motion to dismiss was denied. Defendant appeals, assigning error.

Walter Clark and Stewart & Bobbitt for plaintiff.
Taliaferro & Clarkson for defendant.

STACY, C. J. Upon the facts found by the trial court, which are conclusive on appeal, as they are supported by competent evidence *(Hennis v. Hennis,* 180 N. C., 606, 105 S. E., 274), there was no error in holding that the defendant was a nonresident of the State within the meaning of chapter 75, Public Laws 1929, at the time of the collision between her automobile and the truck driven by the plaintiff. *Brann v. Hanes,* 194 N. C., 571, 140 S. E., 292; *Gower v. Carter,* 195 N. C., 697, 143 S. E., 513; *S. v. Carter,* 194 N. C., 293, 139 S. E., 604; *Roanoke Rapids v. Patterson,* 184 N. C., 135, 113 S. E., 603; *Hannon v. Grizzard,* 89 N. C., 115.

The constitutionality of chapter 75, Public Laws 1929, was upheld in *Ashley v. Brown,* 198 N. C., 369, 151 S. E., 725.

The case of *White v. Lumber Co.,* 199 N. C., 410, 154 S. E., 620, is distinguishable and has no particular bearing upon the question presently presented. The fact that it was written under a *per curiam* opinion, however, in no way impairs its force as a precedent for what it decides. *Hyder v. Henderson County,* 190 N. C., 663, 130 S. E., 497. *Per curiam* decisions stand upon the same footing as those in which fuller citations of authorities are made and more extended opinions are written. *Mote v. Lumber Co.,* 192 N. C., 460, 135 S. E., 294; *S. v. Munn,* 134 N. C., 680, 47 S. E., 15; *Parker v. R. R.,* 133 N. C., 336, 45 S. E., 658; *Osborn v. Leach,* 133 N. C., 427, 45 S. E., 783; *S. v. Council,* 129 N. C., 511, 39 S. E., 814.

Affirmed.

E. M. McINTURFF v. ST. LOUIS UNION TRUST COMPANY ET AL.

(Filed 20 May, 1931.)

1. **Negligence A c—In this case held: owner was not liable for alleged negligence of lessee.**

   The owner of a hotel is not liable in damages for the alleged negligence of its lessee causing injury to the latter's employee arising solely in the management of the leased premises.

2. **Master and Servant C g—Contributory negligence of employee held to bar recovery in this case.**

   The negligent act of a night employee at a hotel in opening an elevator gate left slightly ajar, and, assuming that the elevator was in place, without looking, stepping into the open shaft to his injury, is held negligence on the part of the employee barring his right to recover.

3. **Torts C b—Release signed by plaintiff is bar to action in the absence of fraud or mistake.**

   A release from liability for a personal injury, signed by the injured party for consideration, is a bar to an action for damages in the absence of fraud or mistake.

APPEAL by plaintiff from *Oglesby, J.*, at December Term, 1930, of BUNCOMBE.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff when he pushed back an elevator door in the Battery Park Hotel, which had been left slightly open, and, without looking, thinking the elevator was there, stepped forward to turn on the lights and fell a distance of fifteen feet, through the elevator shaft, to the concrete floor below and was injured.

The evidence shows that plaintiff was employed by the lessees of the hotel and not by the defendants. He was in charge of the work he was doing as night-watchman. It was further in evidence that, after returning to work, the plaintiff accepted $150, and released the defendants from any and all liability.

The court also held that the negligence of which the plaintiff complains was his own, or at least it was not attributable to the defendants, owners of the hotel, and nonsuited the case at the close of plaintiff's evidence. Plaintiff appeals, assigning errors.

E. M. McInturff in propria persona and John H. Cathey on brief for plaintiff.

Merrimon, Adams & Adams for defendants.

STACY, C. J. The case was properly dismissed, first, upon the ground that the defendants were not responsible to plaintiff for the open elevator

shaft *(Tucker v. Yarn Mill Co.,* 194 N. C., 756, 140 S. E., 744; *Biggs v. Ferrell,* 34 N. C., 1), second, because the negligence of which the plaintiff complains was his own *(McLean v. Hardwood Co.,* 200 N. C., 312; *Ingram v. R. R.,* 181 N. C., 491, 106 S. E., 565), and, third, for the reason that the release signed by plaintiff, in the absence of fraud or mistake, is a bar to his right to recover against the present defendants. *Aderholt v. R. R.,* 152 N. C., 411, 67 S. E., 978; *Butler v. Fertilizer Works,* 193 N. C., 632, 137 S. E., 813.

Affirmed.

W. J. SHUFORD, RECEIVER OF THE Y. & B. CORPORATION, v. J. C. BROWN.

(Filed 20 May, 1931.)

1. Corporations H c—Evidence of purchase of its stock by corporation when insolvent held insufficient to be submitted to the jury.

In this action by the receiver of an insolvent corporation to recover the purchase price of stock alleged to have been sold by the defendant to the corporation when the corporation was insolvent, the evidence tended to show that the defendant sold the stock to the president of the corporation in his individual capacity and accepted the president's personal notes in payment, that the notes were collected by the defendant through a bank, and were paid by the president by check on corporate funds, that the president had a personal account with the corporation and it not appearing that he did not have the right to issue the checks thereon, that the corporation had continuously paid dividends on the stock and that the defendant was ignorant of its insolvency, and that the stock book of the corporation recorded the transfer as a personal transaction of its president, *Held:* the evidence was insufficient to show that the corporation had purchased the stock, and defendant's motion as of nonsuit should have been granted.

2. Same—Mere purchase of stock by president of insolvent corporation is not sufficient to establish collusion working fraud on creditors.

The fact that a president and treasurer of a corporation paid for shares of the corporation's stock he had purchased by check on corporate funds on his personal account with the corporation is not alone sufficient evidence to take the case to the jury upon the question of fraud and collusion between the officer, the purchaser of the stock, and the corporation, under the allegation that it was a device whereby the corporation purchased its own stock to the detriment of its creditors at a time when it was insolvent.

3. Corporations G c—Where corporation or innocent third party must suffer loss from officer's wrong the loss should fall on the corporation.

Where the transactions of an officer of a corporation acting within the scope of his duties causes a loss which must fall either on the corporation or a third party, both being innocent, the corporation who selected its own officer, must suffer the loss.

4. Corporations H c—Principle that insolvent corporation may not purchase its stock is not applicable to the facts of this case.

The principle that an insolvent corporation may not purchase its own stock is not applicable to the facts of this case, the evidence tending to show that the stock in question was purchased by the president of the corporation in his individual capacity and not by the corporation.

5. Evidence I b—Regular entries in stock book of corporation held admissible in this case.

Explanatory entries upon the stock book of a corporation made in the regular course of business in relation to transfers and purchases of its shares is not, in proper instances and in connection with other evidence, objectionable as hearsay evidence. *R. R. v. Hegwood*, 198 N. C., 309, cited and approved.

6. Trial D a—Mere scintilla of evidence, raising only suspicion or conjecture, is insufficient to be submitted to the jury.

A mere scintilla of evidence, raising only a suspicion, conjecture, guess, or speculation as to the issue to be proven is insufficient to take the case to the jury. C. S., 567.

APPEAL by defendant from *Moore, J.*, and a jury, at October Term, 1930, of MECKLENBURG. Reversed.

The complaint alleges: That on 1 December, 1927, W. J. Shuford was appointed receiver of the insolvent Y. & B. Corporation, with full authority "to collect accounts, settle claims, institute and prosecute suits, and bring such actions at law and in equity as the interest of its creditors and the facts of the case may warrant."

The defendant, J. C. Brown, in the year 1926 was a stockholder in the said corporation and held 60 shares of preferred stock and some common stock standing in his name on the books of the corporation. That the outstanding preferred stock at that time amounted to 40,000 shares at the par value of $10 a share; that at the time it had no real or substantial value; "that the said Y. & B. Corporation in the year 1926, had no property and assets over and above its outstanding indebtedness, or none which was available to either purchase or redeem and cancel its stock or any part thereof, which facts were known to the defendant, J. C. Brown, or he had sufficient knowledge or information to put him upon inquiry as to the financial condition of the corporation, notwithstanding which, and desiring and designing to obtain a preference over all other stockholders of the same class and to gain advantage over them in the distribution of the assets of the corporation, and to procure from the corporation money, bonds or other things of value in exchange for his stock, which he knew, or should have known, had no actual or market value, the defendant wrongfully and unlawfully prevailed upon the officers of the corporation, or one or more of them, to take up his aforesaid stock at par by paying to him cash out of the

treasury, and thus unlawfully obtained and thus received the sum of $625 of assets of the corporation in violation of law and of his relationship and duty to the creditors thereof, and to those other persons, stockholders of a like class to him or in a class preferred to the stock held by him. That no steps had been taken by the corporation through its directors and stockholders to decrease its capital stock under the provisions of section 1131 of the Consolidated Statutes of North Carolina, or under section 1161 thereof, or any other provisions of law, but the transaction hereinbefore mentioned was wholly unauthorized and unlawful, and in violation of the express terms of the statutes under which the corporation was chartered; that in the way and manner above described the assets of the corporation were greatly reduced and depleted and it and its creditors were endamaged in the sum of $625, and there are now in the hands of the plaintiff, receiver, insufficient assets to meet the legitimate claims of creditors," etc.

The prayer of plaintiff is to recover from defendant $625 and interest thereon from 20 April, 1926. The defendant denies the material allegations of the complaint. As a further answer and defense the defendant denies that he either directly or indirectly sold stock of any kind to the Y. & B. Corporation. That the said stock, in the sum of $625 was "sold to J. A. Yarborough by the defendant, as he had a right to do; that the said sale of said stock was in all respects a personal transaction between this defendant and J. A. Yarborough as individuals; that at the time said sale was consummated the said J. A. Yarborough executed and delivered to this defendant in payment of said stock his personal notes, which this defendant accepted in good faith as the personal obligation of the said J. A. Yarborough. That in the purchase of said stock and the resale of the same, as aforesaid, the defendant acted in the utmost good faith, believing that the said Y. & B. Corporation was at all times amply solvent, with a large accumulated surplus, and that the defendant further believed at all times, and now believes that said resale was made to J. A. Yarborough as an individual, and not for or on behalf of the said Y. & B. Corporation; that if, in the repurchase of said stock, the said Yarborough was acting for the said corporation and not for himself, then the said Yarborough was acting in the capacity of agent for an undisclosed principal, and without notice to this defendant, then or afterwards, of his said agency, and without notice that he was acting in a representative capacity; that the defendant was at no time advised, or put upon inquiry, that the said corporation was negotiating the repurchase of said stock through the said Yarborough as agent, and the defendant verily believed, and now believes and so alleges that the said J. A. Yarborough repurchased said stock for his own individual use and profit, and not with the intent that the same should at any time become the property of said corporation."

For a further answer and defense, the plaintiff alleges that he purchased Y. & B. Corporation stock at the solicitation of the agent of the Y. & B. Corporation, representing to him that the Y. & B. Corporation was solvent, accumulating large profits in its business and it was paying 8 per cent dividends on the stock. That relying on these representations, which were false, he purchased the stock paying par for same and gave his note in payment to the Y. & B. Corporation. "That the said corporation designed and perpetrated a wilful and malicious fraud upon the defendant as to the true financial condition of said corporation in the sale of said stock to this defendant; that by reason of said fraud which the plaintiff-receiver alleges was perpetrated, this defendant, in the first instance, was induced to purchase said stock by false and fraudulent representations, made with the design, intent and purpose that the defendant might, and did, purchase said stock which was known to the corporation to be worthless. . . . That if it had been made known to the defendant at the time he purchased said stock, or at any time prior to the resale of the same, that the said corporation was insolvent and was paying out the corpus of the corporate property under the guise of dividends, the defendant could have, and would have, repudiated his purchase of said stock, and could have and would have, recovered the purchase price thereof in an action against the said corporation. That if the defendant's resale of said stock to J. A. Yarborough, as aforesaid, was, in law, a sale to the said corporation, which is denied, then by reason of the fraud perpetrated upon the said defendant in the sale of said stock to him in the first instance, said stock having no value as the plaintiff-receiver alleges, the defendant has received in said resale only the sum to which he was entitled, and could have recovered in an action against the said corporation, and this defendant sets up the aforesaid false and fraudulent representations by which he was induced to purchase said stock in the first instance in defense of the plaintiff's right to recover in this action. That if said resale of the defendant's said stock to the said J. A. Yarborough, as aforesaid, was, in fact and in law, a sale to the said corporation, which is denied, then the said corporation, its officers and stockholders, ratified said resale, knowing the same to have been made, which said resale, as the defendant is informed, believes and alleges, is noted on the stock book of said corporation and imports actual notice to the said corporation, its officers and stockholders."

By reason of the facts alleged, the defendant pleads ratification and estoppel in bar of recovery.

For a further answer and defense, set-off and counterclaim, defendant alleges: "That if the plaintiff-receiver is permitted to repudiate the said resale of said stock, and to recover judgment against the defendant

for the resale price thereof, then the defendant is the innocent victim of a wilful and malicious fraud by reason of which the said defendant has expended money for worthless stock, suffered loss, and incurred liability thereon, in the sum of such judgment as the plaintiff may recover, which said sum with interest thereon from the date of said resale the defendant is entitled, in law and equity, to set up in this action as a set-off and counterclaim against any sum that the plaintiff may recover by reason of the matters alleged in his complaint, and which said sum the defendant sets up as a set-off and counterclaim against the plaintiff's alleged claim.

The prayer of defendant was, "Wherefore, the defendant prays:

(1) That the plaintiff's alleged cause of action be dismissed; that the defendant go without day and recover of the plaintiff his costs.

(2) That if the plaintiff is permitted to recover judgment against the defendant in any sum by reason of the matters alleged in the complaint, that the said judgment be credited with a like sum as a set-off and counterclaim against the plaintiff by reason of the matters alleged by the defendant.

(3) For such other and further relief as the defendant is entitled to receive."

In the reply plaintiff denied the material allegations set forth in the further answers, defenses, set-off and counterclaim, of defendant.

The issue submitted to the jury and their answer thereto was as follows:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: Yes, $625 and interest from 20 April, 1926."

Judgment was rendered for plaintiff on the verdict. The defendant made numerous exceptions and assignments of error. The material ones and necessary facts will be considered in the opinion.

E. R. Preston and E. B. Cline for plaintiff.
Fred C. Hunter for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The motions were overruled by the court below. We think the motions should have been allowed. It is conceded on the record that the assets of the corporation are insufficient and will pay the general creditors only about 20 cents on the dollar.

The Y. & B. Corporation was chartered in December, 1923, and operated until 31 October, 1927. The corporation during its existence issued approximately $400,000 of preferred stock and $200,000 common

stock, par value of $10 per share, and when placed in the hands of the temporary and then permanent plaintiff-receiver, 1 December, 1927, the general indebtedness was $309,399.57.

Dividends of 8 per cent paid in 1926 quarterly by Y. & B. Corporation to the stockholders amounted to $50,310. J. A. Yarborough was president and treasurer of Y. & B. Corporation from its organization until the receivership. He was actively connected with its management. In reference to the controversy over the $625 sued for in this action, defendant J. C. Brown testified in part: "I sold it to J. A. Yarborough on 20 April, 1926. I delivered the certificates to J. A. Yarborough on that date. I took four notes for the stock, $625 each, three, six, nine and twelve months, that is the way the notes were given me. J. A. Yarborough was the maker of these notes. These notes were paid. I can't recollect when the first one was paid, but as I mind it was 19 or 20 July, 1926, about the time it was due it was taken up; it was due three months from date. I don't know how it was paid, but I put it in the Union National Bank; it was collected there. I never saw the check with which it was paid; the bank sent me a credit slip. I borrowed some money and put up my own note as collateral; when it came due they took out their note and sent me the balance. As to how the transaction was done, I can't say. This is the note to which I refer that I put up at the bank and used Yarborough's note as collateral. I put the notes in the bank as they became due. The first one I put in when I borrowed some money, as collateral; the other two I put up for collection. I looked to Mr. Yarborough for payment of the notes given me in payment of stock. I made an investigation at that time as to Mr. Yarborough's ability to pay. I made investigation from Mr. Victor, at the Union National Bank. I think he is the president of the bank. At that time I had no intimation as to whether or not the corporation was in a failing condition. I believed it to be solvent. I sold on 20 April, 1926, and I really didn't know, only what I heard here; it was October, 1927, it went in the hands of receiver. It was some eighteen months."

J. A. Yarborough testified as to the purchase of the stock from Brown as follows: "On or about 20 April, 1926, I purchased certain shares of stock from defendant, J. C. Brown. The three certificates of stock shown me are the certificates I purchased from J. C. Brown. Common stock certificate No. 201, 20 shares; common stock certificate No. 414, 30 shares; common stock certificate No. 318, 80 shares. I do not know where preferred stock certificate No. 639 is. As to whether or not I purchased that certificate from Mr. Brown, I would rather refer to the books. Referring to the Y. & B. Corporation Journal, as appears on page 229, and the Stock Subscription Record, I purchased preferred certificate No. 629, 120 shares, from J. C. Brown. The certificates of

stock I have identified as being purchased by me were delivered on 20 April, 1926. I gave Mr. Brown $2,500 for this stock. I paid for it in a year; gave him four 90-day notes, three months apart, $625 each. These were my personal notes."

After a careful review of the record, we can find no competent evidence on the part of the plaintiff to show that this stock was purchased by the Y. & B. Corporation. Brown's stock was canceled and in lieu thereof the stock was issued to Yarborough. The auditor testified: "In making my audit I found that J. A. Yarborough had a personal account that ran along throughout the entire history of the corporation. J. A. Yarborough had a personal account with the corporation at the time this stock is alleged to have been sold, as well as I can remember. I think he had from that date up to the date of the receivership."

There is no evidence that defendant knew, or in the exercise of due care could have known, that the corporation was insolvent during the period of the above transaction. It was paying an 8 per cent dividend. There is no evidence of bad faith, fraud or collusion on the part of the defendant, and there is no evidence that Yarborough misused any of the funds of the corporation in this transaction in the payment of said notes. There is evidence, so stated by the auditor, that he (Yarborough) had a personal account with the corporation during the period of this transaction, but it does not appear that said account was ever overdrawn.

The complaint and trial of this action was on the theory that the stock was sold by defendant Brown to the Y. & B. Corporation. We can find no sufficient evidence on the record to support this position of plaintiff. All the evidence is to the effect, record and otherwise, that it was purchased by J. A. Yarborough and he gave defendant four notes in payment. After these notes were given, they were paid by Yarborough. As stated, when the sale of the stock was made, on 20 April, 1926, by defendant Brown to Yarborough, there was no evidence that defendant knew, or by due care could have known, that the Y. & B. Corporation was insolvent. In fact, the record discloses that during that year, 1926, it paid an 8 per cent dividend, 2 per cent quarterly, which amounted to $50,310. After the sale by Brown to Yarborough of the stock which he had a perfect right to do, and taking his notes, Brown was a stranger to the corporation and looked alone to Yarborough for payment of the notes. If any of these payments came out of the funds of the corporation, there is no evidence in this record that Yarborough, who the corporation trusted to properly check on it, that same did not belong to Yarborough for services or otherwise.

Plaintiff introduced no evidence that Yarborough, who was president and treasurer of the corporation, was not authorized to pay these per-

sonal notes of his by giving a check on the corporation, and did not have funds due him which he had a right to use in payment to Brown of the personal notes he gave him. If Yarborough had no right to use the money of the Y. & B. Corporation to pay Brown, then in that event the receiver would have the right to sue Yarborough. The record discloses that Brown sold the stock in good faith to Yarborough and took the four notes in payment. It further discloses, and is so stated by the auditor, that during the period in which these notes were paid, that Yarborough had a personal account with the Y. & B. Corporation. The Y. & B. Corporation elected Yarborough its president and treasurer and put it in his power to issue checks on the corporate funds. Brown, without collusion, but in good faith, as shown by the record, sold this stock to Yarborough. If Yarborough paid him with the funds of the corporation, under the facts and circumstances of this case, the principle of law applicable is fully set forth in *Bank v. Liles,* 197 N. C., 413, citing numerous authorities, and quoting from *R. R. v. Kitchin,* 91 N. C., at p. 44: "Where one of two persons must suffer loss by fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss." *Lightner v. Knights of King Solomon,* 199 N. C., 525.

The question arises, if one of two persons must suffer loss by the misconduct of Yarborough, Brown or the Y. & B. Corporation, on whom shall the loss fall? On Brown or on the Y. & B. Corporation represented by the receiver in this action? We think it should fall on the Y. & B. Corporation, as it was responsible in the selection of Yarborough as its president and treasurer, the first reposed the confidence.

It is the well settled law in this jurisdiction, as set forth in *Pender v. Speight,* 159 N. C., 612: "An insolvent corporation cannot buy in its own stock, and if it becomes insolvent after such purchase the stockholder is held liable to the creditor for the purchase money received by him. *Heggie v. Building & Loan Asso.,* 107 N. C., 581. It is generally held that a corporation cannot settle with its members by the application of assets to the retirement of their stock until it has first discharged all of its liabilities, and any agreement looking to such arrangement among its shareholders is void as to creditors." *Fuller v. Service Co.,* 190 N. C., at p. 658.

This principle is sound and salutary, but not applicable on this record. The evidence in the present action was to the effect that Yarborough purchased the stock from Brown and not the Y. & B. Corporation. The entire evidence on the part of plaintiff was a type of hearsay evidence, the material part duly objected to by defendant, such evidence should be admitted with caution. The auditor testified: "I found that the books and records of the corporation were in *right much of a jumble.*

. . . Yes, I find some explanation why this entry should have been made three months after the transfer of stock. When I conducted the examination I frequently ran into that condition where a transaction had happened, not only stock, but everything."

In *R. R. v. Hegwood,* 198 N. C., at p. 315-16: "Dean Wigmore, in discussing exceptions to the hearsay rule—regular entries—in Vol. 3, 2 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 salesman, 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.' " *Supply Co. v. McCurry,* 199 N. C., 799.

Some of the cases in reference to hearsay evidence are set forth in *R. R. v. Hegwood, supra.* For some other authorities, see *Kello v. Maget,* 18 N. C., 414; *Sloan v. McDowell,* 75 N. C., 29; *Ball-Thrash Co. v. McCormick,* 162 N. C., 471; *Mercer v. Lumber Co.,* 173 N. C., 49; *Lumber Co. v. Lumber Co.,* 176 N. C., 500; *S. v. Hightower,* 187 N. C., 300.

Defendant objected to the issue submitted and excepted, but did not tender other issues. He cannot now complain. *Greene v. Bechtel,* 193 N. C., 99-100. This is not material from the view we take of the case. Defendant's further answers and defenses, set-off and counterclaim, are such that are equitable and appeal to a court of equity. The defendant Brown testified as to the fraud perpetrated on him in the sale of the stock by the Y. & B. Corporation, fully sustaining his allegations in his further answers and defenses and set-off and counterclaim against the plaintiff's alleged claim. Taking the entire evidence, as appears on the record, we see no legal or equitable claim that plaintiff has against the defendant. The auditor was asked the following question by defendant: "Q. Have you any record of the amount paid to the stock salesmen of the corporation? (Objection by plaintiff; sustained.) The witness, if permitted to answer would have said $152,928.18." Mere scintilla of evidence, or evidence raising only suspicion, conjecture, guess, surmise or speculation, is insufficient to take a case to the jury. *Denny v. Snow,* 199 N. C., 773. The judgment of the court below is

Reversed.

MARY VIRGINIA MOORE, ADMINISTRATRIX OF J. R. MOORE, v. ATLANTIC COAST LINE RAILROAD COMPANY; FRANK MOORE v. ATLANTIC COAST LINE RAILROAD COMPANY; AND D. W. ETHERIDGE, TRADING AS THE NEW BAKERY, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 May, 1931.)

1. Railroads D b—Evidence of contributory negligence of plaintiff in crossing tracks held insufficient to bar recovery as matter of law.

Where in an action against a railroad company to recover damages resulting from a collision at a public grade crossing the evidence tends to show that the driver of the truck stopped within about sixty feet of the track and he and an occupant therein looked and listened, and again stopped when from seven to fourteen feet of the track, and, failing to see or hear an approaching train, drove upon the track without further precaution, that the truck stalled upon the track and was hit by defendant's train within twelve or fourteen seconds, that there were two mounds between the highway and the crossing between eight to fifteen feet from the tracks, one mound being from ten to twelve feet high and preventing a clear view of the track, that the driver could see up the track in the direction from which the train came for one-third of a mile, and that at the crossing there were boards projecting two or three inches above the rails, is *Held:* insufficient to establish contributory negligence on the part of the driver as a matter of law, the issue being for the jury, and defendant's motion as of nonsuit was properly denied.

2. Trial D a—Upon motion of nonsuit only the evidence tending to establish the plaintiff's cause of action will be considered.

Upon a motion of nonsuit the evidence favorable to the plaintiff will be taken as if established to the satisfaction of the jury, and conflicting or contradictory evidence offered by the plaintiff will not be considered in passing upon the sufficiency of the evidence. C. S., 567.

3. Railroads D b—In moment of peril the plaintiff will not be held to degree of care for own safety required under ordinary circumstances.

Where in a few seconds of peril caused by the unexplained stopping of the engine of the plaintiff's truck on defendant's railroad track, with evidence tending to show that the defendant was negligent in causing a collision at a grade crossing, the mere fact that the driver of the automobile unsuccessfully endeavored to start his engine instead of seeking safety by jumping therefrom, is not held to bar recovery on the issue of contributory negligence upon which the defendant based his motion as of nonsuit.

4. Same—Person crossing track and train crew are required to use care of ordinarily prudent man under the circumstances.

One who drives across a railroad track at a public crossing and the employees on the defendant's train are mutually held to the degree of care required under the rule of the ordinarily prudent man under the circumstances to avoid receiving or inflicting injury.

5. Same—Railroad company is under duty to keep public crossing in reasonably safe condition.

It is the duty of a railroad company to keep its right of way at a public crossing in a reasonably safe condition and one using a crossing without previous knowledge of its condition may assume that the railroad company had performed this duty.

6. Appeal and Error F a—Where there is no exception to the charge it will be presumed correct.

Where the charge of the court to the jury is not excepted to it will be presumed on appeal that the law was correctly explained.

STACY, C. J., and BROGDEN, J., dissent.

APPEAL by defendant from *Moore, Special Judge,* at October Term, 1930, of HALIFAX. No error.

These are actions to recover damages for the death of J. R. Moore, for personal injury to Frank Moore, and for the destruction of a truck owned by D. W. Etheridge, alleged to have been caused by the negligence of the defendant.

J. R. Moore, the intestate, as a salesman for D. W. Etheridge, was engaged in selling bread, cakes, and other products of a bakery, which he hauled in his employer's truck. Frank Moore, 23 years of age, was his son. On 24 January, 1929, these two left South Rosemary at 10:30 a.m., intending to go to Weldon and other places. At the request of his father Frank Moore drove the truck—a Dodge truck of three-quarter-ton capacity. There was a door on each side of the seat, the driver sitting at the left, his father at the right. After going to South Weldon and Garysburg they continued their journey. They traveled on a State highway until near the place where a bridge over the railroad tracks was under construction, and then they turned to the left into a road which crossed the defendant's tracks at a distance of 415 feet from the highway. This is a main line and has double tracks. The truck approached the track from the east, and when the front wheels were between the rails of the east track the engine stalled. The defendant's train coming from the south struck the truck, demolished it, killed the intestate, and seriously injured Frank Moore. Pleadings were filed, in which the plaintiffs alleged negligence and resultant damages, the defendants denying liability and pleading contributory negligence on the part of the occupants of the truck. In each case issues of negligence, contributory negligence, last clear chance, were answered in favor of the plaintiffs, and damages were assessed. Judgment accordingly, and appeal by defendant.

Parker & Allsbrook for plaintiffs.

Thomas W. Davis, F. S. Spruill and Dunn & Johnson for defendant.

ADAMS, J. During the trial several exceptions were entered of record, but all have been abandoned except the one relating to the defendant's motion for nonsuit. This motion was based, not upon the ground that there is no evidence of the defendant's negligence, but upon the sole contention that the evidence offered by the plaintiffs shows such contributory negligence on the part of the occupants of the truck as will bar recovery in all the cases. In maintaining this position the defendant relies chiefly, but not exclusively, on the testimony of Frank Moore, who drove the truck at the time of the collision. Construed most favorably for the plaintiffs, their evidence tends to establish the following circumstances.

The crossing at which the collision occurred has been used by the public and kept up by the defendant for many years. On the track there were boards above which the rails projected two or three inches. The day was cloudy. The road between the highway and the crossing is a "lane with woods all the way" to a point within nine feet of the road-bed. There were two mounds between the highway and the crossing. The driver of the truck entered this "lane," and stopped sixty or seventy feet from the railroad track, lowered the window and "looked right and left up and down the track and did not hear or see anything." The mound on the left prevented him from seeing very far. It was ten or twelve feet high. There was another mound six feet high. Estimates of its distance from the railroad vary from eight to fifteen feet. The driver testified that when within ten or fifteen feet (he afterwards said seven or eight feet) of the track he stopped, listened, and looked again to the right and left. His father looked also. For one-third of a mile they had a view of the track in the direction from which the train came; but they neither saw nor heard the train at that time. After looking and listening, when within eight or nine feet of the crossing, they drove upon it without again looking for the train. The front wheels passed over the first rail and the engine stopped running. The driver "pulled down on the starter" several times trying to put the engine in motion. Within twelve or fourteen seconds the engine struck the truck. The driver saw the train one or two seconds before the collision. He did not hear the sounding of the whistle, the ringing of the bell, or the noise of the cars.

There is abundant evidence in contradiction. Indeed, other testimony introduced by the plaintiffs is in some respects inconsistent with that of Frank Moore. In other respects it corroborates him. But on a motion for nonsuit the testimony of Frank Moore must be accepted as if established to the satisfaction of the jury. No authorities need be cited in support of this elementary proposition. Tested by this principle, are we justified in holding as a matter of law that the negligence of those who occupied the truck is a bar to the plaintiff's recovery of dam-

ages? For the purposes of the present discussion we may assume that Etheridge owned the truck and that the occupants had it in charge as his agents and were acting within the scope of their employment. There is evidence that Frank Moore was subject to the control and direction of his father.

When approaching a public crossing the employees in charge of a train and a traveler upon the highway are charged with the mutual and reciprocal duty of exercising due care to avoid inflicting or receiving injury, due care being such as a prudent person would exercise under the circumstances at the particular time and place. "Both parties are charged with the mutual duty of keeping a careful lookout for danger and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty." *Improvement Co. v. Stead,* 95 U. S., 161, 24 Law Ed., 403, cited in *Cooper v. R. R.,* 140 N. C., 209. On reaching the crossing and before attempting to go upon it, a traveler must use his sense of sight and hearing—must look and listen for approaching trains if not prevented from doing so by the fault of the railroad company; and this he should do before entering the zone of danger. *Johnson v. R. R.,* 163 N. C., 431; *Holton v. R. R.,* 188 N. C., 277; *Butner v. R. R.,* 199 N. C., 695. This, as we understand it, is the prevailing rule. At any rate it is observed and has often been applied by this Court.

We are referred to *B. & O. Railroad Company v. Goodman,* 275 U. S., 66, 72 Law Ed., 167, in which it is said: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train—not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal, and takes no further precaution, he does so at his own risk." The "standard of conduct" there set up was on admitted or undisputed facts: when forty feet from the crossing Goodman reduced the speed of his truck from ten or twelve miles an hour to five or six, but he did not stop, though his view was obstructed; and in the opinion of the Circuit Court of Appeals it is suggested that he neither looked nor listened before going on the track. It seems that he neither stopped, looked, nor listened; but, heedless of danger, drove directly in front of an oncoming train. 10 Fed. (2d), 58.

In the case before us, if we treat the testimony of Frank Moore with its legitimate inferences as established or undisputed, we have this situation: when sixty or seventy feet from the crossing he stopped the truck, looked and listened; again within seven or eight feet of the rails

he stopped and he and his father looked to the right and left, and listened; and at that time, according to his testimony, the train was not within the range of his view, which extended one-third of a mile down the track. Is it logical to conclude as a necessary inference of law that he was negligent in attempting to cross the track under the circumstances? It is said he should have looked down the track when traversing the intervening distance of seven or eight feet; but he had just looked and apparently the way was clear. He was not required to look in that direction continuously, because his "attention was rightly directed elsewhere." *Lee v. R. R.*, 180 N. C., 413, 417. The crossing was in "bad condition" and called for the exercise of forethought and perhaps of rather tense effort, though of brief duration. This is obvious from the sequel. Under conditions disclosing inconsistent testimony among the plaintiffs' witnesses, whether those who had control of the car were negligent in going on the railroad track was a mixed question of law and fact, properly submitted to the jury by whose finding of facts the standard of conduct was to be measured. *Osborne v. R. R.*, 160 N. C., 310. It may be noted here that the facts upon which *Harrison v. R. R.*, 194 N. C., 656, was decided were similar to those in the *Goodman case,* the deceased obviously having gone upon the track in front of a moving train without exercising the faculty of seeing or hearing. It is there said that the standard laid down was but another way of stating the rule of the prudent man.

Another controverted question relates to the conduct of Frank Moore and his father after the engine had choked on the track. The defendant contends that they had ample time to get out of the truck and that by the exercise of due care they could have escaped injury. This position calls for consideration of other aspects of the plaintiffs' evidence.

It is hardly open to doubt that if the engine had not stopped running the truck would have passed the crossing in safety. Why the engine stopped is left in doubt. We see no convincing evidence that it was due to the driver's negligence. It may more reasonably be attributed to the condition of the crossing. The driver had never traveled this road. It was incumbent upon the defendant by the use of proper care to maintain the crossing in a reasonably safe condition. *Stone v. R. R.*, 197 N. C., 429; *Williams v. R. R.*, 187 N. C., 348. The men in the truck were not wanting in ordinary care because they did not inspect the crossing before venturing upon it to see whether the defendant had discharged its duty. *Bullock v. R. R.*, 105 N. C., 180. What, then, was their legal duty when the engine ceased to run? The duty generally imposed upon those who are charged with negligence—that of exerting for the protection of themselves and their property such care as a prudent man would exercise under the same or similar conditions. We must keep in mind the crucial point: whether their conduct at this

time must be declared negligent as a matter of law or whether negligence is dependent upon facts to be determined by the jury. The question is vital and, in our opinion, is clearly for the jury unless we conclude that the testimony of Frank Moore bars recovery.

If he and his father closed their eyes to existing conditions, as if hoodwinked or blinded, and negligently awaited results, the recovery of damages should be denied, because in that event their negligence, concurring with that of the defendant to the last moment, would eliminate the doctrine of the defendant's last clear chance. It is upon this theory that the defendant says the answer to the third issue may be disregarded.

The distance between the train and the truck at the time the latter stopped on the track is variously estimated by the witnesses for the plaintiffs. As previously stated, Frank Moore said in effect that having stopped, looked, and listened in seven, twelve, or fifteen feet of the crossing, he went upon the track and that the train, not then in sight, must have been distant at least one-third of a mile. In reaching the track he went up an incline or "small slant." Other witnesses for the plaintiffs testified as to various estimates of the distance, ranging from almost one mile to only two hundred yards. If, as the plaintiffs claim and as their evidence tends to show, the engineer failed to give the usual warning when approaching the crossing, by which the occupants of the car were misled, and no "distress" signal was given until the train was within twenty-five or thirty yards of the stationary truck, the problem of contributory negligence would necessarily involve several unknown quantities determinable only by the jury; and as there is no exception to the charge we must presume that the law was correctly explained. If uncontradicted testimony for the plaintiffs is taken to be true the truck was on the railroad only twelve or fourteen seconds; the deceased got out at the right door, but too late to avoid injury and death; the driver said he could not escape through the door at the left. His thought instinctively turned to the task of getting his engine in motion, and his effort to achieve this result should not necessarily be imputed to him for negligence. It was not an occasion for the deliberate calculation of infinitesimals.

As stated, we are dealing with the defendant's motion for nonsuit based on the ground that the evidence for the plaintiffs conclusively establishes contributory negligence. The evidence for the defendant, if accepted, would have justified a verdict in its behalf; but in submitting the controversy to the jury upon inconsistent and contradictory testimony the trial court made no error. Consideration of the third issue is eliminated by the answer to the second.

No error.

STACY, C. J., and BROGDEN, J., dissent.

STATE v. J. J. LATTIMORE.

(Filed 27 May, 1931.)

1. Trial B e—Where incompetent evidence is stricken out and the jury instructed not to consider it an exception thereto becomes immaterial.

Where the president of a bank in testifying as to the making of false entries on the bank's books by another officer of the bank, under indictment therefor, inadvertently refers to an irrelevant account and has corrected the error after discovering it, whereupon the judge has ordered this testimony stricken from the record and instructed the jury not to consider it, an exception theretofore taken becomes immaterial.

2. Evidence D g—In this case held: testimony was to matters within knowledge or subject to inspection of witness and was competent.

The president of a bank may testify as to false entries made by the secretary and treasurer thereof when the testimony is to matters within the knowledge of the witness or subject to his inspection.

3. Banks and Banking I a—Specific intent to deceive or defraud is not necessary to conviction of making false entries.

A specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of section 224(e) N. C. Code of 1927, it being sufficient if the defendant wilfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent, section 83 of chapter 4, Public Laws of 1921, having been struck out and superseded by section 16 of chapter 47, Public Laws of 1927, and an instruction to the jury that the issue before them was whether the defendant "knowingly made false entries on the books of the bank" is in accord with the provisions of the statute and is not erroneous.

4. Same—Instruction as to wilfulness in making false entries on books of bank held not erroneous when considered as a whole.

In a prosecution under section 224(e), N. C. Code of 1927, for wilfully making false entries on the books of a bank an instruction to the jury that they should find whether the alleged false entries were made for the purpose of "deceiving and preventing the directors and others from knowing the correct status of the books," will not be held for error, when it appears that the instruction, when taken in connection with the other parts of the charge, was intended to stress and in effect did stress the necessity of proving that the false entries were wilfully and not inadvertently made.

APPEAL by defendant from *Clement, J.*, at January Term, 1931, of CLEVELAND.

The defendant was prosecuted on an indictment containing two counts, each of which charged him with making false entries on the books of the Cleveland Bank and Trust Company, in which he was an officer, in breach of section 224(e) of the N. C. Code of 1927, P. L., 1927, ch. 47, sec. 16.

The jury returned a general verdict: "Guilty thereof in manner and form as charged in the bill of indictment." From the judgment pronounced the defendant appealed and assigned error.

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

Clyde R. Hoey and B. T. Falls for defendant.

ADAMS, J. William Lineberger testified that he was president of the Cleveland Bank and Trust Company from its organization in 1920 to its merger on 24 February, 1930, with the Union Trust Company, and that during this period the defendant was the secretary and treasurer of the Cleveland Bank and Trust Company and the custodian of its records. Near the beginning of his testimony the witness inadvertently referred to an irrelevant account and upon discovering it corrected the error. The court struck out this testimony and instructed the jury to disregard the questions and the answers. Necessarily the defendant's first exception, which was taken to one of these questions, was thereby eliminated. The question to which the second exception related was not answered; and the matters to which the third, fourth and fifth were addressed were within the knowledge or subject to the inspection of the witness and were therefore competent. The sixth exception may be dismissed with the remark that the witness said he knew nothing of the pencil marks mentioned in the question to which the defendant had objected. The seventh and eighth are obviously without merit and call for no discussion.

The exceptions on which the defendant chiefly relies were taken to the instructions given the jury. After saying that it was immaterial whether or not the defendant actually received the money because he was not prosecuted for abstracting it, the judge gave the following instruction, to which the ninth and tenth exceptions have reference: "The issue that is before you is a very simple issue. There is nothing complicated at all about it. It comes down to this: Did this defendant knowingly make false entries in the books of the bank? Did he knowingly make them? That is the only thing that you are to find out by your verdict. These are the only facts that you are interested in."

The act upon which the defendant was indicted (P. L., 1927, ch. 47, sec. 16), is a modification of the statute enacted by the General Assembly at the session of 1921. P. L., 1921, ch. 4, sec. 83. The act of 1921 provided for the conviction of an officer, employee, agent, or director of a bank upon his doing the acts therein denounced with intent to defraud or injure the bank or another person or corporation, or to

deceive an officer of the bank or an agent appointed to examine the affairs of the bank, or to conceal its true financial condition.

The averments in the indictment are broad enough to include these provisions; but the act of 1927, chapter 47, section 16, struck out section 83, chapter 4, of the Public Laws of 1921, and substituted section 16, which is now section 224(e) of the North Carolina Code of 1927. This substituted section contains the following provisions: "Whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificates, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, . . . shall be guilty," etc.

The instruction complained of conforms strictly to the clause which condemns the making of a false entry in a "book, report, statement, or record of a bank," and is free from the alleged error which is the basis of the exception to the foregoing instruction. In effect the clause declares the wilful making of false entries in the books and records of banks by an officer, employee, agent, or director thereof a distinct offense, without regard to the fraudulent intent which, under the substituted section above referred to, applies to the embezzlement, abstraction, and misapplication of funds and to other instances therein particularly specified.

The reason for enacting the amended statute, by which the wilful making of false entries is declared to be a felony, is apparent. The natural and perhaps the unavoidable effect of making false entries in the books and records of a bank is to deceive the officers, to impair the assets, and to maim, if not totally to destroy the business. A specific intent to deceive or to defraud is not essential. It is true that an act may become criminal only by reason of the intent with which it is done, but the performance of an act which is expressly forbidden by statute may constitute an offense in itself without regard to the question of intent. *S. v. King,* 86 N. C., 603; *S. v. R. R.,* 122 N. C., 1052; *S. v. Perley,* 173 N. C., 783; *Perley v. State* 249 U. S., 510.

We do not understand the instruction referred to in exception 11 materially to conflict with instructions previously given; it was intended to stress and in effect did stress the necessity of proving that the alleged false entries were wilfully and not inadvertently made. This is clearly indicated by the concluding words: "This matter, gentlemen, just comes down to this one issue: Did the defendant knowingly make false entries on the bank books?" The following interrogatory—"Did he do it for the purpose of deceiving and preventing the directors and others from knowing the correct status of the books?"—must be taken in con-

nection with other parts of the charge which were intended to point out the distinction between the wilful and the mistaken entry on the books of a statement or statements that were false.

Exceptions 12, 13, 14, 15, and 16 relate respectively to the judge's statement of contentions, to a definition of reasonable doubt, and to a recital of testimony, and are altogether without merit. So as to the seventeenth and eighteenth exceptions; the nineteenth and twentieth are formal.

After a careful examination of all the exceptions we have discovered no reversible error in the trial. The evidence is amply sufficient to justify the verdict and the whole controversy seems to have been clearly and accurately presented to the jury, upon whom devolved the responsible duty of finding the facts.

The law as administered under the former statute is set forth in *S. v. Hedgecock,* 185 N. C., 714; *S. v. Switzer,* 187 N. C., 88; *S. v. George,* 188 N. C., 611; *S. v. Maslin,* 195 N. C., 537. We find

No error.

J. M. OLDHAM ET AL. V. T. S. MCPHEETERS AND JOHN CROSLAND.

(Filed 27 May, 1931.)

Pleadings D c—Demurrer ore tenus to the complaint must distinctly specify the grounds of objection.

A demurrer *ore tenus* to the complaint for insufficiency to state a cause of action must state the legal grounds upon which it is based or it will be disregarded. C. S., 512; *Seawell v. Cole,* 194 N. C., 546, cited and applied.

CIVIL ACTION, before *Harding, J.,* at Spring Term, 1931, of MECKLENBURG.

The individual plaintiffs, approximately seventeen in number, and the Charlotte Consolidated Construction Company instituted this action against the defendants on 9 June, 1931. The defendants, at the time the suit was instituted, were the owners of lot No. 4, Block 37, as shown on the map referred to in the pleadings. Pending the litigation the defendant, McPheeters, sold his interest in said lot to the defendant, Crosland, who is now the sole owner thereof. The plaintiffs allege that the Charlotte Consolidated Construction Company owned a certain tract of land and developed the same into a high-class suburban residential section known as Dilworth, and that said land was developed by said original owners "as an integral whole and as a subdivision of Dilworth pursuant to a general plan and scheme as herein fully set out.

That the development of said subdivision of Dilworth, all of which was done pursuant to the general plan and scheme . . . was begun about the year 1914. . . . That in the sale and development of the lots contained in said subdivision the Charlotte Consolidated Construction Company and its grantees followed and enforced a general scheme and plan of development whereby the lots in said development were restricted to residential purposes." It is further alleged that within the area set aside for high-class residential purposes "four tracts were permitted to be used for purposes other than residential purposes, but were restricted to the purposes hereinafter set out, which the plaintiffs allege did not constitute a deviation from said general plan and scheme, but were a part thereof and in harmony therewith." These four exceptions referred to were: (a) Shrine Temple; (b) Scottish Rite Temple; (c) Woman's Club; (d) Church Building. The plaintiffs other than the Construction Company allege that they are lot owners in said subdivision, and that the deeds contained restrictions limiting the use of the lots to residential purposes with certain minor exceptions. It is further alleged that at the institution of suit the defendants were threatening to erect a filling station, stores and other buildings for business and commercial purposes on said lot No. 4, and that the erection of such structures would constitute a violation of the restrictions contained in the deeds. Pending the litigation it appears that the defendants had completed structures upon said lot No. 4 to be used for store buildings and other commercial enterprises, whereupon the plaintiffs pray for a mandatory injunction compelling the defendants to remove said structures from said property.

The defendants filed an answer alleging in substance that there had been substantial, radical and fundamental changes in the character of the property, and that such changes had rendered the restrictions unenforceable. The defendants further allege that the Charlotte Consolidated Construction Company had retained the right to change the restrictions in any of the lots in the subdivision, and that this reserve power rendered the restrictions unenforceable. The defendants further alleged that the case of *Higgins v. Hough,* 195 N. C., 652, had expressly decided that the restrictions on lot No. 4 were unenforceable by virtue of such substantial and fundamental changes as to render the enforcement of the restrictions inequitable.

The plaintiff, however, in its reply to the answer, alleged that the parties to this action are different from those involved in *Higgins v. Hough,* and that the facts in the present action are essentially different from the facts appearing in said decision.

At the hearing the record discloses the following proceedings: "Defendants demur *ore tenus* to the complaint on the ground that the

facts therein alleged are not sufficient to constitute a cause of action as to all plaintiffs except the Charlotte Consolidated Construction Company. Overruled. Defendants except. The defendants further demur *ore tenus* to the complaint as to the cause of action set up in the complaint of plaintiff, Charlotte Consolidated Construction Company, for that it does not state facts sufficient to constitute a cause of action. Overruled. Defendants except. Defendants demur *ore tenus* to the complaint for that the complaint does not allege facts sufficient to constitute a cause of action against the defendants. The demurrer is overruled, and the defendants except and appeal to the Supreme Court."

Cochran & McClenneghan, John M. Robinson and Hunter M. Jones for plaintiffs.

Whitlock, Dockery & Shaw for defendants.

PER CURIAM. The appeal comes to this Court upon a demurrer *ore tenus*. The grounds for demurrer are not specified as required by C. S., 512. The reason for requiring such demurrers to specify the legal grounds upon which they are based was discussed and applied in *Seawell v. Cole,* 194 N. C., 546; *Enloe v. Ragle,* 195 N. C., 38; *Scales v. Trust Co.,* 195 N. C., 772.

Affirmed.

DAVID ELDER HUNT, DECEASED, v. THE STATE OF NORTH CAROLINA, ADJUTANT GENERAL'S DEPARTMENT, SELF-INSURER.

(Filed 27 May, 1931.)

Master and Servant F d—Where deceased employee leaves no dependents only his personal representative may litigate claim under the act.

It is required by C. S., 446, that an action be prosecuted in the name of the real party in interest, and where a statute names a person to receive funds and authorizes him to sue therefor, only the person named may litigate the matter, and section 40 of the Workmen's Compensation Act provides that in case the deceased employee leaves no dependents, the employer shall pay the amount recoverable thereunder to the personal representative of the deceased, and *held:* where a claim under the act is litigated in the name of the deceased the proceeding is a nullity and will be dismissed on appeal to the Supreme Court, nor may the personal representative come in and make himself a party under the provisions of C. S., 1414.

APPEAL by defendant from *Devin, J.,* at April Term, 1931, of GRANVILLE.

Proceeding under Workmen's Compensation Act by "David Elder Hunt, deceased," to determine liability of the State, as self-insurer, to decedent's dependents or his estate.

David Elder Hunt, a duly enlisted member of the North Carolina National Guard, was killed in an automobile accident about 1:30 a.m. 13 July, 1930, while driving from his home in Oxford, N. C., to Morehead City, N. C., to report for duty at Camp Glenn in connection with the annual encampment of the North Carolina National Guard.

The deceased was nineteen years of age at the time of his death. He left no one him surviving wholly or partially dependent upon his earnings for support. No personal representative of the deceased has been appointed, and it is not clear from the record just how the matter was presented to the North Carolina Industrial Commission.

At any rate, the Industrial Commission "denied compensation in this case" on the ground that the injury by accident, resulting in death, did not arise out of and in the course of the employment of the deceased as a National Guardsman. This ruling was reversed on appeal to the Superior Court, the appeal being by "the claimant," and the judgment of the Superior Court recites "that the personal representative of the said David Elder Hunt, deceased, is entitled to compensation under the provisions of the Workmen's Compensation Act."

From this judgment the defendant appeals, assigning error.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for appellant.

Parham & Lassiter and Royster & Royster for appellee.

STACY, C. J. The liability of the State, as self-insurer, under the Workmen's Compensation Act, for injuries arising out of and in the course of the employment of a duly enlisted National Guardsman was considered in *Baker v. State,* 200 N. C., 232, 156 S. E., 917.

But it is provided by section 40 of the Workmen's Compensation Act that in case the deceased employee leaves no dependents, the employer shall pay the amount allowed thereunder "to the personal representative of the deceased." When a statute names a person to receive funds, and authorizes him to sue therefor, no one but the person so designated has the right to litigate the matter. 20 R. C. L., 664.

It is further provided by C. S., 446 that "Every action must be prosecuted in the name of the real party in interest," etc. *Casualty Co. v. Green,* 200 N. C., 535, 157 S. E., 797; *Chapman v. McLawhorn,* 150 N. C., 166, 63 S. E., 721. The proceeding, therefore, brought in the name of the deceased, and no one else, would seem to be *nullius juris. S. v. Beasley* 196 N. C., 797, 147 S. E., 301.

Nor is it permissible under C. S., 1414 for the personal representative of the deceased, hereafter to be appointed, to come in now and make himself a party to the proceeding in the Supreme Court. Having acquired no jurisdiction of the matter as presently presented, there is nothing before the Court.

Proceedings dismissed.

J. C. KELLIS v. ERNEST WELCH, J. S. BRASWELL, SHERIFF OF RICHMOND COUNTY, AND EDGAR HAYWOOD, CLERK OF THE SUPERIOR COURT OF MONTGOMERY COUNTY.

(Filed 27 May, 1931.)

1. **Venue A b—Action against sheriff of one county and clerk of another held not separable, and removable as to clerk was error.**

   Where the clerk of the Superior Court of one county issues an execution to the sheriff of another county who seizes the plaintiff's property in the latter county, and the plaintiff brings action against the clerk and the sheriff in the county wherein the goods were seized, alleging that the seizure was wrongful: *Held*, the causes relate to substantially one transaction and are not separable in the sense of being mutually independent, and the motion of the clerk for removal as to him to the county of his office should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of the statute, C. S., 464, relating to venue of actions against public officers, being effected in such instances by trial of the whole controversy in the county where the goods were seized.

2. **Courts A a—Motion for removal from one Superior Court to another presents question of venue and not jurisdiction.**

   Where in an action against the clerk of the Superior Court of one county and the sheriff of another county the clerk makes motion for removal of the cause as to him to the county of his office under C. S., 464, the motion raises a question of venue and not of jurisdiction.

APPEAL by plaintiff from *Schenck, J.*, at March Term, 1931, of RICHMOND. Reversed.

The plaintiff, a resident of Richmond County, brought suit against the defendants to recover damages for the alleged wrongful seizure and conversion of his automobile. In his complaint he alleges that on 21 February, 1930, he bought the car from Lewis Motor Sales, Inc., of Montgomery County, and held possession of it as owner until 6 October, 1930; that on 2 October, 1930, the defendant Haywood, in the capacity of clerk, issued from the Superior Court of Montgomery County a paper purporting to be an execution in an action entitled

J. H. Hilyard *v.* Troy Motors, Inc., and the Commercial Credit Company, and caused it to be delivered to the sheriff of Richmond County; and that by virtue of this execution the defendant Braswell, as sheriff of Richmond County, seized the plaintiff's car and delivered it to the defendant Welch, who removed it to Guilford County.

The plaintiff alleges, in addition, that the action of the clerk in issuing the execution, of the sheriff in seizing the car, and of Welch in carrying it to Guilford County was unlawful, and that he is entitled to the market value of the converted property.

The defendants filed answers and in apt time the defendant Haywood made a motion for removal of the cause against himself to Montgomery County. The motion was allowed, and the cause so far as it relates to the defendant Haywood, as clerk, was removed, the court finding the following facts:

1. That Edgar Haywood is the clerk of the Superior Court of Montgomery County, and as such he issued the execution to the sheriff of Richmond County, under and by virtue of which the sheriff of Richmond County seized the automobile of the plaintiff.

2. That the sheriff of Richmond County, acting under and by virtue of said purported execution, seized the plaintiff's automobile in Richmond County.

3. That the plaintiff is a citizen and resident of Richmond County, and the execution was served on him in Richmond County.

The plaintiff excepted to the order of removal and appealed.

J. C. Sedberry for plaintiff.
R. T. Poole for defendant Haywood.

ADAMS, J. The appeal raises a question, not of jurisdiction, but of venue—the county in which the facts relied on are alleged to have occurred, or in which the cause of action arose.

The place of trial is regulated by statute. C. S., 463 *et seq.* Subject to statutory exceptions an action may be tried in the county in which the plaintiff or the defendant resides at the time the action is commenced (C. S., 469; *McFadden v. Maxwell,* 198 N. C., 223); but an action against a public officer for an act done by him by virtue of his office must be tried in the county in which the cause or some part of it arose, subject to the power of the court to change the place of trial. C. S., 464.

The defendant Braswell is a public officer of Richmond County and the defendant Haywood is a public officer of Montgomery County. Obviously, therefore, we cannot literally apply the provisions of section 464 unless the alleged causes of action are separable in the sense

of being so mutually independent as to authorize their separation and the removal of one cause to the county of Montgomery.

We recognize the principle that a plaintiff cannot change the venue of an action to the prejudice of the defendant and against his will by uniting two causes having different venues. *Cedar Works v. Lumber Co.,* 161 N. C., 603, 613. But the complaint does not purport to state separate and independent causes of action against all the defendants, but a series of interrelated acts culminating in the cause of action which the plaintiff contends he is entitled to maintain in the county in which he and the sheriff reside. There is no finding or judgment that the complaint sets forth severable causes of action or that there is an allegation to this effect in either of the answers. In the absence of a statement of facts in the pleadings or a finding or judgment that there are severable causes the statute seems to provide for changing the place of trial as to all the parties. C. S., 470.

According to the answer of the defendant Haywood, the execution was prepared by an attorney in Richmond County and forwarded to the clerk in Montgomery, who immediately signed and returned it to the attorney in Richmond. Conceding without deciding that as against the clerk the cause of action arose in Montgomery County, while it is difficult to reconcile apparently inconsistent provisions of the statutes, we are of opinion that the action can be maintained against all of the defendants in the county in which it was instituted. In *Sherrod et al. v. Dawson,* 154 N. C., 525, the plaintiffs brought suit in Edgecombe County against the sheriff of Edgecombe and the sheriff of Martin to restrain the defendants from selling the property of the plaintiffs pending the action, which involved the legality of certain taxes levied by the commissioners of both counties. The commissioners of Martin, claiming that the property in question had been owned by J. W. Sherrod, entered it upon their tax list after his death. At the time of his death he lived in Martin County. His son, whose residence was in Edgecombe, claimed to be the owner of the property by assignment from his father, and in consequence a tax was assessed against the property in Edgecombe County. The sheriffs attempted to collect the tax levied in their respective counties. It was contended that there was a misjoinder of causes. This Court decided otherwise and said: "All the averments in the pleadings relate to one transaction and one cause of action, to wit, a permanent injunction to prevent the sale of plaintiff's property. All parties in interest are before the court, and its judgment will be binding upon them. If two separate actions were brought, one in Martin and one in Edgecombe, conflicting verdicts and judgments may be rendered and the result be that the authorities of two counties might levy and collect taxes upon identically the same personal property."

In *McCullen v. R. R.*, 146 N. C., 568, the plaintiff brought suit in Craven County, where he resided, for special damages caused by unreasonable delay in the transportation of goods and for a penalty for the unreasonable delay. Objection was made on the ground that the cause of action for the penalty was triable, not in Craven, but in the county in which the cause of action for the penalty arose. It will be observed that an action for a penalty as well as an action against a public officer must be brought in the county where the cause or some part thereof arose. C. S., 464. True, the objection was taken by demurrer instead of a motion to remove; but this Court after pointing out the distinction between jurisdiction and venue, said: "It would seem that, as the action in respect to the first cause was properly brought in Craven County, and the two causes of action arose out of the same transaction, both the letter and spirit of the law would be met by permitting them to be tried in that county, otherwise, the court would be compelled to separate the two causes of action and direct the removal of one to another county, retaining the other. The two causes of action are permitted to be joined because they arise out of the same transaction. It is manifest that practically the same evidence will be relevant in the trial of both causes of action."

In the case before us all the allegations in the complaint relate primarily to one transaction, the wrongful sale of the plaintiff's property. The evidence as to the execution will be relevant on the trial against all the defendants. If the order of removal stands there will be a possibility of conflicting verdicts and judgments—a judgment in Montgomery for or against the clerk and a judgment *contra* in Richmond as to the sheriff; whereas the liability of these officers may be dependent, or at least in part, upon the validity or invalidity of the execution. As suggested in *McCullen's case* the spirit, if not the letter of the law, would be met by disposing of the whole controversy in one trial.

The order of removal as to the defendant Haywood is

Reversed.

MRS. SALLIE CHILDERS, ADMINISTRATRIX OF ESTATE OF CONIE CHILDERS, v. DR. GLENN R. FRYE.

(Filed 27 May, 1931.)

1. Physicians and Surgeons C b—A physician is liable for neglect of patient only after relationship of physician and patient is established.

The law applicable to the care and treatment a physician must give his patient applies only when the relationship of physician and patient has been established, it being the privilege of a physician to accept or

reject an injured man as a patient, whether he misconceived the cause of the proposed patient's condition or otherwise under the provisions of the law relating to contracts.

2. Same—Evidence in this case held insufficient to establish relationship of physician and patient.

Where in an action against a physician for alleged neglect of a patient the evidence tends to show that the proposed patient was brought to the hospital in an unconscious condition, that the person who brought him stated to the physician or nurse that the proposed patient had been injured in an automobile accident, that the physician, after looking over the injured man and discovering that he had been drinking, told the injured man's companion to take him home: *Held*, the evidence shows a refusal by the physician to accept the injured man as a patient, and is insufficient to establish the relationship of physician and patient, and the action was properly nonsuited.

3. Same—Plaintiff must establish the alleged neglect of the physician as the proximate cause of the injury in suit.

In order to hold a physician liable in damages for neglect of his patient the plaintiff must show by his evidence that the alleged neglect caused the injury in suit, and the evidence in this case to the effect that the intestate died from an injury after having been first refused as a patient by the defendant, but that the intestate was thereafter treated by other well qualified physicians, is *held:* insufficient to take the case to the jury.

CIVIL ACTION, before *Shaw, J.*, at September Term, 1930, of BURKE.

The plaintiff is the mother and administratrix of Conie Childers, who died on or about 24 May, 1930. The defendant is the head physician and surgeon of Richard Baker Hospital and controlled the same by virtue of a lease from Dr. J. H. Shuford.

The plaintiff alleged that on or about 18 May, 1930, her son, who was then 22 years of age, while riding in a motor vehicle driven by another party at a rapid and reckless rate of speed, was suddenly thrown from the vehicle in turning a curve, and as a result thereof his head struck a telephone pole, fracturing his skull and otherwise injuring him to such an extent that he was rendered unconscious; that the injured man was immediately carried by automobile to the hospital of the defendant by his companions, and that the defendant accepted plaintiff's intestate as a patient, but failed to use ordinary care and skill in the diagnosis and treatment of said patient so as to ascertain the extent of his injuries and failed to make an X-ray examination of the head of plaintiff's intestate. That after keeping the unconscious man in the hospital for a short period of time the defendant abandoned the treatment of the injured man and directed that he be returned to his home, a distance of about eight miles, and that a few days thereafter plaintiff's intestate died as a result of concussion of the brain, and this action was instituted to recover damages upon the theory that the de-

fendant had failed to make a proper examination of plaintiff's intestate in order to discover the extent of his injuries and had negligently abandoned the treatment of his patient.

The defendant filed an answer denying that he had accepted the plaintiff as a patient and further alleging that plaintiff was brought into his hospital temporarily, in an intoxicated and unconscious condition, and that the companions of the injured man took him home with instructions from the defendant to return him to the hospital after he was sober, but that he was never returned to the hospital and the defendant never requested to render any treatment.

The testimony tended to show that Conie Childers, after being thrown from the car, was taken to the hospital of defendant in Hickory by two or three of his companions. The narrative of the event is as follows: We drove up in front of the hospital. Lowman blew his horn and a lady came out. He said, "We have a patient for you." She said, "Drive around to the other side," and we drove up and she rolled a carriage out and laid him on it. She said, "Is he drunk?" I said "No, he might have been drinking, but he is not drunk." I went into the operating room and Dr. Frye and Chief Lentz and some other policemen were all in the operating room. Dr. Frye said, "You can take him on home or I will turn him over to the policemen." He was talking to me. I do not remember whether Mr. Lowman was in there at the time, but the nurse was in there. I said, "I will take him home." Mr. Lentz said, "Since you are from Burke County, I will let you take him home." Dr. Frye had said, "You can take him home or I will turn him over to the police; I cannot keep him." And I said, "I will take him home." We rolled him on the outside, or I had the nurse to roll him out. . . . I did not hear Dr. Frye say anything about bringing him back to the hospital if he did not get better. . . . He was unconscious all the way home. We got home with him about six o'clock. . . . I either told the nurse or Dr. Frye that he was slung off the truck against a telephone pole, but I do not remember which one. After we got him home, I next saw him about an hour and a half later when Dr. Flippin got there. I don't know whether Conie Childers had had a drink, but he talked like it. I told the woman at the hospital that he might have been drinking, but that he was not drunk. I had heard him talk like a drunk man, and came to the conclusion that he was drinking. . . . I did not ask Dr. Frye to examine him, and neither Lowman nor Mostellar asked him in my presence. . . . Dr. Frye told me that we could take him home or he would have to turn him over to the police officers; that he could not keep him. Another witness for plaintiff testified that when Dr. Frye came to the hospital and saw the injured man he said, "Do you know this young man?" I said, "Yes, sir." He said,

"Is he capable of drinking?" I said, "No, not as I know of much." I have seen him with a drink in him. Dr. Frye said, "He is drinking now," and he called me up there to smell his breath, which I did, and I smelled just a little touch of it—just could smell something or another that smelled like it. He was dressing his right eye when I went in and he got through with that, and then he examined his arms while he was in there, worked them up and down, and his legs, and felt over his head and says, "That is all we can do. Take him home or I will turn him over to the cops."

There was further evidence tending to show that in a few hours after Conie Childers reached his home Dr. Flippin was called to treat him, and later on Dr. Corpening. Both of these physicians were examined in behalf of plaintiff, and both were physicians of note and accepted repute and skill.

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

D. L. Russell and D. L. Russell, Jr., for plaintiff.
Johnson, Smathers & Rollins for defendant.

BROGDEN, J. There are only two exceptions in the record. The first is to the ruling of the trial judge sustaining the motion for nonsuit, and the other is entirely formal. Therefore, the question of law to which all others are subsidiary is whether there was sufficient evidence to be submitted to the jury tending to establish the relationship of physician and patient between the deceased and the defendant. The duties which a physician owes to his patient have been established by several decisions, notably *Long v. Austin,* 153 N. C., 508; *Mullinax v. Hord,* 174 N. C., 607; *Brewer v. Ring,* 177 N. C., 476; *Thornburg v. Long,* 178 N. C., 589; *Nash v. Royster,* 189 N. C., 408; *Smith v. Wharton,* 199 N. C., 246. These principles, however, apply when the professional relationship has been established. "A physician or surgeon is not bound to render professional services to every one who applies, and he may, therefore, by notice or special agreement, limit the extent and scope of his employment. Such is the simple law of contract." *Nash v. Royster, supra.* Of course a physician or surgeon could not make a contract with an unconscious man, and hence the ultimate test of liability would depend upon whether the physician actually accepted an injured person as a patient and undertook to treat him. Upon conflicting testimony, such undertaking or acceptance would ordinarily raise an issue for the determination of a jury. In the case at bar all the evidence tends to show that when the injured man was brought into the hospital that the defendant looked him over, and upon discovering

that the patient had been drinking, declined to accept him as a patient or to undertake the necessary treatment. Conceding that the defendant was not justified in assuming that Conie Childers was drunk, still the law did not compel him to accept the injured man as a patient.

Moreover, there is no evidence tending to show that the refusal of defendant to accept plaintiff's intestate as a patient or to make a more thorough examination was the proximate cause of his death. Indeed, the patient was treated by two physicians possessing and employing, so far as the record discloses, the requisite skill and care.

Affirmed.

L. A. CRISP AND WIFE, MARTHA CRISP, v. NANTAHALA POWER AND LIGHT COMPANY.

(Filed 15 June, 1931.)

1. Eminent Domain B b—Power of eminent domain is given to public service corporations, but statutory procedure should be followed.

A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines under the provisions of our statute, C. S., 1706, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedure.

2. Appeal and Error J g—Assignments of error relating to issue not answered held to have become immaterial on this appeal.

Where, in an action for damages for the taking of land by a power company for its transmission lines, the jury has answered the issue as to wrongful entry in the affirmative, but has failed to answer to issue as to damages therefor, and has assessed permanent damages for the land taken: *Held*, all objections and exceptions upon the trial relating to the wrongful entry by the defendant become immaterial.

3. Eminent Domain C c—Evidence of use to which land could have been put except for taking of contiguous land held competent.

In assessing damages for the taking of the land of a private owner by a public service corporation for the erection of transmission lines, entire and full compensation for its permanent use should be awarded, and witnesses acquainted with the facts are properly allowed to testify as to the use to which the lands contiguous to that taken could have been put, except for the taking, within reasonable bounds, not including those that are imaginative or merely speculative, and such evidence is competent on the question of damages, and the fact that the transmission line was to carry a highly dangerous voltage of electricity is a competent circumstance to be considered by the jury.

4. Eminent Domain C b—Placing of transmission line on railroad right-of-way is additional burden on land for which owner is entitled to compensation.

In assessing damages to be awarded the private owner of lands for its taking for a permanent use by a power company for the maintenance of transmission line, its erection upon a right of way of another public service corporation is a superimposed burden upon the title of the owner, for which compensation should be awarded.

APPEAL by defendant from *Moore, J.*, and a jury, at March Term, 1931, of GRAHAM. No error.

This is an action brought by plaintiffs against the defendant for the possession of certain land, alleged to be owned by them, which defendant took possession of without their consent and built a hydro-electric line across a portion or part of their land, to the damage of plaintiffs. It is alleged by plaintiffs that defendant, for the purpose of transferring the power from Santeetlah to its proposed dam site at Nantahala constructed the transmission line across their land during the months of January and February, 1930, and the defendant, through its servants, agents and employees wilfully, unlawfully and forcefully, and after being forbidden, entered and trespassed upon the plaintiffs' premises, dragging poles and rubbish, digging holes and erecting poles, frames and braces thereon, on which it strung over plaintiffs' land wires and cables for carrying high and dangerous voltages of electricity, and since completion of its said transmission has turned on and caused continually to pass over and through the said land over plaintiffs' premises a high, dangerous current voltage of electricity, making the premises unsafe, rendering it unfit for subdivision, development, erection of buildings, trees or other usage which would be to plaintiffs' advantage and profit, and all to plaintiffs' great damage, etc. That while a part of the said transmission line is located on the railroad right-of-way, it results in an increased burden to plaintiffs' land, and defendant had no right without plaintiffs' consent to use the railroad right-of-way for said purposes as they are informed and believe, and that a part of the said transmission line is on plaintiffs' premises and outside of the railroad right-of-way.

The defendant denied some of the material allegations of the complaint, and says: "That it is a public service corporation, duly chartered and organized under the laws of the State of North Carolina; that its principal office and place of business is in Bryson City, in said State; that it is engaged in the development and production of hydro-electric energy and the distribution, use and sale of the same to the public; that it is developing, maintaining, and constructing hydro-electric current in the counties of western North Carolina, and furnishing and distributing electric current to the general public in the towns

of Robbinsville and Andrews, and is preparing to supply current to other users in the State; that it intends in good faith to increase its production and distribution of hydro-electric current, and that in order to insure a constant supply of electric current to its consumers in the towns of Andrews and Robbinsville and at other places in the counties of Cherokee and Graham, and other territory adjacent thereto, and in order to guarantee a constant supply of current to all users of the same connected with and tributary to its plants, it has constructed a transmission line connecting its plant on Hiawassee River with the Santeetlah power house of Tallassee Power Company in Graham County, from which company it has a contract for power in case of breakdown of its Hiawassee plant, or lack of current for its customers. . . . That it is advised and believes that it had the right, as a public service corporation, under the laws of the State of North Carolina, to construct its said lines across and upon the lands of the plaintiffs, and to remove such obstructions on said land as might interfere with the use of the same, and that if the plaintiffs own an interest and can establish title to the lands described in their complaint, that this defendant stands ready and willing to pay them such permanent damage as they may have sustained by reason of the construction, maintenance and use of said transmission line."

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

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

2. Did the defendant enter upon said lands of plaintiffs and dig holes, place poles, string wire thereupon in the construction of an electric transmission line as alleged in the complaint? Answer: Yes.

3. If so, was such entry of the defendant wilful, wanton and wrongful? Answer: Yes.

4. What damage, if any, are plaintiffs entitled to recover of the defendant by reason of said wilful, wanton and wrongful acts and conducts? Answer: .....

5. Have plaintiffs' said lands been diminished in value as result of the location, erection and maintenance of the defendant's transmission line over and across said lands? Answer: Yes.

6. If so, what permanent damage or compensation are plaintiffs entitled to recover of the defendant by reason thereof? Answer: $1,000."

The court below signed judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

T. M. Jenkins for plaintiff.

R. L. Phillips and S. W. Black for defendant.

CLARKSON, J. Under "Eminent Domain," chapter 33, C. S., 1706, is the following: "The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporations, or persons following: . . . (3) Persons operating or desiring to operate electric light plants, for the purpose of constructing and erecting wire or other necessary things."

Under said chapter the procedure for condemnation of land for public purposes is provided for. The defendant had a right, under the above law, to condemn plaintiffs' land, and the issues in such a case are set forth in *Light Co. v. Reeves,* 198 N. C., at p. 409. Instead of pursuing the orderly procedure provided by law, defendant went on plaintiffs' land without their permission and erected its poles and transmission lines, contrary to all law. Plaintiffs sued for this wrong and defendant in its answer says that "This defendant stands ready and willing to pay to them such permanent damage as they may have sustained by reason of the construction, maintenance, and use of said transmission line."

The court below tendered other issues and also issue 6, which is as follows: "If so, what permanent damage or compensation are plaintiffs entitled to recover of the defendant by reason thereof?"

The defendant tendered a sole issue, practically as above, relating to compensation or permanent damage. The jury under this issue assessed the permanent damage as $1,000. The jury answered the third issue that defendant's entry was wilful, wanton and wrongful, but assessed no damage against defendant for its wanton and wilful conduct as found by the jury; therefore, all exceptions and assignments of error in regard to the evidence and charge of the court below on this aspect becomes immaterial and not necessary to be considered on this appeal.

The defendant contends that several witnesses were allowed to give their opinion as to the purpose for which the lands are adapted or suitable and to give an opinion of its decreased value. We see no objection to the competency of this character of evidence.

Brown v. Power Co., 140 N. C., 333, is similar to the case at bar. At page 341-2, it is said: "It is well settled that when, for the purpose of meeting and providing for a public necessity, the citizen is compelled to sell his property or permit it to be subjected to a temporary or permanent burden, he is entitled by way of compensation, to its actual market value. Lewis on Eminent Domain, sec. 478. The difficulty arises not so much in fixing the standard of the right, as in ascertaining what elements or factors may be shown in applying the standard. Certainly where by compulsory process and for the public good the

State invades and takes the property of its citizens, in the exercise of its highest prerogative in respect to property, it should pay to him *full compensation.* The highest authorities are to that effect. 'The market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered and not merely the condition it is in at the time and the use to which it is then applied by the owner.' Lewis Eminent Domain, *supra.*"

This principle is also set forth in the citations made by defendant in *R. R. v. Mfg. Co.,* 169 N. C., 164, and under chapter on Eminent Domain, 10 R. C. L., p. 130.

Also the question of damage by private property being taken for public purposes is fully discussed in *Ayden v. Lancaster,* 195 N. C., 297. All these authorities are to the effect, as set forth in *R. R. v. Mfg. Co., supra.* "But mere possible or imaginary uses or the speculative scheme of its proprietor are to be excluded."

The defendant contends that some of the transmission poles were on the right-of-way of the railroad company, but the fee-simple title being in plaintiff the law is set forth in *Rouse v. Kinston,* 188 N. C., at p. 11, as follows: "In the present case the defendant denies the right of plaintiff to recover damages for the pipe line running along the State Highway, No. 10, plaintiff having a fee-simple title to the land. In *Teeter v. Tel. Co.,* 172 N. C., 785, it is said: 'It is not denied by defendant that the telegraph line superimposed upon a railroad right-of-way is an additional burden which entitled the owner to compensation. *Hodges v. Tel. Co.,* 133 N. C., 225; *Phillips v. Tel. Co.,* 130 N. C., 513.' To the same effect is a water main."

The evidence covered a wide range, but we do not think it was so remote, conjectural or speculative that we could hold it, if error, reversible or prejudicial. We think the evidence that the power line over the property carried 66,000 volts, a circumstance to be considered by the jury. *R. R. v. Mfg. Co.,* 169 N. C., 156.

In *Greensboro v. Bishop,* 197 N. C., at p. 754, it is said: "In this character of evidence (value standards) no ironclad rule can be laid down. The relevancy is largely with the court below, the probative force is for the jury."

The right-of-way taken by defendant company was 50 feet from the center of the transmission line on both sides. The line ran 1,200 feet from the point where it entered plaintiffs' land to the point where it left it.

On the entire record we see no reversible or prejudicial error.

No error.

G. W. SHIRLEY v. N. B. AYERS AND MRS. EULA SHIRLEY.

(Filed 15 June, 1931.)

1. **Highways B a—Driver may assume that another driver will take right side of road in passing, there being nothing to indicate disability.**

A driver of an automobile upon a public highway has a right to assume that another driver coming towards him will observe the rule in passing, and will turn to the right to avoid a collision when there are no indications that he is under any physical disability, and under the evidence in this case an instruction is held correct that if the defendant was running to the right of the center of the highway and met the plaintiff's car, it was not the duty of the defendant to turn further to his right even though he could have done so, he having the right to assume that the other driver would take his rightful position in passing. N. C. Code of 1927 (Michie), sec. 2621(53).

2. **Husband and wife B d—Husband may sue wife for tort committed prior to marriage, the subsequent marriage not affecting her liability.**

Where prior to their marriage the wife incurs liability for a negligent injury to the husband: *Held*, the subsequent marriage does not affect her liability, and the question of law relating to the right of a husband to sue his wife in tort is not presented, and a motion as of nonsuit based upon the marriage relationship is improvidently granted. C. S., 2517, 454.

APPEAL by plaintiff from *McElroy, J.*, at October Term, 1930, of UNION. No error as to N. B. Ayers; reversed as to Mrs. Eula Shirley.

This is an action to recover damages for personal injuries sustained by plaintiff, resulting from a collision between two automobiles, one owned by the defendant, N. B. Ayers, and the other owned by the defendant, Mrs. Eula Shirley.

The collision occurred on a State highway in Union County, about 6:30 p.m. on 26 December, 1929. At the time of the collision, the defendant, N. B. Ayers, was driving the automobile owned by him; Horace Yandle, a step-son of the defendant, Mrs. Eula Shirley, was driving the automobile owned by her, as her chauffeur. The defendant, Mrs. Eula Shirley, was riding in her automobile, with the plaintiff as her guest. They were on the rear seat with Mrs. L. L. Sears, a sister of Mrs. Shirley. Woodrow Burns and Parker Wilson were on the front seat of her automobile with Horace Yandle, the driver.

In his complaint plaintiff alleges specific acts of negligence on the part of the driver of each of the automobiles, as the proximate cause or causes of the collision. These allegations are denied in the answer of each of the defendants. Each defendant alleges that the collision, with the resulting injuries to plaintiff, were caused by the negligence of the driver of the other automobile.

As the result of the collision, plaintiff sustained serious and painful injuries by reason of which he has suffered damages.

After the pleadings had been read at the trial, the plaintiff admitted in open court that at the time the action was begun, plaintiff and defendant, Mrs. Eula Shirley, were, and that they are now, husband and wife. They were married on 30 March, 1930, after the collision which resulted in plaintiff's injuries, which occurred on 26 December, 1929. This action was begun on 12 May, 1930. It was agreed that the facts admitted by the plaintiff should be deemed to have been alleged in his complaint to the same extent as if they had in fact been alleged therein.

After the foregoing admission and agreement by the plaintiff, the defendant, Mrs. Eula Shirley, demurred *ore tenus* to the complaint, and moved that the action be dismissed as to her, for that on the facts alleged in the complaint, and admitted by the plaintiff at the trial, plaintiff cannot maintain this action against her. The demurrer was sustained, and the action dismissed as to the defendant, Mrs. Eula Shirley.

The action was then tried on issues submitted to the jury involving the liability of the defendant, N. B. Ayers, to the plaintiff, for the damages which he had suffered as the result of the collision.

The jury found that the plaintiff was not injured by the negligence of the defendant, N. B. Ayers, as alleged in the complaint.

From judgment that plaintiff recover nothing of the defendant, N. B. Ayers, and that said defendant recover his costs of the plaintiff to be taxed by the clerk, plaintiff appealed to the Supreme Court.

John C. Sikes for plaintiff.
Vann & Milliken for defendant, N. B. Ayers.
Taliaferro & Clarkson for defendant, Mrs. Eula Shirley.

CONNOR, J. At the trial of this action on the issues submitted to the jury, there was evidence tending to show that as the automobile driven by the defendant, N. B. Ayers, approached the automobile driven by Horace Yandle, the defendant's automobile, immediately before its collision with the Yandle automobile, was on the right side of the highway, and was proceeding at a rate of speed not in excess of twenty-five miles per hour; that the automobile driven by Horace Yandle, coming from the opposite direction, was approaching defendant's automobile at a rate of speed not less than fifty miles per hour; and that as said automobile approached defendant's automobile, it was in the middle of the highway. The defendant proceeded on the right side of the highway, thinking that the driver of the approaching automobile would turn to the right before the automobiles met. When he was about ten feet from

the approaching automobile, defendant realized for the first time that its driver was not going to turn to his right. He then turned his automobile sharply to his right, toward the shoulder beyond the pavement. This was too late. The Yandle automobile struck the front wheel of defendant's automobile, causing it to swerve to the left. The Yandle automobile went across the road, jumped a ditch and turned over in the field. The plaintiff, who was riding on the rear seat of the Yandle automobile, as the guest of the owner, who was also in the automobile, was injured when it turned over.

In the charge to the jury, the court instructed them as follows:

"The court further charges you, gentlemen of the jury, that if the jury shall find from the evidence that the defendant Ayers was operating his automobile to his right of the center of the highway, and that the automobile occupied by the plaintiff Shirley was meeting him, being driven in or near the middle of the highway, then the court charges you that it would not be the duty of the defendant Ayers to turn his automobile further to his right, even though he may have had room to do so and avoid the accident, for the defendant had the right to assume, up to the point of the collision, that the automobile occupied by the plaintiff would assume its proper and rightful position in passing."

Plaintiff having duly excepted to this instruction, on his appeal to this Court, assigns same as error.

The rule to be observed by the driver of an automobile, when he approaches another automobile, coming from the opposite direction, on a public highway in this State, in order that the automobiles may pass each other in safety, is prescribed by statute, section 10, chapter 148, Public Laws 1927, N. C. Code, 1927, sec. 2621(53). The rule is as follows:

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible."

The driver of each automobile, who is himself observing the rule, has the right, ordinarily, to assume that the driver of the other automobile will also observe the rule, and thus avoid a collision between the two automobiles when they meet each other. Neither is under a duty to the other to anticipate a violation of the rule by him. When the driver of one of the automobiles is not observing the rule, as the automobiles approach each other, the other may assume that before the automobiles meet, the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety. "One is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption, that others

will exercise ordinary care for their own safety." 45 C. J., 705. "A person operating an automobile has the right to act upon the assumption that every person whom he meets will also exercise ordinary care and caution according to the circumstances, and will not negligently or recklessly expose himself to danger, but rather make an attempt to avoid it; but when an operator of a motor vehicle has had time to realize, or by the exercise of a proper care and watchfulness should realize, that a person whom he meets is in a somewhat helpless condition or apparently unable to avoid the approaching machine, he must exercise increased exertion to avoid a collision." 2 R. C. L., 1185. In the instant case, in the absence of any evidence tending to show that the driver of the approaching automobile was in a helpless condition, or was apparently unable to turn his automobile to his right, and thus avoid a collision with the automobile which defendant was driving on his right side of the highway, there was no error in the instruction, which plaintiff contends was erroneous.

Plaintiff's contention on his appeal to this Court that there is error in the judgment dismissing the action as to the defendant, Mrs. Eula Shirley, for the reason that she is now and was at the commencement of this action his wife, must be sustained. The question presented by this contention is not whether a husband may maintain in this State an action against his wife for damages resulting to him from her negligence, where the cause of action arose during the coverture. A decision of this question would require serious consideration not only of constitutional and statutory provisions in force in this State, affecting the mutual rights and liabilities of a husband and wife, but also of matters of grave public policy as determined by such provisions. This question has not heretofore been presented to this Court. Manifestly it cannot and ought not to be decided on this appeal. The question was presented to the Supreme Court of California in *Peters v. Peters,* 103 Pac., 219. In that case it was held that under the law in California, neither a husband nor a wife can sue the other for personal wrongs inflicted during the marriage. This seems to be the only case in which this question has been decided.

It has been held by this Court, however, that because of constitutional and statutory provisions in force in this State, materially modifying, if not abrogating the common-law doctrine that because of the fiction as to the unity of husband and wife, neither can maintain an action against the other, a wife may maintain an action against her husband in this State and recover thereon, whether the action is founded on contract or on tort, where the cause of action arose during the coverture. Thus in *Etheredge v. Cochran,* 196 N. C., 681, 146 S. E., 711, referring to Article X, section 6 of the Constitution of this State, and

to certain cited statutes, it is said by *Adams, J.*: "By virtue of these and other provisions the relation which married women formerly sustained to their husbands has been materially modified. Unity of person in the strict common-law sense no longer exists, and many of the common-law disabilities have been removed. Not only may they contract with each other; a married woman may now sue her husband in contract or in tort. *Dorsett v. Dorsett,* 183 N. C., 354, 111 S. E., 541; *Roberts v. Roberts,* 185 N. C., 566, 118 S. E., 9." See, also, *Crowell v. Crowell,* 180 N. C., 520, 105 S. E., 206, and 181 N. C., 66, 106 S. E., 149.

In the instant case, the cause of action alleged in the complaint arose, and defendant incurred liability to plaintiff thereon, prior to her marriage to plaintiff. Her liability to plaintiff was not impaired or altered by her subsequent marriage. It is so expressly provided by statute, C. S., 2517. It is also provided by statute that where an action is between a married woman and her husband, she may be sued alone. C. S., 454. In view of these statutes, we are of the opinion that there was error in the judgment dismissing the action as against the defendant, Mrs. Eula Shirley. The judgment is therefore reversed. The action is remanded to the Superior Court of Union County for trial on the issues raised by the pleadings.

No error as to N. B. Ayers.

Reversed as to Mrs. Eula Shirley.

W. W. MITCHELL, CHAIRMAN; C. M. BLAYLOCK, GEORGE M. TROSTEL, MRS. J. H. KIRKPATRICK, AND MRS. C. F. RHINEHART, TRUSTEES OF CANTON GRADED SCHOOL DISTRICT, v. THE BOARD OF EDUCATION OF HAYWOOD COUNTY, A BODY CORPORATE; G. C. PLOTT, CHAIRMAN; H. A. OSBORNE AND J. H. HAYNES, MEMBERS.

(Filed 15 June, 1931.)

Schools and School Districts D c—Title to certain property not used for school purposes by enlarged district held to remain in county board.

Where under the provisions of N. C. Code of 1927 (Michie), sec. 5490(1), several school districts have been included in an enlarged district, and certain property in the former districts is not necessary to be used for school purposes in the enlarged district because of new consolidated schools therein, and the trustees of the enlarged district have not assumed any debt on such property: *Held,* under the express provisions of the statute the title to such property remains in the county board of education, the statute providing that the county board should execute a deed to the trustees of the district for all school property in the district

"except property maintained by the county for other district purposes, the debt for which property has not been assumed by the new district," and the provisions of the exception, being clear and unambiguous, must be given effect.

APPEAL by plaintiffs from *Moore, J.*, heard at Chambers 18 March, 1931, at Robbinsville, Graham County. From HAYWOOD. Affirmed.

The judgment, based upon an agreed case, in the court below, is as follows: "This cause coming on to be heard, and being heard before his Honor, Walter E. Moore, resident judge of the Twentieth Judicial District, at his Chambers in Robbinsville, Graham County, N. C., on 18 March, 1931, and upon an agreed case, the same being submitted pursuant to section 626, C. S. of North Carolina; and it appearing to the court and the court finds as a fact from the case agreed that there is a real controversy between the plaintiffs and defendants which should be judicially determined, and the court further finds from the case agreed that the Canton Graded School District was originally a Special Charter District, and that the district was originally coterminous, with the corporate limits of the town of Canton, and that an election was held in the territory now constituting the Canton Graded School District, for the enlargement of said district and for the purpose of issuing bonds, and assuming certain bonded indebtedness of the original Canton Graded School District and the indebtedness of the Patton District which is now included in the enlarged district, and that the election was duly carried and that the newly created and enlarged district assumed the indebtedness of the old Canton Special Charter District, and the indebtedness of the Patton District which is now embraced by the enlarged district, and that there was no indebtedness on the other district that are now included in the enlarged district, and that the trustees of the enlarged district issued bonds and erected a Central High School building for said district, and two other buildings for the lower grades; and that the districts known as Austin's Chapel, Beaverdam, North Hominy, Dutch Cove and Noah's Chapel were used for school purposes by the county until the end of the school year 1929-1930; and that the Thickety School property was used for school purposes up to and including the school year 1930-1931. And it further appearing to the court that the county board of education of Haywood County has already conveyed by deed to the trustees of Canton Graded School District as enlarged, all the said property on which is located any building now being used for school purposes in said enlarged district, but have not conveyed the property in controversy in this action. The court being of the opinion that under section 5490(1) of the Consolidated Statutes that upon the consolidation and enlargement of said school district that the title to all the school property in said district,

both real and personal, that was not used by the new district, remained the property of the county board of education of Haywood County, and that the title to said property did not vest in the trustees of said new district. It is therefore considered, ordered and adjudged and decreed that the school property real and personal described in the agreed case as Thickety, Austin's Chapel, Beaverdam, North Hominy, Dutch Cove and Noah's Chapel, is the property of the board of education of Haywood County, and that the said board of education of Haywood County has the right and authority to sell and convey said land in fee simple, and it is further ordered and adjudged that the trustees of the new district have no interest in said property as described in the agreed case. That the plaintiffs pay the cost of the action to be taxed by the clerk."

The only exception and assignment of error is to the signing of the judgment. The necessary facts will be considered in the opinion.

S. M. Robinson for plaintiff.
Grover C. Davis for defendant.

CLARKSON, J. The question involved in this appeal: Does the title to the school property owned by the board of education of Haywood County pass to the trustees of the New Enlarged Special School District under section 5490(1), N. C. Code, 1927, Anno. (Michie), Public Laws 1924, ch. 131, sec. 12, when the district has been enlarged and the trustees of the said new district have sufficient property turned over to it for its new school purpose and elect not to use the six pieces of property in controversy owned by the board of education of Haywood in said new district for school purposes as soon as said trustees could officially act as trustees of the said new district. Who owns the six lots of land described in the agreed case? We think the board of education of Haywood County.

N. C. Code, 1927, Anno. (Michie), sec. 5490(a), Public Laws N. C., 1924, ch. 131, sec. 1, is as follows: "It shall be lawful to create school districts, whether the same be enlargements of existing school districts or not, in the manner provided by this article." In subsequent sections the procedure is provided for. In creating the new enlarged school district the statute has been complied with, but this controversy involves a construction of a section of the statute since the district has been created.

The fee simple to the six pieces of land in controversy is in the board of education of Haywood County. The board of education has conveyed to the trustees of the new enlarged Special Charter School District all land necessary on which is located the new school buildings. The facts show that the trustees of the new enlarged Special Charter School District are not now using the six pieces of property in controversy, and

"do not deem it necessary to use said property hereafter for public school purposes." These six pieces before the creation of the new district were used for school purposes.

The statute above mentioned (Michie, *supra,* sec. 5490(1), is as follows: "When the new district shall come into existence as hereinbefore provided, all school property, real and personal within the same, *except property maintained by the county for other than district purposes, the debt for which property has not been assumed by the new district* shall automatically pass in the case of a new special charter district to the board of trustees thereof, and in the case of a local tax district, to the county board of education for the use of the district, but it shall nevertheless be the duty of all boards and bodies holding any such property to convey the same formally by deed and other proper conveyance and every such deed shall be promptly recorded."

The statute is not clear, and if the exception was not in it *"except property maintained by the county for other than district purposes, the debt for which property has not been assumed by the new district,"* etc., there would be no question that this statutory transfer could be made for another public purpose—the new enlarged Special Charter School District. *Greensboro v. Simpson,* 188 N. C., 737.

The new district has come into existence, and the board of trustees of the new enlarged district have had all the land transferred to it within the same by the board of education needed for its present school purposes, except the property in controversy—some six pieces former school districts—that had theretofore been maintained by the county board of education, and is not now needed for the enlarged Special Charter School District purposes. We think it remains the property of the board of education. The only assumption of debt was that of the Canton Special Charter District and the Patton District. No debts were assumed by the new enlarged Special Charter School District on the six pieces of property in controversy. The plaintiffs contend that the above construction would be unfair, to the new enlarged Special Charter School District, as it carried the burden, but does not get the benefits of the proceeds of the sale of these six pieces of property to aid in this consolidation, which it is the manifest intention of the General Assembly to encourage. We cannot construe the exception ambiguous and meaningless, when a reasonable construction can be given it, although it may work a hardship. The judgment below is

Affirmed.

W. C. BATEMAN v. T. W. STERRETT, TRUSTEE, ET AL.

(Filed 15 June, 1931.)

1. **Constitutional Law E b—Provisions prohibiting impairment of obligations of contract include all means for enforcement.**

The constitutional provisions against the impairment of the obligations of a contract include all means and assurances available for the enforcement of the contract at the time of its execution, and any unreasonable alteration of the remedies available which enlarges, abridges, or in any manner changes the intention of the parties is prohibited, but a statute that merely facilitates the intention of the parties does not come within the constitutional prohibition. State Constitution, Art. I, sec. 17, Federal Constitution, Art. I, sec. 10.

2. **Contracts B a—General laws in force at time of execution of contract become a part thereof.**

The general laws of the State in force at the time of the execution of a contract enter into and become a part thereof.

3. **Constitutional Law E b — Statutory provision for substitution of trustees in deeds of trust is constitutional and valid.**

Where a deed of trust is executed after the effective date of C. S., 2583, providing for the removal and substitution of trustees in deeds of trust, the provisions of the statute enter into and become a part of the contract, and a later statute providing a more economical and expeditious procedure for such substitution, so long as the rights of the parties, especially those of the *cestui que trust*, are not injuriously affected, does not violate the constitutional provisions, and in this case a substitution under the provisions of the act is upheld.

4. **Statutes A c—Retroactive statutes are valid unless they impair obligations of contract or disturb vested rights.**

Neither the State nor the Federal Constitution prohibits the passage of retrospective or retroactive laws, as distinguished from those that are *ex post facto*, unless they impair the obligations of contracts or disturb vested rights, and no person has any vested right in procedure.

APPEAL by W. C. Bateman *et al.* from *Daniels, J.*, at April Term, 1931, of ROBESON.

Civil action to determine validity of removal and substitution of trustee in deed of trust under the provisions of a recent act of the General Assembly, Senate Bill No. 67, ratified 6 March, 1931, ch. 78.

This act provides that in addition to other existent rights and remedies, "the holder and/or owner of all or a majority, in amount, of the indebtedness, notes, bonds, . . . secured by mortgages, deeds of trust . . . may . . . substitute a trustee by the execution (and registration) of a paper-writing (to be certified by the clerk of the

Superior Court) whenever it shall appear that the trustee then named in such mortgage, deed of trust . . . has removed from the State, become incompetent to act . . . or has been declared a bankrupt," etc.

It is further provided by said act that whenever the right of substitution given therein "is exercised in respect to any deed of trust, mortgage or other interest creating the lien which was executed prior to the ratification of this act," any person interested may appeal from the findings of the clerk of the Superior Court where the matter shall be heard *de novo*, with the further right of appeal to the Supreme Court.

It is conceded that the provisions of this statute have been observed in the instant case; and that, if valid, the judgment is correct, as the facts bring it within its terms.

The specific facts are that on 21 April, 1926, W. C. Bateman executed and delivered to the Chicamauga Trust Company, trustee, a deed of trust on certain lands in Robeson County, to secure a $1,000-note executed to The Prudential Insurance Company of America.

The Chickamauga Trust Company was adjudged a bankrupt 20 December, 1930, and is still in bankruptcy. Frank A. Nelson is its trustee in bankruptcy.

On account of the bankruptcy of the said trustee, T. W. Sterrett was duly substituted in its stead under the provisions of the act aforesaid. The appeal challenges the validity of this act as applicable to the present facts.

W. C. Bateman, the trustor, and Frank A. Nelson, trustee in bankruptcy of Chicamauga Trust Company, and the Chicamauga Trust Company appeal, assigning errors.

Vernon Townsend and Henry A. McKinnon for W. C. Bateman, appellant.

David H. Fuller for Chicamauga Trust Company and Frank A. Nelson, trustee in bankruptcy of Chicamauga Trust Company, appellants.

Varser, Lawrence & McIntyre, McLean & Stacy and Junius J. Goodwin for T. W. Sterrett, substituted trustee, and the Prudential Insurance Company of America, appellees.

STACY, C. J. We have no hesitancy in holding that the act in question is not subject to successful challenge on the ground that it is a law "impairing the obligation of contracts" within the meaning of the constitutional provisions on the subject. Art. I, sec. 10, U. S. Const.; Art. I, sec. 17, N. C. Const. This is the only point raised by the appeal.

In the first place, the right of removal and substitution of trustees in deeds of trust existed at the time of the execution of the Bateman-Chicka-

mauga-Prudential deed of trust. C. S., 2583; *McAfee v. Green,* 143 N. C., 411, 55 S. E., 828; *Trust Co. v. Padgett,* 194 N. C., 727, 140 S. E., 714.

True, the provisions of mortgages and deeds of trust are contractual. *Mitchell v. Shuford,* 200 N. C., 321; *Brown v. Jennings,* 188 N. C., 155, 124 S. E., 150; *Eubanks v. Becton,* 158 N. C., 230, 73 S. E., 1009. And the obligation of a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for the enforcement of the contract at the time of its execution. *Green v. Asheville,* 199 N. C., 516, 154 S. E., 852; *Barnes v. Barnes,* 53 N. C., 366; *Jones v. Crittenden,* 4 N. C., 55; 6 R. C. L., 324, *et seq.* But it is also true that the laws in force at the time of the execution of a contract enter into and become a part of the convention of the parties. *Trust Co. v. Hudson,* 200 N. C., 688; *House v. Parker,* 181 N. C., 40, 106 S. E., 137; *Mfg. Co. v. Holladay,* 178 N. C., 417, 100 S. E., 597.

As pertinent and illustrative of this principle may be instanced *Clark v. Reyburn,* 8 Wall., 322, where it was said that the remedy provided by statute for the foreclosure of a mortgage, in existence at the time of its execution, enters into and becomes a part of the contract of the parties, and any change by legislative action, which substantially and materially affects this remedy to the injury of the mortgagee, is a law "impairing the obligation of contracts," within the meaning of the constitutional provision on the subject; and *Brine v. Ins. Co.,* 96 U. S., 627, where it was held that a statutory right of redemption, existent at the time of the making of a mortgage, enters into and becomes a part of its terms. See 6 R. C. L., 365, and cases there cited.

With the right of removal and substitution of trustees in deeds of trust given by statute at the time of the execution of the instrument in question, which entered into and became a part of the agreement of the parties, we see no valid objection to a procedural change in the method provided for the enforcement of this right, so long as the rights of the parties, and especially those of the *cestui que trust,* are not injuriously affected thereby. 6 R. C. L., 356. "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights." *Martin v. Vanlaningham,* 189 N. C., 656, 127 S. E., 695; *Dunn v. Jones,* 195 N. C., 354, 142 S. E., 320; *Statesville v. Jenkins,* 199 N. C., 159, 154 S. E., 15. The 1931 act provides for registration, hearing, right of appeal, etc.

It is recognized that any unreasonable alteration in the remedies afforded by the *lex loci contractus* at the time of the making of a contract is prohibited by the contract clause of the Constitution. *Green v. Biddle,* 8 Wheat., 1. And a law which enlarges, abridges, or in any

manner changes the intention of the parties, though professing only to regulate the remedy, necessarily impairs the obligation of the contract. *S. v. Carew,* 13 Rich. L. (S. C.), 498, 91 Am. Dec., 245. But a statute which facilitates the intention of the parties neither impairs the obligation of the contract, nor divests vested rights. *Nat. Surety Co. v. Architectural Co.,* 226 U. S., 276; *Lowe v. Harris,* 112 N. C., 472, 17 S. E., 539.

The law on the subject is very clearly stated by *Mr. Justice Swayne* in *Von Hoffman v. City of Quincy,* 4 Wall., 535, as follows:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces those which affect its validity, construction, discharge, and enforcement. . . . Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden . . . It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." And see *Louisiana v. New Orleans,* 102 U. S., 203; *Seibert v. Lewis,* 122 U. S., 284; *Hendrickson v. Apperson,* 245 U. S., 106; *Williams v. Suydam,* 6 Wall., 723, 18 L. Ed., 967.

The result of the decisions on the subject is, that a change in the statutory method of procedure for the enforcement or exercise of an

existent right is not prohibited by any constitutional provision, unless the alteration or modification is so radical as to impair the obligation of contracts or to divest vested rights. 6 R. C. L., 356.

The primary purpose of the act in question is, not to enlarge the substantive rights of the *cestui que trust* (though such rights are enumerated therein in greater detail), but to provide a more expeditious and economical way for the removal and substitution of trustees in deeds of trust and other instruments. We are of opinion that the act is valid as against the challenge leveled against it in the instant proceeding.

There is no provision in the Federal or State Constitution which prohibits the passage of retroactive or retrospective laws, as distinguished from those that are *ex post facto,* unless they impair the obligation of contracts or disturb vested rights. *Ashley v. Brown,* 198 N. C., 369, 151 S. E., 725; *Stanback v. Bank,* 197 N. C., 292, 148 S. E., 313.

Affirmed.

A. MARTIN v. GUILFORD COUNTY ET AL.

(Filed 15 June, 1931.)

Taxation B d—Property purchased by World War veteran with money received from Federal Government is not exempt from taxation by the State.

Where a veteran of the World War has received money as a benefit under the Federal statute, and has invested it in property in this State subject to taxation, it does not fall within the intent and meaning of the Federal statute excepting the benefit from State or Federal taxation (Title 38, U. S. C. A.), and the question does not arise as to whether Congress has the power to exempt the benefit from taxation by the State, the statute not including within its intent property acquired by investment of the money so received as a benefit, and the veteran having paid his taxes under protest is not entitled to recover it in his action under N. C. Code, 1927 (Michie), 7880(189).

APPEAL by plaintiff from *Finley, J.,* at May Term, 1931, of GUILFORD. Affirmed.

This is an action to recover of the defendants, Guilford County, and W. C. Coble, treasurer of said county, the sum of $23.77.

The said sum of money was paid by plaintiff to the sheriff of Guilford County as taxes levied by said county on property, real and personal, owned by plaintiff, and assessed for taxation for the year 1930, under and pursuant to the laws of this State.

At the time said sum was paid by him, plaintiff notified the sheriff of Guilford County, in writing, that he paid the same under protest. Within thirty days thereafter, plaintiff made demand, in writing, on the defendant, treasurer of Guilford County, for the refund of said sum of money to him. Said sum was not refunded to plaintiff within ninety days after the date of said demand. Having thus complied with the provisions of C. S., 7880(189), plaintiff began this action in the court of a justice of the peace of Guilford County, for the recovery of said sum of $23.77. From the adverse judgment of said court, plaintiff appealed to the Superior Court of Guilford County, where the action was tried, *de novo,* on a statement of facts agreed. These facts are substantially as follows:

Plaintiff and his wife, Bettie G. Martin, are the owners, as tenants by the entirety, of a certain lot of land, located in Guilford County. On 1 April, 1930, the said lot of land, with the improvements thereon, was assessed for taxation by Guilford County, under and pursuant to the laws of this State, at $2,250. The tax levied by Guilford County, on said lot of land for the year 1930, was $22.28.

Plaintiff, a resident of Guilford County, is the owner of an automobile. This automobile was assessed for taxation on 1 April, 1930, at $150. The tax levied by Guilford County on said automobile for the year 1930 was $1.49.

The total amount of the taxes levied by Guilford County, on said lot of land and said automobile for the year 1930, at the rate uniformly levied by said county on all property, real and personal, in said county, was $23.77. This sum was paid by plaintiff to the sheriff of Guilford County under protest. Plaintiff contended that said lot of land and said automobile, having been purchased and paid for by him, in part, with money received from the government of the United States, by virtue of the provisions of the acts of Congress, providing for the relief of veterans of the World War, were exempt from taxation by the State of North Carolina, or by any political subdivision of said State.

Plaintiff is a veteran of the World War. He served as a soldier in the Army of the United States, with the American Expeditionary Forces in France, and is included within the provisions of the acts of Congress for the relief of veterans of the World War. From May, 1925, to May, 1931, plaintiff received from the government of the United States, from time to time, sums of money paid to him by said government, under the provisions of the act of Congress for the relief of veterans of the World War, Parts II, III and IV of Title 38, U. S. C. A. Plaintiff applied these sums of money, or at least part of same, to the payment of the purchase price of said lot of land and of said automobile.

The provisions of the act of Congress, relied on by plaintiff in support of his contention that said lot of land and said automobile are exempt from taxation by Guilford County, under the laws of this State, are as follows:

"Assignability and exempt status of compensation, insurance and maintenance and support allowances. The compensation, insurance, and maintenance and support allowance payable under Parts II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III or IV; and shall be exempt from all taxation. Such compensation, insurance and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

The provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Part III of this chapter of his interest in such insurance to any other member of the permitted class of beneficiaries." Title 38, U. S. C. A., sec. 454, 7 June, 1924, ch. 320, secs. 22, 43 Stat., 613.

"Benefits exempt from seizure under process and taxation. No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this chapter, no adjusted service certificate, and no proceeds of any loan made on such certificate, shall be subject to attachment, levy, or seizure under any legal or equitable process, or to National or State taxation." Title 38, U. S. C. A., sec. 618, 19 May, 1924, ch. 157, sec. 308, 43 Stat., 125.

Upon consideration of the contention of plaintiff on the facts agreed, the court was of opinion that plaintiff is not entitled to recover of the defendants the sum demanded.

From judgment in accordance with this opinion that plaintiff recover nothing of the defendants by this action, plaintiff appealed to the Supreme Court.

Austin & Turner for plaintiff.

B. L. Fentress, D. Newton Farnell, Jr., and Frazier & Frazier for defendants.

CONNOR, J. The question of law presented for decision by this appeal is whether property, real or personal, located in this State, and otherwise subject to taxation under its laws, is exempt from such taxation under the laws of the United States, because said property is owned by a veteran of the World War, who purchased and paid for the same with money paid to him by the government of the United States,

under the provisions of the act of Congress for the relief of veterans of the World War. The decision of this question involves, primarily, a construction of the provisions of said act found in sections 454 and 618 of Title 38, U. S. C. A. Whether Congress has the power, under the Constitution of the United States, express or implied, to exempt property in this State from taxation under its laws, need not be discussed or decided, if these sections, properly construed, do not show that Congress had the purpose or intent to exempt such property from taxation under the laws of this State by the enactment of said sections.

This question was considered and decided by the Supreme Court of Kansas in *State ex rel. Smith, Atty.-Gen., v. Board of Commissioners of Shawnee County,* decided on 10 January, 1931, 294 Pac., 915. In that case it was held that corporate securities held by the guardian of the minor children of a deceased veteran of the World War, as assets of the estate of his wards, are not exempt from taxation under the laws of the State of Kansas, because they were purchased and paid for by said guardian with money paid to him by the government of the United States on account of a certificate of war-risk insurance issued to and held by the father of his wards at his death. In the opinion in that case it is said: "We conclude that the intervention of a guardian does not leave the pension funds still in the hands of the government so that they are still 'payable' or 'due' the ward as expressed by 38 U. S. C. A., section 454, so as to exempt them from assignment, execution or taxes, but, when paid to the guardian, the title and possession have both passed from the government, and they are no longer 'payable,' and consequently not entitled to any exemption from taxes under section 454." 38 U. S. C. A., section 618, provided that "no sum payable under this chapter to a veteran or his dependents . . . shall be subject to National or State taxation." After the "sum payable," has been paid to the veteran or his dependents, and invested in property, real or personal, otherwise subject to State taxation, the exemption provided for in section 618, is no longer applicable.

In the instant case the sum of money which was payable to plaintiff as a veteran of the World War, under the act of Congress, as compensation, insurance and maintenance and support allowance, has been paid to him; he has acquired full and unrestricted title to the money, free from any control over the same by the government of the United States; he has invested it, as he had a right to do, in the purchase of a lot of land and an automobile, which are subject to taxation by Guilford County, under the laws of this State.

We think it clear that by the enactment of sections 454 and 618, of Title 38 U. S. C. A., Congress has not undertaken to exercise any control over the property, real or personal, now owned by the plaintiff, and

that said property is not exempt from taxation by Guilford County, under the laws of this State, applicable to said property as well as to all other property in said county.

There is no error in the judgment. Plaintiff having paid the taxes lawfully levied on his property, is not entitled to recover of the defendants the sum so paid. The judgment is

Affirmed.

J. M. LAMBERT v. GUILFORD COUNTY ET AL.

(Filed 15 June, 1931.)

(For digest see *Martin v. Guilford County, ante*, 63.)

APPEAL by plaintiff from *Finley, J.*, at May Term, 1931, of GUILFORD. Affirmed.

This is an action to recover of the defendants, Guilford County and W. C. Coble, treasurer of said county, the sum of $18.07.

The said sum of money was paid by the plaintiff to the sheriff of Guilford County as taxes levied on property, real and personal, owned by plaintiff, and assessed for taxation for the year 1930, under and pursuant to the laws of this State.

This action was begun in the court of a justice of the peace of Guilford County, after plaintiff had fully complied with the provisions of C. S., 7880(189). From the adverse judgment of said court, plaintiff appealed to the Superior Court of Guilford County, where the action was tried, *de novo,* on a statement of facts agreed.

Plaintiff contended that the property, real and personal, owned by him, and assessed for taxation under the laws of this State, was exempt from such taxation, under the laws of the United States, for the reason that he is a veteran of the World War, and that said property was purchased and paid for with money paid to him by the government of the United States, under the provisions of the act of Congress for the relief of veterans of the World War.

The court was of opinion that this contention was not well founded.

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

Austin & Turner for plaintiff.

B. L. Fentress, D. Newton Farnell, Jr., and Frazier & Frazier for defendants.

CONNOR, J. The question of law presented for decision by this appeal has been this day decided in *Martin v. Guilford County, ante,* 63. The decision of this question involves, primarily, a construction of the provisions of the act of Congress for the relief of veterans of the World War found in sections 454 and 618, of Title 38, U. S. C. A. In accordance with our decision in *Martin v. Guilford County, supra,* the judgment is

Affirmed.

W. C. MARTIN v. SWAIN COUNTY.

(Filed 15 June, 1931.)

Sheriffs B b—Sheriff collecting taxes on fixed salary is entitled to monthly payments thereof from beginning of fiscal year to end of his term.

Where a sheriff is paid a fixed amount a year for the collection of taxes, the amount payable in equal monthly installments, and he receives the tax books in October, and fails to succeed himself and goes out of office the following December, the tax books being turned over to his successor under court order: *Held,* he is entitled to receive payment of the "monthly installments" of the salary for so much of the fiscal year as intervened between its beginning on 1 July and the date he went out of office. N. C. Code, 1927 (Michie), secs. 7692, 1334(53), 1334(46), 1334(50).

APPEAL by defendant from *MacRae, Special Judge,* at October-November Term, 1930, of SWAIN. Error.

Moody & Hall for appellant.
Alley & Alley and Edwards & Leatherwood for appellee.

ADAMS, J. The plaintiff brought suit for $3,250 alleged to be due by the defendant for his services as tax collector of Swain County. He was elected sheriff of the county in November, 1926, for a term of two years, and was inducted into office on the first Monday in December. He alleged in his complaint that in October, 1927, he became tax collector by virtue of his office, gave his bond, collected taxes, and received $3,250 as his salary. At the trial he testified that in October, 1928, he executed another official bond and received from the defendant the tax books for the ensuing year. He was succeeded in office by S. R. Patterson, who, after his election in November, took the official oath on the first Monday in December, 1928, and executed his bond, which was accepted by the board of commissioners. On 22 December the commissioners caused the plaintiff to be served with a written request that he

deliver to them the tax lists and receipt books in his hands and account for the taxes he had collected. Upon his refusal to comply, the board of commissioners, together with S. R. Patterson, applied to the Superior Court for a mandamus to compel him to deliver the books as requested, and in that proceeding it was adjudged that the defendant (plaintiff in this action) turn over and deliver to the plaintiffs therein the tax lists, books, and documents in his possession; and on appeal to this Court the judgment was affirmed. *Ferguson v. Martin,* 197 N. C., 301. The plaintiff thereupon complied with the notice and afterwards instituted the present action.

The fiscal year of the State government closes on 30 June (Code, 1927, sec. 7692), and for the counties the fiscal year begins on 1 July and ends on 30 June. Code, 1927, sec. 1334(53). The fiscal year of 1926 ended on the last day of June, 1927; that of 1927, on the last day of June, 1928; and that of 1928, on the last day of June, 1929. It is contemplated that the tax collecting officer shall get the tax lists on the first Monday in October and on the first Monday in the following July, according to the general law, and on the first day of the following May, according to the local law, make settlement for all taxes due the county. Code, 1927, secs. 1334(46), 1334(50); P. L. Laws 1919, ch. 134.

Previously to the first Monday in December, 1926, the tax list had been delivered to the plaintiff's predecessor, and the plaintiff renounces any claim for services for collecting the taxes of that fiscal year. He said the first two years he served do not concern this controversy. Indeed, he said in his complaint that he became tax collector "about the month of October, 1927." He collected the taxes for that fiscal year and received his stipulated salary. He alleged that he continued the collection for the year 1928 and for this year was entitled to the same amount, which the defendant refused to pay.

His allegations are borne out by his testimony: "I did not collect the 1926 taxes. I was paid the sum of $3,250 in full for collecting the 1927 taxes. I never made settlement with the commissioners in July, 1928, in full for the 1927 taxes. I never got the tax books for the 1928 taxes until some time in October. . . . I claim the commissioners are due me my full salary for the year 1928. I went out of office on the first Monday in December, 1928. . . . I claim for my whole year's work, the year 1928, for collecting the 1928 taxes."

The plaintiff contends, then, that for the year 1927 he was paid a salary of $3,250, and that for the year 1928 (January-December) he was entitled to a like salary, which has not been paid. The trial judge seems to have approved this position, as appears from the following instruction to the jury: "If you believe the evidence in this case, that is, all of the evidence—the evidence offered by the plaintiff and the

evidence offered by the defendant, and find the facts to be as testified by the witnesses, you will answer the issue Yes, $3,250." ..... the issue being, "Is the defendant indebted to the plaintiff, and if so, in what amount?"

Whether this instruction is correct depends upon the interpretation of two statutes. An act applicable to Swain County contains this provision: "The sheriff shall receive for his services as sheriff the fees of his office, and for his services as tax collector he shall receive three thousand two hundred and fifty dollars per annum, payable in equal monthly installments." Public-Local Laws 1925, ch. 329. At the session of 1927 the General Assembly enacted a statute providing for the collection of taxes and repealing all laws and clauses of laws in conflict with it. Laws 1927, ch. 213, Code, 1927, sec. 1334(51). Section 7 provides: "If any sheriff, or tax collector, to whom the tax list and receipt books shall be delivered on the first Monday in October, shall fail to succeed himself as such officer on the first Monday in December of any year, he shall make a full and complete settlement of such taxes as he may have collected on or before the first Monday in December, at which his term of office may expire and the tax list and receipt books shall be delivered to his successor, who shall in his settlement be credited with the amount for which settlement was made with such officer whose term expired." This section further provides that if the outgoing sheriff was to be paid fees or commissions based upon the collections made he should yet proceed to collect the taxes due for such year.

With respect to a sheriff or tax collector who is paid a salary for the collection of taxes, the effect of the statute is to end his services in this capacity when his successor qualifies on the first Monday in December. *Ferguson v. Martin, supra.* The plaintiff admitted that he went out of office on the first Monday in December, 1928.

It follows from what has been said that the specific question is whether the period for which the plaintiff's salary was payable was the calendar year or the fiscal year. The word "year" generally imports a calendar year. C. S., 3949. It is not so, however, when otherwise expressed.

It has been the policy of the courts, unless controlled by special legislation, to refer the collection of taxes to the fiscal year. Although the plaintiff qualified as sheriff on the first Monday in December, 1926, his predecessor collected the taxes for the fiscal year ending 30 June, 1927. This was in accord with previous decisions of this Court. In *Commissioners v. Bain,* 173 N. C., 377, it was said: "It has been the custom in this State for the retiring sheriff to collect the taxes due on tax lists

already in his hands, and this custom has the sanction of numerous judicial decisions." The decisions cited in the opinion sustain the position that a sheriff who is elected for the first time ordinarily has nothing to do with a tax list issued to a preceding officer; that the fiscal authority of a tax collector is not necessarily incident to the office of sheriff, and that his responsibility begins when he receives the tax list for collection.

The first fiscal year of the plaintiff's incumbency extended from the first day of July, 1927, to the last day of June, 1928. For this year his salary was paid. The second fiscal year began on the first day of July, 1928. The plaintiff went out of office on the first Monday in December, and as his salary was payable in equal monthly installments and the tax list for 1928 went into his hands, he had a right each month to demand payment of a "monthly installment" of the salary for so much of the fiscal year as intervened between the first day of July, 1928, and the time he went out of office. Upon the undisputed facts he is entitled to judgment for this sum, but not the amount for which he brought suit.

Error.

FRICK COMPANY AND H. W. SCOTT, TRUSTEE, v. D. G. SHELTON.

(Filed 15 June, 1931.)

Trial G b—Verdict in this case held contradictory, and defendant was entitled to a new trial.

In an action on a note given for the purchase price of an engine the defendant pleaded a counterclaim, with supporting evidence, as to fraudulent representations inducing the purchase, the jury answered the issue as to fraudulent representations in the negative, but in another issue assessed damages against the plaintiff for such fraudulent representations: *Held*, the verdict is conflicting, and the instructions failing to point out the connection between the issues, and it being apparent that the jury was confused, a new trial is awarded on appeal.

APPEAL by defendant from *MacRae, Special Judge,* at September Term, 1930, of CLAY.

This is an action for judgment on promissory notes executed for the purchase of an engine and secured by a deed of trust on personal property. A former appeal was reported in 197 N. C., 296.

At the commencement of the action there were three defendants, but the court dismissed the action as to J. G. Shelton and as to O. L.

Shelton the plaintiff took a voluntary nonsuit. The verdict which follows sufficiently shows the nature of the action:

1. In what sum, if any, are the defendants, as partners, indebted to the plaintiff, Frick Company, by reason of the notes sued upon? Answer: No.

2. In what sum, if any, are the defendants, as partners indebted to plaintiff by reason of their failure to deliver the Case engine at Murphy, N. C.? Answer: .....

3. If the defendants are not indebted to Frick Company as partners by reason of the notes sued on, in what sum, if any, is defendant, D. G. Shelton, indebted to Frick Company on said notes? Answer: Yes, $800 and interest from 8-27-1927.

4. If the defendants are not indebted to Frick Company, as partners, by reason of their failure to deliver said Case engine at Murphy, N. C., in what sum, if any, is D. G. Shelton indebted to Frick Company for said reason? Answer: Yes, $40.

5. What was the value of the Russell engine and boiler at the time the same was taken by the sheriff in claim and delivery and retained by the defendant upon giving bond required? Answer: $700 (by consent).

6. What was the value of the other machinery and material set out in the deed of trust, and retained by defendant, after the same had been seized by the sheriff at the time D. G. Shelton executed the statutory bond? Answer: $200 (by consent).

7. Did the plaintiff, Frick Company, falsely and fraudulently represent to the defendant, D. G. Shelton, or his agents, that the said Russell engine and boiler was a 25-horse power engine in first-class working condition? Answer: No.

8. If so, was said defendant induced to enter into the contract and buy said engine and boiler and execute said notes and deed of trust by said false and fraudulent representations of plaintiff, Frick Company? Answer: .....

9. What general damages, if any, has the defendant, D. G. Shelton, sustained by reason of said false and fraudulent representations on the part of plaintiff, Frick Company? Answer: $200.

10. What special damages, if any, is the defendant, D. G. Shelton, entitled to recover of plaintiff, Frick Company, on account of said false and fraudulent representations on the part of said plaintiff? Answer: None.

11. Is the plaintiff, H. W. Scott, trustee, entitled to the possession of said Russell engine and boiler and other machinery and material referred to in said deed of trust? Answer: .....

The trial court adjudged upon the verdict that the plaintiff recover of the defendant and his surety the sum of $800 with interest at 6 per

cent from 27 August, 1927, and the additional sum of $40; that the defendant recover nothing on his counterclaim, and that he forthwith give up the personal property for foreclosure of the deed of trust; and in default thereof that the plaintiff recover of the defendant's surety, etc.

The defendant excepted upon assigned error and appealed.

Frank S. Hill and Thomas J. Hill for plaintiffs.
J. B. Gray and Moody & Moody for defendant.

ADAMS, J. The appellant's brief contains several assignments of error, only two of which, in our view of the case, we need consider. These two involve the single question whether there is such inconsistency in the jury's response to the seventh and ninth issues as to require a new trial. The issues complained of relate to false representations alleged to have been made by the Frick Company and to consequent damages sustained by the defendant.

In their answer the original defendants pleaded by way of defense the alleged false representation that the engine purchased of the Frick Company was a 25-horse power engine in first-class working condition. This is the explicit question presented to the jury in the seventh issue. Upon instructions which were clear and definite, the jury answered the issue in the negative, absolving the Frick Company from the imputation of fraud. The ninth issue has reference to the general damages which the defendant sustained by reason of the "said false and fraudulent representations on the part of the plaintiff, Frick Company," and the jury assessed the damages at two hundred dollars. The appellant complains because this amount was not allowed him in the judgment.

If his Honor had instructed the jury to answer the ninth issue "None" or "Nothing," if they answered the seventh issue "No," and had said no more, the present assignments of error would have had no merit; but we do not find such an instruction in the record. On the contrary, we find the following instructions given with respect to the ninth issue: "Before you would be justified in finding the defendant is entitled to recover any general damages sustained, it is necessary for you to find such damages were sustained by reason of the false and fraudulent representation of the plaintiff. If you do not find by the greater weight of the evidence that there was a false and fraudulent representation, then the court charges you that you would answer the ninth issue Nothing. On the other hand, if you should find there were false and fraudulent representations made on the part of the plaintiff, Frick Company, to the defendant, and that those representations contained all of the four material elements of fraud, as I have defined them to you, and that by reason

of such false and fraudulent representations the defendant suffered general damages, then the court charges the defendant will be entitled to recover of the plaintiff the difference between the actual value of the Russell engine as delivered to the plaintiff and its value as falsely represented by the plaintiff to be."

There is nothing in the instructions showing the interrelation of the seventh and ninth issues; and as the jury awarded damages in answer to the latter, the reasonable conclusion is they would not have done so had they not understood the instructions set out to be applicable to the ninth issue and to be independent of the seventh. That the jury was confused seems to be supported by an inquiry they made in reference to the ninth issue "after deliberating for some time": "We want to ask if we can give any amount of damages we want to?"

The appellant's assignments may be upheld on the principle stated in *Bottoms v. R. R.*, 109 N. C., 72. It is not clear that the jury comprehended the instructions relating to the seventh and ninth issues; indeed, apparently they were misled. Where a verdict is so inconsistent or indefinite that the court cannot determine what judgment should be rendered in favor of a given party, or which of the parties is entitled to judgment, it must be set aside and a new trial awarded. *Crews v. Crews*, 64 N. C., 536; *Mitchell v. Brown*, 88 N. C., 156; *Turrentine v. R. R.*, 92 N. C., 638; *Morrison v. Watson*, 95 N. C., 479; *Porter v. R. R.*, 97 N. C., 66; *Allen v. Sallinger*, 105 N. C., 333.

Under the instructions given on the seventh issue the jury found there was no fraud; under other instructions which apparently they regarded as applicable only to the ninth issue, the jury found there was fraud. The two findings are inconsistent and repugnant.

In support of the verdict the plaintiff cites *Baker v. R. R.*, 118 N. C., 1015, and *McKoy v. Craven*, 198 N. C., 780. These were cases in which the plaintiff brought suit for damages, the issue of negligence being answered against the defendant, the issue of contributory negligence against the plaintiff, and damages being assessed. But in these cases there was no repugnancy in the answers of the first and second issues; the fact that the defendant was negligent did not imply that the plaintiff was not negligent. The defendant prevailed because the plaintiff was not entitled to damages resulting from his own negligence.

New trial.

W. G. BYERS, ADMINISTRATOR OF WILLIAM PRICE, v. BOICE HARDWOOD COMPANY AND W. H. STOUGHTON.

(Filed 15 June, 1931.)

1. Master and Servant C c—Evidence of habitual violation of rule by employees held properly submitted to jury on question of its abrogation.

Where there is a rule for the protection of the employees of a logging road requiring them to apply the brakes on the rear of the car to prevent their being run over and injured by the car in the event they are thrown therefrom, and a violation of this rule proximately causes an injury, the employer is not liable, but where there is evidence that the rule had been openly, constantly and habitually violated for so long a time that the employer in the exercise of ordinary care and diligence knew or should have known thereof, it should be submitted to the jury on the question of whether the rule had been waived or abrogated.

2. Master and Servant C g—In action under C. S., 3467, against logging road contributory negligence is not a complete bar to recovery.

The contributory negligence of an employee of a steam logging road will not completely bar a recovery when the negligence of the defendant is a proximate cause of the injury. C. S., 3467.

3. Death B d—Instruction as to damages recoverable in action for wrongful death held correct.

The rule for damages recoverable for a wrongful death was correctly given in the instructions in this case. *Ward v. R. R.*, 161 N. C., 179; *Pickett v. R. R.*, 117 N. C., 616.

CIVIL ACTION, before *Barnhill, J.*, at September Term, 1930, of HAYWOOD.

William Price was killed on 8 May, 1929, and the plaintiff as the administrator of his estate, brings this action to recover damages for the wrongful death of his intestate. Prior to the date of his death William Price had been working for the defendant on a logging road which the defendant operated for the purpose of hauling logs from the mountains to the mill. In addition to acting as foreman on a logging engine, the intestate also helped in switching and braking operations. The manner of his death as detailed by an eye witness was substantially as follows: "The morning William Price lost his life they set a car upon the sidetrack and Steve McLaughlin pulled it with his engine and Bill Price tied up the brakes on those. He went to the front end of the car and tied up the brakes. By tying up the brakes I mean, brake it, which holds the car, putting the brakes on and tightening it up. I couldn't describe the brake to the jury exactly; the chain winds around a spool, and the spool is between two bars at the top of the car. This car was a skeleton narrow-gauge car. . . . The tie bars go across

and the bolt that ties the brake is behind the tie bars. The engineer placed this car on the main line track, and then the engine was disconnected with this car. The engine was over to the left on another track, and the purpose of leaving the car there and putting the engine on the sidetrack was in order to drop it and get it behind the engine. Where this car was left it was about six per cent grade, I suppose. I didn't see William Price put on the brake, but after the engine was disconnected and put over on the sidetrack I saw William Price go on top of the car and release the brake. When you release the brake you knock it off with a jim crow; that is what they use to tie it up and to release it. . . . Price walked up and knocked the brake off; the brake is held by a catch. There is a cog wheel and you knock that catch out and the brake flies off. Price stepped up on the car to knock the ratchet loose, and he went to the usual and ordinary place where brakemen go to on that kind of car to release it. After he released it he tried to tighten it up and the car started as soon as he knocked the brake off; the car got pretty fast, twenty miles an hour, I guess. I saw Price try to tie the brake and it fouled him. . . . There is a wheel at the top of the brake and the jim crow is a piece of iron, and it fits down in the spokes of the wheel. When he pulled it he was pulling it toward his body and the jim crow released all at once before he fell off. . . . Immediately after Mr. Price's death I went to the car and found the rod fouled against the cross bar. The brake rod fouled against the tie bar, and by 'fouled' I mean, dropped behind it. . . . The reason the rod fouled was it was too short, and the man operating the jim crow, trying to release or put on the brake when that is fouled behind the cross rod can't pull it up there. When the rod is fouled and you go to pull it, it will move. I saw him pulling against the crank, and when he pulled against it, it released all at once and pitched him off. . . . When I got to him he was dead. . . . The car Price was working on was No. 24. I saw the car he was working on every day, and after William Price was killed we looked at the wheels and some of them were a little flat. From the time the brakes were released up to the time he fell off the car run about 50 yards with him, and the car was bouncing. . . . It was not the rule of the company there to brake only from the rear of the car; I never heard that rule proclaimed by Colonel Stoughton or others, and nobody ever told me about it. The rule was to tighten up either brake you come to first. . . . I used the first brake I came to, and from time to time I would brake from the front of the car when Colonel Stoughton and Mr. Boice and other officers of the company would be present. No official of the company ever told me not to brake from the front end of the car."

The defendant offered many witnesses and much evidence to the effect that the company had promulgated a rule that a brakeman should brake from the rear of the car so that if he was thrown off his body would not be in front of the moving cars. There was evidence that the deceased himself had been instructed not to brake from the front of the car. There was also positive testimony from numerous witnesses for the defendant that there was no defect in the brake or the wheel.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The jury awarded damages in the sum of $7,250. From judgment upon the verdict, the defendant appealed.

Morgan, Ward & Stamey for plaintiff.
Queen & Alley and Alley & Alley for defendant.

BROGDEN, J. The first group of exceptions relates to evidence to the effect that the rules requiring brakemen to brake from the front of the car had been violated by employees other than the deceased. The evidence for the defendant, coming from numerous witnesses, tended to show that the rules of the company prescribed that a brakeman should brake from the rear of the car, and that William Price, in open violation of the rule, undertook to brake from the front of the car, and that such violation of the rule was the proximate cause of his death. The evidence for plaintiff tended to show that no such rule had been promulgated, and if such rule had been prescribed, it had been so openly and frequently violated as to work an abrogation or revocation thereof.

Any reasonable and proper rule, designed for the protection of an employee in performing his duties, will bar recovery provided such rule is alive and in force, and such violation was the proximate cause of the injury. *Biles v. R. R.*, 139 N. C., 528; *Boney v. R. R.*, 155 N. C., 95; *Fry v. Utilities Co.*, 183 N. C., 281; *Hayes v. Creamery*, 195 N. C., 113. But if such rule has been openly, constantly and habitually violated for such length of time that the employer in the exercise of ordinary care and diligence knew or should have known of such habitual nonobservance, then the rule is deemed to be waived or abrogated. Hence, the evidence objected to was competent upon the vital question as to whether the rule in controversy was alive and in force.

Another group of exceptions relates to the ruling of the trial judge in instructing the jury that contributory negligence, if any, of plaintiff's intestate was not a complete defense and bar to recovery under our statute. C. S., 3467, has been construed in many decisions of this Court. *McKinish v. Lumber Co.*, 191 N. C., 836; *Stewart v. Lumber Co.*, 193 N. C., 138; *Jones v. R. R.*, 194 N. C., 227; *Hawkins v. Lum-*

ber Co., 198 N. C., 475. An examination of the charge to the jury discloses that the trial judge correctly applied the law as set forth in the decisions.

Another group of exceptions relates to the charge of the trial judge upon the question of damages. The record discloses that the trial judge applied the law as announced in *Ward v. R. R.*, 161 N. C., 179, and in *Pickett v. R. R.*, 117 N. C., 616.

There was exception to the failure of the trial judge to sustain the motion of nonsuit. Obviously, this ruling was correct. There are certain other exceptions in the record, but none of them are sufficient to overthrow the judgment. Indeed, a careful perusal of the record discloses that the merits of the case rest upon an issue of fact upon which the evidence was conflicting and irreconcilable. Hence, the verdict of the jury determines the rights of the parties.

No error.

JEFFERSON STANDARD LIFE INSURANCE COMPANY v. GORDON H. BUCKNER, JAMES BUCKNER, GEORGE P. BUCKNER, HEIRS AT LAW OF ANNA K. BUCKNER, DECEASED, R. E. SHUFORD, TRUSTEE; T. B. SUMNER, W. E. SHUFORD, FRANK COXE AND C. N. PENLAND, ADMINISTRATOR OF THE ESTATE OF ANNA K. BUCKNER, DECEASED.

(Filed 15 June, 1931.)

Executors and Administrators D g—In this case held: demurrer to complaint in action to set aside deed to heirs was properly granted.

Although a conveyance by the heirs at law within two years from the qualification of the administrator of the estate is voidable as to creditors of the estate, C. S., 76, an administrator does not have the power to charge the estate with liability created by him on matters wholly occurring after the death of the testator, and, upon a sale of lands of the estate to make assets for the payment of debts, he may not exchange land with the purchaser and assume, as administrator, a mortgage debt on the lands conveyed to him by the purchaser, nor may the clerk approve such an exchange, C. S., ch. 1, and where the mortgagee of the purchaser from the administrator seeks to set aside a conveyance to the heirs at law by the administrator on other lands received in the exchange and conveyed to the heirs at law and conveyed by them to a third person, a judgment sustaining a demurrer to the complaint is affirmed.

APPEAL by plaintiff from *McElroy, J.*, at April Term, 1931, of BUNCOMBE. Affirmed.

The facts—briefly: Anna K. Buckner died leaving about $500 in personal property and certain land in West Asheville (now a part of

Asheville) heavily encumbered. The total indebtedness of the estate being some $51,000. She left as her only heirs at law three children of full age, Gordon H., George P. and James Buckner. C. N. Penland was appointed administrator of the estate. A petition was filed before the clerk of the Superior Court of Buncombe County, N. C., by the administrator and heirs at law to sell the lands to pay the debts. An order of sale was made and C. N. Penland appointed a commissioner to sell the land described in the petition at private sale. A report of the sale of the lands was made by the commissioner and agreed to by the heirs at law. The sale was to Frank Coxe, who in the deal was to take the property and pay off the encumbrances and convey certain property to the administrator and the administrator to assume a certain debt hereafter set forth. Coxe had theretofore made a deed of trust to Julian Price, trustee, to secure $5,000 on a certain piece of real estate which in the deal was conveyed to C. N. Penland, administrator of the estate of Anna K. Buckner. In the deed is the following:

"Said last mentioned lot being subject to a deed of trust from Frank Coxe to Julian Price, trustee for the Jefferson Standard Life Insurance Company, securing the payment of $5,000, and heretofore recorded in the office of the register of deeds for Buncombe County in Book 292, page 301, *the payment of which the party of the second part hereby assumes and expressly agrees to pay.*"

This is not one of the lots in controversy in this action.

C. N. Penland, administrator, deeded two of the pieces of land acquired in the deal with Coxe to two of the heirs at law: Lot 57, Block C, to James Buckner, and Lot 58, Block C, to George P. Buckner. They in turn conveyed said lots to T. B. Sumner, one of the defendants in this action. All these deals between the said administrator, Coxe, and heirs at law of Anna K. Buckner, were approved by the clerk of the Superior Court of Buncombe County, N. C., and in the decree is the following: "If any surplus shall remain after the payment of said debts and charges the same is to be considered as real estate, and is to be disposed of by the administrator of said estate to and among such persons as would have been entitled to this land according to law, and he shall deliver or have delivered, the deeds for said lands to be conveyed by the said Frank Coxe, as hereinbefore more fully set out, to the children and sole heirs at law of the said Anna K. Buckner, deceased, or in accordance with their direction, but not until all the debts of the said estate, including charges of administration and the costs of this proceeding, shall have been first paid or provided for fully and satisfactorily to the creditors of said estate."

This decree was signed 24 August, 1928. Thereafter, about 26 November, 1928, the administrator conveyed said above-mentioned Lots

57 and 58 to James and George P. Buckner, heirs at law of Anna K. Buckner; and thereafter, on 16 November, 1929, they conveyed said lots to the defendant, T. B. Sumner, within two years of the appointment and qualification of C. N. Penland, administrator of the estate of Anna K. Buckner.

The trustee for the plaintiff, Jefferson Standard Life Insurance Company, duly advertised the property under the Coxe deed in trust, which in the deal was assumed by Penland, administrator. The property did not bring a sufficient amount to pay the Coxe debt, and this action is brought to recover the deficiency—$2,617.55, with interest from 21 January, 1930.

The prayer of plaintiff is to recover said amount. "That this plaintiff be declared to have a first and prior lien on Lots 57 and 58, Block C, of the Coxe properties, located on Coxe Avenue, and that a commissioner be appointed and authorized and directed to sell said property and apply the proceeds of said sale to the payment of the indebtedness as herein alleged, and the costs of this action, and the over-plus, if any, pay into the office of the clerk of the Superior Court, or to those legally entitled to the same."

Ford, Coxe & Carter for plaintiff.
Ward & Allen for defendant, T. B. Sumner.

CLARKSON, J. The defendant, T. B. Sumner, in the general County Court of Buncombe County, N. C., duly demurred to the complaint. The demurrer was sustained. The plaintiff appealed to the Superior Court and the demurrer of the general County Court was affirmed; an appeal was taken to this Court. In the judgment of the courts below we find no error.

The main question involved in this appeal is whether the assumption of the debt owed by Frank Coxe to the plaintiff, Jefferson Standard Life Insurance Company, by C. N. Penland, administrator of the estate of Anna K. Buckner, fixed a lien upon the other property conveyed by said Coxe to said administrator for payment of that debt, viz., the lots in controversy, 57 and 58, same being conveyed by said administrator to two of the heirs at law who in turn conveyed said lots to defendant, T. B. Sumner? We think not.

C. S., 76, is as follows: "All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators and collectors of such decedent; but such conveyances to bona fide purchasers for value and without notice, if made after two years

from the grant of letters, shall be valid even as against creditors." *Bank v. Felton,* 188 N. C., 384; *S. v. McCanless,* 193 N. C., 200; *Bank v. Zollicoffer,* 199 N. C., 620.

In *Davis v. Perry,* 96 N. C., at p. 263, we find: "They are only void in case as to creditors and personal representatives, and as to them, only in case the personal assets are insufficient to pay the debts and costs of administration; they are not void—they never cease to operate as to the parties to them." *Bank v. Zollicoffer, supra.*

In N. C. Practice and Procedure, ch. 1, sec. 72, at p. 70, Mr. McIntosh says: "Since the clerk has only such jurisdiction as may be given by statute, in the absence of express statutory provision he cannot exercise any general equity jurisdiction." *In re Estate of Wright,* 200 N. C., 620.

In a careful review of C. S., ch. 1, Administration, and Amendment Public Laws N. C., 1927, ch. 222, we find no authority for an exchange, approved by the clerk, permitting an administrator to assume a debt as was done in this case to plaintiff. The clerk's jurisdiction is statutory, he cannot go beyond express or implied authority given him.

In *Snipes v. Monds,* 190 N. C., at p. 191: "An executor cannot, by any contract of his, fasten upon the estate of his testator liability created by him, and arising wholly out of matters occurring after the death of the testator." *Hall v. Trust Co.,* 200 N. C., at p. 739.

For the reasons given, the judgment below is

Affirmed.

BOARD OF EDUCATION OF SWAIN COUNTY v. BOARD OF COUNTY COMMISSIONERS OF SWAIN COUNTY.

(Filed 15 June, 1931.)

Schools and School Districts D e—Salary of superintendent held determined by sec. 15 and not sec. 19 of ch. 245, Public Laws of 1929.

When the salary of a county superintendent of public instruction is to be determined under the provisions of our statute the amount fixed as to population under the provisions of section 19, chapter 245, Public Laws of 1929, are not a full restriction of the amount of the entire salary the superintendent shall receive, but only a portion thereof when a larger salary has been allowed in accordance with section 15 thereof, the former being intended as a basis of the county's participation in the aqualization fund.

APPEAL by defendant from *MacRae, Special Judge,* at October Term, 1930, of SWAIN.

Moody & Hall for appellant.
Edwards & Leatherwood for appellee.

ADAMS, J. This is an action to determine the annual salary to be paid the county superintendent of public instruction in Swain County. The plaintiff prepared the May budget of 1930 and delivered a copy of it to the defendant, who disapproved the item of $3,500 proposed as the salary of the superintendent and the item of $600 for his traveling expenses. Code of 1927, secs. 5595, 5601; *Board of Education v. Commissioners,* 198 N. C., 430. These two boards held a joint session and the vote in reference to the rejected items resulted in a tie; whereupon the clerk of the Superior Court who acted as arbitrator upon the issues (section 5608) rendered a decision fixing the salary at $2,500 and the expense account at $200. The plaintiff appealed to the Superior Court, and Judge MacRae held that the salary set out in the May budget ($3,500) is the sum to which the superintendent is lawfully entitled, and submitted to the jury an issue as to the reasonable expense of travel. The expense account was settled by the verdict and is not contested.

It is conceded that the salary of the superintendent is to be determined by the provisions of chapter 245, Public Laws 1929, the crucial question being whether section 15 or section 19 is controlling. The plaintiff relies upon the former, and the defendant upon the latter.

By the terms of section 15 the salaries paid all teachers, principals, supervisors, superintendents and assistant superintendents shall be in accordance with the uniform graduated salary schedule adopted by the State Board of Education, and the undisputed evidence tends to show that the plaintiff decided upon the salary prescribed by this schedule. Indeed, a written contract between the plaintiff and the superintendent had previously been made for two years and no objection, it seems, was made to the payment of the salary of the first year.

Section 19 provides that "for the purpose of ascertaining that portion of the salary of the county superintendent in each of the participating counties the following schedule shall be allowed in the budget approved by the State: in all counties with a population of twelve thousand or under, census of 1920, an amount not to exceed $2,000; in all counties with a population of twelve thousand and not exceeding twenty-five thousand, an amount not to exceed $2,500," etc. In 1920 the population of Swain County, according to the evidence, was less than twenty thousand. It is therefore contended by the appellant that the superintendent's salary cannot exceed $2,500.

We do not concur in the appellant's conclusion. Section 19 applies in terms to a "portion of the salary" only, not to the entire sum; it has

reference to "the participating counties"; it embraces items "in the budget approved by the State." This section, we take it, was not intended definitely to fix the amount of the salary, but to serve as the basis of participation in the equalization fund—$2,500 being the amount going to the participating county in part payment of the salary. As suggested above, section 15 points out the method of computing the sum to be paid the superintendent in accordance with "the uniform graduated salary schedule adopted by the State Board of Education."

The appellant's exceptions to the admission of evidence must be overruled. The written contract was competent; the testimony of the chairman of the county board of education was not essentially hearsay; testimony as to the duties of the superintendent was not prejudicial, and the motions to set aside the verdict and to dismiss the action were correctly denied. We find

No error.

STATE v. MORGAN SHATLEY.

(Filed 15 June, 1931.)

Seduction A b—Promise of marriage must be absolute for conviction of seduction under C. S., 4339.

In order for conviction of the offense of seduction of an innocent and virtuous woman under promise of marriage, C. S., 4339, the promise of marriage must be absolute and unconditional, and a promise at the time to marry the woman in the event "anything should happen to her," is insufficient for a conviction under the statute.

APPEAL by defendant from *Schenck, J.*, and a jury, at March Term, 1931, of WILKES. Reversed.

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

Trivette & Holshouser and F. J. McDuffie for defendant.

CLARKSON, J. C. S., 4339, is as follows: "If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the State's prison not exceeding the term of five years: *Provided,* the unsupported testimony of the woman shall not be sufficient to convict: *Provided further,* that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant,

it shall operate as to the costs of the case as a plea of *nolo contendere,* and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same."

Defendant was indicted, tried and convicted and sentenced under the above statute. At the close of the State's evidence and at the close of all the evidence the defendant moved for judgment of nonsuit. C. S., 4643. The court below overruled the motions. The defendant excepted, assigned error and appealed to this Court. We think the motions should have been allowed.

The prosecuting witness testified: "I had sexual intercourse with him on the night of 20 October, 1927. It occurred in Mocksville, Davie County. *I did this because he promised to marry me if anything happened.* . . . I never had sexual intercourse with any other man except the defendant, and not with him until he promised to marry me."

Construing the above testimony as a whole, the promise was conditional, but to convict one under the statute the promise must be absolute.

In 35 Cyc., at p. 1336, speaking to the subject, citing a wealth of authorities, is the following: "By the weight of authority, under the statutes punishing seduction only when under a promise of marriage, the promise must be absolute, and not conditional upon other events than the intercourse, and a promise to marry in case the woman becomes pregnant or 'gets into trouble,' etc., is not sufficient."

In *S. v. Crowell,* 116 N. C., at p. 1057, it is said: "Indeed deceit is the very essence of this offense, the warp and woof of it so to speak."

In *S. v. Cline,* 170 N. C., at p. 752, we find: "Sexual intercourse is not an indictable offense under this statute, nor is seduction itself a criminal offense, but it is the seduction of an innocent and virtuous woman under the promise of marriage that constitutes a criminal offense. As has been said: 'The purpose of this statute is to protect innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage.'" *S. v. Ferguson,* 107 N. C., at p. 848.

In *S. v. Johnson,* 182 N. C., at p. 888, is the following observation: "The statute was passed to guard, and protect, the innocent and virtuous woman, and not those who seek only to gratify their own lustful desires and have no proper regard for the sacredness and purity of the marriage promise, and do not even wait for it, before yielding their persons to the embraces of evil-minded men. In such a case, the woman is considered to be as bad as he is, and beyond the pale of the law's protection under this statute."

This is not a case of seduction under promise of marriage, which promise must be absolute and not conditional, but it appears from the evidence to be a case of bastardy. The law on that subject is fully set forth in C. S., ch. 6, "Bastardy." The prosecuting witness is not without remedy under the bastardy statute.

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

Reversed.

STATE v. R. M. CAUDLE.

(Filed 15 June, 1931.)

Criminal Law L e—In this case held: error, if any, in exclusion of testimony was harmless and a new trial will not be awarded.

Defendant's motion for a new trial on appeal in a criminal action must be based on injustice arising from error on the trial, and his motion therefor will be denied when it appears that the granting of a new trial would carry no prospect of ultimate benefit to the defendant, and where on the trial of a clerk of a municipal court for embezzlement, the trial court excludes testimony of the auditor, who had audited the accounts, as to transactions not included in the counts in the indictment, tending to show that the clerk had turned over money for which no record of fines, etc., could be found, and it appears that evidence of the same substance was fully brought out on cross-examination, error, if any in the exclusion of the testimony will not be held prejudicial, and a new trial will not be awarded therefor.

APPEAL by defendant from *Devin, J.*, at December Term, 1930, of GUILFORD.

Criminal prosecution tried upon indictment charging the defendant, clerk of the municipal court of High Point, in thirty-eight counts, with embezzlement. Only twelve counts were submitted to the jury. There was a general verdict of guilty, and judgment of imprisonment in the State's prison for a period of not less than one nor more than five years.

The defendant appeals, assigning errors.

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

L. B. Williams, Roberson, Haworth & Reese and Austin & Turner for defendant.

STACY, C. J. The only exception of prima facie substance, appearing on the record, is the one addressed to the refusal of the court to allow

Russell A. Barnhart to state that in auditing the records of the court, he found two or three cases where the defendant was credited with having paid funds to the county treasurer, when the docket failed to show that a fine had been imposed, or, if imposed, it was later remitted by the judge. It is conceded that these cases were not related to any of the counts set out in the charges against the defendant.

The manner and method, pursued by the auditor in examining the records, was so thoroughly covered in the cross-examination that we are convinced the exclusion of the above testimony, if erroneous, could have had no appreciable effect upon the verdict. It is not likely that a different result would have ensued had the evidence been admitted. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The defendant received full benefit, if such it were, of much evidence tending to show carelessness in keeping the records of his office. The evidence excluded was of the same sort, and, therefore, only cumulative in character.

The error, if error at all, is not sufficient to overturn the verdict. *In re Ross,* 182 N. C., 477, 109 S. E., 365; *S. v. Heavener,* 168 N. C., 156, 83 S. E., 732.

The foundation for the application of a new trial is the allegation of injustice arising from error, but for which a different result would probably have followed, and the motion is for relief upon this ground. A reversal of the present judgment would carry with it no prospect of ultimate benefit to the defendant. *Brewer v. Ring and Valk,* 177 N. C., 476, 99 S. E., 358. The verdict and judgment, therefore, will be upheld.

No error.

STATE v. JASON RHODES.

(Filed 15 June, 1931.)

Homicide H c—Instruction in this case relating to right to shoot another held reversible error under the evidence.

Where, in a prosecution for murder, there is evidence that both the defendant and the deceased were hunting each other with shotguns and met and fired at each other at about the same time, an instruction of the court that no man has a right to shoot another because the latter has shot at him, though technically correct, is held to constitute reversible error when applied to the setting and circumstances of this case.

CRIMINAL ACTION, before *Harding, J.,* at September Term, 1930, of McDOWELL.

The defendant conducted a store on the right-hand side of the public road. The scene opens with the deceased, Sam Gardner, standing in front of defendant's store, armed with a shotgun, and the defendant leaving his place of business in a stooping position and looking back toward his store. A witness spoke to the deceased and asked him what was the matter, and the deceased replied that "Jase Rhodes had mistreated him." The evidence further discloses that the defendant, who was unarmed, went to his home and secured a gun and came back toward his store. Before reaching the store he encountered the deceased. "Both shot about the same time. Jase shot only once. Immediately after Jase shot, Sam shot and then run. He shot in the direction where Jase was." . . . Sam stopped at the porch and put his gun by the side of the house and then took it down and Jase kept on coming to the hedge. . . . Jase kept on coming, and when Sam got to the corner of her house Jase was then at the hedge and shot Sam. Sam was fixing to run again. . . . After the shot that hit Sam was fired Jase ran up the road."

Another witness for the State testified that when the defendant came to his house to get his gun that she grabbed the gun and started to run out with it, and before she got to the front door the defendant overtook her and said, "Give it here. I am not going to let that negro kill me."

The defendant was convicted of murder in the first degree, and from judgment of death pronounced, appealed.

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

D. F. Giles for defendant.

BROGDEN, J. The evidence tends to show that the deceased came to the store of defendant, armed with a shotgun. It does not appear what happened, but at any rate the defendant was first seen leaving his store and going in the direction of his home, where he procured a shotgun. In the meantime the deceased had moved in the general direction of defendant's home, and they met at a point between the defendant's home and his place of business. It is readily inferred that both the deceased and the defendant were hunting each other with shotguns, and the record actually discloses that both fired at each other. The judge charged the jury as follows: "Under the law of this State a man has a right to use force to protect himself against the attack and assaults of another. He has no right to shoot another man because another man has shot him or has insulted him or has done some act which he feels outraged by. He has no right to even lay hands upon him if the act is done."

The defendant excepts to the following portion of the foregoing instruction: "Has no right to shoot another man because another man has shot him." This instruction is of course technically correct, but when applied to the setting of the case and the circumstances surrounding the parties, the law was stated too broadly, and the principle should have been applied and fitted to the testimony.

New trial.

J. H. STOCKTON v. H. R. LENOIR, TRUSTEE.

(Filed 15 June, 1931.)

Trial D a—Judgment as of nonsuit in favor of party upon whom was the burden of proof held error.

Where upon the evidence and admissions of record the defendant may show by parol evidence that plaintiff's commissions as selling agent were to be confined to payment out of notes given the principal as a part of the purchase price of the lands sold, the burden of proof is upon the defendant, and his motion as of nonsuit on the plaintiff's evidence should be denied. (See *S. c.*, 198 N. C., 148.)

APPEAL by plaintiff from *MacRae, Special Judge,* at November Term, 1930, of MACON.

Civil action to recover commissions on sale of real estate, evidenced by two notes, each containing the following stipulation: "To be paid out of funds from corresponding note of W. D. Almazov and Sophie Albert, when collected."

At the close of plaintiff's evidence judgment as in case of nonsuit was entered on motion of defendant, from which the plaintiff appeals, assigning error.

George B. Patton, Edwards & Leatherwood and R. D. Sisk for plaintiff.

T. J. Johnston and Moody & Moody for defendant.

STACY, C. J. The facts are fully set out in the first appeal as reported in 198 N. C., 148, 150 S. E., 886, to which reference may be had to avoid repetition.

We there held that, while the stipulation appearing on the face of each of the notes did not *ipsissimis verbis* provide for payment exclusively out of funds to be collected from corresponding note of the purchasers, Almazov and Albert, yet, in view of the allegations of the answer, taken in connection with the stipulations appearing in the notes,

it was open to the defendant to show by parol, if he could, that such was the understanding of the parties. Unless the defendant is able to establish this under the principles announced in *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320, *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, 55 S. E., 417, and *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847, he will not be in position to resist an adverse verdict.

With the defendant thus required to handle the laboring oar, it was error to nonsuit on the plaintiff's evidence.

Reversed.

STATE v. BEN GOLDSTON.

(Filed 15 June, 1931.)

Criminal Law L a—Appeal in capital case not prosecuted according to rules will be dismissed, no error appearing on record.

Where in a capital case the defendant's appeal in *forma pauperis* is not prosecuted according to the Rules of Court, and his motion for *certiorari* is not resisted, but return thereto is not made for about four months, when, as the only possible return, the clerk of the Superior Court sends up defendant's statement of case on appeal, which had not been served on the solicitor because of the expiration of time therefor: *Held,* although the statement of case on appeal is subject to the plea of "*nul tiel* record," the Supreme Court will examine it, and upon the absence of reversible error appearing therein or on the face of the record proper, the judgment will be affirmed and the appeal dismissed.

APPEAL by defendant from *Sinclair, J.,* at January Term, 1931, of CHATHAM.

Motion by the State to affirm judgment and dismiss appeal.

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

R. F. Paschal for defendant.

STACY, C. J. At the January Term, 1931, Chatham Superior Court, the defendant herein, Ben Goldston, was tried upon an indictment charging him with the murder of one John Headen, which resulted in a conviction and sentence of death. The prisoner gave notice of appeal to the Supreme Court, but this has not been prosecuted as required by the rules, albeit he was allowed to appeal *in forma pauperis,* and was given sixty days from 17 January within which to make out and serve statement of case on appeal, and the solicitor was allowed thirty days thereafter to prepare and file exceptions or countercase.

Application for *certiorari* was filed with the clerk of the Supreme Court 19 February, which was not resisted by the Attorney-General. Nothing was done in behalf of the prisoner, however, until 5 June, when his statement of case on appeal, without being served on the solicitor, as the time had expired for this (*S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85), was filed in the office of the clerk of the Superior Court of Chatham County, and forwarded by him to the clerk of the Supreme Court as the only return he could make to the writ of *certiorari.* In the meantime, 19 May, the Attorney-General had lodged a motion to dismiss the appeal.

Notwithstanding the prisoner's statement of case on appeal is subject to a plea of "*nul tiel* record," we have examined it and find no reversible error appearing therein or on the face of the record proper. *S. v. Massey,* 199 N. C., 601.

Judgment affirmed. Appeal dismissed.

J. M. DICKERSON v. THE ATLANTIC REFINING COMPANY, E. R. SWAIM AND F. G. BRADY.

(Filed 15 June, 1931.)

1. Malicious Prosecution A a—Elements necessary to be proved in order to recover in action for malicious prosecution.

To make out a case of malicious prosecution, the plaintiff is required to allege and prove that the defendant instituted or participated in a proceeding against him maliciously, without probable cause, which ended in failure.

2. Malicious Prosecution A d—Nolle prosequi with leave is a sufficient termination of prosecution to support action for malicious prosecution.

A *nolle prosequi* with leave is sufficient termination of a criminal prosecution to support an action for malicious prosecution based thereon.

3. Malicious Prosecution A c—Definition of probable cause.

Want of probable cause may be inferred from the facts and circumstances, and it does not depend upon the guilt or innocence of the accused, but upon whether the apparent facts are such as to lead a discreet and prudent man to believe that a crime has been committed by the person charged.

4. Same—Proof of a collateral purpose in prosecution is sufficient to establish a prima facie want of probable cause.

Evidence that the chief aim of a prosecution was to accomplish some collateral purpose, as the collection of a debt or the obtaining of possession of property, is competent to show want of probable cause, and is sufficient to establish it prima facie.

5. Malicious Prosecution A c—Malice may be inferred from want of probable cause.

In actions for malicious prosecution malice may be inferred from want of probable cause.

6. Malicious Prosecution B c—Evidence held sufficient to take the case to the jury in this action.

Where in a civil action to recover damages for malicious prosecution there is evidence that one of the defendants swore out a warrant for the arrest of the plaintiff for issuing an alleged worthless check, and that he did so at the instance of the other defendant, who sought to have the cashier of the bank place "an insufficient funds tag" on it, and who afterwards told the plaintiff that they had made a mistake and wanted to have the warrant withdrawn, and that thereafter the check was paid upon presentation, and the action *nol prossed* without the plaintiff's knowledge or consent, is *held:* sufficient to establish a prima facie case against the defendant swearing out the warrant, and to permit the inference that the defendants were acting in concert, and should have been submitted to the jury under correct instructions from the court.

7. Evidence N a—A prima facie case is sufficient to take the question to the jury.

Where a prima facie case has been made out it is sufficient to carry the case to the jury and to warrant a recovery, but it neither insures nor compels a recovery, the question of whether the necessary facts have been established being for the jury.

8. Principal and Agent C d: Master and Servant D b—Master or principal is liable for acts of servant or agent in scope of his duties.

Where an agent or servant causes injury to a third person while acting in the line of duty and exercising the functions of his employment, the principal or master is liable therefor, without reference to whether the intent of the agent or servant was good or bad.

9. Same—Whether act is within scope of duties of agent or servant depends upon whether he was then engaged in service of employer.

Whether an act causing injury to a third party is within the scope of an agent's or servant's employment depends upon whether the agent or servant at the time is engaged in the performance of the duties he is employed to perform, and not upon intent to benefit the employer or protect his property.

10. Corporations G i—Corporation is liable for torts of servants or agents committed in the course of their employment.

A corporation may be held liable for the negligent or malicious torts of its employees, servants or agents when committed by them in the course of their employment and within its scope, precisely as a natural person.

11. Principal and Agent C d: Master and Servant D b—Whether prosecution for issuing worthless check was within scope of authority held for jury.

While the criminal prosecution of an offender is not ordinarily within the scope of an agent's or servant's authority, a distinction is to be made

where the prosecution could have no effect other than the punishment of the offender and those cases where it is instituted to recover the employer's property or protect his business, and where the evidence tends to show that the agents or employees of a refining corporation were acting within the scope of their authority in making a sale of gasoline and in accepting a check payable to the corporation in payment of gasoline sold, and in presenting the check for payment: *Held*, in an action for malicious prosecution, the question of whether the refining corporation is responsible for their act in swearing out a warrant for the arrest of the purchaser of the gasoline for giving an alleged worthless check, either upon the theory of authorization or ratification, is for the determination of the jury, and a directed verdict in favor of the defendant is error.

APPEAL by plaintiff from *Sink, Special Judge,* at September Term, 1930, of GUILFORD.

Civil action for malicious prosecution.

It appears from the record that on Saturday morning, 8 February, 1930, the plaintiff, who is president and general manager of the King Cotton Garage, Inc., ordered from the Atlantic Refining Company, Inc., 100 gallons of gasoline to be delivered during the day. The order was given to and received by E. R. Swaim, manager in charge of the Greensboro office of the Atlantic Refining Company, Inc., and delivery was made about 5 p.m. that afternoon by F. G. Brady, truck-driver and deliveryman for the said Refining Company.

In payment of the gasoline the plaintiff handed to Brady a check for $18.20, made payable to "The Atlantic Refining Co.," and signed "King Cotton Garage, Inc., by J. M. Dickerson, Pres." Brady hesitated to accept the check, but on being assured by the plaintiff that it was all right, he decided to take it. Plaintiff testified: "I was not prepared at that time to give him the cash, but I said 'I will be very willing to have my men and myself get the gas and return it to you if you don't want to receive the check.' "

Within a couple of hours thereafter Brady returned with the check and said he would have to have cash for the gasoline. "He then got very sore about it." Plaintiff told him the check was all right and would be paid upon presentation; that he had on hand only enough money to cover his pay-roll, but that if he would bring the check back later in the evening he thought he would have sufficient cash by 11 o'clock that night to take it up.

Plaintiff was arrested about 8 p.m. that evening on a warrant sworn out by F. G. Brady charging him with uttering a worthless check—the check above mentioned—in violation of chapter 62, Public Laws 1927. The plaintiff was held in custody several hours until he gave a cash bond for his appearance before the justice of the peace on Tuesday thereafter, 11 February, at 3 o'clock p.m.

On the following Monday morning plaintiff went to the bank at 9 o'clock sharp and made a further deposit of $30 as a certain protection to the check which he had given to Brady for the Atlantic Refining Company, Inc., the previous Saturday afternoon. He had money in the bank at the time—amount not stated—to the credit of King Cotton Garage, Inc. When the plaintiff arrived at the bank he found Mr. Swaim there and overheard a request on his part that the bank put "an insufficient funds tag" on the check. This the teller declined to do. Two days later, 12 February, the check was presented to the bank for payment by E. R. Swaim and was paid upon presentation.

At 11 o'clock on the morning of 10 February, E. R. Swaim saw the plaintiff and said to him: "We made a mistake; we want you to come up with me and have this warrant withdrawn." This the plaintiff declined to do. The constable came to plaintiff's place of business at 6 o'clock the same day and offered the plaintiff his cash bond back, which he declined to accept. Plaintiff appeared at the magistrate's office at the time set for the hearing, 3 o'clock p.m., 11 February, and found that "the case had been *nol pros'd,* with leave." This was without his procurement or consent.

There was evidence that the plaintiff's reputation and character had been injured by the prosecution in question.

At the close of plaintiff's evidence, the trial court being of opinion that the plaintiff had failed to make out a case against any of the defendants, directed a verdict in their favor and entered judgment accordingly. Plaintiff appeals, assigning errors.

Benbow, Hall & Wilson for plaintiff.
Frank P. Hobgood for defendants.

STACY, C. J. To make out a case of malicious prosecution, the plaintiff is required to allege and to prove that the defendant instituted or participated in a proceeding against him maliciously, without probable cause, which ended in failure. *Wingate v. Causey,* 196 N. C., 71, 144 S. E., 530; *Bowen v. Pollard,* 173 N. C., 129, 91 S. E., 711; *Carpenter Co. v. Hanes,* 167 N. C., 551, 83 S. E., 577; *Humphries v. Edwards,* 164 N. C., 154, 80 S. E., 165; *Stanford v. Grocery Co.,* 143 N. C., 419, 55 S. E., 815; *R. R. v. Hardware Co.,* 138 N. C., 174, 50 S. E., 571; *S. c.,* 143 N. C., 54, 55 S. E., 422; *Ely v. Davis,* 111 N. C., 24, 15 S. E., 878; *Jerome v. Shaw,* 172 N. C., 862, 90 S. E., 764; 18 R. C. L., 11.

A *nolle prosequi* with leave is sufficient termination of a criminal prosecution to support an action for malicious prosecution based thereon. *Winkler v. Blowing Rock Lines,* 195 N. C., 673, 143 S. E., 213; *Wilkinson v. Wilkinson,* 159 N. C., 265, 74 S. E., 740; *Marcus v. Bernstein,* 117 N. C., 31, 23 S. E., 38; *Hatch v. Cohen,* 84 N. C., 602.

It was held in *Welch v. Cheek,* 115 N. C., 310, 20 S. E., 460, *S. c.,* 125 N. C., 353, 34 S. E., 531, that a dismissal of a warrant by a justice of the peace at the instance of the prosecutor, without the consent or procurement of the defendant therein, was a sufficient determination of the proceeding to support an action of malicious prosecution based thereon. See, also, *Murray v. Lackey,* 6 N. C., 368.

Want of probable cause, since it involves a negative, may be inferred from such facts and circumstances as will reasonably permit the inference, especially in case of nonsuit or directed verdict. *Tyler v. Mahoney,* 166 N. C., 509, 82 S. E., 870; *Moore v. Bank,* 140 N. C., 293, 52 S. E., 944. As against a demurrer to the evidence, it is sufficient to show that the proceeding, upon which the action for malicious prosecution is based, was instituted or pursued causelessly. *Humphries v. Edwards, supra.*

Probable cause for a criminal prosecution does not depend upon the guilt or innocence of the accused, nor upon the fact as to whether a crime has actually been committed. When one acts upon appearances in preferring a criminal charge, and the apparent facts are such as to lead a discreet and prudent person to believe that a crime has been committed by the party charged, although it turns out that he was mistaken, and the party accused was innocent, still he is justified. 18 R. C. L., 36. It is a case of apparent, rather than actual, guilt.

Justifiable cause, in a case of this kind, is a well founded belief on the part of the prosecutor in the existence of facts essential to the prosecution, supposing him to be a person of ordinary caution, prudence and judgment. *Cabiness v. Martin,* 14 N. C., 454. Probable cause for a criminal prosecution, in the sense in which the term is used in actions for malicious prosecution, was defined by *Mr. Justice Washington* in the case of *Munn v. Dupont,* 3 Wash., 37, as "a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged." This was approved by the Supreme Court of the United States in the case of *Stacey v. Emery,* 97 U. S., 642, where the following definition of *Shaw, C. J.,* taken from *Ulmer v. Leland,* 1 Me., 135, was also quoted with approval: "Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty."

Speaking to the subject in *Smith v. Deaver,* 49 N. C., 513, *Battle, J.,* delivering the opinion of the Court, says: "As a guide to the Court, it is defined to be 'the existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty, was guilty. It is a case of apparent guilt as

contra-distinguished from real guilt. It is not essential, that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time, as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others, as well as his own, to institute a prosecution; not that he knows the facts necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense.' "

"Probable cause, in cases of this kind, has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution"—*Hoke, J.*, in *Morgan v. Stewart,* 144 N. C., 424, 57 S. E., 149.

Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest, *e. g.*, to obtain possession of property, or to enforce collection of a debt, and the like, is admissible, both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a prima facie want of probable cause. *McDonald v. Schroeder,* 214 Pa., 411, 6 L. R. A. (N. S.), 701; *Wenger v. Phillips,* 195 Pa., 213; 78 A. S. R., 810; *Ross v. Hixon,* 46 Kan., 550, 26 A. S. R., 123, and note; 18 R. C. L., 53. *Contra: Barton v. Woodward,* 32 Idaho, 375, 5 A. L. R., 1090. *Quære: McRae v. O'Neal,* 13 N. C., 166.

The reason for holding that proof of a collateral purpose is sufficient to make out a prima facie want of probable cause, is based upon the hypothesis that a person, bent on accomplishing some ulterior motive, will act upon much less convincing evidence than one whose only desire is to promote the public good. See opinion of *Budge, J.*, in *Barton v. Woodward, supra.*

Speaking to the subject in *Brown v. Selfridge,* 224 U. S., 189, 56 L. Ed., 727, *Mr. Justice Day,* delivering the opinion of the Court, says: "While it is true that the want of probable cause is required to be shown by the plaintiff and the burden of proof is upon her in this respect, such proof must necessarily be of a negative character, and concerning facts which are principally within the knowledge of the defendant. The motives and circumstances which induced him to enter upon the prosecution are best known to himself. This being true, the plaintiff could hardly be expected to furnish full proof upon the matter. She is only required to adduce such testimony as, in the absence of proof by the defendant to the contrary, would afford grounds for presuming that the allegation in this respect is true. 1 Greenl. Ev., sec. 78. In other words, the plaintiff was only obliged to adduce such proof, by circumstances or otherwise, as are affirmatively within her control, and which she might fairly be expected to be able to produce. As *Mr. Justice Clifford* put

it, in *Wheeler v. Nesbitt,* 24 How., 544, 16 L. Ed., 765, the plaintiff must prove this part of the case 'affirmatively, by circumstances or otherwise, as he may be able.'"

The criminal prosecution, here in question, ended in failure. The chief purpose of Brady, who swore out the warrant, was to collect a debt. Prima facie, therefore, the prosecution was without probable cause. *Johnston v. Martin,* 7 N. C., 248; *Bostick v. Rutherford,* 11 N. C., 83. Malice, in the sense in which it is used in actions for malicious prosecutions *(Downing v. Stone,* 152 N. C., 525, 68 S. E., 9), is inferable from the absence of probable cause. *Turnage v. Austin,* 186 N. C., 266, 119 S. E., 359; *Kelly v. Traction Co.,* 132 N. C., 368, 43 S. E., 923; *Merrell v. Dudley,* 139 N. C., 57, 51 S. E., 777; *McGowan v. McGowan,* 122 N. C., 145, 29 S. E., 97; *Johnson v. Chambers,* 32 N. C., 287. This suffices to carry the case to the jury as against the defendant, F. G. Brady. *Motsinger v. Sink,* 168 N. C., 548, 84 S. E., 847.

It is also a permissible inference from the record that Brady, in swearing out the warrant, was acting at the instance of Swaim and under his direction and advice. In addition to what transpired on Saturday afternoon, Swaim took the check to the bank on Monday morning and requested that "an insufficient funds tag" be placed upon it. This undoubtedly was for the purpose of using the dishonored check as evidence at the hearing. Failing in this, Swaim later saw the plaintiff and said to him: "We made a mistake; we want you to come up with me and have this warrant withdrawn." Without the knowledge or consent of the plaintiff, the criminal prosecution was thereafter *"nol. pros'd* with leave." Swaim then presented the check for payment on the following day, 12 February, and it was duly paid by the bank upon presentation. *S. v. Crawford,* 198 N. C., 522, 152 S. E., 504.

Thus it would seem that Brady and Swaim were acting in concert, first, in an effort to obtain cash for the check; and, second, in undertaking to have it dishonored by the bank in order to use it as evidence before the magistrate. At least, such are the permissible inferences from the evidence appearing on the record. The court erred, therefore, in directing a verdict for the defendant, E. R. Swaim. *Bowen v. Pollard,* 173 N. C., 129, 91 S. E., 711.

Of course, a prima facie showing does not necessarily mean that the plaintiff is entitled to recover. It is sufficient to carry the case to the jury *(Brock v. Ins. Co.,* 156 N. C., 112, 72 S. E., 213), and it is for the jurors to say whether or not the crucial and necessary facts have been established. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; *Cox v. R. R.,* 149 N. C., 117, 62 S. E., 884. We express no opinion as to the weight of the evidence, other than its prima facie character, which means only that it is legally sufficient to carry the case to the jury and

to warrant a recovery, nothing else appearing. *Hunt v. Eure,* 189 N. C., 482, 127 S. E., 593. It neither insures nor compels a recovery, however. *White v. Hines,* 182 N. C., 275, 109 S. E., 31.

Two questions arise in connection with the case as it relates to the Atlantic Refining Company, Inc.:

1. In prosecuting the plaintiff for uttering the check in question, were Brady and Swaim acting within the course of their employment or in the scope of their authority as employees or agents of the corporate defendant? *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501.

2. Was the prosecution of the plaintiff previously authorized or subsequently ratified by the corporate defendant? *Jackson v. Tel. Co.,* 139 N. C., 347, 51 S. E., 1015.

It is elementary that the principal is liable for the acts of his agent, whether malicious or negligent, and the master for similar acts of his servant, which result in injury to third persons, when the agent or servant is acting within the line of his duty and exercising the functions of his employment. *Roberts v. R. R.,* 143 N. C., 176, 55 S. E., 509. This upon the doctrine of *respondeat superior.* One who commits a wrong is liable for it, and it is immaterial whether it be done by him in person or by another acting by his authority, express or implied. *Qui facit per alium facit per se. Sawyer v. Gilmers,* 189 N. C., 7, 126 S. E., 183; *Cotton v. Fisheries Products Co.,* 177 N. C., 56, 97 S. E., 712; *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145; *Cook v. R. R.,* 128 N. C., 333, 38 S. E., 925; *Pierce v. R. R.,* 124 N. C., 83, 32 S. E., 399.

"A servant is acting in the course of his employment, when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment, if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct." Tiffany on Agency, p. 270.

If the wrongdoer, while acting within the range of his authority, does an act which injures another, the principal or master is liable therefor, without reference to whether the intent of the agent or servant was good or bad, innocent or malicious. *Sawyer v. R. R.,* 142 N. C., 1, 54 S. E., 793; *Cook v. R. R.,* 128 N. C., 333, 38 S. E., 925; *Pierce v. R. R., supra; Hussey v. R. R.,* 98 N. C., 34, 3 S. E., 923.

When the tort or wrongful act is done by express command of the principal or master or when it is afterwards adopted or ratified by him, there is little or no difficulty in applying the rule; but it is otherwise

when liability is made to depend upon implied authority. *Jackson v. Tel. Co., supra.*

Liability of the principal or the master depends not upon the motive of the agent or the servant, such as his intent to benefit the employer or to protect his property, but upon the question whether in the performance of the act which gave rise to the injury the agent or the servant was, at the time, engaged in the service of his employer. *Kelly v. Shoe Co.,* 190 N. C., 406, 130 S. E., 32; *Butler v. Mfg. Co.,* 182 N. C., 547, 109 S. E., 559; *Munick v. Durham,* 181 N. C., 188, 106 S. E., 665; *Clark v. Bland,* 181 N. C., 110, 106 S. E., 491; *Sawyer v. R. R., supra; Daniel v. R. R.,* 136 N. C., 517, 48 S. E., 816.

It is fully recognized that corporations may be held liable for negligent and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employees, servants, or agents, in the course of their employment and within its scope. *Ange v. Woodmen,* 173 N. C., 33, 91 S. E., 586; *Huffman v. R. R.,* 163 N. C., 171, 79 S. E., 307; *Tripp v. Tobacco Co.,* 193 N. C., 614, 137 S. E., 871.

The following from Reinhard on Agency, sec. 335, clearly and cogently states the rule in such cases and the reasons for its adoption by the courts:

"It is a general principle of law, as well as of social compact, that every one must so conduct himself in the enjoyment of the privileges of life and property as not to injure the person or property of others. . . . If a legal wrong is committed by an accountable being, the party injured may obtain redress therefor in damages. If the wrong was committed by his authorized agent, or servant, the result is the same. By 'authorized agent' it is not meant to imply that the wrongful act itself must be authorized by the principal or master, or that any presumption of that nature must be indulged before the principal can be held responsible: it is sufficient if the agent was authorized to perform the act in the performance of which the wrong was committed; for the principal is responsible, not only for the act itself, but for the ways and means employed in the performance thereof. The principal may be perfectly innocent of any actual wrong or of any complicity therein, but this will not excuse him, for the party who was injured by the wrongful act is also innocent; and the doctrine is that where one of two or more innocent parties must suffer loss by the wrongful act of another, it is more reasonable and just that he should suffer it who has placed the real wrongdoer in a position which enabled him to commit the wrongful act, rather than the one who had nothing whatever to do with setting in motion the cause of such act. 'In such cases,' says Story, 'the rule applies *(respondeat superior),* and it is founded upon public policy and convenience, for in no other way could there be any safety to third per-

sons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.' "

Continuing, the same author, in section 336, says:

"Of course, if the master or principal authorized or ratified the tort, or participated in it himself, he will be liable for the damages occasioned by it. But if he did not authorize or ratify it he will still be liable if it was done in the course of the agent's or servant's employment; and this is so even if the master or principal had actually forbidden the act to be done. The test is, whether the tort was committed in the course of the employment of the servant or agent; if the wrongful act complained of was outside of the course of such employment, the master or principal is not liable, unless it was subsequently ratified."

To like effect is the following from *Marlowe v. Bland,* 154 N. C., 140, 69 S. E., 752: "An act is within the scope of the servant's employment, where necessary to accomplish the purpose of his employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. But the act cannot be said to be within the scope of the employment merely because the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master, nor because the servant supposed that he possessed authority to do the act in question." See, also, *Cotton v. Transportation Co.,* 197 N. C., 709, 150 S. E., 505, and cases there cited.

The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person. Though it may have no mind with which to plot a wrong or hands capable of doing an injury, yet it may employ the minds and hands of others. If the tort of the servant is committed in the course of doing the master's work, and for the purpose of accomplishing it, it is the act of the master, and he is responsible "whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner." *Levi v. Brooks,* 121 Mass., 501; *Denver, etc., Ry. v. Harris,* 122 U. S., 597.

When the servant is engaged in the work of the master, doing that which he is employed or directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question. *Ange v. Woodmen, supra;* Reinhard on Agency, *supra; Bucken v. R. R.,* 157 N. C., 443,

73 S. E., 137; *May v. Tel. Co.*, 157 N. C., 416, 72 S. E., 1059; *Berry v. R. R.*, 155 N. C., 287, 71 S. E., 322; *Roberts v. R. R., supra.*

In actions for malicious prosecution, where it is sought to hold the employer liable for an unwarranted proceeding by his employee, the question of liability, as in other cases, is made to depend, firstly, upon whether the proceeding was within the scope of the employee's duties; and, secondly, upon adoption or ratification. *Wilson v. Sewing Machine Co.*, 184 N. C., 40, 113 S. E., 508; *Cooper v. R. R.*, 165 N. C., 578, 81 S. E., 761, *S. c.*, 170 N. C., 490, 87 S. E., 322.

Undoubtedly, an officer employed to make arrests and to prosecute offenders in proper cases, would be acting within the scope of his authority in carrying out such duties, and the employer would be liable for an unwarranted prosecution instituted by him in the line of his duties. *Butler v. Mfg. Co., supra.*

Ordinarily, however, the criminal prosecution of an offender, even where the offense is against the property of the principal or master, is not within the scope of the agent's or servant's authority. *Daniel v. R. R., supra; Sawyer v. R. R., supra; Powell v. Fiber Co.*, 150 N. C., 12, 63 S. E., 159; *West v. Grocery Co.*, 138 N. C., 166, 50 S. E., 565; *Moore v. Cohen*, 128 N. C., 345, 38 S. E., 919; *Central Ry. Co. v. Brewer*, 78 Md., 394. "In doing such act the agent acts in response to his duty as a citizen to see that public justice is done by punishing the offender. He, by such act, does not in theory of law seek to punish the supposed thief because he has wronged the company, but because he has wronged the state." *Cameron v. Pacific Express Co.*, 48 Md. App., 99.

A distinction is to be made in this connection between those cases in which the action of the agent or the servant could have no effect other than the punishment of the offender, and those in which the prosecution was instituted or pursued with a view to the recovery of the employer's property or the protection of his business. As said by *Justice Blackburn* in *Allen v. London, etc., R. Co.*, L. R., 6 Q. B., 65: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act for the purpose of punishing the offender for that which has already been done." Accordingly, in *Wheeler and Wilson Mfg. Co. v. Boyce*, 36 Kan., 350, where the unwarranted arrest and detention of the plaintiff was incidental to a replevin suit for the recovery of property belonging to the principal, the latter was held liable. To like effect is the decision in *Jackson v. Tel. Co., supra.* And in the following cases, where unwarranted arrests were made to enforce collections of debts which the agents believed to be due their principals, the latter were held responsible for the acts of the former. *Palmeri v. Manhattan Ry. Co.*, 133 N. Y.,

261, and *Dupree v. Childs,* 65 N. Y. Supp., 179. See, also, *Railroad Co. v. King,* 69 Miss., 852.

In the instant case, Swaim and Brady were undoubtedly acting within the course of their employment as agents or servants of the Atlantic Refining Company, Inc., in making sale and delivery of the gasoline and in undertaking to collect therefor. As to whether they exceeded their authority in resorting to or pursuing the criminal prosecution of the plaintiff, to enforce collection of the check, is the crucial point upon which the liability or nonliability of the corporate defendant in the first instance depends. 26 Cyc., 18; 2 C. J., 848. The check was made payable to "The Atlantic Refining Co." It was the property of the corporate defendant when the warrant was sworn out by Brady. It was the property of the corporate defendant when Swaim took it to the bank and asked that it be dishonored for nonpayment. It was the property of the corporate defendant when Swaim later presented it to the bank for payment.

If the individual defendants were acting within the scope of their authority as agents or servants of the corporate defendant in accepting the check, and Swaim was acting for the corporate defendant in finally presenting it for payment, which is not controverted, we think the case is one for the jury, under proper instructions from the court, to determine whether the Atlantic Refining Company, Inc., is liable to the plaintiff on either theory, *i. e.,* the theory of authorization or the theory of ratification.

On the theory of authorization, as to whether the individual defendants, in instituting or pursuing the criminal prosecution of the plaintiff for uttering the check in question, were about the business of the corporate defendant, acting in the line of their duties as such agents and servants, see: *Kelly v. Shoe Co., supra; Beam v. Fuller,* 171 N. C., 770, 88 S. E., 760; *Fleming v. Knitting Mills,* 161 N. C., 436, 77 S. E., 309; *Berry v. R. R.,* 155 N. C., 287, 71 S. E., 322; *Stewart v. Lumber Co.,* 146 N. C., 47, 59 S. E., 545; *Merrell v. Dudley,* 139 N. C., 57, 51 S. E., 777; *Kelly v. Traction Co.,* 132 N. C., 368, 43 S. E., 923; *Lovick v. R. R.,* 129 N. C., 427, 40 S. E., 191; *Griffis v. Sellers,* 19 N. C., 492; *Davenport v. Lynch,* 51 N. C., 545.

On the theory of ratification, as to whether the corporate defendant, with full knowledge of the facts, ratified the acts of its agents or servants in instituting or pursuing the prosecution in question, see: *Waggoner v. Publishing Co.,* 190 N. C., 829, 130 S. E., 609; *Starkweather v. Gravely,* 187 N. C., 526, 122 S. E., 297; *Bank v. Justice,* 157 N. C., 373, 72 S. E., 1016; *Daniel v. R. R.,* 136 N. C., 517, 48 S. E., 816; *Minter v. Express Co.,* 153 N. C., 507, 69 S. E., 497; *Dempsey v. Chambers,* 154 Mass., 330; 18 R. C. L., 811; 21 R. C. L., 919; 2 C. J., 470.

The decisions in *Turnage v. Austin, supra; Powell v. Fiber Co., supra; West v. Grocery Co., supra; Moore v. Cohen, supra,* cited and relied on by the defendants, and *Lamm v. Charles Stores Co., post,* 134, are not at variance with our present position. They are distinguishable by reason of different fact situations.

The entire merits of the case are not before us. For aught we know, the jury may find, upon consideration of all the evidence, that probable cause existed for the prosecution; that it was instituted and pursued without malice, and that the corporate defendant in no event is liable therefor. But upon the record, as presently presented, there was error in directing a verdict for the defendants.

New trial.

DEWEY CAMPBELL v. HIGH POINT, THOMASVILLE & DENTON RAILROAD COMPANY.

(Filed 15 June, 1931.)

1. **Trial D a—On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff.**

   Upon a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Railroads D b—Violation of ordinance in respect to safety and condition of crossing is negligence.**

   Where a city ordinance requires a railroad company, among other things, to keep its grade crossing in the city in a safe condition at all times by paving same with wood, brick, cement, etc., for the full width of the street, and makes the failure to do so a misdemeanor, evidence that the wheels of the automobile in which the plaintiff was riding as a guest became caught between the exposed cross-tie on one side of the crossing where the driver was forced to go by other passing automobiles, and that this part of the crossing was in an unsafe condition, and that the car was struck by defendant's train approaching the crossing without giving any warning, is held sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit.

3. **Highways B k—Negligence of driver will not be imputed to guest having no control or management over automobile.**

   Upon evidence tending to show only that the plaintiff was an invitee of the owner and driver of an automobile, and had no management or control over the driver, any contributory negligence attributable to the driver will not ordinarily be imputed to the plaintiff.

4. Railroads D b—Where negligence of railroad is proximate cause of injury to guest the negligence of driver will not relieve it of liability.

Where the owner of an automobile is driving his own car and his invitee or guest, who has no control over the running or operation of the car, is injured in a collision with a train at a grade crossing, and the railroad company is negligent, the negligence of the driver of the automobile, if any, will not bar plaintiff's right to recover against the railroad company unless it is the sole proximate cause of the injury in suit.

5. Damages F a—Instruction as to measure of damages for personal injury under evidence in this case held not error.

Where the plaintiff in a negligent injury action does not offer evidence of any expense he was put to as the result of the injury, and instruction upon the measure of damages recoverable that the plaintiff has the burden of proof and may recover, if at all, only an amount which would compensate him for past, present and future suffering and the condition of his person, excluding any expense he may have incurred otherwise on account of the injury received, is not erroneous, and an exception by the defendant to another portion of the charge consistent and not in conflict therewith will not be sustained.

6. Trial E c—Where instructions sufficiently state law applicable, party desiring more specific instructions should make request therefor.

Where the instructions of the court to the jury are generally sufficient under the evidence, the objecting party must offer prayers for instructions in more detail if he desires them or his exception is untenable.

7. Trial G a—Jurors will not be allowed to impeach their own verdict.

After verdict jurors will not be heard to impeach it by their individual testimony, though the power of the trial court to perfect a verdict or to correct an inadvertence or mistake does not fall within the rule, and *held:* on this appeal an exception and assignment of error for that the trial court refused to hear testimony of jurors that the verdict was a quotient verdict is not sustained.

8. Appeal and Error J e—Where it does not appear what answer of witness would have been, exception to its exclusion will not be held for error.

Exception to the refusal of the trial court to permit a witness to answer a question is not maintainable on appeal when the record does not disclose what the answer would have been.

9. Trial E g—Charge correct when construed as a whole will not be held for reversible error.

Where the charge of the trial court to the jury taken in its related parts and construed contextually as a whole is free from error an exception thereto will not be sustained on appeal.

10. Trial G b—Where verdict determines rights of parties the jury's failure to answer one of the issues is not ground for a new trial.

In a personal injury case involving upon the trial the issues of negligence, contributory negligence, and the last clear chance, the failure of the jury

to answer the last issue will not entitle the defendant to a new trial on appeal when it appears that the jury's answer to the first two issues completely and properly dispose of the case.

11. Negligence B d—When negligence of defendant concurs with negligence of another in proximately causing injury the defendant is liable.

In a case involving defendant's negligence, any degree of causal negligence, however small, on defendant's part, will entitle the plaintiff to recover if he is free from contributory negligence.

12. Trial E e—Refusal to give special instructions requested will not be held for error when they are substantially embodied in charge.

The refusal of the trial court to give special instructions requested will not be held for error if the requested instructions are substantially covered in the charge.

APPEAL by defendant from *Schenck, J.*, at December Term, 1930, of GUILFORD. Affirmed.

This was a civil action heard and tried in the municipal court of the city of High Point, before Lewis E. Teague, judge, and a jury, at the April Term, 1930, of said court.

It is an action for actionable negligence brought by plaintiff against defendant. Defendant denied negligence and set up the plea of contributory negligence.

The evidence on the part of plaintiff was to the effect that he was a guest or gratuitous passenger in an Essex coach automobile driven by one W. G. Long. Long and his wife were in the front seat, Long at the steering-wheel and his wife beside him, plaintiff in the rear seat. The automobile was so constructed that it was necessary for the person in front of him to get up and the seat be turned down and open the door before plaintiff could get out. That defendant's train was backing and the automobile was *stuck* on the middle track, Long and his wife, after sensing the situation, were able to escape, Long opening the door on his side and his wife the one on her side, but plaintiff was not able to escape in time, and in getting out behind Mrs. Long he got as far as the running board and was caught by the backing train of defendant and seriously injured, losing his leg, which had to be amputated about 3 inches below the knee.

The collision occurred on 5 February, 1929, about 5 to 10 minutes after 12 o'clock noon, where defendant's railroad tracks cross Oak Street in High Point. The automobile in which plaintiff was riding was headed north, traveling on the east side of Oak Street. There were three railroad tracks of defendant crossing Oak Street at this place. The center of the crossing, some 7 to 9 feet, was in fairly good condition for automobiles to cross, but the balance of the crossing was unballasted, uneven and in bad condition on the side the automobile was

being driven by Long. The rails projected up and the cross-ties could be seen. "The rails on Mr. Long's side as he proceeded north were sticking up pretty high and pretty rough." The street was about 24 to 30 feet wide. Long was coming down the road on the right side, traveling on that side, to avoid a car he was meeting. On approaching the tracks of the railroad crossing Oak Street one could not see in the direction the train was coming on account of obstruction until within about 15 feet, or, as testified to by plaintiff, "practically on the crossing," and then not over some 40 feet. No train was seen or heard—no bell ringing or whistle blowing.

Long, the driver of the automobile, testified in part: "I undertook to cross the crossing that is referred to in this case. . . . I just got stopped on it. I tried to get the car off the track both ways, and there was only one thing to do, and that was to jump out to keep from being killed. I couldn't get my car off because it was hung on the rail. When I went up to this crossing I looked both ways to see if a train was coming and saw none. I slowed down. I remember one automobile passing when I went to cross, and when that car was passing my car had to go away over to the right where the road was not filled up. In crossing there at that time I had to cross over the exposed T-irons. Dewey Campbell and my wife and myself were in the car. Dewey Campbell had nothing to do with the driving of the car. The train hit my automobile just about the time I got out. It went about 40 feet down the track. If the train slackened its speed I couldn't tell it. It tore my automobile all to pieces."

It was further in evidence that Long, after getting *stuck* between the rails, tried to go forward and then backward, but could do neither. The wheels of the automobile were spinning around, snow was on the ground. As soon as plaintiff discovered the situation he exclaimed to Long: "Lord, Bill, there's the train," and the train was backing on them some 50 feet away.

T. P. Anderson, a witness for plaintiff, testified in part: "I was familiar with the condition of the crossing. I don't think the space between the rails was filled in for the entire width of the crossing with either wood, brick, concrete, stone or other suitable material all the way across. . . . When I first saw his car it was on the track. From the time I first saw the train it was at least 100 feet from the car. . . . I saw the occupants in the car. Mr. Long appeared to be trying to move his car. I saw Mr. Campbell rise up in the back of the car. I saw Mr. Long get out; I saw Mrs. Long get out; I saw Mr. Campbell start out the same door Mrs. Long went out of."

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

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

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. If so, could the defendant, by the exercise of reasonable prudence and proper care, have avoided injuring the plaintiff, as alleged in the complaint? Answer: .....

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $11,875."

Judgment was rendered on the verdict by the municipal court of the city of High Point. Numerous exceptions and assignments of error were made by defendant and appeal taken to the Superior Court.

The following judgment was rendered in the Superior Court: "This cause coming on to be heard upon appeal from the municipal court of the city of High Point, and being heard upon the assignments of error on the part of the defendant as set forth in the record: It is ordered that each and every assignment of error appearing in the record be overruled; that the judgment heretofore rendered in the municipal court of the city of High Point be in all things affirmed, and that the clerk of this court certify this opinion to the municipal court of the city of High Point to the end that said cause may be proceeded with according to law."

The defendant made numerous exceptions and assignments of error, the same as on appeal to the Superior Court and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Frazier & Frazier and Gold, York & McAnally for plaintiff.
Lovelace & Kirkman and King, Sapp & King for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant made motions in the municipal court of the city of High Point for judgment as in case of nonsuit. C. S., 567. The court refused these motions, and in this we can see no error. On appeal to the Superior Court the numerous exceptions and assignments of error taken to the trial in the municipal court on questions of law were overruled, which we think correct.

It is the settled rule 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. The

evidence in the present action was to some extent conflicting, but this was a matter for the jury to determine.

An ordinance in regard to railroad crossings, in force in the city of High Point at the time, is as follows: "It shall be the duty of all railroad companies owning or operating railroads within the limits of the city of High Point to keep all grade crossings and overhead bridges, used by vehicles or pedestrians, or both, in a smooth, level, clean and perfectly safe condition at all times by paving same with wood, brick, concrete, stone or other suitable materials; said crossings to be so maintained for the full width of the street and sidewalks and for the full distance of the railroad right of way on both sides of the track or tracks; that any railroad company failing to keep and observe the requirements of this ordinance shall be subject to a penalty of $25 for each offense; that each day's failure or neglect on the part of any railroad company to keep and observe any of the requirements or provisions of this ordinance shall constitute a separate and distinct offense."

If Long, the driver of the car, had been injured and had brought an action against defendant, the evidence was sufficient to be submitted to the jury on the question of negligence and contributory negligence. *Earwood v. R. R.*, 192 N. C., 27; *McGee v. Warren*, 198 N. C., 675; *Smith v. R. R.*, 200 N. C., 177; *King v. R. R.*, 200 N. C., 398; *Madrin v. R. R.*, 200 N. C., 784.

Plaintiff was a guest or gratuitous passenger. It is well settled that "Negligence on the part of the driver will not, ordinarily, 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. *Bagwell v. R. R.*, 167 N. C., 611; *White v. Realty Co.*, 182 N. C., 536; *Williams v. R. R.*, 187 N. C., 348; *Albritton v. Hill*, 190 N. C., 429. Of course, if the negligence of the driver is the sole, only proximate cause of the injury, the injured party could not recover." *Earwood v. R. R.*, 192 N. C., at p. 30; *Dickey v. R. R.*, 196 N. C., 726.

On this aspect the court charged the jury: "If you find from the evidence in this case and by its greater weight that the defendant in this case was negligent and that W. G. Long, the operator of the automobile on this occasion, was negligent and that their negligence cooperating and concurring there together was the proximate cause of the injury that the plaintiff received on this occasion, then the court charges you that under that circumstance it would be your duty to answer the first issue 'Yes.' The court further charges you, gentlemen of the jury, if you find by the greater weight of the evidence in this case that the operator of the automobile, W. G. Long, was negligent and his negligence was the sole proximate cause of the injury that the plaintiff in this case received, then the court charges you that under that circumstance it would be your duty to answer the first issue 'No.'"

The contention of the defendant that the charge in reference to damages was erroneous cannot be sustained. The judge of the municipal court, after setting forth accurately the contentions of the parties in reference to damages, charged the jury: "You will not consider any expense that the plaintiff in this case has gone to as a result of this injury, because there is no evidence in this case that he has gone to any expense as a result of that injury, and you will pass upon the amount of damage he is entitled to recover for the injury he received on this occasion; that is, the present worth of that amount that he is entitled to receive. Of course, that takes into consideration, under the charge I have given you, that you are giving him one compensation which will compensate him for the injury that he received, taking into consideration the past suffering, present suffering, and future suffering, and the condition of his person. This part of the charge was not excepted to, and that part which was excepted to on this phase was consistent and not conflicting.

In *Ledford v. Lumber Co.*, 183 N. C., at p. 616-17, the rule is thus stated: "And it is for the jury to say, under all the circumstances, what is a fair and reasonable sum which the defendant should pay the plaintiff, by way of compensation, for the injury he has sustained. The age and occupation of the injured party, the nature and extent of his business, the value of his services, the amount he was earning from his business, or realizing from fixed wages, at the time of the injury, or whether he was employed at a fixed salary, or as a professional man, are matters properly to be considered. *Rushing v. R. R.*, 149 N. C., 158. The sum fixed by the jury should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective. *Penny v. R. R.*, 161 N. C., 528; *Fry v. R. R.*, 159 N. C., 362." *O'Brien v. Parks Cramer Co.*, 196 N. C., 366-7.

In *O'Brien v. Parks Cramer Co., supra,* at p. 367, the following observation is made: "If the defendant desired fuller instruction, or in any special way, it should have asked for an instruction sufficient to present its view or so as to direct the attention and consideration of the jury more pointedly to that particular phase of damage which defendant desired to present."

The question presented by defendant as to the impeachment of the jury cannot be sustained. It is well settled in *Lumber Co. v. Lumber Co.*, 187 N. C., at p. 418, citing numerous authorities: "It is firmly established in this State that jurors will not be allowed to attack or to overthrow their verdicts, nor will evidence from them be received for such purpose. . . . But this rule does not affect the power of the court to perfect a verdict, nor to correct any inadvertence or mistake that

may have occasioned the entry of a verdict at variance with the real finding of the jury."

The exception and assignment of error made by defendant on this aspect, is as follows: "For that his Honor refused to permit the defendant to offer evidence to show that the verdict of the jury was a quotient verdict, and refused to set aside said verdict."

In *Barbee v. Davis,* 187 N. C., at p. 85, citing numerous authorities, "There was no error, for another reason. *Adams, J.,* in *Snyder v. Asheboro,* 182 N. C., 710, says: 'Since the record fails to disclose what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness.'" *Ice Co. v. Construction Co.,* 194 N. C., at p. 409. We can see no error in the charge as a whole.

In re Mrs. Hardee's Will, 187 N. C., at p. 382-3, we find: "It is now settled law that the charge of the court must be considered and examined by us, not disconnectedly, but as a whole, or at least the whole of what was said regarding any special phase of the case or the law. The losing party will not be permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with other portions, they are readily explained, and the charge in its entirety appears to be correct. Each portion of the charge must be considered with reference to what precedes and follows it. In other words, it must be taken in its setting. The charge should be viewed contextually and not disjointedly. Any other rule would be unjust, both to the trial judge and to the parties." *Brown v. Tel. Co.,* 198 N. C., 773-4.

The exception and assignment of error as to the jury not answering the third issue, involving last clear chance, is immaterial on this record. The Supreme Court will not consider exceptions arising upon the trial of another issue, when the issues found by the jury are sufficient to support the judgment. *Sams v. Cochran,* 188 N. C., at p. 734.

On this record, as the plaintiff was a guest or gratuitous passenger, we must call attention to another well settled principle of law set forth in *White v. Realty Co.,* 182 N. C., at p. 538: "But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff in the absence of any contributory negligence on his part, would be entitled to recover; because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others. 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' *Wood v. Public Service Corp.,* 174 N. C., 697." *Earwood v. R. R., supra.*

The court below charged: "If you are satisfied by the greater weight of the evidence in this case that the defendant railroad company failed to comply with that city ordinance, . . . in keeping that grade crossing according to requirements in this ordinance, that that would be negligence, and if you are further satisfied by the greater weight of the evidence that that negligence was the proximate cause of the injury that this plaintiff received on this occasion, then the court charges you that under that circumstance it would be your duty to answer the first issue 'Yes.'"

The above principle is well settled in this jurisdiction. *Delaney v. Henderson-Gilmer Co.*, 192 N. C., 651.

The exceptions and assignments of error that defendant's prayers for instructions were not given, cannot be sustained. The parts of the special instructions prayed for, that were correct in law and applicable to the facts in this action, were fully set forth in the charge. The court below in the charge defined burden of proof and applied it in reference to the different issues; in like manner negligence and proximate cause and contributory negligence. The charge is unusually clear and comprehensive, covering every phase of the controversy, and complies fully with C. S., 564.

We find no error in law. The judgment of the court below is

Affirmed.

STATE v. MILTON FIELDS.

(Filed 15 June, 1931.)

1. **Intoxicating Liquor A c—Testimony that liquor in defendant's possession was intoxicating held sufficient to be submitted to jury in this case.**

   It may be shown in evidence as a fact that other beverages than those defined by our statute, N. C. Code, 1927, sec. 3411(a) as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute, and while courts will not take judicial notice that home brew is intoxicating, where officers experienced in such matters testify that the liquor in question was home brew, and the defendant admits it to have been root beer, and the officers testify that from its smell and appearance when it was seized by them that the beverage was intoxicating, it is sufficient to take the case to the jury on this question under proper instructions from the court and to resist defendant's motion as of nonsuit. C. S., 4643.

2. **Criminal Law G i—Testimony that liquor, from its appearances and smell, was intoxicating, held competent under facts of this case.**

   Where it is shown that witnesses have sufficient knowledge and experience to enable them to form an opinion as to whether liquor found in

the possession of the defendant or manufactured by him was intoxicating, their testimony that from its odor and looks upon examination, the liquor was intoxicating, their testimony is competent without further qualification as experts.

BROGDEN, J., dissents.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1931, of VANCE. No error.

This is a criminal action tried on a warrant issued by the recorder of Vance County on the affidavit of a deputy sheriff of said county, charging that "at and in said county, on or about 30 January, 1931, Milton Fields did unlawfully and wilfully have in his possession intoxicating liquors and ingredients for making and manufacturing intoxicating liquors contrary to the statute in such case made and provided and against the peace and dignity of the State."

On the evidence submitted to the jury, under the charge of the court, there was a verdict that defendant is guilty.

From judgment that defendant be confined in the county jail of Vance County for six months, with leave to work on the roads of said county or of any other county in the State, defendant appealed to the Supreme Court.

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

T. P. Gholson and A. W. Gholson, Jr., for defendant.

CONNOR, J. At the trial of this action in the Superior Court of Vance County, the State relied on the testimony of G. H. Tucker, and of J. L. Case, deputy sheriffs of Vance County, as evidence for the conviction of the defendant. Their testimony tended to show that on the night of 30 January, 1931, they went to the home of the defendant, Milton Fields, on the Oxford road in Vance County, with a search and seizure warrant which they had procured from a justice of the peace of said county. As authorized by this warrant, the officers searched the house in which defendant lives, and found in said house two six-gallon containers. In each of these containers, there was about five gallons of a liquor, which both officers testified was, in their opinion, home brew. Each officer smelled the liquor, and testified over the objection of the defendant, that in his opinion the liquor was intoxicating. They did not taste the liquor, but after smelling it, poured it out of the containers on the ground. None of the liquor was analyzed; none of it was offered in evidence at the trial. Each officer testified that he did not know whether or not the liquor which they found in defendant's house contained one-half of one per cent or more of alcohol. Both were of the

opinion, based upon its appearance and odor, that the liquor did contain more than one-half of one per cent of alcohol.

The officers also found in defendant's house from one hundred and fifty to two hundred empty bottles, with a large number of bottle caps. One of the officers testified that he found in a bag in defendant's house a substance which he thought was malt. None of this substance was offered in evidence at the trial.

The defendant was not at his home when the officers went there, entered his house and made the search. He returned after they had completed the search.

Each of the witnesses for the State was an officer of experience. Both had previously made searches for and seizures of intoxicating liquors in the performance of their official duties. Both testified that they thought that the liquor which they found in defendant's house was intoxicating and that it contained more than one-half of one per cent of alcohol by volume. Each testified that this opinion was based upon the appearance and odor of the liquor.

The defendant, Milton Fields, as a witness in his own behalf, testified that the liquor in the two containers found by the officers in his house, was root beer, which he had made for his own use, and that the substance found by one of the officers in his house was not malt, but was a preparation which he used in making root beer. He denied that the liquor was intoxicating. He testified that he had lived in the city of Henderson for the past twenty years.

Both the chief of police of the city of Henderson and the sheriff of Vance County testified that they had heard recently that defendant, Milton Fields, was "mixed up with whiskey." Neither of them had heard anything against the defendant until recently. The defendant offered no evidence as to his general character.

The defendant contends on his appeal to this Court that there was error in the refusal of the trial court to allow his motion, made at the conclusion of all the evidence, that the action be dismissed, and for judgment of nonsuit. C. S., 4643. This contention is properly presented to this Court by defendant's assignment of error based on his exception duly taken at the trial of the action to the refusal of his motion. The only question involved in the contention is whether or not there was evidence at the trial of the action of sufficient probative force for submission to the jury, tending to show that the liquor found by the officers in defendant's possession, and manufactured by him, was intoxicating. If the liquor was intoxicating, there was evidence tending to show that its possession by the defendant, although in his home, was unlawful. *S. v. Hammond,* 188 N. C., 602, 125 S. E., 402. In that case it was held that the possession of a large quantity of whiskey by the defendant in her home raised a prima facie case of her guilt, and

that her motion for judgment of nonsuit was properly denied. See *S. v. Dowell,* 195 N. C., 523, 143 S. E., 133.

In the instant case there was evidence tending to show that the liquor found by the officers in defendant's possession was home brew. There was no evidence tending to show that home brew is a spirituous, vinous, malt or fermented liquor. The statutory definition of the word "liquor" or of the phrase "intoxicating liquor," as used in the prohibition statutes of this State, does not include home brew. The statute, which in that respect is identical with the Volstead Act, provides that the word "liquor," or the phrase "intoxicating liquor," when used in the statutes of this State prohibiting the manufacture, possession or sale of 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 per centum or more of alcohol by volume, which are fit for use for beverage purposes. Section 1, chapter 1, Public Laws 1923, N. C. Code, 1927, sec. 3411(a).

A liquor, although fit for use for beverage purposes, known and described as home brew, is not intoxicating within the meaning of our prohibition statutes, unless it be a spirituous, vinous, malt or fermented liquor, containing one-half of one per cent or more of alcohol by volume. Although such liquor is not intoxicating within the statutory definition, it may nevertheless be intoxicating in fact. The statutory definition is not exclusive. It is, therefore, unlawful in this State to manufacture, possess or sell any liquor which is intoxicating within the statutory definition, or which is intoxicating in fact. Where there is no evidence at the trial of a defendant charged with manufacturing, possessing or selling intoxicating liquor contrary to the statutes of this State, tending to show that the liquor was intoxicating within the statutory definition, it is incumbent on the State to offer evidence tending to show that the liquor which the defendant manufactured, possessed or sold was in fact intoxicating. In the absence of such evidence, the action should be dismissed upon motion of the defendant duly made in accordance with the provisions of the statute. C. S., 4643.

It has been said that without regard to statutory definition, "the courts will take judicial notice that whiskey, brandy, gin, rum, porter, and strong beer are intoxicating liquors. According to some of the authorities, it will also be judicially noticed that all wine, alcohol, lager beer, and Jamaica ginger are intoxicating liquors; but there are also cases holding to the contrary as to all wine, alcohol, lager beer and Jamaica ginger. As to whether the courts will take judicial notice that the term beer, used without restriction or qualification, denotes intoxicating liquor, there is likewise a conflict of authority. Some of the

cases holding in the affirmative, and some in the negative. As to other varieties of beer, or ordinary malt beer disguised under other names, their character as intoxicating or the reverse is a matter of evidence. Where a liquor is designated simply as cider, the fact that it is intoxicating must be established by evidence; but it is otherwise as to hard cider. A 'Manhattan cocktail' is generally and popularly known to be intoxicating, and hence no proof of its intoxicating character is necessary. Judicial notice may be taken of the fact that it is alcohol in a liquor that renders it intoxicating, that wine contains alcohol in varying quantities, and that whiskey, properly so called, contains many times one-half of one per cent of alcohol. It will not be judicially noticed that hop pop, hop ale, or hop jack is an intoxicating liquor. Courts do not generally know that all malt liquors are intoxicating, or that mead or metheglin is an intoxicating liquor." 33 C. J., 497. In view of our statutory definition of liquors or intoxicating liquors, many of the cases cited in support of the text are not authoritative or controlling on the courts of this State; the principle, however, on which the decisions rest is sound. It has been so recognized in this State.

In *S. v. Packer,* 80 N. C., 439, it was held that where it was shown on the trial of a defendant for selling intoxicating liquor in violation of a statute of this State, that the defendant sold port wine, the defendant was properly convicted, although there was no evidence at the trial that port wine is intoxicating. *Dillard, J.,* in the opinion in that case, says: "As to the motion for a new trial because no proof was offered that port wine was an intoxicating liquor, the defendant, in our opinion, has no legal cause of complaint. It was, of course, a question for the jury, and after the proof of the sale of the liquor, and that it was port wine, the jury could rightfully as to matters of common knowledge and experience, find without any testimony as to such matters. Now, everybody knows what port wine is, knows that it is a liquor, and also knows that it is intoxicating." See, also, *S. v. Giersch,* 98 N. C., 720, 4 S. E., 193, where *Merrimon, J.,* says: "The term 'liquor,' in its most comprehensive signification, implies fluid substances generally—such as water, milk, blood, sap, juice, but in a more limited sense and its common application, it implies spirituous fluids, whether fermented or distilled—such as brandy, whiskey, rum, gin, beer, and wine, and also decoctions, solutions, tinctures and the like fluids in great variety."

It cannot be held as a matter of common knowledge and experience that a liquor known by a name which does not indicate whether it is a spirituous, vinous or malt liquor, whether it is the product of distillation or fermentation, or whether it is intoxicating or not, such as home brew, although it is fit or at least designed for use as a beverage, is intoxicating. It may or may not be intoxicating, dependent upon whether

or not it contains alcohol, and if it does, whether or not it contains alcohol in sufficient volume to produce intoxication, when used as a beverage. In the absence of evidence tending to show that liquor which a defendant on trial for a violation of our prohibition laws, manufactured, had in his possession or sold, was intoxicating within the statutory definition, or was intoxicating in fact, the action should be dismissed on defendant's motion made in accordance with the provisions of C. S., 4643.

It has been so held in other jurisdictions. *Vanmeter v. Commonwealth* (Ky.), 23 S. E. (2d), 594. In that case it was held that evidence that liquor found in the possession of the defendant, who was charged with the unlawful possession of intoxicating liquor, was home brew, and that the liquor effervesced when the cap was removed from the bottle, was not sufficient to show that the liquor was intoxicating. The judgment on the conviction of the defendant in that case was reversed.

In the instant case, the evidence relied on by the State to sustain its contention that the liquor found in the defendant's possession and manufactured by him was intoxicating, was the testimony of the officers. They testified that they saw the liquor in the containers, and as they poured it out on the ground. They also smelled the liquor. Both of the officers had had experience in handling intoxicating liquors, in the performance of their official duties. From the appearance of the liquor and its odor, they were of the opinion, and testified, that the liquor was intoxicating. This was the only evidence offered at the trial tending to show, as contended by the State, that the liquor was intoxicating. Was this evidence legally sufficient for submission to the jury, when in view of defendant's admissions, the only question involved was whether or not the liquor was intoxicating? The trial court so held, and in this we find no error.

In *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854, it was held, *Clarkson, J.,* writing the opinion for the Court, that testimony that an automobile smelled like whiskey, shortly after the owner of the automobile had left it standing by the roadside, was properly submitted to the jury as evidence tending to show that the defendant, the owner of the automobile, had transported intoxicating liquor in violation of the statute. The odor was sufficient to show that whiskey had recently been transported in the automobile. Whiskey is included within the statutory definition of intoxicating liquor. No additional evidence was therefore required to show that the liquor transported in the automobile was intoxicating.

In *Lewinsohn v. United States,* 278 Fed., 421, one of the questions presented for decision was whether the evidence admitted at the trial in the United States District Court was sufficient to show that the beverage

sold by the defendant was intoxicating. Witnesses testified from the appearance of the beverage both as to its character and its alcoholic content. They were of the opinion that the beverage was intoxicating and so testified. In the opinion of the United States Circuit Court of Appeal, Seventh District, it is said: "Before one can give opinion evidence he must show his qualifications. One who has drunk whiskey, who is familiar with its taste and smell, can give opinion evidence as to whether the beverage sold and drunk was intoxicating. If it appears that whiskey had been sold, it would require no stretch of the law of judicial notice to conclude that whiskey contains more than one-half of one per cent of alcohol. . . . The same reasoning applies with almost equal force to wine. As to beer, undoubtedly the court should be more careful; but with a proper showing of qualification we see no reason why the witness should not give his opinion that the beverage sold and drunk was or was not beer." It should be noted that both whiskey and beer are within the statutory definition in this State of intoxicating liquor.

It has been held that although a witness is not an expert, where it is shown that the witness has sufficient knowledge and experience to enable him to form an opinion as to whether liquor found in the possession of a defendant or manufactured by him, was intoxicating, his testimony that the liquor was intoxicating is competent as evidence. 33 C. J., 753, and cases cited.

After a careful consideration of the determinative question presented by this appeal, we have concluded that the testimony of a witness, who is shown to have had experience as an officer or otherwise in handling intoxicating liquors, that the liquor found in the possession of the defendant or manufactured by him, was intoxicating, is competent as evidence where it is shown that the witness saw and smelled the liquor, and formed his opinion that it was intoxicating from its appearance and its odor. The witness is subject, of course, to cross-examination by the defendant. His testimony may be contradicted by evidence for the defendant to the contrary, as was done in the instant case. Whether or not the liquor was intoxicating is a question of fact to be determined by the jury from all the evidence, and under the charge of the court. Where at the trial of an action, there is evidence legally sufficient to sustain the contention of the party who has the burden of the issue, it must be submitted to the jury; its weight and probative force is not ordinarily a matter for the court, but for the jury, under proper instruction of the court as to the law, involved in the issue. We find

No error.

BROGDEN, J., dissents.

MRS. MARIE MARKHAM v. DUKE LAND AND IMPROVEMENT COMPANY, THE CORLEY COMPANY, AND THE CITY OF DURHAM.

(Filed 15 June, 1931.)

1. **Municipal Corporations E c—City is liable for injury caused by dangerous condition of sidewalk of which it has actual or implied notice.**

   A city is liable in damages to one who sustains a personal injury proximately caused by a dangerous condition of its sidewalk of which the city has actual or implied notice.

2. **Same—Evidence of implied knowledge of city of dangerous condition of sidewalk held sufficient.**

   Where a dangerous place in the sidewalk of a city has existed for a sufficient length of time to have been known by the city in the exercise of due care in inspection, the city will be held to have implied knowledge thereof, and where there is evidence that a dangerous condition had existed for a week or more in the sidewalk, while it was in constant use by the public, it is sufficient to bar a motion as of nonsuit, and in this case there was evidence that the city manager had knowledge of the defect.

3. **Appeal and Error J c—Rights of defendant held not prejudiced in this case.**

   Where the trial court refuses a defendant's motion as of nonsuit, but later directs a verdict in his favor, the defendant's rights are not prejudiced.

4. **Trial D a—Refusal of nonsuit of one of defendants in action for tort held not error in this case.**

   Where a city and a development company are sued for an injury resulting from a dangerous condition of a sidewalk constructed by the development company under an agreement with the city that the development company should assume all responsibility for injuries resulting therefrom, the refusal of the motion of the development company for nonsuit is not error when the legal relationship between the city and the development company had not been determined.

5. **Trial D d—Liability of one defendant to another under contract of indemnity held to involve only matter of law not requiring submission to jury.**

   Where a city and a development company are sued for an injury resulting from a dangerous condition of a sidewalk in the city, and in its answer the city alleges that it granted a permit to the development company to construct a basement under the sidewalk under an agreement that the development company should relieve the city of all liability that might result from such construction, and this is not denied by the development company, the question as to the liability of the development company to the city under the contract of indemnity involves a matter of law arising upon undisputed facts, and its submission to the jury is not necessary.

6. Indemnity A c—Contract indemnifying against liability from construction of sidewalk is not affected by lease of premises.

Where a development company is granted a permit to construct a basement under a sidewalk in a city under an agreement that the development company should relieve the city of any liability by reason of such construction, and thereafter the development company leases the property to a third person under a contract requiring the lessee to keep the premises in repair: *Held*, as between the city and the development company the lease contract in no way affects the contract of indemnity, and a judgment providing that if the city is required to pay any part of a recovery obtained by a person injured by the dangerous condition of the sidewalk, that the city is entitled to be reimbursed by the development company, is not error.

7. Negligence A c—Admissions of manager of lessee that he knew of dangerous condition of leased premises held properly admitted in evidence.

In an action against a lessee and others for an injury resulting from a dangerous condition of the leased premises, the admissions of the manager of the lessee that he knew of the existence of the defect are properly admitted in evidence.

8. Contracts B a—Contracts will ordinarily be given that interpretation given it by parties thereto.

The parties to a contract will be presumed to know its intent and meaning better than strangers thereto, and where they have practically interpreted the contract the courts will ordinarily give it that construction which they themselves have given it.

9. Landlord and Tenant B c—Evidence that lessee was under duty to keep sidewalk in repair held sufficient in this case.

Where under a lease contract the lessee covenants to keep the premises "in good repair except the roof and floor of said storebuilding" and to "make all repairs which might be necessary during said term," and the lessee in possession of the premises has repaired defects in the sidewalk over the basement thereof as occasion required: *Held*, conceding that the contract in respect to repairing the sidewalk was ambiguous, the parties have practically interpreted their contract, and, in an action by a person injured by the dangerous condition of the sidewalk, the evidence of the lessee's duty to keep it in repair is sufficient to bar the lessee's motion as of nonsuit.

10. Negligence A c—Judgment that liability of tenant for injury caused by dangerous condition of leased premises was primary held not error.

The general rule is that a tenant in possession is liable for injury caused by a defective condition of the leased premises, and where under the lease contract the lessee is under duty to keep the sidewalk in repair, and has negligently failed to do so, the tenant is liable to a third person injured by the defective condition, and, in an action against the lessor, the lessee and the city, a judgment that the plaintiff recover against the lessee and the city, and that as between the defendants the liability of the lessee was primary and that of the city secondary, and that the city,

if required to pay any part thereof, would be entitled to reimbursement from the lessor on a contract of indemnity entered into by them, is held not to contain error entitling either defendant to a new trial.

APPEAL by defendants from *Grady, J.*, at November Term, 1930, of DURHAM. No error.

The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the negligence of the defendants. She alleged and offered evidence tending to prove that in April, 1928, while she and her husband were on a sidewalk on the north side of East Main Street in the city of Durham walking in an easterly direction, she stepped into a hole in the sidewalk whereby the heel of her left shoe was caught and she was thrown upon the pavement and injured.

The defendants filed answers denying negligence and pleading the plaintiff's contributory negligence in bar of recovery.

The Duke Land and Improvement Company owned a lot on the north side of East Main Street upon which there was a three-story brick building. In August, 1919, the city granted to this company a permit to dig a basement under the sidewalk in front of its building, the company agreeing to "relieve the city of all responsibility and all liability" that might result from the construction of the basement under the sidewalk. The company dug the basement, and above it and in front of the building constructed a sidewalk of concrete with thick glass discs at intervals, intended to light the basement. On 15 July, 1925, the Duke Land and Improvement Company leased to the Corley Company for a period of six years from 1 September, 1925, the lot and building above referred to, and the Corley Company agreed to keep the premises in good repair, except the roof and floor of the building, and to make all repairs which might be necessary during the term.

The trial involved the question of the negligence of the defendants, the contributory negligence of the plaintiff, and the priority of liability.

The verdict was as follows:

1. Was the plaintiff injured by the negligence of defendant, Duke Land Improvement Company, as is alleged in the complaint? Answer: No.

2. Was plaintiff injured by the negligence of defendant Corley Company as is alleged in the complaint? Answer: Yes.

3. Was the plaintiff injured by the negligence of defendant, city of Durham? Answer: Yes.

4. Did plaintiff by her own negligence contribute to her injury as is alleged in the answers? Answer: No.

5. What damages, if any, is plaintiff entitled to recover? Answer: $3,750.

6. Which of the defendants is primarily liable? Answer: The Corley Company (answered by the court).

7. Which of the defendants is secondarily liable? Answer: The city of Durham (answered by the court).

8. Which of the defendants is tertiarily liable? Answer: .....

McLendon & Hedrick for plaintiff.
Brawley & Gantt for Corley Company.
Guthrie & Guthrie for Duke Land and Improvement Company.
S. C. Chambers for City of Durham.

ADAMS, J. Upon the verdict returned by the jury the trial court adjudged that the plaintiff recover of the Corley Company and the city of Durham the sum of $3,750 and the costs of the action; that as between the defendants the liability of the Corley Company is primary and that of the city of Durham secondary; also that the city, if required to pay the judgment, or any part of it, shall be entitled to reimbursement by the Duke Land and Improvement Company, this provision obviously growing out of the contract between the land company and the city. All the defendants appealed, and as each assigns specific error we may consider the several appeals with respect to their distinctive exceptions.

APPEAL BY THE CITY OF DURHAM.

In apt time this defendant moved for judgment of nonsuit on the ground that notice of the alleged defect in the sidewalk should not be imputed to the city upon the facts disclosed by the evidence. The motion was denied and the city excepted. This is the only exception taken by this appellant; and in the brief filed in its behalf it is suggested that if the negligence of the city was a matter for the jury the judgment of the court should not be disturbed. So, the single question is whether the city of Durham had actual or constructive notice of the defective condition of the sidewalk.

The law imposes upon the governing authorities of a city or town the duty of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who may have occasion to use them in a proper manner. Such authorities are liable only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect and the occurrence of an injury; he must show that the officers of the city knew, or by ordinary diligence, might have known of the defect. But actual notice is not required. Notice of a dangerous condition in a street may be implied, and indeed will be imputed to the city or town if its officers should have discovered it in the exercise of due care. This principle has been adhered to in our decisions and is now regarded as firmly established. *Jones v. Greensboro,* 124 N. C., 310; *Fitzgerald v. Concord,* 140 N. C., 110; *Brown v. Durham,* 141 N. C., 249; *Kinsey v. Kinston,*

145 N. C., 106; *Revis v. Raleigh,* 150 N. C., 348; *Bailey v. Winston,* 157 N. C., 253.

In the present case there is evidence tending to disclose a dangerous condition which had existed for a week or more in the sidewalk, while it was in constant use by the public. This of itself is sufficient to bar the nonsuit; but there is evidence, also, that the city manager had knowledge of the defect. The exception of the city is therefore overruled.

APPEAL BY THE DUKE LAND AND IMPROVEMENT COMPANY.

The judge refused this appellant's motion for nonsuit, but held as a matter of law that the evidence was not sufficient to warrant a verdict against the appellant and instructed the jury to answer the first issue against the plaintiff. With respect to the plaintiff's alleged cause of action the Duke Land and Improvement Company was not prejudiced by this instruction. There was no error, however, in denying the motion for nonsuit, for the reason that the legal relation between the city and the Land and Improvement Company was yet to be determined. The appellant intimates that this relation could be adjudged only upon the verdict of a jury on an issue presenting the exact question. But the material facts are not in dispute. In its answer to the complaint, the city of Durham alleges that on 4 August, 1919, the city granted to the Land and Improvement Company a permit to construct a basement under the sidewalk, it being understood and agreed that the company should "relieve the city of all responsibility and all liability" that might result from the construction of the basement. This is not denied in the pleadings and is admitted in the appellant's brief. It must be remembered that the question here is not that of this appellant's liability to the plaintiff, for that was settled by the answer to the first issue; the question is whether under the contract between the appellant and the city the appellant agreed to indemnify the city against loss in consideration of the granted permission to construct the basement. This involves a matter of law arising upon undisputed facts, in the determination of which the aid of a jury was not essential.

The appellant advances the contention that as the appellant constructed the sidewalk under a license from the city and allowed the Corley Company, its lessee, to take possession of the premises when the street was in safe condition, the lessee and not the owner is liable in damages; but this position cannot avail to defeat the appellant's express contract with the city.

It is argued that the contract cannot reasonably be construed as requiring the appellant to keep the sidewalk in repair; but the contract is yet in force and is no doubt continued for the financial benefit of the appellant, the owner of the lot and building.

We find no error in the court's interpretation of the contract or the relative priority in liability of the appellant and the city as between themselves.

APPEAL BY THE CORLEY COMPANY.

The first six exceptions of this appellant relate to its manager's admissions that he had knowledge of the defect in the sidewalk, and for this reason they call for no discussion. The evidence was properly admitted.

The sixteenth and seventeeth exceptions are addressed to the court's refusal to dismiss the action as to this defendant. The reasons assigned for the motion of nonsuit are these: (1) The Corley Company was not responsible for the maintenance and upkeep of the sidewalk in front of the building occupied by it, either under the law or under the lease; (2) there was no evidence of negligence on the part of this defendant.

With regard to the first proposition the appellant's contention is this: From the time the sidewalk was constructed by the Land and Improvement Company in 1919 until the date of the injury the defect in the sidewalk was a nuisance, for which the Land and Improvement Company is liable, having constructed it, and for which the city is liable, having failed to abate it. Let us assume, as stated in *Knight v. Foster,* 163 N. C., 329, that the rule, making the occupant or tenant, and not the owner or landlord, liable to third persons for injuries caused by failure to keep the premises in repair, may be extended to the owner or landlord when he demises premises which are in "a state of nuisance"; then, the question thus raised is whether, conceding the liability of the city to the plaintiff and the liability of the Land and Improvement Company to the city by virtue of its contract, the Corley Company, also, is not liable to the plaintiff. As pointed out, the general rule is that the tenant who occupies the premises is liable for injury caused by the defective condition. *Rucker v. Willey,* 174 N. C., 42; 36 C. J., 245.

Not only was the Corley Company in the actual possession of the building; it had possession under a lease of the Land and Improvement Company in which it contracted to keep the premises "in good repair except the roof and floor of said storebuilding," and to "make all repairs which might be necessary during said term." If with respect to the sidewalk the contract is ambiguous we may consider the interpretation given it by the parties themselves, presuming that they know best what was meant by its terms. This principle has recently been stated in *Cole v. Fibre Co.,* 200 N. C., 484, and is supported by the authorities therein cited. Applying the principle we find that the Corley Company had undertaken from time to time to maintain the sidewalk in front of the building and to repair the defects as occasion required. In this way the appellant interpreted its contractual obligation. There is ample evi-

dence that it construed the lease as imposing upon it the duty to keep the sidewalk in proper condition and that it was negligent in the performance of this duty.

Considering the principles heretofore stated, we are of opinion that the instructions tendered by the appellant are inconsistent with the theory upon which the case was tried and with the legal principles heretofore stated.

According to the judgment the priority of liability was determined only as between the defendants. We have considered this question in connection with the exceptions taken by all the appellants and find no error which entitles either of them to a new trial.

No error.

STATE ON RELATION OF THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA v. GARRETT D. GARDNER.

(Filed 15 June, 1931.)

1. Physicians and Surgeons A d—Board of Medical Examiners may revoke license for unprofessional conduct in violating Narcotic Act.

Where the State Board of Medical Examiners has revoked the license of a physician on the ground that he had been guilty of unprofessional conduct in that he had violated the Harrison Narcotic Act, a Federal statute: *Held*, while the board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, C. S., 6618, and while C. S., 6683, does not empower the board to revoke a license on the ground of its violation, its provision for the revocation of licenses upon its violation being a part of the punishment prescribed therein, the board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the act.

2. Physicians and Surgeons A e—Respondent is entitled to trial de novo upon appeal to Superior Court from order revoking license.

Where upon appeal from the order of the board of medical examiners revoking the license of a physician upon the ground that he had been guilty of unprofessional conduct in that he had violated the Harrison Narcotic Act, the physician denies that he had been guilty of unprofessional conduct and denies that he had violated the statute: *Held*, he is entitled to trial *de novo* by jury of the controverted facts, upon the question of his guilt or innocence of the offense charged, and the submission of the sole issue as to whether he had been convicted in the Federal Court of violating the act is error entitling him to a new trial. C. S., 6618.

APPEALS by both plaintiff and defendant from *McElroy, J.*, at January Term, 1931, of BUNCOMBE. Error in appeal of plaintiff; new trial in appeal of defendant.

This is a proceeding authorized by statute (C. S., 6618), for the revocation of a license, issued to respondent by the Board of Medical Examiners of the State of North Carolina, to practice medicine and surgery in this State. C. S., 6613 or C. S., 6617.

An order to show cause why the license should not be revoked was duly served on respondent.

At the hearing, pursuant to said order, upon its finding that respondent had been guilty of unprofessional conduct, as a physician and surgeon, in that he had violated the provisions of the act of Congress, known as The Harrison Narcotic Act, as shown by the record of his conviction in the United States District Court for the Western District of North Carolina, Asheville Division, on an indictment pending in said Court, it was ordered by the Board of Medical Examiners of the State of North Carolina that license No. 1926 issued to respondent by said board on 16 June, 1908, be and the same was revoked.

From this order respondent appealed to the Superior Court of Buncombe County, as authorized by statute, C. S., 6618. Upon the trial of said appeal, an issue was submitted to the jury, subject to the exception of the respondent, as follows:

"Was the respondent, Garrett D. Gardner, convicted in the United States District Court for the Western District of North Carolina, Asheville Division, on a bill of indictment charging him with a violation of the provisions of The Harrison Narcotic Act, as set forth in the judgment of the Board of Medical Examiners of the State of North Carolina?"

Respondent excepted to the refusal of the court to submit to the jury an issue tendered by him, as follows:

"Was the defendant guilty of the offense charged in said bill of indictment?"

At the trial the court admitted as evidence a certified copy of the bill of indictment and of the proceedings thereon in the United States District Court for the Western District of North Carolina, Asheville Division, showing the conviction of the respondent on said indictment, charging respondent with the unlawful possession and sale of 823 grains of morphine hydrochloride, and the judgment of said court that respondent be confined in the Federal Prison at Atlanta, Ga., for the term of one year and a day. Respondent objected to the admission of this evidence and excepted to the overruling of his objection by the court.

The issue submitted to the jury was answered, "Yes."

Upon the return of the verdict, the respondent moved for judgment, *non obstante veredicto,* reversing the order of the Board of Medical Examiners of the State of North Carolina, and reinstating license No. 1926 heretofore issued by said board to respondent to practice medicine

and surgery in this State. This motion was allowed, and plaintiff excepted.

From judgment that the order of the Board of Medical Examiners of the State of North Carolina in this proceeding be revoked, set aside and vacated, and that license No. 1926, heretofore issued by said board to respondent to practice medicine and surgery in this State be reinstated, the plaintiff appealed to the Supreme Court.

The respondent also appealed to the Supreme Court for the purpose of preserving his right to have his exceptions taken at the trial reviewed and passed upon by said Court.

Alfred S. Barnard for plaintiff.

Don C. Young, Anderson & Howell and Carter & Carter for respondent.

CONNOR, J. It is provided by statute in this State that if any person shall practice medicine or surgery therein without being duly licensed so to do, as provided by law, he shall not be allowed to maintain an action to collect any fee for services, and upon his conviction, he shall be fined not less than $50, nor more than $100, or imprisoned at the discretion of the court for each and every offense. C. S., 6622.

The Board of Medical Examiners of the State of North Carolina, provided for by statute (C. S., 6606) is authorized and in proper cases is required to examine all applicants for license to practice medicine and surgery in this State. C. S., 6613. Each applicant for such license must be not less than twenty-one years of age, and of good moral character. C. S., 6615. The subjects on which applicants for such license shall be examined by said board are prescribed by statute. "If on such examination the applicant is found competent, the board shall grant him a license authorizing him to practice medicine or surgery, or any of the branches thereof." C. S., 6613.

It is further provided by statute that the Board of Medical Examiners shall have power to rescind or revoke any license granted by the said board. The statute is as follows:

"C. S., 6618. The board shall have the power to rescind any license granted by it when upon satisfactory proof it shall appear that any physician thus licensed has been guilty of grossly immoral conduct, or who has been guilty of producing or attempting to produce criminal abortion, or who by false or fraudulent representation has obtained or attempted to obtain practice in his profession, or who is habitually addicted to the use of morphine, cocaine, or other narcotic drugs, or who has by false or fraudulent representations of his professional skill obtained or attempted to obtain money or anything of value, or who has advertised or held himself out professionally under a name other than his own, or who shall advertise or profess publicly to treat human ail-

ments under a system or school of treatment or practice other than that for which he holds a license, or who is guilty of any wilful violation of the rules and regulations of the State Board of Medical Examiners, or who is guilty of any fraud or deceit by which he was admitted to practice or who has been guilty of any other unprofessional or dishonorable conduct. For any of the above reasons, the Board of Medical Examiners may refuse to issue a license to an applicant; provided, that no license or certificate shall be revoked until the holder thereof, after due notice being given, shall have a hearing before the State Board of Medical Examiners; *provided further,* that the holder of a license so revoked shall have the right to appeal to the courts; and if the action of the Board of Examiners be reversed, he shall be allowed to retain his license; *provided further,* that the Board of Medical Examiners, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate, before restoration."

It should be noted that the Board of Medical Examiners has no power, under this statute, to rescind or revoke a license to practice medicine or surgery, issued by said board, on the sole ground that the holder of the license has been convicted in a court, State or Federal, of a violation of a criminal statute in force in said State or in the United States. In that respect, this statute differs from the statute, now in force, authorizing the disbarment of an attorney at law. C. S., 205. The latter statute was amended after the decision of this Court, in *In re Ebbs,* 150 N. C., 44, 63 S. E., 190. In that case it was held that under the statute then in force relative to the disbarment of an attorney at law, the courts of this State had no power to disbar an attorney at law, on the ground that he had been convicted of forgery, in violation of a Federal statute, in a District Court of the United States. It was suggested in the opinion of the Court that the General Assembly, if it saw fit so to do, might amend the statute, and thus provide for the disbarment of an attorney at law, licensed to practice his profession in this State, upon his conviction in a Federal Court, of a violation of a Federal statute, where such conviction showed that he was unfit to be trusted in the performance of the duties of his profession. The statute was subsequently amended, doubtless in consequence of this suggestion. Chapter 134, Public Laws 1927.

We have a statute providing that the license of a physician who has been convicted of a violation of the statutes of this State, relative to the prescription, sale or possession of cocaine, alpha or beta cocaine, novocaine, opium, morphine, heroin, their salts or compounds, shall be revoked. Such revocation, however, is part of the punishment prescribed by the statute for its violation, which is made a misdemeanor, and is included in the judgment of the court, in which the physician is tried

and convicted. C. S., 6683. This statute confers no power on the Board of Medical Examiners to revoke the license of a physician who has been convicted of its violation. The board is established, by statute, not for the purpose of enforcing the criminal laws of this State, but for the sole purpose of regulating the practice of medicine and surgery therein. C. S., 6606. Such regulation is for the purpose of maintaining a high standard of professional character and conduct among physicians and surgeons practicing in this State, as well as for the protection of the public.

In the instant case, the order of the Board of Medical Examiners, revoking the license of the respondent to practice his profession in this State, was made on its finding that respondent had been guilty of unprofessional conduct, as a physician and surgeon, in that he had violated the provisions of the Harrison Narcotic Act, a Federal statute, as shown by the record of his conviction in the United States District Court for the Western District of North Carolina, Asheville Division. This was a sufficient finding, under the express language of the statute, to support the order of the board, revoking the license of the respondent to practice medicine and surgery in this State. The finding was that the respondent had been guilty of unprofessional conduct, as specified by the board, which "consists of seven regularly graduated physicians." C. S., 6606. The power to determine whether or not the conduct of the respondent was unprofessional, is conferred, primarily, on the Board of Medical Examiners.

The conviction of a physician and surgeon duly licensed to practice his profession in this State, of the violation of a statute, whether Federal or State, is not sufficient alone for the revocation of his license by the Board of Medical Examiners. Where, however, the Board of Medical Examiners finds that the violation of such statute, under all the facts and circumstances shown by the evidence at the hearing by said board, constitutes unprofessional conduct, said board has the power, under the statute, to revoke the license. This is true, in the instant case, although the validity of the Harrison Narcotic Act was sustained by the Supreme Court of the United States, for the reason that it is a Revenue Act. In *United States v. Jin Fuey Moy,* 60 L. Ed., 1061, *Justice Holmes* says: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right."

The respondent in the instant case denied that he had been guilty of unprofessional conduct; he also denied that he had violated the provisions of the Harrison Narcotic Act. On his appeal to the Superior Court of Buncombe County, he was entitled to a trial *de novo* by a jury of the controverted issue of fact. He was entitled to have an issue

involving his guilt or innocence submitted to the jury, and tried according to the usual course and practice in the Superior Court. This right is expressly conferred by the statute as interpreted and construed in *S. v. Carroll,* 194 N. C., 37, 138 S. E., 339.

The issue submitted to the jury at the trial in the Superior Court, and answered in the affirmative, was not determinative of the validity of the order made in this proceeding by the Board of Medical Examiners. The order was not made upon the ground that respondent had been convicted in the District Court of a violation of the Harrison Narcotic Act. It was made upon the finding by the board that respondent had been guilty of unprofessional conduct. The respondent by his appeal challenges this finding, and was entitled to have an issue submitted to the jury involving this controverted fact. No judgment can be rendered in this proceeding by the Superior Court until an issue involving this controverted fact has been answered by the jury.

There was error in the judgment reversing, setting aside and vacating the order of the Board of Medical Examiners in this proceeding.

The respondent is entitled to a new trial, at which an appropriate issue involving his guilt or innocence of the charge that he has been guilty of unprofessional conduct, as specified by the Board of Medical Examiners, should be submitted to the jury.

The burden will be on the relator to show by competent evidence that the respondent has been guilty of unprofessional conduct, in that he violated the provisions of the Harrison Narcotic Act, under facts and circumstances that show him to be unworthy of a license to practice medicine and surgery in this State.

Error in plaintiff's appeal.

New trial in respondent's appeal.

L. D. FERGUSON v. DR. L. N. GLENN.

(Filed 15 June, 1931.)

1. Evidence N b—Sufficiency of evidence to be submitted to the jury.

Where there is any evidence tending to sustain the plaintiff's cause of action, even though conflicting in material parts, it should be submitted to the jury, but where there is no such evidence the defendant's exceptions to the refusal of the trial court to grant his motion of nonsuit or his request for a directed verdict will be sustained on appeal.

2. Physicians and Surgeons C b—Evidence held insufficient to show neglect or unskillful treatment on part of physician.

Where a duly licensed physician and surgeon is sued for damages arising from alleged unskillful treatment of the plaintiff's broken leg, and all the evidence tends to show that the physician possessed the skill and

used the treatment which was usual for injuries like the plaintiff's, and which was used in like circumstances by physicians and surgeons of standing in their profession, without evidence to the contrary, the defendant's motion as of nonsuit thereon or his prayer for instructions to like effect, aptly tendered, should have been allowed.

3. Same—Burden of proving physician's lack of skill and character required of him by law is upon person alleging such insufficiency.

The standard of duty which a physician owes his patient is prescribed by law and arises out of the relationship, which is voluntary and contractual, and the law requires that a physician shall have such knowledge and skill as are ordinarily possessed by those similarly situated, and that he use his best skill in the treatment of a patient, but the physician is not an insurer of his patient's recovery, and the burden of proving that a physician licensed by the State Board of Examiners lacks the skill and character required of him by the law is upon the person alleging to the contrary.

APPEAL by defendant from *Harding, J.*, at January Term, 1931, of GASTON. Reversed.

This is an action to recover damages resulting from injuries caused by the negligent and unskillful treatment of plaintiff's broken leg by the defendant, a physician and surgeon. In his answer, the defendant denied all the allegations of the complaint which are essential to the cause of action on which plaintiff seeks to recover.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff injured by the negligence and unskillful treatment of his leg by the defendant, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover from the defendant? Answer: $5,000."

From judgment that plaintiff recover of the defendant the sum of $5,000, together with the costs of the action, defendant appealed to the Supreme Court.

J. D. McCall and J. L. Hamme for plaintiff.

J. Laurence Jones and John G. Carpenter for defendant.

CONNOR, J. On his appeal to this Court the defendant contends that there was error in the trial of this action in that the trial court declined (1) to allow his motion for judgment as of nonsuit (C. S., 567), and (2) to instruct the jury as requested by him in writing and in apt time (C. S., 566), that if they believed all the evidence taken in the light most favorable to the plaintiff, they should answer the first issue, "No." The question presented for decision by these contentions is whether there was any evidence at the trial tending to sustain the allegations of the complaint. It is well settled that if there was no such evidence, the contentions must be sustained; but if there was any evidence tending to

show that defendant is liable in law to plaintiff for damages caused by his negligent failure to perform his duty, by reason of his relation to plaintiff as his physician and surgeon, then the contentions must be overruled. In the latter event, the evidence, although conflicting in material respects, was properly submitted to the jury.

On 3 August, 1927, the plaintiff, while crossing a State highway in Gaston County, North Carolina, was struck, knocked down and run over by a passing automobile. As a result of the accident, which it is not contended by plaintiff was caused by the negligence of the driver of the automobile, plaintiff's left leg was broken in two places, one just below the knee, and the other just above the ankle. He was taken at once by the driver of the automobile to the Gastonia Hospital, and there placed under the care of the defendant, who is a practicing physician and surgeon, for the treatment of his injuries. The defendant undertook the treatment of plaintiff's injuries.

In his complaint plaintiff alleged that in the treatment of his injuries defendant negligently failed to exercise that degree of knowledge and skill ordinarily possessed by members of his profession, (1) in that he negligently failed to reset the broken bones of his leg in a proper manner; (2) in that he negligently failed to take or have taken an X-ray picture of the broken bones in plaintiff's leg, in order to ascertain the exact condition of the bones, as he was requested by plaintiff to do; and (3) in that after he discovered, when the plaster cast was taken from plaintiff's leg, that the bones had not reunited, he negligently failed to operate on plaintiff's leg. He alleged that as the result of defendant's negligent and unskillful treatment of his leg, he has suffered permanent injuries to his great damage. These allegations are sufficient to constitute a cause of action on which plaintiff is entitled to recover of the defendant such damages as the jury shall assess. The burden was on the plaintiff, of course, to offer evidence sufficient to sustain the allegations.

The testimony of plaintiff as a witness in his own behalf was to the effect that he was unconscious when he was taken to the hospital by the driver of the automobile, and placed under the care and treatment of the defendant; that defendant caused a plaster cast to be put about plaintiff's broken leg, and that his leg remained in this plaster cast until some time in December, 1927; that when the plaster cast was taken from the leg, it was discovered that the bones had reunited at the break just below the knee, but had failed to reunite at the break just above the ankle; that he then requested defendant to take or cause to be taken an X-ray picture of his broken leg, but was advised by defendant that this was not necessary. After the plaster cast was taken from plaintiff's leg, the defendant put the leg in a wire brace, and wrapped it with adhesive strips.

Plaintiff was discharged from the hospital after about thirty days, and went to his home. At the request of the defendant, he returned to the hospital from time to time, for treatment by the defendant. He testified that while he was at his home he discovered that the broken bones at the break just above the ankle were pressing upon the skin of his leg. After making this discovery he went to the hospital and consulted the defendant, who advised him, after an examination of his leg, that the bones had not knitted together. This was early in December, 1927. He then requested the defendant to operate on his leg if defendant thought that an operation would be helpful. The defendant said: "We will wait sixty days, and if it does not join in that time we will go in and see what is the matter." Plaintiff did not return to the hospital after this visit, and did not again call upon defendant for treatment of his leg. Subsequently, he consulted Dr. McAdams. In consequence of his conversation with Dr. McAdams, plaintiff procured Dr. Miller to perform an operation on his leg. Before undertaking the operation, Dr. Miller had an X-ray picture made of plaintiff's leg. The operation was performed on 16 January, 1928. Since the operation the bones in plaintiff's leg have reunited, but the leg is weak, and plaintiff now walks with a decided limp. He continues to suffer pain because of the injuries to his leg.

Dr. McAdams, a practicing physician in this State, testified as a witness for the plaintiff. It was admitted by the defendant that the witness is an expert. He examined plaintiff's leg, at his request, some time in December, 1927, and found that it had been broken. The bones had not reunited. He said: "I noticed nothing unusual about the appearance of the bones other than that they had not reunited. They looked to be in good alignment." There was no evidence that an X-ray picture had been made of plaintiff's leg prior to the examination by Dr. McAdams, or that Dr. McAdams' testimony was based on such picture.

Dr. O. L. Miller, a practicing surgeon, testified as a witness for the defendant. He first saw the plaintiff some time in January, 1928, and operated on his leg on 16 January, 1928. He testified that he found that the lower fracture, for some cause which he did not discover, had not united. About six months after the operation the ends of the broken bones had begun to reunite. The X-ray pictures of plaintiff's leg showed that there had been an interference with the natural blood supply at the site of the injury. This may have been caused by infection at the time of the injury. There was nothing to indicate that there was any internal infection.

With respect to the X-ray picture the witness said: "I ordinarily take an X-ray picture in a fracture of this kind. The taking of an X-ray picture would depend upon the circumstances. It may be more impor-

tant to the patient not to disturb him, than to take the picture. When I saw the plaintiff, and had the X-ray picture made, he was in better condition than he was under the treatment of the defendant. Ordinarily, the taking of the picture would not hurt the patient, but it might hurt him to take him upstairs to have the picture made."

With respect to the time after the injury within which an operation such as the witness performed on plaintiff's leg, should be performed, the witness said: "If the injury occurred on 3 August, 1927, and the bones had not reunited at the end of thirty-nine days, because infection had prevented the formation of callous, I would not consider it usually safe to operate under six months because of the danger of relighting the infection. I would not have considered it safe to have operated on plaintiff's leg, at the end of thirty-nine days, even if I had discovered at the end of this period that there was no infection."

Dr. L. N. Glenn, the defendant, testified as a witness in his own behalf. He described the condition of plaintiff's leg when he was brought to the hospital, and testified in detail as to his treatment of plaintiff's injuries up to the time the plaintiff ceased to visit him for treatment. He said: "In the treatment of Mr. Ferguson I gave him my best judgment. My first impression was that the leg should be amputated, but I decided after debating the matter in my own mind that I would save his leg if I could. That is what I did. His leg is much better than I ever thought it could be. I advised him to go to Dr. Miller. The last day I saw Mr. Ferguson I saw that there was a non-union. This was some time in December, 1927."

Dr. Miller was recalled and testified that he had heard Dr. Glenn testify as to the method and manner in which he treated plaintiff's injuries. In answer to a hypothetical question, to which there was no objection, he said that the treatment which Dr. Glenn testified that he gave to plaintiff was the recognized treatment of injuries such as the plaintiff had sustained. He said that when he first examined the broken bones in plaintiff's leg, he found that there was a low grade union at the corner of the tibia. The bones were not united. They had not united and were still separated because there was no callous. If sufficient callous had been thrown out, they would have united. The witness said: "In my opinion callous was not thrown out because of infection. From the history given me by the plaintiff, and from the appearance of the bones, I am of the opinion that there was infection at the time of the injury. When I operated on plaintiff's leg I had a clean field to work on and no infection."

After a careful consideration of all the evidence offered at the trial, as set out in the case on appeal, we are of opinion that it fails to show a breach of any duty which the defendant, as a physician and surgeon, owed to the plaintiff as his patient, or any injury resulting from de-

fendant's treatment of plaintiff's broken leg. There is no evidence tending to show that defendant did not possess the requisite degree of learning, skill and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; there was affirmative evidence to the contrary. There is no evidence that defendant failed to exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge in the treatment of plaintiff's injuries; there was affirmative evidence to the contrary. There is no evidence that defendant failed to exert his best judgment in said treatment, or in the care of plaintiff's leg so long as the relation of physician and surgeon and patient continued between defendant and plaintiff; there is affirmative evidence to the contrary. In the absence of such evidence, it was error to decline to allow defendant's motion for judgment as of nonsuit, or to give his prayer for instruction as to the answer to the first issue. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. The cited case is authoritative and may be regarded as the leading case in this jurisdiction with respect to the duty which a physician and surgeon ordinarily owes to his patient. See *Smith v. Wharton,* 199 N. C., 246, 154 S. E., 12; *Covington v. Wyatt,* 196 N. C., 367, 145 S. E., 673.

The law which seeks to be impartial, and to establish a just rule for both parties, prescribes the standard of duty which a physician and surgeon owes to his patient. The duty arises out of the relationship, which is voluntary and contractual in its nature. The law recognizes that medicine and surgery is both a science and an art, and requires that one who professes knowledge of the science, and skill in the art, shall have such knowledge and skill as are ordinarily possessed by men of his profession, similarly situated. This is not all. He is required to exert his best judgment and use his best skill in the treatment of his patient. If he has fully measured up to these requirements of the law, he cannot be held liable for consequences which no human agency can ordinarily prevent. At best the science is empirical and the practice of the art subject to limitations. Neither justice nor sound policy requires that a physician or surgeon, although learned in his science and skilled in the practice of his art, shall be an insurer of his patient's recovery and restoration to his previous health and physical strength and condition.

It is provided by statute in this State that no person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do as provided by law. N. C. Code, 1927, sec. 6622. Every applicant for license to practice medicine or surgery in this State must show that he is at least twenty-one years of age, and of good moral character. N. C. Code, 1927, sec. 6615. No license shall be

issued unless the applicant upon an examination by the State Board of Medical Examiners, shall be found to have completed the course of study prescribed by statute and to have a competent knowledge of the subjects included in said course of study. N. C. Code, 1927, sec. 6613. It would seem to be at least a reasonable inference that a physician and surgeon who is duly licensed to practice his profession in this State, possesses that degree of knowledge of his science and of skill in his art, which is required by the law, and that degree of moral character which insures his best judgment in the professional care and treatment of his patient. At least, one who alleges to the contrary with respect to such a physician and surgeon, is and should be required to offer evidence to sustain his allegations. Otherwise, his action for the recovery of damages alleged to have been caused by negligent and unskillful treatment, should be dismissed.

As we are of the opinion that the judgment should be reversed and the action dismissed, it is unnecessary to consider the assignments of error based upon exceptions with respect to the release, which plaintiff executed to the driver of the automobile. We do not decide the question discussed in the argument of this appeal and in the briefs filed in this Court, as to whether the release executed by plaintiff bars his recovery from the defendant in this action.

Reversed.

ROSAMOND LAMM, BY HER NEXT FRIEND, S. K. LAMM, v. CHARLES STORES COMPANY, INC.

(Filed 15 June, 1931.)

1. Principal and Agent C d: Master and Servant D b—Evidence held insufficient to show that prosecution for worthless check was within scope of duties.

Where the evidence in behalf of the plaintiff, in an action for false imprisonment, malicious prosecution and libel, tends to show that the general manager of one of the defendant's stores had a warrant issued against her for obtaining goods by means of a worthless check, that she did not give the check in question, that the general manager was authorized to cash checks only on his own responsibility, and that he had personally paid the defendant the amount of the check, that he wrote a letter to the plaintiff's father on the firm stationery threatening criminal prosecution, and the undisputed evidence is to the effect that the defendant did only a cash business, and there is no evidence that the general manager had ever collected accounts for the defendant: *Held*, upon defendant's motion of nonsuit the plaintiff's view must be adopted, and upon this theory the general manager of the defendant's store swore out the warrant without justification and without the sanction of any business transaction, and

such action was outside the scope of his duties, and was without authorization or ratification of the defendant corporation, and its motion as of nonsuit was properly granted.

2. Same—Whether act is within scope of duties of agent or servant depends upon whether he was then engaged in service of employer.

Where an agent, of his own motion, institutes a criminal action against another to avenge an imagined wrong done his employer, the employer is not liable therefor unless the action is authorized or ratified by him, and it is immaterial whether the agent or employee intended to secure a benefit for the employer, the employer's liability depending upon whether act is done by the employee in the line of duty and within the scope of the employment while attempting to accomplish what he was employed to do.

CLARKSON, J., dissents.

CIVIL ACTION, before *Small, J.*, at September Term, 1930, of PITT.

Plaintiff, the daughter of S. K. Lamm, lived at Lucama, N. C., and at the time of the injury complained of was a student at Eastern Carolina Teachers' College at Greenville, N. C. While a student at Greenville and away from home, the plaintiff had authority from her father, S. K. Lamm, to sign checks in his name.

The defendant alleged and offered evidence tending to show that on 28 July, 1927, the plaintiff drew a check on the Lucama Bank in words and figures as follows: "Pay to the order of Charles Stores Ten and no/100 Dollars. S. K. Lamm, per Rosamond Lamm." On the back of the check are the initials J. B. L. This check was paid by the bank upon which it was drawn and charged to the account of S. K. Lamm.

The plaintiff alleged and offered evidence tending to show that when she discovered said check in her father's bank statement, she notified him that she had not drawn the check and had had no transaction with the defendant, Charles Stores. Thereupon, the plaintiff informed the Bank of Lucama that the check was a forgery and said bank returned the check to the Bank of Greenville and from thence to the defendant. Thereafter, on 12 September, 1927, S. K. Lamm duly received through the mail the following letter: "Charles Stores Co., Inc., Inter-Office (your files). Date 9/12/27. Subject ..... Always give complete reference numbers, dates, etc. To Mr. S. K. Lamm: Please send cashier's check at once for $10.00 to cover payment of check you stopped payment of as this check was given by Rosamond Lamm and is no forgery unless you want warrant issued for Rosamond Lamm obtaining money under false pretense and forgery. We have given check over to our local magistrate with instructions to serve warrant which carries prison sentence for forgery. Unless cashier check or Western Union Money Transfer is here by Friday. Our witnesses are ready to identify the giver of this check. This is final—no more letters. Rush check here by Friday. Yours truly, Charles Stores Co." The amount of the

check was not paid, and on 14 November, 1927, J. B. Long went before a justice of the peace and made an affidavit to the effect "that on or about 28 July, 1927, Rosamond Lamm did unlawfully and feloniously obtain money by means of a worthless check, said Rosamond Lamm giving check to Charles Stores in payment of merchandise and cash, and signing check S. K. Lamm, per Rosamond Lamm, check given with intent to cheat and defraud contrary to the form of the statute and against the peace and dignity of the State," etc. Thereupon, the magistrate issued a warrant for the plaintiff, requiring her to appear before the County Court of Pitt County on 29 November, 1927. Pursuant to the warrant the plaintiff was arrested and afterwards appeared at the trial, pleading not guilty, and was adjudged not guilty. Subsequently, on 8 February, 1929, the plaintiff instituted this action for damages against Charles Stores, Inc., basing the action upon false imprisonment, malicious abuse of process and upon libel by reason of the letter of 12 September, 1927. The plaintiff testified that she never signed the check for $10.00, and that she had never been upon the premises of Charles Stores Co., Inc. There was other evidence in behalf of plaintiff that the signature upon the check was not in her handwriting. There was further evidence in behalf of plaintiff that J. B. Long was the manager of Charles Stores in Greenville, and that he had instructed the clerks in the store "not to take a check unless he O. K'd them. . . . He had charge of all the departments. He was manager of the store. He was ruler over all."

The evidence for the defendant tended to show that plaintiff came in the store and made a purchase of merchandise, and in paying for the purchase wrote the check in controversy and delivered it to the clerk who waited upon her; that said clerk took the check to Long, manager, who approved and O. K'd it, and the balance was paid to the plaintiff in cash. It also appeared without contradiction that the defendant operates a cash store, and that the manager, J. B. Long, had authority to hire and discharge clerks; that he received goods when they came in the store and paid the freight or express thereon, and that it was his duty to put the price on the goods and mark them, and to supervise the various clerks in the store. It was also in evidence without contradiction that the defendant Charles Stores on 24 August, 1925, had given written instructions to all managers. The only instruction pertinent to this appeal is number 2, in the following words: "If a manager cashes a personal check, it is on his own responsibility and he will positively be held responsible." It was also in evidence that Long, the general manager, cashed one hundred and fifty or two hundred checks every day, and that these checks were deposited to the credit of Charles Stores. There was further uncontradicted testimony that Long, the general manager, paid the check in controversy out of his personal funds to the Charles Stores,

Inc. All of the evidence disclosed that the plaintiff was a young woman of good character and of fine lineage.

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

Moore, Strickland & Dickens, W. A. Finch and Albion Dunn for plaintiff.

Harding & Lee and L. I. Moore for defendant.

BROGDEN, J. Is a mercantile corporation liable in damages for the act of the general manager in issuing a warrant upon a forged check, supposed by him to have been given by a customer of the corporation?

There is ample evidence for a jury to find that the check in controversy was a forgery, and that the plaintiff had never been a customer of the defendant. A correct application of the principles of law governing the transaction rests entirely upon whether Long, the general manager of defendant corporation, was acting wholly beyond the scope of his employment in writing the letter complained of and in procuring the warrant for the arrest of the plaintiff. Much has been written upon the scope of employment, and the general outlines of the doctrine have been clearly marked. The term is elastic and correct interpretation and application thereof must always depend upon the variability of given facts. This legal variability has produced in this jurisdiction two well marked lines of decisions. The liability line is represented by the following decisions: *Lovick v. R. R.,* 129 N. C., 427; *Jackson v. Telegraph Co.,* 139 N. C., 347; *Bucken v. R. R.,* 157 N. C., 443; *Fleming v. Knitting Mills,* 161 N. C., 436; *Cotton v. Fisheries Products Co.,* 177 N. C., 56; *Gallop v. Clark,* 188 N. C., 186; *Kelly v. Shoe Co.,* 190 N. C., 406; *Colvin v. Lumber Co.,* 198 N. C., 776. The nonliability line is represented by the following decisions: *Moore v. Cohen,* 128 N. C., 345; *Daniel v. R. R.,* 136 N. C., 517; *Sawyer v. R. R.,* 142 N. C., 1; *Roberts v. R. R.,* 143 N. C., 176; *Dover v. Mfg. Co.,* 157 N. C., 324; *Marlowe v. Bland,* 154 N. C., 140; *Strickland v. Kress,* 183 N. C., 534; *Grier v. Grier,* 192 N. C., 760; *Ferguson v. Spinning Co.,* 196 N. C., 614; *Cotton v. Transportation Co.,* 197 N. C., 709; *Martin v. Bus Line,* 197 N. C., 720. There is an extensive annotation upon the general subject in 35 A. L. R., 637. See, also, *Md. Casualty Co. v. Woolley,* 36 Fed. (2d), 460.

The plaintiff bases her right to recover upon three major facts:

(a) That Long was general manager of the defendant, and therefore, clothed with extensive discretion;

(b) That many checks were taken by Long in payment of merchandise;

(c) That the letter was written upon the stationery of defendant, and that in writing the letter and issuing the warrant, the manager was thereby intending to benefit his employer and safeguard its rights.

In *Kelly v. Shoe Co., supra, Varser, J.*, said: "The designation 'manager' implies general power, and permits a reasonable inference that he was invested with the general conduct and control of the defendants' business centered in and about their Wilmington store, and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." Obviously, it is not the size of the job that the offending agent holds which determines liability, but the quality of the act done in the line of duty. This essential distinction was noted in *Grier v. Grier, supra,* where it is written: "But liability in such cases is not ordinarily imposed upon the employer, by reason of the extent of the authority of the agent, but rather upon the purpose of the act and whether it was done in the furtherance of the employer's business or was reasonably incident to the discharge of the duties entrusted to the employee." *Strickland v. Kress, supra.*

Nor does the fact that Long, as manager, had received checks from other people in payment of merchandise, have any bearing upon the principle of law involved in this appeal, because plaintiff denies that any check was given. Neither is the fact that Long used the stationery of defendant determinative. Certainly, he was authorized to use it in the line of his duty, and the heading upon the stationery neither added to nor subtracted from his power as manager of the store. In the final analysis, the whole controversy reduces itself to the inquiry, was Long acting in the line of his duty when he wrote the letter forty-six days after the transaction, and procured the issuance of a warrant one hundred and nine days after the transaction? The undisputed evidence is to the effect that the defendant conducted a cash business. However, as the defendant contends, the plaintiff made a purchase and gave a check in part payment therefor, receiving the balance in cash. Then the check became an account due the defendant. There is no evidence that Long had ever collected an account from anybody or that any merchandise had ever been sold upon credit. Even if Long had authority to collect accounts, or such was within the line of his duty, resort to the criminal law by the agent, without the advice, counsel, or participation, knowledge or ratification of the principal, was not incidental to such collection. *Moore v. Cohen, supra; West v. Grocery Co.,* 138 N. C., 166.

The plaintiff insists that she did not sign the check, and furthermore, that she had never been in the store of defendant. Upon motion of nonsuit this view must be adopted. Hence it follows that the agent of defendant, without any justification and without the sanction of any sort of business transaction, undertook to invoke the criminal law against the plaintiff either by reason of mistaken identity or by virtue of a reckless notion that she had committed a crime. All the authorities are in agreement that if the agent, of his own notion, undertakes to set

in motion the machinery of the criminal law to avenge an imagined wrong against his employer, that such act does not impose liability upon the employer unless such employer authorized or ratified the conduct of the employee. It is immaterial that the employee intended by such act to secure a benefit for the employer. This view is supported by the declaration of the Court in *Kelly v. Shoe Co., supra,* as follows: "Liability does not flow from the employee's intent to benefit or serve the master, but it does flow from the acts of the servant or employee in attempting to do what he was employed to do, that is, the acts complained of must have been done in the line of his duty, and within the scope of his employment."

Viewing the evidence from the standpoint of plaintiff, her arrest and humiliation were wholly without warrant, and such conduct arouses a feeling of resentment and outrage. However, it was for this very reason that the wisdom of mankind has established courts of law for the purpose of giving to each citizen or litigant an abiding guarantee that his rights shall be determined, as far as humanly possible, in the cold neutrality of even and exact justice. The Court is of the opinion that the judgment of nonsuit was properly entered.

Affirmed.

CLARKSON, J., dissents.

W. W. MEECE v. COMMERCIAL CREDIT COMPANY.

(Filed 15 June, 1931.)

Judgments K d—Judgment by default may be set aside by defendant without fault who has employed counsel of another county to appear therein.

Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the State, to defend an action brought in another county, and has put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the case has been calendared and called for trial without notice to the defendant or his attorney: *Held,* upon a judgment being obtained by default against the defendant, the defendant may, upon his motion aptly made, have the judgment set aside for surprise, excusable neglect, etc., upon a showing of a meritorious defense, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. C. S., 600.

STACY, C. J., dissenting; ADAMS, J., concurs in dissent.

CIVIL ACTION, before *Harwood, Special Judge,* at January Term, 1931, of CHEROKEE.

The necessary facts appear in the judgment and findings of fact upon which it is based. Said judgment is as follows:

"The motion of the defendant in the above-entitled cause to have set aside the judgment obtained through mistake, surprise, inadvertence and excusable neglect, coming on to be heard before Hon. J. H. Harwood, judge holding the January Term, 1931, of said Superior Court, and being heard upon the petition of defendant, with exhibits thereto, the affidavit of Henry E. Fisher, and the answer of plaintiff to said petition, the Court finds the following facts, and enters the following judgment, to wit:

(1) That the plaintiff instituted the above cause on 19 September, 1930, and filed his complaint therein; and summons in said action was served on defendant at its office in Mecklenburg County, North Carolina, by the sheriff of Mecklenburg County on 19 September, 1930.

(2) That said defendant promptly employed Henry E. Fisher, a duly licensed, reputable attorney of Charlotte, N. C., to draft and file answer in said cause, and to go to Cherokee County, where said action was pending, and represent the defendant therein; that said defendant gave to said attorney the facts necessary for drafting answer; that said attorney, in apt time, filed said answer, mailing same to the clerk of said court, and at the same time wrote plaintiff's counsel of the filing of the said answer, as set out in said Fisher's affidavit in this cause; that the defendant inquired of its said attorney if there was anything else it could do in said case, after having given said attorney the names and addresses of its witnesses and said attorney stated that there was nothing else to be done, and that he would notify the defendant when said case should be reached for trial so it could have its witnesses present and make defense to said action; that the defendant relied upon said attorney's advice and did nothing else, as it knew of nothing else it could do.

(3) That said Henry E. Fisher, at said time was, and now is, duly licensed to practice his profession, by authority of the Supreme Court, in the courts of all counties in this State, and after having filed said answer on which his name appeared alone as counsel, he expected or anticipated the clerk would mail him a copy of the court calendar when said cause was placed thereon, as such was the practice, in regard to nonresident lawyers, in Mecklenburg and other counties in which said attorney appeared.

That said case was calendared for trial at the November Term, 1930, of said Superior Court, but was continued, of which defendant and its counsel had no notice; that same was again calendared at the January Term, 1931, without notice whatever to defendant or its counsel, and was tried in his absence as well as that of the defendant

and its witnesses, on the pleadings and evidence offered by plaintiff; that said pleadings, the issues and judgment, set forth as exhibits in defendant's petition, are here referred to and made a part of this judgment.

(4) That neither the defendant nor the defendant's counsel requested of plaintiff, his counsel or of the clerk of said court, copy of calendars which might show said cause for trial, and no inquiry was made by the defendant or its attorney after the filing of the answer.

(5) That within a few days after said action was tried, and upon notice thereof, and of the plaintiff obtaining said judgment, defendant promptly filed its motion to have said judgment vacated and set aside under C. S., 600; that had said defendant, or its counsel, received notice of the calendaring of said action for trial they would have attended and defended said action; defendant's counsel could have been reached by telegraph or telephone and would have attended within a few hours after notice and presented defense to said action.

(6) The court further finds as a fact that the defendant's answer sets out a good and meritorious defense to said action.

The defendant, having employed reputable counsel, duly licensed by the Supreme Court to practice law in all the courts of this State, and having disclosed all the facts necessary to its defense, and said attorney having accepted employment by making an appearance in said cause, and by agreeing with the defendant to go to Cherokee County and represent defendant therein, and no negligence being disclosed on the part of the defendant, but it appearing that defendant had done all that a reasonably prudent-minded person should have done.

Therefore, it is ordered and directed by the court that the judgment entered at the January Term, 1931, in said cause be, and the same is hereby vacated, annulled, and set aside, and a new trial of said action is ordered.

Witness Honorable J. H. Harwood, judge presiding, March-April Term, 1931, of said Superior Court. J. H. HARWOOD, *Judge Presiding.*"

J. D. Mallonee and Moody & Moody for plaintiff.
Hill & Gray for defendant.

BROGDEN, J. The facts set out in the judgment bring the case squarely within the principles of law announced in *Sutherland v. McLean,* 199 N. C., 345. The divergent views of the law upon the subject were fully set forth therein, and it is not deemed necessary to beat the same old brush with the same old stick to run out the same old rabbit for another chase.

Affirmed.

STACY, C. J., dissenting: This case marks the extreme swing of the pendulum in the interpretation of C. S., 600. It carries *Sutherland v. McLean,* 199 N. C., 345, 154 S. E., 662, to its severest implications. My brethren and I have studied the same books and learned different lessons; read the same lines and construed them not alike. But, then, it is said: Times change and with them we change. *Tempora mutantur, nos et mutantur in illis.* This is true, but not all change is progress.

The present decision is destined soon or late to be overruled, as it ought to be, or else silently to take its place among those cases which are consistently overlooked or forgotten, or, failing in both of these, it may continually rise up to plague the diligent practitioner. It certainly is at variance with the maxim *"vigilantibus et non dormientibus subvenit lex,"* so often quoted with approval in our Reports. *Battle v. Mercer,* 188 N. C., 116, 123 S. E., 258; *Pierce v. Eller,* 167 N. C., 672, 83 S. E., 758; *School v. Peirce,* 163 N. C., 424, 79 S. E., 687; *Pepper v. Clegg,* 132 N. C., 312, 43 S. E., 906; *Sluder v. Rollins,* 76 N. C., 271.

Without legislative sanction, it adopts the "Courtesy Rule of Practice in Mecklenburg" as the law of the State, and in a sense may be said to constitute a new "Declaration of Independence" for defendants. Heretofore it has been thought that the statute under review dealt with the rights of litigants and not with the amenities of counsel. *Manning v. R. R.,* 122 N. C., 824, 28 S. E., 963; *Kerchner v. Baker,* 82 N. C., 169; *Waddell v. Wood,* 64 N. C., 624. And see *White v. Rees,* 150 N. C., 678, 64 S. E., 777, followed by *Hunter v. R. R.,* 163 N. C., 281, 79 S. E., 610, where illness of counsel was held insufficient to establish "excusable neglect" under the statute. The law is the standard or plumb line set in the midst of the people for their protection and guidance. It is essential that its application should be uniform. It cares for all sorts and conditions of men.

By comparison the following, first from *McLeod v. Gooch,* 162 N. C., 122, 78 S. E., 4, and, second, from *Hamby v. Const. Co.,* 189 N. C., 747, 128 S. E., 146, though written only a short time ago, stand out in bold relief:

First, "A party has no right to abandon all active prosecution of his case simply because he has retained counsel to represent him in the court."

Second, "We are not permitted to abandon the rules of practice, nor will they be construed so as to favor the negligent and penalize the diligent party."

To like effect are the numerous decisions collected in the dissenting opinion in the case of *Sutherland v. McLean, supra.*

The difficulty with the position of the majority is, that it overlooks the statutory rights of the plaintiff and creates a hiatus in the law. The

plaintiff and his counsel did all that the law requires of them. The clerk of the Superior Court of Cherokee County is guilty of no dereliction of duty. The case was docketed and tried according to the usual course and practice of the court. No other practice prevails in Cherokee County, and yet the plaintiff is denied his judgment, without fault on his part, and without notice of any contrary mode of procedure existing elsewhere.

The trial court finds that "defendant's counsel could have been reached by telegraph or telephone." Presumably like connection could have been had in the opposite direction, and perhaps the defendant has a telephone in its place of business. But aside from this, the orderly processes of the law were duly followed by the plaintiff, his counsel and the officers of the court. Why hold the plaintiff to a practice of which he had no knowledge and took no part in establishing, and at the same time grant to the defendant a privilege not accorded by law? "The employment of counsel does not excuse the client from proper attention to his case." *Grandy v. Products Co.*, 175 N. C., 511, 95 S. E., 914.

The defendant is not represented in this Court by the same counsel who filed its answer. Would it be possible, then, for it to defeat the rights of the plaintiff indefinitely by changing counsel from term to term? Note: The practice in Mecklenburg, as appears from the record, is for the clerk to mail copy of calendar to nonresident counsel, not litigants.

A lawsuit is not a social function which is governed entirely by the rules of etiquette. *Lex non favet delicatorum votis.*

The instant decision raises this question: Under the law as now written, when a defendant, duly served with process, employs a lawyer anywhere in North Carolina to look after his defense, who simply files answer and does no more, can the plaintiff obtain a valid judgment in such case without further notice to the defendant of the hearing?

ADAMS, J., concurs in dissenting opinion.

GENERAL TALKING PICTURES CORPORATION v. ELECTRICAL RESEARCH PRODUCTS, INC., AND JOSEPH E. CAUDELL.

(Filed 15 June, 1931.)

1. Injunctions D b—Order restraining violation of contract held properly dissolved, evidence warranting finding that there was no valid contract.

The seller of motion picture apparatus sought to enjoin the installation of the apparatus of another firm in a theatre upon the ground that the

owner thereof had made a previous contract with him for such installation, and alleged irreparable damage, insolvency, etc.: *Held*, the evidence warranted a finding that there was no valid contract between the plaintiff and the owner, and the order dissolving a temporary order theretofore issued is affirmed.

2. Appeal and Error J a—In injunction proceedings the Supreme Court may review evidence, but it is presumed that the judgment is correct.

While the Supreme Court may review the evidence and findings of fact by the court below upon appeal in injunction proceedings, the presumption is that the judgment of the lower court is correct, with the burden of showing error on the appellant, and where the court does not find the facts and there is no request therefor, it is presumed that he found the proper and necessary facts to support the judgment.

APPEAL by plaintiff from *Clement, J.*, 2 December, 1930. From IREDELL. Affirmed.

The plaintiff is a corporation engaged in the business of making contracts for the installation of talking picture equipment in moving picture theaters. The defendant is engaged in like business and is a competitor of plaintiff. The defendant, Joseph E. Caudell, is operating a talking picture theater in Statesville, N. C., in which there has been installed talking picture equipment supplied by plaintiff. It is alleged by plaintiff that the said Caudell thereafter, desiring to open and operate a second talking picture theater in Statesville, made a contract with plaintiff to install a "Hollywood Junior Phonofilm" in his "Broadway Theater." A copy of the contract is set forth. That plaintiff is ready, willing and able to perform its part of the terms of the contract, but the said Caudell has failed to carry out his part of the contract, although plaintiff has demanded that he comply with same.

That plaintiff is advised, believes and so alleges that the defendants to this action have wrongfully and unlawfully conspired to break the written contract that was entered into between the plaintiff and defendant, Joseph E. Caudell, on 25 September, 1930, and has, in divers and sundry ways, induced the said Joseph E. Caudell, its codefendant, to breach its contract with this plaintiff and to enter into a contract with the said Electrical Research Products, Inc., for talking picture equipment for his said Broadway Theater in Statesville, N. C. That plaintiff is advised and believes, and so alleges, that the said Electrical Research Products, Inc., has not only unlawfully and wrongfully induced the said Joseph E. Caudell to break its contract with this plaintiff, but has further induced the said Joseph E. Caudell to enter into a contract with it, his codefendant, for the installation of the talking picture equipment of said Electrical Research Products, Inc., in the said Broadway Theater, and that the said Caudell is now preparing to have the equip-

ment of its codefendant so installed in said Broadway Theater, and if it has already been installed to operate said Broadway Theater with the talking picture equipment of the said Electrical Research Products, Incorporated, unless restrained by this court by the proper order made in this cause. That plaintiff is advised, believes and so alleges that the said Joseph E. Caudell is insolvent and cannot be made to respond in damages that will be sustained by this plaintiff if he is allowed to breach his contract with this plaintiff. That it is well nigh impossible for this plaintiff to estimate the damages it will suffer if the defendants are permitted to break the contract now held by this plaintiff with the defendant, Joseph E. Caudell, but it verily believes it has and will be damaged in a sum not less than $25,000.

Wherefore, this plaintiff prays the court: (1) That the defendant, Joseph E. Caudell, be restrained from breaching its contract with this plaintiff and that it be restrained from installing the talking picture equipment of the Electrical Research Products, Inc., or if now installed that he be restrained from operating the said Broadway Theater with any equipment other than that of this plaintiff. (2) That the said Electrical Research Products, Inc., be restrained from installing any of its equipment in the Broadway Theater to be operated by its codefendant, and if already installed that it be required to remove the same from said theater. (3) That it recover of the defendants the sum of $25,000 as damages."

The defendants deny the material allegations of the complaint. The defendants also deny that any contract as alleged by plaintiff was ever entered into between plaintiff and Caudell. The said Caudell, in further answer to plaintiff's complaint, says: "That at the time the said preliminary application was signed by this defendant, he issued his check for the initial payment, but that before the said check was presented to the bank upon which it was drawn this defendant stopped the payment thereof and notified the bank, but that the bank through inadvertence paid the said check, and that the said bank offered afterwards to reimburse this defendant for its failure to stop the payment of said check, but this defendant being indebted to the plaintiff on account of other matters gave notice to the plaintiff that the said check had been paid by the said bank through inadvertence and demanded of the plaintiff that credit for the amount thereof be given to the defendant on account of other claims, and that it was the understanding and agreement between this defendant and the said Griffith (Walter Griffith, southeastern district manager of plaintiff) that unless the defendant desired to execute a binding lease and contract based upon the said application he need not do so, and that the said initial payment should

be applied upon said other indebtedness, and that this defendant decided not to execute the said lease and contract and did not execute them and go further with the transaction. That, not having entered into any contract with the plaintiff, and being under no obligations to the plaintiff, and having refused to proceed any further in his dealings with the plaintiff, and being free to enter into a contract with any one he chose, this defendant got in touch with a representative of the Electrical Research Products, Inc., Mr. E. C. Shriver, and stated to him that he was under no contract or lease with the plaintiff, and in the exercise of his freedom as an American citizen he voluntarily and of his own choice made and entered into a contract with the Electrical Research Products, Inc., to install the talking picture equipment handled by it, pursuant to the terms of said contract, which was entered into on 14 October, 1930; that in pursuance of the said contract the said Electrical Research Products, Inc., shipped by freight to this defendant at Statesville, N. C., the said talking picture equipment, and the same was duly received by this defendant on or about 10 November, 1930, and this defendant immediately made preparations for getting his building, known as the Broadway Theater, in proper shape and condition for the installation of said equipment, employing electricians and carpenters for such purpose, and that said work was being duly carried on until the same was interrupted and put a stop to by the restraining order issued herein." The defendant Caudell set up a counterclaim against the plaintiff for damages.

Edwin C. Shriver, sales representative for defendant Electrical Research Products, Inc., made an affidavit denying the material allegations of the complaint.

A temporary restraining order was issued which was heard before Clement, J., who rendered the following judgment: "This cause coming on to be heard upon the order to show cause why the temporary injunction and restraining order heretofore issued in this cause should not be continued in force, and the defendant having appeared before the undersigned judge holding the courts of the Fifteenth Judicial District at the courthouse in Asheboro, N. C., on 2 December, 1930, being the return day of said order; and the said matter being heard upon the complaint, the separate answers of the defendants, and the affidavit of Edwin C. Shriver filed by the defendants, and the court after argument and due consideration being of the opinion that the plaintiff is not entitled to an injunction or restraining order: It is therefore ordered and adjudged that the said temporary injunction and restraining order be and the same is hereby vacated and dissolved, and that the issue as to damages be retained on the civil issue docket of this court to be heard and determined in due course by said court at Statesville, N. C."

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

Fred W. Bynum for plaintiff.
T. C. Guthrie for defendant Electrical Research Products, Inc.
E. M. Land for defendant, Joseph E. Caudell.

PER CURIAM. We do not think on this record it is necessary to consider the prayer for injunctive relief prayed for by plaintiff against defendants, in respect to a breach of an alleged contract between plaintiff and defendant Joseph E. Caudell, in which it is alleged that the defendant Electrical Research Products, Inc., wrongfully and unlawfully conspired with said Caudell to break his contract with plaintiff, which he did, and install the equipment of the Electrical Research Products, Inc. The court did not find the facts, but the pleadings and affidavit fully warranted the court below in concluding that there was no binding contract between plaintiff and Caudell. The contract relied on in the record states, in part: "Please *enter our order* for delivery to us of one complete unit of the DeFrost Hollywood Junior Phonofilm, for installation in the Broadway Theater in the city of Statesville, State of North Carolina." There is no acceptance of this offer appearing in the record signed by plaintiff. Defendant Caudell denies that he entered into any contract with plaintiff. That the matter was taken up with plaintiff's agent and the understanding and agreement with him was that "unless the defendant (Caudell) desired to execute a binding lease and contract based upon the said application he need not do so."

In *Roebuck v. Carson,* 197 N. C., at p. 493, we find: "The judge dissolved the restraining order, but found no facts. It does not appear that either party requested a finding of facts. In such cases the determinative principle of law is thus stated in *Wentz v. Land Co.,* 193 N. C., 32: 'In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct.' *Angelo v. Winston-Salem,* 193 N. C., 207, 136 S. E., 489; *Lineberger v. Cotton Mills,* 196 N. C., 506, 146 S. E., 215. The theory upon which these decisions rest is that it is to be presumed, nothing else appearing, that the judge found the proper and necessary facts to support the judgment."

The plaintiff filed an interesting and elaborate brief and supplemental brief as to the right of injunctive relief against the defendants, contending that "The plaintiff is entitled to an injunction against the defendants restraining them from placing certain moving picture equipment in the Broadway Theater at Statesville, N. C., after the defendant, Joseph

E. Caudell, had previously contracted with this plaintiff for the installation of such equipment."

As the court below could have found on this record, there was no binding contract between plaintiff and Caudell, it is not necessary on this appeal to consider the questions presented by plaintiff. The judgment below is

Affirmed.

UNAKA AND CITY NATIONAL BANK OF JOHNSON CITY, TENN., AND FIRST NATIONAL BANK OF BRISTOL, TENN., v. JOHN P. LEWIS AND WIFE, MADGE M. LEWIS.

(Filed 27 June, 1931.)

1. Parties B c—Refusal of trial court to require interpleader bond in this case held not error.

Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife is a necessary party, C. S., 456, and has a right to set up her claim to the property attached, C. S., 829, 840, and the refusal of the trial court to require the wife to give an interpleader bond is not error.

2. Trial F a—Where issues submitted afford opportunity to introduce all pertinent evidence an exception thereto will not be sustained.

Where the issues submitted to the jury afford the parties opportunity to introduce all pertinent evidence and apply it fairly, an exception thereto by a party tendering other issues will not be sustained.

3. Fraudulent Conveyances A d—Admission of testimony of wife that her money was used in purchase of land held not error.

Where, in an action to set aside a deed from a husband to his wife as being fraudulent as to his creditors, the trial court admits testimony by her to the effect that money received by her from her family was used in payment of the purchase price, and instructs the jury to consider the testimony only on the aspect of fraudulent intent of the husband in executing the deed, the admission of the evidence will not be held for error on the plaintiff's exception.

4. Same—Where grantor retains property sufficient to pay his then existing debts his voluntary conveyance to wife is valid.

In an action against a husband and wife to set aside a deed from him to her as being voluntary and fraudulent as to creditors, an instruction that if the husband, taking into consideration his financial condition at the time of the execution of the deed and the fact that he had signed a guaranty for a company in which he was interested, and the financial

condition of the company and the other signers of the guaranty, if he had retained property sufficient to pay his then existing debts that the conveyance would be valid, is not error.

5. Same—In action to set aside deed from husband to wife indebtedness of husband at time may be considered on question of his intent.

In an action against a husband and wife to set aside a deed from him to her as being voluntary and fraudulent as to creditors, an instruction that the jury might consider the financial condition of the husband in determining the question of his fraudulent intent is not error.

6. Same—Deed from husband to wife raises presumption of fraud as to creditors but where fair price is paid the deed is valid.

A deed from a husband to his wife in consideration of love and affection is founded upon a good consideration, and is valid as to the parties, and where there is evidence that funds received by her from her family were used in the purchase the evidence is admissible to show a valuable consideration, although the deed recites a consideration of one dollar and love and affection, and although the relationship raises a presumption of fraud as to creditors, the presumption is rebuttable, and the deed is valid as to all parties if the consideration was a fair price for the land conveyed.

APPEAL by plaintiffs from *Lyon, Emergency Judge,* and a jury, at Fall Term, 1930, of WATAUGA. No error.

The following judgment was rendered by the court below:

"This cause coming on to be heard before his Honor, C. C. Lyon, judge presiding, and a jury, and the following issues having been submitted to the jury and answered as follows:

'1. Is the defendant, John P. Lewis, indebted to the plaintiff, Unaka and City National Bank of Johnson City, Tenn., and if so, in what amount? Answer: $16,275 with interest.

2. Is the defendant, John P. Lewis, indebted to the plaintiff, First National Bank of Bristol, and if so, in what amount? Answer: $5,000 with interest.

3. Did the defendant, John P. Lewis, execute the deed of 25 October, 1926, to his wife, Madge M. Lewis, with the purpose and intent to cheat and defraud and hinder or delay his creditors in the collection of their debts? Answer: No.

4. Is the feme defendant, Madge M. Lewis, the owner of the personal property or any part thereof that is in dispute, seized by the sheriff of Watauga County under the warrant of attachment in his hand in this cause, viz., two diamond solitaire rings, one cluster diamond ring, one diamond stick pin, one diamond dinner ring, one watch and chain, one breast-pin, the Major Donnelly horse and the Chrysler automobile, and if so, what part? Answer: 1913 and 1914 rings to Mrs. Lewis, remainder as personal property to plaintiffs.'

Plaintiffs moved to set aside the verdict on the third issue and moved the court on the pleadings and evidence to answer the third issue 'Yes,' which motion is denied and overruled and plaintiffs except.

The defendants, and especially the feme defendant, Madge M. Lewis, move to set aside the verdict on the fourth issue, which motion is denied and overruled and the defendants, especially the defendant Madge M. Lewis, excepts; whereupon the court renders the following judgment:

It is considered, ordered and adjudged that the plaintiff Unaka and City National Bank of Johnson City, Tenn., recover of the defendant, John P. Lewis, the sum of $16,275, together with interest on the component parts of said sum as follows, to wit: Interest on $5,000 from 24 August, 1929, and interest on $4,000 from 21 August, 1929, and interest on $7,275 from 26 August, 1929.

It is further ordered, considered and adjudged that the plaintiff, First National Bank of Bristol, Tenn., recover of the defendant, John P. Lewis, the sum of $5,000, together with interest thereon from 12 August, 1929.

It is further considered, ordered and adjudged that the defendant, Madge M. Lewis, is the owner in fee and entitled to the possession of the property described in the deed from John P. Lewis to Madge M. Lewis, dated 25 October, 1926, and registered in the office of the register of deeds of Watauga County, in Book 36, pages 92 and 93, and known as the Blowing Rock property.

It is further considered, ordered and adjudged that the defendant, Madge M. Lewis, is the owner of and entitled to the possession of the diamond rings given her by her husband in the years 1913 and 1914, and thus labeled.

It is considered, ordered and adjudged that the defendant, John P. Lewis, is and was at the time of the issuing of the warrant of attachment the owner of all the other personal property levied upon, by the sheriff under and by virtue of said warrant of attachment in this cause, to wit, the Chrysler automobile, the two horses and all the remainder of the jewelry, including one watch and chain, one breast-pin, one cluster diamond ring, one diamond stick-pin and all the other jewelry levied upon by the officer in this cause other than the two rings labeled 1913 and 1914, and this judgment is declared a specific lien upon said personal property, and that execution be issued to the sheriff or other lawful officer commanding him that out of said personal property levied upon he satisfy the judgment aforesaid or so much thereof as the proceeds of the sale of said personal property, after deducting the cost of this action will satisfy, and that the proceeds of said sale, after deducting the costs of this suit be applied to the discharge of the plaintiffs' judgment in this cause pro rata.

C. C. LYON, *Judge Presiding.*"

Both the plaintiffs and defendants gave notice of appeal to the Supreme Court. Defendants did not perfect their appeal, so the appeal of plaintiffs is alone to be considered. Numerous exceptions and assignments of error were made by plaintiffs. The material ones and necessary evidence will be considered in the opinion.

Cox, Taylor & Epps, Bingham, Linney & Bingham, T. C. Bowie and John E. Brown for plaintiffs.

W. C. Newland, S. J. Ervin and S. J. Ervin, Jr., for defendants.

CLARKSON, J. We see nothing in plaintiffs' contention that there was error in the ruling of the court below in refusing to require Madge M. Lewis to give interpleader bond. C. S., 829, 840.

C. S., 840, is in part as follows: "When the property taken by the sheriff is claimed by any person other than the *plaintiff or defendant* the claimant may interplead upon filing an affidavit of his title and right to the possession of the property," etc.

Madge M. Lewis was a defendant in the action, made so by plaintiffs. The complaint of plaintiffs commenced "The plaintiffs, complaining of the *defendants,* allege and say." She had a right in her answer to set up her ownership to the Blowing Rock property and certain personal property. She was a necessary party for a complete determination of the action. C. S., 456. *Moorefield v. Roseman,* 198 N. C., 805.

The defendants did not perfect their appeal in reference to the finding of the jury on the fourth issue. The main controversy, therefore, is over the third issue, which we think enabled the parties to present every phase of the contention.

In *Hooper v. Trust Co.,* 190 N. C., at p. 428: "The test of the sufficiency of issues is, 'did the issues afford the parties opportunity to introduce all pertinent evidence and apply it fairly'?" *Erskine v. Motor Co.,* 187 N. C., at p. 831-2. The plaintiffs tendered other issues. The exception and assignments as to the issues submitted cannot be sustained.

The third issue: "Did the defendant, John P. Lewis, execute the deed of 25 October, 1926, to his wife, Madge M. Lewis, with the purpose and intent to cheat and defraud and hinder or delay his creditors in the collection of their debts?" This issue was answered "No" by the jury.

Is there any error on the record in reference to this issue and the answer thereto? We think not.

The real battle was waged over the deed made by John P. Lewis to his wife Madge M. Lewis, dated 25 October, 1926, to the "Blowing Rock" property.

The deed recited: "Witnesseth, that for and in consideration of one dollar cash in hand paid, receipt of which is hereby acknowledged, and love and affection."

C. S., 1005—conveyance with intent to defraud creditors void. C. S., 1007, is as follows: "No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidenced only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper."

In *Shuford v. Cook,* 169 N. C., at p. 55, the following is said: "The plaintiff earnestly pressed this exception, but the act of 1840, now Revisal, 962 (C. S., 1007), provides that the court, where there is any evidence tending to show that at the time of the alleged fraudulent conveyance the grantor retained property fully sufficient and available for the satisfaction of his then creditors, shall submit the question to a jury 'with such observations as may be right and proper.' The presumption formerly arising from a voluntary conveyance made by a party indebted is thus removed and the indebtedness in such case is to be taken and held, in the language of Revisal, 962 (C. S., 1007), 'to be evidenced only from which an intent to delay, hinder and defraud creditors may be inferred.' *Hobbs v. Cashwell,* 152 N. C., 183." *Beasley v. Bray,* 98 N. C., 266.

"In *Garland v. Arrowood,* 177 N. C., at p. 374, it is said: 'The jury have found that there was no actual intent to defraud or, in other words, no *mala mens,* but if the defendant, the donor of the gift, failed to retain property fully sufficient and available for the satisfaction of his then creditors, the gift was void in law, without regard to the intent with which it was made. *Black v. Saunders,* 46 N. C., 67; *Aman v. Walker,* 165 N. C., 224; *Michael v. Moore,* 157 N. C., 462. The burden of at least going forward with proof of such retention of property is upon the defendant, where, as found in this case by the jury, there is a voluntary gift or settlement. *Brown v. Mitchell,* 102 N. C., 347, 369; *Tredwell v. Graham,* 88 N. C., 208; *Cook v. Guirkin,* 119 N. C., 13; *Aman v. Walker, supra.*' . . . (See *Garland v. Arrowood,* 179 N. C., 697.) In the *Aman case, supra,* at p. 227, it is held: 'If the conveyance is voluntary, and the grantor retains property fully sufficient

and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.' " *Wallace v. Phillips,* 195 N. C., at p. 671-2; *Worthy v. Brady,* 91 N. C., 265; *Peoples Bank and Trust Co. v. Mackorell,* 195 N. C., 741; *Flowers v. American Agr. Chem. Co.,* 199 N. C., 456.

In *Faust v. Faust,* 144 N. C., at p. 387, is the following: " 'It was formerly held, although there was much conflict of opinion, that the clause stating the consideration in a deed or other instrument under seal must be held conclusive on the parties like other parts of the instruments and was not open to contradiction or explanation, but the more modern decisions settle the rule that although the consideration expressed in a sealed instrument is prima facie the sum paid, or to be paid, it may still be shown by the parties that the real consideration is different from that expressed in the written instrument. Accordingly, it is held, by an uncounted multitude of authorities, that the true consideration of a deed of conveyance may always be inquired into and shown by parol evidence.' 16 Cyc., 653. The course of the decisions of this Court is set forth with care and ability by *Shepherd, J.,* in *Barbee v. Barbee,* 108 N. C., 581; *Kendrick v. Ins. Co.,* 124 N. C., 315; *Deaver v. Deaver,* 137 N. C., 240." *Pate v. Gaitley,* 183 N. C., at p. 263; *Exum v. Lynch,* 188 N. C., at p. 396.

In *Mining Co. v. Smelting Co.,* 119 N. C., at p. 417-8, citing numerous authorities, "Looking alone to the derivation of the words 'solvent' and 'insolvent,' they mean respectively, able and unable to pay. Whether the adjective insolvent is used to define the condition of a decedent's estate or the financial status of a living person, its signification is the same. It means, unable to meet liabilities after converting all the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them. . . . But applying the crucial test, we will find that in the discussion of almost every appeal involving an issue of fraud and depending in any way upon the ability of a debtor to pay his debts at the time of making a conveyance, the discussions in the opinions of this Court have been predicated upon the assumption that solvency and insolvency depends upon the question whether the entire assets equal or exceed in value the total indebtedness. . . . (Citing authorities.) It would prove subversive of settled principles, and would tend to impair credit and embarrass trade, to give our sanction to a definition of an insolvent that would bring within the class of which it is descriptive every person, natural or artificial, who in the course of active business is unable to meet the demands of creditors without borrowing money." *Flowers v. Chemical Co.,* 199 N. C., 456.

The defendant, Madge M. Lewis, testified in part: "Since my marriage my people have given me quite a bit of money. I would say six or seven thousand dollars." She testified how it was used with her husband "and part went into the purchase of the Blowing Rock property." Plaintiffs objected to this testimony on the ground that the conveyance of 25 October, 1926, was a voluntary conveyance. This objection was sustained by the court below: "The court holding that it was not competent for the purpose of showing any additional consideration in the purchase of the Blowing Rock property. The court further holds that it may be offered in evidence for the purpose and which the jury may consider in passing on the fraudulent intent of the defendant, John P. Lewis, in making the deed of 25 October, 1926. Q. State to the court and the jury what amount of money indirectly or directly went into the purchase of the Blowing Rock property? Gentlemen of the jury, I am permitting the answer to this question, not for the purpose of showing that there was any valuable consideration paid for the Blowing Rock property by Mrs. Lewis, because the deed recites one dollar and love. It is not for the purpose of changing the consideration of the deed, but I am permitting it to enter in as bearing upon the fraudulent intent of John P. Lewis when he made the deed, and you may consider it for that purpose and no other. To this ruling of the court in excluding this evidence for the purpose of showing the consideration in the deed, defendants except. A. I should say half of the money went into the purchase of the property, amounting to two or three thousand dollars. Improvements were placed on the property after its purchase to the extent of about $1,500. My husband promised me a home in Blowing Rock some time before that deed of 25 October, 1926, some two or three years before. I went to Blowing Rock first for my health, and he promised me this home in Blowing Rock. My husband had used in his business some four or five thousand dollars of my money. Total purchase price of the Blowing Rock property was $5,500, exclusive of improvements put on it."

From the *Faust case,* above cited, this was more favorable than plaintiffs were entitled to. *McCanless v. Flinchum,* 89 N. C., 373.

The court below charged the jury: "The law in this case, gentlemen, is very plain, and very simple, and I am going to tell you what it is now, so that you can have your minds directed to that during the further charge of the court. As has been said by some of the counsel, and which has been said by the courts, a man must be just before he is generous. Our statute provides that before a man can make a voluntary gift or conveyance of his property, he being in debt at the time, that he must retain property sufficient and available for the payment of his then existing debts, and if he does not, then his voluntary gifts

or conveyances made by him are void. Now, the deed in question, the court charges you, is a voluntary deed made by a husband to his wife for the express consideration of one dollar and love. As between them that is a good deed. Thousands of conveyances in this State are made in the same way. It is only void, if void at all, as to creditors. The bare fact that a man makes a voluntary deed to his property is not a presumption that it is fraudulent, because a man has a right to do as he pleases with his property, provided he does not thereby defraud his creditors. (Now, the deed as I say is a voluntary deed, made upon a good consideration, but not a valuable consideration, and if Lewis retained property enough at the time of the conveyance and delivery of that deed to pay all of his then existing debts, taking into consideration that he was one of the four signers of this guaranty and the condition of the Tri-State Fruit Company at that time, I say if you find that he did have sufficient to pay all of his then existing debts under those circumstances, then it would be your duty to answer the third issue 'No.') (To the foregoing portion of charge in parentheses plaintiffs except.) If you are not so satisfied, the burden being on the defendants, Lewis, to satisfy you by the greater weight of the evidence that at the time of the delivery of this deed that he did retain property amply sufficient and available to pay his then existing debts, and if he has not so satisfied you by the greater weight of the evidence, it is your duty to answer the third issue 'Yes.'"

We can see no merit in the above exception and assignment of error, treating the deed as a voluntary conveyance between husband and wife, although the evidence of Madge M. Lewis was competent to show a valuable consideration. Plaintiffs have no cause to complain of this charge.

In *McCanless v. Flinchum, supra,* at p. 375, the following correct principle is set forth: A voluntary deed, executed by an insolvent person, is void *per se* as to creditors; where the deed is made upon a fair consideration it is not necessarily void; and where the transaction is between an insolvent father and his son, a rebuttable presumption of a fraudulent intent arises from the close relationship of the parties; therefore, where there was evidence tending to show that the deed was supported by a valuable consideration, and the judge charged the jury that if at the time it was executed the bargainor did not retain property sufficient to pay his debts, then in law the deed is void, and failed to submit the question as to the bona fides of the transaction, it was held to be erroneous. At pp. 374-5: "Every sale of real or personal property made to a son by his father, at the time embarrassed with debts beyond his ability to pay them, is not necessarily fraudulent and void as to creditors. If the son honestly buys the land or other property

from the father in such circumstances, and pays for it a fair price, such a sale is good and valid as to everybody, and it stands on the same footing as if it had been made to a stranger. There is no reason why a father, unable to pay his debts, may not sell his property to his son, and the only difference between such a sale and one to a stranger is, that the close relationship between the father and son, if the bona fides of the sale shall be questioned, is a circumstance of suspicion, and evidence tending to show a fraudulent intent." The same principle applies to a conveyance by a husband to his wife. *Worthy v. Brady, supra.*

In *King v. Thompson,* 9 Peters (U. S.), 220; 9 Law Ed., 108, the following observation is made: "In testing the validity of that transaction (an alleged fraudulent conveyance), the subsequent fall of property, or failure of King, cannot be taken into view. The inquiry must be limited to his circumstances at the time. Was King when this property was received by the complainant, in a failing or embarrassed condition?" *Schreyer v. Scott,* 134 U. S., 408, 33 Law Ed., 959.

Certain prayers for instruction were given by the court below at the request of plaintiffs that were perhaps in some respects more favorable than plaintiffs were entitled to from the authorities heretofore cited.

"The court instructs you further that if at the time of the execution of a deed by one indebted he then retains property amply sufficient and available for the payment of such debts as he then owes, and in later years either by reason of an act of God, by fire, flood, tempest, or by reason of losses in business or other casualty, such as insolvency or financial embarrassment of those owing him which render them unable to pay the debts they owe him the grantor becomes financially embarrassed and the property he then owns insufficient for the payment of his debts, this does not affect the validity of the deed executed by him years before, but such deed, if valid when executed, remains valid and is not affected by financial embarrassment or insolvency which comes upon him years later. . . . (In considering and passing upon the question as to whether the deed executed by the defendant, John P. Lewis, to his wife, Madge M. Lewis, on 25 October, 1926, was executed with the fraudulent intent and purpose of hindering, delaying and defrauding the plaintiffs, you have the right and it is your duty to consider the evidence tending to show the financial condition and solvency, not only of John P. Lewis himself, but also the financial condition and solvency of the Tri-State Fruit Company, the party primarily liable for the payment of its debts to the plaintiffs, the payments of which were guaranteed under said contract executed by Lewis, Hanks, Sanders and Lacy. And you have a right and it is also your duty to consider the evidence tending to show the financial condition and solvency of Hanks, Lacy and Sanders, who also signed the contract of guaranty and were

equally liable with Lewis thereunder, and, if this evidence satisfies you that, at the time of the execution of said deed, the real and personal property then owned, held and retained by them was amply sufficient and available for the discharge of their liabilities and the payment of said indebtedness, and that the deed from John P. Lewis to his wife was executed in good faith and not for the purpose or with the intent of hindering, delaying or defrauding the plaintiffs or evading or escaping his liabilities, if any, under said contract of guaranty, then you will answer the third issue 'No.')"

To the foregoing portion of the charge in parentheses plaintiffs except.

From the facts appearing on this record we can see no objection to the above charge made by the court below to which plaintiffs excepted and assigned error. It was consonant with the law of this State and the authorities heretofore cited. We find no error in the refusal of certain prayers for instruction requested by plaintiffs, nor to the other assignments of error not herein considered. On the whole record we find no prejudicial or reversible error.

The conduct of the case by the court below was fair and impartial. The contentions of the parties on each side fully given. The charge was clear and the law, applicable to the facts, justly stated.

This is the last appeal that will come to this Court from the learned and conscientious judge who tried this case in the court below. At a great age, this righteous judge, who for nearly a quarter of a century adorned the Superior Court bench, has gone to his reward.

We find in the trial of this case, in law,

No error.

LONNIE G. CONN v. SEABOARD AIR LINE RAILWAY COMPANY AND C. A. RICE.

(Filed 27 June, 1931.)

Trial C a—Counsel may not read dissenting opinion in argument to jury over objection of adverse party.

It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto, and the fact that the trial court, upon objection, made a general observation to the effect that the jury would take the law from the court and not from counsel is insufficient, it being his duty, upon objection duly made, either to direct counsel not to read the dissenting opinion or to plainly and

unequivocally instruct that the dissenting opinion had no legal bearing upon the case. C. S., 203. Limitations on counsel in their argument to the jury discussed by BROGDEN, J.

STACY, C. J., concurring.

CLARKSON, J., dissenting.

CONNOR, J., concurs in dissenting opinion.

CIVIL ACTION, before *Sinclair, J.*, at October Term, 1930, of VANCE.

This was an action instituted by the plaintiff against the defendant to recover damages for personal injuries sustained 3 April, 1930, at a crossing in the town of Henderson. The defendant denied the allegations of negligence, pleaded contributory negligence and other defenses not pertinent to a decision of this case.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded $7,000 damages for personal injuries and $250 for property damage.

From judgment upon the verdict the defendant appealed.

M. C. Pearce, D. P. McDuffie, C. A. Douglass and Thomas W. Ruffin for plaintiff.

Murray Allen and Pittman, Bridgers & Hicks for defendant.

BROGDEN, J. The record shows the following: During the argument of one of the counsel for plaintiff to the jury, he made the following statement:

"The law in North Carolina says that all Mr. Conn had to do when he approached the track was to stop, if the circumstances were such that an ordinarily prudent man would stop, look and listen, and then go ahead as he did in this case." "The North Carolina Supreme Court in the case of *Kimbrough v. R. R.*, 180 N. C., 274, and decided in the year 1920, turned the defendant's theory down flat. I want to read here what *Judge Clark* said about the law. *Judge Clark* was a great *Chief Justice* of the Supreme Court and one who upheld the liberties of the people."

Objection by defendant to plaintiff's attorney reading from the opinion of *Judge Clark*. The court then charged the jury: "The jury will take the law from the court and not from counsel."

Counsel for defendant: "We note an exception to the reading of the dissenting opinion of *Judge Clark*."

Objection by defendant; overruled; defendant excepts.

"Talking about going out upon the track, he said: 'Gessler placed his hat upon a pole and compelled the public to pay obeisance to it. But neither of these are more repugnant to our sense of propriety and right

than to require the people traveling their own roads to come to a full stop at the sight of two parallel bars of iron laid across a public highway, simply because the railroads, while saving themselves the expense of avoiding grade crossings, are unwilling to take the trouble or responsibility to give proper signals or to establish gates and custodians whenever needed.' " This is *Judge Clark's* language on it. I don't care how much the attorney for the railroad objects to it. It is my opinion that the Supreme Court of North Carolina in the case of *Moseley v. R. R.,* 197 N. C., 628, has backed *Judge Clark* up in his statement that it is not your duty to stretch your necks and bow to two iron rails. That is what you say the law is," etc.

The foregoing excerpt from the record presents for decision this question of law:

In arguing a case to the jury, is it permissible for an attorney to read to the jury a dissenting opinion of one of the Justices of the Supreme Court of North Carolina?

Doubtless, it should be observed at the outset that a general dissertation or essay upon dissenting opinions is not pertinent to a solution of the question of law involved in this appeal. Suffice it to say that such opinions constitute valuable and helpful interpretation of the law as expounded or present in clear relief the divergent paths of legalistic thought upon a given subject. Moreover, at times, they may serve to demonstrate that courts and judges do not always fall into the goose-step of outworn precedent.

Prior to 27 December, 1844, an attorney was not permitted to argue law to a jury. In *S. v. Miller,* 75 N. C., 73, *Justice Reade* said: "Some twenty-five years ago a circuit judge restrained a lawyer from arguing the law to the jury, suggesting that the argument of law ought to be addressed to the court, as the jury had to take the law from the court. Umbrage was taken at that, and the Legislature passed an act allowing counsel to argue both the law and the facts to the jury." The act referred to is chapter 13, Public Laws of 1844, and is now embodied in C. S., 203, which provides that "in jury trials the whole case as well of law as of fact may be argued to the jury." This declaration is broad and comprehensive and easily lent itself to a construction by the profession that the field of a jury argument was unlimited and boundless. Hence, in the course of time, it became necessary for courts to fence in the field by imposing certain restrictions upon counsel in presenting causes to the jury. These restrictions are reflected in certain legal inhibitions imposed by the courts. These inhibitions may be grouped and classified as follows:

1. Attorneys are not permitted, except in certain specific instances, to read medical books or writings of a scientific nature to the jury.

Melvin v. Easley, 46 N. C., 386; *Huffman v. Click,* 77 N. C., 55; *S. v. Rogers,* 112 N. C., 874; *Butler v. R. R.,* 130 N. C., 16; *Lynch v. Mfg. Co.,* 167 N. C., 98; *Tilghman v. R. R.,* 171 N. C., 652. Nor can counsel read a paper-writing not in evidence for the purpose of impeachment. *S. v. Bryan,* 89 N. C., 531. The theory which excludes the reading of such publications, is based upon the idea that declarations in a book or opinions of experts contained therein, are not under oath, and hence cannot be classified as evidence. The exception to the general rule is pointed out in the *Tilghman case, supra,* in these words: "When an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidence by the adverse party as impeaching testimony. But unless the book is referred to on cross-examination it cannot be used for this purpose. It would be a mere evasion of the general rule under discussion if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinion there expressed; hence this is not allowed."

2. The second class of restrictions may be denominated as unfair comment and is discussed in many decisions, notably: *Jenkins v. Ore Co.,* 65 N. C., 563; *S. v. Williams,* 65 N. C., 505; *Coble v. Coble,* 79 N. C., 589; *S. v. Davenport,* 156 N. C., 596; *S. v. Tucker,* 190 N. C., 708; *Lamborn v. Hollingsworth,* 195 N. C., 350; *S. v. Green,* 197 N. C., 624; *S. v. Beal,* 199 N. C., 278. These illustrations of unfair comment, beginning with the familiar "poor widow and rich corporation" argument, running through the "Pennsylvania Yankee" appeal, including the famous upas tree declaration and ending with the religious and social theories referred to in the *Beal case,* all stand as a lasting monument to vituperative ingenuity. The climax of unfair comment in the literature of the law of this State was reached in the argument of counsel and the charge of the court in *S. v. Brown,* 67 N. C., 435.

The third class of inhibitions denies to counsel the right to read the decisions of the Supreme Court of North Carolina where such reading would reasonably tend to prejudice either party upon the facts. *S. v. Corpening,* 157 N. C., 621; *Forbes v. Harrison,* 181 N. C., 461; *Elliott v. Power Co.,* 190 N. C., 62. Thus, in the *Corpening case,* the Court said: "As we understand the record, the counsel for the prosecution read the facts in *Malonee's case,* relied upon as supporting evidence to the prosecutrix, and over defendant's objection was allowed by the court to say in effect that a jury of Jackson County had convicted Malonee, and the supporting evidence was much stronger "than in *Malonee's case,*" etc. A new trial was awarded because the trial judge permitted such argument to be made. In the *Forbes case* counsel attempted to read a portion of the opinion in *Bell v. Harrison,* 179 N. C., 190, and

upon objection by counsel for defendant the court declined to permit such reading, and this ruling was upheld. The Court observed "that two cases grew out of said administration and there was grave danger of prejudicing the defendants upon the facts as counsel was allowed to read the part of the opinion in the case proposed to be read by him."

4. The fourth class of restrictions denies to counsel the right to comment upon extraneous matters upon which there is no evidence. *McLamb, Admr., v. R. R.,* 122 N. C., 862; *Hopkins v. Hopkins,* 132 N. C., 25; *S. v. Love,* 187 N. C., 32.

5. The fifth class of restrictions excludes personal experience of counsel as part of the argument. *Perry v. R. R.,* 128 N. C., 471.

The courts of other jurisdictions have considered the question as to what may be read to a jury by counsel in the course of argument.

6. The Court of Appeals of New York granted a new trial in the case of *Williams v. Brooklyn Elevated R. R. Co.,* 26 N. E., 1048, because counsel, in the course of the argument, was permitted, over objection, to read to the jury an article appearing in the New York *Tribune,* entitled "Only a Boy Peddler." The article purported to be an account of the death of a little boy who was selling collar buttons and combs to help support his mother and eight brothers and sisters, and his death was caused by contact with a live wire swinging from a pole. The Court said: "The reading by counsel in summing up to the jury of the newspaper article 'Only a Boy Peddler' was wholly irrelevant to the case. It could have been read for no purpose except to inflame the jury against corporations, and to lead them, under the influence of a just anger excited by the incident narrated, to give liberal damages to the plaintiff in the case on trial. The refusal of the court to interfere, under the circumstances of this case, was legal error. The privilege of counsel, and the largest liberality in construing it, did not authorize such a totally irrevelant and prejudicial proceeding."

Again in *People v. Fielding,* 53 N. E., 497, the defendant was indicted for auditing a fraudulent claim against the city of Brooklyn. The District Attorney, in the course of his argument, referring to taxpayers, said: "I say you will see old men in that line clutching in their knotted fingers rolls of dirty one-dollar bills. Look at their worn and shabby garments. Look at the marks of painful labor written all over their aged and clumsy limbs. It is the money of these people which the defendant has stolen and squandered. These are the people whose cause I plead. These are the victims of the defendant's crime. These are the people who now, by tens of thousands, are waiting outside for your verdict. Will you do them justice, or will you not? If you shall let this man, loaded with his guilty plunder, escape, then I say you have committed the unpardonable sin." The court, in charging the jury,

said: "Some things have been said about the newspapers, about popular clamor, and about the burden of the taxpayers. Those are considerations which are not to control or influence you in deciding this case." The Court awarded a new trial, and in the course of the opinion it is said: "Even in a civil action, when counsel are permitted, under objection and exception, while summing up, to read to the jury an abstract from a pamphlet or newspaper, or to exhibit a cartoon, not in evidence, it is good ground for reversal. . . . So statements made by counsel, outside of the evidence, and subject to objection, which strongly tend to arouse sympathy, prejudice, or resentment in the minds of the jury, require a new trial, even if the court charges that they have nothing to do with the case, and must be disregarded." See, also, *Scripps v. Reilly*, 38 Mich., 10.

7. Eulogies of deceased in suit for wrongful death. *Dixon v. Haynes*, 262 Pac., 119. The Court of Washington said: "The misconduct of counsel complained of consists of an attempt by one of the counsel for respondent to read something to the jury which had not been introduced in evidence, appearing to be a eulogy of deceased, or something of the kind. Upon objection, the court refused to allow counsel to read it, and counsel for respondent was peremptorily directed to refrain from making any reference to any document not in evidence. Although counsel for respondent should not have attempted to read anything to the jury which had not been introduced in evidence on the trial, the court fully protected the rights of appellants, so that no prejudicial error occurred."

8. Counsel are not permitted to read to the jury, as law, decisions which are inapplicable to the facts, or which do not declare the law as held by the jurisdiction in which the trial occurs. This principle was announced by the Supreme Court of South Carolina in *Key v. Carolina & N. W. Ry. Co.*, 147 S. E., 625. The Court said: "It appears from the record that the presiding judge permitted appellant's counsel to read the entire decision of the United States Supreme Court in the *Goodman case* to the jury in the trial of the case at bar, but that the court refused to charge the law of that case, and on motion for a new trial failed to grant the same because the jury had disregarded the principles announced in the *Goodman case*. . . . Lately, it has been cited often by counsel for railroad companies in this Court, and it has received considerable attention in dissenting opinions. A majority of the Court has never indorsed the views of that case. The only mistake made by the presiding judge in this connection was in permitting counsel for the appellant to read the decision in the *Goodman case* to the jury." *Union Pac. R. R. Co. v. Field*, 137 Fed., 14; *Ray v. Chesapeake & Ohio R. R. Co.*, 50 S. E., 413; *Farnandis v. Great Northern R. R. Co.*, 84 Pac., 18.

This Court expresses no approval or disapproval of the various principles announced in other jurisdictions upon the subject, but such decisions are referred to in order to demonstrate the trend of judicial thinking. The range of a jury argument is carefully and correctly set forth by McIntosh North Carolina Practice and Procedure, sec. 569, *et seq.* Summarizing the principles of legitimate argument by counsel, the author says: "But he may refer to well-known facts in history, literature, and science by way of illustration and ornament. He may argue matters of common knowledge, or matters of which the court will take judicial notice, and within the limits of the evidence the manner of presenting the case is left to his own judgment. He may indulge in impassioned bursts of oratory, or what he may consider oratory, so long as he introduces no facts not disclosed by the evidence. It is not impassioned oratory which the law condemns and discredits in the advocate, but the introduction of facts not disclosed by the evidence. It has been held that he may even shed tears during his argument, the only limitation on this right being that they must not be indulged in to such excess as to impede or delay the business of the court."

Applying the principles deduced from the authorities, it is clear that a dissenting opinion is not admissible in evidence, and hence cannot be classified as a fact. Neither is it the law of the particular case, else it would not be a dissenting opinion. Manifestly, a dissenting opinion expresses the individual view of the judge who writes it, and thus would logically fall into the classification of newspaper editorials, magazine articles, pamphlets, or other writings, which have not received the judicial sanction of a court. Therefore, the Court concludes that it is not permissible, upon objection duly made and entered, for an attorney to read as the law of the case a dissenting opinion of one or more of the Justices of the Supreme Court.

A perusal of the record discloses, beyond a doubt, that the dissenting opinion in the *Kimbrough case* was read to the jury as a correct statement of the law. The trial judge, upon objection, made a general observation to the jury, but this was not sufficient. It was his duty, upon objection duly made, either to direct counsel to refrain from such reading or instruct the jury plainly and unequivocally that the dissenting opinion had no legal bearing upon the case.

New trial.

STACY, C. J., concurring: A verdict, or *veredictum* as it was called in the old English law, is, as indicated by the derivation of the word, the *dictum* of truth. It is the finding of a jury, or the accord of the twelve, as distinguished from the decision of a court, a referee, or a commissioner.

Verdicts are to be rendered on evidence pertinent to the issues, and not on extraneous matters. Animadversions or conclusions of others, therefore, based on different fact situations, whether found in legal opinions or elsewhere, are neither relevant nor competent, as they tend to mislead rather than to aid in reaching the correct determination of a particular case. And exact justice is the goal of every judicial inquiry.

Not only is the establishment of justice the goal of every judicial inquiry, but, in a sense, it may rightly be denominated the end of all government, if not the end of all civil society. It has ever been and ever will be pursued by men until it is attained, or until liberty is lost in the pursuit. Justice is not an abstraction, nor yet an ethereal, intangible something, but rather an act of the mind, a positive resolution and the will to see that every man shall have his due. The quality of right or wrong is not a physical manifestation, but it is the attribute of a mental concept produced by external stimuli. No act acquires color or meaning-content until it is brought in judgment, and the correctness of every judgment depends upon its own approximation or nearness to the truth.

Here, the rightness or the wrongness of the conduct of the parties is not in the street-crossing, nor in the collision of the automobile with the engine, nor yet in the actions of the plaintiff and the engineer, but it is to be found first in the minds of the witnesses, next in the verdict of the jury, and finally in the judgment of the court. There can be no conclusion of right or wrong where there is no mental determination. This is the result of an intellectual process, the mind's characterization or classification of phenomena. The character of an act is determined first by the category to which it is assigned in the mind of the listener or the observer and finally by the settled judgment of the community. Thus an act pronounced good or lawful today may be declared bad or unlawful tomorrow, and *vice versa,* by reason of a change in the standard of judgment. It is only by the refining process of growth that we are able to approach, if not reach, the ideal of absolute justice—a consummation devoutly to be wished, if happily we may find it.

A's conduct is approved or condemned by B according to B's conception of right, and B's conduct is approved or condemned by A according to A's estimate of right, the correctness of the judgment in each case depending, in its final analysis, upon the correctness of the standard by which it is made. As thus understood, justice is universal in its application, and it likewise imposes an universal obligation. It is as much a duty to see that justice is rendered to others as it is to demand it for one's self, and to fail in either is a questionable act. The character of the conduct of a man as he walks along the street is to be judged, in the

first instance at least, by those who observe his conduct in the street. In a very real sense, therefore, every man is his brother's keeper and is in duty bound to him according to the precepts of the golden rule. This is the basis of the injunction: "Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty: but in righteousness shalt thou judge thy neighbour." Lev. 19:15. Out of the theory that the binding estimate of the community or "law is the highest expression obtainable, at any given time, of the people's conception of the correct rule of conduct," rules of evidence have been evolved, all having as their one aim the discovery of truth, upon which just judgments may be rendered.

As the matter complained of was extraneous to the inquiry and was calculated to hurt rather than to help appellant's cause, it should have been excluded. The conclusions reached by the writer of the dissenting opinion, which counsel read to the jury, grew out of a different fact situation from the one here disclosed; and, as said by *Marshall, C. J.*, in *U. S. v. Burr,* 4 Cr., 470, "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered." Furthermore, the opinion read was not the law of that case, nor of this one. That part of C. S., 203, therefore, which provides, "In jury trials the whole case as well of law as of fact may be argued to the jury," is not applicable to the instant facts.

CLARKSON, J., dissenting: C. S., 203, in part: "In jury trials the whole case as well of law as of fact may be argued to the jury."

The record, quoting *all of it* upon which a new trial is awarded, is as follows: "During the argument of Thos. W. Ruffin, of counsel for plaintiff, to the jury, he made the following statement: 'The law of North Carolina says that all that Mr. Conn had to do when he approached that track was to stop, if the circumstances were such that an ordinarily prudent man would stop, look and listen, and then go ahead, as he did in this case.' The North Carolina Supreme Court in the case of *Kimbrough v. R. R.,* reported in 180 N. C., at p. 274, and decided in the year 1920, turned Mr. Allen's (speaking of defendant's attorney) theory down flat. I want to read here what *Judge Clark* said about the law. *Judge Clark* was the great *Chief Justice* of the Supreme Court and one who upheld the liberties of the people. (Objection by defendant to plaintiff's attorney reading from opinion of *Judge Clark.)* The court then charged, 'The jury will take the law from the court, and not from counsel.' Counsel for defendant: We note an exception from the reading of the dissenting opinion of *Judge Clark.* Objection by defendant; overruled; defendant excepts. Talking about going out upon the track

he said: 'Gessler placed his hat upon a pole and compelled the public to pay obeisance to it. But neither of these are more repugnant to our sense of propriety and right than to require the people traveling their own roads to come to a full stop at the sight of two parallel bars of iron laid across the public highway, simply because the railroads, while saving themselves the expense of avoiding grade crossings, are unwilling to take the trouble or responsibility to give proper signals or to establish gates and custodians whenever needed.' That is *Judge Clark's* language on it. I don't care how much Mr. Allen objects to it. It is my opinion that the Supreme Court of North Carolina in the case of *Moseley v. R. R.*, 197 N. C., at p. 628, has backed *Judge Clark* up in his statement that it is not your duty to stretch your necks and bow to two iron rails. That is what you say the law is. The Supreme Court of North Carolina does not say that in this *Moseley case* here. I want to read this. It is the last word from the Supreme Court of North Carolina on the question: 'If the plaintiff's view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant (remember the defendant in this case had a little old shanty out there and that is the reason he could not see by it—especially if this is done by the fault of the defendant), the company's servants fail to warn him of its approach (what Mr. Coon said they did here), and induced by this failure of duty, which had lulled him into security, he attempted to cross the track and is injured, having used his faculties as best he could, under the circumstances (Look if you can. If you can't look, listen and you have a right to listen. His Honor will charge you that any man driving or walking across a railroad track, having used his faculties as best he could by listening and looking, has a right to expect that the railroad is going to carry out its duty, had a right to assume that the railroad will be careful in running at the proper speed, and ringing its bell)—having used his faculties as best he could, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received.' That case is dated 30 October, 1929, just a year ago."

This record discloses that the learned attorney for plaintiff, taking the argument as a whole, was comparing the dissenting opinion in the *Kimbrough case* and showing similarity to the *Moseley case,* which was a unanimous decision of this Court. In the controversy *the court then charged: "The jury will take the law from the court and not from counsel."* This was a clear, well understood charge by the court below to the jury. When the court came to charge the jury the law was stated so accurately that there is no question made in the main opinion that the court below did not charge the law applicable to the facts correctly.

Then, again, since the decision in the *Kimbrough case,* the Legislature of North Carolina has practically said what *Judge Clark* said: Acts 1923, ch. 255, sec. 1, N. C. Code, 1927 (Michie), C. S., 2621(b): "No person operating any motor vehicle upon a public road shall cross or attempt to cross, any railroad or interurban track intersecting the road at grade, other than a crossing at which there is a gate or a watchman (except an electric railway track in a city, town or village), without first bringing said motor vehicle to a full stop at a distance not exceeding fifty (50) feet from the nearest rail. *No failure so to stop, however, shall be considered contributory negligence per se in any action against the railroad or interurban company for injury to person or property, but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence.*"

The failure of a motorist to stop his automobile before crossing a railroad at a grade crossing on a public highway, as directed by this section, "at a distance not exceeding fifty feet from the nearest rail," does not constitute contributory negligence *per se* in his action against the railroad company to recover damages to his car caused by a collision with a train standing upon the track, and where the evidence tends only to show that the proximate cause of the plaintiff's injury was his own negligence in exceeding the speed he should have used under the circumstances, a judgment as of nonsuit thereon should be entered on defendant's motion therefor properly entered. *Weston v. R. R.,* 194 N. C., 210 (written for the Court by *Brogden, J.).*

The *Moseley,* and other cases too numerous to cite, are similar to the *Kimbrough case,* and written since the above statute was enacted. From the charge of the court below: "The jury will take the law from the court and not from counsel," a new trial granted in this case will seriously hamper the sound discretion of the court below and tend to land its discretion in quick-sand.

I think a new trial granted on the record in this case is technical in the extreme, and contrary to the well settled principles of law, time and time again reiterated by the Court, viz.: "The appellant is required to show error, and he must make it appear plainly, as the presumption is against him."

CONNOR, J., concurring.

JOHN H. BOWDITCH v. FRENCH BROAD HOSPITAL, INC.

(Filed 27 June, 1931.)

1. Hospitals C a—Private hospital is under duty to exercise due care in treatment and care of its patients.

A hospital operated for profit is held to the duty of exercising ordinary care in the treatment and care of its patients, and is responsible for injuries resulting from failure to perform such duty.

2. Same—Hospital has no duty to obtain patient's discharge by his physician and acts of nurse relating thereto are beyond scope of employment.

Where a patient in a hospital operated for profit selects his own physician the hospital owes no duty to the patient to obtain his discharge by the physician, and where there is evidence that the patient requested a nurse furnished by the hospital to find out from his physician whether he could go home, and if the discharge was obtained to bring him his bill, and that the nurse shortly thereafter had the bill presented to him, whereupon he went home, causing permanent injury by his premature discharge: *Held*, the acts of the nurse relating to obtaining the discharge were beyond the scope of her employment and the hospital is not liable therefor.

CIVIL ACTION, before *Schenck, J.*, at January Term, 1931, of YANCEY.

The plaintiff alleged that on 25 July, 1927, while working at a mine, he sustained a personal injury to his right hip and right leg, and that he was taken to the defendant hospital for treatment; that said hospital is a private hospital, organized and operated for gain; that he procured a room and Dr. Clark, a member of the staff of said hospital, was called to render treatment; that he remained in the hospital for about four days when "some discussion arose as to the plaintiff returning home. The nurse in charge was advised by the plaintiff that he did not desire to return home unless with the consent of the attending physician, and he was thereupon advised that the attending physician would be called, and that if he advised the discharge of plaintiff that hospital bill would be presented and the plaintiff discharged. The plaintiff was entirely dependent upon the defendant and its agents and servants in charge for such information. That the nurse in charge, after reporting to the person in managerial charge of the defendant's hospital, soon returned with the bill for services rendered, which was duly paid, and the defendant was then and there discharged from the hospital of the defendant, and he returned home a distance of about forty-five miles to Micaville, N. C.

The plaintiff further alleged that as a matter of fact his leg was broken, and that in riding over rough roads for a considerable distance

to his home the bones scraped together, causing him great pain and suffering, and resulting in permanent injury.

The defendant filed an answer denying all allegations of negligence.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages against the defendant in the sum of $4,616.67.

The evidence tended to show that when the plaintiff was hurt he sent for Dr. Robinson, and that said physician advised him to go to the defendant hospital "and call for Dr. Clark." The plaintiff arrived at the hospital between five and six o'clock and some one sent for Dr. Clark. Arrangements were made by the plaintiff to secure a $35 per week room.

The narrative of events, as detailed by the plaintiff, is substantially as follows: They wanted to know what doctor I wanted, and I told them Dr. Robinson told me to call for Dr. Clark. . . . He afterwards came. I was suffering pretty bad and don't remember exactly, but he came in an hour and a half or two hours. . . . There was a lady that came up the first afternoon that I took to be the clerk, but don't know who she was, except I know she was not a nurse, and she said: "If you've got any valuables, I will take them to the office." So I had some money and my watch and gave them to her and she took them out of the room. . . . Dr. Clark came in the afternoon and examined me and says: "We will have to have an X-ray made of that right hip and see what kind of an injury you have. I don't believe you have got anything but a bad sprain and a bad bruise." . . . A day nurse and a night nurse attended on me—one during the day and one during the night. I was discharged from the hospital on Thursday afternoon. Dr. Clark had told me that I had a bad sprain and bruise and said, "If you want to go home, I don't see why you can't do as well at home as you can here," and I said, "I am a poor man and unable to pay hospital expenses if I can get out of paying them." So, on Thursday morning I asked the nurse and said, "Did the doctor say anything about me getting off?" She said, "He hasn't said anything to me about you leaving, but if the doctor says you haven't got anything but a bruise, don't see why you can't go." I said, "I would like to go home if I don't have to stay; would like to be at home if I can do as well at home." There wasn't anything more said about it until that afternoon when she came around about 1 or 2 o'clock, and I said, "Have you seen the doctor yet?" and she said, "No, sir," and I said, "I think some of my people will be here this afternoon and I would like to go home," and she said, "I haven't seen the doctor yet—don't know whether he is going to be over here in the hospital or whether he is out of town; don't know where he is." That afternoon my wife and some neighbors came to see

me. I said to the nurse that came in with them: "Nurse, I want to go home this afternoon, but I am not going to leave here without the doctor's—without a discharge from the doctor," and she said, "I will go and see the doctor or will call him and see if you can get a discharge." She went out again, and I judge this was about four or five o'clock. When she came back there was another lady with her. This lady had my pocket-book and watch and my bill, and she said, "Here is your money." I took the money, and said, "How much is my bill?" She handed me the bill and I paid it. The lady that brought my pocket-book and money was the same lady that took my pocket-book and money. The nurse said if the doctor ordered me discharged, she would have my bill sent up. . . . I left the hospital that evening. After I paid my bill I left as quick as the boys could put me on a stretcher and carry me down and put me in the car. . . . On the way home every time we would turn a curve either way it was just like a knife running through my hip. When my leg would creak a little, I would feel something like a grinding—like two somethings rubbing together. . . . I don't remember what time we got home. . . . Dr. Robinson was there when we drove up, or came a few minutes later. Dr. Gibbs came to see me two or three or four days after I got home, and he gave me a thorough examination, and told me to go to the hospital at Erwin, Tennessee, and I went there immediately. Dr. Stack treated me at Erwin. . . . My leg is about two inches short, and I can't raise it up nor put it on the floor without taking my hand and raising it up.

Plaintiff further testified with respect to the facts relating to his discharge from defendant hospital as follows: After I decided to go, I asked the nurse to get in touch with Dr. Clark, and I says: "I wish you would find Dr. Clark and see if he will let me go."

The nurse who attended the plaintiff was Miss Bettie McGuire. She was a student nurse and had been in training two years and three months, and testified that the plaintiff told her he was going home, and that she tried to get in touch with the physician but failed to do so, and upon reporting the information to plaintiff, he said, "he couldn't wait and had to go home." There was uncontradicted evidence that the duties of a student nurse at the hospital were to carry out any orders the doctors left and to observe the hospital rules, and that student nurses had no authority to discharge patients from the hospital, and that the doctor in charge had sole and exclusive right and authority to discharge patients.

From judgment upon the verdict the defendant appealed.

Watson & Fouts and Charles Hutchins for plaintiff.
Harkins, Van Winkle & Walton for defendant.

BROGDEN, J. Is a private hospital, operated for gain, liable in damages for the act of a nurse, who induces a patient to conclude that his physician has discharged him from further treatment?

The plaintiff was a patient in the hospital of defendant. He was under the care and treatment of his own physician. The hospital, therefore, was not liable for the acts of the physician, but the hospital furnished a nurse who was required to obey the instructions and orders of the doctor. The plaintiff, having information from the physician, that his injuries were not serious, was anxious to return to his home, but was unwilling to do so unless he was discharged by the physician. He states in his testimony, "After I decided to go I asked the nurse to get in touch with Dr. Clark." I said: "I wish you would find Dr. Clark and see if he will let me go." The nurse, according to plaintiff's testimony, informed the patient that if the doctor ordered him discharged, she would have his hospital bill sent to his room. Shortly thereafter the nurse returned to the room with another lady, who presented the hospital bill and other valuables which the plaintiff had left in the care of the hospital, and thereupon the plaintiff paid the bill and left the hospital. It seems that the plaintiff did not ask the nurse upon her return whether she had communicated with the doctor or whether the doctor had consented to his discharge, but he assumed that the physician had consented to his discharge by reason of the fact that the bill was presented. It developed that the nurse had not communicated with the physician and that he had not consented to the discharge.

A private hospital, operated for profit, is held to the duty of ordinary care in the treatment and protection of patients, and is responsible for injuries resulting from failure to perform such duty. *Johnson v. Hospital,* 196 N. C., 610; *Penland v. Hospital,* 199 N. C., 314.

The liability of hospitals for the negligence of nurses employed or furnished by the hospital, is a question of law which has created widely divergent theories. For instance, the Court of Appeals of New York, in the case of *Schloendorff v. Society of New York Hospital,* 105 N. E., 92, in an opinion by *Cardoza, J.*, stated the doctrine in these words: "It is true, I think, of nurses, as of physicians, that, in treating a patient they are not acting as the servants of the hospital. The superintendent is a servant of the hospital; the assistant superintendent, the orderlies, and the other members of the administrative staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake, through the agency of nurses, to render those services itself. The reported cases make no distinction in that respect between the position of a nurse and that of a physician." Subsequently, the same Court

considered the question in the case of *Renouf v. New York Central R. Co.*, 173 N. E., 218. The opinion was written by *Pound, J.*, who, in discussing the status of the nurse, says: "They are regarded as especially equipped to render professional services to patients when called on to do so rather than as workmen. They are grouped with doctors and lawyers rather than with cooks and chambermaids. This rule of relationship between employer and nurse is not limited in its application to charitable corporations, although it has often been applied to relieve such corporations from liability for the negligent acts of physicians and nurses employed by them in the treatment of patients. It rests on the fact that one who employs such a nurse to take care of an injured person undertakes, not to treat the employee through the agency of the nurse, but to procure a nurse for the special purpose for which her services are required. This is all that the railroad company did in this case. It procured the nurse, but it did not act through her in caring for the patient. She was left to act on her own responsibility under the general direction of the physician in charge of the case. Although she was, in a general sense, employed by the railroad company, she was not its employee. She occupied the position of an independent contractor following her own calling rather than that of one in the service of the employer. The fact that she was employed by the railroad company rather than the hospital in no wise alters her status." *Phillips v. Buffalo General Hospital,* 146 N. E., 199. The Court of Louisiana takes the same view of the question as the Court of Appeals of New York. See *Jordan v. Touro Infirmary,* 123 Southern, 720. Many authorities are cited to support the opinion. The courts of Alabama, Oklahoma, Idaho and Kentucky adopt the general theory that nurses in a hospital are employees and not independent contractors, and hence the hospital is liable to a patient who suffers injury through the negligence of the nurse. *Norwood Hospital v. Brown,* 122 Southern, 411; *Birmingham Baptist Hospital v. Branton,* 118 Southern, 741; *Skidmore v. Oklahoma Hospital,* 278 Pacific, 334; *Hayburst v. Boyd Hospital,* 254 Pacific, 528; *Hicks, Admr., v. Harlan Hospital,* 21 S. W. (2d), 125. See, also, 22 A. L. R., 341; 39 A. L. R., 1431.

A decision, determining the merits of the case now under consideration, does not require this Court to adopt either theory of liability applied in the foregoing cases from other jurisdictions.

In the case at bar the plaintiff selected his own physician. Therefore, the hospital assumed no liability and was charged with no responsibility for the medical treatment of plaintiff or the time when the relationship of patient and physician should be terminated by discharge of the patient. Nor was the hospital, under the circumstances, charged with any duty in procuring a termination of the relationship of patient

and physician. Hence, if no such duty was imposed upon the defendant, and if it did not assume the performance of such duty, then there is no negligence upon its part, and consequently, no liability.

The record discloses that the patient requested the nurse to secure for him certain information from his physician. Assuming that the nurse negligently failed to do so, it is apparent that she was acting upon the request of plaintiff in a matter with which the defendant hospital was not concerned. In apt time the defendant requested the court to charge the jury as follows: "The court charges you that if you find from the evidence, and by its greater weight, that the plaintiff went to the French Broad Hospital, and employed Dr. H. S. Clark as his surgeon, who assumed the charge of the case, then the court charges you that the relationship of physician and patient was established. And if you further find from the evidence, and by its greater weight, that Miss Betty McGuire was a student nurse in the French Broad Hospital and was assigned to the plaintiff's case for the purpose of carrying out the orders and instruction of Dr. Clark in the treatment and care of the plaintiff, and that she undertook, at the instance of the plaintiff, or at the suggestion of the plaintiff, or upon her own motion in behalf of the plaintiff to procure the consent of Dr. Clark to the plaintiff's returning home, that the court charges you that the said Betty McGuire was the agent of the plaintiff, and not the agent of the defendant hospital, and that her act in so doing was not the act of the hospital, and the hospital is not bound by her said act, and the defendant hospital would not be liable for her act, and you will answer the first issue, "No."

The court declined to so instruct the jury, and the exception of the defendant to such refusal is error, and a new trial is awarded.

New trial.

G. N. PENLAND v. HESTER WELLS AND HUSBAND, JOHN S. WELLS.

(Filed 27 June, 1931.)

1. Trusts F a—Where party has conveyed land to defeat threatened litigation he is not entitled to reconveyance from alleged trustee.

Where the complaint in an action by a father against his daughter alleges that he conveyed certain property to her by absolute conveyance to be held in trust for him for the purpose of defeating certain threatened litigation which he alleges was without merit, and prays for a reconveyance of the property: *Held*, a demurrer thereto was properly sustained, it appearing that the plaintiff was attempting to defeat the due administration of the law and the equitable doctrine of "clean hands" applying, and the law condemning, in proper cases, the tying of a parol trust for the benefit of the grantor to an absolute conveyance.

2. Conversion B a—Complaint held to state good cause of action for recovery of money alleged to have been converted by defendant.

Where the complaint alleges that the plaintiff gave a sum of money to his daughter to give to his wife and that the daughter converted it to her own use, it alleges a good cause of action for the recovery of the sum and a demurrer is properly overruled.

3. Parties A a—Only personal representative may sue for funds of deceased converted by third person.

Where a father in his individual capacity brings an action against his daughter to recover certain money alleged to have been owned by and in possession of his wife at the time of her death, a demurrer is properly sustained, the cause of action for the recovery of such sum being vested in the personal representatives of the wife alone.

CIVIL ACTION, before *MacRae, Special Judge,* at November Term, 1930, of MACON.

The plaintiff is the father of the *feme* defendant. He alleges that prior to 18 August, 1922, he was the owner of a tract of land which he conveyed to his only daughter, the defendant, Hester Wells. The reason for making the conveyance is set out in the complaint as follows: "That, shortly prior to 18 August, 1922, the plaintiff received information which, at the time, he deemed to be reliable, that certain unscrupulous persons were threatening to procure an indictment in the Superior Court of Macon County against the plaintiff, falsely preferring against the plaintiff offenses that he never committed; and likewise threatening to institute other legal proceedings against the plaintiff for alleged wrongs, that he never committed, all for the purpose of wrongfully and unlawfully extorting money from the plaintiff, which he did not owe and for which he was in no manner liable; and the plaintiff being an unlettered man, and unlearned in the law, and believing, in the absence of legal advice, that prompt action was necessary in order to defeat such litigation and thereby preserve his property for his own use and benefit, on 18 August, 1922, together with his wife, who was then living, executed and delivered to his daughter, the defendant, Hester Wells, a deed absolute in form, therein conveying to her the lands described in paragraph 2 hereof in trust, for the use and benefit of the plaintiff, and then to be reconveyed to the plaintiff by the defendants, at such time thereafter as the plaintiff might desire and designate."

Plaintiff further alleged that the defendant and her husband went in possession of said lands, but that "about four years prior to the institution of this action, and although the plaintiff is an old man, upwards of eighty years of age, and although the defendant, Hester Wells, is the only daughter of plaintiff, the said defendant wilfully and unlawfully . . . drove the plaintiff from his home," etc.

The plaintiff further alleged as a second cause of action, that upon one occasion he gave to the defendant the sum of $400 to be delivered by her to her mother, the wife of plaintiff, and that his said daughter, the defendant, Hester Wells, failed to deliver said money, but wrongfully and unlawfully converted the same to her own use. The plaintiff further alleged as a third cause of action, that his wife at the time of her death had $1,060 in her possession derived from the sale of her property, and that the defendants unlawfully took possession of said money.

Upon the foregoing pleading the plaintiff asked for a decree declaring that he was the owner of the land described in the complaint and for reconveyance of same by the defendants, and also for judgment for $1,460 covering the items hereinbefore specified.

The defendants demurred to the complaint upon the following grounds:

(a) That it appears from the complaint that the plaintiff is attempting to impeach his own conveyance, which he alleges was made for the purpose of defrauding his creditors.

(b) That the plaintiff has improperly united several causes of action.

(c) That the plaintiff has no legal capacity to sue for the $1,060 for that it appears from the complaint that said sum was personal property belonging to plaintiff's wife at the time of her death, and that the suit is not brought by the plaintiff either as executor or as administrator of her estate.

Upon the hearing, the trial judge sustained the demurrer to the third cause of action relating to the $1,060 item, but overruled the demurrer as to the reconveyance of the land and the recovery of the $400 item.

From judgment so rendered the defendants appealed.

Jones & Jones and Alley & Alley for plaintiff.

Edwards & Leatherwood, George B. Patton and R. D. Sisk for defendants.

BROGDEN, J. Can a father compel his daughter to reconvey land conveyed by him to the daughter for the purpose of defeating threatened litigation and thereby preserving his property for his own use and benefit?

The principles of law applicable to the facts have been discussed in many cases in this jurisdiction, notably: *Pinckston v. Brown,* 56 N. C., 494; *Turner v. Eford,* 58 N. C., 106; *York v. Merritt,* 77 N. C., 213 (80 N. C., 285); *Harrell v. Wilson,* 108 N. C., 97; *Bank v. Adrian,* 116 N. C., 538; *Pierce v. Cobb,* 161 N. C., 300. See, also, Annotation 4 A. L. R., 144. In *York v. Merritt, supra,* the Court said: "Where both parties have united in a transaction to defraud another, or others,

or the public, or the due administration of the law, or which is against public policy, or *contra bonos mores,* the courts will not enforce it in favor of either party." The entire doctrine is based upon the "clean hands" concept of equity. The plaintiff alleges "that prompt action was necessary in order to defeat such litigation and thereby preserve his property for his own use and benefit." While the plaintiff denies that there was any merit in the threatened litigation, it is quite obvious that he was attempting to get his fodder out of the field before the storm broke.

Moreover, the law condemns, in proper cases, the tying of a parol trust for the benefit of the grantor, to an absolute conveyance of property. *Gaylord v. Gaylord,* 150 N. C., 222; *Williams v. McRackan,* 186 N. C., 381.

The plaintiff has stated a cause of action for the item of $400. If he gave $400 to his daughter, the defendant, to give to her mother, which she declined and refused to do, then she has in her possession $400 that belongs to the plaintiff, and the trial judge was correct in overruling the demurrer to the $400 item.

The ruling of the trial judge upon the $1,060 item was correct for the reason that if plaintiff's wife had $1,060 at her death which had been wrongfully converted by a third party, then the cause of action for the recovery of such property vested in the personal representatives of the wife.

The Court concludes upon the record that the trial judge should have sustained the demurrer to the cause of action for the reconveyance of the land; overruled it upon the $400 item; and sustained it upon the $1,060 item.

Affirmed in part.

Reversed in part.

PINEHURST PEACH COMPANY, INC., v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 27 June, 1931.)

Carriers B a—Demurrer to complaint in action for breach of contract to furnish cars on specified date held properly sustained.

A contract to furnish a specified number of iced cars on a specified date for shipment of peaches in interstate commerce falls within the provisions of the Federal Interstate Commerce Act which requires only due diligence of the carrier to furnish the empty cars after notice, and a demurrer to the shipper's complaint in an action to recover damages based upon the contract alone is properly sustained. C. S., 3522.

PEACH CO. *v.* R. R.

CIVIL ACTION, before *McElroy, J.*, at December Term, 1930, of MOORE.

Plaintiff alleged that prior to August, 1926, in accordance with the rules of defendant, he placed an order in writing for four cars for the use of plaintiff in shipping peaches, said cars to be placed as is usual and customary at the siding at plaintiff's peach orchard in West End for use in shipping peaches on 6 August, 1926; and said order for said four cars was accepted by the defendant and the plaintiff was assured said cars would be furnished and placed as ordered for use in shipping peaches on said 6 August, 1926.

Plaintiff also alleged that prior to 6 August, 1926, he placed an order in writing for five cars, to be furnished as above set out, for use in shipping peaches on 6 August, which said order was accepted by the defendant.

Plaintiff further alleged that on 5 August, the defendant only furnished two cars on the four-car order and only four cars on the five-car order, one of which was used for local purposes.

Plaintiff further alleged that by reason of the failure of defendant to comply with the contract, he lost four carloads of peaches, of the net value of $1,436.17.

The defendant filed answer alleging that the orders were placed with the defendant on 4 August for refrigerator cars to be iced and furnished on 5 August, and that after exercising due diligence, was able to obtain only three of such cars, and that two other such cars were properly iced and placed on 7 August, and that in complying with the written orders in both instances the defendant had exercised due diligence.

The defendant further pleaded the interstate commerce act, and also C. S., 3522, and alleged that the cause of action was based upon an express contract to furnish cars on a specified date, and that such contracts were invalid under the Federal Act, as all of said cars were to be used in interstate commerce.

The cause came on for hearing at the September Term, 1930, and the defendant demurred *ore tenus* upon the ground that the express contract alleged by the plaintiff was forbidden by the Federal statute. The demurrer was sustained and plaintiff was allowed to amend.

Thereafter, the plaintiff filed an amended complaint substantially identical with the original complaint except in paragraph 10 of such amended complaint, wherein it is alleged "that by reason of defendant's wrongful and negligent failure, within a reasonable time and in accordance with the order of plaintiff to provide said cars for loading and shipping said peaches, the plaintiff was damaged as hereinbefore set out, in the sum of $1,436.17, and said damages were caused by reason of the negligence or default of the said defendant, as herein set out."

The defendant filed an answer to the amended complaint substantially identical with the original answer, except that the defendant pleaded the former judgment sustaining the demurrer as an estoppel.

The cause came on for hearing again at the December Term, 1930, and the defendant again demurred *ore tenus* to the amended complaint upon the ground that the amended complaint and the original complaint founded the cause of action upon the violation of an express contract to furnish cars on a specified date. The plaintiff, having declined at the suggestion of the court to further amend its complaint or amended complaint, the demurrer *ore tenus,* interposed by the defendant was sustained and the plaintiff appealed.

H. F. Seawell, Jr., for plaintiff.
U. L. Spence for defendant.

BROGDEN, J. The demurrer to the original complaint was properly sustained. Therefore, the only question is whether the amended complaint proceeds upon the theory of common-law liability for negligence for failure to furnish cars, or upon damages resulting from the breach of an express contract to furnish specified cars at a specified place on a specified date.

Paragraph 10 of the amended complaint alleges that the plaintiff was caused to suffer damage by reason of the wrongful and negligent failure of defendant to furnish cars within a reasonable time and in accordance with the order of the plaintiff. The order of plaintiff, as set out in both the original and amended complaint, called for a specified number of cars, to be furnished at a specified place on a specified date. In such cases the law has been declared in *Davis v. Cornwell,* 264 U. S., 560, 68 Law Ed., 848, in which case the Court said: "The transportation service to be performed was that of common carrier under published tariffs; not a special service under a special contract. . . . The agent's promise that the cars would be available on the day named was introduced to establish an absolute obligation to supply the cars, not as evidence that the shipper had given due notice of the time when the cars would be needed, or as evidence that the carrier had not made reasonable efforts to supply the cars. The obligation of the common carrier implied in the tariff is to use diligence to provide, upon reasonable notice, cars for loading at the time desired. A contract to furnish cars on a day certain imposes a greater obligation than that implied in the tariff. For, under the contract, proof of due diligence would not excuse failure to perform. See, also, *Strock v. Southern Ry.,* 140 S. E., 470; *Williams v. St. Louis-San Francisco Ry. Co.,* 274 S. W., 935; *McLemore v. R. R.,* 199 N. C., 264.

The plaintiff having admitted that the cars ordered were to be used in shipment of peaches in interstate commerce, it is therefore the opinion of the Court that the *Davis case, supra,* is determinative of the controversy.

Affirmed.

PAGE TRUST COMPANY v. CLAUDE B. WOLTZ AND W. H. McNEILL, JR., EXECUTORS OF W. H. McNEILL, DECEASED, AND A. B. CAMERON.

(Filed 27 June, 1931.)

Appeal and Error E c—Case dismissed for insufficiency of record.

Where the record purports to contain a case on appeal, but the same is not signed, and it does not appear that it has been served, and there is no judgment signed by the judge, although it appears that he signed the "entries of appeal," and the record evidence is conflicting as to material dates, the appeal will be dismissed. *Pruitt v. Wood*, 199 N. C., 788.

CIVIL ACTION, before *Stack, J.,* at February Term, 1931, of MOORE.

On 2 June, 1927, W. H. McNeill executed and delivered to the plaintiff a promissory negotiable note for the sum of $350. The note contained the following clause: "The subscribers and endorsers hereof hereby agree to remain and continue bound therefor, notwithstanding any extension or extensions of the time of payment of it, or any part of it, and notwithstanding any failure or omission to make presentment or demand for its payment or to protest it for nonpayment or to give notice of its nonpayment or dishonor or protest, and hereby expressly waive any and all presentment or demand for its payment, and protest for its nonpayment, and any and all notice of any extension or extensions of time of payment of it, or any part of it, or of its nonpayment or dishonor or protest or any other notice whatsoever, and further agree to be liable for all costs of collection." The defendant Cameron endorsed the note before it was delivered to the bank. It appears from the pleadings that the maker, W. H. McNeill, died some time prior to 24 September, 1927, leaving a last will and testament and appointing therein the defendants, Claude B. Woltz and W. H. McNeill, Jr., executors of said will. Said executors qualified on 24 September, 1927. After the death of the maker the bank presented the note to said executors and they endorsed their names on the back of the note according to the testimony, "simply allowing the note as an obligation of the estate." The executors paid the interest once or twice, paying it 30 July, 1928. The defendant Cameron was not present at the time the executors endorsed their names on the back of the note, and apparently knew nothing about it, or certainly did not consent thereto. On 8 July, 1930, this

action was instituted by the Page Trust Company, the holder of the note, against the executors and Cameron, the endorser. The defendant Cameron filed an answer alleging that the estate of defendant, W. H. McNeill, the deceased maker of the note, had sufficient property to pay all debts, including said note, and that the plaintiff had permitted said property or a part thereof to be sold at public auction, and the proceeds of the sale diverted and appropriated to the use and benefit of the beneficiaries named in the will, without undertaking to assert any right to said funds.

It was further alleged that as the plaintiff had accepted interest on said note and extended the time of payment after the death of the maker, without notice to the defendant endorser, that such conduct released and discharged the endorser from all liability. The defendant Cameron further alleged that after the death of W. H. McNeill he went to see the plaintiff and its attorney, and that plaintiff assured him that the estate of McNeill was sufficient and solvent and able to pay and discharge all his debts, and that the defendant need not give himself any more concern about the matter. The only witness offered at the trial by either party was the cashier of plaintiff, who testified that the defendant Cameron endorsed the note; that no part of it had been paid; that the bank had accepted interest once or twice from the executors, and that the interest had been paid on the note to 30 July, 1928. The note was offered in evidence. Thereupon the plaintiff rested, and the defendant Cameron moved for judgment of nonsuit.

It may be implied from the record that the trial judge entered a judgment as follows: "When the plaintiff rested the defendant, A. B. Cameron, moved for judgment as of nonsuit. The motion is allowed as to the defendant, A. B. Cameron, upon the evidence before the court, and it further appearing that the provision in the note for the extension of time did not bind the defendant Cameron beyond the death of W. H. McNeill, he not assenting to the bank's contract for the extension to the estate. This judgment of nonsuit is as to the defendant, A. B. Cameron only; there being no answer filed by the executors, judgment for the amount claimed by the plaintiff on the note is granted."

S. R. Hoyle for plaintiff.
W. R. Clegg for defendant.

BROGDEN, J. The record purports to contain a case on appeal, but the same is not signed by counsel nor by the judge; nor does it appear that it was ever served on anybody. There is no judgment in the record signed by the judge, although the record does disclose that the trial judge signed the "entries of appeal." What purports to be a judgment precedes the "entries of appeal." There was allegation in the answer

that the maker of the note, W. H. McNeill, died after 29 June, 1927, and that his executors were duly qualified on 24 September, 1927. The evidence, however, discloses that McNeill, the maker of the note, died in May, 1927, and therefore he was dead before the note was ever signed.

The Court deems it inadvisable to decide an important question upon the present record, and the appeal is dismissed upon the authority of *Pruitt v. Wood,* 199 N. C., 788.

Appeal dismissed.

J. W. MERRIMON, MRS. J. W. MERRIMON, AND J. B. MERRIMON v. CITY OF ASHEVILLE, CENTRAL BANK AND TRUST COMPANY, AND G. N. HENSON, LIQUIDATING AGENT.

(Filed 27 June, 1931.)

Banks and Banking H c—Individual may not bring action to recover bank's assets hypothecated where liquidating agent has not refused to do so.

In order for individual depositors to maintain an action to recover the bank's assets hypothecated with a city to secure its deposit upon the theory that the officials of the bank were without authority to hypothecate its assets and that the city was given an unlawful preference, the individual depositors must allege and show the failure of the liquidating agent to make demand for the return of the assets or follow the appropriate remedy for their recovery, and in the absence of such allegation in the complaint a demurrer thereto is properly sustained.

CIVIL ACTION, before *McElroy, J.,* at March Term, 1931, of BUNCOMBE.

The plaintiffs brought this suit in behalf of themselves and such other parties as might desire to interplead, alleging that the Central Bank and Trust Company was indebted to them in the sum of $1,818, evidenced by certain certificates of deposits issued to plaintiff on 6 December, 1929, 8 February, 1930, and 24 October, 1930. It was further alleged that the Central Bank and Trust Company was closed on 20 November, 1930, and all of its assets turned over to the Corporation Commission as provided by law, and that the defendant, G. N. Henson, one of the officers of the banking department, was duly appointed liquidating agent for said bank. It was further alleged that the defendant, city of Asheville, had on deposit in said bank, on the day it was closed, approximately $4,300,000. It was further alleged that the officers of the bank had turned over to the city of Asheville as security for said deposit certain collateral, consisting of notes, bonds, stocks, etc., aggregating $6,000,000.

It was alleged that the hypothecation of such collateral to secure the deposit of the city of Asheville was unlawful and wrongful and constituted a fraud on the rights of plaintiffs and other depositors of said bank. It was further alleged that said bank had hypothecated other assets with out of town banks to secure loans. The plaintiffs further allege that they duly filed a claim in writing against the city of Asheville, and that said claim has been disallowed. The relief prayed for, was that the plaintiffs have judgment against the bank and Henson, liquidating agent, for the amount of the certificates of deposit, and that the defendant, city of Asheville, be restrained from liquidating the collateral held by it, and further be required to surrender said collateral to the liquidating agent.

The defendants demurred to the complaint upon the ground that it appeared upon the face of the complaint that the Corporation Commission was in charge of the assets of said bank, and that it alone had the right to institute an action for the recovery of the assets of the bank.

The defendants demurred further upon the ground of misjoinder of parties and causes of action.

The cause was duly heard and the demurrers of the defendants were sustained.

From the foregoing judgment plaintiffs appealed.

Robt. R. Mullikin for plaintiffs.
Johnson, Smathers & Rollins for liquidating agent.
J. G. Merrimon for defendant, city of Asheville.

BROGDEN, J. This suit was instituted to recover certain collateral which the Central Bank and Trust Company had hypothecated with the defendant, city of Asheville, for the purpose of securing the deposit of the city in said bank. The cause of action rests upon the theory that the officials of the bank had no right to hypothecate the assets thereof for such purpose, and furthermore, that such hypothecation enabled the city to secure an unlawful and fraudulent preference. It is not alleged that demand had been made upon the Corporation Commission to recover the assets of the bank, and that it has failed and refused to institute a suit or to pursue any other available remedy. Therefore, the demurrers were properly sustained upon authority of *Trust Co. v. Rose,* 192 N. C., 673; *Richmond Co. v. Trust Co.,* 195 N. C., 545. See, also, *Douglass v. Dawson,* 190 N. C., 458; *Wall v. Howard,* 194 N. C., 311; *In re Trust Co.,* 198 N. C., 783; *Roscower v. Bizzell,* 199 N. C., 656.

Affirmed.

JOHN W. WALKER v. EDITH MAE WALKER.

(Filed 27 June, 1931.)

1. Divorce A a—Evidence on issue of adultery held competent and sufficient to be submitted to the jury.

In this case *held:* testimony on the issue of adultery was competent and sufficient to be submitted to the jury in the plaintiff's action for divorce, the defendant introducing no evidence in rebuttal.

2. Appeal and Error J d: J e—Burden is on appellant to show prejudicial error.

Error will not be presumed and the burden is on the appellant to show not only that error was committed in the trial below, but that the error was material and prejudicial.

APPEAL by defendant from *Moore, J.*, and a jury, at January Term, 1931, of CHEROKEE. No error.

This is a civil action for divorce. The issues submitted to the jury and their answers thereto, were as follows:

"1. Were the plaintiff and defendant married as alleged in the complaint? Answer: Yes.

2. Has the plaintiff been a resident of the State of North Carolina for two years next preceding the bringing of this action? Answer: Yes.

3. Has the defendant, since said marriage committed adultery with some one unknown to plaintiff, as alleged in the complaint? Answer: Yes.

4. Is the plaintiff the injured party? Answer: Yes."

Hill & Gray and Moody & Moody for plaintiff.

J. D. Mallonee and D. Witherspoon for defendant.

CLARKSON, J. This action was before this Court on demurrer, *Walker v. Walker,* 198 N. C., 826. The demurrer was overruled in the court below and on appeal to this Court the judgment was affirmed.

We have read the record carefully, and the able briefs of the parties to this action. The allegations of the complaint of plaintiff set forth several alleged causes of action against the defendant for divorce absolute. The record discloses that at the conclusion of plaintiff's evidence: "The court sustains the motion as to all causes, except as to the cause of adultery, and signed the judgment sustaining the motion as to all of such causes." The court below sustaining the defendant's motion eliminated many matters set forth in the complaint. The only material issue left for the jury to determine was that of defendant's adultery since her marriage with plaintiff. From the view we take of the evidence on this

record is, as it were, sewer filth, and we see no good that would come by the recital of the evidence and setting forth the law applicable to the facts. We think the evidence was competent on the question of adultery and sufficient to be submitted to the jury. Plaintiff's charge against defendant was adultery, if the evidence of so serious a charge was not true, the defendant had the opportunity to refute it. Whether the charge was true or not, the falsity of it was peculiarly within defendant's knowledge. The fact that she did not refute the damaging charge made by plaintiff, it may be that this was a silent admission of the charge made against her.

In *Hudson v. Jordan,* 108 N. C., at p. 13, the party's failure to testify was regarded as a "pregnant circumstance." *Powell v. Strickland,* 163 N. C., at p. 402; *In re Hinton,* 180 N. C., at p. 213.

The defendant has had her day in court. She took her chances with the jury without offering evidence, and lost. The case narrows itself principally to a question of fact. The jury has found the issue against her. Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right, and we cannot say this on the present record. Error will not be presumed; it must plainly appear. The question for the jury to determine was one of fact of which defendant was fully informed, if the evidence was not true defendant failed to deny it on the trial, yet she had the opportunity. In the judgment below we find

No error.

C. E. WRIGHT v. BEMIS LUMBER COMPANY AND L. W. WILSON.

(Filed 27 June, 1931.)

Removal of Causes C b—Petition for removal on ground of fraudulent joinder and separable controversy held properly refused in this case.

Where a petition and bond are filed by a nonresident defendant to remove a cause from the State to the Federal Court on the ground of alleged fraudulent joinder of the resident defendant to defeat the jurisdiction of the Federal Court, the allegations of the complaint of a breach of duty by each of the defendants to the plaintiff proximately causing the injury is sufficient to retain the cause in the State court.

APPEAL by defendant, Bemis Lumber Company, from *Moore, J.,* at February Term, 1931, of HAYWOOD. Affirmed.

Jones & Ward for plaintiff.

R. L. Phillips for defendant, Bemis Lumber Company.

CLARKSON, J. This is an action brought by plaintiff against defendants to recover damages. Giving the complaint a liberal construction, it is an action for actionable negligence against both defendants as joint *tort-feasors*. It alleges a duty owed by both defendants to plaintiff, the nonperformance of which duty it is alleged was the proximate cause of injury to plaintiff. The Bemis Lumber Company, a nonresident corporation defendant, duly filed its petition and bond for removal of the action to the District Court of the United States for the Western District of North Carolina, for trial, on the ground of fraudulent joinder of L. W. Wilson, a resident defendant. The court below made an order refusing the petition of Bemis Lumber Company for removal. *Crisp v. Fibre Co.*, 193 N. C., 77; *Hurt v. Mfg. Co.*, 198 N. C., 1; *Tron v. Refining Co.*, 199 N. C., 816. From the record, serious questions may arise on the trial, which we do not now consider. The case is not before us on demurrer. We pass alone on the petition of the Bemis Lumber Company for removal to the Federal Court, as that is the only question presented. *Huntley v. Express Co.*, 191 N. C., 696. The judgment below is Affirmed.

STATE v. HERMAN CASEY.

(Filed 27 June, 1931.)

1. **Criminal Law L e—Upon appeal in criminal cases the Supreme Court may review only matters of law or legal inference.**

   Upon appeal in a criminal case the Supreme Court has jurisdiction to review only matters of law or legal inference. Article IV, section 8.

2. **Criminal Law I j—Upon a motion to dismiss only the evidence favorable to the State will be considered.**

   Upon a motion to dismiss a criminal action only the evidence favorable to the State will be considered, and the motion is properly denied if there is any sufficient evidence upon the whole record of the defendant's guilt.

3. **Criminal Law I h—Competency, admissibility and sufficiency of evidence is for court, weight and credibility is for jury.**

   The competency, admissibility and sufficiency of the evidence is for the court to determine, and the weight and credibility is for the jury.

4. **Homicide B a—Testimony in this case held competent as tending to show motive, malice, premeditation and deliberation.**

   Where in a prosecution for murder there is evidence that the defendant was engaged in cutting and hauling lumber on the land of another, and that the company for which the deceased worked stopped payment of a check given the defendant for certain lumber on account of a dispute as to the ownership of the timber, that the defendant had been told that the

deceased was responsible therefor, and that the defendant had shot the deceased and taken a sum of money from his person and then put the body in the deceased's car and burned them: *Held,* testimony of threats made by the defendant to the effect that he was going to get his money one way or another, is competent under the evidence in this case as tending to show motive, malice, premeditation and deliberation, although the threats were not directed specifically against the deceased.

5. Criminal Law G i—Testimony that pistol found in defendant's room had been recently fired held competent under facts of this case.

Where there is evidence in a prosecution for murder that the defendant shot the deceased twice with a pistol, poured gasoline on his body and his car and set fire thereto, that the defendant then returned to the house where he was boarding, and bathed and changed his shirt, which had blood on it, and that a pistol was found in the room of the house where he had been, and that two bullets had been fired therefrom, and the pistol is identified as the one which was in defendant's possession: *Held,* testimony of witnesses, one of whom had run paper through the barrel in the presence of the others, that the pistol had been recently fired is competent, when taken in connection with other evidence in the case, as a circumstance to be considered by the jury, the probative force being for their determination.

6. Homicide G a—Evidence held sufficient to be submitted to the jury in this case.

Where there is evidence that the defendant in a prosecution for murder held a grudge on account of the stopping of payment on a check given him in payment of certain lumber, that he had been informed that the deceased was responsible therefor; that he was seen near the place of the crime at or about the time of its commission; that a pistol in his possession had been recently fired, with testimony of an eye witness that the defendant had shot the deceased and then taken a sum of money from his person and burned his body, and that a key belonging to the defendant had been found at the scene of the crime, together with tracks of a tire similar to those upon the defendant's truck, with other incriminating evidence, is *held:* sufficient to be submitted to the jury and to sustain a verdict of murder in the first degree.

7. Homicide H c—Where there is no evidence of manslaughter the failure to charge the jury in regard thereto is not error.

Where there is sufficient evidence in a prosecution for murder to justify a charge on the aspect of manslaughter it is error for the trial court to fail to do so, but in this case the record failed to disclose any evidence of manslaughter and the failure of the trial court to instruct the jury in regard thereto was not error.

8. Criminal Law I g—Charge fully covering aspect of alibi relied on held not prejudicial for failure to use specific word "alibi."

Where the charge of the court fully states the contentions of the defendant that he was not at the scene of the crime at the time of its commission, and that he was not guilty of the offense charged, the instructions will not be held for prejudicial error on the defendant's exception because of the failure to use the specific word "alibi" in regard thereto.

9. Criminal Law G j—Testimony of accomplice, if believed by jury, is sufficient for conviction.

In this case there was no evidence that the State's witness accompanying the defendant at the time of the commission of the crime was an accomplice, and no request for instructions was made in regard to his testimony, but the unsupported evidence of an accomplice, if believed by the jury, is sufficient to convict.

10. Criminal Law L c: J d—Appeal to the Supreme Court stays all proceedings in lower court and motions before it thereafter are coram non judice.

The effect of an appeal is to stay all proceedings in the lower court pending the disposition of the appeal, and where, after appeal bond has been given, the defendant makes motions before the Superior Court judge for a mistrial for prejudice of jurors and for a new trial for newly discovered evidence, the motions are *coram non judice*. C. S., 4654.

APPEAL by defendant from *Devin, J.*, and a jury, at September Special Term, 1930, of LENOIR. No error.

The defendant, Herman Casey, was tried upon a bill of indictment charging him with murder in the first degree of James C. Causey. A verdict of guilty of murder in the first degree on the bill of indictment was returned by the jury, and the defendant was thereupon sentenced by the court below to death by electrocution.

The evidence was to the effect that James C. Causey was from Suffolk, Va., but was living in Goldsboro, N. C., prior to 3 July, 1930, and was working for the Atlas Plywood Corporation. It had bought out the Utility Manufacturing Company, and he was in charge of the logging operations in the woods. Causey drove a Hudson coach, belonging to the company. The defendant Casey knew Causey and who he was working for. Defendant Casey was hauling some hogshead stave timber during the summer of 1930, shortly before 3 July, 1930, off the land of one John H. Sutton. There was a controversy between Sutton and the Utility Manufacturing Company (then owned by the Atlas Plywood Corporation, located at Goldsboro, N. C.), over who owned the land the timber was cut off of. Some of this timber was sold by defendant Casey to Goldsboro Lumber Company, at Dover, N. C., some three or four weeks before 3 July, five and three-fourths cords amounting to some $28.75. The Goldsboro Lumber Company was notified by one E. H. Graham, an officer of the Atlas Plywood Corporation, to stop payment, which was done. Defendant Casey, as testified to by one Blandford, connected with the Goldsboro Lumber Company, on 3 July, the day it is alleged Causey was killed about eleven-thirty or one-thirty, was trying to get the money, claiming it was coming to him and that he understood bond had been executed for the timber. He told John Bryant, who he was hauling lumber for, on the morning of 3 July, having delivered

some timber to the Goldsboro Lumber Company at Dover, N. C., where defendant left him about eleven o'clock, that he got balled up with the Goldsboro Lumber Company about $35.00.

E. H. Graham testified, in part: That he knew defendant Casey. "The latter part of May or first of June. He came over there to see about some money that had been withheld at Goldsboro Lumber Company. He did make a statement in reference to it. Q. What was it? (Defendant objects unless it refers to Mr. Causey.) He said 'I am going to have my money, somebody is going to pay me.' (Defendant objects to answer and asks that it be stricken out; overruled; defendant excepts.) I did refuse to pay him the money and did not permit him to be paid. I was manager. The money that I am talking about was to be paid at Dover. The litigation was between Utility Manufacturing Company and Mr. Sutton, about the timber. . . . I don't know whether Mr. Casey knew Mr. Causey or not. As I recall it, I told Mr. Casey that Mr. Causey had charge of the logging operations."

Luby Underwood, testified, in part: "While we were hauling from Mr. John H. Sutton's place Mr. Casey had to stop hauling. There came a man down from Goldsboro. Mr. Casey was with me at the time. Mr. Casey was with me and we were coming down in woods riding in the truck together. It was in June. (Defendant objects to this; overruled, and the defendant excepts.) We come on down the woods with a load and he was going to Dover to get some chewing tobacco and he got out on the road and a car was standing there, over there to the left at the bridge and the man got out of his car and asked if he was Mr. Casey and Mr. Casey said, yes, and he wanted to know of Mr. Casey where he was getting his timber from. (Defendant objects and excepts to above testimony; overruled; exception.) This gentleman asked him who he was buying his timber from and Mr. Casey told him from Mr. John H. Sutton, and he wanted to know how much he had gotten out of there and Mr. Casey told him he did not know. (Defendant objects and excepts to above; overruled; exception.) The gentleman in the car, the car was from Goldsboro, but I could not swear where the man was from, he said to Mr. Casey, 'Don't get any more timber out of that piece of woods down there and not to cut any more out of there.' He pulled out some map and begun to show Mr. Casey about the map, and Mr. Casey stopped and did not get any more out of there and he quit and moved over to Mr. Tilgham's tract of land. (Defendant objects and excepts; overruled, and exception.) This man was driving a large car, I don't know the name of it. . . . That night we come to town and he paid us but not all. His talk was that this man owed him this money at Goldsboro where he went to see, and the way he talked, said

'the G—— d—— son of a bitch, he was going down there, said wherever he met this G—— d—— son of a bitch, wherever he met him he was going down with him.' (Defendant objects and excepts to above testimony; overruled; exception.)"

Peter Brown testified, in part: "The next week we worked at the John H. Sutton place, still working for Mr. Casey sawing stave timber. Something happened while we were working there that stopped us working on the John H. Sutton place on Friday night of that same week. Q. Did Mr. Casey tell you why you stopped working there? (Defendant objects in apt time to all this line of testimony; overruled; defendant excepts.) A. Mr. Casey told me the next week that they objected to him cutting and hauling any more of that timber out of there. The next week we worked on Mr. Pete Tilgham's place, cutting stave timber. . . . A. He said Friday when he left that he had to go to Dover, that somebody was going to pay him his money. (Defendant moves to strike out this evidence; overruled; defendant excepts.) . . . On Monday he stated that he would rather be laying flat of his back in the sunshine with his toes bound together than for anybody to beat him out of his labor. (Defendant moves to strike out above; denied, and defendant excepts.)"

John Anthony Brown testified, in part: "He said he went to Goldsboro Monday to get our money. On Monday he carried us to the woods and put us to work and told me he was going to Goldsboro to get the money. (Defendant objects; overruled, and exception to the above.) He came back that night and paid us off across the street yonder and told us he borrowed the money from the company at Dover. He told us about his money being stopped. He told me on the way going to Greene County 'You just as well be dead with my toes turned up to the sun as to be working and can't get our labor.' (Defendant objects; overruled; exception.)"

Thurman Morris testified, in part: "It was this summer. . . . Q. Did you hear Herman Casey make any statement in reference to any money that was held up, whether he had been to get his money? (Defendant objects; overruled; defendant excepts.) I went down there one afternoon and I heard him say a fellow in Dover owed him some money and he went for it and could not get it, and he said 'Damn if he did not aim to have it on some terms.' (Defendant objects; overruled and exception.)"

C. S. Cornwell, testified, in part: "Yes, I know Mr. J. C. Causey, had known him about 15 years. I last saw him on the morning of 3 July; it was about 10 o'clock that he left the office. I do know that he had business at what is known as Caswell Camp, near Kinston, on that

day. When he left the office he was driving a Hudson coach. Yes, I have seen the car that was burned and I know of my own personal knowledge that the burned car was the car that was driven by Mr. Causey on that day. The car belonged to the company."

Henry West testified, in part: "I live about a mile and a half from where the car was burned, out towards Kelly's Mill. I knew Mr. Causey when I saw him, and I saw him on 3 July; at the time I saw him he was going in the direction of where the car was burned. He was driving a Hudson car; it was about 11:30. I saw smoke in the direction of where the burned car was found about 12 o'clock that day, but I could not say whether it was that car burning that I saw the smoke from, or not. There was no other fire around there that day I know of."

Decatur Nobles testified, in part: "I knew Mr. J. C. Causey when I saw him, had known him since November. I saw him on Thursday, 3 July, he passed my house driving a Hudson coach, going towards Oak Bridge, around toward Route No. 10 from my house; he was going toward the scene of the accident when I saw him, toward where the car was found burned. As near as I could guess at it I would say it was between 11:00 and 11:30. I never looked at the clock to see the exact time. I had just gone to the house from topping some tobacco, and I later saw the smoke from the fire. I think it was about half an hour after I saw Mr. Causey pass before I saw the smoke. That is just guessing. Right around 12 o'clock is as near as I can get at it that I saw the smoke. . . . Was present on the 4th where the car was burned. . . . The front of the car was about 20 or 25 feet from this little road that crossed the tram road. I saw some bushes right side of the car it looked like it had been beaten out with a brush or something of that sort. That was on the left of the car next to the Neuse road and on the side away from the tram road, west approximately from the car."

Jerry Sutton testified, in part: "I was at home on 3 July. I worked in the tobacco patch, about 50 steps of the road, was about 50 yards of the road when Mr. Causey passed by. I knew Mr. Causey. It was about 11:20 or 11:30 when Mr. Causey passed; he was driving what looked to be a Hudson coach, but I could not swear as to the make of the car. It looked like the same car he had been driving since he had been coming down there. When he passed he was running 35 or 40 miles an hour. It is a pretty good road by my house, at that time they had just drug the road and had piled a lot of loose dirt in the middle of the road and it was dry and it was pretty tough at that time."

Milton Wood testified, in part: That on 3 July, he was staying with his mother near Fort Barnwell. "I got up with Mr. Herman Casey

at Sam Smith's house. I was at Sam Smith's house and Mr. Casey came along and I waved him down and asked him how his truck drove and asked him how about getting a job with him, and he said he did not know, to come with him and he would let me know later. . . . After he turned off on this road he drove down a mile or more down to a little by road, after a while he came to a little small piece of woods, and I asked him where he was going, and he said he was going down through the islands. After a little while he got to a railroad, and I looked up ahead of me just before we got to the railroad and saw this big car coming. Mr. Casey drove up to the foot of the railroad and stopped his truck and got on the ground and by that time Mr. Causey in the car ahead of us had stopped his car. The railroad was between them and Mr. Causey could not pass this truck. Mr. Casey was already on the ground, and he walked around on the right-hand side of Mr. Causey's car, and Mr. Casey reached in his pocket and got a black looking pistol from his pocket. I could not swear as to the pistol (shows witness pistol). This looks like the pistol. I remember this little piece here on the side of it. He had it about this close to my face (indicating). Mr. Casey took his pistol out and shot Mr. Causey twice and Mr. Causey's head fell backwards, and after he was dead he come back to the truck where I was and he told me if I told it he would kill me if I was the last one on God's earth, and I told him I would not tell it, and he put his pistol back in his pocket and went back to the car and opened the car and got Mr. Causey around the shoulders and dragged him on the ground and got down kinder on his knees and searched all his pockets and pulled some money out of his right-hand pants pocket; I don't know how much money he got; I saw money sticking out of the edge of his hand, it was paper money. He pulled him out the right-hand side of the car. At that place it is little fine old dead looking grass along down where he pulled him out. It was right on the edge of the road, right at the edge of the car. After he pulled him out and searched him and got what he wanted off of him, he took him up in his arms and after two or three lunges he got him back in the car. He got him in the back seat, but what position he laid him in the back seat I could not see; he got in the car and backed it off in the woods and come back to the car and got a pint bottle and he goes behind the car and then comes to the right-hand side of the car and raises the hood up, and when he gets up he has a pint bottle of gas and he opens the door of the car and pours over half of the gas on Mr. Causey and strikes a match to him and the fire blazes up and the rest of the gas he poured on the car and struck a match to that; and he came back to the car and got up in the truck and drove back down the road. He came off where this

other road comes in. He started to turn around but his mind changed and he never turned around, and he went down to Jasper Tyree's filling station and asked for gas but he did not have any gas, and then he drove off on down by the oak bridge and after he gets to a little road that turns off from the highway after you cross the bridge he turned around and comes back the same way he went before except as he got right to the car instead of turning off this little piece of woods road he went around another road. When he went across the oak bridge and turned around and came back he went right back in by Jasper Tyree's filling station, the same way he came out. He passed the same little road he came out of from the car, he went up that road a half mile or more, then he turned off to the left and came back into this old road lying out field, and turned back in by this car, and stopped and broke a little sweet gum bush and put out some fire around the car. . . . We went down the Greenville highway and turned off to the left on a dirt road and went 5 or 6 miles, and he came to where he had his washing done, and he got out and went up on the porch. . . . He asked me to draw him some water in a tub, and I drawed about half a tub full and he kept talking about he was so cold he did not think he could take a bath. I hope him carry the water in the tin tub in the room, and when he come out from his bath he had on a clean shirt. He never changed anything else that I know of. . . . Then he drove on out by the Greenville fork and he stopped at the filling station and called me over behind a Whippet car and tells me 'Look here, don't think this will be the last time, I will see you, I will see you sooner or later, if you ever tell it you will never tell anything else'; and I told him I would not tell it, and he told me what to tell if they got me up on the stand. He said, 'You get up there and tell that we come through those woods and saw this car burning and that the top had fallen in and that we got out of the truck and looked at the car and saw the gas tank had not bursted and went on.' He said 'you better stick to that and you better not tell anything else.' . . . The detective also told me if I knowed anything to tell the truth about it. I was guarded while in jail here because I told the truth on the man; I knowed his brothers would get me. Yes, sir, the first statement I made about this thing was that Mr. Casey did not have anything to do with the killing and the statement that I made to those men in the jail in Wilson was that Mr. Casey did not have anything to do with it. . . . I think it was pretty close to 1:30 or 2 o'clock when we got there. I have not said he set the car afire at 11:30 o'clock. I have heard what the other witnesses said about it. A colored man said he saw the smoke about 11:30. Yes, sir, all the witnesses except me have said the smoke was

between 11:30 and 12 o'clock. . . . I could not say for certain whether there was any blood on Mr. Casey's shirt; I think there was. I can't remember every word I testified to before. I don't know whether there was any blood or not. If I am not mistaken I said there might be some on his left-hand sleeve, right along here (indicating), between elbow and shoulder. That is all the blood I remember seeing on Mr. Casey. Yes, sir, I say Mr. Casey took his pistol and shot Mr. Causey twice and dragged him out of the car and placed him on the ground and put him back without any assistance and did not get a drop of blood on him except the little spot on one of his sleeves. I am nineteen years old or somewhere thereabout, I don't know when my birthday is. . . . None of the officers or anybody has ever told me to tell anything but the truth about this matter. . . . The day I went around this route that Mr. Casey and I took they carried me around there twice. . . . No one forced me to follow the route I did. The last I remember looking at my watch that day was when we come out down there to Mr. Tyree's filling station, and it was 12 o'clock by my watch. That was the first time and not after we went back in there. My watch was not keeping good time and I would be about an hour or more out of time. I had had it about six months and it was a dollar watch."

Jap Hornder testified, in part: That he and a party were fishing. He saw two colored men who asked the way to the river road. These colored people had no guns. Two reports of a gun were heard in the direction of Decatur Nobles', he lived about three-fourths of a mile from where the car was burned, this report was heard between 10 and 12 o'clock.

Numerous witnesses testified that they saw Casey in a Chevrolet truck with Milton Wood. Afterwards identified and admitted by all to be Milton Wood, going towards the burned car, between 11:30 and 12:30, or about 12 o'clock. That about that time they saw the smoke at the place where the car was found burned the next morning. Some of the defendant's witnesses put it about 1:00 to 1:30 after the car was burned, that they saw defendant and Wood in the Chevrolet truck.

R. T. Jarman, working for the funeral directors, testified, in part: "I got to the scene of the burned car about 10:30 or fifteen minutes to 11 o'clock on 4 July. Mr. Milburn Nobles and Mr. Leo Tilgham went with me. Yes, sir, I saw the defendant, Herman Casey at the scene of the burned car. I heard him make the statement there as I was on the inside of the car at work and he was on the outside talking to Jasper Tyree and some more people; I didn't notice particularly who they were. He said he came through there the day before, 11 and 12 o'clock and saw the car burning and that he got out and went around and looked

at the gas tank of the car and saw that it had not bursted and that he said 'Come on boys and let's go.' He did not call any names as to who he was talking to. He also said that when he saw the car or when he was leaving it one that he said 'there was a good car that somebody was burning up to get insurance.' "

The identity of the remains of Causey and the car was undisputed.

R. H. Leath, testified, "I have the title to the car. The motor number is 620519 and the serial number 886499. I have checked those numbers with the numbers appearing on the car and they are the same."

R. L. Woodard, Jr., who roomed with Causey in Goldsboro, and had an engagement with him, last saw him alive at 7:20 a.m., Causey did not keep his engagement and Woodard went to look for him. He testified, in part: "I did not find Mr. Causey on my trip. Left there and came out on the New Bern highway back to Kinston and from Kinston to Goldsboro; arrived at Goldsboro 5 minutes to 6 o'clock. I came down here after the car was burned and learned that I had passed near where the car was found on 3 July, when I was looking for Mr. Causey. I have not seen Mr. Causey since that morning of 3 July. (Counsel hands witness key rings, keys which have been identified by witness Jarman as having been found in the burned car.) Witness identifies key rings and other personal effects as having been found in the car as articles belonging to Mr. J. C. Causey, deceased. There is an inscription on the inside of the band ring as follows, 'M. C. C. to J. C. C., 27 December, 1900.' *That is the date of his wedding.* . . . I was present in Suffolk, Va., at Mr. Causey's funeral and was present at the burial; his family, widow and children were present."

S. C. Cornwell, testified as above, and also testified: "When I saw the car it had the appearance of having been backed off of the woods path, just a cut short and backed off in the woods to the best of my recollection about 8 feet or 10 feet from the path. The car was badly burned up. Yes, I noticed that a right good little area had been burned over there; I would say a half acre or possibly more. When I saw the car I noticed that the right hood of the engine was raised and the gas line to the carburetor was disconnected. The right-hand hood over the engine, the side the carburetor was on was open."

Gus Simmons testified, in part: "We three got there about 9 o'clock the next morning, when we got there the cross-ties were burning, but there was no burning around the car at all. . . . It looked like around the car there had been some fire fighting around the car there next to the dirt road. . . . There were some little green pine tops laying around there looked like someone had been fighting fire, that is all I saw."

J. T. Dunn, testified, in part: "I knew Mr. J. C. Causey, had known him 14 or 15 years. I had worked with him around 12 years. I was working with him on 3 July. On 3 July, I was in Goldsboro, the Atlas Plywood Company plant is in Goldsboro. Caswell Camp is the logging camp that belongs to the company, and it is out from Kinston, the mill itself is in Goldsboro. I was in Goldsboro on Thursday. My attention was first called to the fact that there was a car burned in the neighborhood of Caswell Camp around 11 or 11:15 on 4 July, Friday morning. I went to the scene of the burned car; when I got there the coroner's jury was there, a good bunch of men were there. . . . I was there when the key was found something like three or four feet in front of the burned car; Mr. Turner picked the key up; saw him about the time he picked it up; it looked like a switch key to an automobile; Mr. Turner gave the key to Mr. T. G. Sutton, deputy sheriff; it had not been through a fire."

Mrs. B. W. Beddard testified, in part; speaking of the defendant Casey: "He stayed at my home a few days, boarded there. He went there on the last day of June, 1930, and rented a room from me. He took his meals there for some days. At the time he was there he was trucking, hauling logs. Yes, I recall seeing him on 3 July, on Thursday. I saw him that morning about 6:30 o'clock and fixed breakfast for him and he ate. I also fixed dinner for him that day but he did not come for it. I don't know where he was of my own knowledge at that time. He spent the night of 2 July at my house but not the night of 3 July, and he did not take supper that night at my house."

Paul Huffman testified, in part: "I know the roads leading from the Dover road down into where this car was burned. I was in that community on 3 July. I was working on the road from Mr. Geo. West's to Caswell by Jake West's; I think it is known as the British road. There is another road that runs parallel with that road down to the river called the Neuse road. I know the defendant, Herman Casey, when I see him. I saw him on 3 July, right at Jake West's yard; there was not room enough for us to pass each other and he pulled up in Jake West's yard for me to go by. That is about a quarter of a mile from George West's. Mr. Casey was going toward Caswell; that is the general direction of where the car was burned, but not on the same road. He was traveling in a Chevrolet truck. It was about 20 minutes to 12 o'clock. . . . At the time I saw Mr. Casey there was somebody with him, but I did not notice who he was; I was sorter in a right and I just noticed the driver and spoke to him. . . . While we were down there working Mr. Casey came back off of that road, I should say he was gone a little better than one hour, but not over an hour and a quarter."

Mrs. J. C. Coward testified, in part: "I have seen Mr. Herman Casey, have known him when I see him, about one year. I saw him on 3 July. I was sitting at my door and I saw him and a young man on a log truck going down toward Mr. Nobles'. I know where the car was burned, it is between my house and Mr. Nobles. At the time I saw the truck it was going in the direction the car was burned. When I saw the truck go on it was a few minutes after 11 o'clock, and I saw him when he come back. This same young man was with him when he came back but I did not know who the young man was. When I saw Mr. Casey coming back it was between 12 and 1 o'clock."

J. C. Coward testified, in part: "I saw him on Thursday, 3 July; I was cropping tobacco; hardly a mile from my home. I got home right after the bell rung for 12 o'clock. When I saw Mr. Casey he was coming from the way the car was burned, going toward No. 10 highway. I was not home that day before 12 o'clock. At the time I saw Mr. Casey I judge it to be around one o'clock, somewhere thereabout. It was somewhere between 12 and 1:30, we are supposed to get one and a half hours at dinner; I could not say just the time. There was a young man with Mr. Casey at the time but I don't know who he was. I have seen the young man since then up here at the coroner's inquest and it was Mr. Milton Wood that I saw with him on that day."

C. C. Beard testified, in part: "I saw another key picked up in front of the car about three or four feet from the front of the Hudson car, where it was burned. The Hudson was backed out from the little road that comes out from the river road out in the woods, I guess about 10 feet from the little road that crosses the railroad, and this key was found between the automobile and the river road. Mr. J. W. Turner found that key. I saw him pick it up. He gave it to Mr. G. T. Sutton, deputy sheriff. I saw Herman Casey come up there and stayed I reckon 10 minutes and went away and while he was gone the key was found. Mr. Casey came back in 10 or 15 minutes and asked if they had found a key and they told him they had and Mr. Sutton gave him the key I think. If he made any statement about the key I did not hear it. I heard Mr. Casey tell Mr. Evans that he came up there about 12 o'clock 3 July. Mr. Evans asked him in what condition the car was in when he got there and he told him it was on fire but that the fire had not reached the gas tank, and that he said to the fellow who was with him that 'We had better get away, the tank has not exploded yet and we had better leave,' and that they hurried on off. That conversation was after the key was found. . . . I saw a jar in the woods out there. I think it was a half-gallon jar; I don't know what was in it, I did not go to it. I don't know who has the jar.

I don't remember who picked it up. I remember it being picked up. I saw it lying out under those bushes. . . . Mr. Casey said he lost it (the key), and he came back looking for it; I know he inquired about it. The best I remember when he was shown the key he said it was his key. Seems like he said he lost his key while walking around there and did not discover it until he got back to his truck. I think the key was handed back to him. It was a perfectly bright key. Mr. Casey took the key and went on to his truck and went off. He said he felt in his pocket and discovered a hole in his pocket and had lost his key out of his pocket."

Jasper Tyree testified, in part: "I don't know exactly what time we got there, between 9:30 and 10 o'clock though. When I got there I saw the burned body in the car and the car was burned up. Mr. Garner had not entered the burned car when I first saw it. From the waist up of the body what was left of the body was in the corner of the back seat with the face down. Mr. Garner turned the body over while I was there. The right-hand side of the hood of the car was raised and the pipe that goes from the vacuum tank to the carburetor was disconnected and a pair of pliers were on the running board. . . . I also saw the fruit jar that has been referred to; it was laying about 10 steps off to the left, back of the car. I picked it up. It had the odor of gas in it, it was a half-gallon jar. . . . Herman Casey came there right after Mr. Garner left. When I first saw him he walked right up behind me, myself and Robert Guzzins were sitting down. Mr. Casey walked up there and said, 'Well it is burned up, aint it' and he said, 'I was at this car yesterday right around 12 o'clock.' At that time none of the officers had come. Mr. Casey said he walked to the side of the car and looked at the gas tank in the back and saw it had not bursted and that he said to Wood, 'Let's go, that tank will go up' and that he got in his car and left; and then he later repeated the same story and stated that he told Wood that he thought somebody had burned the car for insurance. . . . Pretty soon he came back up. At that time nobody had found a key on the ground. Mr. Casey walked up side of me and Mr. Turner was standing next to him, and Mr. Turner stooped down and picked up this key, and Turner said 'Here is a key,' and he handed it over to Mr. Guy Sutton, and Casey was standing there and said it was his key, and Mr. Sutton handed it to him. Mr. Turner picked the key up in the path, sorter in front of the car. At that time Mr. Casey had not been over where the key was found while I was there. He did not go in front of the car at any time until Mr. Turner found the key and he walked up and said it was his key; when Mr. Sutton gave him the key he took it and put it in his pocket and he

only stayed there a short time then. . . . I asked Mr. Casey to let me ride with him and he said all right. That was some distance from Neuse road. I went with him to his car where he was parked out on Neuse road, he and I both got in the truck. He did not use the key that Mr. Sutton gave him to start his car; the key was in the switch when he got in the truck. He did not take the key out of his pocket after he left the scene of the fire that day. I rode back to my filling station with him. On the way back Mr. Casey would not talk. I came on down the road about three-quarters of a mile and got up with Herman Johnson and I asked Herman Johnson what kind of truck did he see going through that woods path; Mr. Casey was present, and he said (Johnson) said that he saw a car the day before that go through his field with two white men in it, but that he could not recognize who they were. I don't remember what Mr. Casey said, he said something but I don't recall what. Mr. Casey was mighty nervous, he was sitting there under the steering wheel just in this shape (indicating). After we drove off I kept watching Mr. Casey; he would not talk to me. Mr. Casey was in a nervous condition; he was not a normal man; he was nervous and trembling. He made 3 different movements in his car and kept cutting his eye around at me. He did not get up; I kept my eye on him, watching him. The field Herman Johnson was talking about was back over to where the car was burned."

W. C. Dunbar testified, in part: "Got to the car the morning of 4 July, 12 minutes to 9 o'clock. The car was sitting face to the path, about 10 feet from the path to the front of the car. It was 30 steps from the railroad to the car, 16 steps from the car to where the car stopped and backed back and out back in there. The car was burned up, a total loss. . . . The ground was burned all around the car and had been whipped out around the car and the fire had turned and gone off side of the track, and during the morning the railroad ties had caught and were burning when I got there. There was no fire about the car when I got there. . . . Will Fowler first saw the pistol that has been shown here. The pistol was seven steps or 21 feet from the right-hand front door of the automobile, laying in the wheel track and a large diamond tread tire had been over it and it was wrapped up in the sand. The pistol was toward the railroad from the car. Mr. Garner picked the pistol up. I would not let any one bother it until Mr. Garner came and I showed it to him and he picked it up. . . . I don't recall anybody stating there in the presence of officers or newspaper men that it was Mr. Causey's pistol. I was there when the pistol was picked up. I don't know that Mr. Causey carried a pistol in his car. The little gun he used to carry with him in Virginia was a little

blue steel gun, not an automatic. . . . Mr. Causey was in the back seat of the car. The fire extinguisher was laying kinder under his side, under the back seat. The fire extinguisher was attached to his car the afternoon before; it was on the right-hand side under the front part; I mentioned something to him about it that he had a fire extinguisher in there, and he told me he had it put in there the day before. . . . I noticed the hood of the burned car, the hood on the right-hand side was up and left back when I got there. I noticed the gas line from the vacuum tank to the carburetor had been broken off, or was not connected. This truck track that had been along there the tread looked to be what they call a diamond tread. If I am not mistaken, the car track and the truck track were the same tread, only the truck tracks were larger than the automobile. . . . I sent a couple of men around there to look about the surroundings and they found a half-gallon jar, it was 25 steps from the side of the automobile laying between two pines. It had the odor of gas in it."

N. B. Evans testified, in part: "I observed the tread and approximate size of the track. I have seen Mr. Casey's truck since that time. We got his truck about 12 miles from here. The tires on his truck are the diamond heavy tread Goodyear, exactly similar to the tracks we had tracked out. Two of his tires are worn and the other two are practically new, and this ground was soft and it made a perfect impression. The road that goes through from the Neuse road, this woods path that goes by where the car was burned, there was signs where the truck had backed practically across the road off of an incline, you could see the impression just as clear as a car could make. . . . I also observed tracks of the burned car. When I got there most of these tracks had been put out, but there was a smaller tread tire altogether from the truck track, but it was also a diamond tread, only one track was larger than the other. You could see where that car was out in the soft dirt backing in the woods off of this little by-road. I would say the burned car was 10 or 12 feet from the road, the front end of the car, was not over 10 feet from the side road. It was backed off in about a 45 degree angle toward the road. . . . When I was talking to Mr. Casey at the scene of the fire on 4 July he was very nervous, it was noticeable. . . . Mr. Casey said he lived in Greene County at Mrs. Bradley's. I later went to the Bradley home, I think it was on 9 or 11 July, I am not positive which day. I found this pistol that has been shown here in court at the Bradley home. (Shows witness pistol.) This is the pistol I got at the Bradley home. When I found the pistol two chambers of the pistol had been freshly fired. (Defendant objects to witness testifying as to the condition of the pistol; overruled and defendant excepts.)

There were some loaded cartridges in the pistol. Two of the chambers had been recently fired, fresh powder burns (witness indicates by use of pistol the freshly fired chambers). I took a piece of paper in the presence of Mr. Garner, the coroner, and run through the barrel and it showed fresh powder, damp, showing that it had been freshly fired."

T. G. Sutton testified, in part, in corroboration, and stated what Wood said about defendant Casey killing Causey, in substance what Wood stated in his testimony. "After Wood finished making that statement somebody asked Casey if he had anything to say and Casey said, 'No, I guess he told it about right.' . . . I took Wood around this route that he said he and Casey went that Thursday; we made two or three trips. . . . We followed the route that he pointed out. . . . He showed us about where both cars stopped and where he picked the man up and told us how he picked him up and put him back in the car and set the car afire."

F. A. Garner, coroner of Lenoir County, testified, in part: Got to the burned car about 9:00 or 9:30, 4 July. "I first looked in the car to see what was in there. There was part of a person in there, the back bone, skull and bony parts were there. It was on the back seat of the car in the left-hand corner, face down. The head and shoulders were on the back springs, the head was up in the left-hand corner, looked like it was mashed down in there and the other part of the body was down between where the frames of seat were. Everything about the car that would burn was burned. The right-hand hood of the car was raised and the gas line was disconnected. The wheels of the car were burned and the gas tank flat on the ground. I examined the glass hangers that run the glass up and down and the front ones were down and rear ones were up. I examined further and found some car tracks, a small one practically the size the Hudson car would make and a larger track. The small tire tracks looked to be Goodyear heavy tread tires, I have some just like them. The other was a diamond tread, larger than the other. The Hudson tire had not crossed the railroad, looked like it drove up to the railroad, within four or five feet and then backed back, and in backing back the wheels kinder wobbled, was the reason you could see the tread so plain, and in some places the big tire treads had passed over the other track. . . . The first thing I found there was this 25 automatic pistol. I found that in about 15 feet to the right in front of the car. Mr. Dunbar pointed the pistol out to me, it was partly covered by dirt a part of the barrel was sticking out. . . . At Bradley's there is a room that comes out even with the edge of the front porch on the right. We got this out of the right-hand room in a dresser drawer. Wood stated to us that Casey went in the right-hand room

when he went there. That is the same room we found the pistol in. I examined the pistol. Q. Did you make any test with the pistol, and if so, what? (Defendant objects; overruled; exception.) A. I examined it and there were three or four cartridges in there that had been snapped on and two of the chambers showed that it had recently been fired. The barrel showed that it had been recently shot. I ran a piece of paper through the barrel and got freshly burned powder on it. (Defendant objects; objection overruled; defendant excepts to answer.) . . . Two empty cartridges that fitted this 25 automatic were found on the ground. Some were found in the car that showed they had exploded from the heat of the car. There were no empty cartridges in this 25 pistol. I picked up an empty cartridge up near the railroad. Near the railroad on the side of the railroad showed there had been a good deal of stamping there, that was in that condition when I got there. There was evidence where there had been some walking around near the railroad; I would not say whether walking or scuffling it showed tracks there. . . . Q. I ask you if it was not stated to you there on the scene that this was Mr. Causey's pistol? A. Mr. Dunbar stated that he thought it was Mr. Causey's pistol."

Causey weighed 168 pounds.

The defendant, Herman Casey, denied that he killed James C. Causey. Denied all the material allegations of the State, and testified, in part: "I have never made any threats against Mr. Causey or against any one employed by the Atlas Plywood Company, or any other Lumber Company. I have never owned a pistol and did not have a pistol with me on 3 July. I did not see a pistol out where the burned car was on Friday, 4 July. I have never carried a pistol and have never shot a pistol in my life. . . . I did not fight the fire out around the car; I did not attempt to put out any fire. . . . There was not any blood on my shirt when I went over to the Bradleys' that Thursday. . . . Mr. Graham did not tell me anything about Mr. Causey being in charge of the logging operations. I have seen Mr. Causey three times; I saw him at Wallace several years ago off at a distance, 15 or 16 years ago. I saw him in Neuse River low grounds in February, but I did not speak to him and the day I was in Goldsboro I saw him pass the office. Those are the only three times I have ever seen him in my life." The defendant further testified: "I left the river road. I then went to the Greenville fork and bought five gallons of gas; from there I went over in Greene County to Mr. Levy Bradley's house. I stayed at Mr. Bradley's sometimes when I did not have any work to do. I would go there and stay a week, his folks had been doing my washing and they had some of my clothes there. . . . I got to Levy Bradley's house and took

a bath and put on clean clothes. . . . I imagine we got to Mrs. Bradley's about 2:30. I had not eaten any dinner. . . . I ate dinner at Mrs. Bradley's. . . . I went to the Bradley's once or twice a month. I spent the night there on Sunday night before 3 July."

Wm. Lang, a witness for defendant, who was in jail with Wood, testified, in part: "Then I went to sleep and about 12 o'clock I woke up and Wood was lying there smoking a cigarette and I got up and lit me one and I said 'Boy did you burn that man up?' and he said 'No' but that fellow Casey did it, he said he was sitting on the truck and after he shot him twice then he backed his car back in the woods and drawed gas out of the car and poured it on him and set him on fire and that he come back to the truck and said 'I am good will to kill you,' and that he begged him not to kill him. Then on Friday night there came two gentlemen over to the jail and on Saturday morning Mr. Barnes put me across the cell to the window where I could get air and my window and Wood's both come out so we could see and talk to each other. Wood told me 'I have been lying on that man.' He said 'When me and Casey came through that woods that car was burning up.' Before Wood said that I asked him when his trial was coming off and he said Tuesday of next week. Then he said 'I have been lying on Casey, he did not kill that man and burn him up; when me and Casey came through that woods that car was burning.'"

There was other testimony offered to contradict Wood. Four witnesses testified that the general reputation of Herman Casey was bad. Three persons testified to the general reputation of Milton Wood as being good. Fifteen witnesses testified to the general reputation of the defendant, Herman Casey, as being good and four testified to the general reputation of Milton Wood as being bad.

Ruffin Carr testified, in part: "I live in Greene County. I have seen the pistol that was shown here in court at a distance. (Shows witness gun.) This is my gun. The last time I saw this gun was the first or second Sunday in April, Mrs. Mollie Bradley came to my house to borrow it, said somebody was stealing her chickens, and I let her have my pistol. It had .32-long cartridges in it when I loaned it to her. There were four old cartridges and two new ones in the gun. I would not say whether any of them had been snapped or not, but the gun would snap. I had fired the gun on Wednesday night before I let her have it; I shot a dog in the house."

The defendant made numerous exceptions and assignments of error. The contentions of the defendant will be considered in the opinion, and other necessary facts.

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

Shaw & Jones for defendant.

CLARKSON, J. The record contains 236 pages. It took a week to try the case and seven counsel for the State and defendant argued the case to the jury. In so important a case, involving life and death, we have set forth the evidence at length. The evidence was direct, the testimony of Milton Wood and circumstantial evidence was sufficient to be submitted to the jury. Our province is alone to determine—"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference," etc. Art. IV, sec. 8, Const. of N. C.

In *S. v. Lawrence,* 196 N. C., at p. 564, it is written: "'An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt.' *S. v. Earp, ante,* at p. 166. See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility and sufficiency of evidence is for the court to determine, the weight, effect and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899."

The first contention of defendant is in regard to the admission of certain evidence, over defendant's objection, of the testimony of several witnesses concerning statements which the defendant is alleged to have made shortly prior to the date of the alleged homicide, and none of which it is contended were in anywise directed toward the deceased, James C. Causey. This evidence was offered by the State for the purpose of showing motive, malice, premeditation and deliberation.

"It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State, as in this case, has to rely upon circumstantial evidence to establish the guilt of the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime." *S. v. Green,* 92 N. C., at p. 782; *S. v. Stratford,* 149 N. C., 483; *S. v. Wilkins,* 158 N. C., 603; *S. v. Lawrence,* 196 N. C., at p. 565.

It is true that the threats were not in so many words made by defendant Casey against the dead man Causey, but circumstantial. What is the setting? The defendant Casey was hauling some hogshead stave

timber, shortly before the homicide, off the land of one John H. Sutton. The company, Atlas Plywood Corporation, contended the land the timber was hauled off of belonged to it and not Sutton. Some four weeks before 3 July, the day Causey and the car were burned, Casey sold some of the timber to the Goldsboro Lumber Company at Dover, N. C., amounting to some $28.75. The Atlas Plywood Corporation stopped payment. This embarrassed Casey in paying those working for him. On the day of the alleged homicide he was trying to get the money from the Goldsboro Lumber Company, claiming a bond had been executed for the timber. About 1 June, after the Goldsboro Lumber Company stopped payment on account of notice given it by the Atlas Plywood Corporation, claiming the timber belonged to it, defendant Casey saw one Graham, manager of the company, and he refused to permit Casey to be paid, and Casey said "I am going to have my money, somebody is going to pay me." Casey was told at the time that Causey had charge of the logging operations. In June Casey was hauling a load to Dover in a truck from Sutton's place, a car was standing at the bridge, the man was driving a large car and got out of the car and asked if he was Mr. Casey and where he was getting his timber from. Casey told him from Mr. John H. Sutton's. The car was from Goldsboro and he showed Casey a map. "Don't get any more timber out of that piece of woods down there and do not cut any more out of there." Casey then moved over to the Tilgham tract of land. "That night we came to town, he paid us but not all." Casey's talk was that "This man owed him this money at Goldsboro where he went to see, and the way he talked said the G—— d—— son of a bitch, he was going down there, said wherever he met this G—— d—— son of a bitch, he was going down with him." Several witnesses testified shortly before 3 July that he said substantially "That he would rather be laying flat of his back in the sunshine with his toes bound together than for anybody to beat him out of his labor." Another witness testified that Casey said "Damn if he did not aim to have it on some terms."

Taking all the statements, we think it was some evidence to go to the jury. These vivid expressions indicated that defendant was harboring a grudge against those who had stopped payment of the $28.75 worth of timber gotten from the John H. Sutton place and also stopping him from hauling any more.

Henry West, who lived about a mile and a half from where the car was burned, saw Causey on 3 July driving a Hudson car about 11:30 o'clock, going in the direction of where the car was burned. He saw smoke in the direction about 12:00 o'clock of where the car was burned. "When I saw the car it had the appearance of having been backed

off of the woods path, just a cut short and backed off in the woods to the best of my recollection about 8 feet or 10 feet from the path. The car was badly burned up. Yes, I noticed that a right good little area had been burned over there; I would say a half acre or possibly more. When I saw the car I noticed that the right hood of the engine was raised and the gas line to the carburetor was disconnected. The right-hand hood over the engine, the side the carburetor was on was open.

James C. Causey, on Thursday, 3 July, passed Decatur Nobles' house driving a Hudson coach, between 11:00 and 11:30, going towards Oak Bridge, the scene of the place where he and the car were found burned. About half hour after Causey passed in the car Nobles saw the smoke about 12:00 o'clock. Jerry Sutton saw Causey driving the Hudson coach, the same car he had been driving since he had been coming down there. This was about 11:20 or 11:30 when Causey passed.

The testimony of numerous witnesses was to the effect that the defendant Casey had a grudge and had made threats against the man in the Atlas Plywood Corporation who was responsible for stopping the Goldsboro Lumber Company at Dover, N. C., from paying him the $28.75 and stopping him from getting any more timber off the Sutton place. Graham had told Casey that Causey had charge of the logging operations. What happened is now told by Milton Wood: "I got up with defendant Casey at Sam Smith's house. . . . After he turned off on this road he drove down a mile or more down to a little by road, after a while he came to a little small piece of woods, and I asked him where he was going, and he said he was going down through the islands. After a little while he got to a railroad, and I looked up ahead of me just before we got to the railroad and saw this big car coming. Mr. Casey drove up to the foot of the railroad and stopped his truck and got on the ground and by that time, Mr. Causey in the car ahead of us had stopped his car. The railroad was between them and Mr. Causey could not pass this truck. Mr. Casey was already on the ground, and he walked around on the right-hand side of Mr. Causey's car, and Mr. Causey and Mr. Casey had not said a word, and Mr. Casey reached in his pocket and got a black looking pistol from his pocket. I could not swear as to the pistol. (Shows witness pistol.) This looks like the pistol. I remember this little place here on the side of it. He had it about this close to my face (indicating). Mr. Casey took his pistol out and shot Mr. Causey twice and Mr. Causey's head fell backwards, and after he was dead he (Casey) come back to the truck where I was and he told me if I told it he would kill me if I was the last one on God's earth, and I told him I would not tell it, and he put his pistol back in his pocket and went back to the car and opened the car and got Mr.

Causey around the shoulders and dragged him on the ground and got down kinder on his knees and searched all his pockets and pulled some money out of his right-hand pants pocket; I don't know how much money he got; I saw money sticking out the edge of his hand, it was paper money. He pulled him out the right-hand side of the car. At that place it is little fine old dead looking grass along down where he pulled him out. It was right on the edge of the road, right at the edge of the car. After he pulled him out and searched him and got what he wanted off of him, he took him up in his arms and after two or three lunges he got him back in the car. He got him in the back seat, but what position he laid him in the back seat I could not see; he got in the car and backed it off in the woods and come back to the car and got a pint bottle and he goes back behind the car and then comes to the right-hand side of the car and raises the hood up, and when he gets up he has a pint bottle of gas and he opens the door of the car and poured over half of the gas on Mr. Causey and strikes a match to him and the fire blazes up and the rest of the gas he poured on the car and struck a match to that; and he came back to the car and got up in the truck and drove back down the road. . . . Later Casey came back, stopped and broke a little sweet gum bush and put out some fire around the car."

These threats to show motive, malice, premeditation and deliberation, were admissible in evidence—the probative force was for the jury.

"A threat to kill or injure someone, not definitely designated, is admissible in evidence, when other facts adduced give individuation to it so that as it is generally held, the jury may infer that they were against deceased; but there is authority requiring it to appear to a reasonable certainty that defendant directed the threat against deceased, and holding, if the evidence leaves that matter in doubt, that the doubt must be resolved in defendant's favor and the threat excluded," etc. 30 C. J., part sec. 417, at p. 190. Sec. 418: "Threats made by defendant against a class to which deceased belonged, and prima facie referable to deceased, although his name is not mentioned, are admissible against defendant. Thus threats against policemen, persons of a certain nationality, the members of the family, or any person visiting a certain woman, are admissible, where deceased was a member of the class referred to." *S. v. Wishon*, 198 N. C., 762.

The second contention of defendant is in regard to the admission of certain evidence over defendant's objection, offered by the State, concerning the condition of the pistol found by the officers at Bradley's home, in Greene County, in the room in which the defendant Casey took a bath. We must get the setting again, and see how far Wood's

testimony is corroborated. Milton Wood testified that defendant Casey "Took his pistol out and shot Mr. Causey twice." A fisherman had heard two shots in the direction of the burned car, the time between 10 o'clock and 12 o'clock on 3 July. Now let us consider how far the testimony of Wood is corroborated by the evidence of others: (1) The two shots heard by the fisherman as above indicated. (2) The truck Casey was in stopped just before it got to the railroad, and the big car Causey was in stopped on the other side of the railroad. They could not pass each other. Witnesses testified to the tracks of the two cars indicating this. Casey got out of the truck and walked around on the right-hand side of Causey's car, reached in his pocket and got a black looking pistol from his pocket. Wood identified it: "I remember this little piece here on the side of it." Casey had had the pistol close to Wood's face. Casey shot Causey in the head twice and his head fell backward, and Casey then came to the truck and threatened Wood. Casey put the pistol back in his pocket. Wood described how Casey took Causey out of the car and put him back. Perhaps the mysterious pistol found near the burned car was Causey's and fell out of his pocket when Casey took him out of the car and searched him and dragged him. Casey "got in the car and backed it off into the woods." The tracks of the car backed was shown on the ground and testified to by all the witnesses, thus corroborating Wood. (3) Casey got a pint bottle and then went behind Causey's car and then went "to the right-hand side of the car and raised the hood up" gets "a pint bottle of gas," which he poured one-half on Causey and the rest on the car, strikes a match and sets it afire. The testimony of Jasper Tyree and other witnesses was to the effect that the right-hand side of the hood of the car was raised and the pipe that goes from the vacuum tank to the carburetor was disconnected and a pair of pliers were on the running board. (4) Casey leaves the scene of the burning car, but comes back to the burning car "stopped and broke a little sweet gum bush and put out some fire around the car." Decatur Nobles testified: He was present the morning of 4 July at the burned car. "I saw some bushes right side of the car; it looked like it had been beaten out with a brush or something of that sort." Other witnesses testified to the same effect. No doubt the testimony of witnesses as to the time Casey was seen can be reconciled as he was at the car twice. Casey himself told numerous witnesses and Jasper Tyree, the morning of 4 July, when they were at the car "I was at this car yesterday right around 12 o'clock." (5) One Turner picked up a key in the path, sort of in front of the car where Casey had not been that morning. Casey walked up and said it was his key. Casey said it was his truck key and he had dropped it out of his pocket that had a hole in it. Jasper Tyree asked Casey to let him ride in the truck with him when

Casey was leaving the morning of 4 July. Tyree testified that he did not use the key that was found to start his truck. "The key was in the switch when he got to the truck. He did not take the key out of his pocket after he left the scene of the fire that day." Tyree rode back to his filling station with him. Tyree testified "Mr. Casey was in a nervous condition; he was not a normal man; he was nervous and trembling."

Casey was boarding at Mrs. Beddard's; stayed there the night of 2 July, and on the morning of 3 July she fixed breakfast for him. She expected him back and fixed dinner for him, but he did not come for it. Nor did he spend the night of 3 July there. He went to the Bradley's and ate there. Wood testified that Casey "did not get a drop of blood on him except a little spot on one of his sleeves." Wood and Casey, according to Wood's testimony, after the second trip to the burning car, went down the Greenville Highway and turned off to the left and went five or six miles to the Bradley home, where Casey had his washing done. Casey went in the room, took a bath and when he came out "he had on a clean shirt." Casey told Evans he lived at the Bradley's. Evans testified, and his testimony was corroborated by others: "I later went to the Bradley home. I think it was on the 9th or 11th of July; I am not positive which day. I found this pistol that has been shown here in court at the Bradley home (shows witness pistol). This is the pistol I got at the Bradley home. When I found the pistol two chambers of the pistol had been freshly fired. There were some loaded cartridges in the pistol. Two of the chambers had been recently fired, fresh powder burns (witness indicates by use of pistol the freshly fired chambers). I took a piece of paper, in the presence of Mr. Garner, the coroner, and run through the barrel and it showed fresh powder, damp, showing that it had been freshly fired."

We think this evidence in regard to the pistol a circumstance with the other evidence, as above set forth, to go to the jury—the probative force was for them to determine.

We think there is nothing in the third contention. There was sufficient evidence on the part of the State to justify the jury in finding that the deceased came to his death as a result of the wounds inflicted by the accused.

The fourth contention is in regard to the failure of the court below to submit to the consideration of the jury the element of manslaughter. There is no evidence of manslaughter on this record. There are no facts on this record from the testimony of Wood or defendant Casey that would justify the court to submit to the jury the contention of defendant "that a fight ensued upon a chance meeting between the deceased and the accused, in which the accused lost his life." The de-

fendant, who was a witness in his own behalf, never made any such contention in his testimony; nor did Wood or any witness in the case. The pistol found could have dropped from Causey's pocket when he was dragged out of the car and the "stamping" from defendant Casey handling a heavy man weighing some 168 pounds.

It is well settled that where the evidence is sufficient to justify a charge on the aspect of manslaughter, it is the duty of the court to give it, and if this is not done it will be held for error.

"In *S. v. Johnson,* 161 N. C., 264, there was no error in the charge as given, and it was held, *Associate Justice Brown* delivering the opinion: 'That there was not a scintilla of evidence upon which a verdict of manslaughter could have been based.' In *S. v. Teachey,* 138 N. C., 598, the same ruling was made: 'That no element of manslaughter was presented.' And on the facts in evidence the same position seems to be fully justified in *S. v. Bowman,* 152 N. C., 817. See *S. v. Chavis,* 80 N. C., 353." *S. v. Merrick,* 171 N. C., at p. 794-5; *S. v. Ashburn,* 187 N. C., at p. 725; *S. v. Hardee,* 192 N. C., 533.

The fifth contention of defendant is in regard to the failure of the court to declare and define the law of alibi, and give the contentions of the defendant arising thereon from the evidence.

The defendant contends that from the entire charge there is not a place in it where the word "alibi" is used. This may be so, but the court gave in the charge the testimony of defendant and the material witness in reference to the time of day Casey claimed he was at the burning car on 3 July, and fully set forth this contention of defendant and his witnesses that he got on the scene after the car was burning and at an hour of the day when he could not have committed the crime. The court below fully charged in regard to reasonable doubt. We can see nothing that could prejudice the defendant by not calling it "alibi." The jury in the charge were given all the evidence bearing on this aspect, and from the charge we see no prejudicial error.

In *S. v. Steadman,* 200 N. C., 768, this Court said: "The court below fully set forth the facts and contentions in the charge as to the alibi set up by defendants. *S. v. Melton,* 187 N. C., 481."

We can see no evidence that would class Milton Wood as an accomplice of the defendant Casey. No instruction was prayed for by defendant Casey on this aspect, but in this jurisdiction the unsupported evidence of an accomplice, if believed by the jury, is sufficient to convict. See *S. v. Ashburn, supra.*

It seems that while this appeal was pending in this Court the defendant's counsel made a motion for mistrial, because certain of the jurors were alleged to have been prejudiced, and for a new trial for newly discovered evidence, before Judge G. V. Cowper. He refused both

motions and put his refusal distinctly on the ground that he did not have jurisdiction to deal with the motion. The appeal bond has been given in the instant case. The effect of this was to stay all proceedings in the court below until the appeal has been heard here. C. S., 4654. This is particularly true since the enactment of chapter 55, Public Laws 1925, the effect of that being to transfer the execution against the body of the defendant to the Supreme Court. The whole record being in the Supreme Court, then, for all purposes, the motions made before Judge Cowper were *coram non judice.*

This case presents a sad tragedy. The evidence was to the effect that defendant Casey was obsessed—"nursing his wrath to keep it warm"—with a wrong he felt had been done him by the Atlas Plywood Corporation, or by Causey working for the Atlas Plywood Corporation, representing the corporation in its logging operations in the woods, in stopping the payment of a timber bill of Casey's—the timber claimed to have come off the corporation's land, and stopping the removal of any more timber off the land which was also claimed by Sutton. The evidence is all to the effect that the defendant Casey, in cutting and selling the timber acted in good faith, as he cut it off land claimed by another. Unfortunately, Casey, driving a Chevrolet truck, meets Causey driving a Hudson coach in the forest. The cars and actors in the tragedy face each other. Revenge was in the heart of defendant Casey, and instead of appealing to the law of his land, he applied the law of the jungle. He shot and killed Causey, and, no doubt seeking payment for his timber, pulled him out of his car, took some money out of his pocket, and then put his body back in the car, put gasoline on his body and the car and burned Causey and the car up. The body of Causey was so burned that it could not be identified, but many of his personal effects were found, among them was a band ring and the inscription on the inside was as follows: "M. W. C. to J. C. C., Decr. 27, 1900." That was the date of his wedding. All these years he had carried this memento. The evidence all indicates that he was an industrious man of high character, and he left a widow and children. He has suffered a horrible death for this unfortunate controversy. Casey has been convicted by a jury of his countrymen of murder in the first degree, which carries with it the penalty of death. He also left children.

From a thorough examination of a long record, in law we can find

No error.

STATE OF NORTH CAROLINA, NATHAN O'BERRY, TREASURER, AND BAXTER DURHAM, STATE AUDITOR, *v.* M. W. GANT AND ÆTNA CASUALTY AND SURETY COMPANY.

(Filed 27 June, 1931.)

1. Principal and Surety B c—Where clerk has embezzled funds either summary proceedings or civil action may be instituted.

In this proceeding by the State, the State Auditor and the State Treasurer against a clerk of the Superior Court and the surety on his bond to recover sums embezzled by the clerk by forging the names of Confederate pensioners to warrants issued by the Auditor and paid by the Treasurer, and converting the funds to his own use: *Held*, the plaintiffs had the right to pursue the summary remedy under C. S., 356, upon their motion after due notice, and demand upon the clerk was not necessary, or the plaintiffs could have brought a civil suit under C. S., 475, in their option.

2. Same—Right of surety to object to plaintiff's proceeding under C. S., 356 held waived by general appearance.

Where a summary proceeding under C. S., 356, has been instituted against a clerk of the Superior Court and the surety on his bonds to recover sums embezzled by the clerk, and the surety has entered a general appearance and filed answer, demanding a jury trial, requested special instructions and argued the case to the jury: *Held*, the surety has waived its rights, if any it had, under C. S., 353, 354, 355, to object that the plaintiffs could not maintain a summary proceeding under C. S., 356.

3. Same—Warrants received by a Superior Court clerk for Confederate pensioners are sums coming into his hands under color of his office.

Where a clerk of the Superior Court has forged the signatures of Confederate pensioners to warrants issued by the State Auditor and sent to him for payment to the persons entitled, and has witnessed such signatures, cashed the warrants, and converted the funds to his own use, such sums are received by him by virtue of and under color of his office, and come within the terms of his bonds given under the provisions of C. S., 927, and the surety thereon is liable within the penalty of the bonds for the amount so embezzled. N. C. Code, 1927 (Michie), secs. 5168 n, o, q, r, s.

4. Same—Refusal of motion to dismiss for that plaintiffs sought to recover on successive bonds in one action held not error.

Where a defaulting clerk of the Superior Court gives successive bonds for succeeding terms of office with the same surety, and continues his defalcations, the surety is liable only to the amount of the bond for each term, but where the court so instructs the jury and specifically charges them as to the limitations of the bonds, the refusal of the surety's motion to dismiss because the plaintiff undertakes to recover on the successive bonds in one cause of action, is not error.

5. Limitation of Actions C b—Action for fraud of clerk in embezzlement of funds held not barred, fraud not being discovered by due diligence.

Where a clerk of the Superior Court forges the names of Confederate pensioners to warrants issued by the State Auditor, and embezzles the proceeds, and such fraud is not discovered until about 90 days prior to the institution of proceedings against the clerk and the surety on his

bonds, and such fraud could not have been discovered earlier by reasonable diligence, C. S., 441(9) applies, and the cause of action on the bonds will not be held to have accrued until the discovery of the fraud, and C. S., 439, providing that actions on bonds of public officers must be brought within six years, will not operate to bar an action to recover the sums embezzled.

6. Limitation of Actions E c—Defendant held not prejudiced by failure of reply to refer to C. S., 441(9).

Where, in a proceeding against a clerk of the Superior Court and the surety on his bonds to recover for moneys embezzled by the clerk, the surety pleads the statute of limitations, and the reply fully sets forth the facts in regard to the concealment of the fraud by the clerk, and the trial court fully and correctly instructs the jury that the cause of action would not accrue until the discovery of the fraud or until the fraud should have been discovered by due diligence, and the issues submitted specifically present the question to the jury: *Held*, the surety was not prejudiced by the failure of the reply to specifically refer to the statute, C. S., 441(9), and its contention that the plaintiffs had not pleaded the statute will not be sustained.

7. Pleadings B f—Failure to make motions for consolidation or to plead pendency of another action held to waive all rights in respect thereto.

Where an action against a clerk of the Superior Court and the surety on his official bonds is instituted by the State, the State Auditor, and the State Treasurer, and thereafter another action against the clerk is instituted by his successor in office to recover funds belonging to the office, and neither the clerk's successor in office, nor the defendant clerk, nor the surety makes motion for consolidation of the actions, and the surety does not plead by way of answer the pendency of the second suit: *Held*, the surety has waived any rights it had in this respect, and the refusal of the trial court to dismiss the action or order it to be consolidated with the subsequent action is not error. C. S., 511(3), 517, 518.

8. Principal and Surety B c—In proceedings under C. S., 356 the ruling of defendants into trial immediately after issues joined is not error.

Where a summary proceeding against a clerk of the Superior Court and the surety on his bonds is instituted under C. S., 356, the ruling of the defendants into trial immediately after issues joined does not deny the defendants any legal right under C. S., 557.

9. Trial C b—Trial court held not to have abused discretion in ruling defendants into trial in this case.

In this summary proceeding against the clerk of the Superior Court and the surety on his official bonds under C. S., 356, there was no abuse of discretion on the part of the trial court in ruling the defendants into trial immediately after issues joined under the facts and circumstances then existing.

10. Appeal and Error J e—Instructions in this case held not to contain prejudicial or reversible error.

Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial or reversible error. C. S., 564.

11. Principal and Surety B c—Interest recoverable on amounts embezzled by public officers.

Under the provisions of C. S., 357, the plaintiff in an action to recover for moneys unlawfully detained by a public officer is entitled to recover, besides the amounts detained, damages at the rate of 12 per cent from the time of wrongful detention until payment, within the penalty of the bond, and where, in an action against a clerk of the Superior Court and the surety on his bonds to recover sums embezzled by the clerk, the State waives the interest from the date of the actual defalcations, but does demand the 12 per cent from the date of the expiration of each term of office: *Held*, judgment awarding damages at 12 per cent on the sums defaulted from the expiration of each term is not error, the amount being within the penalty of the bond.

12. Same—Surety held estopped from setting up statutory limitation on amount of bond of clerk.

Although C. S., 927, is directory and prescribes the penalty on the bond of a clerk of the Superior Court of not less than $10,000, and not more than $15,000, both the clerk and his surety are presumed to know the provisions of the statute, and where the clerk has voluntarily executed a bond in the penal sum of $25,000, and the surety has accepted premiums based on a bond in this amount, the surety is estopped to deny the validity of the bond, and the plaintiff may recover of the surety, upon a proper showing, to the full amount of the penalty of the bond.

13. Same—The surety on the bond of a public officer is an insurer.

The surety on the bond of a public officer is an insurer, and its liability is to be measured by the liability of the principal on the bond.

APPEAL by defendant, Ætna Casualty and Surety Company, from *Schenck, J.*, and a jury, at November Term, 1930, of GUILFORD. No error.

This is a summary remedy on official bonds, instituted by plaintiffs against M. W. Gant, clerk of the Superior Court of Guilford County, N. C., and his bondsmen, Ætna Casualty and Surety Company, defendants, under C. S., 356.

Notice was duly given defendants, in accordance with the statute, and complaint filed against them alleging that M. W. Gant, on 22 March, 1913, was duly appointed clerk of the Superior Court of Guilford County, N. C., and on assuming the duties of the office (1) executed a bond on 22 March, 1913, in the sum of $12,500 with a bonding company as surety, known as the Ætna Accident and Liability Company, liability to begin from the date of the bond and continue until his successor is elected and qualified. (2) In the fall of 1914 the defendant Gant was duly elected clerk for the term of four years, and executed another bond in the sum of $12,500, with the same surety bonding company, liability for the term of four years beginning with the first Monday in December, 1914. The defendant Ætna Casualty and Surety

Company acquired the assets of the Ætna Accident and Liability Company, and assumed the obligation on these bonds. (3) In the fall of 1918 the defendant Gant was duly elected clerk for the term of four years, executed a bond in the sum of $15,000 with Ætna Casualty and Surety Company, defendant, as surety, liability for the term of four years beginning with the first Monday in December, 1918. (4) In the fall of 1922 the defendant Gant was duly elected clerk for the term of four years, executed a bond in the sum of $15,000 with Ætna Casualty and Surety Company, defendant, as surety, liability for the term of four years beginning the first Monday in December, 1922. (5) In the fall of 1926 the defendant Gant was duly elected clerk for the term of four years, executed a bond in the sum of $25,000 with Ætna Casualty and Surety Company, defendant, as surety, liability for the term of four years beginning the first Monday in December, 1926. All the bonds had the following provision in them:

"Now, if the said Mason W. Gant shall account for and pay over according to law all moneys and effects which have come or may come into his hands by virtue or color of his office or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property which have or may come into his hands, by virtue or color of his office and shall in all things faithfully perform the duties of his office as they are, or hereafter shall be prescribed by law, for the term above mentioned, or until his successor be duly elected or appointed and qualifies, then this obligation is to be void; otherwise, to remain in full force and effect." The bonds were given in accordance with C. S., 927.

The complaint, among other things, alleges: "That a list of all warrants and vouchers with their several dates, name of payees and amount, sent by the plaintiff auditor and received by the defendant, M. W. Gant, as clerk of the Superior Court for each six months in each year from 1913 to 1930, both inclusive, which were made payable to pensioners then and there dead and which were wrongfully embezzled, abstracted, misapplied and not delivered to the parties entitled to receive same, is tabulated and set out in an attached exhibit, marked 'A,' and asked to be taken as a part of this allegation as fully and as completely as if herein set out in detail, all of which said warrants and vouchers were duly and regularly paid by the plaintiff treasurer upon the forged endorsement of the said M. W. Gant, clerk of the Superior Court. That the total amount so received and misappropriated by the defendant, M. W. Gant, as shown by the attached Exhibit 'A,' aggregates the sum of $59,340, and that the plaintiffs aver that they are entitled to judgment against the defendant, M. W. Gant, and the defendant Ætna

Casualty and Surety Company, as surety, to cover said sum, and with interest thereon as a penalty, as prescribed by statute, of twelve per cent (12%) from the time of the receipt of each of said warrants above mentioned, calculated up to and including the date of the rendition of the judgment herein asked for."

Exhibit "A" shows one hundred and fifty-five pensioners' names and the amount due each, all being dead except two, who are living but did not receive the proceeds of the warrants. The evidence on the trial showed more than 950 warrants and vouchers drawn in favor of Confederate pensioners and collected by defendant Gant, clerk, extending over a period of seventeen years.

After the trial had proceeded about a week, the following occurred: Mr. E. D. Broadhurst, one of the attorneys for M. W. Gant, stated in open court: "May it please your Honor, the defendant Gant, in view of his physical condition and the testimony that has been adduced here, desires to say that the defendant Gant will not resist a judgment—such judgment as may be rendered under your Honor's instructions."

The defendant Ætna Casualty and Surety Company, moved that the action should be dismissed (1) That this action was not commenced by summons as required in civil actions, C. S., 475. (2) That it does not appear by the complaint that Gant as clerk has admitted that the money sought to be recovered in this proceeding that he has or ever had same in his hands, such admission being a condition precedent to the remedy under C. S., 356. (3) That it appears affirmatively that the funds were never held under order of this court, or subject to control or direction of the court. (4) That it appears affirmatively that the allegations of the complaint does not come within the provisions of C. S., 356, therefore the remedy is by civil action commenced by summons. "For that the funds sought to be recovered in this action, if in fact they did come into the defendant Gant's hands, did not come into his hands by virtue or color of his office, or under an order or a decree of the judge, and even if the defendant Gant is guilty of the matters and things alleged in the complaint this defendant is in no way liable or responsible therefor, as the matters and things alleged are not within the provisions of the bonds alleged and not being within the terms and provisions alleged there has been no breach thereof, and this defendant is in no way liable to the plaintiffs." Other reasons are set forth why the proceeding should be dismissed. The defendant Surety Company then answered, not waiving any rights to have the action dismissed. The defendant company denied all liability, and in the answer avers that the bonds are liable only for such defalcations as are covered "by the terms, stipulations and conditions of said bond, if any, occurring during the term for which said bond was given."

"The defendant avers that even if the roll of names furnished the State Auditor, as alleged in the complaint, was continually since 1913 false, in that it contained the names of pensioners who were dead and the names of other persons not entitled to receive pensions, the defendant avers that this was not an act of M. W. Gant, as clerk of the Superior Court, but was such as a member of the county board of pensions, and that it was the duty of the State Board to examine each application for a pension. And defendant avers that it is in no way liable therefor or in any way responsible therefor by reason of being surety for the said M. W. Gant or issuing the bonds sued on. For that it appears upon plaintiff's complaint that plaintiffs have joined together as one cause of action five separate and distinct causes of action, and are undertaking to recover as if the five bonds alleged constitute one entire transaction, when in fact and in law each bond of the defendant, M. W. Gant, as clerk, is liable only for defalcations occurring during the term for which the bond is given. For that plaintiffs are undertaking by said proceeding to deny this defendant right of trial by jury, in violation of the guarantees of the Constitution of the State of North Carolina, Article I, section 19, and to deprive this defendant of its property without any process of law, in violation of Article I, section 17, of the Constitution of the State of North Carolina, and the Fourteenth Amendment of the Constitution of the United States."

The defendant Surety Company further sets up the plea of the statute of limitations. In conclusion, "This defendant now, this being its first appearance in court in this cause, demands a trial by a jury in a properly constituted civil action, and that this defendant be allowed the legal right to put at issue all matters of fact and have the same passed upon by a jury as guaranteed to it under the provisions of Article I, sections 17 and 19 of the Constitution of the State of North Carolina, and of the Fourteenth Amendment to the Constitution of the United States. Wherefore, this defendant having answered plaintiffs' complaint as fully as it is advised it is its duty to do, prays that this cause be dismissed as to it; that it recover its costs to be taxed by the clerk, and for such other and further relief as to the court may seem meet and just." Other contentions were made, but they will be considered in the opinion.

The plaintiffs replied and denied the allegations of the answer inconsistent with the facts alleged in the complaint. "Plaintiffs say that the first knowledge or information that they had that the defendant Gant had wrongfully misapplied and appropriated the pension checks set out in the complaint and had not delivered them to the payees therein named or returned them to the plaintiffs, as the law required, was about ninety days prior to the institution of this summary proceeding, and

that upon acquiring such information and being advised that there were other shortages and misapplications by the defendant Gant of moneys coming into his office as clerk, otherwise, plaintiffs offered to institute a suit for a receivership of all the properties of said Gant in order to protect the entire fund for the benefit of all parties in interest, and invited the county commissioners to join in said proceeding. This they declined to do. That thereafter, as shortages were discovered by an auditor employed to investigate the office, the defendant Gant paid into the office from time to time an amount in cash, as plaintiffs are advised and believe, of about $60,000 to cover such shortages, none of which was applicable to the claims of the plaintiffs. That plaintiffs were further advised that there were other shortages connected with the office of the defendant Gant which might total an amount in excess of his official bonds and leave these plaintiffs without any remedy or protection for the repayment of these pension funds so misappropriated. That plaintiffs finally, in order to protect this fund, instituted this summary proceeding. That all of the amounts sued upon were admitted by the defendant Gant in writing to have been received in his office, and all of the payees therein named, except two, were dead at the time said warrants were received, and the same could not have been delivered and were not delivered to the said payees or to any one else entitled thereto, or returned to the plaintiffs, as required by law."

The plaintiffs further set forth in detail the method the law prescribed which the plaintiffs should and did pursue with respect to payment of Confederate pensions. That not until about 90 days prior to the institution of this summary proceeding did any of the plaintiffs have any knowledge of the defendant Gant, clerk, forging the names of the payees in the warrants and his appropriating the funds.

"The plaintiffs further aver that they did not have any direct knowledge, or any intimation of any of the frauds alleged in the complaint as committed by the said M. W. Gant, clerk of the Superior Court, in connection with said pension warrants prior to the time above stated, and they further aver that they could not, with the exercise of due diligence and reasonable business prudence, have discovered such fraudulent acts on the part of said M. W. Gant, and that the defendant, M. W. Gant, by means of such fraudulent acts in connection with making up, revising and correcting the lists under which said warrants were issued; in forging the names of payees thereon, and officially attesting said signatures; by cashing and procuring the funds called for by said warrants, by fraudulently and deceitfully keeping false records; by fraudulently and deceitfully failing to keep records, and by fraudulently and deceitfully making false reports, all acts being contrary to law; intentionally and fraudulently concealed the existence of the facts which would have,

or could have, put these plaintiffs on notice, and by such fraudulent concealment kept these plaintiffs in ignorance of each and every one of the misappropriations and conversions referred to and alleged in the original complaint."

The judgment of the court below is as follows:

"The above-entitled proceedings coming on to be heard before his Honor, Michael Schenck, Judge of the Superior Court of the State of North Carolina, regularly holding the courts of the Twelfth Judicial District, and a jury, and being heard upon issues submitted to the jury, which the jury answered as follows, to wit:

1. (a) Did defendant, M. W. Gant, clerk of the Superior Court of Guilford County, North Carolina, receive the State pension warrants by virtue or color of his office during the term of said office ending 7 December, 1914, and misapply and fail to deliver the same, or the proceeds therefrom, to the persons or parties entitled thereto, as alleged in the complaint? Answer: Yes.

(b) If so, what was the amount so misapplied? Answer: $416.

(c) What amount of damages, if any, are plaintiffs entitled to recover for the misapplication of said funds by the defendant, M. W. Gant, as alleged in the complaint? Answer: $798.72.

(d) Are said amounts, or any part thereof, barred by the statute of limitations, as alleged in the answer of the defendant, Ætna Casualty and Surety Company? Answer: No.

2. (a) Did the defendant, M. W. Gant, clerk of the Superior Court of Guilford County, North Carolina, receive the State pension warrants by virtue or color of his office during the term of said office ending on the first Monday in December, 1918, and misapply and fail to deliver the same, or the proceeds therefrom, to the persons or parties entitled thereto, as alleged in the complaint? Answer: Yes.

(b) If so, what was the amount so misapplied? Answer: $5,423.

(c) What amount of damages, if any, are plaintiffs entitled to recover for the misapplication of said funds by the defendant, M. W. Gant, as alleged in the complaint? Answer: $7,809.12.

(d) Are said amounts, or any part thereof, barred by the statute of limitations, as alleged in the answer of the defendant, Ætna Casualty and Surety Company? Answer: No.

3. (a) Did the defendant, M. W. Gant, clerk of the Superior Court of Guilford County, North Carolina, receive the State pension warrants by virtue or color of his office during the term of said office ending on the first Monday in December, 1922, and misapply and fail to deliver the same, or the proceeds therefrom, to the persons or parties entitled thereto, as alleged in the complaint? Answer: Yes.

(b) If so, what was the amount so misapplied? Answer: $13,865.

(c) What amount of damages, if any, are plaintiffs entitled to recover for the misapplication of said funds by the defendant, M. W. Gant, as alleged in the complaint? Answer: $13,310.40.

(d) Are said amounts, or any part thereof, barred by the statute of limitations, as alleged in the answer of the defendant, Ætna Casualty and Surety Company? Answer: No.

4. (a) Did the defendant, M. W. Gant, clerk of the Superior Court of Guilford County, North Carolina, receive the State pension warrants by virtue or color of his office during the term of said office ending on the first Monday in December, 1926, and misapply and fail to deliver the same, or the proceeds therefrom, to the persons or parties entitled thereto, as alleged in the complaint? Answer: Yes.

(b) If so, what was the amount so misapplied? Answer: $10,115.

(c) What amount of damages, if any, are plaintiffs entitled to recover for the misapplication of said funds by the defendant, M. W. Gant, as alleged in the complaint? Answer: $4,855.20.

(d) Are said amounts, or any part thereof, barred by the statute of limitations, as alleged in the answer of the defendant, Ætna Casualty and Surety Company? Answer: No.

5. (a) Did the defendant, M. W. Gant, clerk of the Superior Court of Guilford County, North Carolina, receive the State pension warrants by virtue or color of his office during the term of said office ending on the date of his resignation from office on 9 October, 1930, and misapply and fail to deliver the same, or the proceeds therefrom, to the persons or parties entitled thereto, as alleged in the complaint? Answer: Yes.

(b) If so, what was the amount so misapplied? Answer: $27,780.

(c) What amount of damages, if any, are plaintiffs entitled to recover for the misapplication of said funds by the defendant, M. W. Gant, as alleged in the complaint? Answer: $6,207.

(d) Are said amounts, or any part thereof, barred by the statute of limitations, as alleged in the answer of the defendant, Ætna Casualty and Surety Company? Answer: No.

6. What amount, if any, are the plaintiffs entitled to recover of the defendant, M. W. Gant, in this proceedings? Answer: $90,519.44.

7. What amount, if any, are the plaintiffs entitled to recover of the defendant, Ætna Casualty and Surety Company, in this proceeding? Answer: $66,184.92.

It is now upon motion of Brooks, Parker, Smith & Wharton, attorneys for the plaintiffs, ordered, adjudged and decreed that the plaintiffs have and recover of the defendant, M. W. Gant, the sum of $90,519.44, with interest as allowed by law until paid, at the rate of six (6) per cent per annum.

That the plaintiffs have and recover of the defendant, Ætna Casualty and Surety Company, the sum of $12,500 upon the bond given by M. W.

Gant, for his term of office ending the first Monday in December, 1914, to be discharged upon the payment of $1,214.72, with interest thereon as allowed by law.

That the plaintiffs have and recover of the defendant, Ætna Casualty and Surety Company, the sum of $12,500, upon the bond given by M. W. Gant, for his term of office ending the first Monday in December, 1918, to be discharged upon the payment of $12,500, with interest thereon as allowed by law.

That the plaintiffs have and recover of the defendant, Ætna Casualty and Surety Company, the sum of $12,500, upon the bond given by M. W. Gant, for his term of office ending the first Monday in December, 1922, to be discharged upon the payment of $12,500, with interest thereon as allowed by law.

That the plaintiffs have and recover of the defendant, Ætna Casualty and Surety Company, the sum of $15,000 upon the bond given by M. W. Gant, for his term of office ending the first Monday in December, 1926, to be discharged upon the payment of $14,970.20, with interest thereon as allowed by law.

That the plaintiffs have and recover of the defendant, Ætna Casualty and Surety Company, the sum of $25,000, upon the bond given by M. W. Gant, for his term of office ending the 9th day of October, 1930, to be discharged upon the payment of $25,000, with interest thereon as allowed by law.

That the plaintiffs have and recover of the defendants all the costs of this cause to be taxed by the clerk of the Superior Court of Guilford County, and there shall be taxed as a part of the costs of this cause an allowance to R. C. Carter, as an expert witness and a certified public accountant, the sum of $250; and C. W. Cloninger, as a handwriting expert witness, an allowance, in addition to his regular witness fees, the sum of $50.

All payments made by the defendant, Ætna Casualty and Surety Company, upon the judgment rendered against it hereunder, shall be entered as credits upon the judgment rendered against the defendant, M. W. Gant, hereunder."

The defendant M. W. Gant did not appeal from the above judgment rendered against him. The defendant Surety Company made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Attorney-General Brummitt and Assistant-Attorney General Nash; Brooks, Parker, Smith and Wharton for plaintiffs.

King, Sapp & King for defendant Ætna Casualty and Surety Company.

CLARKSON, J. The questions involved, as contended by defendant Surety Company, will be considered *seriatim.*

(1) Is this a summary proceeding such as is provided for by C. S., 356, or is it a civil action and should it have been commenced by summons, as directed by C. S., 475, and subject to the statutes otherwise controlling civil actions? We think this is a summary proceeding as is provided for by C. S., 356.

C. S., 475, provides for civil actions which shall be commenced by summons. We see no reason, from the facts in this case, why plaintiffs could not pursue the summary remedy under C. S., 356 or bring a civil action under C. S., 475. It was optional with plaintiffs.

The statute, C. S., 356, is as follows: "When a sheriff, coroner, constable, *clerk,* county or town treasurer, or other officer, collects or receives any money by virtue or under color of his office, and on demand fails to pay the same to the person entitled to require the payment thereof, the person thereby aggrieved may move for judgment in the Superior Court against such officer and his sureties for any sum demanded; and the court shall try the same and render judgment at the term when the motion shall be made, but ten days notice in writing of the motion must have been previously given."

The summary remedy against certain public officials has been provided for by statute practically ever since this has been a commonwealth, and held to be constitutional. *Anonymous case,* 2 N. C., 29; *Oats v. Darden,* 5 N. C., 500; *Broughton v. Haywood,* 61 N. C., 380.

In *Worth v. Cox,* 89 N. C., at p. 49, it is said: "The office is accepted and the bond given under the known conditions of the law that permits this direct and expeditious remedy in case of default, and these may be said to enter as elements into the contract itself. But it is enough to say that if any law can be deemed settled and not longer to admit of controversy, the practice under this, or a similar enactment for near a century past, has established its validity."

In *Lackey v. Pearson,* 101 N. C., at p. 654, we find: "The reasoning is not satisfactory to us, because it does not follow, when a choice of two modes of redress is given, that both may be used at the same time, but rather that an election of the one precludes a resort to the other. A familiar illustration is furnished in the statute which gives the summary remedy by a motion, after notice, against a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, who receives money by virtue or color of office, and on demand fails to pay the same to the person entitled, and not only against him, but the sureties to his official bond—The Code, sec. 1889 (C. S., 356)—and it has never been understood that this cumulative and optional remedy obstructed the

bringing a regular action on the bond, when the injured party preferred to have recourse to it." *Lyman v. Coal Co.,* 183 N. C., 581.

The defendant Surety Company in its answer set up certain reasons, and renews them by proper exceptions and assignments of error, why this proceeding should be dismissed, but if tenable we think they have been waived by the answer of defendant Surety Company setting up the plea of the statute of limitations and other defenses and demanding a jury trial. The record shows "The defendant, Ætna Casualty and Surety Company, in apt time asked the court to instruct the jury as follows," etc. The defendant Surety Company requested twenty-two prayers for instructions. The case was argued by defendants' counsel to the jury.

In *Motor Co. v. Reaves,* 184 N. C., at p. 263, we find: "We must hold upon principle and authority, that the defendants have made a full appearance in the case, and will be bound in all respects by the orders and decrees of the court. This result follows because they have not confined themselves to a special appearance for the purpose of raising the question of jurisdiction of the person, but have gone beyond that and asked for a hearing upon matters not relating solely thereto, but including other matters, as to the plaintiffs' legal rights and their own in regard to the policy of insurance, and still further, they have challenged the jurisdiction of the court as to the subject-matter of the action, and thereby waived any defect as to the jurisdiction of the person, the appearance being considered by all the authorities as a general one." *Scott v. Life Asso.,* 137 N. C., at p. 518-19; *School v. Peirce,* 163 N. C., at p. 429; *Hatch v. R. R.,* 183 N. C., at p. 628; *In re Rockford Produce Co.,* 275 Fed., 813; *Livingston v. Becker,* 40 Fed. (2d), 675; *Babbitt v. Dutcher,* 216 U. S., 102.

The defendant Gant is out of the picture. His attorney, speaking for him, said: "The defendant Gant will not resist a judgment—such judgment as may be rendered under your Honor's instructions." The jury rendered a verdict against him for $90,519.44. Defendant Surety Company contends no demand was made before issuing the notice and for this reason the action should have been dismissed. The clerk does not make this contention, he did not resist the judgment and has not appealed from it.

In *Furman v. Timberlake,* 93 N. C., at p. 67, we find: "The case of *S. v. McIntosh* (31 N. C., 307), was the first case in this State where the point was decided, and it was there expressly held that no demand was necessary, before bringing an action against the sheriff for money collected by him because as Nash said, 'The money here collected is *public money,* and for it no demand was necessary.'"

C. S., 956, in reference to public funds reported by the clerk to county commissioners, if required by order of the board of commissioners, has no application here.

The evidence was so overwhelming against the clerk that he waived everything and submitted to the judgment. Defendant Surety Company, surety for the clerk, now alone contests plaintiffs' right to recover this money admittedly misappropriated by the clerk.

The Surety Company contends that C. S., 356, contemplates only a notice and motion. "C. S., 353, 354 and 355, contains the provisions authorizing the plaintiff to bring a civil action. These, of course, require the issuance of a summons, the filing of a complaint, and the right to the defendants to file their pleadings and to have the issues made up and to be heard and determined by a jury. Under the authorities hereinbefore cited and the very wording of the statute itself, the record shows that the plaintiffs should have brought a civil action and that there was error in holding that plaintiff could maintain a summary proceeding under C. S., 356."

The theory upon which this case was tried, the Surety Company's general appearance and pleading, demand for jury trial, prayers for instructions, and argument by defendant's counsel to jury, waives any rights, if it had any, under the above sections of the Consolidated Statutes it now attempts to invoke.

(2) Were the moneys and effects sued for received by the defendant, M. W. Gant, either by virtue or by color of his office for and on behalf of the plaintiffs herein, and are his alleged defalcations within the terms of the bonds executed by appellant? We think so.

The statute, C. S., 356, under which this summary proceeding was instituted, expressly provides that the clerk shall be responsible when he "collects or receives any money by virtue or under color of his office."

The several bonds executed by the defendant and upon which judgment was rendered, each contains the following provision: "The said M. W. Gant shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands by virtue or color of his office."

The defendant Gant, as clerk, made up and certified the lists of pensioners to the State Auditor. This is not denied. He did it continuously for seventeen years. Warrants were sent by the State Auditor in accordance with this list, and semiannually each year, the defendant Gant, as clerk of the court, receipted for them and assumed the responsibility of paying them out to the parties entitled thereto, or of returning them as the State Auditor directed, within sixty days, if not called for. During

this time he received more than 950 such warrants for pensioners who were already dead (except two who were living), receipted for them, kept them, collected them, and misapplied them to his own use. He witnessed the forged signature of the payee on each warrant, as clerk of the Superior Court, as this was the only way, under the law, he could collect them. Plaintiffs contend that by virtue of his office he came into possession of these vouchers, and under color of his office he misappropriated and embezzled this fund. We think the plaintiffs' contentions correct. See chapter 92 "Confederate Homes and Pensions," N. C. Code, 1927, Anno. (Michie), C. S., 5168, n, o, q, r, s.

C. S., 5168(n) expressly provides that before any petitioner can receive a pension, he must file with the clerk of the Superior Court where he resides an application. C. S., 5168(o), provides it shall be the duty of the clerk to forward this application to the State Auditor; and C. S., 5168(q) definitely fixes the clerk of the court with the responsibility as follows:

"Pensions are payable in advance, and the State Auditor shall transmit to the clerks of the Superior Courts of the various counties warrants for pensioners for one-half of the yearly pensions between the first and fifteenth of December and for one-half of the yearly pensions between the 1st and 15th of June of each year. It shall be the duty of the clerk of the Superior Court to acknowledge to the Auditor the receipt of such warrants by the next mail after their receipt, to deliver or mail forthwith to each pensioner in his county his warrant, and to post in the courthouse a list of the pensioners to whom he has mailed or delivered warrants."

C. S., 5168(r) directs that the clerk of the court shall attest by his official signature the endorsement of the payee. C. S., 5168(s) designates further what the clerk shall do with pension warrants after the death of the pensioner.

The State Auditor testified that accompanying this list was a letter addressed to the clerk of the Superior Court in which it was said: "These warrants will not be paid by the State Treasurer unless presented within sixty days from their date. . . . Please return to us all warrants on hand undelivered and also return printed lists sent, indicating on these lists such changes as have occurred among the pensioners by death, removal or any other causes." The State Auditor further testified, "The form which I have in my hand has been used for thirty years."

C. S., 927, is as follows: "At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a Superior Court it is the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than

fifteen thousand dollars, payable to the State of North Carolina, and with a condition to be void if he shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities and shall diligently preserve and take care of all books, records, papers and property which have come or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are or thereafter shall be prescribed by law."

In *Thomas v. Connelly,* 104 N. C., at p. 346-7, construing this section, we find: "Such clerk is an important and responsible public officer, his duties are varied and serious, affecting the public and individuals. In a variety of ways moneys, rights, credits, securities and other things of value belonging to others go into his hands, and the law charges him with the same for such persons or for their benefit. The statute is careful to make the bond extend to and embrace within its scope and purpose, not only such 'moneys and effects' as may come into his hands by *'virtue'* of his office, but as well, and as certainly, to such as may so come by *'color'* thereof, and, likewise, to such additional *'duties of his office'* as may be prescribed by law after the execution of the bond. There seems to be a studied purpose to make the bond embrace and to create liability of the sureties thereto on account of all 'moneys and effects' that come into the hands of the clerk as such, whether they so come strictly according to law or not."

"Color of his office" has been construed to embrace all cases where the officer receives the money in his official capacity, when he is not authorized or required to receive the same. *Thomas v. Connelly, supra; Sharpe v. Connelly,* 105 N. C., 87; *Presson v. Boone,* 108 N. C., 78; *Smith v. Patton,* 131 N. C., 396; *Hannah v. Hyatt,* 170 N. C., at p. 638; *State ex rel. Gilmore v. Walker,* 195 N. C., 460; 59 A. L. R., 53 Anno. "Rule in N. C.," p. 73.

The statute is broad and comprehensive "if he shall account for and pay over, according to law, all *moneys and effects* which have come into his hands by *virtue or color of his office,"* etc. The surety bond of defendant surety company is in the language of the statute. The pension warrants came into the clerk's hands by virtue or under color of his office. They were things of value belonging to others. As clerk, by express statutory authority, he had these warrants and was a trustee to perform a solemn duty. The possession enabled him to betray this trust by forging the warrants and misappropriate and embezzle the funds. We think the Surety Company is liable under the facts and circumstances of this case, and the statute applicable. The plaintiffs

were entitled to require the payment of the warrants sent the clerk. This trust was betrayed by the clerk, and plaintiffs were aggrieved by the nonpayment and are entitled to bring this action, as they were entitled to have these warrants of the dead soldiers returned to them and responsible to the two who were alive and whose names were forged and funds misappropriated and embezzled. We think all this was done by virtue or color of his office.

(3) Did plaintiff undertake to join as one cause of action five separate and distinct causes of action, and undertake to recover as if the five bonds alleged constitute one entire transaction, and should said action have been dismissed? We think not.

It is well settled that where a defaulting clerk succeeds himself, and has given the required bond for each term, with the same surety, and continues his defalcation, the surety is liable only to the amount of the bond for each term. *S. v. Martin,* 188 N. C., 119.

In *Smith v. Patton,* 131 N. C., at p. 397, we find: "It is settled in this State that the bond of a public officer is liable for money that comes into his hands as an insurer, and not merely for the exercise of good faith . . . (citing authorities). Bonds of administrators, executors, guardians, etc., only guarantee good faith," citing authorities. *Marshall v. Kemp,* 190 N. C., at p. 493; *Gilmore v. Walker, supra,* at p. 464; *Indemnity Co. v. Corp. Com.,* 197 N. C., 562.

The court below clearly charged that the Surety Company is liable only to the amount of the bond for each term, and further charged: "It is admitted, in this connection, gentlemen of the jury, that there were five bonds executed, and that those bonds have a limitation, and in no event can the plaintiffs recover more than the limitation fixed in the bond. In some of these instances the principal and damage demanded, or contended for by the plaintiffs, exceed the amound of the bond. Although the plaintiffs may establish that much indebtedness by Gant, they cannot recover of the bondsmen more than the face of the bond." *Supply Co. v. Plumbing Co.,* 195 N. C., 629.

(4) Are the different amounts which were received by the defendant Gant six years prior to the commencement of this action barred by the statute of limitations, as a matter of law, upon these allegations and evidence, and should the trial judge have instructed the jury to that effect? We think not.

The facts as disclosed in the record establish one of the most flagrant cases of official misconduct and successful fraudulent concealment of the facts that has occurred in the annals of our Court. The defendant Gant, first appointed clerk by a judge of the Superior Court in 1913, on account of his high standing and reputed character, was continually renominated and reëlected every four years, and was still in office in

1930. There is no evidence in the record to disclose that any one ever questioned his integrity or suspected his honesty, and even at the trial he filed an answer signed by a number of reputable lawyers in which it was avowed that he had been guilty of no wrongdoing or fraudulent act in connection with these matters. Even the banks cashed more than 950 warrants, extending over a period of seventeen years, upon his certificate of forged endorsement, without even suspecting a fraud. He kept all the records. The local pension board trusted him to make up the rosters; he certified semiannually, under the seal of his office, to their correctness to the State Auditor, and the warrants were presented for payment to the State Treasurer, who, seeing that they appeared to be regular and that the endorsements were witnessed by the clerk, as provided by law, paid them without question. The evidence in this case was all to the effect that prior to about ninety days before the summary remedy was resorted to by plaintiffs against Gant and the Surety Company, that no suspicion of wrongdoing was ever thought of against Gant.

The periods prescribed for the commencement of actions in matters of this kind: C. S., 439. "Within six years—(1) Upon the official bond of a public officer."

C. S., 441: "Within three years an action—(1) Upon a contract obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections. (9) 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 and 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." *R. R. v. Hegwood*, 198 N. C., at p. 317.

It is contended by defendant Surety Company that C. S., 441(9) was not pleaded. The statute was not referred to in the pleading, but the facts set forth and the court in its charge fully explained the statute to the jury and no exception was taken by the Surety Company. The

court charged: "It also provides, gentlemen of the jury, that an action brought based on fraud shall be brought within three years of the perpetration of the fraud, or within three years after the discovery of the fraud, provided due diligence has been exercised. . . . The court charges you that if in this case you gentlemen of the jury shall find from the evidence and by its greater weight that the said M. W. Gant received and misapplied pension checks and warrants and fraudulently concealed the facts of such misapplication of such warrants, and if you shall further find from the evidence and by its greater weight that the plaintiffs did not and could not, in the exercise of proper diligence or reasonable business prudence have discovered such fraud, that then the statute of limitations did not begin to run in favor of the defendant, Ætna Casualty and Surety Company, in this case until such fraud was actually discovered, and if you shall further find from the evidence and by its greater weight that the plaintiffs did not discover such fraud and could not by the exercise of proper diligence or reasonable business prudence have discovered such fraud until within about ninety days before the institution of this proceeding, then the plea of the statute of limitations by the defendant, Ætna Casualty and Surety Company, does not avail it, and the court charges you to answer the issues 'No' (referring to them seriatim)." The issues on this aspect were as follows: "Are said amounts, or any part thereof, barred by the statute of limitations, as alleged in the answer of the defendant, Ætna Casualty and Surety Company?"

From the issues submitted, the charge of the court in reference to this matter, we think defendant Surety Company was not prejudiced.

In 17 R. C. L., sec. 223, at p. 866, speaking to the subject: "A surety's liability is measured by that of his principal and where, owing to the concealed fraud of the latter, the statute has not commenced to run, the surety will not be permitted to invoke the protection of the statute on the ground that he was innocent of the fraud. Therefore, where, because of fraud of a principal in the concealing and misappropriation of money, the statute does not run against him, it does not run against the sureties on his bond. The reason in such cases seems to be that the sureties guarantee the good conduct and faithfulness of the principal in the discharge of the duties of his office, and that in equity and good conscience they should not be exempt from liability for his misconduct and peculations, when by fraudulent concealment he has prevented discovery until the time limited by the statute to bring action has expired. Any other construction would make the very frauds against which the sureties covenanted the means of relief from liability. The bond in such case, instead of securing the faithfulness of the officer, would tend to promote on his part skillfully and fraudulently concealed pecula-

tions, and would be an inducement to fraud." Jones' Commentaries on Evidence, Vol. II, p. 1027; *Waugh v. Guthrie Gas, etc., Co.,* 131 Pac., 174, L. R. A., 1917-B, 1253; *Bailey v. Glover,* 21 Wall., 342, 22 L. Ed., 636; *Reynolds v. Hennessy,* 17 R. I., 169, 23 Atl., 639.

(5) Should the trial judge, before whom the motion herein was made, either have dismissed this action or made an order consolidating it with the action then pending in the same court entitled, "State of North Carolina, on relation of A. Wayland Cooke, clerk of the Superior Court of Guilford County, suing in behalf of itself and all persons having claims against Mason W. Gant, on account of moneys, funds and securities received by him during his tenure of the office of clerk of the Superior Court of Guilford County, by virtue or under color of his office as such cleck, *v.* Mason W. Gant and his wife, Minnie D. Gant, and Ætna Casualty and Surety Company?"

(6) Can plaintiffs maintain this alleged summary proceeding in the same court and at the same time the creditors' bill aforesaid was pending, thereby appropriating to the payment of its indebtedness the greater part of the penalty of the bonds executed by appellant, the effect of which is to have itself adjudicated a preferred creditor and to deprive all other creditors in the same class from benefiting *pro tanto* in the bonds given as much for their protection as for that of plaintiffs?

The contention of the Surety Company is that an action subsequently instituted by A. Wayland Cooke, as clerk of the Superior Court, against Gant, for moneys received by him to which the present clerk was entitled should have been consolidated with this summary proceeding. From the record, it does not appear that Cooke made any motion asking that the two actions be consolidated, although he was present in court during the progress of this trial. Neither did the defendant Gant make any such motion, nor the defendant Surety Company. It was a ground of defendant Surety Company on its motion to dismiss, but it made no motion to consolidate, nor did it set up in its answer another action pending between the same parties. If the Surety Company ever had any rights on this aspect, we think the matter has been waived.

C. S., 511: "The defendant may demur to the complaint when it appears upon the face thereof, either that: (3) There is another action pending between the same parties for the same cause."

C. S., 517: "When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer." Where any action is pending for the same cause and between the same parties, which fact does not appear on the face of the complaint, the objection may be taken by answer. *Cook v. Cook,* 159 N. C., 47; *Allen v. Salley,* 179 N. C., 147. It is a ground of demurrer, if it appears on the face of the complaint. C. S., 511(3),

supra. Defect of parties which does not appear on the face of the complaint must be taken advantage of by answer, otherwise it will be deemed as waived. *Lunn v. Shermer,* 93 N. C., 164, 167.

C. S., 518: "If objection is not taken either by demurrer or answer the defendant waives the same, except the objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action."

The Governor of the State, the Attorney-General and the Auditor, who compose the Pension Board, were diligent and vigilant, as it was their duty to be in the matter, and entitled to commendation.

A case involving very similar facts to this was approved by the Supreme Court of the United States in *Secretary et al. v. Chaloner's Executors,* 1st Law Ed., 696. The *Chief Justice,* speaking for the Court in this case, said: "It is an established principle, that the person who first sues and obtains judgment on an official bond is entitled to take the whole of the penalty, if his demand amounts to so much, in exclusion of every other claimant." And further: "It is a plain principle in equity that whenever a man who had originally a legal remedy impairs it by his own neglect or omission, he shall be postponed to another more vigilant claimant; and that the Legislature entertained the same equitable sentiment may be collected from the relief which they afforded to the sureties of an auctioneer under similar circumstances." In this case a public auctioneer was indebted to various people, including the State, and the Attorney-General instituted a peremptory action in the name of the State and recovered judgment while other creditors waited. This case is quoted with approval and the principle elaborated upon in 260 Pac., 152.

(7) Did the trial judge, in ruling the defendants into trial immediately after issues joined, deny appellant a legal right given it by C. S., 557, amended by chapter 54, Public Laws of 1923, and so declared in *Cahoon v. Everton,* 187 N. C., 369? We think not. This is a summary remedy under C. S., 356. Notice and complaint were filed on defendant, as required by the statute. The statute plainly says, "And the court shall try the same and render judgment at the term when the motion shall be made, but ten days notice in writing of the motion must have been previously given."

(8) Was there an abuse of discretion on the part of the trial judge in ruling the defendants into trial at the time and under the facts and circumstances then existing? We think not.

The principle is set forth in *S. v. Sauls,* 190 N. C., at p. 814: "The modern application of the rule has thus been summarized: When the discretion of the trial judge is exercised with a reasonable degree of judicial acumen and fairness, it is one which the higher courts are loath

to review or disturb. The mere fact that the case was disposed of with unusual dispatch is not an ear mark of error. The presiding judge must be to a certain extent free to secure a speedy and expeditious trial, when such speed and expedition are not inconsistent with fairness. While it is not necessary, to constitute abuse, that the court shall act wickedly or with intentional unfairness, it is essential to show the commission of a clear or palpable error, without the correction of which manifest injustice will be done. Familiar with all the attendant circumstances, the judge has the best opportunity of forming a correct opinion upon the case presented and has the benefit of a presumption in favor of his action. 16 C. J., 452, sec. 822(2)." *Wolf v. Goldstein,* 192 N. C., 818.

(9) Did his Honor violate C. S., 564, and was there error in the evidence admitted and the peremptory instructions given to the jury as to the different amounts recovered under the different surety bonds executed by appellant? We think not.

C. S., 564, is as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

The matter complained of was a matter of mathematical calculation. There could be no dispute about the amounts. In the court below stating the undisputed amounts, we can see no harm done or prejudicial or reversible error.

In *Williams v. Lumber Co.,* 118 N. C., at p. 935, is the following: "The next exception was that the judge made a calculation 'as per alleged contract price and handed it to the jury,' telling them to make their own calculation, that they were not bound by his, that they must find the amount from the evidence, etc., as we have already stated. This seems harmless, and we understand it is frequently done by the judge without prejudice to any one."

(10) Is appellant liable for twelve per cent interest from the date of the different defalcations on the part of M. W. Gant, or from the time plaintiff demanded payment from the defendant, or from the said M. W. Gant, and refusal to pay on the part of said defendants, or either of them?

The appellees waived the recovery of this 12 per cent from the actual date of each defalcation, and his Honor stated to the jury that "the court is authorized to state that the State in this instance, however, does not demand the 12 per cent from the date of the misapplication, but does demand it from the date of the expiration of each term of

office." This was a concession against the interests of the State and in favor of the defendant bonding company. If the 12 per cent had been actually calculated upon each voucher as when misapplied, the amount recoverable against the bonding company would have been increased over $5,000.

C. S., 357, immediately following C. S., 356, authorizing this summary remedy on official bonds, declares: "When money received as aforesaid is unlawfully detained by any of said officers, and the same is sued for in any mode whatever, the plaintiff is entitled to recover, besides the sum detained, damages at the rate of 12 per centum per annum from the time of detention until payment."

The present *Chief Justice,* in *S. v. Martin,* 188 N. C., at p. 122, in a well considered opinion, conclusively settles this question against the contentions of appellant. It is there said: "As against the principal, E. E. Martin, the plaintiffs or relators are entitled to recover, in addition to the several sums found to be detained by him, damages at the rate of 12 per cent per annum from the time of detention until paid. (C. S., 357). . . . If the judgments against the principal for defalcations or misappropriations during any one term, plus damages at the rate of 12 per cent per annum, do not exceed the penalty of the bond given for that term, the relators would be entitled to collect out of the surety the full amount of their judgments against the principal. But if the bond given for any one term be not sufficient to pay such judgments in full, the pro rata interest of each relator would be determined on the basis of the principal amount recovered plus damages at the rate of 12 per cent per annum from the time of detention by the officer up to date of settlement."

(11) Can the plaintiff recover of the defendant the sum of twenty-five thousand dollars ($25,000) upon the bond executed by it covering the term of M. W. Gant, which ended 9 October, 1930? We think so.

C. S., 927, *supra,* is directory and prescribes the penalty of the clerk's bond of not less than $10,000 and not more than $15,000. The bond given was $25,000. The Surety Company received the premium on the $25,000 bond and is estopped to deny its validity. *S. v. Taylor,* 72 N. W., 409; *U. S. v. Hodson,* 10 Wall., 395; 21 R. C. L., sec. 200, p. 1160. C. S., 324 and 327 do not militate against the position here taken. *Commissioners v. Magnin,* 86 N. C., 286.

"No officer of the government has a right by color of his office to require from any subordinate officer as the condition of his holding his office that he should execute a bond with a condition different from that prescribed by law. That would be not to execute it, but to supersede the requisites of the law." *U. S. v. Tingey,* 8 L. Ed., 66.

Gant, the clerk, gave the bond voluntarily, the defendant Surety Company signed it as surety voluntarily. Both are presumed to know the statutes on the subject. After receiving these premiums for years, the Surety Company cannot now repudiate its solemn obligation and shirk its responsibility.

We see no error in the issues submitted by the court below. *Erskine v. Motor Co.,* 187 N. C., 826; *Greene v. Bechtel,* 193 N. C., 94.

The arguments and briefs by the able and learned counsel on both sides in this case were elaborate, well prepared and helpful. The case involving so important a matter was thoroughly presented by counsel on both sides. In going over the long record, we find that the court below tried the case with unusual patience, care and ability. The Surety Company is an insurer in a matter of this kind. It received the premiums on these bonds for long years to protect the plaintiffs. The Surety Company was paid for the liability it assumed, and now must make good the breach made by its principal, who has admitted his liability in the sum of $90,519.44. The appeal to this Court is by the Surety Company alone. We see nothing in this record which the Surety Company can complain of. It has had its day in court. It demanded a jury trial, they heard the defendant's arguments, a fair and impartial charge was given by the court below to the jury, they have found all the issues against the Surety Company and in favor of plaintiffs, and rendered a verdict against the Surety Company for $66,184.92.

From the record we can see no error in law. The judgment of the court below is

Affirmed.

F. M. GLENN ET AL. v. BOARD OF COUNTY COMMISSIONERS OF DURHAM COUNTY ET AL.

(Filed 2 July, 1931.)

1. Taxation A b—County may not levy taxes in excess of fifteen cents on the hundred-dollar valuation for general fund.

Within the limitations of our Constitution, Article V, section 6, providing that the total State and county tax on property shall not exceed fifteen cents on the one hundred-dollar valuation, the county commissioners of the respective counties may levy a tax for necessary expenses without a vote of the people or special legislative authority.

2. Taxation A a—County may levy tax for special, necessary expense with speciaf approval of General Assembly without vote of people.

Taxes levied for a special purpose by a county with special legislative approval and for necessary county expenses are valid without a vote of the people.

3. Same—Where tax is not for necessary expenses, approval of voters is necessary whether for special purpose or not.

For purposes other than necessary expenses, whether special or not, taxes may not be levied by a county either within or in excess of the limitation fixed by our Constitution, Article V, section 6, except by a vote of the people under special legislative authority. Article VII, section 7.

4. Taxation A b—Where debt is created for general expense its funding is also for general expense and not for special purpose.

The issuance of bonds by a county to refund a debt arising from a deficiency in the general fund for general county expenses may not be declared to be for a special purpose within the meaning of the Constitution, but where the original debt was incurred for a special purpose for a necessary expense its funding may be declared to be for a special, necessary expense because of its original character. Special purposes within the constitutional provisions discussed by STACY, C. J.

5. Same—Ch. 81, Public Laws 1927, as amended by ch. 60, Public Laws 1931, does not provide for tax for general fund in excess of limitation.

Our statute permitting a county to refund its indebtedness incurred prior to 1 July, 1931, provides that "nothing herein contained shall be construed as authorizing an unlimited tax for the payment of bonds not issued for a special purpose," and the statute is declaratory of the law as construed by our courts, and confines the refunding of debts to those not requiring a tax rate in excess of the constitutional limitation for general county expenses or those created for a special, necessary purpose with the special approval of the General Assembly.

6. Same—General Assembly may not authorize tax for general fund in excess of the constitutional limitation.

The General Assembly is without power to suspend the constitutional provision limiting the tax rate for general county expenses by declaring the issuance of bonds to refund debts incurred for general county expenses to be for a special purpose by reason of financial depression, and to the extent a statute attempts to violate the constitutional provision it is void.

7. Statutes A e—Of two possible constructions of a statute the courts will adopt that one which is constitutional.

Where an act of the General Assembly is susceptible of two interpretations, one constitutional and the other not, the courts will adopt that interpretation which would be constitutional and reject the other, the presumption being in favor of the validity of the act.

8. Taxation A b—Ch. 60, Public Laws 1931, authorizes funding of debts incurred for special, necessary expenses or within limitation.

Where a statute authorizes the issuance of bonds by a county for funding indebtedness now outstanding or incurred before 1 July, 1931, and declares that taxation for the payment of such funding bonds shall constitute a special purpose, it will be interpreted in the light of the Constitution, and it authorizes the funding of debts incurred for purposes properly denominated special which are also necessary expenses of the county, but it does not authorize the funding of debts incurred to meet a de-

ficiency in the general county fund when it would be necessary to exceed the constitutional limitation on the tax rate for their payment. Article V, section 6.

9. Same—Whether tax is for general or special purpose is for determination of courts.

Whether a tax levy authorized by statute is for a special purpose is a question including both law and fact, and is for judicial and not for legislative determination.

ADAMS, J., concurring.

APPEAL by defendant from *Frizzelle, J.*, at Chambers, Durham, N. C., 11 June, 1931. From DURHAM.

Controversy without action submitted on an agreed statement of facts.

The plaintiff, a resident taxpayer of Durham County, sues on behalf of himself and all others similarly situated who may wish to make themselves parties, to test the right or to enjoin the defendants from issuing, on 1 July, 1931, certain funding bonds of Durham County in the amount of $65,000 "for the purpose of funding, redeeming and paying a like amount of indebtedness created by said county for its current necessary expenses, without enumeration of any particular purpose for which such indebtedness was created, the same being evidenced by tax anticipation notes of said county now outstanding, and to cause such bonds to recite on their face that they and the interest thereon are payable from an unlimited ad valorem tax upon all taxable property of said county. . . . That all of the notes hereinabove mentioned were issued in anticipation of the collection of the taxes and other revenue for the fiscal year ending 30 June, 1931, $50,000 of the proceeds thereof having been paid into the county operating expense fund and expended for such necessary current operating expenses, and $15,000 of such proceeds having been used for the payment of $15,000 revenue anticipation notes issued for necessary current operating expenses in the preceding fiscal year."

The defendants are proceeding under "The County Finance Act," ch. 81, Public Laws 1927, as amended by the "Local Government Act," ch. 60, Public Laws 1931, and they contend that the issuance of the bonds in question for funding the county "indebtedness now outstanding or incurred before 1 July, 1931," and the recital in said bonds to the effect "that the tax for their payment is unlimited" are authorized by said statutes, particularly section 41 of the former as amended by section 60 of the latter.

It is agreed that if, under these statutes, an unlimited tax may be levied to pay the interest on said bonds and the principal when due, everything necessary to bring this about has been done, *i. e.*, all the requirements of the law have been observed on the part of the defendants.

It further appears that "Durham County levied in the fiscal year ending 30 June, 1931, and also in the fiscal year ending 30 June, 1930, a tax of fifteen cents on the one hundred dollars of taxable property for said fund known as County Operating Expense Fund, which fund is for its necessary current operating expenses, but has been unable to collect sufficient taxes and other revenue for the payment of all of its necessary current operating expenses or for the payment of any of said notes."

On the facts agreed the trial court enjoined and restrained the defendants from inserting in the advertisement of sale any statement that said bonds and the interest thereon will be payable "from an unlimited tax upon all the taxable property in said county, or that the face of said bonds will so recite."

From this ruling and order the defendants appeal, assigning error.

Victor S. Bryant for plaintiffs.
R. P. Reade for defendants, and Chester B. Masslich of counsel.
John W. Hinsdale amicus curiæ.

STACY, C. J., after stating the case: The essence of what the defendants propose to do, and the ultimate effect of their proposal is, to issue bonds of Durham County to meet a deficiency of $65,000 in the county operating expense fund, which deficiency, without enumerating the several items composing it, was occasioned by the inability of the county authorities to collect or to realize sufficient taxes out of the maximum constitutional levy for said fund. The remedy suggested in *French v. Commissioners,* 74 N. C., 692, to meet such a situation (elaborated in later cases) is, either to reduce expenditures, if the taxes cannot be collected, or, if the tax for any of the items going to make up the general levy be required "for a special purpose," which is also a necessary expense of the county, to apply to the Legislature for its special approval to add an increased levy for such special purpose. *Mayo v. Commissioners,* 196 N. C., 15; *Owens v. Wake County,* 195 N. C., 132; *Commissioners v. Assell,* 194 N. C., 412 (on rehearing, 195 N. C., 719); *R. R. v. Reid,* 187 N. C., 320; *R. R. v. Commissioners,* 178 N. C., 449; *Davis v. Lenoir,* 178 N. C., 668.

The defendants contend that this latter course has been pursued in the instant case, while a contrary view is taken by the plaintiff.

Special approval of the General Assembly is given in section 8 of "The County Finance Act" to the issuance of county bonds and notes for certain purposes designated therein as special. And in section 41 of the same act it is provided that the full faith and credit of the county shall be deemed to be pledged for the punctual payment of the

bonds and notes issued thereunder, including bonds for which special funds are provided, etc. This section was amended by section 60 of the Local Government Act by adding at the end thereof the following:

"'Nothing in this section shall be construed as authorizing an unlimited tax for the payment of bonds not issued for a special purpose within the meaning of section six of article five of the Constitution of North Carolina. It is the intention of this act, however, to authorize the issuance of funding and refunding bonds and notes as herein provided in cases where taxes for their payment is limited by the Constitution, as well as in other cases. The General Assembly hereby declares that an emergency exists by reason of the present extraordinary financial condition of the counties of this State, and hereby gives its special approval to the levying of taxes to the fullest extent permitted by the Constitution for the purpose of paying bonds and notes issued hereunder to fund or refund or renew indebtedness now outstanding or incurred before July first, nineteen hundred and thirty-one, and hereby declares that the payment of such bonds and notes constitutes a special purpose.'"

The pertinent constitutional provisions on the subject are as follows:

Article V, section 6: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of public schools of the State for the term required by article nine, section three, of the Constitution: *Provided further,* the State tax shall not exceed five cents on the one hundred dollars value of property."

Article VII, section 7: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

It is established by the authoritative decisions interpreting these sections of the Constitution:

1. That within the limitations fixed in Article V, section 6, the county commissioners of the several counties may levy taxes for the necessary expenses of the county without a vote of the people or special legislative approval. *Henderson v. Wilmington,* 191 N. C., 269; *Commissioners v. Commissioners,* 165 N. C., 632; *Guire v. Commissioners,* 177 N. C., 516; *Hargrave v. Commissioners,* 168 N. C., 626; *Black v. Commis-*

sioners, 129 N. C., 121; *Herring v. Dixon,* 122 N. C., 420; *Vaughn v. Commissioners,* 117 N. C., 429; *Long v. Commissioners,* 76 N. C., 273.

"Taxation for State and county purposes combined cannot exceed the constitutional limitation for their necessary expenses and new debts. . . . If what are often miscalled the 'necessary expenses' of a county exceed the limitation prescribed by law, the necessity cannot justify the violation of the Constitution." *French v. Commissioners,* 74 N. C., 692.

2. That for special purposes and with the special approval of the General Assembly, the county commissioners of the several counties may exceed the limitations in Article V, section 6, without a vote of the people; provided the special purposes so approved by the General Assembly are for the necessary expenses of the county. *R. R. v. Lenoir County,* 200 N. C., 494; *R. R. v. Cherokee County,* 195 N. C., 756; *R. R. v. Forbes,* 188 N. C., 151; *R. R. v. McArtan,* 185 N. C., 201; *Parvin v. Commissioners,* 177 N. C., 508; *Pritchard v. Commissioners,* 160 N. C., 477; *Smathers v. Commissioners,* 125 N. C., 480 (defendant's appeal, 487); *Tucker v. Raleigh,* 75 N. C., 267; *Brodnax v. Groom,* 64 N. C., 244.

Speaking to the subject in *McCless v. Meekins,* 117 N. C., 35, *Montgomery, J.,* delivering the opinion of the Court, says: "We have already said that the commissioners would have no right to issue bonds without a popular vote unless for necessary expenses. Neither would the Legislature have the power to authorize them to do so. It seems from the perusal of the act that power was intended to be given to the commissioners to issue bonds for any and all indebtedness of the county, whether incurred for necessary expenses or not. This power will not be conferred by the legislative power, for such an attempt would be directly in conflict with Article VII, section 7, of the Constitution. But we see no reason why the commissioners should not be allowed, under the act, to fund the county debt and issue bonds for that part of same which was contracted for necessary expenses, without a popular vote, even if they had not the power given to them expressly under the Constitution and other laws than the act of 1889. An act of the Legislature can be constitutional in part and in part unconstitutional. *McCubbins v. Barringer,* 61 N. C., 554; *Johnson v. Winslow,* 63 N. C., 552."

"Such 'special purposes' must be of the ordinary purposes of the county, such as that to build a courthouse, a public jail, or an important bridge, as to which it may be deemed necessary to create a special fund"—*Merrimon, C. J.,* in *Jones v. Commissioners,* 107 N. C., p. 264.

3. That for purposes other than necessary expenses, whether special or other, taxes may not be levied by the commissioners of any county,

either within or in excess of the limitations fixed by Article V, section 6, except by a vote of the people under special legislative authority. *Briggs v. Raleigh,* 195 N. C., 223; *Jones v. New Bern,* 184 N. C., 131; *Herring v. Dixon, supra; Moose v. Commissioners,* 172 N. C., 419; *R. R. v. Commissioners,* 148 N. C., 220.

4. That a tax "to supplement the general county fund" *(R. R. v. Reid,* 187 N. C., 320), or "to provide for any deficiency in the necessary expenses and revenue of said respective counties" *(R. R. v. Commissioners,* 178 N. C., 449), or "for the purpose of taking up a note in bank made by the predecessor board and other current expenses" *(R. R. v. Cherokee County,* 177 N. C., 86), or to meet "the other current expenses of said county in said years" *(Williams v. Commissioners,* 119 N. C., 520), or "to borrow money for the necessary expenses of the county and provide for its payment" *(Bennett v. Commissioners,* 173 N. C., 625), is not for a special purpose within the meaning of the Constitution.

When a debt is originally created for a purpose properly denominated special, which is also a necessary expense of the county, its funding or refunding may be declared a special purpose because of its initial character *(Barbour v. Wake County,* 197 N. C., 314), but when the debt arises from a deficiency in the general county fund, its funding or refunding would not be "for a special purpose" in the constitutional sense. Its creation comes from a deficiency in the general fund, and nothing else appearing, its funding would be to make up that deficiency. To say that the funding of tax-anticipation notes, given for money borrowed to meet the general expenses of the county, or to supplement the general county fund, may itself be declared a special purpose would be to convert a note given for one purpose into another and special one by the simple expedient of renewing it and changing its name. When a note is given for one purpose, ostensibly its renewal would be for the same purpose. This is the rationale of the decisions on the subject.

Nor does it appear that the Legislature had any different object in view. It says: "Nothing in this section shall be construed as authorizing an unlimited tax for the payment of bonds not issued for a special purpose." The statute provides that funding and refunding bonds may be issued where taxes for their payment are limited by the Constitution, as well as in other cases. But this is only declaratory of the law as heretofore announced in a number of cases, notably *Bennett v. Commissioners, supra,* where *Hoke, J.,* speaking for a unanimous Court, says: "True, we have held in this jurisdiction that when county commissioners have power to contract a debt or to provide for valid debts already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation, the right of taxation,

therefore, being restricted to the constitutional limitations as to debts incurred since the same was adopted. *Commissioners v. Webb,* 148 N. C., 120; *McCless v. Meekins,* 117 N. C., 34; *French v. Commissioners,* 74 N. C., 692; *Johnston v. Commissioners,* 67 N. C., 103."

The General Assembly further declares that an emergency exists by reason of the present extraordinary financial condition prevailing in the counties of the State and gives its special approval for the levying of taxes "to the fullest extent permitted by the Constitution" for the purpose of paying bonds and notes issued to fund or refund or renew indebtedness of the counties now outstanding or incurred before 1 July, 1931, and declares that the payment of such bonds and notes shall constitute a special purpose. But this does not purport to convert notes issued for a deficiency in the general county fund into notes for special purposes. If it does, then to this extent the act runs counter to the organic law, for the Legislature is without power to suspend the Constitution even in times of stress. *Dixon v. Commissioners,* 200 N. C., 215. To hold otherwise would be to permit by indirection that which is prohibited from direct accomplishment. The Constitution is the protector of all the people. It stands as their shield and buckler in fair weather and foul; and in periods of panic and depression, it is to them "as the shadow of a great rock in a weary land, a shelter in the time of storm." The observations of *Reade, J.,* in *R. R. v. Holden,* 63 N. C., 410, at p. 418, which were pressed on the argument, are not at variance with this position, but are accordant herewith. When an act of the Legislature is susceptible to two interpretations, one constitutional and the other not, the courts will adopt the former and reject the latter, as the presumption is in favor of its validity. *Green v. Asheville,* 199 N. C., 516, 154 S. E., 852; *Hammond v. McRae,* 182 N. C., 747, 110 S. E., 102; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

It is true, the act provides for funding "indebtedness now outstanding or incurred before 1 July, 1931," and declares that the payment of such funding bonds and notes shall constitute a special purpose. Interpreted in the light of the Constitution, this means that debts created in prosecuting purposes properly denominated special, which are also necessary expenses of the county, may be funded and taxes levied to pay said funding bonds as "for a special purpose," while those levied to pay the bonds issued to meet a deficiency in the general county fund, would fall within the limitations of Article V, section 6. *Bennett v. Commissioners, supra; McCless v. Meekins, supra.*

The cases of *Wolfe v. Mt. Airy,* 197 N. C., 450, *Hartsfield v. Craven County,* 194 N. C., 358, *Jones v. Commissioners,* 137 N. C., 579, *Edwards v. Commissioners,* 70 N. C., 571, and *Sedberry v. Commissioners,* 66 N. C., 486, the last three cited and relied upon by defend-

ants, are not at variance with anything said herein, nor do they announce a contrary view. In these cases the right to fund certain valid obligations was upheld, but the question of the limitation of the tax as fixed by the Constitution was not involved. So in the instant case the right of the authorities to fund the present indebtedness is not mooted. This is conceded. The point is: May an unlimited tax be pledged and levied for the payment of said funding bonds? We think not. *Pritchard v. Commissioners,* 160 N. C., 476.

As a "special purpose" for which an unlimited tax may be levied with the special approval of the General Assembly and without a vote of the people must also be a "necessary expense" of the county, which latter includes both law and fact, and, as used in the Constitution and municipal resolutions, is a matter for judicial, rather than legislative, determination *(Henderson v. Wilmington, supra),* it follows that what constitutes a special purpose within the meaning of the Constitution, must ultimately be decided by the courts. *Storm v. Wrightsville Beach,* 189 N. C., 679; *Hightower v. Raleigh,* 150 N. C., 569; *Wharton v. Greensboro,* 146 N. C., 356; *Fawcett v. Mt. Airy,* 134 N. C., 125; *Black v. Commissioners,* 129 N. C., 121; *Long v. Commissioners,* 76 N. C., 273.

The expressions "current necessary expenses" and "necessary current operating expenses," used in the agreed statement of facts, were doubtless induced by similar expressions in some of our opinions, notably *Black v. Commissioners, supra,* where "current necessary expenses of the county" and "floating indebtedness of the county" were used by the writer of the opinion; but these expressions are neither determinative of the legal question now presented, nor do they furnish a cue to its solution.

We think the instant case falls within the principles stated in the fourth paragraph above, to the effect that, in substance, the effort is to supplement the general county fund, or to provide for a deficiency therein, or to take up a note in bank and other current expenses, or to borrow money for the necessary expenses of the county and provide for its repayment, which we have said was not "for a special purpose" within the meaning of Article V, section 6, of the Constitution. The judgment is accordingly

Affirmed.

ADAMS, J., concurring: The law as I understand it is correctly stated in the opinion delivered by the *Chief Justice,* and for this reason I should perhaps make reference to a paragraph in the appellants' brief. It is there said that the decision in *R. R. v. Reid,* 187 N. C., 320, is authority for the position that a tax for the "ordinary expenses" of a county may be a tax for a "special purpose." The pertinent part of the

opinion in that case is in these words: "Now, if we apply the statement of *Chief Justice Marshall,* that 'every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered' *(U. S. v. Burr,* 25 Fed. Cases, p. 165), we must conclude that, although a tax 'to supplement the general county fund' is not a tax for special purpose, neither of the decisions cited by the plaintiff sustains the contention that the maintenance of the county home or the building and repair of bridges is not such special purpose as comes within the purview of the sixth section of Article V. On the contrary, while the construction and maintenance of the county home and the building and repairing of bridges may be considered a part of the ordinary expenses of the county, to be defrayed out of the general county revenue when sufficient for these purposes, still a tax levied under a special or general act for the specific and exclusive purpose of constructing, maintaining or repairing courthouses, jails, county homes, highways, or bridges is deemed to be levied for a special purpose. Therefore, if the tax of 3 cents was levied to provide for constructing, repairing or maintaining bridges or the county home, the purpose was special."

This language, it seems to me, is not susceptible of the appellants' liberal construction. The meaning is this: If a county had sufficient money or "revenue" on hand to construct or maintain a county home, or to build or repair a bridge, the cost may be paid out of such money or "revenue" just as the ordinary expenses of the county are paid *(Adams v. Durham,* 189 N. C., 232); and a tax levied by a county for the specific and exclusive purpose of constructing, maintaining or repairing courthouses, jails, county homes, highways or bridges is deemed to be levied for a special purpose, these purposes and others of like character involving "necessary expenses" within the meaning of Article VII, section 7, of the Constitution. *Herring v. Dixon,* 122 N. C., 420; *Jones v. Commissioners,* 137 N. C., 579, 598; *Crocker v. Moore,* 140 N. C., 432; *Hendersonville v. Jordan,* 150 N. C., 35; *Commissioners v. Road Commissioners,* 165 N. C., 632; *Keith v. Lockhart,* 171 N. C., 451; *Moose v. Commissioners,* 172 N. C., 419; *Woodall v. Highway Commission,* 176 N. C., 377; *Parvin v. Commissioners,* 177 N. C., 508; *Ketchie v. Hedrick,* 186 N. C., 393; *Henderson v. Wilmington,* 191 N. C., 269.

The only way to preserve the vitality of Article V, section 6, and Article VII, section 7, of the Constitution is to adhere to the construction, as stated in the opinion of the Court, that the "special purpose" for which the "special approval" of the General Assembly is essential must be for a "necessary expense" in contemplation of the constitutional provision.

W. R. BLACKMORE ET AL. v. DUPLIN COUNTY ET AL.

(Filed 2 July, 1931.)

1. Taxation A f—Statutory procedure for issuance of bonds must be strictly followed.

A county proceeding under the County Finance Act to refund its indebtedness must act strictly according to the procedure prescribed by the statute, and section 17 of the act provides that after hearing the governing body may pass an order in the form of its introduction or in an amended form, but that the amount of the issue shall not be increased nor the purpose of the issuance substantially changed by the amendment unless due notice and opportunity of hearing as required by the act shall be given, and where the governing body of a county substantially changes the purpose of the proposed issue by amendment without notice and an opportunity of hearing as prescribed by the act it is sufficient to invalidate the proposed bonds.

2. Appeal and Error A e—The Supreme Court will not anticipate questions of constitutional law.

Appellate courts will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor give advisory opinions on constitutional questions.

APPEAL by plaintiff from *Small, J.*, 10 June, 1931, at Chambers, Kinston. From DUPLIN.

Controversy without action submitted on an agreed statement of facts.

The plaintiff, a resident taxpayer of Duplin County, seeks to enjoin the defendants from issuing bonds to fund the present outstanding indebtedness of the county as "for a special purpose," which the defendants are attempting to do under "The County Finance Act," chapter 81, Public Laws 1927, as amended by the "Local Government Act," chapter 60, Public Laws 1931.

Prior to 3 March, 1931, Duplin County had incurred an indebtedness for necessary expenses, including upkeep of roads and bridges, and the payment of maturing bonds and interest, and money borrowed to meet said expenses, itemized in the record as follows:

Tax Anticipation Note (dated 5 December, 1930, due 5 June, 1931)	$ 40,000.00
Tax Anticipation Note (dated 18 February, 1931, due 18 July, 1931)	50,000.00
Part balance due on road and bridges—28 April, 1931	8,000.00
	$ 98,000.00

A resolution looking to the funding of this indebtedness was introduced 11 May, 1931, before the governing body of the county as required by section 9 of the County Finance Act and duly published in *The Duplin Journal* on 14 and 28 May, and 4 June, agreeably to the provisions of section 16 of said act.

No protest against the issuance of the bonds having been made by any citizen or taxpayer on 25 May, the day fixed therefor under authority of section 17 of the County Finance Act, the resolution was finally adopted by the board of commissioners.

There was nothing in the resolution or in the publication thereof to indicate that the funding of the indebtedness was to be "for a special purpose" or that a tax in excess of the 15 cents on the $100 valuation would be levied to pay the same.

On 8 June, at an adjourned meeting of the board of commissioners of Duplin County, an amendatory resolution was adopted setting forth that the necessary expenses of the county chargeable to the general county fund for the fiscal year beginning 1 July, 1931, will require the levying of a tax to the full constitutional limit of 15 cents on the $100 valuation of property, making it impossible to care for the above indebtedness out of said tax levy and carry on the necessary operations of the county, and by reason of the unusual depression now prevailing, it has been found impossible to collect sufficient taxes to meet said obligations; and the "board of commissioners of Duplin County finds as a fact that an emergency exists by reason of the present extraordinary financial condition and that the issuance of the said funding bonds 'for a special purpose' is necessary, in fact, the only means of meeting said indebtedness, and that said bonds are issued with the special approval of the General Assembly."

From a judgment denying the injunctive relief sought and adjudging "that the funding bonds in the sum of ninety-eight thousand dollars ($98,000), authorized to be issued by the board of commissioners of Duplin County, and to be advertised and sold by the Local Government Commission of North Carolina, by Chas. M. Johnson, Director of Local Government and Executive Secretary of said Local Government Commission, are valid and legal and are authorized by legal authority, and that the levy of the tax is not prohibited by the Constitution of North Carolina," the plaintiff appeals, assigning errors.

L. A. Beasley for plaintiff.

Rivers D. Johnson, Wm. Henry Hoyt and J. T. Gresham, Jr., for defendants.

STACY, C. J., after stating the case: While there is nothing in the judgment of the Superior Court to indicate that the proposed funding bonds are declared valid and duly authorized as "for a special purpose,"

it may fairly be assumed that such is the meaning and intent of the judgment. It is so debated on brief, and this was the interpretation given to it on the argument.

The defendants are proceeding under "The County Finance Act," as amended, but the record shows that some of its requirements have not been observed.

Section 17 provides that after hearing the protest, if any, against the issuance of the proposed bonds on the day fixed therefor, "the governing body may pass the order in the form of its introduction, or in an amended form, but the amount of the bonds to be issued shall not be increased by such amendment, nor the purpose of the issuance substantially changed, without due notice and hearing as above required."

The purpose of the issuance, it will be observed, is substantially changed by the amendatory resolution adopted on 8 June. This was without notice or hearing.

Furthermore the time allowed by section 21 of the County Finance Act for filing with the clerk a petition for a referendum on the bond order, to wit, "thirty days after the first publication of the order," had not expired at the time of the adoption of the amendatory resolution, nor had it expired at the time of the submission of the present controversy on 10 June. But the substantial change in the purpose of the issuance of the bonds without notice or opportunity of hearing, is sufficient to invalidate them. *Markham v. Carver,* 188 N. C., 615, 125 S. E., 409.

Where the Legislature has prescribed a method of procedure in a matter of this kind, and such procedure is sought to be followed, the statutory provisions on the subject are controlling. *Proctor v. Commissioners,* 182 N. C., 56, 108 S. E., 360; *Owens v. Wake County,* 195 N. C., 132, 141 S. E., 546; *Hendersonville v. Jordan,* 150 N. C., 35, 63 S. E., 167; *Commissioners v. Webb,* 148 N. C., 120, 61 S. E., 670; *Robinson v. Goldsboro,* 135 N. C., 382, 47 S. E., 462. Indeed, in certain instances, the legislative method and the requirements thereof, whether expressed in permissive or mandatory terms, are declared to be exclusive and binding on those chargeable with the execution of such powers. *Ellison v. Williamston,* 152 N. C., 147, 67 S. E., 255; *Wadsworth v. Concord,* 133 N. C., 587, 45 S. E., 948.

It should be observed, perhaps, that the point upon which the case is made to turn here was not debated in the court below. But it is a rule of appellate courts not to anticipate questions of constitutional law in advance of the necessity of deciding them; nor do they venture advisory opinions on constitutional questions. *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

For the reason stated, plaintiff is entitled to the relief demanded.

Error.

H. B. EDWARDS AND CORA L. EDWARDS v. J. E. ASHCRAFT ET AL.

(Filed 2 July, 1931.)

1. Conspiracy A b—Evidence held not to establish conspiracy to defraud by inducing purchase of stock by misrepresentation.

In an action against the directors of a corporation for conspiracy in procuring the purchase of stock by the plaintiff by false and fraudulent representations, evidence that a man entered the office of the secretary and demanded the right to inspect the books of the corporation, and that the secretary, not knowing the man's identity, "talked short" to him and refused the request, and that thereafter, at a discussion of the happening at the directors' meeting, a motion was made and passed to have the question of auditing the books submitted to the corporation's attorney: *Held*, the passage of the motion was not evidence of conspiracy of a director as to a purchase of stock by the plaintiff prior to the meeting, and the fact that the secretary refused the stranger's request to inspect the books is not evidence that the director was attempting to conceal the financial condition of the company.

2. Same—Evidence of conspiracy to defraud by inducing purchase of stock by misrepresentations held insufficient.

Where the directors of a corporation enter into an agreement that certain directors be permitted to buy a share of preferred stock for ten dollars and receive as a bonus eighty shares of common stock for each share of preferred, provided they bought the preferred stock in blocks aggregating the sum of five thousand dollars, such stock to be held by a trustee until the whole purchase price was paid, and that thereafter stock was sold to the plaintiff for ten dollars a share for preferred stock and two dollars and a half for common stock, and there is no evidence of the actual value of the stock: *Held*, the agreement is not evidence of a conspiracy to defraud the plaintiff by inducing him to purchase stock upon false representations, and in an action against a director, where there is no evidence that he was present, or knew of false representation made by the corporation's salesman in inducing the purchase of the stock, it is insufficient to be submitted to the jury on the issue of conspiracy to defraud, and the defendant's motion as of nonsuit should have been allowed.

3. Same—Sufficiency of evidence of conspiracy to be submitted to the jury.

While conspiracy may be proved by circumstantial evidence, the evidence must be sufficient to create more than a suspicion or conjecture in order to justify the submission of the issue to the jury.

CIVIL ACTION, before *Cowper, Special Judge,* at September Special Term, 1930, of UNION.

This cause was considered by the Court upon a former appeal reported in 196 N. C., at page 462, where the facts are fully set forth. In the former appeal it was held that the fraudulent representations, if any, made by a stock salesman in the absence of the defendants, direc-

tors, were not competent except upon the theory of conspiracy, and that the defendants were entitled to have an issue of conspiracy submitted to the jury.

Upon the present trial in the Superior Court the following issues were submitted:

1. "Did the defendants, Ashcraft, Cherry and Rhyne, or either of them, conspire with the salesmen who sold the stock to the plaintiff to defraud said plaintiff, as alleged in the complaint and the amendment thereto?"

2. "If so, which of said defendants entered into such conspiracy?"

3. "Was the plaintiff induced to subscribe and pay for stock in the Southern States Finance Company by reason of false and fraudulent representations made pursuant to such conspiracy, as alleged in the complaint and the amendment thereto?"

4. "What damage, if any, is the plaintiff entitled to recover?"

The jury answered the first issue "Yes"; the second issue, "Ashcraft, Cherry and Rhyne"; the third issue "Yes," and the fourth issue "$4,200 with interest at 4 per cent from 1 January, 1924."

From judgment upon the verdict the defendant, Rhyne, appealed, the other defendants not appealing.

Vann & Milliken and H. B. Adams for plaintiffs.

Hartsell & Hartsell and Armfield, Sherrin & Barnhardt for defendants.

BROGDEN, J. The case was tried upon the theory that the defendants, Ashcraft, Cherry and Rhyne, who were directors and officers of the bankrupt corporation, entered into a conspiracy to cheat and defraud the plaintiffs by means of fraudulent representations made by agents of the bankrupt corporation, inducing the sale of common and preferred stock to said plaintiffs. The defendant Rhyne appealed and asserts at the outset that no competent evidence was introduced tending to establish, as against him, a conspiracy to defraud. Hence, it becomes necessary to examine the items of evidence offered at the trial and relied upon in this Court as sufficient to be submitted to the jury upon the issue of conspiracy.

The first item of evidence offered against the defendant Rhyne was to the effect that, at a meeting of the directors on 10 May, 1924, at which Ashcraft, Rhyne and Cherry were present, Cherry, who was secretary of the company, "made a verbal report to the board with reference to an order or citation that had been made on him that the books of the company be turned over to the courts for an audit to be made." Over the objection of Rhyne the statement of Cherry at the

meeting was offered in evidence, such statement being as follows: "Mr. Cherry stated that a man came into his office and took him rather unawares; I think he said who it was, but I don't recall; that he came in a rather officious manner and demanded to see his books; that he, Cherry, on the spur of the moment, didn't know what the fellow wanted, and talked rather short to him, and probably refused to let him see his books, and the man went out. That report was followed by a discussion on the part of the directors in regard to it. Witness testified: "I have no recollection in regard to whether or not Mr. Rhyne participated in that discussion. A motion was made that the matter be referred to the corporation's counsel by Mr. Rhyne. My recollection is that the motion made by Mr. Rhyne was put to a vote and carried."

The plaintiff purchased stock on 9 November, 1922; 16 November, 1922; 19 April, 1923, and 6 November, 1923. It is therefore apparent that the fact that Mr. Rhyne made a motion in 1924, to submit the question of having the books audited to the attorney for the corporation in nowise tended to show the existence of a conspiracy to cheat and defraud in 1922, at the time the plaintiffs made the first purchase of stock. Moreover, the fact that Cherry, the secretary of the company, "talked short" to a stranger whose identity he did not know, did not tend to establish the fact that Rhyne was attempting to conceal the financial condition of the company.

The second item of evidence offered upon the issue of conspiracy is gathered from the minutes of the meeting of the directors, held on 10 July, 1922. The defendants, Ashcraft, Cherry and Rhyne, were present at this meeting. The minutes show the following: "Mr. Cherry made a motion, which was seconded by Mr. Rhyne, that the duly authorized officers be ordered to issue this stock and set it aside in some manner in keeping with the usual forms and customs practiced, for delivery to the respective officers, directors and salesmen, after, and only after, the conditions under which this stock was sold to them have been fulfilled and complied with."

The scheme proposed by the directors was set out in the minutes of the meeting held on 3 April, 1922, at which meeting the defendant, Rhyne, was elected vice-president of the company. The minutes of the meeting of 3 April, 1922, do not show that Rhyne was present at the meeting at which he was elected vice-president. However, they do show that "President Ashcraft announced that certain men of influence in their respective communities and regarded as having marked business ability, had purchased the first stock sold by the company, these men agreed to purchase this first stock in blocks of not less than $5,000 in amount, for the purpose of making the organization possible from a monetary standpoint, and they further agreed to take the affairs of the

company in charge as officers and to serve on its board of directors, both without salary, until such time as the stockholders chose to elect successors to them, and in consideration therefor, these certain men were sold their stock on a basis of one share of the preferred and 80 shares of the nonpar-value common for a total price of $10.00." President Ashcraft also announced that we had with us certain salesmen whose loyalty to the company and persistence of efforts in trying to sell our stock had played an important part in the progress made by the company up to this time, and that these salesmen's services were needed further to put the company over, and that he would recommend that these certain salesmen be permitted, under certain conditions, to purchase stock from the company on the same basis that the officers and directors above mentioned had, in amounts, however, up to, but not to exceed $5,000. At this juncture Mr. Payne made a motion which was seconded by Mr. Jenkins, that the board of directors be authorized at such time and in such manner as is found just and proper, to order this stock, especially the common, set aside by the duly authorized officers for delivery to the above mentioned officers, directors and salesmen upon the fulfillment of the certain conditions mentioned herein. Upon being put to a vote, all present voted in the affirmative, whereupon the president declared the motion carried."

Thereafter, at a meeting held on 10 July, 1922, at which meeting Rhyne was present, a resolution was duly passed in the following words: "That we change the basis of sale of our stock from $10 per share for the preferred, and giving with it one share of the common as a bonus, to $10 per share for the preferred and $2.50 per share for the common, and that the stock be sold in units of 3, one preferred and two of the common for a total price of $15 per unit." Another excerpt from the minutes is as follows: "We have executed an agreement between the company and certain individuals whereby 798,730 shares of the common stock of the company are to be set aside in the hands of H. S. Bryant, trustee, for the trustee to distribute to these individuals who purchase on a basis of 80 shares of common and one of preferred for $10, and under the terms of the agreement, certificates not to be issued to individual until after the total allotted to each individual has been fully paid in."

The so-called Bryant agreement is not in the record, and, therefore, it is impossible to state the terms of the agreement except as explained by the witness.

The foregoing excerpts from the minutes tend to show this situation: The defendants, Ashcraft, Cherry and Rhyne, together with the other directors of the company, entered into an agreement that certain directors should not be permitted and allowed to buy a share of preferred

stock for $10 and receive in addition as a bonus 80 shares of common stock for each share of preferred, provided they purchased preferred stock in blocks aggregating the sum of $5,000, such bonus stock to be placed in the hands of Bryant, trustee, and held by him until the whole purchase price was paid. Thereafter, the preferred stock was sold to the plaintiff at $10 per share, but the common stock was sold at $2.50 per share. There is no evidence in the record as to the actual or market value of either the preferred or common stock at the time of the sale to the plaintiffs.

Therefore, the question is whether the fact that director Rhyne got 80 shares of common for each share of preferred provided he bought $5,000 worth, and that plaintiff was required to pay the same price for the preferred and $2.50 per share for the common was evidence of a conspiracy on the part of Rhyne to cheat and defraud the plaintiffs by false representations made by agents of the company as to the value of the stock. The court is constrained to answer this question in the negative.

There is no evidence that Rhyne was present when the stock salesmen made fraudulent representations to the plaintiffs or any one else, or that he ever knew that such fraudulent representations were made. While conspiracy may be proved by circumstantial evidence, yet such evidence must be sufficient to create more than a suspicion or conjecture. *Swann v. Martin,* 191 N. C., 404; *S. v. Wrenn,* 198 N. C., 260.

Upon the whole record the Court is of the opinion that the purported evidence of conspiracy was not of sufficient probative value to be submitted to the jury as against Rhyne, and his motion for nonsuit should have been allowed.

Reversed.

M. T. CRAIG ET AL. v. GULF BARGE AND TOWING COMPANY.

(Filed 2 July, 1931.)

Pilots B a—Barge held liable to State pilotage under C. S., 6955.

A barge dependent entirely upon motive power furnished by a tug or other towing vessel is not a vessel "propelled in whole or part by steam" within the meaning of U. S. C. A., Title 46, section 361, and does not come within the provisions of section 215, which provides that no State shall require of such vessels a state or other license in addition to that issued by the United States, and a barge of over sixty gross tons having a United States licensed pilot on board is subject to pilotage, tender and refusal under C. S., 6955, upon entering North Carolina waters, and where State pilotage has been refused, is under the same liability as to performance. C. S., 6991.

CRAIG *v.* TOWING CO.

APPEAL by defendant from *Daniels, J.*, at October Term, 1930, of NEW HANOVER.

Civil action by pilots of the Cape Fear River and Bar to recover fees, aggregating $795, alleged to be due for pilotage services tendered at different times to three barges belonging to the defendant, which services were refused by the masters in charge of said barges.

The facts upon which it is agreed the rights of the parties depend, appear in the record as follows:

"1. It is admitted that the barges 'S. D. Warriner,' 'Northern Light' and 'Waukersha' were at the times mentioned in the complaint owned by, or chartered from their respective owners, and were operated, by the defendant at the times the plaintiffs' claims arose, and at which times the charterer was using said barges in the coastwise trade of the United States at the times set forth in the complaint, and each of the said barges was enrolled as a coastwise vessel of the United States in conformity with the provisions of the act of the United States in such case provided, and neither of said barges or vessels was or is equipped with machinery, sails or appliances making her movable by and with her own equipment or power, and that other and independent means had to be called in aid when either of said barges was navigated or moved, and that each of them, at the times stated in the complaint, was being navigated by being towed, moved, transported or propelled by a steam-tug vessel by means of a hawser or tow-line attached to said barge and thence to the tug—the barges being towed in the rear of the tug, the hawser or tow-line being about 150 feet long, the tug furnishing the motive power for the navigation of the barges, all of which barges being over 60 tons gross.

"2. That each of the said barges was towed as aforesaid on a voyage to Wilmington at the time alleged in the complaint on its incoming trip from some state south of North Carolina, and upon the ocean to or at a point near Cape Fear River bar, each of said tugs at the time having a pilot on board and in charge of the navigation of the barge who was regularly licensed by the United States authorities (under the provision of statutes, U. S. C. A., Title 46, secs. 214 and 215, R. S., 4442 and 4444), when each was timely spoken and pilotage service offered and tendered by some one of the plaintiffs who was at that time and is now a duly licensed pilot for the Cape Fear River and Bar according to the laws of North Carolina, and such pilotage service, so tendered by the plaintiffs or one of them, was on each occasion refused by the said barges, or the master in charge thereof, as it was claimed that the said barge was not required by law to take a pilot or pay pilotage, because the barges and each of them were at the time in charge of a pilot regularly licensed under the laws of the United States, who was on

board the barge and piloting it, and the master on the tug towing said barges was a duly licensed United States pilot, and that such fact exempted the barges from liability for compulsory pilotage under the laws of the State of North Carolina, and on each alleged voyage out from Southport over the Cape Fear River and Bar to sea said barges were duly spoken and pilotage services tendered by some one of the plaintiffs, North Carolina licensed pilots as aforesaid, on their voyage on the Atlantic Ocean to some state south of the State of North Carolina, and such pilotage services were refused upon the ground aforesaid, and the said barges were, as alleged in the complaint, towed in and out by the tug without accepting said State pilot's services tendered as aforesaid, which said pilotage services, if the barge or barges were liable for the same, and in the amounts set forth in the complaint.

"3. If under the admitted facts the barges were liable as a matter of law for pilotage services to those of the plaintiffs so tendering their services as North Carolina State licensed pilots, then the plaintiffs are entitled to recover all of the sums sued for in this action, and judgment accordingly shall be entered for the plaintiff, but if under the facts and law the barges were not liable for compulsory pilotage, then judgment shall accordingly be entered for the defendant."

Upon the facts agreed, judgment was entered for the plaintiffs, from which the defendant appeals, assigning errors.

Bryan & Campbell for plaintiffs.
Rountree & Rountree for defendant.

STACY, C. J. The question to be determined is whether barges of over 60 gross tons, having no motive power of their own, and being towed by steam tugs in and out of the harbor of Southport, are liable to compulsory pilotage dues under the State pilotage laws.

C. S., 6955, provides that "All vessels, coastwise or foreign, over 60 gross tons, shall take a State licensed pilot from sea to Southport, and from Southport to sea," and shall pay the designated rates of pilotage fixed by said section, etc. The statute imposes compulsory pilotage on all vessels coming within its terms. This is in the interest of safety to navigation. *St. George v. Hardie,* 147 N. C., 88, 60 S. E., 920; *Cooley v. Board,* 12 How., 312.

"The purpose of these laws is to insure at all times a due supply of men well qualified by skill, knowledge, and experience to protect vessels entering into ports and harbors from the dangers of navigation. They are engaged in a perilous calling, and must be ready to brave the perils of their vocation. To encourage such men, and to secure permanence in their ranks, every nation engaged in commerce, and all the states in the

Union having harbors, have enacted laws making it compulsory upon all vessels entering their ports, except those of very small tonnage, to employ a duly-licensed pilot for the purpose of piloting them." *Simonton, Circuit Judge,* in *The Carrie L. Tyler,* 106 Fed., 422.

There is an exemption in C. S., 6985, of "vessels, barges, schooners, or other craft passing through the inland waterway of the State," with the proviso that "steam vessels" not having on board a United States licensed pilot for the waters navigated shall be subject to pilotage.

It is the position of the defendant that these sections run counter to the act of Congress, U. S. C. A., Title 46—Shipping, sec. 213, which prohibits any discrimination in the pilotage laws adopted by a State.

Similar statutes enacted in Virginia were assailed upon the same ground and upheld in the case of *Thompson v. Darden,* 198 U. S., 310.

But aside from the decision in the *Thompson case,* section 215 of the Federal Act provides that no State shall impose upon pilots of "steam vessels" an obligation to procure a State or other license in addition to that issued by the United States, etc., with the proviso that nothing therein shall be construed to annul or affect any State regulation requiring vessels entering or leaving a port of the State, other than coastwise steam vessels, to take a duly-licensed State pilot.

A steam vessel is defined in section 361 of the act of Congress as one that is "propelled in whole or in part by steam," and it is conceded that barges are vessels within the meaning of the law. It is further conceded that if defendant's barges are subject to pilotage, tender and refusal of such services, import the same liability as performance. C. S., 6991.

The case, then, narrows itself to a single point: Are the barges in question "steam vessels" within the meaning of the law? If they are, the judgment is erroneous. If they are not, it is correct. The answer depends upon whether they are propelled in whole or in part by steam within the meaning of the act of Congress.

For some purposes, especially in cases of collision, the tug and the tow are regarded as one vessel, just as a railroad engine and the cars drawn by it at a single time are regarded as one train. But in strictness, while the tug propels herself, she is said to "tow the tow," *i. e.,* she draws the vessel in tow either alongside or astern. And in strictness, an engine propels itself and draws or pushes the cars which go to make up the train.

Neither the industry of counsel nor our own research has resulted in the discovery of an American decision which would seem to be determinative of the exact question here presented. The case of *"The Carrie L. Tyler,"* 106 Fed., 422, cited by the plaintiffs, is almost in point, but not quite. Nor is the case of *The "Civilta"* and *The "Rest-*

less," 103 U. S., 699, cited by defendant, controlling. *Anderson v. Steamship Co.*, 255 U. S., 187, contains a valuable opinion on the subject by *Mr. Justice Hughes* (now *Chief Justice*), but does not decide the point presently mooted.

The precise question was before the English Privy Council in the case of *The St. John Pilot Commissioners v. Cumberland Railway and Coal Co.*, Appeal Cases, 1910, Law Reports, 208. It was there held, reversing the Supreme Court of Canada, that barges moved by towage alone did not come within the meaning of "ships propelled wholly or in part by steam" as used in the Canadian Act, and that the word "propelled" had reference to the motive power possessed by the vessel herself, *"propellere navem remis"*—in Cicero's phrase, and did not embrace the idea of traction.

We are content to rest our decision on the reasoning of this case until the matter is decided by the Supreme Court of the United States.

Affirmed.

F. E. LYKES & COMPANY, INC., v. E. W. GROVE, JR., ET AL.

(Filed 2 July, 1931.)

1. Election of Remedies A b—Plaintiff must elect between suit for rescission and action for breach of contract.

The plaintiff is put to his election between bringing a suit for the rescission of a contract *ab initio*, where fraud is not alleged, and bringing an action for damages for the breach thereof, as he will not be permitted to deny and affirm the contract at the same time, but where special damages have been sustained, notwithstanding the rescission, rescission will not bar a recovery of such special damages.

2. Election of Remedies A a—Plaintiff may not unite two inconsistent causes of action in complaint.

Where two inconsistent causes of action are joined in the same complaint the plaintiff will be required to adopt one and abandon the other, or to reform the complaint to make it square with the rules of good pleading. The distinction is noted between inconsistent remedies and inconsistent defenses allowed by statute. C. S., 522.

3. Cancellation and Rescission of Instruments A e—Suit for rescission of contract held properly dismissed.

Where the plaintiff seeks to have a contract for the purchase of land rescinded on the ground of total failure of consideration, there being no allegation of fraud, and sets up agreements to assist him in the erection of a building on the land purchased and to erect a building on adjoining land, and alleges that the agreements were material inducements to the purchase of the land, and that the agreements were not performed, and

it appears that a building on the adjoining land has been completed by another substantially as promised the plaintiff and that the plaintiff has suffered no damage by failure to perform, and it does not appear that the plaintiff has ever been in a position to insist upon performance of the agreement to assist in financing a building on his land, or, if so, that he suffered injury for the nonperformance: *Held*, the plaintiff's suit for rescission is properly dismissed, the evidence failing to show want of consideration entitling him to the relief sought.

APPEAL by plaintiff from *McElroy, J.*, at January Term, 1931, of BUNCOMBE.

Civil action to rescind contracts for purchase and sale of real estate, recover cash payments made thereon and cancel notes and deeds of trust given for unpaid balances of purchase price, or, failing in this, to recover damages for breaches of said contracts.

Plaintiff alleges, and offers evidence to prove, that on or about 5 October, 1925, he bought from E. W. Grove lots 1, 2 and 3, Block B, Battery Park Development, in the city of Asheville, at and for the price of $159,525, with the understanding, first, that Grove was to erect a large Arcade Building on the center square of said development, retained by him, and complete the same by 1 April, 1927; second, that the said Grove would help the plaintiff finance the erection of a building on its property by reducing his notes 5 per cent and accepting a second mortgage as security: *Provided,* the first mortgage did not exceed 60 per cent of the value of the building; and further, that this should be done within a period of eighteen months.

About a year later the plaintiff, desiring to enlarge its plans, purchased from one Frank L. Nelson, with the advice and consent of the said E. W. Grove, three adjacent lots, 4, 5 and 6, Block B, Battery Park Development, at and for the price of $206,250, under similar terms and conditions and with like verbal assurances from the said E. W. Grove as to completion of the Arcade Building and financial assistance for the erection of a hotel and theatre building on plaintiff's enlarged premises. Deed for these lots was made direct from Grove to the plaintiff as title had not passed to Nelson at the time of plaintiff's purchase. (Nelson held a more favorable contract with Grove than the plaintiff, and there is a suggestion, at one place in the record, that this was taken over by the plaintiff, but the whole testimony is otherwise, and the allegation is not pressed.)

Matters were progressing satisfactorily when the death of E. W. Grove, 27 January, 1927, caused an interruption of the proposed plans, The deceased had spent approximately half a million dollars on the Arcade Building up to that time. Representatives of the Grove estate declined to carry out the agreements which the deceased had with the plaintiff, and not until the summer of 1928 was work resumed on the

Arcade Building after it had been purchased by one Walter P. Taylor, who completed it in the spring of 1929, not entirely according to the original plans, however.

The plaintiff has paid on said lots the sum of $110,273.93 in principal, interest and taxes.

Plaintiff alleges that "a total failure of consideration for the purchase of said lots" has resulted from the refusal of the defendants to recognize and perform the agreements made by the said E. W. Grove; and that it has been damaged in a large sum by reason of said refusal and breach of said contracts on the part of defendants.

The first prayer is for a return of all cash payments and cancellation of the notes and deeds of trust given by plaintiff for balances of purchase price on said lots.

The second prayer is "that in the event said contracts of purchase are not rescinded, the plaintiff have and recover of the defendants by way of damages the sum of $150,000."

On motion of defendants, the trial court ruled that, as the plaintiff had originally declared for rescission of the contracts, and then later, in its amended complaint, again asked for rescission, or, failing in this, demanded damages for defendants' refusal to carry out said contracts, it had thereby elected to stand on its alleged right to rescind said agreements. The second cause of action for damages was thereupon dismissed. Objection and exception.

At the close of plaintiff's evidence on the first cause of action, in which rescissions of the contracts were sought, on the ground of an alleged total failure of consideration (no fraud being alleged), the same was dismissed as in case of nonsuit. Plaintiff appeals, assigning errors.

Vonno L. Gudger and Alfred S. Barnard for plaintiff.
Merrimon, Adams & Adams and J. W. Pless for defendants.

STACY, C. J., after stating the case: Can a plaintiff unite in the same complaint an action for the rescission of a contract and one for its breach? The decisions are to the effect that he may not, as this would be to deny and affirm the contract at the same time—"to blow hot and cold in the same breath." The rights are opposed and the remedies are inconsistent. *Machine Co. v. Owings,* 140 N. C., 503, 53 S. E., 345; *Davis v. Lumber Co.,* 132 N. C., 233, 43 S. E., 650; *Fleming v. Congleton,* 177 N. C., 186, 98 S. E., 449; *Pritchard v. Williams,* 175 N. C., 319, 95 S. E., 570; *Power Co. v. Casualty Co.,* 193 N. C., 618, 137 S. E., 817; *Irvin v. Harris,* 182 N. C., 647, 109 S. E., 867; 9 R. C. L., 965.

Speaking to the subject in *Stewart v. Realty Co.,* 159 N. C., 230, 74 S. E., 736, *Brown, J.,* delivering the opinion of the Court, says: "Res-

cission will bar an action for damages when the only damage sustained is in not getting what was bargained for, and no special damages have been proven. 14 Am. & E., 170. But where special damages have been sustained, so that the party defrauded is damaged, notwithstanding the rescission, his rescission of the contract will not bar a recovery of such special damages. *R. R. Co. v. Hodnett,* 29 Ga., 461; *Nash v. Title Insurance Co.,* 163 Mass., 574; *Warren v. Cole,* 15 Mich., 265. . . . It seems to be well settled that an election once made, with knowledge of the facts, between coexisting, remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding, based upon any remedial right inconsistent with that asserted by the election. 15 Cyc., 262; *Moller v. Tusker,* 87 N. Y., 166; *Clausen v. Head,* 110 Wis., 405."

Nor is the decision in *Anderson v. Corporation,* 155 N. C., 131, 71 S. E., 221, cited and relied upon by plaintiff, at variance with this position. There the action was in affirmance of the contract, which provided that unless the improvements stipulated in the agreement of the parties were made agreeably thereto, plaintiff's money would be refunded and the contract canceled. And in *Troxler v. Building Co.,* 137 N. C., 51, 49 S. E., 58, rescission was sought and obtained on the ground of fraud. Fraud was also the basis of the action in *Hinsdale v. Phillips,* 199 N. C., 563.

The law is otherwise with respect to cumulative and consistent remedies, all of which are based either on affirmance or disaffirmance of the contract. *Machine Co. v. Owings, supra; Bare v. Thacker,* 190 N. C., 499, 130 S. E., 164; *Case v. Ewbanks,* 194 N. C., 775, 140 S. E., 709; 9 R. C. L., 958; 20 C. J., 13. And a distinction is to be observed between an abandonment of performance which recognizes the existence of a valid contract, and rescission *ab initio. Flickinger v. Glass,* 222 N. Y., 404; *Anderson v. Corporation, supra.*

There was no error, therefore, in requiring the plaintiff to elect between its action to rescind, and its alternative and inconsistent action for damages. *Warren v. Susman,* 168 N. C., 457, 84 S. E., 760; *Fields v. Brown,* 160 N. C., 295, 76 S. E., 8; *Huggins v. Waters,* 154 N. C., 443, 70 S. E., 843; *Dunlap v. Ingram,* 57 N. C., 178; *Pettijohn v. Williams,* 55 N. C., 302; *Marx v. Marx,* 89 Mo. App., 455; 9 R. C. L., 958; 20 C. J., 44. Where two inconsistent causes of action are improperly joined in the same complaint, it is proper to require the plaintiff to adopt one and abandon the other, or to reform the complaint so as to make it square with the rules of good pleading. *Lyon v. R. R.,* 165 N. C., 143, 81 S. E., 1.

The cases of *Worth v. Trust Co.,* 152 N. C., 242, 67 S. E., 590, and *Wiggins v. Motor Co.,* 188 N. C., 316, 124 S. E., 621, do not announce

a contrary rule, but, by correct interpretation, they accord with this procedure. See, also, valuable opinion of *Cothran, J.*, in the case of *McMahan v. McMahan,* 115 S. E., 293, 26 A. L. R., 1295.

It should be observed, perhaps, that we are not dealing with inconsistent *(McLamb v. McPhail,* 126 N. C., 218, 35 S. E., 426) or contradictory *(Upton v. R. R.,* 128 N. C., 173, 38 S. E., 736) defenses, set forth by answer, such as are permitted under C. S., 522. *Williams v. Hutton,* 164 N. C., 216, 80 S. E., 257.

It is equally clear, we think, that the trial court ruled correctly in entering judgment as of nonsuit on the plaintiff's first cause of action. There is no allegation of fraud, and no sufficient evidence of total or substantial failure of consideration, available to the plaintiff. 24 A. & E. Enc, of Law, 644. Even if the erection of the Arcade Building were a material inducement to the contracts of purchase, as plaintiff alleges, this has been completed as originally contemplated, or substantially so, with the exception of the tower, according to plaintiff's own witnesses. Likewise, if the agreement to aid the plaintiff in financing the erection of a building on the lots purchased by it were a material inducement to the contracts of purchase, as plaintiff alleges, it does not appear from the record that the plaintiff so positioned itself as to be able to insist upon the terms of this agreement, or, if so, that it suffered injury from its breach or nonperformance on the part of the defendants. *Flour Mills v. Distributing Co.,* 171 N. C., 708, 88 S. E., 771; Black on Rescission and Cancellation, sections 198, 202, 213.

The record presents no sufficient reason for disturbing the ruling of the Superior Court.

Affirmed.

STEPHENS COMPANY v. CITY OF CHARLOTTE.

(Filed 2 July, 1931.)

1. Municipal Corporations J b—Charter provision requiring notice does not apply to taking of property for public use.

Where a complaint alleges that the defendant city took and appropriated a water system constructed by the plaintiff on his own lands in a development later taken into the city, and that by reason of such taking the city became indebted to the plaintiff in the amount of the value of the water system upon an implied promise to pay: *Held,* a provision in the city charter that no action against it should be maintained, unless notice of injury to person or property should have been given it within six months of the date of such injury, does not apply to an action for compensation for the taking of private property for public use. The distinction between an action sounding in tort is pointed out.

2. Eminent Domain C a—Owner is entitled to compensation for appropriation of water system by city.

Where the owner of a development has constructed a water system therein and deeded the lands in the development to others, upon an appropriation of the water system by a city extending its limits to include the development, the city may not maintain that the owner had no interest in the water system or nothing of value for which compensation should be paid upon such appropriation. *Realty Co. v. Charlotte*, 198 N. C., 564.

STACY, C. J., dissents.

CIVIL ACTION, before *Harding, J.*, at December Special Term, 1930, of MECKLENBURG.

Plaintiff alleged that many years ago he purchased a tract of land near the city of Charlotte known as Myers Park, and during the course of years developed said property into a high-class residential suburb, "opening and paving streets, laying water and sewer mains and pipes and selling lots." That prior to November, 1916, the defendant permitted the plaintiff to make physical connection between the water mains of the city of Charlotte and the water mains and water system constructed by plaintiff in Myers Park. Plaintiff further alleged that during the course of years the water system installed, constructed and paid for by it was reasonably worth $27,114.21, and that on 1 January, 1928, the corporate limits of the city of Charlotte were extended so as to take in nearly all of Myers Park, including the water mains and water system so installed by the plaintiff. Plaintiff further alleged that when the corporate limits were extended to include Myers Park that the defendant city of Charlotte thereupon took charge of, assumed control of, and appropriated said water system to the sole and exclusive use of said city, and, therefore, brought a suit against the city for the sum of $27,114.21.

The defendant filed an answer alleging as a defense that chapter 342, Private Laws of 1907, and the amendments thereto constituted the charter for the city of Charlotte, and that said charter contained the following provision: "No action for damages against said city of any character whatever, to either person or property, shall be instituted against said city unless within six months after happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of said city of such injury in writing, stating in such notice the date and place of happening or infliction of such injury, the manner of such infliction, the character of the injury, and the amount of damages claimed therefor, but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of happening or infliction of such injury or in any manner interfere with its running."

Defendant further alleged that the plaintiff did not file notice of claim with the defendant until 31 October, 1929, and that as plaintiff's cause of action arose on 1 January, 1928, when the city took over and appropriated to its own use plaintiff's property, the plaintiff was barred of recovery by reason of failure to file notice of claim in accordance with the charter provisions. The defendant further contended that the plaintiff had no property in said water system for the reason that such property right as it had had passed out of the plaintiff by virtue of the many deeds which the plaintiff had executed and delivered to various purchasers of lots in said subdivision.

The following issues were submitted to the jury:

1. "Did the defendant wrongfully take and appropriate the water lines, as alleged in the complaint, to its own use on or after 1 January, 1928?"

2. "If so, was the plaintiff the owner of the said water lines in controversy at the time of the appropriation?"

3. "Did the plaintiff, prior to 1 January, 1928, by deeds conveying lots abutting the water mains in controversy, convey to the grantees therein any easements with respect to the water mains in controversy?"

4. "Is the plaintiff's cause of action barred by the six months statute in the charter of the city of Charlotte?"

5. "Is the plaintiff's cause of action barred by the two-year statute of limitations?"

6. "Is the plaintiff's cause of action barred by the three-year statute of limitations?"

7. "In what amount, if any, is the defendant indebted to the plaintiff?"

The jury answered the first issue "Yes"; the second issue "Yes"; the third issue "No"; the fourth issue "No"; the sixth issue "No"; the seventh issue "$15,000 without interest," and the fifth issue was not answered.

From judgment upon the verdict the defendant appealed.

Whitlock, Dockery & Shaw for plaintiff.

C. A. Cochran, F. A. McClenaghan, and Stancill & Davis for defendant.

BROGDEN, J. Does a provision of the charter of the city of Charlotte, requiring notice, apply to an action for compensation for the taking of private property for public use?

The plaintiff was permitted to amend the complaint by alleging "and that, by such taking and using, the defendant by virtue of an implied promise and agreement on its part to pay the plaintiff for said water mains, became indebted to the plaintiff in the amount of the value

thereof." By virtue of such amendment the plaintiff contends that the suit is based upon contract, and hence the charter provision does not apply because such provision is limited to actions for damages growing out of a tort.

The general subject of notice is discussed in McIntosh North Carolina Practice and Procedure in sections 187 and 389. See *Pender v. Salisbury,* 160 N. C., 363, 76 S. E., 228; *Dayton v. City of Asheville,* 185 N. C., 12, 115 S. E., 827, 30 A. L. R., 1186; *Graham v. City of Charlotte,* 186 N. C., 649, 120 S. E., 466; *Peacock v. City of Greensboro,* 196 N. C., 412, 146 S. E., 3. See, also, *Kirby v. Commissioners,* 198 N. C., 440, 152 S. E., 165.

The defendant contends that the *Dayton case* is determinative, but it must be observed that the *Dayton case* did not involve the physical taking of property. The injury to plaintiff's property in that case arose from negligent construction or operation of the incinerator, resulting in the emission of smoke, grease, ashes and noxious odors. That is to say, the injury arose from negligence, and hence in the ultimate analysis, the cause of action sounded in tort. From a careful perusal of all the cases bearing upon the subject, the Court is of the opinion that the statutory provision with respect to notice does not include a claim for compensation arising out of physical appropriation of private property for public use.

The second contention made by the defendant is that the plaintiff had nothing to sell to the city or nothing of value for which the city would be liable for the appropriation so made. This contention is determined adversely to the defendant by the decision of this Court in *Realty Co. v. Charlotte,* 198 N. C., 564.

There are many exceptions in the record, but the essential merits of the case are determined by the propositions of law hereinbefore referred to.

No error.

STACY, C. J., dissents.

R. A. KNIGHT v. CAROLINA COACH COMPANY.

(Filed 2 July, 1931.)

Carriers D c—Bus company's liability for loss of baggage is limited to fifty dollars by Commission where higher valuation is not declared.

The Corporation Commission in accordance with authority given it by statute, chapter 136, Public Laws of 1927, has passed certain regulations in regard to the carriage of baggage by bus companies, and its Rule 65, limiting the number of pieces of hand baggage, the weight and the value thereof that shall be checked and carried free of charge, is within the

delegated power of the Commission, and the rule that a common carrier in intrastate shipments may not make a valid contract limiting liability for negligent loss of baggage, is thereby made inapplicable to bus companies, and a provision on a ticket of a bus company limiting liability for loss of baggage to fifty dollars unless a higher valuation is declared and an extra charge paid, in accordance with the rules of the Corporation Commission, is valid, and a passenger may not recover a greater sum than that fixed by the rule.

CIVIL ACTION, before *Moore, Special Judge,* at January Term, 1931, of WAKE.

On or about 10 April, 1930, the plaintiff purchased a ticket from the defendant at Rocky Mount for transportation over its line to Durham, and delivered to the defendant his traveling bag, containing personal effects. The defendant accepted the traveling bag and checked the same, giving to plaintiff a claim check. The claim check provided: "Baggage liability limited to $50 unless higher valuation declared and shown on this check and extra charge paid as provided by tariff regulations filed with and approved by the Corporation Commission."

The bag and its contents were lost by the defendant during transit, and the plaintiff instituted this action for damages in the sum of $158.50, alleging that such sum was the fair value of the bag and its contents.

The defendant filed an answer alleging that it had offered to pay plaintiff $50 in accordance with the terms of the baggage check. The defendant further alleged that it operated under and by virtue of chapter 136, Public Laws of 1927, and in accordance with rules and regulations prescribed by the Corporation Commission, and that pursuant to such rules it had adopted a ticket limiting liability for damage to $50 "unless higher valuation declared," etc., and that it had adopted a baggage check or claim check pursuant to the laws of the State and the regulations imposed by the Corporation Commission. Defendant further alleged that under the regulations of the Corporation Commission it was required to carry insurance insuring the baggage of passengers to the amount of $50 only, such policies being filed with the Corporation Commission.

Issues were submitted to the jury and the value of the baggage was found to be $148. It was agreed that the trial judge should answer the issues in accordance with the contentions of the parties and to find the facts. The facts are set out at length in the judgment, and it is not deemed necessary to set out the entire judgment.

Rule 65, duly adopted by the Corporation Commission, is as follows: "Subject to the limitations in Rule 53 and the conditions of Rules 62 and 64, three pieces of hand baggage, not to exceed a total weight of one hundred pounds nor exceeding fifty dollars ($50) in value shall be checked and carried free of charge for each adult passenger," etc.

Upon the facts found the trial judge was of the opinion that the $50 limitation set out in the ticket and baggage check was binding and valid. Whereupon, it was adjudged that the plaintiff was entitled to recover the sum of $50, together with the costs of the action.

From the foregoing judgment plaintiff appealed.

R. O. Everett and Bart M. Gatling for plaintiff.
Smith & Joyner for defendant.

BROGDEN, J. This Court in *Cooper v. R. R.,* 161 N. C., 400, announced the policy of the law in this State to be, that common carriers in intra-state shipments could not make a valid contract limiting liability for negligence resulting in loss or damage to the baggage of a passenger. In that case baggage liability was limited to $100 "unless a greater value has been declared by the owner and excess charges paid thereon at the time of taking passage."

The question of law is, whether chapter 136, Public Laws of 1927, takes a bus company out of the operation of the rule declared in the *Cooper case,* with respect to liability for loss or damage to the baggage of a passenger.

An examination of the statute discloses that it was enacted for the purpose of regulating, supervising and controlling motor vehicles used in the business of transporting persons or property for hire over and along the highways of the State. In pursuance of such purpose, it is provided in section 2 that no person or corporation shall operate a motor vehicle for the transportation of persons or property "except in accordance with the provisions of this act, and said operation shall be subject to control, supervision and regulation by the Commission in the manner provided by this act." Section 6 requires that in granting a franchise certificate the applicant shall procure and file with the Commission "acceptable liability and property damage insurance in a company licensed to do business in the State . . . in such amount as the Commission may determine, insuring passengers . . . receiving personal injury by reason of an act of negligence . . . and for damage to baggage in the custody of the assured and for loss of baggage when checked by the assured," etc. Section 7 provides that the Corporation Commission "is hereby vested with power and authority to supervise and regulate every motor vehicle carrier under this act; to make or approve the rates, fares, charges, classifications, rules and regulations for service and safety of operation and checking of baggage of each such motor vehicle carrier. . . . The Commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers," etc. It is provided in section 8 that the Commission shall have power to

revoke the franchise of any motor vehicle carrier if it "has wilfully violated or refused to observe the laws of this State touching motor vehicle carriers, or any of the terms of his certificate, or any of the Commission's orders, rules or regulations." It is further provided in section 10, subsection 3, that the franchise certificate may be canceled "for failure to check baggage as provided by this act and the Commission's regulations." It is provided in section 13 that no motor vehicle carrier shall charge or receive "a greater or less or different compensation for the transportation of persons or property . . . than the rates, fares, or charges applicable to such carrier as specified in its tariffs filed with and approved by the Commission and in effect at the time."

The foregoing provisions of the statute clearly demonstrate that broad and comprehensive powers were delegated by the Legislature to the Corporation Commission in supervising and controlling the operation of passenger and freight busses. In the exercise of such powers so delegated the Commission has established certain rules and regulations prescribing certain duties with respect to the baggage of passengers. Such rules and regulations, pertinent to this case, are clearly within the power of the Commission, and the Commission in effect requires a bus company, upon penalty of forfeiting its charter, to carry baggage upon such conditions and for such rate or charge as shall be prescribed. Rule 65 limits the number of pieces of hand baggage, the weight, and the value thereof that shall be checked and carried free of charge. The bus company must observe this limitation or forfeit its charter. Hence, it is concluded that the Legislature had the power to prescribe the conditions controlling the granting of a franchise to a motor vehicle transportation company, and such power was delegated to the Corporation Commission. The Corporation Commission entered upon the exercise of the power by prescribing rules and regulations relating to the personal baggage of passengers. These rules are valid and exclusive, and the trial judge ruled correctly upon the question of law presented.

Affirmed.

L. W. GODFREY, ADMINISTRATOR, v. QUEEN CITY COACH COMPANY.

(Filed 2 July, 1931.)

1. Negligence A a: B b—Violation of safety statute is negligence per se and question of proximate cause is ordinarily for jury.

The violation of a statute intended and designed to prevent injury to persons or property is negligence *per se*, and where such violation is admitted or established the question of proximate cause is ordinarily for the determination of the jury.

2. Highways B c—Evidence held properly submitted to jury on issues of negligence in exceeding speed limit and proximate cause.

The evidence in this case tended to show that the car in which the plaintiff's intestate was riding as a guest was thrown across the highway by skidding when the driver thereof put on brakes to attempt to regain his position behind another car upon seeing the defendant's bus approaching around a curve, that the bus was traveling at a greater rate of speed than fifteen miles per hour around the curve and that the driver's view was obstructed by the grade within a distance of two hundred feet; that the defendant's bus collided with the car in which plaintiff's intestate was riding, causing the intestate's death: *Held*, the evidence was properly submitted to the jury on the question of the defendant's negligence in exceeding the speed limit in such circumstances, C. S., 2621(46), N. C. Code, 1927, and the question of whether such negligence, if established, was the proximate cause or one of the proximate causes of the injury.

3. Highways B k—Bus company's liability for death of guest in another car into which bus collided on highway.

The administrator of an intestate, killed in a collision between a bus and a car in which the intestate was riding as a guest, may not recover against the bus company if the negligence of the driver of the car was the sole proximate cause of the injury, but he may recover if the negligence of the bus company was the proximate cause or one of the proximate causes of the intestate's death.

APPEAL by defendant from *Sink, Special Judge,* at May Special Term, 1930, and *Cowper, Special Judge,* at January Special Term, 1931. From MECKLENBURG.

Civil action to recover damages for alleged wrongful death caused by collision between an automobile in which plaintiff's intestate was riding and one of defendant's busses.

On Saturday night, 28 December, 1928, plaintiff's intestate was a guest in his brother's Essex automobile going from Charlotte in the direction of Monroe. The defendant's bus was running from Monroe to Charlotte. The night was dark and misty. The road was wet and slippery. The Godfrey car was traveling behind a car driven by one W. E. Kiker and was attempting for the second time to pass the Kiker car near the crest of a hill and near the center of a 55-degree curve, when the lights of the bus were observed at the other end of the curve, 250 or 275 feet away, "not in the highway, but out in the field to the left." The bus was running from 35 to 45 miles an hour. Realizing that he would not be able to execute the pass, the driver of the Godfrey car, plaintiff's intestate's brother, put on his brakes so as again to fall in behind the Kiker car. The sudden application of the brakes caused the Godfrey car to "turn kinder angling to the left, . . . about a 45-degree angle across the highway in front of the approaching bus."

The bus was fully 200 feet away when the Godfrey car skidded across the highway. Looking in the direction the bus was going, "one could

not see any distance ahead on account of the deep curve in the road and the thickly settled houses on the left-hand side."

The driver of the bus was within 35 feet of the Godfrey car before he saw it. He pulled as far to the right as he could and attempted to stop, but was unable to avoid a collision. The front wheel of the bus hit the Godfrey car right at the cowl and jammed it into the embankment on the right-hand side of the road going in the direction of Charlotte (the left-hand side going in the opposite direction). Plaintiff's intestate died a few hours thereafter from injuries sustained in the wreck.

The alleged negligence on the part of the defendant is that of excessive speed, under the circumstances, and failure to keep a proper lookout.

Issues were submitted to the jury at the May Term, 1930, and answered in favor of the plaintiff. The verdict was set aside by the trial court as a matter of law, which order was vacated on appeal. 200 N. C., 41.

Judgment on the verdict was entered at the January Term, 1931, from which the defendant appeals, assigning errors.

Stewart & Bobbitt for plaintiff.
J. Laurence Jones and N. A. Townsend for defendant.

STACY, C. J. The discretionary power of the Superior Court to set aside the verdict in this case was not invoked, either at the trial term or following the first appeal here. Compare *Allen v. Gooding,* 174 N. C., 271, 93 S. E., 740; *Lancaster v. Bland,* 168 N. C., 377, 84 S. E., 529. The only point presented is the legal sufficiency of the evidence to carry the case to the jury.

The defendant's evidence, standing alone, would seem to bring the case within the decision in *Burke v. Coach Co.,* 198 N. C., 8, 150 S. E., 636. But viewing the plaintiff's evidence with the liberality required on demurrer, we think the question of proximate cause was one for the jury under the principles announced in *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180; *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5; *White v. Realty Co.,* 182 N. C., 536, 109 S. E., 564; *Taylor v. Lumber Company,* 173 N. C., 112, 91 S. E., 719.

It is provided by C. S., 2621(46), N. C. Code, 1927, that "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed, not greater than is reasonable and proper," etc. Then follows an enumeration of certain rates of speed at given places, which, if exceeded, shall be deemed violations of the statute, the one here pertinent being as follows: "Fifteen miles an hour in traversing or going around curves or traversing a grade upon a highway when the driver's view is obstructed within a distance of two hundred feet along such highway in the direction in which he is proceeding." It is also provided in

said section that "no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person." *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669.

The violation of a statute, intended and designed to prevent injury to persons or property, or the failure to observe a positive safety requirement of the law, is, under a uniform line of decisions, negligence *per se. Dickey v. R. R.,* 196 N. C., 726, 147 S. E., 15; *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066. And when a violation or failure of this kind is admitted or established, it is ordinarily a question for the jury to determine whether such negligence is the proximate cause of the injury. *Stultz v. Thomas,* 182 N. C., 470, 109 S. E., 361.

Of course, if the negligence of the driver of the Godfrey car were the sole proximate cause of plaintiff's intestate's death, the defendant would not be liable. *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361. But if the defendant's negligence were the proximate cause, or one of the proximate causes, of plaintiff's intestate's death, then the defendant would be liable. *Wood v. Public Service Corp.,* 174 N. C., 697, 94 S. E., 459. Upon this theory, the case was properly submitted to the jury. The verdict and judgment will be upheld.

No error.

RICHARD J. REYNOLDS v. SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, AS TRUSTEE UNDER THE WILL OF RICHARD JOSHUA REYNOLDS; MARY REYNOLDS BABCOCK, CHARLES BABCOCK, NANCY REYNOLDS BAGLEY, HENRY WALKER BAGLEY, ZACHARY SMITH REYNOLDS, ANNE CANNON REYNOLDS, W. N. REYNOLDS AND R. E. LASATER, GUARDIANS OF NANCY REYNOLDS BAGLEY AND ZACHARY SMITH REYNOLDS; HARDIN V. REYNOLDS, ETHEL R. REYNOLDS, SUE R. STALEY, THOMAS STALEY, A. D. REYNOLDS, GRACE REYNOLDS, HOGE REYNOLDS, SCOTTIE REYNOLDS, R. S. REYNOLDS, LOUISE REYNOLDS, CLARENCE REYNOLDS, EDNA REYNOLDS, NANCY L. LASATER, R. E. LASATER, LUCY L. STEDMAN, J. P. STEDMAN, MARY LYBROOK, SAM LYBROOK, WILL LYBROOK, D. J. LYBROOK, CHINA LYBROOK, ANNIE D. REYNOLDS, HARDIN W. REYNOLDS, KATHERINE REYNOLDS, WILLIAM N. REYNOLDS, LUCY R. CRITZ, W. N. REYNOLDS, KATE B. REYNOLDS, J. EDWARD JOHNSTON AND J. EDWARD JOHNSTON, JR., AND J. EDWARD JOHNSTON, GUARDIAN OF J. EDWARD JOHNSTON, JR.

(Filed 2 July, 1931.)

1. Wills E i—Parol evidence is not admissible in action for construction of will.

A will signed by the testator and witnessed as required by statute and clearly unambiguously expressed as to the testator's intent in the disposi-

tion of his estate, and sufficient in law as his last will and testament, will be given effect as written, and parol evidence to show a different intent as to the meaning of its terms upon which the designated beneficiary is to receive his portion, is incompetent when the issue of fraud or undue influence does not arise.

2. Wills E a—A will is to be construed as a whole.

The intent of the testator in the disposition of his property is to be construed by the courts from the entire instrument with regard to its relevant parts.

3. Wills E h—Construction of will as to amount due legatees from trust fund thereby created.

Where a will provides for the payment of a certain amount annually to the testator's children from a trust fund therein set up, and in another item provides "to encourage habits of industry, thrift and economy in my children, . . . I direct my trustee, upon any of my children presenting to it a statement showing to its satisfaction that he or she has made by individual effort, in any legitimate business or investment, or has saved from money, stocks or bonds owned by him or her, any money over and above all living expenses, to pay to such child . . . two dollars for every one dollar so made or saved," except money made in buying or selling stocks on margin: *Held*, the provisions as to money saved from money, stocks or bonds owned by the legatees does not include bequests from the estate of the testator or any other estate or gifts without consideration from any persons, such sums not being saved or earned by the legatees from money or stocks owned by them, and such items are properly excluded from the statement of a legatee in calculating the amount due such legatee under the provisions.

APPEAL by Richard J. Reynolds and Mary R. Babcock, from *Clement, J.*, 29 November, 1930. From FORSYTH. Affirmed.

The following judgment was rendered by the court below:

"This cause coming on to be heard, and it appearing to the court that summons was issued herein on 9 June, 1930, and that service of the summons and a copy of the complaint was accepted by all of the defendants except the defendants Anne Cannon Reynolds, Louise Reynolds, William N. Reynolds (minor), Nancy Reynolds Bagley (minor), J. Edward Johnston, Jr. (minor), and Zachary Smith Reynolds (minor), but that said defendants have been served with summons by publication or personally as required by law, and that all of the infant defendants are represented by general guardians and by a guardian *ad litem*, and it further appearing to the court that none of the defendants have filed answers except the Safe Deposit and Trust Company of Baltimore, as trustee, under the will of Richard Joshua Reynolds, and Forrest G. Miles, as guardian *ad litem* for Anne Cannon Reynolds and William N. Reynolds, and it further appearing to the court that all necessary parties to this action have been served with summons, or have accepted service of summons:

Upon a consideration thereof and of the complaint and the answers of the Safe Deposit and Trust Company of Baltimore as trustee under the will of Richard Joshua Reynolds and Forrest G. Miles, guardian *ad litem,* and the will of Richard Joshua Reynolds referred to in the complaint, which said will is filed in the office of the clerk of this court and is recorded in Book No. 8 of Wills on page 91, the court finds from the admissions in the pleadings and the evidence offered the following facts:

The plaintiff is the son and eldest child of Richard Joshua Reynolds, who died, a resident of Forsyth County, North Carolina, on 29 July, 1918, leaving surviving him a widow, Katherine Smith Reynolds (subsequently Katherine Smith Johnston) and four minor children.

At the time of the death of said testator his total estate aggregated about $11,000,000 in value, and the approximate then value of the share to be held in trust for each child was one million eight hundred thousand dollars ($1,800,000).

The plaintiff, Richard J. Reynolds, attained the age of 21 on 4 April, 1927; his mother, the widow of said testator, died prior to his attaining said age; and by decree of this court passed in a cause instituted for the purpose of determining the amount of income which should be paid him by the trustee, it was determined that the trustee shall pay him fifty thousand dollars ($50,000) per annum out of the income, until he should attain the age of 28, and the trustee has accordingly so done.

On or about 17 April, 1929, the plaintiff filed with the trustee a statement of his affairs for the year 4 April, 1928, to 4 April, 1929, as the basis for his claim to receive payment out of said trust estate or share, of a sum equal to twice the amount of savings claimed to be shown by said statement, in pursuance of the provisions of item fourth, subsection 6, of said will, and elected to have any such payment or allowance made in stock of the R. J. Reynolds Tobacco Company at par, out of the shares of such stock held in said trust; the items of said statement as filed being set forth in paragraph 7 of the plaintiff's complaint.

The defendant, trustee, has admitted the correctness of said statement, except with respect to the disputed items hereinafter mentioned, and recognized net savings shown by the statement for the period in question in the amount of nineteen thousand eight hundred and eighty-five dollars and twenty-two cents ($19,885.22), for which it transferred and delivered to the plaintiff Class B stock of the R. J. Reynolds Tobacco Company out of the shares held by it as such trustee aggregating thirty-nine thousand and seven hundred and seventy-seven dollars and forty-four cents ($39,777.44) in par value being twice the said amount of savings so recognized); said payment and delivery having been made,

however, without prejudice to the right of the plaintiff to claim a further amount or amounts, in such stock, upon the basis of his said statement.

That the items in said statement which were not recognized, but were disallowed by said trustee upon the ground that they were not properly included under the terms of said will in fixing the basis of the plaintiff's claim, consist of and comprise the following items in said statement, viz.:

Income received from the estate of Katherine S. Johnston	$ 54,473.71
Income received from the estate of Richard J. Reynolds	50,000.00
Amount received from the estate of William R. Reynolds	783.70
Amount received from Safe Deposit and Trust Company of Baltimore	5,121.74
	$110,379.15

That of said items so rejected or disputed by the trustee, the item of fifty-four thousand four hundred and seventy-three dollars and seventy-one cents ($54,473.71) is the amount of income received by the plaintiff during said year from the trust estate of his mother, Katherine S. Johnston, the widow of said testator, and was paid out of the income from the trust created by her will, of which will a copy is filed in the evidence in this case.

The item of fifty thousand dollars ($50,000) is the amount paid by the defendant trustee to the plaintiff during the said year from the income of the trust estate under his father's will, as hereinbefore mentioned.

The amount of seven hundred and eighty-three dollars and seventy cents ($783.70) was the distributive share of the plaintiff, being principal which he received from the estate of his uncle, W. E. Reynolds, in said year.

The item of five thousand one hundred and twenty-one dollars and seventy-four cents ($5,121.74) was a gift to the plaintiff from the Safe Deposit and Trust Company of Baltimore of a portion of its commissions as trustee of said estate, received by the plaintiff during said year.

The item of twelve hundred dollars ($1,200) appearing in said application or statement should be deducted from the personal expenses shown by said application or statement, and was put on the first side

of said application or statement to balance this nondeduction, and has been allowed for by the trustees in the payment already made to the plaintiff, as aforesaid.

The income from the trust share of the plaintiff under his father's will has been more than sufficient since his father's death to pay him the sum of $50,000 a year, the 203,543 shares of R. J. Reynolds Tobacco Company Class B stock held in said trust share alone paying at present dividends at the rate of $3 per share per annum.

At the time of the death of said testator the stock of the R. J. Reynolds Tobacco Company had a par value of $100 a share; and the Class A stock was worth $250 per share, and the Class B stock $205 per share, the only difference between said two classes of stock being that Class A stock had the sole voting power, and entitled an employee owner to share in the bonus plan of said company. On 4 April, 1929, being the date as of which the plaintiff filed his application with the defendant, trustee, the value of the share of the estate, held in trust for him under his father's will, which then included 207,520 shares of Class B stock of the said R. J. Reynolds Tobacco Company (but no Class A stock) was about $21,000,000; and at said time the par value of said Class B stock was $10, and the market value thereof was $55 per share. On 18 November, 1930, the date of the hearing of this cause, the Class B stock of the R. J. Reynolds Tobacco Company had a market value of $45 per share.

That the statements as to the family and relatives of said testator, Richard Joshua Reynolds, as set forth in paragraphs 12 and 13 of the plaintiff's complaint are true and correct.

Upon the record before it, the court orders, adjudges and decrees that by true construction of the will of said testator, Richard Joshua Reynolds, the items to be included in the statement furnished to the trustee in any year, as the basis for showing the amount made or saved by any of his children between 21 and 28 years of age, over and above all living expenses during such year, and from the total of which items the entire living expenses are to be deducted, should include only net earnings made by the individual efforts in any legitimate business or investment, and income saved from money, stocks or bonds or other productive property owned by such child, including the earnings and savings, as aforesaid, of the husband of any married daughter; and should not include amounts received by such child during such year, as either income or principal, from the share held in trust for such child during such year, as either income or principal, from the share held in trust for such child under said will, or income or principal so received by such child from the trust created by the will of the mother of said

children, or received during such year as next of kin or devisee or legatee of any other relative or other person, or gifts received from any other person without consideration; the annual statements to be filed by the children of the testator, Richard Joshua Reynolds, are to be filed as of the anniversary of the birth of the child filing the statement, and the correctness of the statement filed is to be determined solely by the trustee under the will, provided such determination is in good faith and is not arbitrary.

Upon the record before it the court orders, adjudges and decrees that the following items, to wit:

> $54,473.71, designated as income received from the estate of Katherine S. Johnston;
> $50,000.00, designated as income received from the estate of Richard J. Reynolds;
> $783.00, designated as an amount received from the estate of W. R. Reynolds, and
> $5,121.74, designated as an amount received as a gift from the Safe Deposit and Trust Company of Baltimore, included in the application or statement of the plaintiff,

filed with the defendant, Safe Deposit and Trust Company of Baltimore, trustee, and referred to in paragraph 7 of the complaint, all of which were rejected and disallowed by the Safe Deposit Company of Baltimore, trustee, as aforesaid, were properly rejected and disallowed, the court being of the opinion that said items are not within the terms of paragraph 6 of the will of Richard Joshua Reynolds.

The court is further of the opinion, and in accordance therewith orders, adjudges and decrees that the net amount forming the proper basis for accelerated distribution because of earnings or savings made by the plaintiff during said year, under paragraph 6 of item 4 ($19,885.22), and it appearing to the court from the admissions in the pleadings that the Safe Deposit and Trust Company of Baltimore, trustee as aforesaid, has delivered prior to the institution of this suit to Richard J. Reynolds $39,777.44 in stock of the R. J. Reynolds Tobacco Company at par, said delivery being made without prejudice to his rights to claim further payment on the basis of the application or statement submitted by him, it is ordered and adjudged that the action be dismissed, and that the costs thereof be taxed against the Safe Deposit and Trust Company of Baltimore as trustee under the will of Richard Joshua Reynolds to be paid in equal shares out of the trust funds held by it for the benefit of the children of the said Richard Joshua Reynolds under his said will. J. H. CLEMENT, *Judge Presiding.*"

The plaintiff, Richard J. Reynolds, made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

Craige & Craige and Ratcliff, Hudson & Ferrell for Richard J. Reynolds and Mary R. Babcock.

Manly, Hendren & Womble and Venable, Baetjer & Howard, of Baltimore, Maryland, for defendant Safe Deposit and Trust Company of Baltimore, trustee.

CLARKSON, J. Richard Joshua Reynolds, of Winston-Salem, Forsyth County, N. C., died in August, 1918, leaving a last will and testament, codicil and nuncupative will, which said instruments were duly admitted to probate in said county in August, 1918, and recorded in office of the clerk of the Superior Court of said county in Book 8 of Wills, p. 91, etc.

At his death Richard Joshua Reynolds left surviving him his widow, Katherine Smith Reynolds and four children, Richard J. Reynolds, Mary Katherine Reynolds, Nancy Susan Reynolds and Zachary Smith Reynolds, all of the said children being minors.

Katherine Smith Reynolds subsequently married J. Edward Johnston and died in 1924, leaving a last will and testament, which was duly admitted to probate in said Forsyth County, N. C., and recorded in Book No. 9 of Wills, on page 19, in the office of the clerk of the Superior Court of Forsyth County, N. C.

The defendant, Safe Deposit and Trust Company of Baltimore, has entered upon the performance of the trusts prescribed in the wills of both Richard Joshua Reynolds and Katherine Smith Johnston, and is now in possession of the trust estates created by both of said wills, and is administering said estates.

Richard J. Reynolds, the eldest child and one of the legatees under item fourth of the will of Richard Joshua Reynolds and item seven of the will of Katherine Smith Johnston, attained the age of 21 years on 4 April, 1927.

After the said Richard J. Reynolds became of age in a proceeding in the Superior Court of Forsyth County, N. C., instituted by the Safe Deposit and Trust Company of Baltimore for an interpretation of item fourth (paragraph 5) of the will of Richard Joshua Reynolds, the said Safe deposit and Trust Company of Baltimore was duly directed by the judge of the said court to pay to the said Richard J. Reynolds the sum of $50,000 per annum until he should attain the age of 28 years, and that the said Safe Deposit and Trust Company of Baltimore has paid and is now paying to the said Richard J. Reynolds, as provided in the said will as interpreted by the court in the said proceeding, the sum of $50,000 per year.

Richard J. Reynolds filed with the Safe Deposit and Trust Company of Baltimore a statement of the affairs of Richard J. Reynolds for the period from 4 April, 1928, to 4 April, 1929, as follows:

"INCOME—4 APRIL, 1928, TO 4 APRIL, 1929.

From estate Katherine S. Johnston	$ 54,473.71
From estate R. J. Reynolds	50,000.00
From balance estate W. R. Reynolds (sale Curtiss Field)	783.70
From Roosevelt Field, Inc.	87,970.75
From Safe Deposit and Trust Co. (payment on $85,000.00 note)	5,121.74
From dividends	9,671.25
From rentals	2,760.00
From salaries	3,600.00
From personal checks of R. J. Reynolds	1,200.00
Total	$215,581.15

EXPENSES—4 APRIL, 1928, TO 4 APRIL, 1929.

Business expense	$ 11,617.90
Personal expense	51,596.21
Interest	17,040.06
Taxes—income	31.00
Taxes, other than income	2,362.67
Real estate, commissions and expenses	2,664.84
Repairs to rental property	4.10
Total	$ 85,316.78
Total income 4 April, 1928, to 4 April, 1929	$215,581.15
Total expenses 4 April, 1928, to 4 April, 1929	85,316.78
Net profit	$130,264.37

Richard J. Reynolds demanded of the Safe Deposit and Trust Company of Baltimore, as trustee under paragraph (6) of item fourth of the will of Richard Joshua Reynolds the sum of $260,528.74 (double the amount contended by him as his net profits) in stocks of the R. J. Reynolds Tobacco Company at par, based upon the said statement, making said claim according to his contention under paragraph (6) of item fourth of the will of Richard Joshua Reynolds.

The trustee was willing to allow the said claim except as to the following items of income in said statement as follows:

Estate Katherine S. Johnston	$ 54,473.71	
Estate R. J. Reynolds	50,000.00	
From estate W. R. Reynolds	783.70	
From Safe Deposit and Trust Co.	5,121.74	
Total as contended by plaintiff		$130,264.37
Less amount as contended by defendant		110,379.15
Total, as contended by defendant		$ 19,885.22

The trustee recognized a net income for the period in question of $19,885.22, for which $39,777.44 in stocks of the R. J. Reynolds Tobacco Company at par have been delivered to Richard J. Reynolds with the understanding that such delivery should be without prejudice to his right to claim any further payment upon the basis of the statements.

All of the children of Richard Joshua Reynolds who were living at his death are now living, as follows:

Richard J. Reynolds (unmarried).

Mary Reynolds Babcock (husband, Chas. Babcock).

Nancy Reynolds Bagley (husband, Henry Walker Bagley).

Zachary Smith Reynolds (wife, Anne Cannon Reynolds).

That of said children, Richard J. Reynolds and Mary Reynolds Babcock are now of age, being more than 21 years of age, and the others are minors under the age of 21 years; that Katherine S. Johnston died in the year 1924, and that her husband J. Edward Johnston, and one son by that marriage, J. Edward Johnston, Jr., survived her.

This Court in this action is called upon to construe item 4, paragraph (6) of the will of Richard Joshua Reynolds, which is as follows:

"(6) *To encourage habits of industry, thrift and economy in my children,* I hereby make the following provision for further payments to them after they reach the age of twenty-one (21) years, and before they attain the age of twenty-eight (28) years, to wit: I direct said trustee, Safe Deposit and Trust Company, annually, upon any of my children presenting to it a statement showing to said trustee's satisfaction that he or she has made *by individual effort, in any legitimate business or investment, or has saved from money, stocks or bonds owned by him or her, any money over and above all living expenses,* to pay to such child, out of his or her share of my estate, if necessary to the full extent of such share, *two dollars for every one dollar so made or saved.* Payment will be made in cash; or, if the child entitled thereto so elects, in stocks or bonds at par, including stocks in R. J. Reynolds Tobacco

Company (subject to sale restrictions as to last named stocks as shown in item fifth hereof). *But, said trustee is directed to exclude and eliminate from any annual statement submitted under this provision of my will any money made in buying and selling stocks, or commodities of any kind, on margin (commonly known as dealing in 'futures'), or earnings of profits derived from speculation of that character.* Any married daughter may avail herself of this provision of my will and may, in filing annual statements as herein required and subject to the same restrictions, include therein like earnings and savings, over and above expenses, by her husband." (Italics ours.)

The plaintiff introduced in part the deposition of H. H. Shelton, an attorney, who became general counsel of the R. J. Reynolds Tobacco Company on 1 January, and continued as such counsel until April, 1921.

"Q. 5. Did you have occasion about that time to confer with Mr. Richard Joshua Reynolds, at that time president of R. J. Reynolds Tobacco Company in Winston-Salem, in regard to redrafting the whole or part of his will? Answer: I did.

Q. 6. In that connection did he present to you the original or a copy of a will executed by him in accordance with the laws of the State of North Carolina? Answer: He did present such a will to me. I think it was a copy.

Q. 7. I hand you a paper marked Exhibit A, and call your particular attention to the last paragraph on page 6, running over on page 7, and ask you if that is a copy of a paragraph in his will, when he asked you to redraft his will on or about 25 July, 1917? Answer: The paper you hand me, marked Exhibit A, is a copy of the will of Mr. Reynolds presented to me, and the copy he presented to me contained the paragraph to which you call attention and which begins on page 6 with the words 'Any further payments,' and concludes on page 7, about the middle thereof, with the words, 'Conditions above provided.'

Q. 9. What changes did you make in the paragraph beginning on page 6 of Exhibit A, referred to in your answer to Question No. 7? Answer: It appears that I reconstructed the paragraph referred to in my answer to Question 7, and which is a part of item fourth of Exhibit A, appearing on pages 6 and 7 thereof. The reconstructed paragraph is a part of item fourth, subparagraphed (6). The first material change appearing in Exhibit B was to declare the purpose and reasons for the remaining provisions thereof. It was to encourage habits of industry and economy that the subsequent provisions were made. The next and the important change was to rewrite the provision in Exhibit A, which reads: 'In any legitimate business or investment, or saved from the earnings of money or stock or bonds owned by them,' by

using the language in Exhibit B, reading: 'In any legitimate business or investment, or has saved from money, stock or bonds owned by him or her.' Another important change which probably should have first been mentioned in this answer was to use the words 'two dollars for every one dollar so made or saved,' in lieu of the words in Exhibit A, reading 'for every one dollar made.' The fact that this change was made is emphasized by the fact that the clause 'two dollars for every dollar so made or saved' was italicised. In Exhibit A, the two dollar for one dollar idea was made effective in favor of any married daughter if the statement required disclosed a dollar 'made by the industry or good management of her husband.' Whereas, in the will as drafted by me this reward was made available to a married daughter if the statement required disclosed a sum of money resulting from 'like earnings and savings.'

Q. 10. Do you recall any instructions given to you by Mr. Reynolds or any conversations with him in connection with the paragraph on pages 6 and 7 of Exhibit A, and the drafting of paragraph 6 of item fourth in Exhibit B? Answer: I do recall such instructions.

Q. 11. What were they? Answer: Mr. Reynolds discussed the provisions of his will, and especially the provisions contained in the paragraphs referred to with me on various occasions prior to my actually finishing the will which he executed. The will as drafted by me was drawn strictly in accordance with his instructions, and I recall very clearly that we discussed the difference between the two paragraphs mentioned and his idea was to enlarge the provisions of Exhibit A, so that the two dollar for one idea would apply to money resulting from industry and to money resulting from economy. His idea was, as he explained it often to me, to encourage his children in industry and to equally encourage them in saving their money from whatever source it came."

The defendant, Safe Deposit and Trust Company, objected to each of the questions and answers contained in this deposition. The court sustained the objection, and plaintiff excepted as to each question and answer. We think the court below correct in sustaining the objections.

This matter has been decided adversely to plaintiff's contention over a century ago. In *Reeves v. Reeves*, 16 N. C., at p. 389, decided June, 1830, *Ruffin, J.*, speaking to the subject, said: "Then as to the parol evidence and answer of the administrator, to vary this construction; it is impossible that the idea should be admitted for a moment. It would be to upset all wills by the loosest proof. . . . But it would be extremely dangerous, entirely too much so, to say, that the testator did not devise, because, in law, the paper would pass a larger estate, and more property, than witnesses supposed the maker of it meant. The

meaning of the testator is to be judged of by his written words; and they must stand, unless it be shown that he was imposed on, and did not know they were in his will; or knowing that they were there, that he had been induced by undue influence to execute it against his own wishes; which goes on quite a different ground, namely, weakness."

"Where the language is clear as to the intent of the testator, and there is no latent ambiguity, there can be no extrinsic proof. In *McDaniel v. King,* 90 N. C., 602, *Merrimon, C. J.,* said: 'If a will is sufficiently distinct and plain in its meaning as to enable the Court to say that a particular person is to take, and that a particular thing passes, that is sufficient, and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it.' *Williams v. Bailey,* 178 N. C., 632." *Kidder v. Bailey,* 187 N. C., at p. 508-9; *Watkins v. Flora,* 30 N. C., 374; *Stowe v. Davis,* 32 N. C., 431; *Hester v. Hester,* 37 N. C., 330; *Deaf Institute v. Norwood,* 45 N. C., 65; *Hathaway v. Harris,* 84 N. C., 96; *Taylor v. Maris,* 90 N. C., 619; *Patterson v. Wilson,* 101 N. C., 594; *In re Shelton's Will,* 143 N. C., 218.

In Jarmon on Wills, Vol. 1, ch. 15, sec. 1, we find: "As the law requires wills both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the judges, as well of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views. Indeed, it was rather to have been expected that judicial experience should have the effect of impressing a strong conviction of the evil of offering temptation to perjury. There are numerous cases in which the courts have refused to admit parol evidence to contradict the express terms of a will. But where a will contains an erroneous recital or statement of fact, parol evidence is sometimes admissible to contradict it."

The cases relied on by plaintiff appellant, *Wooten v. Hobbs,* 170 N. C., at p. 214; *Cecil v. Cecil,* 173 N. C., 410, and *Brown v. Brown,* 195 N. C., 315, are not inconsistent to the position here taken.

In the *Brown case, supra,* the testator added codicils to his will, and it was held that to effectuate the intent of the testator, as expressed by the entire writing, the will will be construed with the codicils.

The court below, in the judgment construing item 4, paragraph (6), held: "That by true construction of the will of said testator, Richard Joshua Reynolds, the items to be included in the statement furnished to the trustee in any year, as the basis for showing the amount made or saved by any of his children between 21 and 28 years of age, over and above all living expenses during such year, and from the total of which items the entire living expenses are to be deducted, should include only net earnings made by individual effort in any legitimate business or investment, and income saved from money, stocks or bonds or other productive property owned by such child, including the earnings and savings, as aforesaid, of the husband of any married daughter; and should not include amounts received by such child during such year, as either income or principal, from the share held in trust for such child under said will, or income or principal so received by such child from the trust created by the will of the mother of said children, or received during such year as next of kin or devisee or legatee of any other relative or other person, or gifts received from any other person without consideration; the annual statements to be filed by the children of the testator, Richard Joshua Reynolds, are to be filed as of the anniversary of the birth of the child filing the statement, and the correctness of the statement filed is to be determined solely by the trustee under the will, provided such determination is in good faith and is not arbitrary." We see no error in this construction of the will.

The construction of paragraph (6) of item fourth set forth in the judgment appealed from, is correct, and that the statements to be filed with the trustee in pursuance of said paragraph should include only:

(1) Net earnings derived from individual efforts of the applicant, in any legitimate business or investment, and

(2) Income saved from money, stocks, bonds or other productive property owned by such child; and should not include, as contended by the appellant, either

(1) Income received from this trust under his father's will, (2) income received from the trust under his mother's will, both derived from property not "owned" by him (3) or amounts received, in money or property, from the estates of other relatives, nor as a gift neither earned nor derived from property owned by the appellant.

The appellant's main contention is that any money or property received in any way during the course of the year, in so far as it is not lost or spent in the course of the year, is "saved" within the meaning of this paragraph.

The paramount idea in the mind of the testator, Richard Joshua Reynolds, in item 4, paragraph (6), was "To encourage habits of industry, thrift and economy in my children," etc. No doubt his great fortune was accumulated in this way, and he wanted to perpetuate this attitude in his children, those that came after him. A laudable purpose and the very keystone of success in any business enterprise. Then he goes on and explains how this must be done, not by buying and selling stocks, or commodities of any kind, on margin (commonly known as dealing in futures) or earnings or profits derived from speculation of that character. This successful business man no doubt having seen the tragedy and wreckage in his long and successful business career of men and women dealing in futures and speculation on margin, condemns it by not allowing any money made in that way to be included in what his idea constituted the encouragement in his children of habits of "industry, thrift and economy." He was careful to define what his children should be rewarded for "individual efforts, in any legitimate business or investment or had saved from money, stocks or bonds owned by him or her any money over and above all living expenses." And then such child should have *"two dollars for every one dollar so made or saved."*

We cannot see how the amount received from his mother's estate, $54,473.71, or from his uncle's estate $783.70, or his allowance under his father's estate $50,000, or refund of commissions from Safe Deposit and Trust Company of Baltimore, the trustee, under his father's will, $5,121.74, were such funds from "individual effort . . . saved from money, stocks or bonds owned by him or her." These items were not "saved from money, stocks or bonds owned by him or her," but came to him by inheritance from his mother's and uncle's estates, and provision under his father's will, and a refund of commissions from defendant Safe Deposit and Trust Company of Baltimore.

Many meanings are given to the word "save," but we think the following is applicable here, taken from the Century Dictionary: "(7) To lay by, little by little, and as the result of frugal care; lay up; hoard; as, he has *saved* quite a good sum out of his scanty earnings." This is ordinarily the generally accepted meaning and well understood among business men, and we think this was the testator's meaning when he used the word "saved" or "so made or saved."

The construction suggested by the trustee and adopted by the lower court in the judgment appealed from, is not only strictly in accordance

with the letter of the clause in question, but attributes to the testator the rational intent of rewarding a child to the extent that such a child could show that, from his own independent efforts and means, he has earned, made, and saved during the year a surplus over and above his living expenses. Any attempt to give to this clause a wider construction and effect than its literal meaning, necessarily leads to results which we think are totally contrary to the expressed design, purpose and object of the entire clause or provision and the intention of the testator.

We see no reason to go into a further analysis of the language of this part of the will of Richard Joshua Reynolds. The testimony of the attorney, H. H. Shelton, can have no bearing on this controversy.

In *McIver v. McKinney,* 184 N. C., at p. 396, citing numerous authorities, the following observation is made: "The question is not what the testator intended to express, but what he actually expressed in his will, when all its provisions are considered and construed in their entirety."

This successful business man condemned dealing in futures and speculation of that character—buying and selling stocks or commodities of any kind on a margin, so also it is outlawed by the General Assembly of this State. In construing C. S., 2144, this Court said, in *Welles & Co. v. Satterfield,* 190 N. C., at p. 95: "The statute in this State makes contracts for 'futures' utterly null and void. The statute clearly defines what are 'future' contracts; 'Whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered.' The Legislature in its wisdom has seen fit to pass a drastic act to stop this kind of gambling or vicious contracts, no doubt fully aware of the wreckage of the human family. The mischief the act is intended to prevent is plain—that no one should get something for nothing, or nothing for something." See Public Laws of N. C., 1931, ch. 236.

The record discloses: "Mary R. Babcock, a sister of the plaintiff, and entitled to file statements in the same manner as the plaintiff, appears as a defendant in this case. Her interest, however, is identical with that of the plaintiff, and she excepted to the judgment signed by the court for the purpose of attacking the construction of the will made by the court jointly with the plaintiff. For that reason no separate case on appeal was made, the interest of the appealing parties being identical."

For the reasons stated, the appeal of Mary R. Babcock will be governed by the law as herein stated, applying to plaintiff's appeal.

In the judgment of the court below we find, in law, no error. The judgment is

Affirmed.

N. L. BROUGHTON, ADMINISTRATOR OF LYNN BROUGHTON, DECEASED, *v.* STANDARD OIL COMPANY OF NEW JERSEY, D. HENRY ALLEN, DOING BUSINESS AS ALLEN'S SERVICE STATION, AND B. R. POOLE.

(Filed 2 July, 1931.)

1. Master and Servant C f—Assumption of risk applies only where relation of master and servant exists.

The doctrine of assumption of risk is applicable only where the relation of master and servant exists between the parties.

2. Negligence A a—Negligence is the want of due care under the circumstances.

Actionable negligence is the want of due care under the existing circumstances and is conveniently defined to be "the failure to observe for the protection of the interest of another that degree of care, precaution or vigilance which the circumstances justly demand, when some other person suffers injury."

3. Negligence A c—Evidence held insufficient to show negligence in installing and inspecting gasoline tanks in filling station.

The plaintiff's intestate brought action against the defendant oil company, alleging that it was negligent in respect to gasoline tanks owned and installed by it at a filling station. The evidence tended to show that the defendant, under contract with the owner of the station, installed its own tanks, pumps and appliances, and inspected them at intervals to see that they were in good condition and properly operated; that on Wednesday prior to the explosion early Saturday morning there was found in the basement of the station a quantity of gasoline floating on water collecting there from heavy rains; that the fluids were drained, but that there remained a very perceptible odor of gasoline about the station, that the intestate was employed as a helper at the station; that prior to the explosion, the intestate, while intoxicated, went to sleep in the station in violation of the orders of the lessee; that the manager of the station, while searching for a key dropped by a customer, struck a match igniting the gasoline fumes causing the explosion: *Held*, in the absence of notice that gasoline had been found in the basement the oil company cannot be held negligent in failing to inspect between that time and the time of the explosion, and there being no evidence tending to show that the tank had leaked during the preceding year, and no evidence that the oil company was under duty to repair, and the evidence raising only a conjecture as to whether the gasoline had leaked from the tank or whether it got there from improper use of the appliances by the employees, it is insufficient to establish negligence on the part of the defendant, and its motion as of nonsuit should have been allowed.

4. Negligence B a—Where evidence of negligence is insufficient, question of proximate cause need not be considered.

Where the evidence is insufficient to establish the negligence of the defendant, the question of proximate cause need not be considered, but in this case there was evidence that the independent act of a third person was the sole proximate cause of the injury.

5. Evidence N b—Sufficiency of evidence to go to jury.

Evidence must be sufficient to raise more than a conjecture or suspicion of the fact to be proved in order to be sufficient to be submitted to the jury.

6. Negligence C a—Held: evidence disclosed contributory negligence barring administrator's right to recover.

Where, in an action by the administrator of an employee of a filling station to recover for his death caused in an explosion thereat, the evidence tends to show that the intestate had knowledge of the presence of gasoline fumes about the station, and the fact that a few days prior to the explosion gasoline was found in the basement of the station, and that the intestate, while intoxicated, in violation of the orders of the lessee operator of the station, went to sleep in the station, that others in the station at the time of the explosion escaped without serious injury, but that the intestate failed to escape because he was asleep at the time: *Held*, the evidence discloses contributory negligence of the intestate barring the administrator's right to recover against the oil company owning, installing and inspecting the tanks upon allegations of negligence on its part in respect thereto.

CLARKSON, J., dissenting upon evidence stated in his opinion.

STACY, C. J., concurs in dissenting opinion.

APPEAL by defendant, Standard Oil Company of New Jersey, from *Sinclair, J.*, at September Term, 1930, of WAKE. Reversed.

This is an action to recover damages for the death of plaintiff's intestate, caused by an explosion in a filling station, owned by the defendant, B. R. Poole, and leased by him to the defendant, D. Henry Allen, who operated the same under the name of Allen's Service Station. The tanks in which gasoline was stored for sale at said filling station, and the pumps and equipment which were used in its operation, were installed by the defendant, Standard Oil Company of New Jersey, and owned by said company at the time of the explosion. The said tanks, pumps and equipment were subject to the inspection of the defendant, Standard Oil Company of New Jersey, and were frequently inspected by said company, in order to ascertain whether or not they were being properly used and were in good condition.

It is alleged in the complaint that the explosion which caused the death of plaintiff's intestate was the result of the negligence of the defendants, as specifically alleged therein. In the answers filed by the defendants, each defendant denied the allegations of the complaint which constitute the cause of action on which plaintiff seeks to recover.

At the close of the evidence introduced by the plaintiff, each of the defendants moved for judgment as of nonsuit. The motion of the defendant, B. R. Poole, was allowed, and the action was dismissed as to him. The motions of the other defendants were denied. No evidence was offered by either of these defendants.

The defendant, Standard Oil Company of New Jersey, excepted to the refusal of the court to allow its motion for judgment as of nonsuit, at the close of the evidence for the plaintiffs.

The said defendant also excepted to the refusal of the court to instruct the jury, as requested by said defendant, in writing and in apt time, that if the jury believed all the evidence, and found the facts to be as testified by all the witnesses, they should answer the first issue, "No," and the third issue, "Yes."

The issues submitted to the jury were answered as follows:

"1. Was the death of plaintiff's intestate caused by the negligence of the defendant, Standard Oil Company of New Jersey, as alleged in the complaint? Answer: Yes.

2. Was the death of plaintiff's intestate caused by the negligence of the defendant, D. Henry Allen, as alleged in the complaint? Answer: No.

3. Did the plaintiff's intestate, by his own negligence, contribute to his death? Answer: No.

4. Did the plaintiff's intestate assume the risk incidental to the employment in which he was engaged? Answer: No.

5. What amount, if any, is plaintiff entitled to recover of defendants? Answer: $5,000."

There was judgment that plaintiff recover nothing of the defendant, D. Henry Allen, and that the action be dismissed as to said defendant.

From judgment that plaintiff recover of the defendant, Standard Oil Company of New Jersey, the sum of $5,000, together with the costs of the action, the said defendant appealed to the Supreme Court.

Bunn & Arendell, Thos. A. Banks and Biggs & Broughton for plaintiff.

Pou & Pou for defendant.

CONNOR, J. At the date of his death, to wit, 29 September, 1928, plaintiff's intestate, Lynn Broughton, was employed by the defendant, D. Henry Allen, as a helper at a filling station located near the town of Garner, in Wake County, North Carolina. The filling station was owned by the defendant, B. R. Poole, and had been leased by him to the defendant, D. Henry Allen, who was operating it under the name of Allen's Service Station. The defendant, Standard Oil Company of New Jersey, owned the tanks in which gasoline was stored for sale at said filling station; it also owned the pumps and equipment which were used in its operation. This defendant had installed the said tanks, pumps and equipment, and from time to time, inspected the same for the purpose of ascertaining whether or not they were being properly used and were in good condition.

Between three and four o'clock on the morning of Saturday, 29 September, 1928, plaintiff's intestate was injured by an explosion which occurred in the filling station. His death resulted instantly from his injuries. He had gone on duty at about 7 o'clock on Friday evening, 28 September, 1928. He procured a substitute for a few hours that night, and was absent from the filling station until about 12 o'clock. During this time he attended a chatauqua in the town of Garner. After his return to the filling station, he resumed his work, and was engaged in the performance of his duties about the premises until about 1 o'clock. He then lay down on a cushion in the filling station and fell asleep. He had been drinking whiskey during the night, and was under its influence when he lay down and fell asleep. He and other employees of the defendant, D. Henry Allen, had been expressly forbidden to sleep at the filling station at night. Efforts of the manager of the filling station to awaken him after he fell asleep were unavailing. While he was asleep, there was a terrific explosion in the filling station resulting in injuries to plaintiff's intestate, from which he died almost instantly.

While plaintiff's intestate was asleep, between three and four o'clock, a customer came into the filling station. There was at this time an odor of gasoline, about the premises, which was quite noticeable. The manager of the filling station and the customer were the only persons present, except plaintiff's intestate. While they were looking for a key on the floor, the manager struck a match; a bluish flame immediately appeared along the floor over the basement of the filling station. This was followed by an explosion which wrecked the filling station. Both the manager and the customer escaped through the open doors of the filling station, without serious injury. Plaintiff's intestate was killed by the explosion. If he had been awake, he also could have escaped through the open doors of the filling station.

On Wednesday afternoon preceding the Saturday morning when the explosion which killed plaintiff's intestate occurred, employees of the defendant, D. Henry Allen, discovered that water and gasoline had accumulated in the basement of the filling station. A heavy rain had fallen during the day. After the rain, it was discovered that water and gasoline had accumulated in the basement to a depth of about five inches. There was a coating of gasoline on the water about three-fourths of an inch thick. Fumes from this gasoline were decidedly noticeable. Ditches were dug on Thursday, and the water and gasoline drained from the basement. These ditches were dug by employees of the defendant, D. Henry Allen. After the water and gasoline were drained from the basement, the basement was washed out by the use of a hose. Prior to this time, for at least six months, the basement of the filling

station had been dry and clean; there had been no gasoline or gasoline fumes in the basement. Plaintiff's intestate was at the filling station, when the water and gasoline were discovered in the basement, on Wednesday afternoon. He was also at the filling station on Thursday and Friday. He knew of the conditions in the basement on Wednesday afternoon, and knew that there had been fumes of gasoline about the filling station on Thursday and Friday.

One of the tanks installed by the defendant, Standard Oil Company of New Jersey, and owned by said company at the time of the explosion, had a capacity of 1,000 gallons. This tank was located about twenty feet from the basement of the filling station, in which water and gasoline were discovered on Wednesday afternoon preceding the explosion. Gasoline purchased from said defendant for sale at the filling station was stored in this tank. It was buried in the ground, with its bottom on a level with the bottom of the basement. Gasoline was drawn from this tank by means of pumps and equipment which had been installed and which were owned by said defendant. The pumps and equipment were used by the operator of the filling station and his employees for drawing gasoline from the tank and delivering it to customers. Both the tank and the pumps and equipment used in the operation of the filling station were subject to inspection by the defendant, Standard Oil Company of New Jersey. There was no evidence tending to show that said company was notified at any time between Wednesday afternoon and Saturday morning that gasoline had been discovered in the basement, or that there were gasoline fumes about the filling station.

The answer of the jury to the fourth issue, involving the defense of assumption of risk by plaintiff's intestate, appearing in the record, is immaterial on this appeal. Plaintiff's intestate was not an employee of the defendant, Standard Oil Company of New Jersey, at the date of his death; he was an employee of the defendant, D. Henry Allen. This appeal is by the defendant, Standard Oil Company of New Jersey, against whom alone judgment was rendered by the Superior Court in favor of the plaintiff. There was judgment on the verdict that plaintiff recover nothing of the defendant, D. Henry Allen, the employer of plaintiff's intestate. There was no appeal from this judgment. As between the plaintiff and the defendant, Standard Oil Company of New Jersey, assumption of risk by plaintiff's intestate was not available as a defense in this action. There was no contractual relation between plaintiff's intestate and said defendant. *Cobia v. R. R.*, 188 N. C., 487, 125 S. E., 18.

On its appeal to this Court the defendant, Standard Oil Company of New Jersey, contends that there was no evidence at the trial of this action tending to sustain the allegations of the complaint upon which

its liability to plaintiff is predicated, and that all the evidence introduced by plaintiff shows that his intestate, by his own negligence, contributed to his injuries and death, and that, therefore, there was error in the refusal of the trial court (1) to allow its motion, made at the close of all the evidence, for judgment as of nonsuit, and (2) to instruct the jury as requested by it with respect to the answers to the first and third issues. These are the only issues raised by the pleadings which are determinative of the right of plaintiff to recover of the defendant in this action.

The action is for the recovery of damages resulting from the death of plaintiff's intestate, caused by the negligence of the defendant. Negligence as the foundation of legal liability has been variously defined, but all the definitions by text-writers and by the courts involve the idea of want of due care under the circumstances. 45 C. J., 624. Judge Cooley in his work on Torts defines negligence as "the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby some other person suffers injury." Cooley on Torts (3d ed.), pp. 1324, 1325. This definition has been adopted or quoted with approval in a large number of cases and characterized as the best definition of the term. See *Fisher v. New Bern,* 140 N. C., 506, 53 S. E., 342, 111 Am. S. R., 857, 5 L. R. A., 542.

Plaintiff's right to recover and defendant's liability for damages in this action are both predicated upon allegations in the complaint of actionable negligence on the part of the defendant, first, in that defendant failed to exercise due care in the construction and installation of the tanks, pumps and equipment at the filling station, owned by the defendant, B. R. Poole, and operated by the defendant, D. Henry Allen, as lessee; and, second, in that defendant failed to exercise due care in the inspection of said tanks, pumps and equipment, after they had been constructed and installed. It is specifically alleged in the complaint that defendant's negligence in these two respects was the proximate cause of the death of plaintiff's intestate.

There was no evidence at the trial tending to show negligence on the part of the defendant in either respect. All the evidence introduced by the plaintiff shows that the tanks, pumps and equipment installed by the defendant for the storage and distribution of gasoline at the filling station, had been used by the successive operators of the filling station for more than a year without any evidence of leaks indicating defects therein.

There was evidence that gasoline was stored in the tanks and distributed by means of the pumps and equipment to customers of the filling station; that on Wednesday afternoon preceding the Saturday

morning when the explosion which caused the death of plaintiff's intestate occurred, there was a coating of gasoline on water in the basement of the filling station. Whether the gasoline in the basement had leaked from the tanks because of defects therein, or whether it had got into the basement because of improper use by the employees of the filling station of the pumps and equipment, is a matter altogether of speculation and conjecture. It is well settled that evidence which does no more than raise a suspicion, justifying, it may be, speculation and conjecture that a fact material to the cause of action alleged in the complaint, may be as alleged therein, is not sufficient for submission to the jury as tending to sustain the allegation of the complaint. *Denny v. Snow,* 199 N. C., 773, 155 S. E., 874; *Smith v. Wharton,* 199 N. C., 246, 154 S. E., 12; *Byrd v. Express Co.,* 139 N. C., 273, 51 S. E., 851. In *Masten v. Texas Oil Company,* 194 N. C., 540, 140 S. E., 89, it was held by this Court that evidence showing that water in a well located one hundred and thirty feet from a tank in which gasoline was stored, was polluted by gasoline, should have been submitted to the jury as tending to show that the gasoline in the well came from the tank. This, however, was in an action for damages resulting from the pollution of the water in plaintiff's well, and not for damages resulting from the negligence of the defendant, the owner of the tank. The distinction is, we think, apparent. In the action for the pollution of his well, all that the plaintiff was required to allege and prove was that his well was polluted by gasoline from the tank owned and maintained by the defendant. In the instant case, plaintiff was required not only to allege, but also to offer evidence tending to show that the presence of the gasoline in the basement of the filling station was the result of the failure of the defendant to exercise due care with respect to the tanks, pumps and equipment, which were installed and owned by the defendant, and subject to its inspection.

There was no evidence at the trial of the instant case tending to show that the defendant was notified or knew that gasoline had been discovered in the basement of the filling station on Wednesday afternoon, or that there were fumes from gasoline about the premises during Thursday and Friday. In the absence of such notice or knowledge, on the facts shown by all the evidence, it cannot be held that the failure of the defendant to inspect the tanks, pumps and equipment installed and owned by it, but in the possession of the operator of the filling station, between Wednesday afternoon and Saturday morning, was evidence of the want of due care on the part of defendant to inspect the same. Both the tanks and pumps and equipment, although owned by the defendant, were in the possession of the operator of the filling station. The defendant had the right and was under the duty to the operator of the

filling station and to its owner, by reason of its contract with them, to inspect the tanks, pumps and equipment, only for the purpose, however, of ascertaining whether or not they were being properly used and were in good condition. It does not appear from the evidence that defendant had any duty, contractual or otherwise, with respect to the repair of said tanks, pumps or equipment in the event defects therein were discovered by an inspection. It had no right and was under no duty with respect to the premises in and about the filling station as was the case with the defendant in *Rushing v. Texas Co.*, 199 N. C., 173, 154 S. E., 1. For this reason the instant case is distinguishable from that case.

As we are of the opinion that there was no evidence at the trial of this action tending to show negligence on the part of the defendant, as alleged in the complaint, we need not discuss the question as to whether or not such negligence, if it had been shown by the evidence, was the proximate cause of the explosion which resulted in the death of plaintiff's intestate. All the evidence shows that there would have been no explosion, notwithstanding the presence of gasoline fumes in and about the filling station, if the manager had not struck the match immediately before the explosion. There was evidence tending to show that this was a negligent act on the part of the manager of the filling station, and that this act was the sole proximate cause of the explosion.

We are further of the opinion that all the evidence introduced by the plaintiff at the trial shows that the death of his intestate was the result of his failure to exercise due care for his own safety. In violation of the express orders of his employer, plaintiff's intestate went to sleep in the filling station, and thus failed to escape, as he could have done if he had been awake, when it was apparent that there would be an explosion caused by the striking of a match by the manager of the filling station. With knowledge of the presence of gasoline fumes in and about the filling station, as the result of the conditions in the basement on Wednesday afternoon, and continuing in some respects through Thursday and Friday, plaintiff's intestate went to work in the filling station on Friday night, while under the influence of whiskey. The plaintiff is and should be precluded from recovery in this action because the death of his intestate was caused by his own negligence.

For error in the refusal of the court to allow defendant's motion for judgment as of nonsuit, on the ground that there was no evidence tending to show that defendant was negligent, as alleged in the complaint, the judgment is reversed. The action is remanded to the Superior Court of Wake County, that judgment may be entered dismissing the action.

Reversed.

CLARKSON, J., dissenting: Plaintiff's intestate, a young man 32 years of age, was a capable and experienced filling station man, and at the time of his death was employed at Allen's Service Station, in the town of Garner. On the night of 29 September, 1928, plaintiff's intestate was at the filling station, on duty, and while he was lying or reclining on a cushion in the filling station, a customer of the station and another employee were looking for some article that had fallen on the floor about 3 or 4 o'clock on Saturday morning, 29 September, 1928. A match was struck by the other employee, there was a blue flame, followed by a terrific explosion that wrecked the filling station and caused the immediate death of plaintiff's intestate.

Suit was brought against B. R. Poole, as the owner of the station, D. Henry Allen, as lessee and operator of the filling station, and Standard Oil Company of New Jersey, as the admitted owner of the tanks, pumps and equipment. It was alleged in the complaint and admitted in the answer of the defendant, Standard Oil Company, that it owned the tanks and pumps at the filling station, installed the same, and from time to time inspected the same. Evidence was offered on the part of plaintiff showing that a few days prior to the explosion there was an accumulation of as much as five inches of water and gasoline in the basement of the filling station, and that the fumes arising therefrom were so strong as to overcome a workman who went into the basement to install some piping or wiring. There was further evidence that while this condition had been improved by a drainage ditch, there was still a strong presence of fumes at the filling station on the night of the explosion, and immediately prior to the explosion.

There was evidence tending to show that the plaintiff's intestate had been drinking on the night of the explosion, and also evidence to the contrary. Plaintiff offered evidence showing that one White, lessee of the filling station prior to the tenancy of defendant, Allen, discovered the strong presence of fumes near the big gasoline tank while making installation of a small tank nearby; also that said White discovered in the operation of the filling station a loss of at least ten gallons of gas a day from the big tank on account of a leak or seepage; that he brought this to the attention of the representative of the Standard Oil Company, and that this representative came out and sealed the tank for the purpose of making a check, and that under such test it showed a loss of at least three inches in twelve hours. This was some six months before the explosion.

The evidence showed that the ground sloped from the direction of the big tank, owned and installed by defendant, Standard Oil Company, in the direction of the basement of the filling station. It was the contention of the plaintiff that the big tank had some sort of leak and that

from this leak there was a seepage of gasoline which found its way to the basement of the filling station, resulting in the accumulation of gas and fumes with the consequent explosion causing the death of plaintiff's intestate.

Plaintiff offered in evidence certain paragraphs of the complaint, together with answers of the defendant, Standard Oil Company. From these portions of the pleadings offered in evidence the following will appear to be undisputed:

(a) That the pumps and tanks and equipment in connection therewith at said filling station, were owned by the defendant, Standard Oil Company;

(b) That said tanks, pumps and equipment were installed by the defendant, Standard Oil Company;

(c) That the said defendant from time to time examined and inspected the said equipment for the purpose of seeing if the same was being properly used and in good condition.

From these admissions and facts of the case, it is manifest that if there was any negligence with respect to the condition of the said tanks at the time of the installation thereof, or in connection with the installation itself, or in connection with the inspection of said tanks, such negligence was the negligence of the defendant, Standard Oil Company. Nobody else had the duty or the right to do anything with reference to remedying any condition or defect in said equipment.

In addition to the responsibility resting upon the defendant, Standard Oil Company, arising out of its ownership, installation and inspection duty with reference to said tanks and equipment, there were the following facts and circumstances offered in evidence by the plaintiff as affecting the liability of defendant, Standard Oil Company:

The testimony of witness A. A. White was to the effect that he operated the filling station for a period of twelve months prior to the time defendant, Allen, operated the same, his tenancy terminating just a few months prior to the explosion; that the big gasoline tank was in use at the station at the time of his tenancy; and that he bought his gasoline from the Standard Oil Company; that while he was using the station a smaller tank was put in at the station at the eastern end of the big tank, by the Standard Oil Company; that while the hole was being dug for the installation of this smaller tank and after getting four or five feet down into the ground, the presence of gasoline fumes were detected; that during his operation of the filling station, he experienced a loss of gasoline and checked up closely on the big tank and found that it was checking short to the extent of ten gallons per day, and that it continued to check short until the time that he gave up the station; that he called this to the attention of the representative of the Standard Oil Com-

pany; that this representative came out and sealed the tank for the purpose of making a check, and that after this was done the tank showed a loss of about three inches in twelve hours. This tank held 1,000 gallons of gasoline.

It was contended by plaintiff that this was sufficient evidence to go to the jury on the question of whether or not there was some leak or defect in the big tank owned, installed and inspected by the defendant, Standard Oil Company. Not only was there evidence of defect, but direct evidence that such defect was brought to the attention of said defendant. No evidence was offered tending to show that the defendant did anything whatever to remedy such defect or to prevent the leakage and seepage of gasoline from this tank.

There was evidence offered by the plaintiff that the big gasoline tank was directly in front of the filling station, and that the big tank was about twenty feet from the basement of the filling station, and that the ground sloped from the direction of the big tank toward the basement of the filling station.

There was testimony that for a considerable time previous to Wednesday (prior to the explosion early Saturday morning, 3 or 4 o'clock) the weather had been dry, but that on Wednesday and for the next day or two, there was an exceptionally heavy rain.

There was undisputed testimony to the effect that on Wednesday prior to the explosion on the following early Saturday morning, there was a strong odor of gasoline from the basement of the filling station and that when the trap door to the basement was opened, it was found that there were several inches of water and gasoline in the basement; that a milk bottle was let down into the basement and drawn up two-thirds full with at least three-fourths of an inch of gasoline in the bottle, and that when the contents of the bottle were poured on the ground and a match struck, it ignited and burned, and that when an employee undertook to go down into the basement he was nearly overcome with the fumes, and had to be pulled out.

There was also evidence by the plaintiff that while a ditch was dug on Thursday to let the gasoline and water out from the basement, the fumes never did leave the basement up to the time of the explosion. The ditch caved in Friday morning and the drain stopped.

The testimony of witness, Arch Wood, was to the effect that on the night of the explosion and immediately previous to the explosion, when he came up to the station, there was a strong and noticeable odor of gas fumes, so much so that he called out to plaintiff's intestate to know if he was not stifling from the fumes; that when a match was struck by Marvin Wall, who was in charge of the station, while looking for a key, there was a bluish flame that run around the cracks on the floor of

the station, followed by a terrific explosion that wrecked the filling station and caused the death of plaintiff's intestate.

The plaintiff contends that the foregoing circumstances clearly and strongly supported by the evidence, were such that the jury was justified in concluding that there was a leak in the big tank due either to a defect in the tank or defective installation, or defective inspection and to the failure of the defendant, Standard Oil Company, to do anything with respect thereto after it had been brought to its notice, and that such leakage amounted to as much as ten gallons per day; and that this amount of gasoline saturated the earth toward the bottom of the big tank to such an extent that there was a seepage in the direction of the basement of the filling station, this being the direction of the natural slope of the land; that such seepage was accelerated by the heavy rainfall immediately preceding the explosion, and that the presence of a large quantity of gasoline and water in the basement of the filling station and the consequent oppressive and dangerous fumes therefrom were due to said seepage from the tank, and that the presence of such fumes and the accumulation thereof in the basement of the filling station caused the explosion resulting directly in the destruction of the filling station and the immediate death of plaintiff's intestate.

No other explanation was offered or reason given for the presence of such an accumulation of gasoline and water in the basement, and the evidence, I think, was sufficient to go to the jury on the question of whether or not this condition resulted from the negligence of the defendant, Standard Oil Company, in respect to the said tank equipment, and the further question as to whether such negligence was the proximate cause of the death of the plaintiff's intestate.

Sherman and Redfield on Negligence, sec. 58: "If facts proven render it probable that the defendant violated his duty, it is for the jury to decide. To hold otherwise would deny the value of circumstantial evidence. In the nature of his case the plaintiff must labor under difficulties. The proof of negligence, and that fact is always a relative one, is susceptible of proof by evidence or circumstances bearing on the fact of negligence."

I think there was no error in the refusal of the court to allow the motion for nonsuit upon the contention that the plaintiff's intestate was as a matter of law guilty of contributory negligence.

If it may be conceded that there was evidence of contributory negligence on the part of the plaintiff's intestate, but this evidence was sharply disputed and this issue was, therefore, properly left for determination by the jury.

There was evidence that plaintiff's intestate was an experienced and capable filling station employee, and that on the night of the explosion

he was engaged in the performance of his regular duties, and that while he was lying down at the time of the explosion, there were two employees of the station at the time, and that it was the custom and practice of the employees for one of them to lie down while the other worked, and that for this purpose there was an automobile cushion and blankets located on the lower part of the tire-rack on one side of the filling station; that while defendant, Allen, did not furnish any cushions or blankets, and did not authorize or permit the employees to sleep while on duty, he was down at the filling station every day, and there was no evidence that he ever objected to the presence of the cushions or blankets with their manifest indication for the purpose for which they were used.

Likewise with respect to the question of whether or not the plaintiff's intestate was under the influence of liquor on the night of the explosion. There was evidence from which the jury might have concluded that the plaintiff's intestate was drinking, and likewise evidence equally strong to the effect that he was in no sense under the influence of liquor on the night in question. Assuming that the question of plaintiff's intestate's drinking, if he had been drinking, entered into the question of contributory negligence, this was a matter in sharp dispute and was certainly a question for the jury to decide.

It is contended by the defendant on the question of contributory negligence that the negligence of plaintiff's intestate in failing to get out of the station after the match was struck and before the actual explosion, was the proximate cause of his death; that he had ample time to get out without injury, and that if he had not been lying down or asleep or intoxicated, he could easily have gotten out without injury. This, of course, was a legitimate matter for argument on the part of the defendant, but it could not be said from the evidence, that the plaintiff's intestate was, as a matter of law, guilty of contributory negligence. The witness Wood got out of the filling station, it is true, but only after he had been blown to the ceiling, and then stepped out the front door, which had been blown out by the force of the explosion. It is also true that employee Wall got out of the filling station after the explosion, but the evidence discloses that he was on fire when he came out, and only narrowly escaped with his life.

As to whether the plaintiff's intestate had an opportunity to get out, the evidence discloses that the blue flames which sprang up when the match was struck, came through the floor all around the sides, and that he was lying near the side of the building when his body was found after the explosion, and it was on the cushion, and that he had not turned over, and that his face was up. The evidence discloses that his

life was snuffed out by the fumes and the explosion, with no opportunity on his part to make a move toward escape.

I think there was sufficient evidence to be submitted to the jury on the issues. The jury have found the issues in favor of plaintiff and the judgment rendered thereon in favor of plaintiff. The verdict and judgment should not be disturbed.

STACY, C. J., concurs in dissent.

STATE v. STEPHEN ENGLISH.

(Filed 2 July, 1931.)

1. Criminal Law G l—Testimony of confession of third party held inadmissible as hearsay evidence.

Testimony of a voluntary confession of a third party that he committed the crime is held properly excluded by the trial court in the trial of the defendant for the murder of his wife, it being established by a long line of decisions that such evidence is incompetent as hearsay. The question whether the technical rule is based upon common sense and reason discussed by BROGDEN, J.

2. Homicide G d—Defendant's infatuation for girl held competent as tending to establish motive for murder of wife.

Where there is strong evidence that the defendant actually committed the murder of his wife for which he was tried, proof of motive is not necessary to convict, but evidence that he was infatuated with another woman at the time is properly admitted as a circumstance tending to show motive under the facts of this case.

3. Criminal Law G r—Testimony in this case held competent as tending to impeach witness.

Where on the trial of a husband for the murder of his wife the wife's father testifies in the husband's behalf, exception to testimony tending to show that the father had attempted to bribe another to implicate others will not be sustained.

CRIMINAL ACTION, before *Cowper, Special Judge,* at July Special Term, 1930, of DUPLIN.

On the evening of 18 January, 1930, about 5:00 or 5:15 o'clock, Stephen English ran screaming to the house of a neighbor who lived about 300 yards away, saying: "Berta is dead. Run to my house. Blood is all over the floor." Soon after this alarm was given the whole neighborhood was in an uproar. The body of Berta English, wife of defendant, was found in her home lying on the floor near the fireplace.

Her head was lying in a puddle of blood. Three chairs were turned over. Some bureau drawers were open and one of them lying on the floor, and clothing and other things scattered over the floor. There was an iron poker, apparently made out of a vehicle tire, at the fireplace near the body of deceased. There was blood on the poker and red hair thereon. The deceased was red headed. On top of the scalp of the dead woman was a two-inch laceration down to the skull. The right ear was completely severed to the bone. The left lower jaw bone was fractured. The clothing of the dead woman was pulled up under her breast. "Her hips, thighs and knees were spread apart. Her bloomers were down to the knee with the left thigh torn."

The doctor, who made an examination of the body, testified that in his opinion there was no evidence of rape, and that the deceased had been dead at least four to six hours. There was a bruise on her hip and a bruise on her throat and on her chest. There was soot on her left jaw bone.

The defendant offered evidence tending to show that on Sunday, the day after the murder, a negro by the name of Dave Locke, was arrested in Wilmington, and this negro, in the presence of three Wilmington officers, admitted that he killed Berta English "and described the house, the conditions of the body and the entire condition of the woman" as she was afterwards found. This negro also stated that he killed Mrs. English with a fire-poker and tore her bloomers off, and stated that the fire-poker was bent at one end, and that in the struggle with Mrs. English he lost two buttons from his overalls, and that he produced these buttons and showed them to the officers at the time of the confession. The statement of the suspect gave "a pretty good description of the house and of the roads about the premises."

Thereafter, on 19 January, 1930, a warrant was issued for Locke, charging him with the murder of Mrs. English. This warrant was returnable before a magistrate. The record is not clear, but apparently the negro was discharged, and has since not been seen about that part of the country. All of the foregoing evidence was excluded by the court.

Thereafter another negro by the name of Dave Brockington was arrested and charged with the murder of Mrs. English.

Subsequently, on 5 March, 1930, the defendant, Stephen English, husband of the deceased woman, was arrested and charged with the murder of his wife. The star witness for the State was Raeford Albertson, who testified in substance that on 18 January, about 10 o'clock in the morning he went to the home of the defendant; that he went into the house and talked to the defendant and his wife until about twelve o'clock and ate dinner there. Witness testified that he then went out on the

porch and the defendant came out behind him and said, "Less go to the stables." The State's witness then continued: "I went out there with him and he approached the subject about Bertie Brinson. He told me about meeting her at the show and what a good time he had, and that she was the sweetest thing to him he ever laid eyes on. Said he never loved anybody but her—that he would love her the longest day he lived. . . . I don't love my wife except as a friend. I will give you my Ford if you will kill her. I will give you $50 in money. I haven't got the money, but I have got the stuff that I can get it out of." I said: "I can't do that. If you have got that in your head, go get your suitcase and leave her, but don't do that." He said: "No, I can do it and never be caught up with." He told me he had tried to destroy her in other ways, but it would not work. He said: "I am going to work a sure plan this time." We were in the yard and he got a shovel handle, something like a yard or a yard and a half long and went out to the front of the house. I said: "I got to go." He said: "If you will go with me by Winnie McGee's, I will go with you," and he went in the house with that shovel handle, and pretty soon after he got in the house, I heard a lick, something like a shovel handle, and I left the porch and went to the stable, and in about fifteen or twenty minutes he came out with a pair of streaked overalls on. When he went in he had on light pants. When he got near me, he pulled out the stick from his overall's leg and carried the stick in the stable and put it down and came on and said: "Let's go," and we went to Winnie McGee's, and he looked at me and said: "I think I have got her fixed so she won't tell on me, and if you do, I'll get you."

This same State's witness testified that about a week after the death of Mrs. English he went by the defendant's house about night, and the defendant went in the house and built a fire and made a fire in the stove and then went in the kitchen loft and got a pair of pants down with blood on them . . . and pushed them under the wood in the fire and went to the stable and got the stick and cut that up and put it in the stove and looked at me and said: "Thank God, I have not got to worry about anybody ever seeing them," and as we came on that morning from his father's, he got against the graveyard and said: "Walk to the graveyard with me," and we went up to the grave where she was buried and the flowers were fresh on the grave and he said: "Look at it," and tears came in his eyes and he said: "If I had it to do over again what I have done, I would kill myself before I'd do it." On cross-examination this witness testified that Mr. and Mrs. English were very pleasant to each other. He never heard a cross word between them except on one occasion. Witness further testified on cross-examination that when the negroes were tried before the magistrate that he was a

witness and was sworn as a witness and testified that he and the defendant left the defendant's house and went some distance to a barber shop and left Mrs. English in the house, and that as defendant was leaving Mrs. English gave him some eggs and told him, "Get me some coffee and I will be at my mother's when you come back." The State's witness explained the contradictions in his testimony by saying: "I swore to a lie for Stephen (the defendant) and against two negroes who were on trial." There was much testimony to the effect that the star witness for the State was a boy of bad character.

The defendant was a witness in his own behalf and testified that he did not kill his wife. The father, mother and relatives of the dead woman all testified in behalf of defendant. There were many witnesses who testified that defendant was a man of good character. The young girl referred to in the testimony of the leading State's witness, testified in behalf of defendant, denying the imputation against her character, and there were many witnesses who testified that she was a girl of good character.

The jury convicted the defendant of murder in the second degree "asking the mercy of the court." Upon the verdict the court pronounced judgment that the defendant be confined in the State's prison for a term of not less than twenty years nor more than thirty years.

From the foregoing judgment defendant appealed.

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

Gavin & Johnson, Geo. R. Ward, N. B. Boney and Sutton & Greene for defendant.

BROGDEN, J. Is the voluntary confession of a third party, made to officers of the law, that he killed the deceased, detailing the circumstances, competent evidence in behalf of the defendant charged with the murder?

The admissibility of confessions of a third party in criminal actions has been bitterly assailed and warmly defended by courts and text-writers. The numerical weight of authority excludes such testimony. About one hundred years ago it appears in *S. v. May,* 15 N. C., 328, that a defendant was charged with stealing a slave. At that time this was a capital felony in North Carolina, and the defendant having been convicted, the judgment of death was pronounced against him. In that case the defendant offered testimony that another man had confessed to stealing the slave and had made compensations therefor. The testimony was rejected. The Court said: "Except the facts of the respective residences of the parties, which of themselves do not tend to establish

guilt in either of the parties, it is obvious that all the evidence, as well that received as that rejected, consists of the acts and declarations of other persons, to which neither the State nor the prisoner is privy. I think the whole of it was inadmissible. The confession is plainly so. It is mere hearsay. It may seem absurd to one not accustomed to compare proofs, and estimate the weight of testimony according to the tests of veracity within our power, that an unbiased confession of one man that he is guilty of an offense with which another is charged, should not establish the guilt of him who confesses it, and by consequence, the innocence of the other, but the law must proceed on general principles; and it excludes such a confession upon the ground that it is hearsay evidence—the words of a stranger to the parties, and not spoken on oath. Indeed, all hearsay might have more or less effect, and from some persons of good character, well known to the jury, it might avail much. Yet it is all rejected, with very few exceptions; which do not in terms or principle extend to this case. Even a judgment upon the plea of guilty could not be offered in evidence for or against another, much less a bare confession. As a declaration of another establishing his own guilt, the confession of a slave might be used upon the same principle."

The *May case* is the original legal patriarch of an increasing line of legal descendants in this State. *S. v. Duncan,* 28 N. C., 236; *S. v. White,* 68 N. C., 158; *S. v. Gee,* 92 N. C., 756; *S. v. Lane,* 166 N. C., 333; *S. v. Church,* 192 N. C., 658. The states holding the same interpretation of the law are assembled in a note in the decision of *Donnelly v. U. S.*, 228 U. S., 243. The minority view is clearly and concisely stated by *Mr. Justice Holmes,* who wrote a dissenting opinion in the *Donnelly case, supra,* in which *Justices Lurton* and *Hughes* concurred. *Justice Holmes* said: "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this Court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations which would be let in to hang

a man; . . . and when we surround the accused with so many safeguards, some of which seems to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at a greater length. 2 Wigmore, Evidence, secs. 1476, 1477."

The Supreme Court of Appeals of Virginia in *Hines v. Commonwealth,* 117 S. E., 843, assails the whole majority doctrine, and summarizes the attack in these words: "The reasons given by the authorities for rejecting proof of such evidence seems to us unsatisfactory and entirely arbitrary; and, no rule of property being involved, we do not think it is even yet too late to abandon the unsound precedents and follow the rule of right and reason."

The Supreme Court of Kansas in *State v. Scott,* 235 Pac., 380, granted a new trial for failure to admit evidence in behalf of a husband on trial for killing his wife, that a "mysterious stranger might have committed the murder." A petition to rehear was filed and the former decision adhered to. Two *Justices,* however, dissented.

The Supreme Court of Colorado in *Moya v. People,* 244 Pac., 69, adopts the majority view with two *Justices* dissenting. The Supreme Court of Kentucky in *Etly v. Commonwealth,* 113 S. W., 896, adopts the minority view in a case in which the husband was on trial for killing his wife.

The great jurist who wrote the *May case* confesses that the holding might seem absurd to a layman, "but the law must proceed on general principles," and hence if proffered testimony is technically and legalistically hearsay, then the technical interpretation must prevail. Furthermore, the suggested possibility that some man accused of crime would procure a confession of guilt by a slave and thus escape punishment, might have been a consequence which law-writers of a hundred years ago were seeking to avoid.

The writer of this opinion, speaking for himself, strings with the minority, but it was the duty of the trial judge to apply the law as written, and the exceptions of the defendant are not sustained.

Certain exceptions were taken to evidence relating to the association of defendant with a school girl. These exceptions are not sustained, for the reason that while proof of motive was not necessary, yet it has been held with practical unanimity that such circumstances are competent in cases similar to the one now under consideration. Exceptions were also taken to evidence tending to show that the father of the deceased woman, who was a witness for defendant, had attempted to bribe a colored man to implicate two other parties. These exceptions are not sustained. *S. v. Patterson,* 24 N. C., 346; *S. v. Beal,* 199 N. C., 278.

The record is voluminous and no impartial mind can review it carefully without an impression of grave doubt. Obviously, such an impression was in the minds of the jurors who convicted the defendant of murder in the second degree and prayed the mercy of the court, but the trial judge has correctly applied the law as written.

No error.

G. W. BRADDY v. CITY OF WINSTON-SALEM ET AL.

(Filed 2 July, 1931.)

Mandamus A b—Mandamus lies only to enforce clear legal right.

Mandamus lies only to enforce a clear legal right, and the writ will be denied when the application therefor fails to show this right on the part of the plaintiff demanding it.

APPEAL by plaintiff from *Finley, J.*, at Chambers in Winston-Salem, 1 August, 1930. From FORSYTH.

Application for writ of mandamus to require the respondents to issue to the plaintiff a building permit to erect a filling station on a lot owned by him in the city of Winston-Salem.

From an order denying application for writ of mandamus and dismissing the action, plaintiff appeals, assigning errors.

George W. Braddy for plaintiff.
Parris & Deal for defendants.

STACY, C. J. Plaintiff assails the validity of the city ordinance which forbids the erection of a filling station on his lot. While the matter was pending, and before hearing in the Superior Court, another ordinance was adopted which is also pleaded in bar of plaintiff's right to the remedy sought. Without undertaking a minute analysis of these ordinances as applicable to plaintiff's lot, which would serve no useful purpose as a precedent or otherwise, suffice it to say the application for writ of mandamus was properly denied for want of a clear showing of right on the part of the plaintiff to demand it. *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169. Mandamus lies only to enforce a clear legal right. *Cody v. Barrett,* 200 N. C., 43, 156 S. E., 146; *Umstead v. Board of Elections,* 192 N. C., 139, 134 S. E., 409; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481. In some respects, the case of *Refining Co. v. McKernan,* 179 N. C., 314, 102 S. E., 505, is not unlike the one at bar.

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1931

F. E. McPHERSON, ADMINISTRATOR OF WILLIE GANT, DECEASED, v. HENRY MOTOR SALES CORPORATION, EMPLOYER, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, CARRIER.

(Filed 16 September, 1931.)

1. **Master and Servant F i—Where employer does not appeal he is without standing in Superior or Supreme Court upon insurer's appeal.**

   Where an award allowed by a member of the Industrial Commission is adopted by the full Commission on appeal to it, and the employer does not appeal therefrom, the matter is at an end so far as the employer is concerned and he has no standing either in the Superior or Supreme Court on the insurer's appeal.

2. **Same—Appeal from award will be considered only upon exceptions to proceedings and judgment of Industrial Commission.**

   Where an insurer appeals upon specified grounds from an award made by the Industrial Commission it may not contend in the Superior Court that certain sections of the Workmen's Compensation Act as applied by the Commission in the case were unconstitutional when the question is not embraced in the specified exceptions it has filed as the foundation of its appeal.

3. **Master and Servant F g—Where deceased employee leaves no dependents amount recoverable must be paid to personal representative.**

   Where the death of an employee is compensable under the Workmen's Compensation Act, and it appears that the deceased employee left no dependents, a recovery may be had under the terms of the statute by the administrator of the deceased employee for distribution to his next of kin.

4. Appeal and Error A e—Courts will not decide questions of constitutional law in advance of necessity therefor.

The courts will not decide the question of the constitutionality of a statute in advance of the necessity therefor.

APPEAL by plaintiff and both defendants from *Schenck, J.*, at November Term, 1930, of GUILFORD.

Judgment modified in plaintiff's appeal; as modified, affirmed in appeal of defendant, Hartford Accident & Indemnity Company, carrier.

Appeal by defendant, Henry Motor Sales Corporation, employer, dismissed.

This cause was heard in the Superior Court of Guilford County on the appeal of the defendant, Hartford Accident & Indemnity Company, carrier, from the award made by the North Carolina Industrial Commission on 20 June, 1930. The facts found by the Commission are as follows:

"1. The parties plaintiff and defendants are bound by the provisions of the North Carolina Workmen's Compensation Act. The Hartford Accident & Indemnity Company, the insurance carrier, has intervened as a party defendant.

2. On 20 November, 1929, Willie Gant was a regular employee of the Henry Motor Sales Corporation, and on that date received an injury by accident that arose out of and in the course of his regular employment, resulting in his death.

3. The average weekly wages were $15.00.

4. Willie Gant, deceased, was unmarried and at the time of his death there was no one either partially or wholly dependent upon him for support.

5. Mr. F. E. McPherson of Burlington, N. C., is the duly qualified administrator of the estate of Willie Gant, deceased."

The award of the Commission was as follows:

"Upon the finding that the deceased left no one dependent upon him for support, at the time of the accident, the defendants will pay to F. E. McPherson, who has duly qualified as administrator of the estate of the deceased, in a lump sum, compensation in the amount of $2,831.68, less the actual amount of the burial expenses. This amount of $2,831.68 is the commuted amount of 350 weekly installments at the rate of $9.00 per week, commuted as of 1 July, 1930. The defendants will pay to proper parties all medical and hospital bills incurred, and the costs of this hearing."

The hearing before the full Commission was upon the application of the defendant, Hartford Accident & Indemnity Company, carrier, for a review of an award made by Commissioner Dorsett, dated 16 April,

1930. The grounds for the review, as stated in the written application therefor, were (1) that there was no evidence that the injury and death of Willie Gant, deceased, arose out of and in the course of his employment; (2) that the personal representative of the deceased employee was not entitled to compensation; (3) that the findings of fact and award are contrary to law; and (4) that the rate of compensation should be $9.00 per week.

The defendant, Henry Motor Sales Corporation, employer, did not appeal from or request a review by the full Commission of the award made by Commissioner Dorsett.

The findings of fact and conclusions of law set out in the award made by Commissioner Dorsett were approved and adopted by the full Commission. Its award was made upon these findings and conclusions.

On 1 July, 1930, the defendant, Hartford Accident & Indemnity Company, carrier, gave notice of its appeal from the award of the full Commission to the Superior Court of Guilford County. This notice of appeal is in writing. Errors of law in the award of the Commission are assigned as follows:

"1. That there is no evidence that the injury and death of Willie Gant, deceased, arose out of and in the course of his employment.

2. That a personal representative is not entitled to receive compensation benefits, there being no dependents, and that sections 38 and 40 of the North Carolina Workmen's Compensation Act, under which the award was made, are vague, indefinite, and contradictory of the other terms and provisions of said act, and the spirit and purpose thereof.

3. That sections 38 and 40 of the North Carolina Workmen's Compensation Act, as construed and applied by the full Commission in this case, violate the due-process and the equal-protection clauses of the 14th Amendment of the Constitution of the United States.

4. For other reasons to be assigned."

The defendant, Henry Motor Sales Corporation, employer, gave no notice of appeal from the award of the North Carolina Industrial Commission. It did not except to said award, or assign errors therein.

On the hearing in the Superior Court, judgment was rendered as follows:

"This cause coming on to be heard by the undersigned judge presiding at the November Civil Term, 1930, of the Superior Court of Guilford County, and being heard upon the appeal by the defendants from the award of the North Carolina Industrial Commission heretofore rendered in this cause, and upon the record of said cause certified to this court by said Commission as by law provided, and upon defendants' exception and assignment of error for that sections 38 and 40 of

the North Carolina Workmen's Compensation Act, as construed and applied by the North Carolina Industrial Commission in this case, violate the due-process and equal-protection clauses of the 14th Amendment to the Constitution of the United States, and the court being of the opinion and so holding, that said sections 38 and 40 are legal and valid provisions of said North Carolina Workmen's Compensation Act, and that they are not repugnant to, nor in violation of the equal-protection and due-process clauses of the 14th Amendment to the Constitution of the United States;

It is therefore, considered, ordered, and adjudged that the award of said Commission be and the same is hereby in all respects, adopted, approved and affirmed, and that the defendants be taxed with the costs of this appeal. MICHAEL SCHENCK, *Judge Presiding.*"

Plaintiff, in apt time, objected to the foregoing judgment, for that defendant, Henry Motor Sales Corporation, employer, did not except to and had not appealed from the award of the North Carolina Industrial Commission in this case. The objection was not sustained and plaintiff excepted. On its appeal to the Supreme Court, plaintiff assigns as error so much of said judgment as recites that the cause was heard on the appeal of said defendant, and adjudges that sections 38 and 40 of the North Carolina Workmen's Compensation Act are not in violation of or repugnant to the due-process and equal-protection clauses of the 14th Amendment to the Constitution of the United States.

Both defendants, in apt time, objected to the foregoing judgment, for that there was error therein in adjudging that sections 38 and 40 of the North Carolina Workmen's Compensation Act, as construed and applied in this case by the North Carolina Industrial Commission, are not in violation of or repugnant to the due-process and equal-protection clauses of the 14th Amendment to the Constitution of the United States. The objection was not sustained, and both defendants excepted. On their appeals to the Supreme Court, each assigns as error the holding by the court that said sections 38 and 40, of the North Carolina Workmen's Compensation Act, as construed and applied by the North Carolina Industrial Commission in this case, is not in violation of or repugnant to the due-process and equal-protection clauses of the 14th Amendment to the Constitution of the United States and the judgment in accordance with such holding.

From the judgment of the Superior Court, plaintiff and both defendants appealed to the Supreme Court.

Coulter & Cooper for plaintiff.
R. M. Robinson for defendants.

CONNOR, J. This cause is founded upon a claim filed by the plaintiff as administrator of Willie Gant, deceased, on 17 March, 1930, with the North Carolina Industrial Commission, against the defendant, Henry Motor Sales Corporation, as employer of Willie Gant at the date of his death, and against the defendant, Hartford Accident & Indemnity Company, as the insurance carrier for its codefendant, for compensation under the provisions of the North Carolina Workmen's Compensation Act. Chapter 120, Public Laws of N. C., 1929.

At the request of the plaintiff, and after notice as required by the statute to each of the defendants, the cause was heard at Greensboro, N. C., by Commissioner Dorsett, who found the facts and made his award thereon, on 20 April, 1930. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue, was filed with the record of the proceedings, and a copy of the award duly sent to each of the parties to the cause as required by the statute, section 58. No application was made to the Commission by the defendant, Henry Motor Sales Corporation, for a review of the award made by Commissioner Dorsett, as authorized by the statute, section 59. The award of Commissioner Dorsett, which was duly filed with the full Commission, was therefore conclusive and binding on the defendant, Henry Motor Sales Corporation, section 60, chapter 120, Public Laws 1929.

On 23 April, 1930, the defendant, Hartford Accident & Indemnity Company, applied to the North Carolina Industrial Commission for a review by the full Commission of the findings of fact and conclusions of law upon which the award made by Commissioner Dorsett was founded. Pursuant to this application, the cause was heard by the full Commission, which approved and confirmed the findings of fact and conclusions of law made by Commissioner Dorsett, and thereupon the Commission made its award on 23 June, 1930. The defendant, Henry Motor Sales Corporation, did not appear at the hearing before the full Commission, nor did it except to or appeal from its award to the Superior Court of Guilford County.

The defendant, Henry Motor Sales Corporation, had no standing in the Superior Court of Guilford County, as an appellant or otherwise, on the hearing of the appeal of the defendant, Hartford Accident & Indemnity Company, to said court. This appeal was taken only by the defendant, Hartford Accident & Indemnity Company. This defendant, upon the facts found by the North Carolina Industrial Commission, under the provisions of section 71 of chapter 120, Public Laws 1929, was directly liable to plaintiff, if plaintiff is the person entitled to compensation under the provisions of the statute. It had the right,

under the statute, to appeal from the award made against it by the Commission to the Superior Court. Its appeal, however, conferred no right on the defendant, Henry Motor Sales Corporation, to be heard in the Superior Court of Guilford County or in this Court, for the reason that said defendant did not except to or appeal from the award of the North Carolina Industrial Commission in this cause. In *Bynum v. Turner et al.,* 171 N. C., 86, 87 S. E., 975, it was held that where a personal judgment was rendered against a defendant, who did not appeal, the judgment could not be reviewed on appeal by another defendant, but is valid and conclusive as to the defendant, who did not appeal. This principle is applicable in the instant case, and in accordance therewith, the appeal of the defendant, Henry Motor Sales Corporation, to this Court from the judgment of the Superior Court of Guilford County is dismissed. See, also, *Hannah v. Hyatt,* 170 N. C., 634, 87 S. E., 517; *Westfelt v. Adams,* 159 N. C., 409, p. 425, 74 S. E., 1041.

In its application to the full Commission for a review of the award made in this cause by Commissioner Dorsett, the defendant, Hartford Accident and Indemnity Company, set out specifically the grounds upon which it asked for such review. Its contentions based upon these grounds were not sustained by the full Commission. It did not present to the full Commission its contention made for the first time in the Superior Court on its appeal from the award of the Commission, that sections 38 and 40 of the North Carolina Compensation Act, as construed and applied in this case, are in contravention of the prohibitions of the 14th Amendment to the Constitution of the United States. This contention was first made in its notice of appeal from the award, dated 1 July, 1930. For this reason, upon well settled principles governing the exercise of its jurisdiction by an appellate court, such as the Superior Court of Guilford County was in this case, the said defendant was not entitled to be heard on this contention, and it was error for the judge of the Superior Court to hear and decide the question involved in the contention. His jurisdiction, as an appellate court, was restricted to the consideration of questions of law which had been duly presented and decided by the North Carolina Industrial Commission. As the said Commission did not hear or decide the only question of law presented by defendant, as appellant, to the judge of the Superior Court, so much of his judgment as holds that sections 38 and 40 of the North Carolina Workmen's Compensation Act, as construed and applied in this case, is not in violation of the prohibition of the 14th Amendment to the Constitution of the United States, should be stricken out.

The question as to whether under the provisions of sections 38 and 40 of the North Carolina Workmen's Compensation Act, as properly

construed, the administrator of a deceased employee, who left no persons partially or wholly dependent on him for support, is entitled to compensation as provided by said act was presented to this Court in *Reeves v. Parker-Graham-Sexton, Inc.*, 199 N. C., 236, 154 S. E., 66. It was there held that where the death of an employee is compensable under the provisions of the act, and such deceased employee has no dependents, the compensation is payable to his personal representative for the benefit of his next of kin.

Whether in any event, an insurance carrier, who has voluntarily assumed liability to an employee for compensation from his employer, under the provisions of the North Carolina Workmen's Compensation Act, in consideration of a premium paid by the employer, can challenge the validity of any provisions of the act, on the ground that such provision is in violation of some prohibition of the Federal or State Constitution, is at least debatable. However, the principle is well established that courts never anticipate a question of constitutional law in advance of the necessity of deciding it. *Goldsboro v. Supply Co.*, 200 N. C., 405, 157 S. E., 58, and cases cited. The constitutionality of sections 38 and 40 of the North Carolina Workmen's Compensation Act, as construed and applied in this cause, is not presented on this record. We do not, therefore, decide the question presented by the appellant, Hartford Accident & Indemnity Company, by its assignment of error.

In accordance with this opinion, the judgment is modified by striking therefrom so much thereof as adjudges that sections 38 and 40 of the North Carolina Workmen's Compensation Act is valid and legal; as thus modified, the judgment is affirmed.

Modified and Affirmed.

VERNON BROWN, BY HIS NEXT FRIEND, J. S. WEBB, v. JOHN L. WOOD AND DAVID SANDERS.

(Filed 16 September, 1931.)

1. Principal and Agent C d—Owner of auto is not liable for another's negligence in driving it in absence of proof of agency.

Where the family-purpose doctrine does not apply, proof of ownership of an automobile does not constitute a prima facie case of liability against the owner for an injury inflicted by another while driving the car, it being necessary that the injured person establish by his evidence the fact of agency and that the agent at the time of the injury was acting within the scope of his employment.

2. Negligence D b—Acts in aid of injured person are not evidence of admission of liability for the injury.

The fact that a defendant procures a doctor and takes an injured person to a hospital is not an implied admission of liability to the injured person.

3. Principal and Agent A a—Evidence held sufficient on issue of whether person causing injury was agent of defendant.

Where a guest in an automobile upon the highway is injured by the negligence of the driver of another automobile, and the owner of the car causing the injury visits the injured person at the hospital and promises to pay the doctor's bill and provide some money for the injured person's education, and pays him a sum of money and promises to see that "everything was all right," *Held:* although the language might be only an assumption of hospital care and treatment, it is susceptible of a broader interpretation, and is sufficient to be submitted to the jury on the question of an implied admission of agency.

CIVIL ACTION, before *Small, J.*, at January Term, 1931, of PASQUOTANK.

The plaintiff, a minor, was riding in a car with his uncle, J. S. Webb, on 8 July, 1928. The car in which plaintiff was riding was approaching Elizabeth City. A car owned by the defendant Wood and driven by the defendant David Sanders was approaching from the opposite direction. The evidence tended to show that the car operated by the defendant Sanders undertook to pass a car in front thereof and traveling in the same direction therewith, and in so doing struck the car in which plaintiff was riding, turning it over, and as a result thereof plaintiff suffered serious and permanent injuries, necessitating the amputation of one of his feet. There was ample evidence to the effect that the defendant Sanders was driving the car in a negligent manner.

At the conclusion of the testimony for plaintiff, the trial judge sustained a motion of nonsuit as to defendant John L. Wood, and thereupon issues of negligence, contributory negligence and damages were submitted to the jury as to the defendant Sanders. The issues were answered in favor of plaintiff and damages were awarded in the sum of $1,250.00.

The plaintiff appealed from the judgment of nonsuit as to Wood.

M. B. Simpson for plaintiff.
McMullan & McMullan for defendant, John L. Wood.

BROGDEN, J. Two questions of law are presented by the record:

1st. Does proof of ownership of a pleasure car constitute a prima facie case of liability against the owner, for injuries resulting from the negligent operation thereof by another?

2d. Is the conversation of defendant Wood with Webb, next friend of plaintiff, competent as evidence of agency of defendant Sanders?

The law answers the first question in the negative. *Reich v. Cone,* 180 N. C., 267, 104 S. E., 530; *Tyson v. Frutchey,* 194 N. C., 750, 140 S. E., 718; *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503. The foregoing cases declare the law in this jurisdiction to be, that if a pleasure car is driven by a person other than the owner and the family-purpose doctrine does not apply, then there must be evidence of agency, and that the agent, at the time of the injury, was acting within the scope of his employment, in order to impose liability upon such owner.

The plaintiff, however, insists that the conversation of defendant Wood, the owner of the car, is some evidence of agency to be considered by a jury. This conversation, occurring at the hospital, as detailed by the record, is as follows: "The boy was on the cot. Mr. Wood said: 'He was a poor boy but he wanted to help him out and they would pay the doctor's bill and would get him a limb and fix it so he would have some money to educate himself.' . . . Mr. Wood said it was his car and said he would do what he could to help Sanders out, but said nothing about why Sanders was driving. Mr. Wood gave me a check on a bank which I did not think exists. Wood told me that he would see 'that everything was all right.' He gave me that check and said he would give me some more and do everything he could to see that it was all right. . . . Mr. Wood said he would do all he could to help Mr. Sanders and said he would give Vernon an artificial foot and pay the hospital bills and give Vernon money for his education." . . .

The foregoing evidence was admitted without objection, and hence the element of compromise is eliminated.

It is stated in Cyclopedia of Automobile Law by Blashfield, Vol. 2, page 1795, "that, after a collision between defendant's car and that of plaintiff, defendant, after examining the plaintiff's automobile, told her to have it fixed and he would pay expenses, and later requested her to send the bill to him, could be found by the jury to constitute such an admission as to warrant a finding that the servant driving the car was acting within the scope of his authority." The text is supported by the following authorities: *Jasmin v. Meaney,* 146 N. E., 257; *Dennison v. Swerdlove,* 146 N. E., 27; *Bernasconi v. Bassi,* 158 N. E., 341; *Epperson v. Rastatter,* 168 N. E., 126.

In this State, the fact that a defendant procured a doctor or took an injured person to a hospital and paid the hospital bill is not an implied admission or circumstance tending to impose liability. *Barber v. R. R.,* 193 N. C., 691; 138 N. E., 17; *Norman v. Porter,* 197 N. C.,

222, 148 S. E., 38. Such acts in themselves, the law deems to be a part of neighborliness and an incident of that commendable impulse of benevolence, dramatically portrayed in the parable of the Good Samaritan. It has never been suggested that the fact that the Good Samaritan placed an injured and unfortunate man upon his own beast, pouring wine and oil into his wounds, paying his maintenance charges at the inn, and promising even to give more, if necessary, upon his return, was an implied admission that the agents of the Good Samaritan, in the course of their employment, actually inflicted the injury upon the wounded man found on the Jericho Highway. This idea was referred to by *Clarkson, J.*, in *Barber v. R. R., supra,* when he wrote: "The defendant, not knowing whether it was liable or not, had the humanity to take the plaintiff, who was struck by its engine, to a hospital in Danville and employed Dr. Miller to attend him. It was an act of mercy which no one should hold in any respect was an implied admission or circumstance tending to admit liability."

However, in the case at bar, the defendant Wood promised to see "that everything was all right." It might be that his engagement, thus expressed, did not go beyond the assumption of hospital care and treatment for the plaintiff, but the language used in the various conversations is susceptible of broader meaning and interpretation. The correct interpretation produces an issue of fact for a jury to determine.

The Court, therefore, holds that the conversations are competent upon the question of the liability of the defendant Wood, and hence the judgment of nonsuit is

Reversed.

W. L. COHOON v. STATE OF NORTH CAROLINA AND STATE HIGHWAY COMMISSION.

(Filed 16 September, 1931.)

States E b—Where complaint presents issue of fact and no important question of law Supreme Court will not exercise recommendatory jurisdiction.

The original recommendatory jurisdiction of the Supreme Court to hear claims against the State is confined to the powers given by Art. IV, sec. 9, of our Constitution, and is not enlarged by the rules of procedure prescribed by C. S., 1410, to include any claim which may be presented for consideration, and where the complaint presents only an issue of fact and raises no important question of law the proceeding will be dismissed.

COHOON *v.* STATE.

THIS is a proceeding invoking the original jurisdiction of the Supreme Court to hear an alleged claim against the State.

On 30 May, 1931, the plaintiff filed with the clerk of the Supreme Court a verified complaint, alleging that he is the owner of a tract of land in Pasquotank County known as Blackacre Farm; that the State Highway Commission is an agency of the State exercising powers conferred by the General Assembly, including the power of constructing and maintaining public highways connecting county seats and principal towns; that in building Highway No. 34 through the plaintiff's land the Highway Commission constructed a roadbed three or four feet above the mean level of the land and dug a canal parallel with the road; that the road extends about four miles through Dismal Swamp, which is a water-shed draining to the south and southeast and forming the source of the Perquimans River on the south side of the road; that the Highway Commission negligently constructed the roadbed and provided no culverts or other means for the natural flow of the water, thereby concentrating great volumes of water and causing the overflow of the plaintiff's property, in consequence of which his crops have been destroyed and his land has been damaged. The plaintiff estimated his loss at $8,500 and prays that a recommendatory decision be rendered and reported to the next session of the General Assembly for its action.

The defendants filed an answer admitting all paragraphs of the complaint except the fifth, in which the alleged negligence of the defendants is set forth. They allege by way of defense that if the construction of the highway damaged the plaintiff's land, this to the extent of the damage was a "taking" of the land, for which an adequate remedy is provided by law.

W. W. Cohoon and M. B. Simpson for plaintiff.
Charles Ross for defendants.

ADAMS, J. An objection that the court has no jurisdiction of the subject-matter or that the complaint does not state a cause of action is not waived by the filing of an answer. C. S., 518; *Knowles v. R. R.*, 102 N. C., 59. So, after answering, the defendants moved *in limine* to dismiss the proceeding on the ground that this Court has no original jurisdiction of the cause stated in the complaint. The motion, we think, should be granted.

The Supreme Court is given original jurisdiction to hear claims against the State, but its decisions are merely recommendatory; they must be reported to the next session of the General Assembly for its action; and no process in the nature of execution shall issue thereon.

Constitution, Art. IV, sec. 9. The procedure thus authorized is prescribed by section 1410 of the Consolidated Statutes; but this procedure must not be construed as exceeding the power conferred upon the Supreme Court by the organic law.

The Constitution of 1868 precluded the trial of issues of fact before this Court (Art. IV, sec. 10); and by amendment in the Convention of 1875 it was provided that jurisdiction over "issues of fact" and "questions of fact" should be the same as was exercised by the Court before the adoption of the Constitution of 1868. Art. IV, sec. 8. Before 1868 when a cause was removed from a court of equity to the Supreme Court questions of fact were heard as well as questions of law; and on appeal from a final decree in a court of equity causes were heard in the same way. *Graham v. Skinner,* 57 N. C., 94; *Long v. Holt,* 68 N. C., 53. Under the present Constitution, in suits which are purely equitable, this Court cannot review the evidence or the findings of fact where issues of fact are tried, because such "issues" are determined by a jury as in cases at law; but it is otherwise as to questions of fact. *Coates v. Wilkes,* 92 N. C., 377.

The constitutional provisions heretofore cited do not contemplate the trial in this Court of issues of fact, but only a decision of such questions of law, based upon "our impression of the facts generally," as will make intelligible the decision of the law. *Bledsoe v. State,* 64 N. C., 392. Upon this principle it has been held that the recommendatory or original jurisdiction of the Court is confined to claims in which it is supposed that an opinion on an important question of law would be of aid to the General Assembly in determining the merits of a claim against the State. *Reynolds v. State,* 64 N. C., 460. This is true notwithstanding the broad provision of section 1410 that *any* person having *any* claim against the State may commence the proceeding by filing his complaint. *Horne v. State,* 82 N. C., 382.

It is for these reasons that the Supreme Court, as a rule, will consider only such claims as present serious questions of law and will not take the burden of passing upon "any and all claims that a party may prefer," especially those which involve mainly issues or questions of fact, although in proper cases the Court may order that issues of fact be tried in the Superior Court, as provided in section 1410. *Reeves v. State,* 93 N. C., 257; *Miller v. State,* 134 N. C., 270; *Dredging Co. v. State,* 191 N. C., 243.

In *Bain v. State,* 86 N. C., 49, *Justice Ruffin* stated in the following words the ground upon which the original jurisdiction of the Court is exercised: "The original jurisdiction, the exercise of which the plaintiffs invoke, was conferred upon this Court for the benefit only of such

plaintiffs, and to be used only in such cases, as could not otherwise obtain a footing in the courts, by reason of the State's being the party against whom the claims were to be asserted. If, by the ordinary process of the law issuing from a Court of ordinarily competent jurisdiction, a plaintiff can constitute his case regularly in court, as against a defendant interested in the subject-matter of the action, and under a judgment against whom complete relief can be had, then the case falls neither within the spirit of the Constitution nor the mischief which it was intended to remedy."

The pleadings in the case before us raise the single issue whether the defendants negligently damaged the plaintiff's land; and the defendants say that, if they did, this was a taking of the land for a public purpose, the damage for which should be sought in another forum. *Dayton v. Asheville,* 185 N. C., 12; *Sandlin v. Wilmington, ibid.,* 257. We only advert to this position. In any view, the issue joined is one of fact, and in these circumstances the proceeding in this Court for the enforcement of the plaintiff's claim cannot be maintained. It raises no serious or important question of law, the decision of which would aid the General Assembly upon the controversy which the plaintiff intended to present. *Lacy v. State,* 195 N. C., 284; *Warren v. State,* 199 N. C., 211.

Proceeding dismissed.

WILLIAM V. JOYNER v. P. L. WOODARD & COMPANY, ET AL.

(Filed 16 September, 1931.)

1. Pleadings A c—Order striking out as surplusage allegations in complaint relating to anticipated defense held not error.

Where the plaintiff in his action to recover damages for an alleged negligent injury anticipates the defense of release and sufficiently attacks the release as procured by fraud, the action of the trial court in treating the plaintiff's allegation in regard thereto as surplusage and ordering it stricken out, and denying defendant's motion of nonsuit based upon the ground of inconsistent pleading and misjoinder of causes of action, will not be held for error; no harm resulting from the judgment as entered.

2. Pleadings D e—Upon demurrer pleadings are to be construed favorably to the pleader.

Upon a demurrer the complaint is to be liberally construed and, contrary to the common law practice, every reasonable intendment is to be made in favor of the pleader. C. S., 535.

CONNOR, J., not sitting.

JOYNER *v.* WOODARD.

APPEAL by defendants from *Harris, J.*, at April Term, 1931, of NASH.

Civil action to recover damages for an alleged negligent injury caused by an automobile truck owned by the defendant, or one of them, and driven at the time by an employee, striking the plaintiff, knocking him unconscious and inflicting serious injury, while he was walking on the public highway leading from Wilson to Kenly, N. C.

After setting out a cause of action for the personal injury sustained by the plaintiff, and in anticipation of the defense of a release, it is alleged in the complaint that sometime thereafter the plaintiff was fraudulently induced to sign a release on a grossly inadequate consideration, which he asks to have set aside.

A demurrer was interposed upon the ground, first, that inasmuch as it appeared a release had been given, the complaint did not state facts sufficient to constitute a cause of action, and, second, because of a misjoinder of two separate and distinct causes of action.

The trial court treated the allegation in regard to the release as surplusage, ordered it stricken out, and overruled the demurrer.

Defendants appeal, assigning error.

Grissom & Marshburn for plaintiff.
Spruill & Spruill for defendants.

STACY, C. J. The action of the trial court in treating the plaintiff's anticipatory allegation in regard to the release as surplusage, and ordering it stricken out, is supported by decisions elsewhere. *Hedlun v. Holy Terror Min. Co.*, 16 S. D., 261, 92 N. W., 31; *Trotter v. Mutual R. F. L. Assoc.*, 9 S. D., 596, 70 N. W., 843, 62 Am. St. Rep., 887; 53 C. J., 1271. And under authority of *Killian v. Hanna*, 193 N. C., 17, 131 S. E., 246, the demurrer might have been overruled without more. McIntosh N. C. Practice and Procedure, 412. But as no harm can come from the judgment as entered, it would serve no useful purpose to disturb it.

Ordinarily, the defense of release or accord and satisfaction must be pleaded in bar, but it is the rule in some of the States to permit the matter to be set out in the complaint in anticipation of such defense for the purpose of affirmative attack. *Berry v. St. Louis, etc., R. Co.*, 223 Mo., 358, 122 S. W., 1043; 53 C. J., 1271. It is obvious, however, that where a defense is anticipated, unless also successfully assailed in the complaint, the pleading nullifies itself, and may be availed of on demurrer. *St. Louis, etc., R. Co. v. United States*, 267 U. S., 346, 69 L. Ed., 649; 21 R. C. L., 481. To anticipate a defense without negativing it is fatal. *Chance v. Credit Co.*, 118 S. E. (Ga. App.), 465.

While the allegations in the instant complaint are rather inartificially drawn, we cannot say that they are wholly insufficient or self-contradictory. We are required on demurrer to construe the complaint liberally, "with a view to substantial justice between the parties," C. S., 535, and, contrary to the common-law rule, every reasonable intendment is to be made in favor of the pleader. *Dixon v. Green,* 178 N. C., 205, 100 S. E., 262; *S. v. Bank,* 193 N. C., 524, 137 S. E., 593.

Affirmed.

CONNOR, J., not sitting.

HERMAN NEWBERN v. L. S. GORDON.

(Filed 16 September, 1931.)

Trial G b—Verdict should establish facts sufficient to enable the court to proceed to judgment.

The verdict of the jury upon disputed questions of fact arising upon the evidence must be sufficient to enable the court to proceed to judgment, and where the recovery of usury is sought in the action a verdict establishing the amount of the interest charged is insufficient without a finding that usury was exacted, or, if so, that it was knowingly done, and where the insufficiency cannot be determined by proper reference to the pleadings the evidence and admissions of the parties and the charge of the court, a new trial will be ordered on appeal.

APPEAL by defendant from *Grady, J.,* at June Term, 1931, of PASQUOTANK.

Civil action in the nature of an action for debt to recover penalty for alleged exaction of usury, knowingly made.

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

"1. What amount of interest has been collected by the defendant from Herman Newbern on the $4,000 note, made to him by I. M. Meekins, and secured by note and mortgage of Herman Newbern to I. M. Meekins? Answer: $1,920.

"2. What amount is the plaintiff entitled to recover of the defendant as penalty for usury? Answer: ....."

Judgment on the verdict in favor of the plaintiff for $3,840 and costs, from which the defendant appeals, assigning errors.

M. B. Simpson and Thompson & Wilson for plaintiff.

Worth & Horner and Ward & Grimes for defendant.

STACY, C. J. The verdict is not determinative of the controversy. It is inconclusive and therefore insufficient to support the judgment. *Bank v. Broom Co.,* 188 N. C., 508, 125 S. E., 12.

In an action involving disputed questions, the verdict should establish facts sufficient to enable the court to proceed to judgment. *Chapman-Hunt Co. v. Board of Education,* 198 N. C., 111, 150 S. E., 713. Here, there is no finding by the jury that usury was exacted, or, if so, that it was done knowingly. C. S., 2306.

Nor is the verdict capable of interpretation, so as to support the judgment *quod recuperet,* by proper reference to the pleadings, the evidence, admissions of the parties, and the charge of the court. *Short v. Kaltman,* 192 N. C., 154, 134 S. E., 425; *Kannan v. Assad,* 182 N. C., 77, 108 S. E., 383.

A new trial will be awarded on authority of *Plotkin v. Bond Co.,* 200 N. C., 590, 157 S. E., 870, and cases there cited.

New trial.

WESTERN CAROLINA POWER COMPANY v. BURKE COUNTY.

(Filed 16 September, 1931.)

1. Taxation C d—Order of county board of equalization and review for horizontal reduction in valuations on property is erroneous.

The board of commissioners of a county when sitting as the statutory board of equalization and review of the county must observe certain statutory rules in reviewing the valuations placed upon property by the local assessors, and it is required that they shall raise the valuation on such property as in their opinion has been returned below its true value and reduce the valuation of such property as in their opinion has been returned above its true value, and an order by such board of equalization and review making a horizontal reduction in all the valuations returned by the local assessors is erroneous.

2. Same—Order of Board of Equalization and Review for horizontal reduction of valuations, while erroneous, is not void.

Where the board of county commissioners while sitting as the statutory board of equalization and review of the county makes an order for the horizontal reduction in the valuations placed on property in the county by the local assessors, such order is erroneous, but it is not void, the board having jurisdiction of the subject-matter and the parties interested therein, and having the power to accomplish the result of the order upon its finding that it would place each tract of land on the tax books at its true value in money, but such order is subject to review by the State Board of Assessment upon complaint of any taxpayer of the county.

3. Taxation E c—Board of Equalization order for horizontal reduction in valuations may not be collaterally attacked in action to recover tax.

An order of the board of equalization and review of a county for a horizontal reduction in the valuations placed on property in the county by the local assessors, although erroneous, is not void, and it may not be collaterally attacked in an action to recover a part of the taxes paid by the plaintiff under protest.

4. Taxation C e—State Board of Assessment has authority to interfere with order of County Board of Equalization for horizontal reduction in valuations.

Upon appeal to the State Board of Assessment from the valuation placed on the plaintiff's property the State Board has the authority to interfere with an order of the county board of equalization and review making a horizontal reduction in the valuations placed upon property by the local assessors, but where the State Board reduces the valuation placed on the plaintiff's property and erroneously holds that it cannot interfere with the order for such horizontal reduction, the holding of the State Board is binding on the plaintiff and all other taxpayers until set aside by a court of competent jurisdiction in a hearing upon a writ of *certiorari*.

APPEAL by both plaintiff and defendant from *Shaw, Emergency Judge,* at September Term, 1930, of BURKE. Affirmed in both appeals.

This is an action to recover a sum of money paid by plaintiff to defendant as taxes on property, real and personal, in Burke County for the year 1927. Plaintiff alleges that the amount levied and assessed on its property in Burke County for the year 1927 by the board of commissioners of said county was computed at illegal rates, for that said rates, as applied to its property, exceeded the lawful rates of taxation on property in said county for said year. This allegation is denied by defendant.

The total amount levied and assessed on plaintiff's property, real and personal, in Burke County, as taxes for the year 1927, was $64,435.80. On 20 June, 1928, plaintiff paid this sum to the sheriff of Burke County. At the time said payment was made, plaintiff notified the said sheriff, in writing, that same was made under protest, for that said amount exceeded the amount of taxes lawfully due on its property. Thereafter, and in apt time as provided by statute, plaintiff demanded that defendant refund to it the sum of $10,512.12, for that the amount paid by plaintiff exceeded by said sum the amount lawfully due by plaintiff as taxes on its property for the year 1927. Upon defendant's failure and refusal to refund said sum to plaintiff, this action was begun on 27 November, 1928, in the Superior Court of Burke County.

The property, both real and personal, owned by plaintiff and located in Burke County, was valued by the local assessors of said county for taxation, as of 1 May, 1927, at $11,055,024.66. Its real estate was

valued at $11,028,325.00. Real estate in Burke County, other than that owned by plaintiff and by other corporations, which was valued by the State Board of Assessment for taxation, as provided by statute, was valued by the local assessors at $18,477,273.00, as of 1 May, 1927. Within apt time as provided by statute, plaintiff filed with the board of commissioners of Burke County, sitting as the board of equalization and review of said county, its protest against the valuation of its property as made by the local assessors, contending that said valuation exceeded the true value in money of its real estate. This protest was heard and duly considered by said board.

On 15 September, 1927, at a meeting of the board of equalization and review of Burke County, the following resolution was adopted:

"Whereas it appears to the satisfaction of the board of commissioners of Burke County, sitting as the board of equalization and review of said county, pursuant to the provisions of section 108 of chapter 71, Public Laws 1927, and of the Machinery Act, that the real estate in said county should be reduced to seventy-five per cent of the assessment thereof as made by the local assessors, to the end that said real estate may be entered upon the tax books at its true value in money;

"Now, therefore, be it resolved by the board of commissioners of Burke County, sitting as the county board of equalization and review, in meeting assembled on this the 15th day of September, 1927, that the valuations placed upon real estate in said county by the local assessors for the year 1927, be and the same are reduced twenty-five per cent, and that said real estate be and the same is hereby listed and valued for the purpose of taxation at seventy-five per cent of the valuation placed thereon by the local assessors."

In accordance with the order contained in the foregoing resolution, the real estate owned by the plaintiff and located in Burke County was reduced in value from $11,028,325.00 to $8,291,296.00. The other real estate in said county which had been valued by the local assessors at $18,477,273.00, was reduced in value to $13,835,455.00. After this reduction, the board of commissioners of Burke County levied a tax on all property, real and personal, in said county for the year 1927, for general county purposes, at the rate of $1.00 on the $100.00 valuation. At the same time, the said board levied certain special taxes on property in certain townships, school and road districts of said county, in which property owned by plaintiff was located, at rates determined by said board. These rates for both general county and special purposes, were determined and levied on valuations made by the board of equalization and review, and not on the valuation made by the local assessors.

After the rates of taxation on property, both real and personal, had been determined and levied by the board of commissioners of Burke County, plaintiff applied to the said board, as the board of equalization and review, for a further reduction in the value of its real estate, contending that the valuation of $8,291,269.00, as fixed by said board, exceeded the true value in money of said real estate. This application was heard and duly considered by said board. On 24 September, 1927, the said board adopted a resolution as follows:

"Whereas, the Western Carolina Power Company has heretofore filed a complaint wherein it claims that its property located in Burke County on 1 May, 1927, has been over-valued by the board of assessors of Burke County for purposes of taxation, and wherein it asks that the valuations placed upon such property by said assessors be reduced; and,

"Whereas, the board of commissioners of Burke County have considered the application of the said Western Carolina Power Company for the reassessment of its property in said county, and said Western Carolina Power Company has been heard upon said application and complaint; and

"Whereas, the board of commissioners of Burke County are of opinion that the valuation placed upon the property of said Western Carolina Power Company by said board of assessors should be approved and confirmed as hereinafter recited;

"Now, therefore, be it resolved by the board of commissioners of Burke County, in meeting assembled, that the said board of commissioners do hereby approve and confirm the valuation fixed by the board of assessors upon the property of the Western Carolina Power Company in Burke County, subject to the terms of the general equalization order made with respect to the real estate in Burke County by the said board of commissioners and by the board of equalization and review of said county on 15 September, 1927."

On 28 September, 1927, plaintiff caused to be served on the board of commissioners of Burke County notice of its appeal from the order contained in the resolution of said board, dated 24 September, 1927, to the State Board of Assessment, on the ground that the valuation of its property made by the local assessors and by the board of commissioners of Burke County, sitting as the county board of equalization and review was "erroneous, illegal, excessive, unjust and discriminatory against it."

Upon the hearing of said appeal by the State Board of Assessment, the valuation of the real estate owned by plaintiff and located in Burke County was finally fixed by the order of said State Board of Assessment, dated 30 May, 1928, at $5,796,565.00, as of 1 May, 1927. This order contains a paragraph as follows:

"In making the aforesaid reduction in the assessed value of the property of the Western Carolina Power Company, the said Board of Assessment carefully considered all the elements of the proposition and especially the actual value of such property as of 1 May, 1927; being of the opinion when they reached that point, that they had no authority to make a reduction less than the actual value of such property. As to the action of the equalization board of Burke County in applying the 25 per cent reduction, this board is of the opinion that it cannot interfere. Whether that has produced a want of uniformity, this board does not attempt to say, that being a matter for the courts."

The taxes, for both general county and special purposes, levied and assessed by the board of commissioners of Burke County on the property, both real and personal, of the plaintiff for the year 1927, were computed at the rates determined and fixed by the board of commissioners of Burke County on 15 September, 1927, on the valuation of said property made by the State Board of Assessment on 30 May, 1928, to wit: $5,796,365.00; they were not computed on the valuation made by the local assessors, to wit: $11,028,325.00, or on the valuation made by the board of equalization and review by its order dated 15 September, 1927, to wit: $8,291,269.00. The total amount of the taxes so computed was paid by the plaintiff on 20 June, 1928.

The taxes, for both general county and special purposes, levied and assessed by the board of commissioners of Burke County, on property other than property owned by plaintiff in said county, were also computed at the rates determined and fixed by the board of commissioners of Burke County on 15 September, 1927, on the valuations made by the county board of equalization and review, pursuant to its order dated 15 September, 1927, to wit: $13,835,455.00; they were not computed, levied or assessed on the valuations made by the local assessors, to wit: $18,477,273.00.

If the valuations made by the local assessors of Burke County had not been reduced by the board of equalization and review, and if such valuation had been adopted by the board of commissioners of Burke County in determining the rates of taxation required to produce revenue necessary to meet the expenses of said county for the year 1927, the rates of taxation would have been less than those determined and fixed by the said board, and the total amount levied and assessed as taxes on the property of the plaintiff would have been less than the amount which plaintiff was required to pay and did pay.

Plaintiff contends that the order of the board of equalization and review of Burke County, dated 15 September, 1927, is void, for that said board was without power to order a horizontal reduction in the valua-

tion of real estate in said county as made by the local assessors, and that therefore the legal rates of taxation for both general county and special purposes, were less than the rates at which the taxes on its property were computed.

By this action plaintiff seeks to recover of the defendant the sum by which the amount which it was required to pay and did pay as taxes on its property exceeds the amount for which it was liable at the legal rates of taxation.

The referee, to whom the action was referred, by consent, for trial, upon the facts found by him, concluded that plaintiff is not entitled to recover, and that the motion of defendant, made at the conclusion of all the evidence submitted at the trial, for judgment as of nonsuit should be allowed.

The action was heard in the Superior Court on exceptions filed by both plaintiff and defendant. These exceptions were overruled.

From judgment in accordance with the report of the referee that plaintiff recover nothing of the defendant, and that defendant go without day, and recover its costs of the plaintiff, both plaintiff and defendant appealed to the Supreme Court.

John M. Mull, S. J. Ervin, Sr., W. S. O'B. Robinson, J. C. McGowan and J. H. Marion for plaintiff.

I. T. Avery, F. C. Patton and Joe W. Ervin for defendant.

CONNOR, J. On its appeal to this Court, defendant assigns as error the refusal of the judge of the Superior Court to sustain its exception to the first conclusion of law made by the referee and fully set out in his report. This conclusion of law is as follows:

"1. That the board of commissioners of Burke County, in discharging the duties and in exercising the powers conferred upon it by statute as a board of equalization and review (C. S., 7971(48) and C. S., 7971(88), had only such powers as were expressly or by implication conferred upon it by statute; and that it had no power either express or implied to make a horizontal reduction in the value of the real estate in the county as fixed by the local assessors."

This assignment of error cannot be sustained. There is no error in the referee's first conclusion of law, or in the refusal of the judge to sustain defendant's exception thereto.

The board of commissioners of each county in this State is constituted by statute the board of equalization and review of the county, with respect to the assessment for taxation of all property, real and personal, subject to taxation by the county. The powers of the board are prescribed by statute; they are commensurate with the duty imposed

on the board by statute. It is the duty of the board to equalize in value all tracts or parcels of land, and all articles of personal property in the county to the end that each shall be assessed for taxation at its true value in money. Each tract or parcel of land in the county is valued in the first instance by the local assessors. Such valuation is subject to review by the board, which has the power to equalize the valuations made by the local assessors. In discharging this duty, the board is governed by certain rules prescribed by statute. These rules are as follows:

"(1) They shall raise the valuation of such tracts or lots of real or articles of personal property, except such as are specifically exempt by law, as in their opinion have been returned below their true value, to such price or sum as they may believe to be the true value thereof.

(2) They shall reduce the valuation of such tracts and lots, or articles of personal property as in their opinion have been returned above their true values, as compared with the average valuation of real and personal property of such county.

In regard to real property, they shall have due regard to the relative situation, quality of soil, improvements, natural and artificial advantages possessed by each tract or lot."

The method adopted by the board of equalization and review of Burke County for the discharge of its duty with respect to the equalization of the values of real estate in said county, as shown by the resolution dated 15 September, 1927, was not in accordance with these statutory rules. The order for the horizontal reduction of the valuations made by the local assessors, was erroneous; it was not, however, void, for the county board of equalization and review had jurisdiction of the subject-matter with which it was dealing and of the parties interested therein. It also had the power to grant the relief contained in the order. *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7. As the result of the order made by the board on 15 September, 1927, directing a horizontal reduction in the valuation of all real estate in the county as made by the local assessors, each tract or parcel of land in the county was assessed for taxation at its true value in money, as found by the board of equalization and review. Thus while the method adopted by the board was erroneous, the result accomplished by its order was within its power, as prescribed by statute. The order was subject to review by the State Board of Assessment, upon complaint by any taxpayer of Burke County, or upon its own initiative. C. S., 7971(5), subsection 3.

Plaintiff's assignments of error, chiefly relied upon on its appeal to this Court, are predicated upon its contention that the order of the board of equalization and review of Burke County, dated 15 September, 1927,

and resulting in the horizontal reduction in the valuations of real estate in said county as made by the local assessors, is void, and not merely erroneous, and is therefore subject to collateral attack in this action. This contention cannot be sustained.

The validity of this order was presented to and considered by the State Board of Assessment by plaintiff's appeal. The holding of the State Board of Assessment that it could not interfere with said order, was erroneous, but binding on plaintiff and all other taxpayers, until set aside by a court of competent jurisdiction in a hearing upon a writ of *certiorari. Caldwell County v. Doughton,* 195 N. C., 62, 141 S. E., 289. There is no error in the judgment. It is

Affirmed.

STATE OF NORTH CAROLINA, EX REL., PASQUOTANK COUNTY, N. E. AYDLETT, CLERK OF SUPERIOR COURT OF PASQUOTANK COUNTY, ET AL., v. AMERICAN SURETY COMPANY OF NEW YORK ET AL.

(Filed 16 September, 1931.)

1. Limitation of Actions C b—Action on bond of clerk held not barred, default not being discoverable by due diligence.

The clerk of the Superior Court is required by statute to give bond for the faithful discharge of his duties as clerk, C. S., 927, and upon orders made according to our statute, C. S., 956, and Rule of Practice in the Superior Court number 13, to keep proper records and to account for all moneys coming into his hands by virtue or color of his office, and where there is evidence tending to show that a clerk had kept accurate records of various funds coming into his hands, but had secreted in his safe a list of securities he had received in making investments which were not discovered until after his death by audit made of his books, and the referee finds as a fact, approved by the trial court, that the concealment could not have been discovered by the exercise of due diligence, the evidence supports the finding and the statute of limitations applicable to the surety on the clerk's bond is C. S., 441(9) which provides that the action will not be barred until three years from the discovery of the fraud, and the six-year statute, C. S., 439, does not apply.

2. Principal and Surety B c—Surety held liable for moneys coming into hands of clerk during term of bond and within penalty thereof.

A clerk of the Superior Court is an insurer of funds coming into his hands by virtue or under color of his office, and where the clerk has made investments of such funds and the total cash value of such investments is not equal to the amount for which the clerk is liable, whether because of defaults and misapplications or because of the failure of the investments, the surety on his bond is liable within the penal amount of the bond to the extent that the investments and cash fail to cover the total amount of the clerk's liability.

3. Same—Orders relating to payment of funds to succeeding clerk by receivers of defaulting clerk held temporary and not prejudicial to surety's right of subrogation.

Where the final judgment against the surety on the bond of a deceased clerk of the Superior Court provides that the surety, after payment of the penal sum of the bond, is entitled to recover of the clerk's administrator the amount of its ultimate liability, and should be subrogated to the county's rights in any assets remaining in the hands of the receivers after the county's rights therein have been fully satisfied, subsequent orders by judges of the Superior Court directing that the receivers pay over to the succeeding clerk such moneys as they might have realized on the deceased clerk's official investments, which payments should operate as a credit on the surety's liability, are temporary instructions by the court to its officers and do not operate as *res judicata*, the matter being *in fieri* and the rights of the surety are not prejudiced thereby.

APPEAL by defendant American Surety Company, from *Grady, J.*, at June Term, 1931, of PASQUOTANK. Affirmed.

This is an action brought by plaintiffs against defendant, American Surety Company, of New York and John L. Rogerson, administrator of Ernest L. Sawyer.

On 5 December, 1921, Ernest L. Sawyer was appointed and qualified as clerk of the Superior Court of Pasquotank County for the remainder of the term ending 4 December, 1922. Thereafter he was elected and served as clerk for the ensuing term beginning 4 December, 1922, and ending 4 December, 1926. Thereafter he was elected for the ensuing term, beginning 4 December, 1926, and served until 7 December, 1928, the date of his death. For each of said terms, or portion of said terms, he filed a bond in the penal sum of $10,000, with the American Surety Company of New York as surety. The first bond was executed on 16 December, 1921, and covered the period from 5 December, 1921, to 4 December, 1922. This action was instituted on 12 April, 1929, against the deceased clerk's administrator and his surety.

The following is the provision in each bond: "Now, if the said Ernest L. Sawyer shall account for and pay over according to law all moneys and effects which have come or may come into his hands by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property which have come or may come into his possession by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are or hereafter shall be prescribed by law, then this obligation is to be void; otherwise to remain in full force and effect." C. S., 927.

The case on appeal, as agreed to by the parties, in part, is as follows:

"There was also evidence tending to show that clerk Sawyer kept individual accounts of the various receipts and disbursements made by him, kept separate receiver's accounts, kept special fund account, kept the accounts of deposits for costs, etc., the records of which from his office were introduced in evidence by the plaintiffs. These records purport to show the correct balances due to each of the parties and funds, and the balance due to each of said funds at various times throughout his term of office.

There was evidence tending to show that clerk Sawyer kept records showing the correct amount and balance of moneys due the various funds and parties, and bank accounts showing the correct amount which he had on deposit in the various institutions, and records of his bank deposits, and that the various notes and securities referred to in the referee's report, aggregating $55,370.08, were kept by him in a pouch in his office, in the vault.

There was evidence tending to show that at the time of his death, on 7 December, 1928, clerk Sawyer had in his possession cash, checks, notes, and other evidences of indebtedness as set out in the referee's report, and that the notes secured by mortgages, the deeds of trust, and other evidences of indebtedness referred to in the referee's report were of the date and payable as set out in said report.

There was evidence tending to show that there is a difference of $4,509.48 between the total amounts received by clerk Sawyer during the three terms for which he is chargeable, and the cash items, bank accounts and notes, mortgages, and other evidences of indebtedness mentioned in the referee's report after allowing to said clerk credit for disbursement and expenditures as appeared on his accounts, the net balance due each fund being as set out in referee's findings of facts Nos. 1, 2, 3 and 4. . . .

That the total amount of net balance, after allowing credits for expenditures made by said Sawyer, and without allowing credit for said notes in amount of $55,370.08, and which net balances were due by said E. L. Sawyer at the time of his death on account of various funds, aggregated $59,879.56, the various items of same being as appears in referee's report.

There was evidence tending to show the date of the various so called investments made by said clerk in the securities found in his office, and the amount of same as being as set out in the referee's report.

There was no evidence to show any report made by clerk Sawyer to the county commissioners or to their predecessors in office at any time during his incumbency in which any mention whatsoever was made

of these funds and particularly none in which any mention was made either of the receivership funds or the so called special funds like the Wadsworth, Jenkins, Pendleton and Hewitt funds.

There was no evidence whatsoever of any report made by clerk Sawyer to the county commissioners at any time during his incumbency or to any Superior Court judge in which any of the so called investments referred to in the referee's findings were listed or reported.

There was no evidence tending to show any report whatsoever by said clerk to a judge of the Superior Court in accordance with Rule 13 of the Superior Court.

There was no evidence whatsoever of any order made at any time specifically authorizing any or either of the so called investments.

There was no evidence whatsoever of any authorization by any judge or any board of commissioners or anyone else in authority for the mixture of these funds.

There was evidence tending to show a mixture of the funds by said clerk through investments in the so called securities, and evidence tending to show that as a result of the clerk's action in so mixing them it is impossible to allocate the investments or any of them to any particular fund or funds, and this is true even of those which were made payable to him as clerk Superior Court and of those which were made payable to him as receiver. That some of these so called investments were made payable to the clerk individually, or to bearer.

There was evidence tending to show that defendant, John L. Rogerson, qualified as administrator upon the estate of said Ernest L. Sawyer. That said estate was and is hopelessly insolvent. There was evidence tending to show that the present clerk, N. E. Aydlett, has duly qualified and that also he has been appointed receiver by proper orders of the court in succession to said Sawyer, and as such is now entitled to all of the funds which went into the hands of his predecessor by virtue of his position, both as clerk and receiver.

The accounts of Sawyer offered in evidence show that said Ernest L. Sawyer as clerk and receiver, kept no account of investments made in or of any particular fund, as required by law, that the so called investments were made in part in his own name and payable to bearer; that they were made in some instances to his kinsmen and insolvents; that some of the so called securities were worthless and uncollectible; that it is impossible at this time to separate and allocate the moneys which he received, or to properly place and apply the securities held by him hereinbefore referred to. There was evidence tending to show and the record is such that it is impossible to ascertain with any degree of certainty just what became of any particular fund which went into his hands or

to follow the same or any part thereof into any particular securities held by him at the time of his death.

There was no demand made upon said clerk by any of the parties plaintiff or their predecessors in title during his term of office.

This case on appeal contains all the evidence offered by all parties bearing upon the statute of limitations.

There was no evidence that any shortage, defalcation or misapplication was either discovered or suspected at any time prior to clerk Sawyer's death, within three years of the institution of this action. The records of all accounts were in his possession as clerk Superior Court in his office, and not in claimants' possession. The owners of said funds include many minors and some nonresidents. There was no evidence that any act or default on his part was brought to the attention of any of said claimants or discovered by them prior to his death. There was evidence that he promptly met all payments and disbursements required of him up to the time of his death. No claimant has any knowledge of any shortage or default until same was discovered by and through the audit of clerk Sawyer's accounts, made after his death at the instance of the board of commissioners of Pasquotank County."

The court below, among other facts, found:

"The referee finds as a fact, and that fact is approved by the court, that the facts as to the defalcations and misapplications of funds in the hands of said Ernest L. Sawyer, could not have been discovered by the plaintiffs in the exercise of reasonable care and diligence until after the death of said Sawyer on 7 December, 1928, or at least, within three years prior to the commencement of this action. The court also finds that there was never any demand made upon said clerk by any of the parties plaintiff, or their predecessors in title, during his term of office, and only by death was the statutory demand put into operation."

The judgment of the court below, in part, is as follows:

"Upon the facts as found by the referee, and approved by the court, and upon the law as understood by the court, it is now considered, ordered and adjudged that the plaintiff have and recover of John L. Rogerson, administrator of Ernest L. Sawyer, deceased, the sum of $59,811.81, with 12 per cent interest thereon, from 9 April, 1929, together with the costs of this action to be taxed by the clerk.

It is further adjudged that the plaintiffs have and recover of the defendant, the American Surety Company of New York, the sum of $10,000, representing the penalty of the bond dated 16 November, 1921; and the further sum of $10,000, being the full penalty of the bond dated 20 November, 1922, and the further sum of $10,000, being the

full penalty of the bond dated 15 November, 1926; said last recovery under the bond of 15 November, 1926, to be discharged upon the payment by said Surety Company of the sum of $9,575.78, with interest thereon at the rate of 12 per cent per annum from 9 April, 1929, and the costs of this action, to be taxed by the clerk, but in no event to exceed the penalty of the bond, to wit, ten thousand dollars.

It is further ordered and adjudged that the receivers heretofore appointed to take over the assets in the hands of said Ernest L. Sawyer, C. S. C. and receiver, at the time of his death, proceed to collect in and reduce to cash all of the notes, securities and collateral held by them, as rapidly as possible, and that the net collections therefrom be applied on this judgment against the defendant Rogerson, administrator, and, after the application of said collections, if the balance due on this said judgment be less than the full liability of the defendant surety company, to wit, $30,000, then said surety company shall not be required to pay any more than the balance due by the estate of E. L. Sawyer, after the application of said payments.

It is further ordered and adjudged that if the said Surety Company shall elect to pay into court the sum of $30,000, in exoneration of its liability under this judgment, then and in that event, it shall be subrogated to any and all equities in the assets of E. L. Sawyer, now in the hands of the receivers, other than what shall be required to pay the balance due by the estate of said E. L. Sawyer to the plaintiff herein. . . ."

Addenda to judgment:

"It is also considered and adjudged that the paragraph adjudging liability against the American Surety Company and beginning 'It is further adjudged that the plaintiffs have and recover of the defendant, the American Surety Company of New York,' be amended to read as follows: It is further adjudged that the plaintiffs have and recover of the defendant, the American Surety Company of New York, the sum of ten thousand dollars, representing the penalty of the bond dated 16 November, 1921; and the further sum of $10,000, being the full penalty of the bond dated 20 November, 1922, and the further sum of $10,000, being the full penalty of the bond dated 15 November, 1926; said last recovery under the bond of 15 November, 1926, to be discharged upon the payment by said Surety Company of the sum of $9,575.78, with interest thereon at the rate of 6 per cent per annum from 9 April, 1929, but in no event to exceed the penalty of the bond, to wit, ten thousand dollars. Plaintiffs will also recover against said company the costs herein to be taxed by the clerk." The material exceptions and assignments of error will be considered in the opinion.

M. B. Simpson and Ehringhaus & Hall for plaintiffs.

Thompson & Wilson and S. S. Lambert, Jr., for heirs of Dr. R. C. Jenkins, interveners.

McMullan & LeRoy for defendants.

CLARKSON, J. The court below rendered judgment against the defendant John L. Rogerson, administrator of Ernest L. Sawyer, deceased, for $59,811.81, with 12 per cent interest thereon from 9 April, 1929, from which judgment no appeal was taken. The defendant American Surety Company, alone appealed, so we consider only the question presented by defendant American Surety Company.

(1) Is this action barred by the statute of limitations as to the bond, executed by the deceased clerk and his surety, covering the period from 5 December, 1921, to 4 December, 1922, inclusive?

The American Surety Company, frankly in its brief states: "The one question upon this point is whether the six-year statute (C. S., 439), or the three-year statute (C. S., 441(9), providing for relief on the ground of fraud or mistake is applicable. To state the question more specifically—is the instant case controlled by *S. v. Gant, ante,* 211?" We think the action is controlled by the *Gant case, supra.*

The defendant contends: "In the *Gant case, supra,* it appeared that the defendant, clerk, had not only misapplied moneys received by virtue or color of his office, to wit, certain pension funds, but that by systematized forgeries and false entries in his records he had both obtained the funds and *concealed their misapplication.* Upon the facts in the *Gant case,* as stated in the Court's opinion, a thorough investigation of his office, at any time until just before the suit was instituted, would have failed to disclose the slightest irregularity. It required an accident to discover his long continued misapplications. In the instant case the converse is true. It appears from the case on appeal that 'There was evidence tending to show that clerk Sawyer kept records showing the correct amount and balance of moneys due the various funds and parties, and bank accounts showing the correct amount which he had on deposit in the various institutions, and records of his bank deposits, and that the various notes and securities referred to in the referee's report aggregating $55,378.08, were kept by him in a pouch in his office in a vault.' There was no evidence to the contrary. This is shown by the further statement in the case on appeal, to wit: 'This case on appeal contains all of the evidence offered by all parties bearing upon the statute of limitations.'"

But it also appears from the case on appeal that "There was no evidence to show any report made by the clerk Sawyer to the county commissioners or to their predecessors in office at any time during his

incumbency in which any mention whatsoever was made of these funds and particularly none in which any mention was made either of the receivership funds or the so called special funds like the Wadsworth, Jenkins, Pendleton and Hewitt funds. There was no evidence whatsoever of any report made by clerk Sawyer to the county commissioners at any time during his incumbency or to any Superior Court judge in which any of the so called investments referred to in the referee's findings were listed or reported. There was no evidence tending to show any report whatsoever by said clerk to a judge of the Superior Court in accordance with Rule 13 of the Superior Court. There was no evidence whatsoever of any order made at any time specifically authorizing any or either of the so called investments. There was no evidence whatsoever of any authorization by any judge or any board of commissioners or anyone else in authority for the mixture of these funds. There was evidence tending to show a mixture of the funds by said clerk through investments in the so called securities, and evidence tending to show that as a result of the clerk's action in so mixing them it is impossible to allocate the investments or any of them to any particular fund or funds, and this is true even of those which were made payable to him as clerk Superior Court and of those which were made payable to him as receiver. That some of these so called investments were made payable to the clerk individually, or to bearer."

C. S., 956, is as follows: "*On the first Monday in December of each and every year,* or oftener, if required by order of the board of commissioners or any other lawful authority, *clerks of the Superior Courts shall make an annual report of all public funds which may be in their hands.* The report shall be made to the board of county commissioners and addressed to the chairman thereof. It shall give an itemized statement of said funds so held, the date and source from which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said fund; and it shall include statement of all funds in their hands by virtue or color of their office, and which may belong to persons or corporations. The report shall be subscribed and verified by the oath of the party making it before any person allowed to administer oaths." (Italics ours.)

Rules of Practice in the Superior Court, 200 N. C., at p. 845: "(13) Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept

or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto. The report by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries."

The law above set forth, C. S., 956, requires a report from the clerk in detail on the first Monday in December of each and every year (or oftener, if required by order of the board of commissioners)—*an open hand;* and to the same effect is Rule 13, *supra.* The record discloses contrary to the statute and rule—*a closed hand*—"a mixture of the funds" and as a result "It is impossible to allocate the investment," etc.

In *Ewbank v. Lyman,* 170 N. C., at p. 508, citing numerous authorities, the following principle is stated: "Under authoritative decisions here and elsewhere construing this and similar statutes, it has been very generally held that these words, 'The action not to be deemed to have accrued until the discovery of the facts constituting the fraud,' etc., by correct interpretation mean until the impeaching facts were known or should have been discovered in the exercise of reasonable business prudence." *Sanderlin v. Cross,* 172 N. C., 234; *Latham v. Latham,* 184 N. C., 55.

The matter is fully discussed in *S. v. Gant,* 200 N. C., at pp. 226, 7, 8, 9.

C. S., 934, is as follows: "At every regular term of the Superior Court for the trial of criminal cases the solicitor for the judicial district shall inspect the office of the clerk and report to the court in writing. If any solicitor fails or neglects to perform the duty hereby imposed on him, he is liable to a penalty of one hundred dollars to any person who sues for the same." Defendant cites the above statute.

The negligence of others in the nonperformance of duty did not relieve the defendant clerk of his duty. Again, a clerk is an insurer.

"In *Smith v. Patton,* 131 N. C., at p. 397, we find: 'It is settled in this State that the bond of a public officer is liable for money that

comes into his hands as an insurer, and not merely for the exercise of good faith. . . . (Citing authorities.) Bonds of administrators, executors, guardians, etc., only guarantee good faith,' citing authorities. *Marshall v. Kemp,* 190 N. C., at p. 493; *Gilmore v. Walker,* 195 N. C., at p. 464; *Indemnity Co. v. Corp. Com.,* 197 N. C., 562." *S. v. Gant, supra,* at p. 226.

The court below found: "The referee finds as a fact, and that fact is approved by the court, that the facts as to the defalcations and misapplications of funds in the hands of said Ernest L. Sawyer, could not have been discovered by the plaintiffs in the exercise of reasonable care and diligence until after the death of said Sawyer on 7 December, 1928, or at least, within three years prior to the commencement of this action. The court also finds that there was never any demand made upon said clerk by any of the parties plaintiff, or their predecessors in title, during his term of office, and only by death was the statutory demand put into operation." We think the evidence on this record sufficient to support the above finding.

(2) If not, what sum is recoverable upon the bond covering said period?

In *Gilmore v. Walker,* 195 N. C., at p. 464, speaking to the subject "It is established in law in this State that failure of the clerk to pay upon demand, raises the presumption that the money was misappropriated and converted upon receipt thereof, and the burden is upon him to show the contrary." *Presson v. Boone,* 108 N. C., 79; *Marshall v. Kemp,* 190 N. C., 491.

In *Williams v. Hooks,* 199 N. C., at p. 492, the following observation is made: "Thus, if the clerk makes an investment in the utmost good faith and in the exercise of sound business judgment, and the investment fails, he is still responsible for the money and must pay it to the person entitled thereto. If he deposits the money in a bank of known and approved solvency and the bank thereafter fails, he must suffer the loss, because if he fails to pay upon demand the law presumes that he misappropriated the fund at the very instant it came into his hands."

Under the facts and circumstances of this case, the sums of money received by said clerk covering said period not exceeding the penalty of the bond, $10,000, is recoverable.

(3) Are the orders of Judge Sinclair entered at the September Term, 1929, of the Superior Court of Pasquotank County, and the order of Judge Small entered at March Term, 1930, valid orders; and, if so, what is their significance?

The material portion of the order of Judge Sinclair, is as follows: "It is further ordered that said receivers be, and they are hereby

authorized, and directed to pay over to N. E. Aydlett, clerk of Superior Court, such funds as they have collected, less an amount sufficient to defray the expenses of the receivership, and to take from said clerk a receipt for the amount so paid, which payment shall operate as a credit on the liability of the defendant, Surety Company, in this proceeding."

But it appears thereafter, at March Term, 1930, that Judge Small made the following order: *"It further appearing that the funds collected by said receivers should be properly paid to said clerk and thereupon operate as a credit in the final adjustment of the liability of the defendants, administrator and surety company;* Now, therefore, it is ordered, decreed and adjudged that N. E. Aydlett and J. H. LeRoy, Jr., receivers, be, and they are hereby authorized and directed to pay over to N. E. Aydlett, clerk Superior Court, such funds as they may hereafter collect as such receivers, less an amount sufficient to defray the expense of said receivership, and to take from said clerk a receipt for the amounts so paid, *which payments shall operate as a credit on the liability of the defendant Rogerson, administrator, and of the defendant, Surety Company, in this proceeding."* (Italics ours.)

No exceptions were taken by the litigants to either of these orders. The referee found, and this finding was sustained by the court below, that "The defendant Surety Company is entitled to recover of the defendant administrator the amount of its ultimate liability to plaintiffs with interest and costs, expenses and attorneys' fees in this action and should be subrogated to plaintiffs' rights in any assets remaining in the hands of the receivers after the plaintiffs' rights therein have been fully satisfied."

We think the orders of Judges Sinclair and Small temporary instructions by the court to its officers, the receivers, made without hearing on the merits and not intended and in no way prejudicial to the contentions presented by the pleadings. The appellant contends that these orders are *res judicata* and do not permit the judgment rendered. The order of Judge Small is later than Judge Sinclair's. No exception was taken by appellant and it distinctly says *"therefore operate as a credit in the final adjustment of the liability," etc.* The matter was *in fieri.*

The case of *Wellons v. Lassiter,* 200 N. C., 474, is not applicable to the facts in this case. From the view we take of the case we do not think it necessary to discuss certain contentions made by interveners. The judgment below is

Affirmed.

VERDIE HEATH JACKSON, BY HER NEXT FRIEND, J. T. JACKSON, v. J. W. BELL AND MARVIN PORTER.

(Filed 16 September, 1931.)

Appeal and Error J d—Burden is on appellant to overcome presumption that judgment of lower court is correct.

Upon plaintiff's appeal from a judgment as of nonsuit the burden is on him to show error, and failing therein the judgment appealed from will be affirmed by the Supreme Court.

APPEAL by plaintiff from *Grady, J.*, at June Term, 1931, of PASQUOTANK.

Civil action to recover damages for an alleged negligent injury caused by a collision between two automobiles, one owned and operated by the defendant Bell; the other owned by the defendant Porter and driven at the time by Beverly Woolard. The plaintiff was a guest in the Porter car.

There was a judgment of nonsuit entered in favor of the defendant Porter, and a verdict of $5,000 rendered against the defendant Bell, who has not appealed.

The plaintiff appeals from the judgment of nonsuit dismissing the action as to the defendant Porter.

Ehringhaus & Hall and M. B. Simpson for plaintiff.
Worth & Horner and Hughes, Little & Seawell for defendant Porter.

PER CURIAM. Without detailing the evidence it is sufficient to say that it falls short of making out a case against the defendant Porter. At least, the appellant, who is required to handle the laboring oar, has failed to overcome the presumption against error. *Bailey v. McKay*, 198 N. C., 638, 152 S. E., 893.

Affirmed.

BERTIE STUBBS, ADMINISTRATRIX OF ROBERT W. STUBBS, v. CHICAGO MILL AND LUMBER CORPORATION AND W. B. EBNER.

(Filed 16 September, 1931.)

Removal of Causes C b—Allegations in petition for removal will be taken as true, plaintiff having right to join issue or move for remand.

Where a nonresident defendant files petition and bond for the removal of a cause from the State to the Federal Court upon diversity of citizenship and pending of the same action in the Federal Court, and the amount is jurisdictional in the latter Court, for the purpose of the

motion the statement contained in the petition is taken as true, the plaintiff having the right to answer, join issue with the petition or move to remand from the District to the State Court, and the defendant's petition to remove the cause as prayed, should be allowed.

APPEAL by plaintiff from *Grady, J.* From WASHINGTON. Affirmed.

W. L. Whitley and Ward & Grimes for plaintiff.
Zeb Vance Norman and MacLean & Rodman for defendants.

PER CURIAM. This is an action for personal injury resulting in the death of the plaintiff's intestate. The defendant Ebner is a resident of Washington County, North Carolina, and the Chicago Mill and Lumber Corporation is a corporation created and organized under the laws of the State of Delaware. The amount in controversy exceeds $3,000 exclusive of interest and costs.

The corporate defendant filed a petition for the removal of the cause to the United States District Court for the Eastern District of North Carolina, specifically and fully setting out the grounds of the motion: not only diversity of citizenship and fraudulent joinder of parties, but the pending of substantially the same cause of action in the District Court. *Stubbs v. Chicago Mill and Lumber Corporation et al.,* 199 N. C., 807. The statements contained in the petition must for the purpose of the motion be taken as true, the plaintiff having the right to answer, join issue with the petition or move to remand from the District Court to the State Court. *Wilson v. Republic Iron & Steel Co.,* 257 U. S., 92, 66 L. Ed., 144.

Affirmed.

ELIZABETH CITY HOTEL CORPORATION v. T. L. OVERMAN.

(Filed 23 September, 1931.)

1. Corporations D h—Evidence of promissory representations is insufficient to establish fraud in procurement of subscription to stock.

Where, in an action to enforce a written agreement for the subscription of stock in a corporation to be formed, the defendant sets up the defense that his signature to the agreement was procured by false and fraudulent representations, evidence tending only to show that the representations were all promissory in their nature is insufficient to support his defense.

2. Same—Evidence of parol representations prior to execution of written stock subscription agreement held incompetent.

Where an agreement for the subscription of stock in a corporation to be formed is in writing and expressly provides that the entire contract

is expressed in the writing, parol evidence of promissory representations theretofore made is incompetent as tending to vary the terms of the written instrument, all prior or contemporaneous oral agreements being merged in the written contract.

3. Corporations D f—Where sellers of stock receive no compensation or commission provision of Capital Issues Law does not apply.

Where those soliciting subscriptions for shares of stock in a domestic corporation to be formed are not paid any compensation, commissions or remuneration for or in connection with the sale or disposition of the stock, a sale by them does not fall within the provisions of section 8, chapter 190 of the "Capital Issues Law" of North Carolina, nor is this result affected by the fact that the corporation after its formation paid a certain sum of money to a special and distinct agency for its services in making an investigation of the desirability of forming such a corporation. Section 4, sub-sec. 8, ch. 190, Public Laws of 1925.

APPEAL by defendant from *Moore, Special Judge,* at May Term, 1931, of PASQUOTANK. No error.

This is an action to recover on a stock subscription agreement executed by the defendant on 11 May, 1926. The agreement is in writing, and was executed by defendant prior to the incorporation of plaintiff. Plaintiff is a domestic corporation, organized under the laws of this State.

By the terms of said agreement, defendant subscribed for ten shares of the preferred and five shares of the common stock of plaintiff; he promised to pay to plaintiff for said shares of stock, the sum of $1,000, in monthly installments as set out in the agreement. None of the installments has been paid. The final installment was due and payable on 20 July, 1927. This action was begun on 10 April, 1929.

In his answer, the defendant admitted the execution by him of the stock subscription agreement as alleged in the complaint. He relied upon two defenses, (1) that the execution of the agreement was procured by false and fraudulent representations, as specifically alleged in his answer; and (2) that the stock subscription agreement is null and void for that it fails to comply with certain provisions of chapter 190, Public Laws 1925, known as the "Capital Issues Law of North Carolina."

The stock subscription agreement, which was offered in evidence at the trial, contains a paragraph at the end thereof as follows:

"(6) No representations, statements or agreements other than as herein recited have been made, or are binding on said corporation, and my entire contract is herein expressed."

The representations alleged in the answer are not recited in said agreement. All these representations are promissory in their nature. As a witness in his own behalf at the trial, defendant testified that he

can read and write, and that he read the "bottom of the agreement" before he signed the same. There was no evidence tending to show that defendant, at the time he signed the agreement, was prevented from reading the entire agreement. On objection by the plaintiff, evidence offered by defendant tending to support the allegations in his answer with respect to the representations, was excluded. Defendant excepted to the exclusion of this evidence.

Section 8 of chapter 190, Public Laws 1925, known as the "Capital Issues Law of North Carolina," and governing the sale in this State of stocks, bonds and other securities at the date of the execution of the stock subscription agreement sued on in this action, contains the following statutory requirement:

"The contract of subscription or of sale shall be in writing, and shall contain a provision in the following language:

'No sum shall be used for commissions, promotion and organization expenses on account of the sale of any securities offered for sale by this company in excess of five per centum of the amount actually paid upon separate subscriptions for such securities.' "

This provision is not contained in the stock subscription agreement sued on in this action. However, subsection 8 of section 4 of chapter 190, Public Laws 1925, expressly exempts from the provisions of the Capital Issues Law, "subscriptions for shares of the capital stock of a domestic corporation prior to the incorporation thereof, when no expense is incurred, and no commission, compensation, or remuneration is paid, or given for, or in connection with, the sale or disposition of such securities."

The evidence at the trial showed that defendant subscribed for the shares of the capital stock of plaintiff upon the solicitation of a citizen of Elizabeth City, who received no commission or other compensation for procuring the execution by defendant of the stock subscription agreement. This citizen was acting for and in behalf of a committee known as the "Elizabeth City Hotel Committee." This committee received no commission or other compensation for the sale of the capital stock of plaintiff. The committee was composed of citizens of Elizabeth City, who were interested primarily in the building of a hotel in Elizabeth City as a community enterprise. The committee was organized for the purpose of investigating the conditions in Elizabeth City, and determining whether such conditions justified the building of a new hotel in said city.

On 23 November, 1925, the "Elizabeth City Hotel Committee" entered into a contract with the Hockenbury System, Incorporated, by the terms of which the said Hockenbury System, Incorporated, agreed to

make a survey of the conditions in Elizabeth City, affecting the proposition under consideration by the committee, and to report to said committee the facts disclosed by said survey. It was agreed that if the committee, after receiving the report of the Hockenbury System, Incorporated, should decide to proceed with its plans to organize a corporation for the purpose of building a hotel in Elizabeth City, and to solicit subscriptions from citizens of said city for shares of the capital stock of such corporation, certain commissions should be paid by the committee to the Hockenbury System, Incorporated, for its services in making the survey and report, and for other services to be rendered by said Hockenbury System, Incorporated. After the plaintiff corporation was organized, the sum of $14,500 was paid to the Hockenbury System, Incorporated, for its services in accordance with the contract. The defendant was represented by proxy at the organization meeting of the plaintiff corporation. It does not appear that defendant objected to the payment by the corporation of the amount due the Hockenbury System, Incorporated, under its contract with the "Elizabeth City Hotel Committee."

At the close of all the evidence, an issue was submitted to the jury as follows: "What sum, if any, is plaintiff entitled to recover of the defendant?"

The court instructed the jury as follows: "Gentlemen of the jury, if you believe the evidence and find the facts to be as it tends to show, your answer to the issue will be $1,000, with interest; otherwise, you will answer the issue, 'Nothing.'" Defendant excepted to this instruction.

The jury answered the issue, "$1,000, with interest."

From the judgment in accordance with the verdict, defendant appealed to the Supreme Court.

J. H. LeRoy, Jr., and McMullan & McMullan for plaintiff.

M. B. Simpson and Thompson & Wilson for defendant.

CONNOR, J. On his appeal to this Court, the defendant relies chiefly on his exceptions to the exclusion of evidence tending to show that oral representations were made to him as inducements for his execution of the stock subscription agreement, which is in writing, and to the instruction of the court to the jury that if they believed all the evidence and found the facts to be as the evidence tended to show, they should answer the issue, "$1,000, and interest"; and that, otherwise, they should answer the issue, "Nothing." Neither of the assignments of error based on these exceptions can be sustained.

It is sufficient to say that the oral representations which the excluded evidence tended to show were made to the defendant prior to his execution of the stock subscription agreement, are all promissory in their nature. They are, therefore, not sufficient as a foundation for the first defense relied on by the defendant. *Colt v. Conner,* 194 N. C., 344, 139 S. E., 694; *Colt v. Springle,* 190 N. C., 229, 129 S. E., 449; *Pritchard v. Dailey,* 168 N. C., 330, 84 S. E., 392; *Cash Register Co. v. Townsend,* 137 N. C., 652, 50 S. E., 306.

In the absence of evidence tending to show that the execution of the stock subscription agreement was procured by false and fraudulent representations, the evidence offered by the defendant was incompetent for that it tended to vary the terms of stock subscription agreement which is in writing. In *Raleigh Improvement Co. v. Andrews,* 176 N. C., 280, 96 S. E., 1032, it is said: "The fact that this is a subscription for stock does not take the case out of the usual rule. It seems to be generally agreed that when a subscription contract is reduced to writing and signed, all oral agreements, whether prior or contemporaneous, are merged in it, and parol evidence of them cannot be received to vary the legal import of the writing."

In addition to the foregoing reasons, the evidence was properly excluded, because defendant had expressly agreed that his entire contract was expressed in the agreement which he had signed. *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406.

There was no error in the instruction of the court to the jury, for all the evidence, if believed, shows that the transaction resulting in the subscription by defendant for shares of the capital stock of plaintiff corporation, was exempt from the provisions of the Capital Issues Law of North Carolina, in force at the date of the subscription. Subsection 8, of section 4, chapter 190, Public Laws 1925.

No expense was incurred, and no commission, compensation or remuneration was paid or given for, or in connection with, the sale or disposition of the stock of plaintiff, a domestic corporation. The subscription was made prior to the incorporation of plaintiff. On the facts shown by all the evidence, the transaction was exempt from the statute, by its express provisions. See *Durham Citizens Hotel Corporation v. Drakeford,* 196 N. C., 808, 145 S. E., 921, and *Durham Citizens Hotel Corporation v. Dennis,* 195 N. C., 420, 142 S. E., 578.

The amount paid by the plaintiff corporation to the Hockenbury System, Incorporated, after its incorporation, was for services rendered to the Elizabeth City Hotel Committee, which alone, through its agents, solicited subscriptions to the capital stock of plaintiff. Neither the committee nor its agents were paid commissions for soliciting subscriptions.

There was no evidence tending to show that the Hockenbury System, Incorporated, was paid any sum by the committee or by the plaintiff for or in connection with the sale of shares of the capital stock of plaintiff corporation. The judgment is affirmed.

No error.

CORPORATION COMMISSION OF NORTH CAROLINA ET AL., V. FRED P. LATHAM.

(Filed 23 September, 1931.)

Banks and Banking H a—Defendant held not liable for statutory assessment of bank stock under the facts of this case.

Where the owner of shares of stock in a bank transfers some of his stock to his sons in trust for his grandchildren, the stock and the increment therefrom to be held for their education, but there is nothing on the books of the bank to indicate for whom the trust was created, and the transfer is regularly made in good faith when the bank was solvent, *Held:* upon the bank becoming insolvent some two years after the transfer, the transferer is not liable for the statutory assessment against the stock. C. S., 219(a), 219(c).

APPEAL by plaintiffs from *Grady, J.,* 21 May, 1931, at Chambers, Washington, N. C. From BEAUFORT.

Civil action to recover of the defendant as an alleged stockholder in a State bank, now in liquidation, the full amount of his statutory liability as such stockholder.

The determinative facts, which properly appear of record, are as follows:

"Defendant owned 89 shares of the capital stock of the Bank of Belhaven, and at the times hereinafter mentioned, was a member of the board of directors of said bank.

"On 16 May, 1925, the defendant transferred on the books of the bank 20 shares of stock to J. R. Latham, trustee, and 20 shares to H. V. Latham, trustee, and said stock was issued to said transferees in regular order by the bank officials. There is nothing on the books of the bank to indicate for whom the two trusts were created; but it is alleged in the complaint, admitted in the answer, and found as a fact by the court, that there was an agreement between the defendant and said trustees, who were his sons, that they were to hold said stock and the increment thereof, as an educational fund for their minor children, the grandchildren of the defendant.

"Said minor *cestui que trustent* are without any estate, and no assessment can be levied and collected against them or any of them. The

Bank of Belhaven became insolvent on 16 March, 1927, and was taken over by the Corporation Commission for liquidation.

"This action is brought for the purpose of collecting out of the defendant the full amount of the par value of said stock, it being alleged that he is still the owner thereof; there is no allegation of fraud in the complaint, nor is it alleged that the bank was insolvent at the time of the transfer of said stock, which was a voluntary donation, and the court finds that it was made in good faith, for the purposes above set out."

From a judgment dismissing the action, the plaintiffs appeal, assigning error.

Ward & Grimes for plaintiffs.
MacLean & Rodman for defendant.

STACY, C. J. It was held in *Trust Co. v. Jenkins,* 193 N. C., 761, 138 S. E., 139, "that no person who appears upon the records of a bank as a stockholder therein is relieved of personal liability under 3 C. S., 219(a), by virtue of the provisions of 3 C. S., 219(c), unless the said record, or the stock certificate issued to him, shows that he holds the said stock as trustee for a *cestui que trust* named on the record or in the certificate."

Under this holding and on the facts appearing of record, it would seem that the present defendant ought not to be held individually responsible as a stockholder in the Bank of Belhaven under 3 C. S., 219(a), for the amount assessable against the stock duly transferred by him 16 May, 1925, in good faith, to J. R. Latham, trustee, and H. V. Latham, trustee.

The decision in *Early, Receiver, v. Richardson,* 280 U. S., 496, cited and relied upon by plaintiffs, is distinguishable by reason of a different fact situation.

Affirmed.

STATE v. JOHN ASTER RIVES.

(Filed 23 September, 1931.)

Criminal Law L a—Appeal in capital case will be dismissed when not prosecuted according to Rules, no error appearing on face of record.

Where the defendant convicted of a capital offense gives notice of appeal, but nothing is done toward perfecting the same, the State's motion to docket and dismiss the appeal will be allowed, no error appearing upon the face of the record proper.

MOTION by the State to docket and dismiss appeal.

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

STACY, C. J. At the May Term, 1931, Chatham Superior Court, the defendant herein, John Aster Rives, was tried upon an indictment charging him with the murder of one John Headen, which resulted in a conviction and sentence of death. His confederate, Ben Goldston, was tried at the previous January Term on a separate bill of indictment. *S. v. Goldston, ante,* 89.

The prisoner gave notice of appeal to the Supreme Court, and was allowed 60 days within which to make out and serve his statement of case on appeal, but nothing has been done towards perfecting the appeal.

As no error appears on the face of the record proper, the motion to docket and dismiss must be allowed. *S. v. Hayeslipps,* 199 N. C., 636, 155 S. E., 927; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

CORPORATION COMMISSION OF NORTH CAROLINA, BANK OF BELHAVEN AND A. G. SMALL, LIQUIDATING AGENT OF THE BANK OF BELHAVEN, v. GEORGE L. WILKINSON AND META SAVAGE WILKINSON.

(Filed 23 September, 1931.)

1. Bills and Notes D b—Liability of parties on note is fixed by Negotiable Instrument Act and different liability may not be shown by parol.

Since the enactment of the Negotiable Instruments Law, a person who places his name on a note otherwise than as maker, drawer, or acceptor is deemed to be an endorser unless he clearly indicates his intention to be bound in some other capacity, C. S., 3044, and as against the holder he may not show a different liability by parol, and the rule, theretofore existing, to the effect that the parties to a negotiable instrument may prove as between themselves whether they have affixed their signatures as joint promisors, endorsers, guarantors, or accommodation endorsers, is changed.

2. Bills and Notes D c—Endorsers held relieved of liability under facts of this case by extension of time for payment given maker.

Where the maker of a negotiable instrument, with accommodation endorsers before delivery, negotiates the note to a bank and thereafter the bank becomes insolvent and is placed in the hands of the liquidating agent of the Corporation Commission, and the liquidating agent agrees with the maker after maturity for an extension of time for payment to

a definite date without retaining recourse upon the endorsers and without their consent, and there is a statement upon the face of the note that the "subscribers" agree to remain bound notwithstanding any extension of time given the maker for payment, *Held:* the word "subscribers" does not include the endorsers whose names appear upon the back of the instrument, and the agreement made between the liquidating agent and the maker discharges them from liability, there being no waiver of their rights under the wording of the instrument or otherwise. C. S., 3102(6), 3092.

3. Signatures B a—Where statute requires that party subscribe signature it must be signed at the end of the writing.

Where a statute requires that a writing be signed to bind a party to its terms it is not necessary that the signature appear at any particular place on the writing, but where the statute requires that the signature be subscribed it must be signed below and after the writing.

4. Bills and Notes D c—Endorsers not referred to therein are not bound by agreement on face of note waiving rights upon extension of note.

In order to bind the endorsers of a negotiable instrument to an agreement appearing upon its face, that the parties should remain bound in the event that an extension of time for payment be given the maker, it is necessary that the agreement refer specifically to the endorsers or otherwise clearly include them within its terms, and where the agreement is that the "subscribers" should remain bound it is insufficient to include the endorsers. This appeal does not present the question of the waiver by the endorsers of dishonor under Art. 8 of the Negotiable Instruments Act, or the effect of an indicated credit upon the instrument, it appearing that the agreement with the maker for an extension of time for payment was made more than a year after the credit entered on the note.

APPEAL by plaintiffs from *Stack, J.*, at March Term, 1931, of BEAUFORT. No error.

On 7 December, 1926, J. E. Wilkinson executed and delivered to the Bank of Belhaven, the following promissory note:

"$645.00. Belhaven, N. C., 7 December, 1926.

Ninety days after date I promise to pay to the order of Bank of Belhaven, Belhaven, N. C., six hundred forty-five dollars, negotiable and payable at said bank, with interest after maturity if unpaid at the rate of six per cent per annum, payable semi-annually for value received, being for money borrowed, and the subscribers agree to continue and remain bound for the payment of this note and all interest thereon, notwithstanding any extension of the time granted to the principal, and notwithstanding any failure or omission to protest this note for nonpayment or to give notice of nonpayment or dishonor or protest or to make presentment or demand for payment, hereby waiving any protest

and any and all notice of any extension of time, of nonpayment or of dishonor or protest in any form, or any presentment or demand for payment, or any other notice whatsoever.

J. E. Wilkinson. (Seal.)

No. 31751. Due 7 March."

On the back of the note the defendants wrote their names before the note was delivered. There appears also an undated credit of $64.30. J. E. Wilkinson died on the afternoon of 7 March, 1929, and on 2 July, 1930, the plaintiffs brought suit against the endorsers.

The following verdict was returned:

1. In what amount is J. E. Wilkinson or his estate indebted to the plaintiff? Answer: $580.70 with interest from 7 March, 1927. (By consent.)

2. Did said J. E. Wilkinson place with the Bank of Belhaven as collateral for his note of $645.00, dated 7 December, 1926, the stock certificate of ten shares in the N. B. Josey Company? Answer: Yes.

3. If so, are the plaintiffs entitled to have said stock condemned and sold and apply the proceeds thereof, or so much as may be necessary, to pay said note and interest? Answer: Yes.

4. Did the defendants sign said note of $645.00 as endorsers? Answer: Yes.

5. Is the plaintiffs' cause of action against the defendant, Mrs. Meta S. Wilkinson, barred by the statute of limitations? Answer: Yes.

6. Is the plaintiffs' cause of action against George L. Wilkinson barred by the statute of limitations? Answer: Yes.

7. In what amount, if any, is the defendant, Mrs. Meta S. Wilkinson, indebted to the plaintiffs? Answer: Nothing.

8. In what amount, if any, is the defendant, George L. Wilkinson, indebted to the plaintiffs? Answer: Nothing.

The judge instructed the jury to answer the second, third, fourth, fifth, and sixth issues "Yes," if they believed the evidence by its greater weight, and to answer the seventh and eighth "Nothing," if they believed the evidence by its greater weight. The exceptions relate to these instructions.

Judgment for the defendants, from which plaintiffs appealed.

Ward & Grimes for plaintiffs.

McLean & Rodman for defendants.

ADAMS, J. The note was due 7 March, 1927; the bank suspended payment 9 February, 1927. At the latter date G. L. Wilkinson, after paying another note he owed the bank left on deposit $64.30, for which he was

given a certificate. The Corporation Commission appointed several successive liquidating agents, the plaintiff A. G. Small taking charge of the business 16 September, 1927. Sometime after this date Small and G. L. Wilkinson had an agreement whereby Wilkinson surrendered his certificate and Small credited the note in suit with $64.30. On 7 February, 1929, J. E. Wilkinson, maker of the note, offered to deposit with the bank, or its agent, ten shares of the preferred stock of N. B. Josey and Company, issued to his wife Meta Savage Wilkinson, as security for his debt if he could "get as much time as he needed for the payment of the debt, not to run beyond 31 December, 1929." His offer was accepted and the time was extended—the debt "not to be forced prior to 31 December, 1929"—and the ten shares of stock were turned over to the bank or its representative in February or early in March, 1929. Neither G. L. Wilkinson nor Mrs. Meta Wilkinson was present when this agreement was made or had any knowledge of it.

The argument was addressed to the consideration of two questions: (1) Are the defendants discharged or relieved of liability by an extension of the time of payment granted the maker of the note? (2) As to the endorsers, what is the legal effect of the alleged "payment by offset"?

J. E. Wilkinson signed the note under seal as maker, and on the reverse side Meta S. Wilkinson, his wife, and George Wilkinson, his brother, wrote their respective names before the note was delivered to the payee. Under the law in effect prior to the adoption of the Negotiable Instruments Act the parties to a negotiable instrument were permitted to prove as between themselves whether they had affixed their signatures as joint promisors, as guarantors, or as endorsers; but under the present statute any person who writes his name on such instrument otherwise than as maker, drawer, or acceptor is deemed to be an endorser, unless he clearly indicates his intention to be bound in some other capacity. C. S., 3044; *Lilly v. Baker,* 88 N. C., 151; *Barden v. Hornthal,* 151 N. C., 8; *Wrenn v. Cotton Mills,* 198 N. C., 89.

The defendants are accommodation endorsers. This is not denied; but it is argued that according to the terms of the note the defendants are bound by the agreement of the liquidating agent and the principal that the payment be extended. In order to bind the endorsers two things are essential to such an agreement: (1) waiver of the defense that the time of payment has been extended; (2) mutual assent to a definite time when payment is to be made. In *Wrenn v. Cotton Mills, supra,* waiver of notice of dishonor was shown, but not a determinable future time when the claim was to be satisfied. In the present case the liquidating agent and the maker of the note, for value, without the assent of the

endorsers, extended the time of payment to 31 December, 1928. The bank did not reserve the right of recourse. In the absence of other facts this would bar recovery by the plaintiffs. An endorser, being secondarily liable, is discharged by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument unless made with the endorser's consent, or unless the right of recourse against him is expressly reserved. C. S., 3102; *Edwards v. Ins. Co.,* 173 N. C., 614. After a person secondarily liable has been discharged by an extension of time his liability can be revived only by contract or by estoppel. *Bank v. Vashor,* 160 Pac. (Kan.), 208. The appellants contend, however, that the endorsers have waived this defense—that the waiver is embodied in the note itself and is binding upon all parties as provided in C. S., 3092. We need not pause to enquire whether the "waiver embodied in the instrument" is merely a waiver of notice of dishonor under Article 8 of the Negotiable Instruments Law, because though the agreement named in C. S., 3102(6) must be binding, it may be express or implied, verbal or written. *Bank v. Farmers Mut. Exchange,* 92 S. E. (Va.), 918.

The appellants say that the language of the note establishes a written agreement binding upon the defendants: "And the subscribers agree to continue and remain bound," etc. The significance of the word "subscribe," when used in written instruments, must often be sought in the context and attendant circumstances. To subscribe means literally to write underneath, as one's name: *sub,* under; *scribere,* to write; or, to write below a documentary statement. Webster's New International Dictionary; New Standard Dictionary of the English Language. Circumstances may call for a different interpretation, as in case of a subscription for stock in a corporation or the attestation of wills and the execution of deeds under our statutes. *Pridgen v. Pridgen,* 35 N. C., 259; *Devereux v. McMahon,* 108 N. C., 134; *Hawley v. Upton,* 102 U. S., 314, 26 L. Ed., 179. In its popular meaning the word is usually limited to a signature at the end of a printed or written instrument. *James v. Patten,* 55 A. D. (N. Y.), 376; *Attorney-General v. Clark,* 59 At. (R. I.), 395; *Wild Cat Branch v. Ball,* 45 Ind., 213.

This Court has approved the definition with respect to the interpretation of statutes, noting a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed. In reference to the first class it is not necessary that the name appear on any particular part of the writing, but as to the second class the name must be at the end of the instrument. *Richards v. Lumber Co.,* 158 N. C., 54; *Boger v. Lumber Co.,* 165 N. C., 557; *Burriss v. Starr, ibid.,* 657; *Peace v. Edwards,* 170 N. C., 64; *S. v. Abernethy,* 190 N. C., 768.

It has been held elsewhere that a waiver in the body of a note by a drawer, who of course was the maker, applied only to the drawer and not to an endorser; also that the words "we promise to pay" similarly placed in a note which was signed by only one maker do not include persons who signed their names as endorsers on the back of the note. *Bank v. Behrens Mfg., Co.,* 198 N. W. (N. D.), 467; *Williams v. Silvestein,* decided 30 July, 1931, by the Supreme Court of California.

We have examined a number of cases which are frequently cited in support of the proposition that a waiver of notice of dishonor (Art. 8, Neg. Ins. Law) is effectual against an endorser; but in the following cases the notes sued on contained words descriptive of endorsers—such, for example, as "subscribers and endorsers," "drawers and endorsers," "sureties, endorsers, and guarantors," or "makers, sureties, and endorsers": *Bank v. Johnston,* 169 N. C., 526; *Gillam v. Walker,* 189 N. C., 189; *McInturff v. Gahagan,* 193 N. C., 147; *Katz Finance Co. v. Levy,* 241 Ill. App., 576; *Owensboro Savings Bank & Trust Company's Receiver v. Haynes,* 136 S. W. (Ky.), 1004; *Corley v. French,* 294 S. W. (Tenn.), 513; *Blucher v. Eubanks,* 5 S. W. (2nd) Tex., 972; *Hoover v. McCormick,* 54 N. W. (Wis.), 505; *Bank v. Sigstad,* 65 N. W. (Ia.), 407; *Bank v. Wilka,* 71 N. W. (Ia.), 200; *Woodward v. Lowry,* 74 Ga., 148; *Sohn v. Morton,* 92 Ind., 170; *Morrison v. Grantz,* 141 S. E. (W. Va.), 394.

Whether in view of section 3092 the word "subscribers" in the note before us could, in any event, be construed to include an endorser, we are not required to decide. We are dealing, not with notice of dishonor under Article 8, but with an alleged agreement to extend the time of payment as provided in section 3102; and our opinion is that the word "subscribers" cannot reasonably be interpreted as extending to the endorsers of the note. The endorsers, therefore, were not parties to the agreement by which the bank extended the time of payment for the benefit of the principal and in consequence are discharged by the express terms of section 3102.

The result is that inquiry as to the legal effect of the agreed credit of $64.30 is unnecessary. Granting, without deciding, that the payment was voluntary and that the liability of the endorsers was thereby continued for the time, we must remember that the agreement for an extension of payment was made more than a year after the credit was entered on the note. This is distinctly proved by the evidence introduced by the plaintiffs and the agreement prevents recovery although the action would not otherwise have been barred by the statute of limitations. For this reason error, if any, in the instructions relating to the fifth and sixth issues was not prejudicial.

No error.

W. M. SANDERS ET AL., v. MARY P. SANDERS ET AL.

(Filed 23 September, 1931.)

1. Appeal and Error F b—Exception to judgment as signed is without merit where verdict supports judgment.

An exception only to the judgment signed is without merit on appeal when the verdict supports the judgment.

2. Appeal and Error F c—Assignments of error must be supported by exceptions duly entered.

Under the requirements of Rule 19 of Practice in the Supreme Court only exceptive assignments of error properly appearing of record are considered, and where no assignments of error appear in the statement of the case on appeal, but only purported assignments are added, after the case has been filed in the Supreme Court, alleging errors appearing on the face of the statement of case on appeal, the case will be dismissed for noncompliance with the rule.

3. Appeal and Error E c—Where record does not comply with Rules of Court the appeal will be dismissed.

Where no summons appears in the record in the case on appeal and there is nothing to show that the term of court was regularly held or that the cause was properly constituted in court the case will be dismissed under Rule 19.

APPEAL by defendants from *Sinclair, J.*, at February Term, 1931, of JOHNSTON.

Civil action to recover on a promissory note, tried upon the following issue:

"In what amount, if any, are the defendants indebted to the plaintiffs? Answer: $690.98 with interest."

Judgment on the verdict for plaintiffs, from which the defendants appeal.

G. A. Martin for plaintiffs.
E. J. Wellons for defendants.

STACY, C. J. The following appears in the agreed statement of case on appeal: "The defendants' only exception is to the order of the court striking out the further defense of the defendants and directing a verdict."

At the close of the case it is stated: "The only exception was to the judgment as signed." This, of course, is without merit, as the verdict supports the judgment.

No assignments of error accompanied the case as certified by the clerk of the Superior Court, but certain purported assignments of error

have been added since the case was filed here, one of which is to an alleged "error appearing on the face of the statement of case on appeal." Only exceptive assignments of error are considered on appeal. Rule 19, Rules of Practice, 200 N. C., 824; *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175.

Furthermore, the transcript is imperfect, in that, no summons appears in the record and there is nothing to show that the term of court was regularly held or that the cause was properly constituted in court. *Jones v. Hoggard,* 107 N. C., 349, 12 S. E., 286. In this state of the record, the appeal must be dismissed for failure to comply with the rules. *Hobbs v. Cashwell,* 158 N. C., 597, 74 S. E., 23; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

EASTERN COTTON OIL COMPANY v. S. E. POWELL, JAMES E. WILSON, INTERPLEADER; MAGGIE LEE, INTERPLEADER, AND MARY MARTIN, INTERPLEADER.

(Filed 23 September, 1931.)

Agriculture D b—Crop lien under C. S., 2480, is superior to prior registered chattel mortgage on crops for antecedent debt.

A statutory agricultural lien for supplies and advancements during the current crop year, conforming to the requirements of the statute both as to context and registration, is superior to a prior registered chattel mortgage given to secure an antecedent debt, the chattel mortgage not being in the required form to constitute a crop lien for supplies as contemplated by statute. C. S., 2480.

APPEAL by James E. Wilson, interpleader, from *Sinclair, J.,* at April Term, 1931, of JOHNSTON. Affirmed.

Leon G. Stevens and E. J. Wellons for plaintiff.

James Raynor and Winfield H. Lyon for James E. Wilson, interpleader.

PER CURIAM. The question involved: Is a chattel mortgage upon crops to secure an antecedent debt that is not in the required form to constitute a crop lien for supplies as contemplated by the statute, C. S., 2480, sufficient to enable it to take precedence over a subsequently recorded agricultural lien for supplies in the form required by the statute? We think not.

C. S., 2480: "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 advances 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."

Although under this section the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. *Ballard & Co. v. Johnson,* 114 N. C., 141.

An agricultural lien duly executed and registered takes precedence over a mortgage of prior date and registration upon the "crops" therein subjected to the extent of the advances made. *Wooten v. Hill,* 98 N. C., 48; *Killebrew v. Hines,* 104 N. C., 194. *Williams v. Davis,* 183 N. C., 90; *Collins v. Bass,* 198 N. C., 99; *White v. Riddle,* 198 N. C., 511; see Public Laws of 1931, ch. 173. For the reasons given, the judgment of the court below is

Affirmed.

B. F. BOWERS v. R. R. BEATTY.

(Filed 23 September, 1931.)

1. Appeal and Error J e—Directed verdict on one issue, if error, held harmless in view of answers to other issues.

Where the verdict establishes the fact that the intervener has a written registered chattel mortgage on the defendant's property and that the debt secured thereby is greater than the value of the property, a directed verdict on a subsequent issue against the plaintiff claiming a verbal mortgage on the same property, if error, is harmless.

2. Chattel Mortgages B a—Registered chattel mortgage held valid as against attachment and claim and delivery.

The validity of the intervener's mortgage, duly executed and registered, as against the plaintiffs' subsequent attachment of the property and proceedings in claim and delivery is upheld upon authority of *Hornthal v. Burwell,* 109 N. C., 10.

BOWERS *v.* BEATTY.

APPEAL by plaintiffs from *Stack, J.,* at March-April Term, 1931, of BEAUFORT.

Separate actions by B. F. Bowers and Bayview Company, creditors of R. R. Beatty, to recover on their respective claims, the one invoking the aid of attachment on a merry-go-round and swing, the other the ancillary proceeding in claim and delivery, consolidated by consent for trial, and, in the consolidated action, one Geo. A. Wilson intervened and set up claim to the property attached and seized, by virtue of a prior chattel mortgage executed and registered in Chesterfield County, S. C., and also registered in Beaufort County, N. C.

The jury returned the following verdict:

"1. In what amount, if any, is the defendant indebted to the plaintiff, Bayview Company? Answer: $280.00 (by consent).

"2. In what amount, if any, is the defendant indebted to the plaintiff, B. F. Bowers? Answer: $561.45 (by consent), with interest from 1 July, 1931.

"3. Has the intervener, Geo. A. Wilson, a chattel mortgage on the merry-go-round in question, as alleged in the interplea? Answer: Yes.

"4. If so, what amount is still owing said Geo. A. Wilson on his chattel mortgage? Answer: $1,700.00 and interest.

"5. Has the plaintiff, Bayview Company, a verbal mortgage on the merry-go-round and swing, as alleged in the complaint? Answer: No.

"6. Has the plaintiff, B. F. Bowers, a verbal mortgage on the merry-go-round and swing, as alleged in the complaint? Answer: No.

"7. Is the defendant, R. R. Beatty, a nonresident of the State of North Carolina, and was he such on 30 July, 1930? Answer: No.

"8. What was the value of the merry-go-round on 15 July, 1930. Answer: $900.00 (by consent)."

Judgment on the verdict, from which the plaintiffs appeal, assigning errors.

MacLean & Rodman for plaintiffs.
S. M. Blount for intervener.
No counsel appearing for defendant.

PER CURIAM. Conceding, without deciding, that, under authority of *Odum v. Clark,* 146 N. C., 544, 60 S. E., 513, and the evidence appearing of record, the court erroneously directed an answer to the fifth issue, nevertheless, unless there were error also in respect to the third or fourth issue, which has not been made to appear, a new trial would avail the plaintiffs nothing.

The validity of the intervener's mortgage, duly executed and registered in Chesterfield County, S. C., and also registered in Beaufort County, N. C., is supported by what is said in *Hornthal v. Burwell,* 109 N. C., 10, 13 S. E., 721, and 5 R. C. L., 399.

No error.

J. B. COLT COMPANY v. J. F. MARTIN AND HIS WIFE, COTTIE MARTIN.

(Filed 23 September, 1931.)

Judgments K b—Upon motion to set aside judgment under C. S., 600, judgment upon facts found that neglect was excusable was not error.

In this case held: upon the facts found by the Superior Court judge on appeal from the clerk upon a motion to set aside a judgment for surprise and excusable neglect under C. S., 600, judgment that the neglect of the defendant was excusable is not error.

STACY, C. J., dissenting.

APPEAL by plaintiff from *Moore, Special Judge,* at June Term, 1931, of MARTIN. Affirmed.

This is an action to recover on notes executed by defendants, and payable to plaintiff. The action was begun on 2 January, 1931. The summons and verified complaint were duly served on defendants on 5 January, 1931.

Neither of the defendants appeared and demurred to or answered the complaint within thirty days after the service of the summons. On 2 March, 1931, on motion of plaintiff, judgment by default final was rendered by the clerk of the Superior Court of Martin County. On 10 March, 1931, defendants having learned that judgment had been rendered against them in this action, caused notice to be served on the attorney of record for plaintiff of their motion that the judgment be set aside and vacated under C. S., 600. This motion was heard, and on 11 May, 1931, the clerk, having found that the neglect of defendants to file an answer to the complaint was excusable and that defendants have a meritorious defense to the cause of action alleged in the complaint, rendered judgment, setting aside and vacating the judgment by default final. From this judgment, plaintiff appealed to the judge of the Superior Court of Martin County.

At the hearing of the appeal, the judge heard and considered the evidence, and approved the findings of fact set out in the judgment of the clerk. On these facts, judgment was rendered, affirming the judg-

ment of the clerk, and setting aside and vacating the judgment by default final. From this judgment, plaintiff appealed to the Supreme Court.

J. W. Bailey for plaintiff.
A. R. Dunning for defendants.

PER CURIAM. The only assignment of error in plaintiff's appeal to this Court is founded on its exception to the judgment rendered by Judge Moore. There is no error in this judgment. It is supported by the findings of fact set out therein.

The neglect of the defendants to appear and file an answer to the complaint within thirty days after service of the summons, as required by statute, C. S., 509, is admitted; the only question involved in defendants' motion is whether such neglect was excusable within the meaning of C. S., 600.

As said by *Smith, C. J.,* in *Mebane v. Mebane,* 80 N. C., 34, it is difficult to deduce from the decisions of this Court any distinct practical principle, or to run a well-defined line separating those neglects that are, from those that are not excusable, in the sense of the statute, and hence the facts relied on must be ranged on one or the other side of the line in each case. In this case, there was no error in the conclusions of the judge, from the facts found by him, that the neglect of defendants is excusable. The judgment is therefore

Affirmed.

STACY, C. J., dissenting.

ANNA B. BENDER v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF NORTH CAROLINA.

(Filed 23 September, 1931.)

Easements B b—Purchaser takes land subject to prior registered grant of right-of-way thereover.

A registered grant of a right-of-way to a telephone company for its transmission lines for a sufficient consideration passes the title as against a later registered conveyance of the land to another, and, the allegations of the one acquiring the land under the later registered conveyance not being sufficient to establish fraud, his action against the telephone company is properly dismissed.

BENDER *v.* TEL. CO.

APPEAL by plaintiff from *Cranmer, J.,* at May Term, 1931, of WARREN. Affirmed.

The judgment of the court below is as follows: "This cause coming on to be heard at the May Term of Warren County Superior Court, and a jury having been empanelled, and it appearing to the court that a grant for a right-of-way, or an easement, over the lands described in the complaint from J. H. Bender, the then owner of the land, having been registered in the office of the register of deeds of Warren County on 8 August, 1927, and thereafter, to wit, on 10 August, 1927, a deed from the said J. H. Bender to Mrs. Anna B. Bender, the instant plaintiff, his wife, was registered in the office of the register of deeds of Warren County. The court being of the opinion that in the situation the plaintiff cannot recover. It is ordered, adjudged and decreed that the action be, and the same is hereby dismissed, and that the plaintiff be taxed with the costs."

The plaintiff excepted and assigned errors for "That the complaint stated a good cause of action against defendant both in respect of the fraud and the trespass alleged therein, and that there was no admission or finding of fact which warranted the judgment."

Pittman, Bridgers & Hicks for plaintiff.
Julius Banzet for defendant.

PER CURIAM. The court held: "It appearing to the court that a grant for a right of way, or an easement, over the lands described in the complaint from J. H. Bender, the then owner of the land, having been registered in the office of the register of deeds of Warren County on 8 August, 1927, and thereafter, to wit, on 10 August, 1927, a deed from the said J. H. Bender to Mrs. Anna B. Bender, the instant plaintiff, his wife, was registered in the office of the register of deeds of Warren County. The court being of the opinion that in the situation the plaintiff cannot recover," adjudged that the action be dismissed.

We think the judgment of the court below correct.

In *Bank v. Smith,* 186 N. C., at p. 641, it is said: "Where the registration of an instrument is required, no notice to purchaser, however full and formal, will supply the place of registration. 'No deed of trust or mortgage for real and personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies,' etc. C. S., 3311. See *Door Co. v. Joyner,* 182 N. C., 521; *Fertilizer Co. v. Lane,* 173 N. C., 184; *Tremaine v. Williams,* 144 N. C., 116 and cases

cited." *Eaton v. Doub,* 190 N. C., at p. 19; *Lanier v. Lumber Co.,* 177 N. C., 200; *Threlkeld v. Land Co.,* 198 N. C., 186. C. S., 3309.

The allegations of fact, made by plaintiff are not sufficient to constitute fraud. The description in the conveyance of the right-of-way, an easement in land, is sufficiently definite and certain.

In law there was no inadequacy of consideration. *Bank v. Mackorell,* 195 N. C., 741. The judgment below is

Affirmed.

STATE v. RODMAN COX AND ELMER WHITLEY.

(Filed 30 September, 1931.)

1. **Criminal Law I c—In this case held: evidence was competent and objection that it unduly excited sympathy of jury is not sustained.**

In a prosecution for robbery it is competent for the prosecuting witness to testify that the money stolen from her had been saved by her over a long period of years and had been accumulated by hard work and thrift, the testimony being competent as tending to explain why the prosecutrix had so large a sum on her person and as affecting her credibility as a witness, and an objection to the admission of such evidence on the ground that it tended to unduly enlist the sympathy of the jury cannot be sustained, the State having the right to introduce all competent and material evidence tending to convict, and there being nothing to show that there was any appeal made to the jury based upon sympathy for the prosecutrix.

2. **Criminal Law G p—Admission of testimony as to foot prints held not error in this case.**

Where a witness testifies that he measured foot prints at the scene of the crime soon after its commission, and testifies in detail as to the measurements taken by him at the time, and testifies that the measurements of one of the tracks checked with the measurements of the shoes of one of the defendants, and further testifies as to the measurements of the defendant's shoes, the measurements being identical, *Held:* error, if any, in the admission of the testimony that the measurements checked with the measurements of the defendant's shoe was harmless in view of the detailed testimony of the measurements of the tracks and shoes of the defendant.

3. **Robbery B d—Evidence held sufficient to overrule nonsuit in prosecution for robbery.**

Evidence in this case is held sufficient to show that both defendants were guilty of robbery as charged in the bill of indictment, and the defendants' motions as of nonsuit were properly overruled.

4. Criminal Law I l—In this case held: failure to instruct jury that defendants might be convicted of lesser degree of crime was not error.

Where all the evidence in a criminal prosecution tends to show that the crime was committed as alleged in the bill of indictment, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the trial court to refuse to instruct the jury that they might find the defendants guilty of a lesser degree of the crime charged. C. S., 4640.

APPEAL by defendants from *Frizzelle, J.*, at April Term, 1931, of PITT. No error.

The defendants were tried on an indictment as follows:

"State of North Carolina—Pitt County.

Superior Court, April Term, 1931.

The grand jurors for the State, upon their oaths, present:

That Rodman Cox and Elmer Whitley, late of the county of Pitt, on 26 December, 1930, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did, in the common and public highway of the State, in and upon one Mrs. G. H. Ballard, make an assault, and her, the said Mrs. G. H. Ballard, in bodily fear and danger of her life, in the highway aforesaid, then and there feloniously did put, and four thousand two hundred fifty dollars ($4,250) in lawful money of the United States of America of the goods and chattels of the said Mrs. G. H. Ballard from the person and against the will of the said Mrs. G. H. Ballard, in the highway aforesaid, then and there feloniously and violently did take, steal and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

At the trial each defendant entered a plea of not guilty and relied upon an alibi as his defense. The jury returned a verdict of guilty as to both defendants.

From the judgment that each defendant be confined in the State's prison for a term of not less than seven or more than nine years, both defendants appealed to the Supreme Court.

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

Harding & Lee and Gaylord & Harrell for defendants.

CONNOR, J. At the trial of this action, the prosecutrix, Mrs. G. H. Ballard, as a witness for the State, testified that at about nine o'clock

on the night of 26 December, 1930, while she was walking alone on a public street in the town of Greenville, returning to her home from church, she was suddenly and violently assaulted by two men, who robbed her of her purse and its contents. She had in her purse, at the time she was assaulted, more than forty-two hundred and fifty dollars. This money, which was the property of the witness, and which she had for many years carried in her purse, was taken from her by the two men who assaulted her. After they had robbed her of her purse and its contents the two men ran away. The witness identified the defendant, Elmer Whitley, as one of the men who assaulted and robbed her. She testified that she had seen the defendant, Rodman Cox, at the church, a short time before the close of the services. He did not come into the church, but the witness saw him standing on the outside, looking through the window at her. She did not identify this defendant as one of the men who assaulted and robbed her.

On her direct examination by the solicitor for the State, the witness was asked the following question:

"Q. Mrs. Ballard, you have already stated approximately how much money you had in the purse; now, please, state to the court and jury how long you have had that money, and how long you have been accumulating it."

The witness replied:

"A. Well, the first nickel I ever earned in my life was in there, and every honest dollar and every honest penny that could possibly be made from the time I came into the world until the night of 26 December, was in there. I was raised on a farm and came up hard. The first nickel I ever got, a man came there and gave it to me. My papa told me to give it back, and I gave it back to the man. When papa had gone I said to the man, 'Papa has gone; give me my nickel back.' I worked until I went off to school. I went off to school, and every minute was study, so that I could some day have money. When I came out of school I started to teach. I saved every dollar I made for three years except what I paid for board. What little I wore came off the farm. I would go home and hoe corn during vacation. At the end of three years, I went to Atlanta, Ga., and opened up a business there. I had a good business, and all the business people bought their office supplies from me. I made money and saved every dollar I could make, except what I spent for board. I married Mr. Ballard. Since I married him I have saved every penny I could make, even picking up blocks of wood and carrying them to sell."

In apt time, defendants objected to the foregoing question and answer. Their objections were overruled, and defendants excepted.

On their appeal to this Court, defendants contend that it was error to admit the answer to the question as evidence, for that it created in the minds of the jurors sympathy for the prosecutrix, which unduly influenced the jurors against the defendants. This contention cannot be sustained.

The evidence, together with other evidence to which there was no objection, was relevant and material, and therefore competent, as tending to show why the prosecutrix had in her purse so large a sum of money as she had testified, and also as affecting her credibility as a witness. There is nothing in the record which shows that any appeal was made to the jury based upon sympathy for the prosecutrix, or that the jury was influenced in returning their verdict by such sympathy. The State could not be deprived of the benefit of evidence which was relevant and material because it might also have a tendency to prejudice the defendants in the eyes of the jury. 22 C. J., 193.

G. H. Ballard, husband of the prosecutrix, testified as a witness for the State. Soon after his wife cried out that she had been assaulted and robbed, this witness went to the place where she said that the assault and robbery occurred. He there found the tracks of two men, and a woman. He measured, with care, the tracks of the two men and testified in detail as to the measurements of each track. After the defendant Elmer Whitley was arrested, the witness measured his shoe. He testified over the objection of the defendants that the measurements of Whitley's shoe "exactly checked with those of the larger track." He further testified in detail as to the measurements made by him of Whitley's shoe. These measurements were identical. Defendants' objections were properly overruled. If there was error in overruling the objection to the statement of the witness that the measurements of Whitley's shoe exactly checked with those of the larger track, the error was harmless, in view of the subsequent testimony of the witness, as to the measurements made by him of the shoe. Of course, it was for the jury to determine from the evidence whether or not the measurements of Whitley's shoe exactly checked with those of the track at the place where the robbery was committed.

Defendants' assignment of error based on their exception to the refusal of the court to allow their motion for judgment as of nonsuit, under the provisions of C. S., 4643, cannot be sustained. It is needless to set out at length the evidence tending to show not only that the prosecutrix was assaulted and robbed, as the State contended, but also that the defendants are the men who committed the crime. The evidence for the State, while contradicted by that offered by the defendants in support of their defense of an alibi, was properly submitted to the

jury. This evidence, if believed by the jury, was sufficient to show that not only the defendant Whitley but also the defendant Cox was present and participated in the robbery of the prosecutrix.

Upon all the evidence in this case there was no error, as contended by defendants on their appeal to this Court, in the failure of the trial court to instruct the jury that under the indictment on which defendants were tried, the jury might convict the defendants of a crime of less degree than that charged in the indictment.

C. S., 4640, does not confer upon a jury in the trial of a criminal action the power arbitrarily to disregard the uncontradicted evidence tending to show that the crime charged in the indictment was committed as alleged therein and in the absence of evidence to sustain such conviction, to convict the defendant of a crime of less degree. The statute is not applicable, where, as in the instant case, all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein. In the instant case there was no evidence tending to support a contention that the defendants, if not guilty of the crime charged in the indictment, were guilty of a crime of less degree. No contention to this effect was made by the defendants or by either of them, at the trial. Neither defendant requested the court to instruct the jury that under the provisions of C. S., 4640, they could convict the defendants or either of them of a crime of less degree than that charged in the indictment, if they failed to find beyond a reasonable doubt that the defendants or either of them was guilty as charged in the indictment.

Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. See *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605, where the statute, C. S., 4640, is construed and applied.

As neither of the assignments of error on this appeal, based on exceptions taken in the trial, and appearing in the case on appeal, can be sustained, the judgment is affirmed.

No error.

LEONARD JOHNSON v. ÆTNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

(Filed 30 September, 1931.)

1. **Insurance J a—Provisions for forfeiture in standard statutory policy of fire insurance are valid and binding.**

Where a standard, statutory fire insurance policy provides that the policy should be void if the insured procures other contemporaneous insurance on the same property during the term covered, unless the insurer agrees thereto and a writing to that effect is attached to the policy contract, the provision is valid and binding, C. S., 6437.

2. **Same—Construction of policy as to forfeitures.**

A policy of fire insurance is to be interpreted to effectuate the lawful intent of the parties as to forfeitures and waiver as other contracts.

3. **Insurance J c—In this case held: policies were forfeited by violation of provision that other insurance not be taken out on property.**

Where two policies of fire insurance are issued on certain property, the policies providing that they should be void if the insured procured other contemporaneous insurance thereon, and thereafter a loss payable clause permitting other insurance is attached to one of the policies, but later, upon payment of the mortgage and the execution of another, a substitute loss payable clause in favor of the second mortgagee is attached thereto revoking the first loss payable clause and containing no provision as to other contemporaneous insurance, *Held:* the provision in the first loss payable clause permitting other insurance is revoked by the second loss payable clause, and upon the insured's procuring other insurance during the term of the first policies they are forfeited and he may not recover thereon for damage by fire occurring during the term of the policies.

4. **Insurance K a—After policy is in effect knowledge of local agent of violation of condition will not ordinarily be imputed to company.**

Where an insurance company has issued and delivered through its local agent a policy of fire insurance and the policy has become a contract binding the parties, subsequent knowledge or agreement by the local agent of a breach of condition that would avoid the policy cannot be construed as a waiver of such condition by the company.

APPEAL by plaintiff from *Sinclair, J.*, at February Term, 1931, of JOHNSTON. Affirmed.

This is an action to recover on two policies of fire insurance issued by the defendant to the plaintiff, one dated 31 May, 1926, and the other dated 20 August, 1926. Each policy expired, according to its terms, at the end of three years from its date.

On 19 January, 1929, before the expiration of either of said policies, the property covered by both policies was destroyed or damaged by fire, causing the plaintiff loss or damage in a sum more than the amount of said policies.

Defendant denied liability for the loss or damage sustained by plaintiff, because of violations by plaintiff after the issuance of said policies of certain stipulations and provisions contained therein. Both policies were in the standard form prescribed by statute. C. S., 6437.

At the close of the evidence for the plaintiff, defendant moved for judgment as of nonsuit, C. S., 567. The motion was allowed and plaintiff excepted.

From judgment dismissing the action, plaintiff appealed to the Supreme Court.

Parker & Lee for plaintiff.
Smith & Joyner for defendant.

CONNOR, J. Both policies of insurance sued on in this action, contain the following stipulations and provisions as required by statute, C. S., 6437:

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring;

Other insurance—(a) while the insured has any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard—(b) while the hazard is increased by any means within the control or knowledge of the insured; or

Unoccupancy—(f) while the described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days."

Both policies also contain the following stipulation and agreement, which is also required by the statute, C. S., 6437:

"Waiver. No one shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement added thereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provision or condition of this policy, or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this company relative to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein, or by rider added hereto."

There were other stipulations and provisions in both said policies, as required by the statute. Only those above set out, however, are pertinent to the question presented by this appeal. These stipulations and provisions are included in the policies by virtue of statutory requirements, and are valid in all respects. *Midkiff v. Ins. Co.*, 197 N. C.,

139, 147 S. E., 812; *Greene v. Ins. Co.*, 196 N. C., 335, 145 S. E., 616; *Bank v. Ins. Co.*, 187 N. C., 97, 121 S. E., 37; *Black v. Ins. Co.*, 148 N. C., 169, 61 S. E., 672. In the last cited case, referring to the stipulations and provisions included in a policy of fire insurance, as required by C. S., 6437, it is said: "They are inserted in the policy, not by the company or by the plaintiff, but by the statute. To fail to give them force and effect is to nullify the statute." These stipulations and provisions are included in the policies, and unless waived as provided therein, must and will be enforced. In *Sugg v. Ins. Co.*, 98 N. C., 143, 3 S. E., 732, it is said: "The contract of insurance embodied and set forth in the policy sued upon must receive a reasonable and just interpretation, and the intention of the parties to it, thus ascertained, must prevail. Contracts of this character, although in some respects peculiar, are governed by the same principles that govern other contracts, and are not different from others as to the rules of interpretation applicable, in varying respects of them. The purpose of courts in construing them is to ascertain what the parties mean and intend—what they have respectively agreed to do or not to do—how they have agreed to be affected—to be bound or not to be bound. It is not the province of the court to amend, modify or make a contract for the parties; or to reform their contract so as to render it reasonable, expedient and just, or, in the absence of fraud, accident or mutual mistake, to relieve them from misadventure, inadvertence, hard bargains, disadvantages, loss and damage, occasioned by lack of foresight, forgetfulness, misfortune, and negligence. Contracts are serious things, and parties capable of contracting must be held by the courts, when properly called upon, to a due observance of their contracts, and those of insurance as well as others, however unfortunate, disadvantageous, or disastrous the results following from them may be to one side or the other. All lawful contracts must be binding upon those who make them, and as they make them."

The evidence offered by plaintiff shows that after the issuance and before the expiration of the policies sued on in this action, plaintiff procured and paid for another policy of fire insurance issued by another company, and covering the same property as that covered by these policies. The additional policy was in force, according to its terms, at the date of the fire which destroyed or damaged plaintiff's property. This policy insured said property in the sum of $900.00. The policies issued by defendant insured said property in the sum of $1,200. Plaintiff has collected from the company which issued the last policy the sum of $280, on account of the loss or damage resulting to him from the fire.

There was no agreement in writing endorsed on the policy issued by the defendant on 20 August, 1926, or in any rider attached thereto,

waiving the stipulation or provision in said policy that the defendant should not be liable on account of said policy, if plaintiff, after its issuance and before its expiration, should have any other contract of insurance, whether valid or not, on the property covered in whole or in part by said policy.

At the date of the issuance by defendant of the policy dated 31 May, 1926, there was attached thereto, as a rider, a Loss Payable Clause, by which it was agreed by and between plaintiff and defendant, that the loss or damage, if any, payable under said policy should be paid to the Atlantic Life Insurance Company of Virginia, as its interest might appear. At the end of this rider, are the words: "Other insurance permitted." This rider, containing these words, was attached to the policy prior to and at the date of the issuance by defendant of the policy dated 20 August, 1926. The issuance of this policy, therefore, did not relieve defendant of liability under the policy dated 31 May, 1926.

Some time during April, 1927, plaintiff paid his indebtedness to the Atlantic Life Insurance Company of Virginia, and executed a mortgage to the Federal Land Bank of Columbia, S. C., by which he conveyed to said bank the land on which was located the property covered by the policies of fire insurance sued on in this action. This mortgage secured the payment of a loan made to plaintiff by said bank. At the request of plaintiff, defendant attached to each of said policies of insurance, as a rider, a "Mortgage Clause with Full Contribution (N. Y. Standard)," by which it was provided that the loss or damage, if any, payable under said policies, should be paid to the Federal Land Bank of Columbia, S. C., as mortgagee, as its interest might appear. This rider attached to each of said policies, contains the following endorsement: "This mortgagee clause is issued in lieu of the one previously attached, the former mortgage having been paid." No words showing permission by the defendant for other insurance on the property covered by the policy to which the rider was attached, appear in said rider.

The Loss Payable Clause, attached to the policy issued by the defendant dated 31 May, 1926, on which appear the words "Other insurance permitted," was superseded by the mortgagee clause subsequently attached to said policy. Permission for other insurance on the property covered by the policy was thereby revoked prior to the issuance of the policy in April, 1927.

After the mortgagee clause had been attached to each of the policies by the defendant at his request, the plaintiff sent both said policies to the Federal Land Bank of Columbia, S. C. The bank declined to accept said policies, and returned them to the plaintiff. Thereafter, plaintiff informed the local agent of the defendant that the bank had declined

to accept the policies, and that at the request of the bank plaintiff had procured another policy of fire insurance on the property. Defendant's local agent said to plaintiff that that was all right.

In *Greene v. Insurance Co.*, 196 N. C., 335, 145 S. E., 616, it is said: "After a policy has been issued, and has become a valid and binding contract between the parties, knowledge by the agent who issued it, of the breach of a stipulation or condition which by the express terms of the policy renders it void, will not be imputed to the company. In such case, forfeiture of the policy, for such breach, can be waived only in accordance with the provisions of the policy, *Smith v. Ins. Co.*, 193 N. C., 446, 137 S. E., 310."

As there was no agreement in writing added to or endorsed on either of the policies sued on in this action, for other insurance on the property covered by the policies, at the time the additional policy of insurance was procured by plaintiff, defendant is not liable to plaintiff, under said policies, for the loss or damage which he sustained as the result of the fire which occurred on 19 January, 1929. The judgment dismissing the action as of nonsuit, is

Affirmed.

B. B. COMBS v. E. W. BRICKHOUSE.

(Filed 30 September, 1931.)

Easements C a—Easement may be terminated by executed parol agreement of parties.

The lower proprietor of lands must show a right of easement in the drainage ditches on the land of the upper proprietor by written grant or prescription, but an abandonment may be shown under verbal agreement evidenced by acts of the parties showing an unequivocal intent to that effect, and testimony in this case was sufficient to be submitted to the jury to the effect that the upper proprietor stopped up certain drainage ditches on his land several times whereupon the lower proprietor as often cleared them out, the action being brought by the latter to restrain the former from continuing to obstruct the flow of water therein. *Semble:* by reference to answers to certain issues the right of easement was by prescription in this case.

CIVIL ACTION, before *Grady, J.*, at April Term, 1931, of TYRRELL.

The evidence tended to show that the Spruill farm was one tract of land containing approximately 300 acres. The farm was drained by twenty-one ditches running from north to south, draining into a canal on the south side of the tract. Afterwards the farm was divided into three tracts of approximate equality in acreage. J. B. Williams became

the owner of the upper third, plaintiff, B. B. Combs, the owner of the middle third, and the defendant, Brickhouse, the owner of the lower third. By reason of certain litigation Williams, the owner of the upper third, constructed on the southern side of his tract a cross ditch running from east to west, and dammed up all the ditches north of the middle tract. Thereafter, the plaintiff Combs constructed a ditch running from east to west along the line of the middle tract and dammed up all of said ditches north of the third or lower tract except three. These three ditches were thus left and they crossed the land of the defendant. In the spring of 1930, the defendant dammed up said three ditches and the plaintiff reopened them. Whereupon, the defendant dammed them up again, and the plaintiff again reopened said ditches and instituted this action to restrain the defendant from further interfering and filling up said ditches.

The defendant offered evidence tending to show that when the plaintiff cut the ditches from east to west on the middle tract owned by him, that he agreed with the grantor of the defendant, the owner of the lower tract, that said ditches could be filled up and eliminated. The verbal agreement was stated by one witness for the defendant as follows: "Plaintiff told me it was agreed that the different owners of the Spruill farm were each going to take care of the water falling on his respective tract and told me to dam up all of the ditches on his tract where they entered said new ditch, as he (plaintiff) was going to take care thereafter of the water which fell on his land."

The following issues were submitted to the jury:

1. "Have the three ditches in question been opened and used for drainage purposes of the lands in question for more than 20 years next before the commencement of this action?"

2. "Were said ditches open and being so used for drainage purposes at the time the defendant purchased the lands to the south of the plaintiff's tract?"

3. "Has the defendant wrongfully filled up and dammed said ditches so as to interfere with or impede the natural flow of the waters from the lands of the plaintiff, over and across the lands of the defendant?"

4. "If so, what damages is the plaintiff entitled to recover of the defendant for said wrongful act?"

The jury answered the first issue "Yes"; the second issue, "Yes, two of them"; the third issue "Yes," and the fourth issue "one cent."

The court instructed the jury to answer the first and second issues as indicated by the verdict, and further instructed the jury: "If you believe the evidence and find the facts to be as it tends to show, even from the testimony of defendant and his witnesses, you will answer the third issue, yes."

From judgment upon the verdict continuing the injunction, the defendant appealed.

M. B. Simpson for plaintiff.
Thompson & Wilson for defendant.

BROGDEN, J. Does a parol agreement to eliminate drainage ditches, made by the owners of the dominant and servient estates, constitute evidence of an abandonment or relinquishment of a drainage easement imposed upon the servient estate?

An easement is an interest in land, and the creation thereof by grant is governed by the statute of frauds. C. S., 988. *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697; *Clark v. R. R.,* 192 N. C., 280, 135 S. E., 26; *Gruber v. Eubank,* 197 N. C., 280, 148 S. E., 246.

The facts in this case, however, involve the abandonment or relinquishment of an easement rather than the creation thereof. Apparently the cause was tried upon the theory that the abandonment of an easement is also within the statute of frauds and therefore to be evidenced by writing. *Faircloth, C. J.,* in *Adams v. Battle,* 125 N. C., 152, 34 S. E., 245, wrote as follows: "It was an iron-clad maxim of the common law that an obligor would only be released by an instrument of as high dignity as that by which he was bound, that is, being obligated by a seal he could be released only by an instrument under seal. Technically, this is the rule of modern times, unless changed by statute, but practically it is seldom enforced. To this rule, the exceptions were and are so numerous that seldom can the rule be applied."

The record does not disclose, unless by reference to the first issue, whether the drainage easement was originally acquired by prescription or by deed. If acquired by prescription, the acts and conduct of the parties for the required length of time gave birth to the easement, and by the same process of logic, it would seem that the unequivocal acts of the parties might also destroy. Indeed, it has been held that a verbal agreement to release a mortgage is not within the statute of frauds. *Hemmings v. Doss,* 125 N. C., 400, 34 S. E., 511. In that case *Clark, J.,* said: "It is true that the evidence of the parol discharge of a written contract within the statute of frauds, or an equitable estoppel by matter *in pais,* must be "positive, unequivocal and inconsistent with the contract," and if left to the jury upon a denial in the answer, it must be with that instruction," etc. *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210. A general statement of the proposition of law is found in 19 C. J., 949, as follows: "It is elementary that oral testimony is not admissible to limit the legal effect of a deed, and that an easement cannot be extinguished or released by a mere unexecuted parol agreement.

Nevertheless the rule is well settled that a parol agreement between the owners of the dominant and servient tenements may operate to extinguish an easement whether created by grant or prescription, where such agreement has been executed by the owner of the servient tenement," etc. To the same tenor, is the statement of the law in R. C. L., Vol. 9, page 812, section 68. The author said: "An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts *in pais* without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case," etc. See, also, annotation, *Trimble v. King,* 22 L. R. A. (N. S.), 880; *Hair v. Downing,* 96 N. C., 172, 2 S. E., 520.

In the case at bar the plaintiff testified that "in the spring of 1930 the defendant dammed up the said three ditches, and upon my cutting out the dams, defendant dammed them up again." The act of the defendant in filling up the ditches in reliance upon the verbal agreement is some evidence of the intention to abandon or relinquish the easement, and hence it was error to withdraw the case from the consideration of the jury.

New trial.

J. C. HAYES ET AL., V. SELLS COTTON ET AL.

(Filed 30 September, 1931.)

1. Ejectment C b—Held: evidence in this action in ejectment should have been submitted to the jury.

Where in an action in ejectment the plaintiff establishes his title to the *locus in quo* and the defendants allege adverse possession of a tract of land under color of title but described in their deed differently from the description of the land in the plaintiff's complaint, and the defendants claim that the two tracts are the same but fail to make it so appear and introduce no evidence of adverse possession, C. S., 432, *Held:* the granting of the defendant's motion as of nonsuit was error.

2. Adverse Possession C a—Where adverse possession is relied on as a defense it must be established by greater weight of evidence.

Where adverse possession is set up as a defense in an action in ejectment such adverse possession must be established by the greater weight of the evidence.

3. Evidence C b—Affirmative defense must be established by greater weight of evidence.

Where an affirmative defense is set up in an action such defense must be established by the greater weight of the evidence.

4. Ejectment C b—Plaintiff in ejectment must establish title, but where this is done, defendant must establish affirmative defense.

In an action in ejectment the plaintiff has the burden of proving his own title to the *locus in quo*, and it is not sufficient for him to show that the defendant does not have title, but where the plaintiff has established his title and the defendant relies upon adverse possession as a defense, the defendant must establish such affirmative defense by the greater weight of the evidence.

APPEAL by plaintiffs from *Cranmer, J.*, at June Term, 1931, of HALIFAX.

Civil action in ejectment to recover possession of 124 acres of land in Halifax County, known as the Adam Cochran Farm. The record recites that "at the close of plaintiffs' evidence" judgment of nonsuit was entered; and further "The defendants having introduced evidence and closed its case, the court being of opinion in the present state of the record, the plaintiffs cannot prevail in their suit, the action is dismissed."

Plaintiffs appeal, assigning errors.

Grissom & Marshburn and T. T. Thorne for plaintiffs.
Dunn & Johnson and E. L. Travis for defendants.

STACY, C. J. The following admission appears in the record:

"Defendants admit that 124 acres of land described in the complaint conveyed by Adam Cochran, Sr., to Adam Cochran, Jr., is the land in controversy in this action, and is the land which was conveyed by Adam Cochran, Sr., to Adam Cochran, Jr., in Book 48, at page 104. This deed conveyed to Adam Cochran, Jr., undivided one-half interest in 250 acres of land."

That the plaintiffs made out a prima facie case is not seriously controverted, but it is contended that the defendants' evidence shows conclusively that they have been in the open, notorious, adverse possession under color of title for 30 years of the following described tract of land:

"A tract of land in Halifax County known as the Lane tract, bounded by the lands of W. M. Westray, Z. M. Bradley and others, containing 124 acres, more or less, and being the tract on which Adam Cochran resided at the time of his death."

The record is silent, however, as to whether the tract described in the defendants' deeds is the same as that set out in the complaint. The defendants assert that it is, and the trial court seems to have acted upon this assumption, but the assertion is not necessarily supported by the record.

Adam Cochran, Sr., owned 250 acres of land and conveyed an undivided one-half interest to his son, Adam Cochran, Jr. Whether partition of this land was subsequently had does not appear, but plaintiffs are only claiming 124 acres. The defendants claim a like amount.

The land claimed by the defendants is described in their deeds as "the tract on which Adam Cochran resided at the time of his death." But there were two Adam Cochrans, and each owned an undivided interest in 250 acres of land in Halifax County. Is the land described in the complaint covered by the defendants' deeds? That is the question. Furthermore, there is allegation, but no evidence, of adverse possession on the part of the defendants.

When the plaintiff in ejectment shows title to the *locus in quo,* and the defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence, otherwise the defendants' occupation is deemed to be under and in subordination to the legal title. C. S., 432. It is not like meeting a prima facie case under a general denial, or plea in bar, when it is only necessary to offer evidence of equal weight so as to balance the scales, or put the case in equipoise, but where an affirmative defense is set up, as here, the defendant must establish his allegations by the same degree of proof as would be required if he were plaintiff in an independent action. *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381.

True, in ejectment, the plaintiff must rely for a recovery upon the strength of his own title, and not upon the weakness of his adversary's. *Rumbough v. Sackett,* 141 N. C., 495. To recover in such action, the plaintiff must show title good against the world, or good against the defendant by estoppel. *Mobley v. Griffin,* 104 N. C., 112. It can make no difference in ejectment whether the defendant has title or not, the only inquiry being whether plaintiff has it, and upon this issue the plaintiff has the burden of proof. *Timber Co. v. Cozad,* 192 N. C., 40; *Pope v. Pope,* 176 N. C., 283. But when the plaintiff has established a legal title to the premises, and the defendant undertakes to defeat a recovery by showing possession, adverse for the requisite period of time, either under or without color of title *(Dill-Cramer-Truitt Corp. v. Downs,* 195 N. C., 189), the defense is an affirmative one in which the defendant *pro hac vice* becomes plaintiff, and he is required to establish it by the greater weight of the evidence. *Bryan v. Spivey,* 109 N. C., 57; *Ruffin v. Overby,* 105 N. C., 78.

This is not placing the burden of proof on both parties at the same time, for such would be an anomaly in the law *(Speas v. Bank,* 188 N. C., p. 529), but it is simply requiring the actor in each instance, while occupying that position, to handle the laboring oar. Perhaps it

should be observed that the defendant is not required to come forward with evidence of adverse possession, unless and until the plaintiff has shown a legal right to the premises. Then, in order to defeat the plaintiff's claim, the defendant must establish his affirmative defense, if such it be, as it is in the instant case, by the greater weight of the evidence.

Reversed.

FRANK WILLIAMS ET AL., v. W. T. SEALY.

(Filed 30 September, 1931.)

Wills E g—An absolute restraint on alienation annexed to a fee is void.

A devise of land to certain named beneficiaries in fee but the land not to be sold under fifty years from the testator's death gives the devisees the immediate right of alienation, the absolute restraint on alienation being annexed to a fee is void.

APPEAL by defendant from *Daniels, J.*, at May Term, 1931, of ROBESON.

Controversy without action submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey a certain tract of land to the defendant, duly executed and tendered therefor a deed sufficient in form to invest the defendant with a fee-simple title, and demanded payment of the purchase price as agreed, but the defendant declines to accept the deed and refuses to make payment of the purchase price on the ground that the title offered is defective.

It was agreed that if, in the opinion of the court, under the facts submitted, plaintiffs were able to convey a good and indefeasible fee-simple title to the land in question, judgment should accordingly be entered for the plaintiffs, otherwise for the defendant.

The court, being of opinion that the deed tendered was sufficient to convey a full and complete fee-simple title to the land in question, gave judgment for the plaintiffs, from which the defendant appeals, assigning error.

Johnson & Floyd for plaintiffs.

McLean & Stacy and Robert Weinstein for defendant.

STACY, C. J. On the hearing, the title offered was properly made to depend upon the construction of the following limitation in the will of Miss A. E. Williams:

"The children of B. P. Williams, Tait, Frank, Roland, Dorcas and Lula, to have my land after the lease expires on it and for it not to sell under fifty years after my death."

It is conceded that if the children of B. P. Williams take a fee, with immediate power of alienation, in the land devised to them under the above clause in the will of Miss A. E. Williams, then the deed tendered is sufficient, and the judgment for the plaintiffs is correct, but defendant questions the immediate power of alienation because of the limitation against selling under fifty years from the death of the testatrix.

The devise to the children of B. P. Williams is in fee, and it is the holding with us that an absolute restraint on alienation, though for a limited time, annexed to a grant or devise in fee, is void. *Combs v. Paul,* 191 N. C., 789, 133 S. E., 93; *Schwren v. Falls,* 170 N. C., 251, 87 S. E., 49; *Christmas v. Winston,* 152 N. C., 48, 67 S. E., 58; *Foster v. Lee,* 150 N. C., 688, 64 S. E., 761; *Wool v. Fleetwood,* 136 N. C., 460, 48 S. E., 785; *Latimer v. Waddell,* 119 N. C., 370, 26 S. E., 122.

The judgment of the Superior Court, therefore, striking out the purported restraint on alienation and declaring the plaintiffs the owners in fee of the premises, with immediate power to dispose of the same, must be upheld. *Jus disponendi* is an incident to the ownership of property in fee.

Affirmed.

STATE v. GEORGE GOSS.

(Filed 30 September, 1931.)

1. Homicide G a—Evidence of premeditation and deliberation held sufficient to go to jury on question of guilt of murder in first degree.

Where in a prosecution for murder there is evidence that the defendant hired a car and drove his wife to the woods where he cut her throat with a razor, that the defendant and his wife were constantly bickering, that the defendant on various, recent occasions had assaulted his wife and threatened her with great bodily harm or death, that he had borrowed the razor and had made careful preparations for the trip, is held sufficient evidence of premeditation and deliberation to carry the case to the jury on the capital felony of murder in the first degree.

2. Homicide G d—Evidence of bickering between defendant and deceased held competent in prosecution for murder.

In a prosecution of a defendant for the murder of his wife evidence tending to show that the defendant and his wife were constantly bickering and quarreling prior to her being killed is held competent on authority of *S. v. Wilkins,* 158 N. C., 603.

STATE *v.* GOSS.

APPEAL by defendant from *Cranmer, J.*, at July Term, 1931, of LEE.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of his wife, Sallie Goss.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

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

Gavin, Teague & Byerly and H. M. Jackson for defendant.

STACY, C. J. The case was submitted to the jury on the State's evidence, as none was offered by the defense. This tends to show that early in the morning of 8 July, 1931, the prisoner, a colored man, hired a "U-Drive-It" Chevrolet car, drove his wife to a patch of woods on the outskirts of Sanford, and there cut her throat with a razor. It was in evidence that the deceased and the prisoner were constantly bickering and quarreling; that the prisoner had, on various, recent occasions, assaulted his wife and threatened her with death or great bodily harm; that he had made careful preparation for the fatal trip; that he confessed the killing, and gave as explanation that he and the deceased were playing and he struck her with a razor. He seems to have borrowed the razor for the special purpose, however; and his excuse for hiring the jitney was that he wanted to go some miles in the country to borrow a pitchfork.

The principal question presented by the appeal is whether there is sufficient, competent evidence of premeditation and deliberation to carry the case to the jury on the capital felony of murder in the first degree. We think there is. *S. v. Evans,* 198 N. C., 82, 150 S. E., 678, and cases there cited.

The competency of the evidence tending to show constant bickering and quarreling between the prisoner and the deceased is supported by what was said in *S. v. Wilkins,* 158 N. C., 603, 73 S. E., 992, *S. v. Langford,* 44 N. C., 436, and *S. v. Rash,* 34 N. C., 382.

A number of exceptions are directed to the charge, and while it consists largely of definitions and contentions, nevertheless a critical examination of it leaves us with the impression that it sufficiently declares and explains the law arising on the evidence to meet the requirements of C. S. 564.

Taking the case by and large, we have discovered no exceptive assignment of error which we apprehend should be held for reversible error. The verdict and judgment will be upheld.

No error.

J. F. BROWN ET AL., v. W. T. POLK ET AL.

(Filed 30 September, 1931.)

Abatement and Revival B b—Held: the two actions in question were not the same and plea in abatement in the second action was bad.

Where notes secured by a deed of trust are given as collateral security for another note, and the payee of the note secured by the collateral notes institutes action thereon against the maker and at the same time has the trustee in the deed of trust advertise the land securing the collateral notes, *Held:* an action instituted in another county, by the maker of the collateral notes and others, to restrain the sale of the land and to have the deed of trust canceled upon allegations of payment of the collateral notes is not the same as the action brought solely on the note secured by the collateral notes, and the defendant's plea in abatement in the second action is bad, since a final judgment in the first action would not support a plea of *res judicata* in the second.

APPEAL by defendant, The Cooper Company, from *Cranmer, J.,* at May Term, 1931, of WARREN.

Civil action to restrain the foreclosure of deed of trust and to have the same canceled of record.

On 26 February, 1930, The Cooper Company, Inc., instituted an action in Vance County against J. F. Brown to recover on a promissory note of $2,295.87, subject to a credit payment of $427.21. The plaintiff asked for judgment on the note, and no more.

It seems that The Cooper Company holds as collateral security to its note, three notes of $551.17 each, given by J. F. Brown to M. P. Burwell, R. B. Boyd and W. B. Boyd for the purchase price of land situate in Warren County and secured by deed of trust thereon. No mention is made of this collateral in the suit instituted in Vance County. But at the same time of the institution of its suit in Vance County, The Cooper Company caused the administrators of the deceased trustee to advertise under the power of sale in order to realize on its collateral as aforesaid.

Plaintiffs bring this action in Warren County, the county of their residence, to enjoin the foreclosure of said deed of trust, alleging payment of the notes, and demanding that the deed of trust be surrendered up and canceled of record. Summons was issued herein 10 March, 1930.

Plea in abatement is filed by The Cooper Company on the ground that the same subject-matter is involved in its action instituted in Vance County 26 February, 1930.

From the overruling of its plea in abatement, The Cooper Company appeals, assigning errors.

Yarborough & Yarborough for plaintiffs.

T. P. Gholson, A. W. Gholson, Jr., Julius Banzet and R. S. McCoin for defendant, Cooper Company.

STACY, C. J., after stating the case: The plea in abatement was properly overruled. *Hawkins v. Hughes,* 87 N. C., 115. The causes of action are different in the two suits. A final judgment in the action brought in Vance County would not support a plea of *res judicata* in the subsequent proceeding instituted in Warren County. This is one of the tests of identity. *Bank v. Broadhurst,* 197 N. C., 365, 148 S. E., 452. In short, the two suits are unlike: the causes of action are not the same; and the results sought are dissimilar. 1 C. J., 56. This renders the plea in abatement bad.

Nothing was said in *Construction Co. v. Ice Co.,* 190 N. C., 580, 130 S. E., 165, or *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545, which militates against our present position.

Affirmed.

C. O. PRICE, ADMINISTRATOR OF HULDA COOK, v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE, INCORPORATED.

(Filed 30 September, 1931.)

1. Appeal and Error J b—Action of trial court in refusing to set aside verdict as matter of discretion is final.

Where in the trial of an action the court has refused the defendant's motion as of nonsuit, and after verdict and judgment has set aside the judgment as a matter of law for insufficiency of evidence, and upon appeal therefrom the Supreme Court remands the judgment for the further proceedings, and thereafter the defendant makes motion before another judge to set aside the verdict as a matter of discretion, which motion is refused, *Held:* the refusal to set aside the verdict as a matter of discretion is final.

2. Judges A a—One Superior Court judge may not review action of another.

As a rule one judge may not review the action of another judge of coordinate jurisdiction on the same facts.

APPEAL by defendant from *Cranmer, J.,* at June Term, 1931, of HALIFAX.

The plaintiff brought suit before a justice of the peace to recover an amount alleged to be due on an insurance policy. On appeal to the

Superior Court a verdict was awarded and judgment was given the plaintiff at the December Special Term for the sum of $175.00. On the day following the rendition of this judgment, the presiding judge, on motion of defendant ordered that the judgment be vacated as a matter of law and not as a matter of discretion. The plaintiff appealed to the Supreme Court and the cause was remanded upon error for further proceedings. 200 N. C., 427. At the June Term, 1931, the defendant made a motion before Judge Cranmer in his discretion to set aside the verdict and judgment rendered by his predecessor at the previous December Term. Judge Cranmer was of opinion that he was without discretion in the matter and denied the defendant's motion. The defendant excepted and appealed.

Allen C. Zollicoffer and E. L. Travis for plaintiff.
Parker & Allsbrook for defendant.

ADAMS, J. The case was tried in the Superior Court in December, 1930. At the close of the plaintiff's evidence the defendant moved for judgment of nonsuit. The motion was denied; the defendant excepted and declined to offer evidence. The jury returned a verdict in favor of the plaintiff for one hundred and seventy-five dollars and the court gave the plaintiff a judgment for this sum. On the next day the court upon motion of the defendant set aside the judgment as a matter of law and not as a matter of discretion. The specific ground upon which the judgment was vacated is not set out in the order, but in its brief the appellant says that the instruction given the jury was in conflict with the principle stated in *Gilmore v. Ins. Co.*, 199 N. C., 632. This objection, however, was essentially involved in the judge's refusal to dismiss the action upon the plaintiff's evidence; and having adjudged the legal sufficiency of the evidence before verdict, the court could not after verdict and judgment reverse this ruling as a matter of law. On this point the defendant's remedy lay in its exception and appeal. *Godfrey v. Coach Co.*, 200 N. C., 41; *Lee v. Penland, ibid.*, 340; *Price v. Ins Co., ibid.*, 427.

It appears from the face of the order that the court refused to vacate the judgment as a matter of discretion. Such exercise of discretion was final. As a rule one judge may not review the action of another judge of coördinate jurisdiction on the same state of facts. Judge Cranmer's judgment must therefore be affirmed.

The appellant says that if Judge Cranmer's order is correct the plaintiff will recover a judgment which cannot be sustained under the

law announced in the *Gilmore case;* but as pointed out by the appellee's brief two courses were open to the appellant, and it pursued the one which led to an unexpected result.

It is not necessary to advert to the obvious distinction between the present case and *Morgan v. Owen,* 200 N. C., 34. Judgment Affirmed.

C. O. H. BOYD, TRADING AS NEW BERN FERTILIZER COMPANY, v. F. P. WALTERS.

(Filed 30 September, 1931.)

1. Appeal and Error E h—Where there is no statement of case on appeal the Supreme Court is limited to correctness of judgment excepted to.

Where the record contains no statement of case on appeal the Supreme Court is limited to the consideration of the judgment, the appeal being regarded as an exception thereto.

2. Replevin G a—Correct form of judgment for plaintiff in action in claim and delivery where defendant replevies property.

Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its detention, and against the surety on the bond for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff, or, if the return of the property cannot be had, upon payment of the value of the property at the time of its detention with interest thereon as damages, and costs, the recovery against the surety in no event to exceed the penalty of the bond. C. S., 610, 836.

APPEAL by defendant from *Devin, J.,* at May Term, 1931, of CRAVEN.

Civil action in claim and delivery, wherein the personal property seized was replevied, N. E. Mohn becoming surety on defendant's forthcoming bond.

The defendant's indebtedness was found to be $227.00 and the value of the property taken in claim and delivery fixed at a like amount at the time of its seizure.

From a judgment that "the plaintiff have and recover of the defendant and the surety on his replevy bond, N. E. Mohn, the sum of $227.00," with interest and costs, the defendant appeals.

R. E. Whitehurst for plaintiff.
Shaw & Jones for defendant.

STACY, C. J. The record contains no statement of case on appeal, hence we are limited to a consideration of the judgment, the appeal itself being regarded as an exception thereto. *Casualty Co. v. Green,* 200 N. C., 535, 157 S. E., 797.

Agreeably to the requirements of C. S., 836, the tenor of the defendant's forthcoming bond is to the effect that, if the plaintiff be adjudged the owner and entitled to the recovery of the possession of the property described in the plaintiff's affidavit, the defendant and his surety bind themselves for the delivery thereof to the plaintiff, with damages for its deterioration and detention, if delivery can be had, together with the costs of the action, and if such delivery cannot for any cause be had, the defendant and his surety bind themselves for the payment to the plaintiff of such sum as may be recovered against the defendant for the value of the property at the time of its wrongful taking and detention, with interest thereon as damages for such taking and detention, together with the costs of the action. *Hall v. Tillman,* 110 N. C., 220, 14 S. E., 745. The judgment, therefore, should have followed the statute and the terms of the bond. *Council v. Averett,* 90 N. C., 168.

As pointed out in *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466, the form of the judgment in claim and delivery, when the plaintiff recovers and summary judgment is taken against the surety, should be "for the possession of the property, or for the recovery of the possession, or for the value thereof in case a delivery cannot be had, and damages for the detention" (C. S., 610), together with the costs of the action, with the further provision that the plaintiff recover of the surety on the defendant's replevy bond the full amount of such bond, to be discharged, first, upon the return of the property and the payment of the damages and costs recovered by the plaintiff, or, second, if a return of the property cannot be had, upon the payment to the plaintiff of such sum as may be recovered against the defendant for the value of the property at the time of its wrongful taking and detention, with interest thereon as damages for such taking and detention, together with the costs of the action, the total recovery against the surety in no event, however, to exceed the penalty of the bond. *Harrell v. Tripp,* 197 N. C., 426, 149 S. E., 548; *Polson v. Strickland,* 193 N. C., 299, 136 S. E., 873. See, also, *McCormick v. Crotts,* 198 N. C., 664, 153 S. E., 152.

The cause, therefore, will be remanded for judgment in accordance herewith.

Error and remanded.

W. H. AUSTIN v. L. GEORGE AND JOHN McCALL, TRADING AS CITY MARKET.

(Filed 30 September, 1931.)

1. **Partnership D d—Notice of retirement from partnership held sufficient to put plaintiff upon inquiry as to the facts.**

   Where a store is rented to one of two partners who pays rent thereon for a time and thereafter tells the lessor that he is no longer connected with the partnership, and the other partner continues to pay rent until a later date, *Held:* in an action to recover rent accruing thereafter, notice given by the retiring partner was at least sufficient to put the lessor upon reasonable inquiry and charge him with all that such inquiry would disclose, and the holding of the trial court that it was not sufficient to relieve the retiring partner of liability is error, and a new trial will be awarded.

2. **Notice A b—Party having notice is chargeable with all that reasonable inquiry would disclose.**

   A party having notice must exercise ordinary care to ascertain the facts and is chargeable with all that a reasonable inquiry would disclose.

APPEAL by defendant, L. George, from *Sinclair, J.*, at April Term, 1931, of JOHNSTON.

Summary proceeding in ejectment instituted by W. H. Austin, agent, against L. George and John McCall, trading as City Market.

Summons was issued by a justice of the peace on an affidavit of the plaintiff, setting forth a cause of action under C. S., 2365, also claiming rent in arrear to the amount of $174.65, as authorized by C. S., 2367. On the hearing, the justice of the peace gave judgment that the defendants be removed from, and the plaintiff be put in possession of, the demised premises (C. S., 2369), and that the plaintiff recover of the defendants the sum of $187.50 with interest and costs.

On appeal by the defendants, the case was tried *de novo* in the Superior Court on the issue of indebtedness alone, resulting in the following verdict:

"What amount, if any, are the defendants indebted to the plaintiff? Answer: $174.65 and interest."

Judgment on the verdict for plaintiff, from which the defendant, L. George, appeals, assigning errors.

Leon G. Stevens for plaintiff.

W. P. Aycock and Winfield H. Lyon for defendant George.

STACY, C. J., the issue of tenancy and holding over was disposed of by the justice of the peace. *Perry v. Perry,* 190 N. C., 125, 129

S. E., 147; *Shelton v. Clinard,* 187 N. C., 664, 122 S. E., 477; *Carnegie v. Perkins,* 191 N. C., 412, 131 S. E., 750.

The record shows that in April, 1929, plaintiff's agent, G. T. Powell, rented the store in question to L. George at a rental of $75.00 per month, but for no special length of time. Three or four months thereafter the defendant George saw the said Powell and told him that he had paid the rent on the building for the first month and one-half, but that he no longer had any interest in the "City Market," an alleged partnership. The defendant, John McCall, continued to pay rent on the building up to 1 January, 1930. The trial court held that the notice given by George to Powell was not sufficient to relieve him from liability for subsequently accruing rent. In this, we think, there is error. *Furniture Co., v. Bussell,* 171 N. C., 474, 88 S. E., 484; *Straus v. Sparrow,* 148 N. C., 309, 62 S. E., 308. Such notice was, at least, sufficient to put the plaintiff on inquiry, and this carries with it a presumption of notice of all that a reasonable investigation would have disclosed. *R. R. v. Comrs.,* 188 N. C., 265, 124 S. E., 560; *Mills v. Kemp,* 196 N. C., 309, 145 S. E., 557. 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., 39, 81 S. E., 949.

The appealing defendant is entitled to have the matter submitted to another jury.

New trial.

FIRST AND CITIZENS NATIONAL BANK v. THE CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA AND A. G. SMALL, LIQUIDATING AGENT IN DISSOLUTION OF THE CAROLINA BANKING AND TRUST COMPANY.

(Filed 30 September, 1931.)

1. Banks and Banking H d—Where bank mingles guardianship and other funds its successor as guardian is not entitled to preference.

Where a bank, authorized by its charter to act as guardian, intermingles funds coming into its hands as guardian with funds received by it in its regular banking business, and it is impossible to separate any of the trust funds from the other funds on deposit and placed in the bank's vault, *Held:* upon the bank becoming insolvent its successor as guardian has no lien on its assets and is not entitled to a preference for the amount of the guardianship funds in an action against the liquidating agent, but is only a general creditor of the bank and entitled only to pro rate with other creditors, the guardianship funds being also protected

by the bond required by statute; the mingling of guardianship and personal funds by an individual guardian depositing the funds in a bank is distinguished.

2. Same—Where bank endorses note to itself as guardian and becomes insolvent the minors are tenants in common therein.

Where a bank acting under authority of its charter as guardian for certain minors is the payee of two certain notes which it endorses without recourse, one to itself as guardian for one group of minors and the other to itself as guardian for a second group of minors, and thereafter the bank becomes insolvent, *Held:* its successor as guardian for some of the second group of minors has no right, title or interest in the note endorsed for the benefit of the first group of minors, and is not entitled to recover the second note from the liquidating agent, it being only a tenant in common along with the other minors for whose benefit the note was endorsed, and the second note should be collected by the liquidating agent and the proceeds applied according to the respective rights of the parties.

APPEAL by plaintiff from *Grady, J.*, at June Term, 1931, at Chambers, in Elizabeth City, N. C., from PASQUOTANK. Affirmed.

The following judgment was rendered by the court below:

"This cause came on for hearing at the above time and place upon an agreed statement of facts, signed by counsel, which is hereto attached, and made a part of this judgment.

1. It appears from said statement of facts that the Carolina Banking and Trust Company was a domestic corporation engaged in the banking business in Elizabeth City, and that it was authorized, under its charter, and under the laws of this State, to act as guardian, administrator, or executor, in the same manner as an individual might act under the laws of this State.

2. That said Carolina Banking and Trust Company closed its doors and was taken over by the Corporation Commission on 19 August, 1930, at which time it was the general guardian, under an order of the clerk of the Superior Court of Pasquotank County, of Mattie Whitehurst and Clarence Whitehurst; and since that time it has been removed as guardian of said minors and the First and Citizens National Bank of Elizabeth City has been appointed as general guardian for said minors, and prosecutes this action in their behalf.

3. At the time of its failure and the taking over by the Corporation Commission, as aforesaid, said Carolina Banking and Trust Company, in its capacity as guardian, or executor, of various and sundry persons, had on deposit in said Carolina Banking and Trust Company, as a banking institution, the sum of $29,750.59; this sum being the aggregate of the several amounts specified and set out in article 6 of the agreed statement of facts; and of this amount the plaintiff's wards, Mattie

Whitehurst and Clarence Whitehurst, were entitled, respectively to $737.18, and $692.21, making a total of $1,429.39. All of said deposits, aggregating $29,750.29, were amply protected by a solvent bond, which had been duly executed by said Carolina Banking and Trust Company as guardian, executor, and so forth, with approved sureties, and out of which a recovery can be had at this time for the full amount due by the defendant, Carolina Banking and Trust Company, former guardian of the minor plaintiffs in this cause.

4. It will be observed that the Carolina Banking and Trust Company, as guardian of the said Mattie Whitehurst and Clarence Whitehurst, is not a party to this action; but the same is being prosecuted solely against the successor in title of the assets of the Carolina Banking and Trust Company as a banking depository of the funds hereinbefore referred to.

5. It is admitted, by all parties, that at the time of the closing of the said Carolina Banking and Trust Company, it had on hand, in cash, more than enough money to pay off and discharge all of said trust accounts, referred to in article 6 of the agreed statement of facts; and the plaintiff insists that, inasmuch as these moneys constituted a trust fund in the hands of the bank, and inasmuch as they were mingled with other moneys belonging to said bank, it is now entitled to have a decree of this court declaring that it is entitled to a preference, to the extent of its claim, over and above all other creditors of the said Carolina Banking and Trust Company, as a banking institution.

6. As the court sees it the plaintiff's contention is, in effect, that, notwithstanding the funds in question are amply secured by a bond, that the unsecured creditors and depositors of said bank must yield their rights in the premises and put themselves in the position of securities, so that their moneys may be used to pay the plaintiff's claim, while they stand to lose what they have on deposit, or the amount owing them by said Carolina Banking and Trust Company, at least to the extent of such preference.

The court is unable to follow the reasoning of the plaintiff. There was no contract, according to the agreed statement of facts, between the parties, which would set aside any particular item of the funds in question so as to give to the plaintiff a particular lien thereon, or a preference over the other creditors; but according to the facts as agreed, the plaintiff and its predecessors in office are simply unsecured creditors of said Carolina Banking and Trust Company, in its character as a bank; and therefore, it stands in a similar position to the defendants as successors in title to the assets of said bank; and it is therefore,

Ordered and adjudged that the plaintiff has no preference and that it is simply an unsecured creditor of the defendants, and entitled to pro-rate in the funds in hand, along with the other unsecured creditors.

It appears from article 10 of the agreed statement of facts, that at the time the Carolina Banking and Trust Company closed its doors, it had in its possession two certain notes, one in the sum of $4,000, dated 29 July, 1929, payable 27 October, 1929, to the order of Carolina Banking and Trust Company, and endorsed, 'Without recourse to Carolina Banking and Trust Company, guardian for Eddie Rhodes, Murden Rhodes, Elvy Rhodes and Cecil Rhodes, or order, and any surplus to the guardian account of McKinney heirs': said note being secured by the pledge of a note for $5,000, which note was secured by real estate. The second note was executed by S. G. Scott, in the principal sum of $6,000, dated 6 November, 1928, and payable 2 September, 1929, to the order of the Carolina Banking and Trust Company, and endorsed 'Without recourse to Carolina Banking and Trust Company, guardian for Clarence Whitehurst, Mattie Whitehurst, Fannie Tadlock, Ira Tadlock, Cora McKinney, and others,' all of which will appear by reference to article 10 of the agreed statement of facts.

The court is of the opinion, and so adjudges, that the plaintiff has no right, title or interest in and to the first note above mentioned; and that as to the second note, for $6,000, the plaintiff's interest in said note is only that of a tenant in common along with 14 other minors, who are named in said article 10 of the agreed statement of facts; and that, therefore, the plaintiff is not entitled to said note, but that it is the duty of the defendant to collect the same and pay out the proceeds derived therefrom to the parties in interest, according to their respective rights, as set out in the agreed statement of facts.

It is further ordered and adjudged that the costs of this action be taxed against the plaintiff."

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

J. H. LeRoy, Jr., and McMullan & McMullan for plaintiff.
Thompson & Wilson for defendant.

CLARKSON, J. Were the funds in the hands of the Carolina Banking and Trust Company, former guardian of plaintiff guardian's wards, divested of their character as trust funds, when placed or deposited by said bank in its own vaults, under the circumstances of this case? We think so.

The agreed facts show: "That, when so placed or deposited, the moneys received belonging to one of the estates aforesaid was not kept

separate and distinct from the moneys belonging to the other estates aforesaid, or from the moneys received by said bank in the usual course of its general banking business—all such moneys being commingled in the vaults of said bank."

"It is a well settled general rule that a receiver of a bank in which a fund impressed with a trust was deposited cannot be required to repay it in preference to the claims of other creditors, unless the trust fund can be identified, or traced into some other specific fund or property. Still it is held that the identical money deposited need not be traced into the receiver's hands where the funds received by him are in any event increased by the amount of the deposit, and it has also been held that it will be presumed that enough of the money in the bank's possession when it closed its doors, to satisfy such fund, belongs to the trust; and that, if the balance on hand is not equal to such fund, the entire balance will be turned over to the beneficiary." 3 R. C. L., "Banks," p. 554, sec. 181, in part.

We find the following stated in 7 C. J.—Banks and Banking—p. 633, sec. 308(5): "With regard to the effect of deposits of trust funds the authorities are not in entire accord. According to one view which appears to prevail more generally deposits made by trustees, executors, administrators, assignees, agents, public officers, and other persons who are serving as fiduciaries are usually considered as simply general deposits, and if the bank fails to pay them, the beneficiaries have no peculiar claims or rights over other creditors, but must share like other creditors; but it has also been held that the receipt by a bank of a trust fund, with the knowledge of its trust character, impressed the assets of the bank, which were increased to that extent, with a trust for the payment of such fund."

In *Bank v. Davis,* 115 N. C., 226, the following principle is laid down: "Plaintiff bank, being ignorant of the insolvency of the Bank of New Hanover, sent to it items for collection and remittance. New Hanover Bank mingled the proceeds of the collection with its own funds, so that the specific money received on the items so sent by plaintiff bank could not be traced. No mutual account was kept between the parties. Before remitting for the items so collected New Hanover Bank failed, and there was money enough on hand and turned over to the receiver to pay the plaintiff's claim; *Held,* that upon the collection of the items and the mingling of the proceeds with the assets of the New Hanover Bank, the relation of principal and agent, trustee and *cestui que trust* ceased, and that of principal and debtor arose between the parties, and plaintiff became a simple contract creditor with no preference over other creditors, and it is immaterial, in such case,

whether or not the officers of New Hanover Bank knew that it was insolvent." (Headnote) *Bank v. Davis,* 114 N. C., 343.

The record discloses that "the funds in question are amply secured by a bond."

In *Roebuck v. Surety Co.,* 200 N. C., at p. 202, the following observation is made: "The bank, as guardian, in not investing the funds of its ward, but intermingling it with other funds of its bank, was faithless to the trust reposed in it; and its bondsman, the defendant, must suffer the loss for such faithlessness."

This Court has adopted the "well settled general rule" set forth in R. C. L., *supra,* and the "view which appears to prevail more generally" set forth in C. J., *supra.*

The plaintiff contends: "It is admitted that, from and after the receipt by the Carolina Banking and Trust Company, as guardian, of the various trust funds set out in the agreed facts until the bank was taken over for purposes of liquidation, there was, in the vaults of the bank, an amount of cash in excess of the aggregate of such trust funds. Upon this admission, it is respectfully submitted that the trust funds have been sufficiently identified or traced into the hands of the defendant as to permit recovery." We cannot so hold.

"The general rule where the bank has completed the collection and mixed the funds with its own is that the bank is no longer a trustee but simply a debtor, and that the owner of the paper cannot claim a preference out of its assets. Some recent cases, however, following the doctrine of *Knachbull v. Hallett,* L. R., 13, Ch. Div., 696, hold that the court may separate the trust fund from the general assets of the bank although they reached the hands of the assignee in an indistinguishable mass." *Sayles v. Cox,* 32 L. R. A., at p. 719 (note).

This matter is so thoroughly considered in an Alabama decision, that we copy fully from that case, as it follows the rule adopted in this State. In *Smith & Co. v. Montgomery,* 95 Sou. Rep., p. 292 (209 Ala., p. 100), speaking to the subject: "There are quite a number of cases holding that a principal may subject funds to his lien when the agent commingles the same with his own, or when a bank places the same to the individual credit of the agent, and a few which conform to the appellants' contention; but the contrary rule, which requires identification and more than tracing the money into a common fund held by a bank or receiver for a number of claimants, has been followed by our court, and is supported by well-reasoned cases in other jurisdictions. This identical question has been recently decided by the Pennsylvania Court, *Commonwealth v. Trademen's Trust Co.,* 250 Pa., 378, 95 Atl., 577, L. R. A., 1916C, 10, wherein the court after commenting on *Knachbull v. Hallet,* and other cases, said:

'These cases establish the general rule that where a trustee receives money from a *cestui que trust* and deposits it with his own account, and in his own name, to which account he subsequently adds and withdraws money, the *cestui que trust* may claim to the extent of his trust fund the lowest amount which was on deposit at any time during the continuance of the trust, regardless of the fact that the funds were commingled and increased or diminished from time to time. This rule is based on the theory that the trustee will not be presumed to have intended to commit a criminal act, and so long as there are funds of his own, though mixed with the trust funds, any withdrawal from the account will be considered as a withdrawal of his own money, and not that belonging to the trust, and it is only when the total amount is reduced below the amount of the trust, that this presumption is rebutted, because the circumstances preclude any other possibility. There appears to be no case in Pennsylvania where it has been decided by an appellate court that the above rule is the law of this State, nor is it necessary to decide here the precise question as to whether the trustee is an individual and deposits money in his own bank account. The trustee here is a trust company authorized by statute to receive and handle funds of others and do a general banking business. In the conduct of this business it necessarily handled trust funds belonging to a large number of persons. These funds in the present case were deposited in a general account and in this way it became impossible to say to whom any particular part belonged. The case is distinguishable from that of an individual trustee who mixes the funds of a single *cestui que trust* with his own account. In such case it can readily be determined whether and to what extent he has appropriated the trust funds to his own use. On the other hand, when a trust company deposits in a common account funds belonging to various persons, it cannot be said that the mere fact of their being on deposit at all times sufficient to meet the claim of any particular customer of the bank entitled that customer to claim it as against other claimants whose money also went into the same account. Claimant could not trace title to any particular part of the deposits and his claim can therefore rise no higher than the claim of others whose money was deposited in the same general fund.'

The present holding is supported in point by the case of *Philadelphia National Bank v. Dowd* (C. C.), 38 Fed., 172, 2 L. R. A., 480. See, also, *Commercial Bank of Baltimore v. Davis,* 115 N. C., 226, 20 S. E., 370."

On rehearing of the above case, it is said: "We can add but little to the above quotation from the *Pennsylvania case,* which is supported in point by the North Carolina and United States Court of Appeals cases, and is in line with previous utterances of this Court," etc.

General deposit, special deposit and deposit for special purpose, see *Corp. Commission v. Trust Co.*, 193 N. C., 696; *Corp. Commission v. Trust Co.*, 194 N. C., 125; *Minnis v. Sharpe*, 198 N. C., 369.

We see no error in the judgment in regard to the two certain notes the Carolina Banking and Trust Company had in its possession. For the reasons given, the judgment of the court below is

Affirmed.

IRA L. GARRETT v. DR. R. L. KENDRICK AND DR. JOHN SALIBA.

(Filed 30 September, 1931.)

1. **Judgments L b—Judgment rendered by court of competent jurisdiction will estop parties as to all issuable matters embraced in pleadings.**

   Where a court of competent jurisdiction renders judgment in a case properly before it, such judgment estops the parties and their privies as to all issuable matter contained in the pleadings, including all material and relevant matters within the scope of the pleadings which the parties in the exercise of reasonable diligence could and should have brought forward.

2. **Same—Judgment in favor of surgeon for services rendered will estop patient from bringing later action for malpractice.**

   Where surgeons have recovered judgment against their patient for services rendered in the treatment of broken bones, lacerations, etc., a later action brought by the patient against them for alleged malpractice in such treatment is barred by the former judgment, since the allegations of malpractice should have been set up as a defense in the surgeons' action against him, which he defended, the matter being within the scope of the prior action.

3. **Same— In this case held: parties were in privity, and estoppel as to one defendant operated as to the other.**

   Where a surgeon who has rendered services in the treatment of a patient recovers judgment against the patient for such services, and thereafter the patient brings action against the surgeon and his partner, who had coöperated and assisted in the treatment, to recover for alleged malpractice in such treatment, the prior action operates as a bar not only in favor of the surgeon recovering judgment therein, but also in favor of the assisting surgeon, he being regarded as a privy in the same cause.

CIVIL ACTION, before *Grady, J.*, at June Term, 1931, of PASQUOTANK.

The facts of the case and the contentions of the parties are set forth in the judgment, which is as follows:

"This cause coming on to be heard, and upon motion of the defendants to dismiss the action, and all parties having appeared and agreed that the court might find the facts and render judgment thereon, either in

or out of term; now, upon an inspection of the pleadings and upon the admissions of the parties, the court finds the facts to be as follows:

1. That on 20 January, 1929, the plaintiff, I. L. Garrett, was injured in an automobile wreck, near Shawboro, N. C., in Currituck County, North Carolina, said injury having been caused by the negligence of W. L. Morrisette and Mrs. W. L. Morrisette.

2. That thereafter during the month of May, 1929, the said I. L. Garrett instituted an action in the Court of Law and Chancery of the city of Norfolk, Va., against the said W. L. Morrisette and Mrs. W. L. Morrisette; it being alleged in the pleadings filed in said cause that by reason of the negligence of said defendants the plaintiff was knocked from his automobile, caused to fall on the roadway, was lacerated, bruised, torn and crushed, and suffered bruises, contusions, lacerations, sprains and broken bones, injured his nerves, flesh and bones and crippled the arms and legs of the plaintiff, causing great pain and distress, permanent and incurable injuries; also that he was caused to suffer great mental anguish and was permanently injured and has been obliged to pay out divers sums of money, aggregating a large sum, to wit, $1,400 in and to endeavoring to be relieved and cured of said injuries, and has been forced to lose a great deal of time from attending to his business, and has suffered, and will continue to suffer, great loss from the continued diminution of his earning capacity, etc. The petition and notice of motion in said cause, and the entire record therein, is here referred to and incorporated as a part of this finding of fact.

3. Thereafter, on 19 July, 1929, the defendant executed a release in the following language: "for the sole consideration of the sum of $4,200, lawful money of the United States, to me in hand paid, this 16 July, 1929, by Mrs. Martha Morrisette (she being one of the defendants in said action) I, I. L. Garrett, being of lawful age, hereby release, acquit and forever discharge the said Mrs. Martha M. Morrisette, her heirs, executors and administrators, from any and all actions, causes of action, claims and demands accrued and to accrue on account of any known and unknown injuries, loss and damage whatsoever sustained by me on or about 20 January, 1929. It is expressly understood and agreed that the acceptance of the said amount of $4,200 is in full accord and satisfaction of a disputed claim and that the payment of the said sum of $4,200 is not an admission of liability.

In witness whereof, I have hereunto set my hand and seal this 19 July, 1929. (Signed) I. L. Garrett."

4. That thereupon, said release having been produced in open court, the said action was dismissed on motion of the plaintiff, on 23 July, 1929.

5. That as admitted in plaintiff's reply the action in the Court of Law and Chancery in Norfolk, above referred to, was against Mrs. Martha Morrisette and husband, W. L. Morrisette; that it was instituted on account of injuries received in an automobile collision which occurred on 20 January, 1929; that it was instituted after the injury referred to in the complaint, and after the treatment and professional services by defendants to the plaintiff therein, also referred to, and the release, original of which is before the court, and signed by this plaintiff as a settlement, adjustment and conclusion of said litigation.

6. That shortly after said accident and injury, and before the institution of said Norfolk action, the plaintiff, I. L. Garrett, placed himself in charge of the defendants, R. L. Kendrick and John Saliba, who, as he alleges, were practicing physicians, holding themselves out to the public as possessing professional skill, efficiency and trustworthiness to treat him in a professional manner; that he was taken to the hospital in Elizabeth City for surgical treatment, and was taken over for professional treatment and attention and surgical operation by the said R. L. Kendrick and John Saliba, who are alleged in the complaint in this cause to have acted jointly and in coöperation in said treatment, and in the setting of the fractured bones of the arm and leg of the plaintiff; and it is admitted by the defendants that they were acting jointly and in coöperation for the purposes of this action.

7. The plaintiff alleges, in this action, that the defendants, without justifiable cause, negligently failed to set, adjust and treat the said fractured bones, and especially that of his leg, with that reasonable degree of care, skill and efficiency which it was their duty to exercise and which was promised and implied by holding themselves out to the public and to the plaintiff as skillful surgeons, and by reason of such neglect and failure of proper care and attention, and failure of the exercise of a fair and reasonable degree of surgical skill, and in proper setting of the bones of both the arm and leg, of the plaintiff, and especially so as to the leg, the bones of which were left lapped, not being properly adjusted and put together so they could knit, grow and heal.

8. The plaintiff further alleges that he has been damaged on account of the negligence of the defendants in the sum of $5,000; and the complaint, answers, amendments and reply filed in this cause are hereby incorporated as a part of this finding of fact.

9. At the time said medical services were performed by the defendants to the plaintiff, the defendant, John Saliba, and Dr. M. S. Bulla, of Elizabeth City, were the owners of a certain hospital in Elizabeth City, and were trading under the firm name of Elizabeth City Hospital; and on 14 August, 1929, the said John Saliba and M. S. Bulla insti-

tuted an action in the Superior Court of Pasquotank County against the plaintiff and his wife, Beatrice Sawyer Garrett, the purpose of which action was to collect from the plaintiff, I. L. Garrett, the sum of $605.00 for bed, board and other hospital attention, other than surgical services, together with the sum of $200.00 for professional or surgical services rendered by the plaintiffs in said action, through the defendant, John Saliba, making a total of $805.00. Said cause came on for hearing at the March Term, 1930, of the Superior Court of Pasquotank County, when and where issues were submitted to the jury and said jury awarded to the plaintiffs, Bulla and Saliba, the sum of $425.00 for bed and board, and other hospital attention and the sum of $100.00 for professional or surgical services rendered through the plaintiffs therein, and judgment in favor of the said plaintiffs, Bulla and Saliba, trading as Elizabeth City Hospital, was thereupon entered by the court, for the amount aforesaid, and was paid by the defendant, I. L. Garrett, the plaintiff in the present suit. The complaint, answer, verdict and judgment in said cause are here referred to and made a part of these findings of fact.

10. The defendant, John Saliba, and defendant, R. L. Kendrick, plead said judgment, together with the judgment rendered in the court of Law and Chancery, in Norfolk, Virginia, hereinbefore referred to, as an estoppel in this action, and moves that the same be dismissed.

11. The defendant, R. L. Kendrick, also contends under the allegations of the complaint herein, and not denied in the answer, that as he was a copartner *pro hac vice* of the defendant John Saliba, in performing the services referred to at the Elizabeth City Hospital, he is privy to the matters and things alleged by the said John Saliba by way of defense, and in his own plea, and is also entitled to have this action dismissed as to him, for the same cause.

12. In *Bell v. Machine Co.*, 150 N. C., page 111, it was held that, "When it has been adjudicated in a former action that the defendant in this action has performed his contract to repair the vessel of the present plaintiff, the plaintiff is estopped to claim damages arising from defective work alleged to have been done thereon." Applying the law as enunciated in *Bell v. Machine Co., supra,* to the facts of the instant case, the court is of the opinion that the judgment in the case of Bulla and Saliba against I. L. Garrett, having been entered and paid, that it is necessarily an adjudication of the fact that both Doctors Saliba and Kendrick performed their services in a satisfactory and acceptable manner, and that because of this adjudication the plaintiff cannot now be heard to complain that he has been damaged by the negligence of either one of them, it is, therefore,

Ordered and adjudged that the plaintiff is not entitled to recover anything by his writ; that the defendants go hence without day and recover their costs to be taxed against the plaintiff and the surety on his prosecution bond. This 15 June, 1931. HENRY A. GRADY, *Judge Presiding.*"

From the foregoing judgment plaintiff appealed.

Ward & Grimes for plaintiff.
Ehringhaus & Hall for Kendrick.
McMullan & McMullan for Saliba.

BROGDEN, J. The record presents the following question of law, to wit:

If a surgeon sues a patient to recover compensation for surgical services, and the patient makes an appearance and defends the suit, and judgment is recovered against him for such services, can such patient thereafter sue the surgeon for damages alleged to have been caused by the malpractice of the surgeon in treating the injuries?

It is to be noted at the outset that the defendant Kendrick was not a party to the suit brought by Saliba and Bulla against the plaintiff for services in treating his injuries. However, it was alleged in the complaint and found as a fact by the trial judge that Kendrick and Saliba "acted jointly and in coöperation in said treatment and in the setting of the fractured bones of the arm and leg of plaintiff," etc. Therefore, it seems to follow that, upon plaintiff's own theory, Kendrick was a copartner with Saliba in performing the services out of which the litigation grows.

The general rule governing estoppel in that class of cases to which the present case belongs, was declared in *Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535, as follows: "That when a court of competent jurisdiction renders judgment in a cause properly before it, such judgment estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward."

Thus, when Saliba and Bulla sued the plaintiff upon a *quantum meruit* for services, it was necessary to allege and prove that the services were rendered and that they were reasonably worth a certain amount. As the defendant in that case defended the action upon the merit of the claim asserted, it was his duty to set up the malpractice complained of as a counterclaim by virtue of the fact that the malpractice grew out of the same contract or transaction which formed the basis of the claim of the plaintiffs.

The trial judge was of the opinion that the principle announced in *Bell v. Machine Co.*, 150 N. C., 111, 63 S. E., 680, was determinative of the question of estoppel. This Court concurs in the ruling of the trial judge. The identical principle was thus stated in the *Bell case, supra:* "The plaintiffs contend that this is a counterclaim, which it was optional with them to plead. It seems to us that while the damage now sued for, if valid, would be a counterclaim, the foundation for them is taken away by the adjudication in the other action that the defendant had performed its contract."

Affirmed.

EX PARTE ALICE BAREFOOT, WIDOW; BETTIE JOHNSON AND HUSBAND, ROBERT JOHNSON; WINNIE BLACKMON, WIDOW; ILA ALLEN AND HUSBAND, J. T. ALLEN; HATTIE LEE AND HUSBAND, T. D. LEE; MATTIE ELDRIDGE, WIDOW; DELLA LEE, WIDOW; EMMIE LEE; HENRY LEE AND WIFE, NORA LEE.

(Filed 30 September, 1931.)

1. Descent and Distribution A a—Where deed from father to son is supported by adequate consideration son takes by purchase.

A deed to lands from a father to his son reciting a consideration of natural love and affection and a further consideration of one hundred and sixty dollars, reserving a life estate with warranty and covenants of title excepting an existing judgment against the land of one hundred and sixty dollars, *Held:* the words of the consideration "natural love and affection" do not qualify the estate, and in the absence of words to the contrary the express consideration of one hundred and sixty dollars, the amount of the outstanding judgment against the land, is a valuable consideration and sufficient to support the deed and create the son a new propositus, and at his death intestate, the lands will descend to his heirs-at-law and not to those of the grantor, his father, the estate acquired by the son not being by descent, devise, gift or settlement.

2. Same—Actual consideration paid may be shown by parol, but in absence of proof to contrary it will be deemed an adequate consideration.

A consideration expressed in a deed is not contractual and the actual amount paid may be shown by parol evidence, but nothing else appearing, it will be presumed that the recited consideration is correct and where a deed from a father to a son is supported by a valuable consideration and another deed is introduced as a correction thereof showing a larger amount, the later deed, if taken as correct, recites a valuable consideration under which the son would also take by purchase.

3. Descent and Distribution B a—Where son acquires land from father by purchase and dies before father, son's heirs take exclusively.

The fourth canon of descent, providing that upon the death of the ancestor intestate and without lineal descendants the inheritance in land

shall descend to the next collateral relation of the person last seized, capable of inheriting, of the blood of the ancestor, is construed in connection with the sixth canon, providing that the collateral relations of the half-blood shall inherit equally with those of the whole blood, with an exception where the inheritance is transmitted to the person last seized by devise, gift or settlement, but the exception does not apply where the estate is acquired by purchase, and where a son acquires land by deed from his father and pays a valuable consideration therefor, and dies without lineal descendants prior to his father's death intestate, *Held:* the land descends to the collateral relations of the son whether of the whole or half-blood, and the inheritance is not limited to the collateral relations of the son who are also of the blood of the father, the grantor. C. S., 1654.

APPEAL by intervening petitioners from *Sinclair, J.*, holding that they are not entitled to any interest in the land described in the petition. From JOHNSTON. Reversed.

The petitioners named above brought a special proceeding, *ex parte*, before the clerk of the Superior Court of Johnston County for the partition of a tract of land containing 85 acres. They alleged that they are the sole owners thereof and tenants in common as the heirs at law of N. J. Lee, deceased. Pending the proceeding R. N. Allen, R. M. Barefoot, E. Fletcher Barefoot, Susan Jane Barefoot, and Amanda Stewart were permitted to intervene and to file a petition setting forth their claim as heirs at law of N. J. Lee. The cause was heard by the clerk upon the following facts:

1. Julius A. Lee, Jr., was the father of N. J. Lee, who died during the lifetime of the said Julius A. Lee, Jr., without lineal descendants and intestate.

2. Julius A. Lee, Jr., conveyed to the said N. J. Lee a tract of land containing about eighty-five (85) acres, by deed, dated 22 December, 1893, which is duly recorded in the registry of Johnston County, in Book H-6, page 410, and that the said deed as recorded is incorporated and made a part of this paragraph.

3. Julius A. Lee, Jr., is now dead, having died during the year of 1930.

4. The original petitioners are lineal descendants of Julius A. Lee, Jr., and are collateral relations of the whole blood of N. J. Lee.

5. The intervening petitioners are collateral relations of the half-blood of N. J. Lee, being of the blood of the mother of N. J. Lee, but not of the blood of Julius A. Lee, Jr.

6. The original petitioners claim as sole heirs-at-law of N. J. Lee as being of the blood of the ancestor, Julius A. Lee, Jr., from whom the inheritance was derived.

7. The intervening petitioners claim their proportionate part of said land as heirs-at-law of N. J. Lee, claiming that said lands were purchased and that therefore N. J. Lee became the beginning of a new line of inheritance.

The deed executed by Julius A. Lee, to N. J. Lee 22 December, 1893, contains the following provisions:

"Witnesseth: that said Julius A. Lee, Jr., in consideration of natural love and the payment of judgment to P. T. Massengill of about $160.00, to him paid by N. J. Lee, the receipt of which is hereby acknowledged, has bargained and sold and by these presents does bargain, sell and convey to said N. J. Lee and his heirs and assigns, a certain tract of land. . . .

"It is expressly understood by both parties to this deed that the party of the first part reserves his life estate upon said land and also the right of his wife, Mary Lee, to a dower thereon, if she survives her husband, and the said Julius A. Lee, Jr., party of the first part, does hereby reserve to himself for the term of his natural life the full use and control of said land and also for his said wife a dower interest in the same after his death.

"To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said N. J. Lee and his heirs and assigns to his and their only use and behoof forever, subject to the reservation and exceptions above set out.

"And the said Julius A. Lee, Jr., covenants to and with the said N. J. Lee and his heirs and assigns forever, that he is seized of said premises in fee and has a right to convey the same in fee simple, that the same are free from all encumbrances, except a judgment to P. T. Massengill and that he will warrant and defend the said title to the same against the claims of all persons whatever except against said judgment."

On 12 August, 1912, after the death of his wife J. A. Lee made another deed to N. J. Lee purporting to convey the same land and to correct the former deed, the only "correction" being a recited consideration of $1,200.

The original petitioners are children of Julius A. Lee, and sisters of the whole blood of N. J. Lee, the only son. N. J. Lee died in 1921.

The clerk adjudged that the original petitioners are the owners of the land and entitled to partition, and upon appeal the Superior Court affirmed the judgment and further adjudged that the intervening petitioners are not entitled to any interest in the land, not being of the blood of Julius A. Lee, from whom the inheritance came.

The intervening petitioners excepted and appealed.

Ezra Parker and Parker & Lee for appellants.
Leon G. Stevens for appellees.

ADAMS, J., after stating the case: N. J. Lee was the only son of Julius A. Lee. While his father was living he died intestate without lineal descendants, leaving sisters of the whole blood who, with the children of a deceased sister, are the original petitioners. The intervening petitioners are collateral relations of the half-blood of N. J. Lee, being of the blood of his mother but not of his father, and in this capacity they claim an interest in the land in suit. The trial court adjudged that they have no interest in the land and they excepted and appealed.

The fourth canon of descent is in these words: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules." C. S., 1654, Rule 4.

This rule must be construed in connection with the sixth, which provides that collateral relations of the half-blood shall inherit equally with those of the whole blood, and that the degrees of relationship shall be computed according to the rules which prevail in descents at common law. *Paul v. Carter,* 153 N. C., 26; *Noble v. Williams,* 167 N. C., 112. It is thus enacted that collateral relations of the half-blood shall inherit equally with those of the whole blood in all cases excepting those particularly stated in the fourth rule. The exceptions are these: (1) cases in which the inheritance has been transmitted to the propositus by descent from an ancestor; (2) cases in which it has been derived by gift, devise, or settlement from an ancestor to whom the person so advanced (the propositus) would in the event of the ancestor's death have been the heir or one of the heirs. In these two cases the inheritance shall descend to the next collateral relations of the propositus who are of the blood of the ancestor from whom it was derived. In *Burgwyn v. Devereux,* 23 N. C., 582, *Chief Justice Ruffin* observed that "purchased estates—in the popular sense of the term, purchase—descend to the nearest relations, whether of the paternal or maternal line; and that descended estates and certain purchased estates (which the act puts on the same footing with those descended) descend to the nearest relations of the blood of the ancestor or person from whom the estate moved." The purchased estates which are on "the same footing" with estates descended are those derived from an ancestor by gift, devise, or settle-

ment. C. S., 1654, Rule 4; *Bell v. Dozier,* 12 N. C., 333; *Felton v. Billups,* 19 N. C., 308; *Wilkerson v. Bracken,* 24 N. C., 315; *Gillespie v. Foy,* 40 N. C., 280; *Osborne v. Widenhouse,* 56 N. C., 238; *Dozier v. Grandy,* 66 N. C., 484; *Watson v. Sullivan,* 153 N. C., 246; *Poisson v. Pettaway,* 159 N. C., 650; *Forbes v. Savage,* 173 N. C., 706.

The immediate question, then, is this: Did N. J. Lee acquire his inheritance or title from his father by descent, devise, gift, or settlement? The clerk held that the deed to N. J. Lee was not such a conveyance of purchase as would change the line of descent and create a new line of inheritance. His conclusion was based in part upon the consideration recited in the first deed, the reservation of a life estate and of the right of dower, and the father's retained possession of the land—"the home place"—until his death. Without reference to these recitals the trial judge affirmed the clerk's judgment in general terms.

If J. A. Lee had died intestate, seized of the land in fee, N. J. Lee would have been one of his heirs; but if, subject to the life tenure, the son acquired his interest for value as a "purchased estate" and not by descent or by purchase in the sense of a gift, devise, or settlement, the judgment cannot be upheld. He did not take title by devise: his father died intestate. The word "gift" ordinarily imports a voluntary transfer of property by one person to another without consideration or compensation. And with respect to advancements the law is explicit. If a father having several children conveys valuable land to one of them for love and affection, or for a nominal consideration, he is presumed to have intended an advancement, the consideration not being meritorious. *Harper v. Harper,* 92 N. C., 300; *Powell v. Morisey,* 98 N. C., 426; *Stevens v. Wooten,* 190 N. C., 378. The judgment appealed from may have been founded on this principle; but in such event the presumption may be rebutted by proof that the conveyance was made for value. *Harper v. Harper, supra.*

In this case the deed recites a consideration of natural love and the payment of one hundred and sixty dollars. The words "natural love" do not qualify the estate. *Mosely v. Mosely,* 87 N. C., 69. The consideration named in the deed is presumed to be correct. *Faust v. Faust,* 144 N. C., 383. As we have said, not being contractual it may be inquired into by parol evidence; but we have discovered no parol evidence to contradict the recital. As there is no such evidence we may assume that the grantee paid Massengill $160 in satisfaction of a judgment which was a lien on the land. This payment was a valuable consideration. *Institute v. Mebane,* 165 N. C., 644; *Fertilizer Co. v. Eason,* 194 N. C., 244; *Trust Co. v. Anagnos,* 196 N. C., 327. It was not merely nominal. Retaining a life estate, Julius A. Lee retained also the possession of the

land. Whether he could have done so if the judgment had not been satisfied is not determined. At any rate the release of the lien was a benefit to the grantor and a detriment, loss, or inconvenience to the grantee who paid the money. No evidence was offered to show that the sum paid was not "near the value of the conveyed property." *Kiger v. Terry,* 119 N. C., 456. Is it not reasonable to conclude upon the admitted facts and upon an inspection of the first deed that the parties regarded the recited consideration as at least approximating the value of the interest conveyed?

The appellees say that the second deed conveyed no title and amounts to nothing. *Buchanan v. Clark,* 164 N. C., 56. The record shows that it was "offered and admitted as evidence." If it was considered as evidence of the inadequacy of the consideration named in the first deed why should not the admitted receipt of $1,200 be accepted as proof that full value was paid? If we disregard the second deed, we are still led to the conclusion that the consideration set out in the first deed is meritorious, that the grantee's estate was acquired by purchase, and not by descent, gift, devise, or settlement, and that the intervening petitioners are entitled to the relief prayed. Judgment

Reversed.

L. L. BROWN, TRADING AS BROWN MOTOR COMPANY, v. LESLIE J. PAYNE.

(Filed 30 September, 1931.)

1. Principal and Agent C d—As between two innocent parties the one first reposing confidence in the wrongdoer must suffer the loss.

Where the purchaser of an automobile executes a note and title retaining contract under an agreement that the seller should negotiate the note to a credit company, and thereafter, while the note is in the hands of the credit company pending its acceptance thereof, the purchaser, with knowledge of the facts, signs another note and title retaining contract in blank, and the seller fills in the blanks in the name of an automobile dealer, who, without knowledge of the first note, negotiates the second note as payee to another credit company and pays the proceeds to the seller as a matter of accommodation, and the seller collects and retains the proceeds of the first note also, *Held:* the dealer, having paid the note negotiated in its name, may recover from the purchaser of the automobile the amount thereof on the principle that as between two innocent parties the one first reposing confidence in a third person must suffer the loss occasioned by his wrongful act, and the question of whether the dealer was the payee of holder in due course of the second note does not affect his right to recover against the purchaser of the automobile.

2. Trial D b—Refusal to direct verdict on conflicting evidence is not error.

Where the evidence relating to an issue is conflicting the refusal of the trial court to direct a verdict thereon is not error.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1931, of NORTHAMPTON. No error.

On or about 13 May, 1929, the defendant, Leslie J. Payne, purchased from J. Dewey Rice, a new Chrysler automobile. In accordance with the contract of purchase, the defendant executed and delivered to J. Dewey Rice a note in part payment of the purchase price of the automobile. Defendant also executed and delivered to the said J. Dewey Rice a contract by which the title to the said automobile was retained as security for the note. It was understood and agreed at the time the note and contract were signed and delivered that both would be sold and assigned to the Atlantic Discount Corporation of Elizabeth City, N. C., provided said corporation should agree to purchase the note from J. Dewey Rice and pay to him the purchase price in cash. This note was dated 13 May, 1929.

On 14 May, 1929, J. Dewey Rice informed the defendant that he had tendered the note and contract executed by the defendant on 13 May, 1929, to the Atlantic Discount Corporation, and that said corporation had advised him that it would require several weeks for investigation before the said corporation could determine whether or not it would purchase the note. J. Dewey Rice then requested the defendant to execute and deliver to him another note and contract for the balance due on the purchase price of the automobile, advising defendant that he would tender the second note and contract to the Commercial Credit Company of Charlotte, N. C. In compliance with this request, defendant executed and delivered to J. Dewey Rice a second note and contract, with full knowledge that said note and contract would be offered to the Commercial Credit Company. Defendant authorized J. Dewey Rice to fill in blanks in said note and contract, after he had signed the same. At the time defendant signed the second note and contract, he knew that the note and contract which he had signed and delivered to J. Dewey Rice on 13 May, 1929, were then in the possession of the Atlantic Discount Corporation, awaiting the decision of said corporation as to whether or not it would purchase the said note and pay the proceeds thereof to J. Dewey Rice.

At the date of the execution by defendant of the second note and contract, which it was understood and agreed would be offered to the Commercial Credit Company, for purchase, J. Dewey Rice had no arrangements with said company by which he was authorized to draw on it

for the amount of a note offered by him to said company for purchase. He knew, however, that plaintiff, a dealer in automobiles, had such arrangements with said company. He therefore requested the plaintiff to take the note and contract, attach same to a draft on the Commercial Credit Company and pay him in cash the amount of the note. Plaintiff, as an accommodation to J. Dewey Rice, agreed to handle the note and contract in accordance with his request. The blanks in the note and contract were filled, showing that plaintiff had sold the automobile to defendant, and that plaintiff was payee of the note. After the completion of this transaction, plaintiff gave to J. Dewey Rice his check for $970.00. This check was paid. Plaintiff then attached the note with his endorsement to his draft on the Commercial Credit Company at Charlotte, N. C., and forwarded the draft for collection. The draft was paid by the Commercial Credit Company. At the time of this transaction plaintiff did not know that defendant had executed the note and contract, which were then in possession of the Atlantic Discount Corporation.

About three weeks after these transactions, the Atlantic Discount Corporation notified J. Dewey Rice that it had accepted the first note and contract executed by defendant; the said corporation paid the proceeds of the said note to J. Dewey Rice who accepted and used the same, without notifying either the plaintiff or the defendant that the Atlantic Discount Corporation had purchased and paid for said note. As the result of these transactions, J. Dewey Rice received the proceeds of both notes executed by defendant in payment of the balance due on the purchase price of the automobile which he had sold to defendant.

Some time after these transactions, defendant was notified by the Atlantic Discount Corporation that said corporation had purchased from J. Dewey Rice the first note executed by him, and by the Commercial Credit Company that said company had purchased from the Brown Motor Company the second note executed by defendant. Defendant then notified plaintiff that he would not pay the note held by the Commercial Credit Company, but would pay the note held by the Atlantic Discount Corporation. Since then, defendant has paid in full the first note executed by him, said payment having been made to the Atlantic Discount Corporation. Plaintiff has been required to pay and has paid to the Commercial Credit Company the sum of $985.00, on account of his endorsement of the note executed by defendant and delivered by him to J. Dewey Rice, on 14 May, 1929. Plaintiff now holds said note.

J. Dewey Rice has paid to plaintiff on account of the note executed by defendant the sum of $375.00, leaving as the balance due plaintiff on said note the sum of $610.00.

The issues submitted to the jury, without objection by the defendant, were answered as follows:

"1. Did the defendant, Leslie J. Payne, by his act in signing the note and contract sued on, in blank, place J. Dewey Rice in position to perpetrate a fraud on defendant? Answer: Yes.

2. If so, did the plaintiff, Brown Motor Company, have knowledge of the fraud perpetrated by J. Dewey Rice and participate therein? Answer: No.

3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $610.00.

4. What was the value of the automobile at the time it was taken under claim and delivery in this action? Answer: $610.00."

From judgment that plaintiff recover of the defendant and the surety on his replevin bond, Southern Surety Company of New York, the sum of $610.00, with interest thereon, defendant appealed to the Supreme Court.

Burgwyn & Norfleet for plaintiff.
A. T. Castelloe for defendant.

CONNOR, J. The fraud perpetrated by J. Dewey Rice on both plaintiff and defendant in this action, as shown by all the evidence at the trial, was not in procuring the execution by the defendant of the second note and contract, now held by the plaintiff, but in retaining the proceeds of the first note paid to him by the Atlantic Discount Corporation, after he had received from the plaintiff the proceeds of the second note which was sold to the Commercial Credit Company, with the endorsement of the plaintiff, who was the nominal payee of said note. At the date of the execution of the second note by the defendant, defendant knew that the first note was then in the possession of the Atlantic Discount Corporation, awaiting its decision as to whether or not said corporation would purchase said note and pay the proceeds thereof to J. Dewey Rice. With this knowledge, defendant executed and delivered to J. Dewey Rice the second note and contract, thereby enabling the said J. Dewey Rice to perpetrate a fraud not only on the defendant, but also on the plaintiff. The principle on which defendant is liable to plaintiff on all the facts shown by the evidence is well settled in the law, and has been frequently applied by this Court. The principle was thus stated by *Ashe, J.*, in *R. R. v. Kitchin,* 91 N. C., 40: "Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss." See *Bank v. Liles,* 197 N. C., 413, 149 S. E., 377, and numerous cases cited therein.

Assignments of error based on defendant's exceptions to the refusal of the trial court to allow his motion for judgment as of nonsuit, and to instruct the jury as requested by the defendant cannot be sustained.

Upon the facts shown by all the evidence at the trial, it is immaterial whether the plaintiff was the holder in due course, or the payee of the note sued on in this action. There was, therefore, no error in the refusal of the court to submit to the jury the issues tendered by the defendant. The right of plaintiff to recover in this action is not determined by his relation to the note, whether payee, as appears upon its face, or holder in due course, as there was evidence tending to show.

There was evidence tending to show that the note for $1,500 was delivered to the plaintiff by J. Dewey Rice in full satisfaction of the loss sustained by plaintiff. There was also evidence tending to show that it was agreed by and between plaintiff and J. Dewey Rice that the proceeds of this note should be prorated among the debts of J. Dewey Rice to plaintiff, resulting in a credit on the note sued on of $375.00. Conflicting evidence in support of the respective contentions of the parties as to the answer to the third issue, was submitted to the jury under instructions which are free from error. The exceptions to the refusal of the court to instruct the jury to answer the third issue "nothing," as requested by the defendant, cannot be sustained.

There was no error in the trial of this action. The judgment is affirmed.

No error.

RUTH PATE v. GURNEY S. PATE.

(Filed 30 September, 1931.)

Judgments G b—Upon agreement of parties judgment on motion may be rendered out of term and county of trial.

Where an absolute divorce has been decreed in an action and a motion is made respecting the custody of a minor child, and the parties agree that the judge should render judgment on the motion out of term and outside the county of trial, the judgment rendered under the terms of the agreement is valid, the judge having authority to render such judgment. C. S., 1664.

APPEAL by plaintiff from *Sinclair, J.*, at June Term, 1931, of WAYNE. Affirmed.

This was an action for divorce, begun in the Superior Court of Wayne County, on 29 June, 1929.

At August Term, 1929, of said court, there was a judgment and decree dissolving, absolutely, the bonds of matrimony theretofore existing be-

tween plaintiff and defendant. There was no order in the judgment or prior thereto, with respect to the custody of Dollie Pate, the minor child of plaintiff and defendant. Since said judgment, the said Dollie Pate has been in the exclusive custody of the plaintiff, who has resided with and been supported by her father, E. F. Lancaster.

At June Term, 1931, of said court, the motion of the defendant for an order with respect to the future custody of Dolly Pate came on for hearing and was heard by Judge Sinclair, holding said court, on the last day of the term. After hearing numerous affidavits filed by plaintiff and defendant, and the arguments of their counsel, Judge Sinclair indicated his wish to have an opportunity to read and consider the affidavits and arguments of counsel. At his suggestion, it was agreed by the parties that he should take the affidavits, and make his order on the motion of the defendant out of the term and out of the county.

Thereafter, while holding the June Term, 1931, of the Superior Court of Johnston County, Judge Sinclair made and signed an order with respect to the custody of Dollie Pate. This order was signed at Smithfield, N. C., on 26 June, 1931, and has been duly filed in the Superior Court of Wayne County.

Plaintiff in apt time moved that the order signed by Judge Sinclair be set aside and vacated on the ground that the order was void. The motion was denied and plaintiff excepted. Plaintiff thereupon appealed from the order to the Supreme Court.

J. Faison Thomson for plaintiff.
Paul B. Edmundson and Kenneth C. Royall for defendant.

PER CURIAM. The contention of plaintiff on her appeal to this Court that the order in this action signed by Judge Sinclair on 26 June, 1931, at Smithfield, N. C., is void, for that Judge Sinclair who had heard defendant's motion at June Term, 1931, of the Superior Court of Wayne County, was without jurisdiction to make and sign the order out of term and out of Wayne County, cannot be sustained.

It appears both from the record and from the case on appeal filed in this Court that Judge Sinclair was expressly authorized by the parties to this action to make and sign the order out of term and out of the county. For this reason the order is valid, notwithstanding it was made and signed at Smithfield, N. C., on 26 June, 1931. *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1. The motion on which the order with respect to the custody of Dollie Pate, the minor child of the parties, was made, was expressly authorized by statute, C. S., 1664. The order is

Affirmed.

A. F. HOLT AND SONS v. MARY LYNCH, INDIVIDUALLY AND AS ADMINISTRATRIX OF W. M. LYNCH, HER DECEASED HUSBAND.

(Filed 7 October, 1931.)

1. **Dower A b—Dower is widow's estate in one-third of lands, etc., of which husband was beneficially seized during coverture.**

   Dower is the life estate to which a married woman is entitled upon the death of her husband intestate or in case of her dissent from his will, and is one-third in value of all lands, tenements, and hereditaments, legal and equitable, of which the husband was beneficially seized at any time during coverture, and which her issue might inherit as heir to the husband, and upon the husband's death the right of dower is consummate.

2. **Dower C a—Respective rights of widow and creditors of husband's estate in regard to widow's dower right.**

   During the term of her life the widow's dower right is not ordinarily subject to the payment of debts of her husband's estate, and while the widow may subject her dower to the payment of the debts of her husband's estate by joining in his mortgage deed or conveyance in conformity to the statutory requirements, C. S., 4102, yet if his estate is solvent the dower need not be sold, and in the event that it is insolvent the estate must be administered according to the established rules.

3. **Dower C b—Procedure for allotment of dower right of widow and rights of creditors and widow in estate of deceased husband.**

   Where a wife has signed her husband's mortgage deed, observing the statutory requirements, and he has died intestate, the mortgagee is not entitled to have the lands sold and the value of the widow's dower paid to her out of the proceeds, but if there are no unsecured creditors of the husband's estate he should first take his claim out of the personal estate of the husband, but if the estate is insolvent, the widow's dower in the land should be laid out, and the remaining two-thirds of the lands sold and applied to the mortgage debt before sharing in the personal estate ratably with other creditors, and if this is not sufficient to pay the mortgage debt, he is entitled to have the dower interests sold and applied thereto, the widow having assigned her right as security for the debt.

4. **Same—Before allotting dower to widow heirs at law of deceased husband should be made parties.**

   Before allotment of dower is made in the lands of a deceased husband dying intestate his heirs at law should be made parties plaintiff or defendant C. S., 456, 457, 460.

APPEAL by respondent from *Sinclair, J.*, at Chambers in JOHNSTON. Error.

The proceeding was brought for appraising dower and paying the value thereof out of funds derived from a sale under the power conferred in a deed of trust.

On 7 January, 1929, W. M. Lynch died intestate seized of a tract of land in Johnston County, subject to a deed of trust executed by himself and Mary Lynch, his wife, to Jack Smith, trustee, to secure a debt the husband owed H. Weil and Brothers of Goldsboro. The plaintiff bought the bond secured by the deed of trust and caused the land to be sold. By consent of parties the sale was set aside. Judge Sinclair then appointed commissioners to sell the land by public auction and to make a report of the sale. He restored the former situation of the parties and adjudged that "Mary, wife of W. M. Lynch, receive as the value of her dower upon said lands, so much of said funds as is equal to a one-third interest in the same for the term of her natural life based upon the purchase price of the said land at the sale herein decreed, and that upon payment of said sum, . . . from which shall be deducted one-third of the taxes upon the said lands for the years 1928, 1929, 1930, the said Mary Lynch . . . is forever barred from any and all claims against the said land." This is followed by an order for the distribution of the funds.

The respondent excepted and appealed.

F. H. Brooks for appellant.
Abell & Shepard for appellees.

ADAMS, J. The trial court set aside the trustee's sale and restored the parties to their former relation. The proceeding may therefore be treated as a suit to foreclose the deed of trust and to administer the intestate's estate. In these circumstances what are the widow's rights with respect to dower?

In her answer Mrs. Lynch alleges that she is entitled to dower in the land of which her husband was seized during coverture and that the remaining two-thirds is of sufficient value to satisfy the deed of trust and all other claims. While the record contains an intimation that the estate of the deceased is solvent, whether in fact it is, is an undetermined question, as is also the suggestion that the intestate may have been seized of other lands.

Upon the death of the husband the widow's right of dower was consummate. She joined him in the execution of the deed of trust and thereby subjected herself to the following provision: "The right to dower under this chapter shall pass and be effectual against any widow, or person claiming under her, upon the wife joining with her husband in the deed of conveyance and being privately examined as to her consent thereto in the manner prescribed by law." C. S., 4102. See *Griffin*

v. Griffin, 191 N. C., 227, and compare *Blower Co. v. MacKenzie,* 197 N. C., 152.

It is possible that Mrs. Lynch's interest in the mortgaged land may finally be exhausted. Still, "dower is a favorite of the law" and the widow has an equity of exoneration as against unsecured creditors, heirs, and the next of kin. *Campbell v. Murphy,* 55 N. C., 357; *Creecy v. Pearce,* 69 N. C., 67.

Dower is a life estate to which every married woman is entitled upon the death of her husband intestate, or in case of her dissent from his will, being one-third in value of all the lands, tenements, and hereditaments, legal and equitable, of which her husband was beneficially seized in law or in fact at any time during coverture, and which her issue might by possibility inherit as heir to the husband. *Chemical Co. v. Walston,* 187 N. C., 817. This estate, that is, the dower or right of dower, is not ordinarily subject to the payment of debts due from the estate of her husband during the term of the widow's life; it is subject only to such debts of the husband as are a charge on the land. C. S., 4098; *Creecy v. Pearce, supra.*

If, as contended by the appellant, the estate of her deceased husband is solvent it may not be necessary to sell the dower at all. In view of this contention and of the undetermined value of the intestate's estate the appellant is entitled to have her dower laid off and a sale made of the remaining two-thirds of the land and, if necessary, of the reversion in the dower, in exoneration of the dower itself. *Caroon v. Cooper,* 63 N. C., 386; *Overton v. Hinton,* 123 N. C., 1. If the sale raises funds sufficient to satisfy all claims against the estate the dower will not be disturbed during the life of the widow.

On the other hand, if the estate turns out to be insolvent the law must be administered according to the rule stated in *Chemical Co. v. Walston, supra:* "Before the mortgagee can enforce his security against the widow's dower, after the death of the husband, he must first take his claim out of the personal estate of the deceased (the fund primarily liable), if there be sufficient assets to pay said debt. But if the estate be insolvent, the other creditors are entitled to have the mortgagee exhaust his collateral security by sale of the two-thirds of land not embraced in the dower and the reversion in the dower land before sharing in the personal estate, and the mortgagee's claim will be reduced by whatever amount he derives from the sale of his collateral security, and only the balance of his claim will then share ratably with the other creditors in the personal estate, and should this be not enough to pay the mortgage debt he would then be entitled to collect the residue of his claim out of the widow's dower in the land assigned as security for his debt."

Under the facts disclosed by the record the widow is entitled to an actual allotment of dower, subject to the principles above stated. In this way the equitable protection of the rights of all parties can best be subserved; but before the allotment is made the heirs of the deceased husband should be made parties plaintiff or defendant. C. S., 456, 457, 460.

Error.

JAMES BYRD v. PILOT FIRE INSURANCE COMPANY, C. C. CANADY, TRUSTEE FOR L. J. BEST, AND L. J. BEST.

(Filed 7 October, 1931.)

1. Judgments G a—Judgment creditor or his assignee has only lien on land of judgment debtor but no estate or title therein.

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, the lien exists against a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. C. S., 614.

2. Insurance D a—Claimant having no contract with insurer in this case the question of insurable interest does not arise.

Where a judgment creditor does not insure his interest in the lands of the judgment debtor and there is no loss payable clause in his favor attached to a policy of fire insurance taken out by the judgment debtor, the question of whether the judgment creditor has an insurable interest in the property does not arise in an action on the policy taken out by the judgment debtor.

3. Insurer N e—Judgment creditor having only lien and no contract with insurer is not entitled to proceeds of policy.

A judgment creditor or his assignee, having only a lien on the lands of the judgment debtor, is not entitled to the proceeds of a policy of fire insurance taken out on the property by the judgment debtor or his transferee in the absence of a contract between the judgment creditor or his assignee and the insurer.

APPEAL by defendant, L. J. Best, from *MacRae, Special Judge,* at February Term, 1931, of HARNETT. Affirmed.

This is an action to recover on a policy of insurance for $500.00, issued to the plaintiff by the defendant, Pilot Fire Insurance Company, on 24 May, 1930.

The property insured by said policy against loss or damage by fire was a one-story, frame building located on a lot in the town of Dunn, Harnett County, N. C. This building was destroyed by fire on 22

August, 1930. The defendant, Pilot Fire Insurance Company, admitted its liability under the policy for the sum of $500.00, but declined to pay said sum to the plaintiff, until the validity of the claim of the defendant, L. J. Best, the owner of a docketed judgment, which was a lien on the lot of land on which said building was located, at the date of its destruction by fire, had been first determined.

The defendant, L. J. Best, is now and was at the date of the fire which destroyed the building covered by the policy of insurance, the owner of a judgment which was rendered by the Superior Court of Harnett County in favor of John Beasely and against R. L. Godwin for the sum of $900.00. This judgment was duly docketed on the judgment docket of the Superior Court of Harnett County, and on 19 March, 1926, was duly transferred and assigned to the defendant, C. C. Canady, trustee for L. J. Best. The defendant, L. J. Best, is the owner of said judgment.

The judgment debtor, R. L. Godwin, at or subsequent to the date of the docketing of said judgment, was the owner of the lot of land on which the building destroyed by fire on 22 August, 1930, was located. He conveyed the said lot of land to J. D. Barnes by a deed which has never been registered. Thereafter, for a valuable consideration, J. D. Barnes conveyed said lot to the plaintiff by a deed which was registered in the office of the register of deeds of Harnett County on 29 June, 1927.

After the said lot was conveyed to him by J. D. Barnes, the plaintiff erected thereon the building which was destroyed by fire.

On 24 May, 1930, the defendant, Pilot Fire Insurance Company, issued to plaintiff the policy of insurance sued on in this action, by which the said defendant insured the plaintiff against loss or damage by fire on said building in the sum of $500.00. There is no loss payable clause in said policy in favor of the defendant, C. C. Canady, trustee for L. J. Best, or in favor of the defendant, L. J. Best.

Plaintiff had no actual knowledge of the existence of the judgment owned by the defendant, L. J. Best, at the date of the erection of said building. He knew, however, prior to the issuance of the policy of insurance that said defendant owned said judgment, and that said judgment was a lien on the lot on which he had erected the said building. There was no agreement between plaintiff and the defendant, L. J. Best, with respect to insurance on the building against loss or damage by fire.

After the destruction by fire of the building insured by the policy of insurance, and prior to the commencement of this action, the defendant, L. J. Best, notified the defendant, Pilot Fire Insurance Company, that he claimed the proceeds of said policy by virtue of his lien, as the owner of the docketed judgment against R. L. Godwin, on the lot of land at

the date of the fire. Upon its receipt of this notice, the defendant, Pilot Fire Insurance Company, notified the plaintiff that it would not pay the amount due under the policy until the validity of the claim of the defendant, L. J. Best, had been first determined. Thereafter this action was begun.

Upon the foregoing facts, found by the court from the pleadings, it was ordered, considered and adjudged that the defendants, C. C. Canady, trustee for L. J. Best, and L. J. Best, had no insurable interest in the building insured by the policy of insurance issued by the defendant, Pilot Fire Insurance Company, on 24 May, 1930, and destroyed by fire on 22 August, 1930, by virtue of the lien of the docketed judgment against R. L. Godwin, and that said defendants are not entitled to the proceeds of said policy of insurance.

It was further ordered, considered and adjudged that plaintiff recover of the defendant, Pilot Fire Insurance Company, the sum of $500.00, with interest, and of the defendant, L. J. Best, the costs of the action.

From this judgment, the defendant, L. J. Best, appealed to the Supreme Court.

Clifford & Williams for plaintiff.
James Best for defendant, L. J. Best.
Hoyle & Harrison for Insurance Company.

CONNOR, J. On the facts found by the court at the trial of this action, the judgment against R. L. Godwin for the sum of $900.00, which was duly docketed on the judgment docket of the Superior Court of Harnett County, and which was subsequently transferred and assigned to the defendant, L. J. Best, who is now the owner thereof, was a lien on the lot of land now owned by the plaintiff, at the date of the issuance of the policy of insurance sued on in this action, and also at the date of the destruction by fire of the building covered by said policy. C. S., 614. *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494.

The defendant, L. J. Best, had the right to enforce this lien by the sale of the lot of land, with all improvements thereon, under execution on the judgment, or by other appropriate proceeding. He had, however, no title to or estate in the lot of land, or the building located thereon; he had only the right to have the land and improvements thereon, whether made by the judgment debtor, or by the plaintiff, who claims title to the lot of land under an unregistered deed from the judgment debtor, appropriated to the satisfaction of the judgment. *Farrow v. Ins. Co.,* 192 N. C., 148, 134 S. E., 427; *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494.

The question as to whether the defendant, L. J. Best, had an insurable interest in the building located on the lot of land, which was destroyed by fire on 22 August, 1930, is not presented in this action. It has been held that one holding a lien on property to secure a debt has an insurable interest in such property to the amount of the lien. 26 C. J., 27. In the instant case, the defendant, L. J. Best, had not insured his interest, as the owner of the judgment lien, in the building on the lot of land. The policy issued to plaintiff and sued on in this action contains no loss payable clause directing that the loss, if any, under the policy shall be paid to the defendant; nor was there any agreement on the part of the plaintiff to insure the building for the benefit of the defendant. *Fitts v. Grocery Co.*, 144 N. C., 463, 57 S. E., 164, cited and relied upon by the appellant, has no application to the facts of this case.

The only question presented by this action is whether the defendant, L. J. Best, as the owner of a judgment lien on the lot on which the building insured was located, is entitled to the proceeds of the policy issued to the plaintiff by the defendant, Pilot Fire Insurance Company. This question was decided by the court below in the negative. In this, there was no error.

"One who has a mere lien only on the insured property has no claim to the insurance money realized by the insured in the event of the loss of the property, for a claim on the insurance money can arise only out of contract." 26 C. J., 445. In the instant case there was no contract between the insurance company and the defendant, L. J. Best, or between said defendant and plaintiff, with respect to insurance on the building which was destroyed by fire.

The judgment that plaintiff recover of the defendant, Pilot Fire Insurance Company, the sum of $500.00, and of the defendant, L. J. Best, the costs of the action, is

Affirmed.

GEORGE P. STREET v. BEAUFORT FISH SCRAP AND OIL COMPANY AND W. J. SWAN, TRUSTEE.

(Filed 7 October, 1931.)

Insurance N e—Holder of tax sale certificate is not entitled to proceeds of policy of fire insurance covering premises.

The assignee of a tax sale certificate has no title to or estate in the land described in the certificate and, upon destruction of the property by fire, he is not entitled to the proceeds of a policy of fire insurance

covering the premises, and his motion for an order restraining the insured from collecting on the policy and for a receiver to collect the proceeds for payment of the amount of the certificate is properly denied.

APPEAL by plaintiff from *Frizzelle, J.*, at Chambers in New Bern, on 8 April, 1931. From CARTERET. Affirmed.

This is an action to foreclose a tax sale certificate which was transferred and assigned to plaintiff by Carteret County. It is alleged in the complaint that said tax sale certificate is a lien on certain lands and premises owned by the defendants. This allegation is denied in the answer filed by defendants.

Since the commencement of the action the buildings located on said land at the date of their assessment for taxation have been destroyed by fire. At the date of the fire the said buildings were insured against loss or damage by fire in a large sum by a policy of insurance issued to the defendants.

Plaintiff moved in this action for an order restraining the defendants from collecting or receiving the proceeds of the policy of insurance and for the appointment of a receiver with full power and authority to take and receive from the insurance company a sum sufficient in amount for the payment of the tax sale certificate, with interest and costs. This motion came on for hearing, and was denied.

From the order denying his motion, the plaintiff appealed to the Supreme Court.

Ward & Ward for plaintiff.
Moore & Dunn and R. E. Whitehurst for defendants.

CONNOR, J. There is no error in the order denying the motion of the plaintiff in this action.

The plaintiff had no title to or estate in the land described in the tax sale certificate, or in the buildings located on said land. He had merely a lien for the amount of the taxes levied on said land as the property of the defendants, for the year 1928. He had no rights under the policy of insurance issued to the defendants and in force at the date of the fire. He, therefore, has no claim to the proceeds of the fire insurance policy which was issued to the defendants. See *Byrd v. Ins. Co., ante,* 407. The order is

Affirmed.

FARMERS BANK OF CLAYTON v. NELLIE HORNE McCULLERS, MELBA McCULLERS MISENHEIMER AND MELBA McCULLERS MISENHEIMER, EXECUTRIX.

(Filed 7 October, 1931.)

1. **Fraudulent Conveyances A b—In action to set aside deed as being voluntary the grantee is entitled to prove real consideration.**

Where, in an action to set aside a deed from a mother to her daughter as being voluntary and fraudulent as to creditors, the daughter attempts to show that the deed was given in consideration of personal services rendered the mother by her, upon a promise to pay therefor, it is error for the trial court to confine her evidence to services rendered within three years next preceding the commencement of the action or the death of the grantor, the action not being to recover for such services and no plea of the statute of limitations being entered.

2. **Same—Where consideration is alleged to be services rendered grantor by daughter presumption of gratuity is rebuttable.**

In an action to set aside a deed from a mother to her daughter as being voluntary and fraudulent as to creditors, the daughter is entitled to show, if she can, that the consideration for the deed was personal services rendered by her to her mother, the presumption of gratuity arising out of the relationship being rebuttable by proof of an agreement to pay, or that payment was intended on the one hand and expected on the other, and although the deed, if voluntary, is void as to creditors, it is otherwise if the defendant can show a valuable consideration therefor.

3. **Judgments C b—Judgment by confession in this case held not necessarily void as matter of law.**

The judgment by confession in this case is held not necessarily void as matter of law, it appearing that the confession and entry on their face conform to statutory requirements.

APPEAL by defendants from *Sinclair, J.*, at April Term, 1931, of JOHNSTON.

Civil action instituted by Farmers Bank of Clayton, judgment creditor of Nellie Horne McCullers, to set aside an alleged voluntary conveyance and purported confession of judgment, alleged to have been executed and entered by the said Nellie Horne McCullers in favor of her daughter, Melba McCullers Misenheimer, fraudulently and with intent to delay, hinder and defeat the rights of plaintiff and other creditors.

On 24 October, 1927, the plaintiff instituted two suits against Nellie Horne McCullers to recover on promissory notes aggregating something over $10,000. Judgments were entered in these cases for the plaintiff at the April Term, 1929. Executions on these judgments were returned "nothing to be found."

During the pendency of these actions, to wit, on 20 March, 1928, Nellie Horne McCullers executed a deed to her daughter, Melba Mc-

Cullers Misenheimer, conveying a one-third undivided interest in the home place of the late Ashley Horne, subject to the dower right of his widow. The deed recites a consideration of $500.00, but in the answers filed by Nellie Horne McCullers, Melba McCullers Misenheimer, and later by Melba McCullers Misenheimer, executrix of the estate of Nellie Horne McCullers, deceased, it is alleged that said deed was executed in consideration of personal services rendered by the daughter to her mother under agreement that the deed should be executed in consideration therefor. The court excluded all evidence tending to show services rendered prior to 1 January, 1925. Objection and exception. It is not claimed that any were rendered thereafter as consideration for the deed.

On 28 February, 1929, Nellie Horne McCullers confessed judgment in favor of her daughter, Melba McCullers Misenheimer, of which the following is a copy of the judgment roll:

CONFESSION OF JUDGMENT.

"North Carolina—Johnston County. In the Superior Court.

Melba McCullers Misenheimer v. Mrs. Nellie Horne McCullers.

1. I, Nellie Horne McCullers, defendant in the above entitled action, hereby confess judgment in favor of Melba McCullers Misenheimer, plaintiff, for the sum of $15,975 with interest from 1 February, 1927, the average due date of said account, and authorize the entry of judgment against me thereof on 28 February, 1929.

2. The confession of this judgment is for a debt justly due by me, the said Nellie Horne McCullers, to the said Melba McCullers Misenheimer, plaintiff, arising from the following facts, to wit:

3. For services rendered in nursing her mother, day and night, being companion to her mother, looking after and generally running the household for her mother from 1 January, 1925, through 28 February, 1929, 213 weeks at $75.00 per week (excepting three weeks in January, 1928), $15,975, which said sum is due to the plaintiff by the defendant over and above all just demands that she has against her.

(Signed) Nellie Horne McCullers.

Nellie Horne McCullers, being duly sworn, says that the facts set out in the above confession are true and the amount of judgment confessed is justly due the plaintiff.

Sworn to and subscribed before me this 28 February, 1929.

(Signed) Weisner Farmer, N. P.

(Notarial Seal.)

My commission expires: 17 August, 1929.

This cause coming on to be heard upon the confession of judgment of the said Nellie Horne McCullers, it is, therefore, considered, adjudged and ordered that the plaintiff, Melba McCullers Misenheimer, recover of the defendant, Nellie Horne McCullers, the sum of $15,975, with interest thereon from 1 February, 1927, the average due date of said running account.

Witness my hand and seal, this 28 February, 1929.

(Signed) H. V. Rose, Clerk Superior Court."

Under peremptory instructions that if the facts were found to be as testified to by all the witnesses and as indicated by the record evidence to answer the determinative issues in favor of the plaintiff, the jury returned the following verdict:

"1. Was the deed executed by Nellie Horne McCullers to her daughter, Melba McCullers Misenheimer, 20 March, 1928, recorded in Book 211, page 72, of the registry of Johnston County, a voluntary conveyance without adequate consideration? Answer: Yes.

"4. Is the confessed judgment referred to in the complaint void? Answer: Yes."

From a judgment declaring the deed and confession of judgment void and of no effect, and ordering their cancellation of record, the defendants appeal, assigning errors.

Ed. F. Ward, James D. Parker and Abell & Shepard for plaintiff.

F. H. Brooks and Winfield H. Lyon for defendants.

STACY, C. J. Defendants were not permitted to show, as consideration for the deed in question, services rendered prior to 1 January, 1925, upon the theory, we presume, that recovery for such services was thought to be limited to three years next immediately preceding the commencement of the action, or the death of Nellie Horne McCullers. *Wood v. Wood,* 186 N. C., 559, 120 S. E., 194; *Edwards v. Matthews,* 196 N. C., 39, 144 S. E., 300; *Miller v. Lash,* 85 N. C., 51. In this we think there is error. The action is not to recover for such services and there is no plea of the statute of limitations.

True, services rendered gratuitously by a daughter to her mother may not support a conveyance as against creditors, or be used as the basis of an action against the latter or her estate. *Nesbitt v. Doncho,* 198 N. C., 147, 150 S. E., 875; *Staley v. Lowe,* 197 N. C., 243, 148 S. E., 240; *Stallings v. Ellis,* 136 N. C., 69, 48 S. E., 548. But the presumption of gratuity, which arises out of certain family relationships, 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. *Nesbitt v. Donoho, supra; Dunn v. Currie,* 141 N. C., 123, 53 S. E., 533; *Brown v. Williams,* 196 N. C., 247, 145 S. E., 233; *Henderson v. McLain,* 146 N. C., 329, 59 S. E., 873; *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540. The defendants are entitled to show, if they can, the real consideration for the deed in question. *Pate v. Gaitley,* 183 N. C., 262, 111 S. E., 339; *Faust v. Faust,* 144 N. C., 383, 57 S. E., 22; *Barbee v. Barbee,* 108 N. C., 581, 13 S. E., 215. The plaintiff, on the other hand, is entitled to assail the instrument, if it can successfully do so, as a voluntary conveyance under the principles announced in *Bank v. Lewis, ante,* 148, and cases there cited.

Nor would it seem, under the tests enumerated in *Bank v. McCullers, post,* 440, that the judgment by confession is necessarily void as a matter of law. The confession and entry on their face appear to conform to the requirements of the statute; at least they are not perforce abortive. *Uzzle v. Vinson,* 111 N. C., 138, 16 S. E., 6; 34 C. J., 97, *et seq.*

New trial.

L. G. SHAFFER v. MORRIS BANK, ADMINISTRATOR OF JULIUS SHAFFER, DECEASED; IDA BANK, WIFE OF MORRIS BANK, AND FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 7 October, 1931.)

1. Pleadings D d—Demurrers may be pleaded only for the causes specified by statute.

Under our practice all demurrers are special and may be pleaded only for causes specified in the statute. C. S., 511, 512.

2. Pleadings D e—On demurrer allegations of complaint will be liberally construed.

Upon a demurrer the allegations of the complaint are taken as true and they will be construed liberally, and if when so construed it sets out sufficient facts, or sufficient facts can fairly be gathered therefrom to state a cause of action, the pleading will stand.

3. Appearance A a: A b—Demurrer to sufficiency of complaint is a general appearance waiving defective process.

By demurring to the sufficiency of the complaint a defendant makes a general appearance constituting a waiver of his objection that he is a nonresident and that the court has no jurisdiction over his person.

4. Pleadings D a—Improper venue may not be taken advantage of by demurrer.

A demurrer to the complaint on the grounds that the action was an attack on the final accounting of an administrator and was not brought

in the county where the letters of administration were issued, is bad, venue not being jurisdictional and being available to the objecting party not by demurrer, but by motion in the cause, C. S., 470, it further appearing in this case that the plaintiff might have the right to bring the action in the county of his residence under C. S., 465.

5. Pleadings D c—Demurrer invoking matters not appearing in complaint is bad.

Where the grounds for demurrer invoke matters not appearing upon the face of the complaint or ignore specific allegations therein that the plaintiff's assignment of his interests was procured by fraud the demurrer should be overruled.

6. Pleadings D b—Held: demurrer for misjoinder of parties and causes should have been overruled.

The plaintiff may unite in one complaint several causes of action if they all arise out of the same transaction or a transaction connected with the same subject of action, C. S., 507, and *held* in this case that there was not such misjoinder of parties and causes as to require a dismissal upon defendant's demurrer.

APPEAL by plaintiff from *Harris, J.*, sustaining a demurrer to the complaint at February Term, 1931, of NASH. Reversed.

The complaint sets out the following allegations. The plaintiff resides in Nash County; Morris Bank and his wife, in Baltimore. The principal office of the corporate defendant is in the city of New York.

Julius Shaffer died 12 August, 1929, leaving neither wife nor children, his next of kin being two brothers and a sister, namely, the plaintiff, Morris Shaffer of New York, and the defendant Ida Bank.

The deceased was a resident of Fayetteville. The plaintiff and Morris Bank conferred as to an administration on the estate. Afterwards, Morris Bank by letter requested the plaintiff to renounce his right to qualify as administrator and the plaintiff refused. Morris Bank then went to Fayetteville and falsely represented to the clerk in Cumberland County that he was the proper person to qualify, that all the relatives of the deceased were nonresidents of this State, and that he held their renunciation. In this way he falsely secured letters of administration and gave bond in the sum of $60,000, with the corporate defendant as surety. Morris Bank was indebted to the estate in the sum of $9,800. Ida Bank consented to and approved what he had done. As administrator he received and removed from North Carolina all the assets of the estate.

These two defendants unlawfully conspired to cheat and defraud the plaintiff and held the evidences of Morris Bank's indebtedness to the estate of the deceased; fraudulently concealed from the plaintiff the financial condition of the estate; misrepresented the value of the

plaintiff's interest; stated that it would hasten a settlement of the estate if the plaintiff would execute a deed of assignment to Ida Bank; and that by reason of the fraud so practiced the plaintiff assigned all his right, title, and interest in the estate of the deceased. He received $16,500, which the administrator represented to be the worth of the plaintiff's interest and which in fact was much less than its value.

On 4 December, 1929, the administrator filed with the clerk in Cumberland County a purported final account showing the value of the estate to be approximately $70,000, although in fact it was worth in excess of $100,000. The plaintiff demanded payment of the full value of his interest, which the administrator refused to pay. The plaintiff then brought suit in the Superior Court of Cumberland County and the administrator accounted for $3,000, the difference shown by the account, but still concealed from the plaintiff the true value of the estate and of his interest therein, and in this way secured the signing of a consent judgment.

The plaintiff afterwards discovered that the estate was worth much more than the administrator's account disclosed and finally brought this action to recover the amount demanded in the complaint as money had and received to the use of the plaintiff.

The defendants demurred to the complaint, the court sustained the demurrer, and the plaintiff appealed.

Grissom & Marshburn and Cooley & Bone for plaintiff.
Nimocks & Nimocks and Dye & Clark for defendants.

ADAMS, J. Under our practice all demurrers are special and may be pleaded only for the causes specified in the statute. C. S., 511, 512; *Love v. Comrs.*, 64 N. C., 706. The causes for which the present defendants demur are the improper joinder of parties and causes, the plaintiff's failure to state a cause of action, and "no jurisdiction" of the person of one of the defendants, or of the subject of the action.

The demurrer admits all the allegations in the complaint; and in giving the complaint a liberal interpretation we must adhere to the oft-repeated rule that if it sets out facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can fairly be gathered from it the pleading will stand, because the plaintiff is entitled to the benefit of every presumption and of every reasonable intendment. *S. v. Bank*, 193 N. C., 524; *Seawell v. Cole*, 194 N. C., 546.

The demurrer contains the recital that the defendants "enter a special appearance and demur to the complaint." The *feme* defendant undertook to amend the original demurrer by stating that she entered a special

appearance and moved to dismiss the action as to her, for the reason that she was a resident of Baltimore and not subject to the jurisdiction of the court.

If the *feme* defendant meant that she had been brought into court by defective process or defective service she should have made a special appearance in the beginning and questioned the court's jurisdiction of her person. Instead of doing this she joined her codefendants in filing a demurrer to the sufficiency of the complaint and thereby entered a general appearance. The demurrer previously filed was addressed to the merits of the action and constituted a full appearance and submission to the jurisdiction of the court. *Motor Co. v. Reaves,* 184 N. C., 260; *Scott v. Life Asso.,* 137 N. C., 515; N. C. Pr. & Pro., sec. 328.

Morris Bank took out letters of administration in Cumberland County, and the defendants demur on the ground that the complaint is an attack upon the administrator's final account, over which, it is contended, the Superior Court of Nash County has no jurisdiction. Whether the object of the action is exclusively to impeach the final account may be doubted; but if it is, we must keep in mind the clear distinction between jurisdiction and venue. Jurisdiction implies or imports the power of the court; venue the place of action. Prior to 1868 venue was jurisdictional. *Killian v. Fulbright,* 25 N. C., 9; *Smith v. Morehead,* 59 N. C., 360. Under the present practice it is otherwise. Venue may now be waived because it is not jurisdictional, and is available to the objecting party, not by demurrer, but by motion in the cause. C. S., 470; *Rector v. Rector,* 186 N. C., 618; *Clark v. Homes,* 189 N. C., 703.

There is another point. The complaint shows that the plaintiff resides in Nash County and that all the defendants are nonresidents of the State. Neither of them resides in Cumberland County. If the action be treated as a suit upon the official bond of the administrator the defendants will be confronted by the following statute: "All actions upon official bonds or against executors and administrators in their official capacity must be instituted in the county where the bonds were given if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county." C. S., 465.

The second, third, fourth, and sixth grounds of demurrer invoke matters which do not appear on the face of the complaint and ignore the specific allegation that the alleged agreement of the parties and the plaintiff's assignment of his interest were procured by false and fraudulent representations. *Sandlin v. Wilmington,* 185 N. C., 257; *Hamilton v. Rocky Mount,* 199 N. C., 504.

The complaint does not reveal such a misjoinder of parties and causes as requires a dismissal of suit. *Shuford v. Yarborough,* 197 N. C.,

150. As pointed out in *Trust Co. v. Peirce,* 195 N. C., 717, the complaint states a connected story, forming a general scheme and tending to a single end. The plaintiff may unite in the same complaint several causes of action if they all arise out of the same transaction or a transaction connected with the same subject of action. C. S., 507.

The judgment sustaining the demurrer is reversed. When they answer the complaint the defendants will have opportunity to set up all the defenses on which they rely. Judgment

Reversed.

JOHNSON COTTON COMPANY v. ALEX SPRUNT AND COMPANY, INCORPORATED.

(Filed 7 October, 1931.)

1. **Agriculture D e—Evidence of identity of cotton purchased by defendant as that upon which plaintiff had crop lien held sufficient.**

Where the holder of an agricultural lien on a cotton crop sues the purchaser from the grower of the crop for money received, and introduces evidence that the grower during the year in question planted about fifty-five acres in cotton and averaged a bale to the acre, that a witness helped the grower carry "a heap of bales" to the gin at night, that there were twenty-six bales in the grower's yard which were carried to the place of business of the purchaser in another city and sold to him, and that the grower had no other crop but cotton during the year in question, is *held* sufficient evidence of the identity of the cotton to be submitted to the jury.

2. **Limitation of Actions B b—Where defendant does not commit fraud or participate therein C. S., 441(9) does not apply.**

Where an action is brought against the purchaser of cotton to recover for money received, upon allegations that the cotton was impressed with a crop lien in favor of the plaintiff, it being alleged that the grower sold the crop to the purchaser and that the grower fraudulently concealed from the plaintiff the fact of sale and the whereabouts of the cotton, *Held:* there is no allegation or proof that the purchaser fraudulently concealed the fact of sale or participated in any fraud in connection therewith, and as to him the action is barred by the lapse of three years, C. S., 441(9) not applying as to the action against the purchaser.

CIVIL ACTION, before *Moore, Special Judge,* at April Term, 1931, of HARNETT.

The plaintiff alleged that on 27 March, 1926, M. J. Jernigan and Venie Jernigan, his wife, executed and delivered to it an agricultural lien in the sum of $1,271.25 "upon their crops of cotton raised by them during the year 1926." It was further alleged that in 1926 the said

Jernigan, "with intent to cheat and defraud the plaintiff and conceal from plaintiff said cotton, caused the same to be carried to the city of Wilmington and there sold in a name to this plaintiff unknown, to Alex Sprunt and Son, Incorporated, disposing of said cotton in a secret manner and under a fictitious name in order to keep the same from being traced." It was further alleged "that plaintiff has just discovered" that in 1926 the said Jernigan and others carried twenty-six bales of cotton grown upon the lands covered by the mortgage of the plaintiff, and sold the same to the defendant." Whereupon the plaintiff prayed judgment for money had and received in the sum of $1,096.20.

The answer of the defendant denies the allegation of the complaint and pleads the statute of limitations. The suit was instituted on 24 June, 1930.

The evidence of plaintiff tended to show that demand had been made upon Jernigan from time to time, and that plaintiff had discovered that the cotton was sold about a month after it happened, to wit, about December, 1926. It further appeared that in December, 1926, the plaintiff issued claim and delivery for the cotton, and the sheriff returned the papers with the following entry: "No property or crops found."

Witness for plaintiff testified in reference to the identity of the cotton, that he got the cotton that was sold in Wilmington out of Jernigan's yard and that he had helped Jernigan load the cotton and carry it to the gin that fall, "a heap of bales at night." . . . "I just could not say whether this cotton was raised on his land or not. He did not have any other crop that year except that. I tended seven acres with Malcolm Jernigan. He had a brother up there farming, adjoining him, who tended ten acres for him. I do not know whether a part of the cotton carried to Wilmington belonged to him. I just know where I got my load. . . . There were twenty-six bales of cotton in that lot. I cannot say of my own knowledge to whom any of it belonged. I just know I loaded mine out of his yard, that is all." Another witness for plaintiff testified that he hauled cotton for Malcolm Jernigan to Wilmington in 1926, and that it was sold to the defendant in the name of one J. S. Draughon.

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

Young & Young for plaintiff.
J. O. Carr and James Best for defendant.

BROGDEN, J. 1. Was there sufficient evidence of identity of the cotton to be submitted to the jury?

2. Is the claim of plaintiff barred by the statute of limitations?

The plaintiff alleged that the agricultural lien, executed by Jernigan and wife, covered "their crops of cotton raised by them during the year 1926." The evidence tended to show: (a) that Jernigan, during the year 1926, had about thirty-five acres in cotton, and that the yield "averaged a bale to the acre"; (b) that the defendant carried "a heap of bales" to the gin at night: (c) there were twenty-six bales of cotton in Jernigan's yard, which were carried to Wilmington and sold to the defendant; (d) Jernigan did not have any other crop during the year of 1926 except cotton.

Discussing the question of identity of cotton in *Long v. Hall,* 97 N. C., 286, 2 S. E., 229, the Court said: "It was the duty of plaintiff to show, affirmatively, by a preponderance of evidence, that it was the identical cotton, and if the evidence presented any question on that point, it was for the jury to weigh and determine." Applying the principle of law, the Court is of the opinion that there was some evidence that the cotton in controversy was raised by Jernigan during the year 1926.

Plaintiff contends that the statute of limitations applicable is C. S., 441, subsection 9, and that the sale of the cotton was not discovered until 1930. Hence, the statute of limitations would run from the discovery of the fraud, and, as suit was brought in June, 1930, the action can be maintained.

However, there is no allegation and no proof that the defendant committed a fraud or participated therein or did any act to conceal the purchase of the cotton or to prevent the disclosure of all the facts surrounding the transaction. Hence, as to the defendant, the cause of action having accrued more than three years before the suit was brought, the judgment of nonsuit was correctly entered. *Dunn v. Beaman,* 126 N. C., 766, 36 S. E., 172.

Affirmed.

ETURA WHITE v. JOSIE COGHILL AND S. F. COGHILL, HER HUSBAND, ET AL.

(Filed 7 October, 1931.)

Easements A c—Petition in Superior Court for way of necessity held properly dismissed, petitioner's exclusive remedy being under C. S., 3836.

Where a petition for a "way of necessity" over the lands of another is filed in the Superior Court, and the petition alleges that the petitioner was devised a tract of land without any way of egress to a public road except over the land of another devisee of the testator, and there is no

allegation that such a way over the land of the other devisee had theretofore existed in favor of the land devised to the petitioner, and there is no stipulation in the devise for a way of ingress and egress to a given point, *Held:* the petitioner's exclusive remedy is under the provisions of C. S., 3835, 3836, by way of petition before the road-governing body of the county, and the proceedings in the Superior Court is properly nonsuited.

CIVIL ACTION, before *Cranmer, J.,* at March Term, 1931, of VANCE.

The plaintiff filed a petition before the clerk of the Superior Court, alleging that her father, J. F. Coghill, died leaving a last will and testament, and devising to her fifty acres of land, "the same to be cut off from the lands of said J. F. Coghill, deceased, so that the same shall adjoin the lands of her husband, by running a line westerly with S. F. Coghill's line and on to Mill Creek a sufficient distance to give said Etura White fifty acres." The testator also devised a certain tract of land to Josie Coghill and the children of herself and her husband, S. F. Coghill. The petitioner further alleged that "the land so given petitioner is wholly without any way of egress or roadway except as may result from the devise of said lands to petitioner and defendants by the will of J. F. Coghill from the lands held by him at the time of his death, and the same can only be established through the lands of Josie Coghill and children, the defendants, to which petitioner is entitled as a way by necessity, both devises being made by the same devisor as part of same tract and no other way existing or being provided or fixed by the will of J. F. Coghill and has not been established by any agreement or legal proceeding between said parties." Thereupon, the petitioner prayed that the line between the two tracts be established and that a right of way to the public road be set off and allotted.

The defendants filed an answer alleging that there was a right of way or roadway leading to the public road, which had been in existence and in constant use for approximately forty-five years.

When the case was called for trial it was admitted in open court that the question of boundary between the two tracts of land so devised had been settled, and that the only question to be determined by the court was the question of a right of way or roadway through the lands of defendants. It was further admitted that no application for a roadway had ever been made to the road-governing body of the county. Upon such admissions the trial judge ordered a nonsuit upon the ground that the proper remedy for plaintiff was to file a petition for a roadway with the road-governing body of the county in compliance with the statute in such cases made and provided.

From the judgment so rendered the plaintiff appealed.

Irvin B. Watkins and Pittman, Bridgers & Hicks for plaintiff.
Kittrell & Kittrell for defendants.

BROGDEN, J. The plaintiff contends that she is entitled to a way of necessity over the lands of defendants, to be set apart and located by the court. The law of "way of necessity" is discussed in many cases in this State, notably, *Cagle v. Parker,* 97 N. C., 271, 2 S. E., 76; *Lumber Co. v. Cedar Works,* 158 N. C., 162, 73 S. E., 902; *Carmon v. Dick,* 170 N. C., 305, 87 S. E., 224; *Brick Co. v. Hodgin,* 190 N. C., 582, 130 S. E., 330; *Weaver v. Pitts,* 191 N. C., 747, 133 S. E., 2; *Grant v. Power Co.,* 196 N. C., 617, 146 S. E., 531. See, also, *Brasington v. Williams,* 141 S. E., 375. The general rules of law are summarized by Mordecai's Law Lectures, Vol. 1, page 466, as follows: "A way of necessity exists where a man sells land entirely surrounded by his own land, and there is no outlet from the lands thus sold to the public highway. A right thus created is a right to pass over the vendor's land so as to reach the public road. It is the duty and right of the vendor to select the route; but, if he fail to point it out, the vendee may select; and after selecting it he must stick to it. . . . It is sometimes stated that, in order to create a way of necessity, the land sold must be entirely surrounded by the lands of the grantor; but this does not seem to be correct, for if the land be surrounded by the lands of the grantor and others, an outlet to the public road over the lands of the grantor is conferred upon the grantee by implication. . . . In this State we have a peculiar way of necessity. It is a way, known as a cartway, given by statute to one whose lands are cut off from access to the public highway, and which is obtained by condemnation proceedings."

The decisions upon the subject in this State are to the effect that if the parties stipulate in a deed for a way of ingress and egress to a given point, the vendor has the right to select such reasonable way in the first instance, and if he fails to do so, the vendee may select. It is also fully settled that if at the time of the conveyance or transfer of title, there are easements of permanent character that have been created or exist in favor of the land sold and which are reasonably necessary for its use and convenient enjoyment, that all such easements pass as appurtenances to the land in the absence of express provision to the contrary.

However, the case at bar does not fall within the foregoing principles. There is no allegation in the petition that any roadway or easement existed or was used for the benefit of the land owned by the plaintiff, nor is there any provision in the devise creating such an easement.

Hence, the situation is that, according to the allegations of the plaintiff, she owns lands not accessible to a highway except by crossing the lands of defendants. These facts invoke the application of C. S., 3835 and 3836 as the exclusive remedy to which plaintiff is entitled. Therefore, the ruling of the trial judge was correct.

Affirmed.

STATE v. LEE JONES.

(Filed 7 October, 1931.)

1. **Parent and Child A b—Failure to support children is continuing offense and prosecution therefor is not barred by conviction for prior time.**

Where, in a prosecution for the violation of C. S., 4447, making it a misdemeanor for a husband to abandon his wife and minor children without providing for their support, and providing that the abandonment shall be a continuing offense and not barred by any statute of limitations until the youngest living child shall obtain the age of eighteen years, *Held:* a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto.

2. **Same—Plea that defendant was in charge of county court was met by instruction that only failure to support since that time be considered.**

Where the father has been convicted of abandonment of his minor children without providing for their support, and the judgment has been suspended upon his payment into court of a sum of money for their support, an objection in a later prosecution under the statute that he was in charge of the county court when the crime for which he is now prosecuted was alleged to have been committed is met by the charge of the court in the instant case that the jury should consider only such evidence as tended to show his failure to provide for their support since the final disposition of the former case. C. S., 4623, 4625.

APPEAL by defendant from *Devin, J.*, at February Term, 1931, of GREENE.

The defendant was indicted for the wilful abandonment of his children in breach of the following statute: "If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor: Provided, that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years." C. S., 4447.

The defendant pleaded former jeopardy and former conviction and moved that the action be dismissed for the reason that he had previously been indicted and convicted of the same offense. The motion was overruled and the defendant excepted. At the conclusion of the evidence the motion was renewed and again denied, and again the defendant excepted.

After his conviction he moved in arrest of judgment, and his motion was denied. Judgment was pronounced and he appealed upon assigned error.

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

Pittman & Eure for defendant.

ADAMS, J. On 14 November, 1929, the defendant was indicted in the County Court of Greene County for the abandonment of his wife and children. *S. v. Bell,* 184 N. C., 701. He was arrested on 18 December, 1929, and was tried and convicted, and on 24 December, 1929, he paid into court for the use of his wife and children the sum of two hundred dollars, to be disbursed by the clerk in monthly installments of thirty dollars. Judgment was suspended and he was discharged 14 October, 1930. The indictment on which he was tried in the present case was returned by the grand jury at the December Term, 1930, of the Superior Court.

The principal exception involves a construction of that part of the statute which provides "that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years"—the defendant contending that this clause was designed merely to prevent the statute from barring an indictment after two years from the first act of desertion.

We do not concur in this interpretation. A recognized principle of the common law, as well as of natural and moral law, imposes upon a father the duty of providing for the maintenance of his minor children, the duty to support and the right to custody and service being reciprocal. This obligation continues until the children in legal contemplation are reasonably able to provide for themselves and is not abrogated by the father's abandonment of his family. The object of the statute is to enforce the obligation, not by subjecting the father to a civil action at the instance of the children, but by the infliction of punishment for his dereliction. It would be a plain evasion of the legislative intent to hold that by suffering the penal consequences of a single violation of the statute the defendant could consign his destitute children

to the embrace of charity and thus absolve himself from liability to further prosecution.

Wharton defines a continuing offense as a transaction or a series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy. Crim. Pleading, 474. It is an offense which continues day by day. *S. v. Hannon,* 168 N. C., 215; *S. v. Beam,* 181 N. C., 597. The statute in express terms constitutes the abandonment of children by the father a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law. 16 C. J., 268, sec. 447. This general principle is fortified by the distinct provision that the statute of limitations shall not bar prosecution until the youngest living child shall arrive at the age of eighteen years.

We have treated the exception upon its merits without reference to the rule that the pleas of former jeopardy and not guilty are matters of evidence and not available to the defendant upon a preliminary motion to dismiss the action. *S. v. Gibson,* 170 N. C., 697.

The objection that the defendant was in charge of the County Court when the crime for which he is now prosecuted is alleged to have been committed is met by the instruction that the jury should consider only such evidence as tends to show that the defendant violated the statute after the final disposition of the former case. Especially in view of this instruction the failure to specify a particular day in the indictment was not fatal to the prosecution. C. S., 4623, 4625. The remaining exceptions require no discussion.

No error.

JOHN T. PILLEY v. GREENVILLE COTTON MILLS, INCORPORATED.

(Filed 7 October, 1931.)

Master and Servant F a—Remedies under Workmen's Compensation Act exclude all other remedies.

The Workmen's Compensation Act provides that its provisions shall be presumed to be accepted by all employers and employees, with certain exceptions, and that the remedies therein provided shall exclude all other remedies, and where an employee coming within the provisions of the act brings an independent action and alleges negligence and that his application for compensation was refused by the Industrial Commission on the grounds that his injuries did not result from an accident arising

out of and in the course of his employment, from which no appeal was taken, the employer's demurrer thereto is properly sustained, and the employee's contention of a distinction between an injury by accident and an injury from negligence cannot avail him, the act eliminating the question of negligence in determining the employer's liability.

APPEAL by plaintiff from *Frizzelle, J.*, at April Term, 1931, of PITT.

The plaintiff brought suit against the defendant to recover damages caused by the alleged negligence of the defendant. The complaint contains the following paragraph: "The North Carolina Industrial Commission upon plaintiff's application for compensation dismissed the same as an accident not sustained in the course of and arising out of his employment."

The defendant demurred to the complaint; the trial judge sustained the demurrer, and the plaintiff excepted and appealed.

S. J. Everett for plaintiff.
Thomas W. Ruffin for defendant.

ADAMS, J. The complaint sets out the plaintiff's residence, his contract of employment, his duties, and his injury. It contains an averment that the Industrial Commission dismissed his application for compensation for the reason that the plaintiff was not injured by accident arising out of and in the course of his employment. From this judgment there was no appeal.

Under the Workmen's Compensation Law every employer and employee, except as therein stated, is presumed to have accepted the provisions of the act and to pay and accept compensation for personal injury or death as therein set forth. The plaintiff, not being in the excepted class, is bound by this presumption. P. L., 1929, ch. 120, sec. 4. It follows by the express terms of the statute (sec. 11) that the rights and remedies thus granted to an employee exclude all other rights and remedies of such employee as against his employer at common law, or otherwise, on account of injury, loss of service or death. The appellant's suggested distinction between an injury by accident and an injury resulting from a negligent act cannot avail him. By mutual concession between the employer and employee who are subject to the compensation law the question of negligence is eliminated. *Conrad v. Foundry Co.*, 198 N. C., 723. Judgment

Affirmed.

PRESTON WOODALL AND WIFE, EMMA C. WOODALL, v. NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, AND THE FIRST NATIONAL BANK OF DURHAM, TRUSTEE; CITIZENS BANK AND TRUST COMPANY, BENSON, N. C., AND EZRA PARKER, TRUSTEE.

(Filed 7 October, 1931.)

1. Receivers B b—In this case held: appointment of receiver for defendant and refusal to allow defendant to give bond was error.

The appointment of a receiver is a harsh and extraordinary remedy in equity intended to prevent the possibility of loss of the rents or profits from the property of the debtor, and it should not be granted ordinarily where, by following the statutory provisions allowing the debtor to give bond, the rights of the creditors can be fully protected, and in this case the appointment of a permanent receiver for the owners of a five-hundred-acre farm in a high state of cultivation and the refusal to allow the owners to give the statutory bond and retain possession is held for error under the facts and circumstances, C. S., 860, 861, it appearing that loss would not likely result to the creditors.

2. Mortgages C e—Agreement in mortgage for receivership under certain conditions does not affect statutory provisions in regard thereto.

The appointment of a receiver is an equitable remedy and our statutory provisions (C. S., 860, 861), enacted before the giving of a deed of trust upon lands may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions so as to prevent our courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts.

3. Courts A d—Legal and equitable rights are determined in one action.

Legal and equitable rights and remedies are now determined in one and the same action. Const., Art. IV, sec. 1.

APPEAL by plaintiffs from *Cranmer, J.*, at August Term, 1931, of JOHNSTON. Reversed.

It is agreed by defendants that the following statement of facts by plaintiff is substantially correct in reference to this controversy:

"This is a civil action instituted in the Superior Court of Johnston County to restrain the defendant, First National Bank of Durham, trustee, from selling or attempting to sell the 511 acres of land described in the complaint, under the powers contained in a certain deed of trust from plaintiffs to said defendants.

Plaintiffs are now and were in 1926, the owners in fee of certain lands situate in Johnston County, aggregating 511 acres. Said lands lie upon both sides of State Highway No. 22, in one compact body, and are in a high state of cultivation. In 1926, plaintiffs applied for and obtained a loan from the defendant, North Carolina Joint Stock Land

Bank, in the sum of $25,000, the said land bank's appraisers then placing an estimated value upon said lands of $50,000. This loan was to be repaid upon an amortization plan in thirty-three years, with installments of $875.00 due on 1 April and October of each year. Plaintiffs paid each of the maturing installments, totaling $7,875, until 1 April, 1931, when, owing to agricultural depression, plaintiffs found it inconvenient to pay the installment then due, and made this fact known to the land bank.

There was considerable negotiation, but finally the land bank agreed to defer the 1 April installment until 1 October, 1931, in consideration of the erection by plaintiffs of five tobacco barns upon the mortgaged premises, which barns were necessary to the curing of the tobacco raised upon said lands during 1931. The land bank also agreed to withhold foreclosure until 1 October. Pursuant to said agreement plaintiffs, immediately thereafter, caused to be constructed upon said lands five new tobacco barns at a cost of about $1,500. Plaintiffs then restrained the sale, alleging the aforesaid contract, and upon the hearing Judge Cranmer continued the injunction to the trial upon the ground that an issue of fact was raised, from which ruling no appeal was made by the defendants.

The defendants, land bank and trustee, in their answer and further defense alleged that they were entitled to have a receiver appointed to take charge of the lands and crops by virtue of a certain provision in the deed of trust, which is as follows:

'7. And it is further covenanted that as further security for the payment of the note and all installments thereof, and for the performance of all the terms of said note and on the conditions and covenants of this deed of trust, that the said parties of the first part hereby assign, set over and transfer to the North Carolina Joint Stock Land Bank of Durham, its successors and assigns, all the rents, and income, of said premises herein conveyed for each and every year that any installment or installments of the said note may be unpaid, together with all rights and remedies for enforcing collection of the same; and that upon filing suit, or at any time thereafter, of foreclosure, the North Carolina Joint Stock Land Bank of Durham, its successors and assigns, shall be entitled to have a receiver appointed to take charge of the said premises herein conveyed, together with all the rents, profits, crops and proceeds arising therefrom during such litigation, and to hold the same subject to the order and direction of the court.'

They also alleged that plaintiffs are insolvent and that the lands have greatly depreciated in value and are worth less than the value of the property.

The defendants offered no evidence or supporting affidavits.

The complaint, treated as an affidavit, together with numerous supporting affidavits, clearly show that plaintiffs have made permanent improvements upon said lands since the loan was obtained in the sum of $10,100; that the present value of the land is in excess of the debt to the land bank; that plaintiffs are abundantly solvent and able to respond to judgment; that there is no imminent danger of the loss of the property itself or the rents and profits arising therefrom; that the P. B. Johnson estate, holder of a first lien for more than $6,000 on the crops for fertilizers and advancements, is opposed to a receivership, as shown by affidavit of Wade F. Johnson; that there are three other crop liens aggregating $1,030, the holders of which are not parties to this action; that the proceeds from the sale of the crop will not be more than sufficient to pay the aforesaid crop liens, and the expense of a receivership would work a hardship upon plaintiffs and the holders of said liens without benefiting defendant, land bank, or any one else.

It was alleged in paragraph 8 of the complaint that the Citizens Bank and Trust Company also has a mortgage upon said lands, and in paragraph 9, that said mortgage is a prior lien upon a portion of the 511 acre tract. At the hearing this position was abandoned by plaintiffs, they having been advised that the defendant land bank had a first mortgage on said land; it was also shown that the Citizens Bank had ample security, other than its second mortgage on the 511 acre tract, with which to pay the debt due it.

On 5 August, 1931, Judge F. A. Daniels, in an *ex parte* hearing, without notice to plaintiff, appointed a temporary receiver, and in the order appointing said receiver cited plaintiffs to appear before himself at Chambers in Roxboro, 10th Judicial District, on 10 August, 1931, and show cause why such receivership should not be made permanent. Plaintiffs appeared through counsel on the date mentioned, and upon motion the cause was transferred to Johnston County to be heard by his Honor, E. H. Cranmer, at Chambers on 17 August, 1931. Judge Cranmer heard the reading of the complaint and answer, treated as affidavits, and the numerous supporting affidavits on behalf of plaintiffs. His Honor, Judge Cranmer, found no facts, but upon the allegations in defendant's answer made the receivership permanent."

The following judgment was rendered in the court below:

"This cause comes on to be heard before me, upon the rule to show cause heretofore issued herein by his Honor, F. A. Daniels, why the appointment of H. G. Gray as temporary receiver in the complaint and answer in this action, should not be made permanent, and it appearing for the protection of the interests of the defendants herein and the interests

of the interpleaders, and for the preservation of the property, a receivership for the said lands and crops is necessary and proper;

It is, now, upon motion of J. S. Patterson, attorney for the North Carolina Joint Stock Land Bank of Durham; and of Strickland and Johnson, attorneys for the interpleaders, P. B. Johnson estate, considered, ordered and adjudged that the appointment of H. G. Gray as temporary receiver be made permanent and that A. T. Tart be appointed as a coreceiver of the lands and crops, as mentioned in the answer herein, pending the final determination of the litigation herein, with the usual powers and duties of receivers in such cases.

And the said receivers are hereby authorized and instructed to cultivate, harvest and market the crops for the year 1931 and to rent or cultivate the said land until the final determination of this matter, making and keeping a true and correct account thereof and all expenses incurred therein, to, out of the proceeds of the sale thereof, apply a sufficient part of the moneys so received to the cultivation and harvesting of said crops, and any and all costs and expenses of these proceedings, retaining the balance in their hands as such receivers to wait the further orders of this court.

This 17 August, 1931."

The plaintiffs excepted and assigned error to the refusal of the court below to dissolve the temporary receivership and to the signing of an order appointing permanent receivers, and appealed to the Supreme Court.

Levinson & Sidenberg for plaintiffs.

R. P. Reade and J. S. Patterson for defendants.

CLARKSON, J. C. S., 860, in part, is as follows: "A receiver may be appointed (1) before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court." N. C. Prac. & Proc. (McIntosh), sec. 887, p. 1002; sec. 888, p. 1003.

C. S., 861: "In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if

the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking."

Upon application for a receiver it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. *Frank v. Robinson,* 96 N. C., 28.

Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be kept. C. S., 861; *Roper Lumber Co. v. Wallace,* 93 N. C., 22; *Durant v. Crowell,* 97 N. C., 367; *Lewis v. Roper Lumber Co.,* 99 N. C., 11; *Ousby v. Neal,* 99 N. C., 146.

The court erred in directing a receiver to take possession and control of the mines, and machinery for operating the same, without giving the defendant an opportunity to file a bond to secure the payment of any proceeds therefrom, as the court might subsequently direct. *Stith v. Jones,* 101 N. C., 361.

In *Lumber Co. v. Wallace, supra,* at p. 30, we find: "It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done, except in extreme cases." *Hurwitz v. Sand Co.,* 189 N. C., 1.

In *Ellington v. Currie,* 193 N. C., at p. 612, it is written: "In 23 R. C. L., part section 3, p. 9, it is said: 'The appointment of a receiver is part of the jurisdiction of equity, and is based on the inadequacy of the remedy at law, being intended to prevent injury to the thing in controversy, and to preserve it, *pendente lite,* for the security of all parties in interest, to be finally disposed of as the court may direct. It is held to be a proceeding *quasi in rem.* . . . The right to the relief must be clearly shown, and also the fact that there is no other safe or expedient remedy.' *Twitty v. Logan,* 80 N. C., p. 69; *Hanna v. Hanna,* 89 N. C., 68; *Thompson v. Pope,* 183 N. C., p. 123."

In Clark on Receivers, Vol. 1 (2d ed.), part section 59, at pp. 67 and 68, the following observations are made: "The appointment of a receiver is ordinarily a harsh remedy because it takes custody of the defendant's property out of his hands on an interlocutory order, before the court has had an opportunity to hear the merits of the case discussed, testimony relative to the merits introduced, and to pass on the final relief prayed for against the defendant. The appointment of a receiver should

only be granted in a clear case. If it is in the power of the court to protect the plaintiff by granting a less drastic remedy than the appointment of a receiver, the court will usually do so. . . . The appointment of a receiver, being a harsh and extraordinary remedy, might in many cases be dispensed with by the defendant giving bond to the plaintiff to protect the plaintiff and to pay to the plaintiff the amount of any judgment plaintiff might secure against the defendant, which judgment might otherwise be made good out of the property if a receiver should be appointed."

The defendants contend that they are entitled to have enforced in their favor the plain unequivocal language contained in section 7 of the mortgage or deed of trust duly executed by the plaintiffs, and providing in certain terms for the appointment of a receiver to take charge of the premises conveyed in the event of foreclosure of the deed of trust or mortgage. We think not under the facts and circumstances of this case.

The appointment of a receiver is a part of the jurisdiction of equity, then again, C. S., 861 was enacted long prior to the deed of trust in controversy, therefore it enters into and becomes a part of the conventions of the parties. *Bateman v. Sterrett, ante,* at p. 61.

In 55 A. L. R., at p. 1028, citing a wealth of authorities, the following principle is stated: "A stipulation pledging the rents and profits and providing a receiver has been generally held insufficient of itself to entitle the mortgagee to the appointment of a receiver, unless further facts justifying such appointment are shown." See 4 A. L. R., pp. 1417, 1418.

The plaintiffs' farm was a going concern. The appointment of a receiver is ordinarily a harsh and extraordinary remedy. The court below has large discretionary powers, yet in view of the statute allowing bond and the facts and circumstances of this case, we think that the plaintiffs should have been allowed to execute such reasonable bond, with sufficient security, as the court may deem proper, payable to the parties affected, conditioned to secure to them such damages as the court may adjudge in their favor upon the determination of the action. In the event of failure to give such bond, the court to make such order or orders in the cause by the appointment of a receiver, or otherwise, as will protect the rights of the parties pending the litigation.

The learned and careful judge in the court below, who tried the case, no doubt considered that the provision in the deed of trust was controlling, but not so (C. S., 861), and the equitable aspect should have been considered. Legal and equitable rights are now determined in one and the same action. Const., Art. IV, sec. 1. For the reasons given, the judgment of the court below is

Reversed.

MRS. IDA BARNES, ADMINISTRATRIX DE BONIS NON OF D. D. ODOM, DECEASED, v. B. C. CRAWFORD AND HIS WIFE, NELLIE W. CRAWFORD, FORMERLY NELLIE W. HOLT.

(Filed 7 October, 1931.)

1. Bills and Notes D b—Where husband and wife sign note secured by mortgage on his lands for his debt the wife is a surety.

Where a wife signs a note under seal upon its face with her husband for money borrowed by him, and joins with him in giving a mortgage upon his lands in order to pass her dower interests therein as security for his debt, she is in effect a surety upon his note, and the payee with knowledge of the facts is presumed to know the law, and takes the note subject to her rights as surety.

2. Bills and Notes C b—Where note is transferred by endorsement after maturity the transferee takes subject to existing equities.

Where the payee of a note under seal made by a husband and wife has knowledge that the wife signed in the capacity of surety and transfers the same by endorsement after maturity, the transferee thus becomes the holder subject to the equities existing between the original parties, and in his action against the wife she may show by parol that she was only a surety on the note.

3. Limitation of Actions A b—Three-year statute applies to sureties on note under seal.

C. S., 441, applies to sureties on a note under seal, and as to the sureties the right of action on the note is barred after the lapse of three years, and the ten-year statute, C. S., 437, by excluding the word "surety" applies only to the principals on the note.

APPEAL by defendant Nellie W. Crawford from *Harris, J.*, at January Term, 1931, of NASH. Reversed.

In the record *Odom* is also spelled *Odum*. We will correct the record and spell it *Odom*.

The parties agreed to the following statement of facts:

"1. That Mrs. Ida Barnes is administratrix *de bonis non* of D. D. Odom, deceased, and in such capacity is the holder of a certain promissory note executed by S. F. Austin to D. D. Odom on 16 January, 1926, in the sum of four thousand dollars ($4,000), and said note was given as renewal of a like note first executed on 9 February, 1923; that on or about 1 February, 1927, S. F. Austin paid on the said sum of four thousand dollars ($4,000) the sum of two thousand dollars ($2,000), which is credited on said note.

2. That on 9 February, 1923, at the time the said S. F. Austin first executed the note, as mentioned above, to D. D. Odom, the Austin-Stephenson Company in order to secure the payment of the said note

transferred and assigned to D. D. Odom a certain note and mortgage deed in the sum of eleven thousand dollars ($11,000), which had been executed by S. S. Holt and wife, Nellie W. Holt, on 14 May, 1920, to the said Austin-Stephenson Company, and due and payable on 14 January, 1921.

3. That the said note and mortgage had been executed to the said Austin-Stephenson Company by S. S. Holt and wife, Nellie W. Holt, to secure an indebtedness of the said S. S. Holt, and that the lands covered by the mortgage were the individual property of the said S. S. Holt; that the said Nellie W. Holt had executed said note and mortgage in her capacity as wife of S. S. Holt to fully convey any contingent interest which she might have in the lands securing said note.

4. That since the execution of the note and mortgage to the Austin-Stephenson Company neither S. S. Holt nor Nellie W. Holt has ever paid any sum on the indebtedness and the lands conveyed by the mortgage deed have been sold under prior liens and nothing received from the sale to be applied on this indebtedness.

5. That on 12 September, 1921, Nellie W. Holt secured a divorce from the said S. S. Holt and since that time has intermarried with said B. C. Crawford, and is now the wife of the said B. C. Crawford. And since such divorce the said Nellie W. Crawford has never been advised of the nonpayment of the note, and has never agreed to any extension of the note to the holder of the same, and she specifically pleads as a bar to the action the statute of limitations applicable to her as surety, and the forbearance on the part of the creditor as the principal of said note.

6. That S. S. Holt died on or about the month of June, 1925, and his estate did not have assets to be applied to said indebtedness, and final account has been filed by his administratrix, who has been discharged from further duties by the courts.

7. That summons in this case was issued out of the Superior Court of Nash County on 24 September, 1928, and due service had on the said B. C. Crawford and wife, Nellie W. Crawford, formerly Nellie W. Holt.

8. That the plaintiff does not claim any right of action against the said B. C. Crawford and agrees that he is not indebted to the plaintiff in any amount whatsoever.

9. That since the execution of the renewal note, as set out above, by S. F. Austin to D. D. Odom, the said S. F. Austin has been adjudicated a bankrupt and discharged in accordance with the bankruptcy statutes; and the said Austin-Stephenson Company since said date has been adjudicated a bankrupt.

From the foregoing facts the plaintiff contends that Nellie W. Crawford, who was formerly Nellie W. Holt, is indebted to her in the sum of four thousand dollars ($4,000), with interest, subject to a credit of two thousand dollars ($2,000), all of which is fully set out above.

From the foregoing statement of facts the defendant, Nellie W. Crawford, contends that she is not liable to the plaintiff in any amount.

If the court from the foregoing facts is of the opinion that the plaintiff is entitled to judgment, then judgment to be given in her favor, but if the court is of the opinion that said cause of action is barred as to the defendant, Nellie W. Crawford, then judgment should be rendered in her favor."

The note in controversy is as follows:

"$11,000. Smithfield, N. C., 14 May, 1920.

On or before 14 January, 1921, with interest from maturity, until paid at the rate of 6 per cent per annum, interest payable annually, we, promise to pay to Austin-Stephenson Company, Inc., or order, the sum of $11,000, same being for value received.

This bond is secured by mortgage deed of even date herewith. It is fully agreed and understood that in default of the payment of this bond when due, either principal or interest, then the whole debt, as evidenced by the other bonds of even date with this which mature later, shall become due and collectible at once, and without demand on the maker of this bond by the owner thereof.

Given under our hands and seals, this 14 May, 1920.

S. S. Holt. (Seal.)
Nellie W. Holt. (Seal.)

Endorsement:

The Austin-Stephenson Company,
By W. H. Austin, President."

The court below rendered the following judgment:

"This action came on to be heard at the present term of the court before Hon. W. C. Harris, judge presiding, and is heard on the agreed statement of facts found in the judgment roll of this action. It is now on motion by the court ordered and adjudged:

That the plaintiff recover of the defendant, Mrs. Nellie W. Crawford, the sum of four thousand dollars ($4,000), with interest thereon at 6 per cent per annum from 16 January, 1926, subject to credit of two thousand dollars ($2,000), 1 February, 1927, and the costs of the action taxed by the clerk of this court.

W. C. HARRIS, *Judge Presiding.*"

Defendant Nellie W. Crawford duly excepted and assigned error to the judgment as rendered, and appealed to the Supreme Court.

T. T. Torne for plaintiff.
Leon G. Stevens for defendant.

CLARKSON, J. On 16 January, 1926, S. F. Austin executed to D. D. Odom his promissory note in the sum of $4,000. This note was given in renewal of a note executed 9 February, 1923. S. F. Austin has paid on the note $2,000. On 9 February, 1923, at the time that Austin executed the note to D. D. Odom, the Austin-Stephenson Company, to secure the payment of said note of Austin, assigned to D. D. Odom a note of $11,000 executed by S. S. Holt and wife, Nellie W. Holt, now Nellie W. Crawford, and secured by mortgage of even date on land of S. S. Holt. This Holt note was dated 14 May, 1920, and payable to Austin-Stephenson Company. It was due and payable on or before 14 January, 1921, and endorsed by the payee. The note of S. S. Holt and wife, Nellie W. Holt, has never been paid. S. S. Holt died in June, 1925.

It is contended by Nellie W. Holt (now Crawford) that she was surety for her husband S. S. Holt on the note under seal, which was known to the payee and the three-year statute of limitations which she pleaded is applicable. That the payee transferred the note after maturity to D. D. Odom, who took same subject to the defenses existing between the original parties to the note under seal. We think this contention correct.

C. S., 437, within 10 years an action (2) "Upon a sealed instrument against the principal thereto."

C. S., 441, within 3 years an action (1) "Upon a contract, obligation or liability arising out of a contract, express or implied," etc.

C. S., 437, (2) Is not applicable to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the General Assembly.

C. S., 441, (1) is applicable to sureties and the action against them is limited to 3 years. *Welfare v. Thompson,* 83 N. C., 276.

In the *Welfare case, supra,* citing numerous authorities, is the following: "We believe it is conceded that whenever it is proposed to prove that a co-promisor or co-obligor to a note or bond is surety only, the fact not appearing upon the face of the instrument, it is competent to show by parol that fact, and that the creditor knew at the time he received the note that he was a surety."

In *Goodman v. Litaker,* 84 N. C., at p. 10: "In the trial of the case of *Manley v. Boycott,* 75 E. C. L. Rep., 45, when counsel was urging

upon the court the right of the maker of a promissory note to show that he signed the instrument as surety only, Lord Campbell interposed the remark *that it must be shown that the note was so made with the knowledge of the payee; that allegation is indispensable.* Such a conclusion seems not only to address itself to our reason, but to be eminently just; and especially so under a system which like our own prescribes different periods for the protection of principals and sureties." *Redmon v. Pippen,* 113 N. C., 90; *Hunter v. Sherron,* 176 N. C., at p. 228; *Kennedy v. Trust Co.,* 180 N. C., 225; *Chappell v. Surety Co.,* 191 N. C., 703; *Adamson v. McKeon,* 65 A. L. R., 817, see annotation. See *Trust Co. v. York,* 199 N. C., 624.

In *Coffey v. Reinhardt,* 114 N. C., at p. 511, it is said: "When a suretyship is known to the original payee the surety is protected by the lapse of three years if the note is assigned after maturity, although the assignee takes without notice. *Capell v. Long,* 84 N. C., 17."

"In *Foster v. Davis,* 175 N. C., 541, it is said that if 'The wife promised to pay the debt of her husband when she signed the note she was a surety, and it was competent to prove the relationship by parol as between the parties, although she appeared to be a principal on the face of the note. *Williams v. Lewis,* 158 N. C., 574.' Indeed the equity of the precedents are so well settled that no citation of authorities or discussion of the principal is necessary." *Haywood v. Russell,* 182 N. C., at p. 713.

In *Blower Co. v. MacKenzie,* 197 N. C., at p. 158, the following principle is stated: "(2) If a wife joins her husband in the conveyance of her separate real estate to secure his debt or in the conveyance of his land, in which she has a right of dower, to secure his debt, the relation which she sustains to the transaction is that of surety; and if she survives him and the land is sold to satisfy the debt she becomes a creditor of his estate in an amount equal to the value of her dower. *Purvis v. Carstaphan,* 73 N. C., 575; *Gwathmey v. Pearce,* 74 N. C., 398; *Gore v. Townsend,* 105 N. C., 228." *Trust Co. v. Benbow,* 135 N. C., 312; *Foster v. Davis,* 175 N. C., 541. See *Royall v. Southerland,* 168 N. C., 405; *Taft v. Covington,* 199 N. C., 51.

No. 3 of the agreed statement of facts, is as follows: "That the said note and mortgage had been executed to the said Austin-Stephenson Company by S. S. Holt and wife, Nellie W. Holt, to secure an indebtedness of the said S. S. Holt, and that the lands covered by the mortgage were the individual property of the said S. S. Holt; that the said Nellie W. Holt had executed said note and mortgage in her capacity as wife of S. S. Holt to fully convey any contingent interest which she might have in the lands securing said note."

S. S. Holt and wife, Nellie W. Holt, executed the $11,000 note under seal to Austin-Stephenson Company, on 14 May, 1920, it was due and payable on or before 14 January, 1921, and on 9 February, 1923, this note was transferred and assigned by Austin-Stephenson Company to D. D. Odom, after the maturity of said note under seal. This action was instituted 24 September, 1928, against Nellie W. Crawford (formerly Holt), over three years after the maturity of the note under seal.

The payee Austin-Stephenson Company was presumed to know the law as interpreted by this Court, that the joining of the wife in the conveyance of her husband's land, in which she had the right of dower, to secure his debt, created the relation on her part of surety. The payee Austin-Stephenson Company, with this knowledge, transferred the note under seal after maturity to D. D. Odom. The payee had knowledge that Nellie W. Holt was a surety on the note which was transferred after maturity to D. D. Odom, therefore Nellie W. Holt has the right to set up any defenses that existed between her and the original payee Austin-Stephenson Company, although the note under seal was transferred to D. D. Odom without notice. The statement of facts, *supra,* is notice to payee that Nellie W. Holt was surety, but the note under seal was secured by mortgage of even date. By an examination of the mortgage the relationship of the parties could have been ascertained. *Bank v. Trust Co.,* 199 N. C., 582.

A familiar principle of the law of negotiable instruments is that one who takes negotiable paper when overdue is charged with notice of all then existing defenses in favor of any party to the paper who became such before maturity. Bigelow on Bills, Notes and Checks, 3d ed. sec. 483, p. 374; *Guthrie v. Moore,* 182 N. C., 24.

In *Capell v. Long, supra,* the following principle is laid down: "A negotiable note or bond executed by a principal and surety, which relation is known to the payee or obligee, and transferred after maturity for valuable consideration, is subject to all equities and defenses existing between the original parties, whether the transferee took with or without notice; therefore, if more than three years have elapsed between the maturity of a bond and action brought on the same, the surety may plead the statute in bar of recovery."

In *Sykes v. Everett,* 167 N. C., at p. 608, *Walker, J.,* in writing the opinion of the Court, says: "It may be added that plaintiffs acquired the notes by the assignment of them, after their maturity, and therefore, in law, with notice of all equities and other rights of the indorser, Everett, and consequently, in law, took subject to them. *Causey v. Snow,* 122 N. C., 326; *Bank v. Loughran,* 126 N. C., 814; *Taylor v. Lauer,* 127 N. C., 157; *Brooks v. Sullivan,* 129 N. C., 190." See *Brown v. Sheets,* 197 N. C., 268; 63 A. L. R., p. 1357.

Under the facts and circumstances of this case, Nellie W. Holt (now Crawford) had the right to set up the three-year statute of limitations as a defense to the note under seal on which plaintiff seeks to recover in this action. (1) The note under seal signed by S. S. Holt and his wife, Nellie W. Holt, was secured by a mortgage on the individual property of S. S. Holt, and Nellie W. Holt executed the note and mortgage in her capacity as wife of S. S. Holt to convey her dower interest in her husband's land. (2) Under the law in this jurisdiction, this made Nellie W. Holt a surety for her husband on the note under seal, signed by her, and the payee, Austin-Stephenson Company, was presumed to know the law that she was surety. (3) After maturity, Austin-Stephenson Company transferred the note under seal to D. D. Odom, who took the note subject to the defense that Nellie W. Holt had against the original payee Austin-Stephenson Company, that she was surety for her husband. The action was not brought against her in three years, it was therefore barred by the statute of limitations. For the reasons given the judgment of the court below is

Reversed.

FARMERS BANK OF CLAYTON v. NELLIE HORNE MCCULLERS ET AL.

(Filed 7 October, 1931.)

1. Deeds and Conveyances A f—Deed from wife to husband not conforming to requirements of C. S., 2515 is void.

The failure of the certificate of a deed to lands from a wife to her husband to state that the conveyance was "not unreasonable or injurious to her" renders the instrument void. C. S., 2515.

2. Appeal and Error J e—New trial will not be granted where error does not prejudice rights of appellant.

An erroneous ruling or action of the trial judge in a civil action will not entitle the objecting party to a new trial when he could by no possibility be injured by the error.

3. Judgments C a—Jurisdiction to enter judgments by confession.

A judgment by confession may be entered in conformity with the statutory requirements in term by the judge, or out of term by the clerk, for money due or to become due, or to secure against a contingent liability, or for both such debt and liability. C. S., 623. As to whether the probate certificate to protect the wife is necessary, *quaere* and not expressly decided. C. S., 2515.

4. Judgments C b—Judgment by confession must show with particularity the items and facts upon which it is based.

A judgment confessed becomes a lien on the lands of the party confessing it from the time of its docketing as in case of other judgments,

but in order to protect the rights of other creditors it is necessary that the essential requirements of the statute be followed, and the statute requires that the statement upon which the judgment is based, if for money due or to become due, should show with particularity the facts out of which it arose and the items constituting the claim and that the amount confessed is justly due, and when for a contingent liability, the facts constituting such liability and that the amount confessed does not exceed it. C. S., 624.

5. Same—Judgment by confession in this case held insufficient.

Where a judgment confessed by a wife in favor of her husband shows only that it was based upon a sum alleged to be due on account of money advanced by the husband from time to time to take care of obligations due at the banks by the wife, and fails to state the items constituting the claim, when advanced and to whom, and that the advancements were not gifts to the wife, the judgment is insufficient to meet the requirements of the statute, and is void.

APPEAL by defendants from *Sinclair, J.*, at April Term, 1931, of JOHNSTON.

Civil action instituted by Farmers Bank of Clayton, judgment creditor of Nellie Horne McCullers, to set aside two alleged voluntary conveyances and purported confession of judgment, alleged to have been executed and entered by the said Nellie Horne McCullers in favor of her husband, E. H. McCullers, fraudulently and with intent to delay, hinder and defeat the rights of plaintiff and other creditors. See case as stated on first appeal in 200 N. C., 591, 157 S. E., 869.

Under peremptory instructions, that if the facts were found to be as shown by all the evidence the issues should be answered in favor of the plaintiff, the jury returned the following verdict:

"1. Was the deed from Nellie Horne McCullers to her husband, E. H. McCullers, dated 30 November, 1928, recorded in Book 211, page 68, registry of Johnston County, void for failure to comply with C. S., 2515? Answer: Yes.

"2. Was the deed from Nellie Horne McCullers to her husband, E. H. McCullers, dated 30 November, 1927, recorded in Book 211, at page 82, registry of Johnston County, void for failure to comply with C. S., 2515? Answer: Yes.

"3. Was the judgment dated 28 February, 1929, recorded in judgment docket 14 at page 237, in the office of the clerk of the Superior Court of Johnston County, confessed by Nellie Horne McCullers in favor of her husband, E. H. McCullers, void for failure to comply with C. S., 2515? Answer: Yes."

It is conceded that the deeds in question, executed by the wife to the husband during coverture, were not probated as required by C. S., 2515.

The confession of judgment and judgment entered thereon are in words and figures as follows:

BANK *v.* MCCULLERS.

CONFESSION OF JUDGMENT.

"North Carolina—Johnston County.

In the Superior Court—Before the Clerk.

Dr. E. H. McCullers v. Mrs. Nellie Horne McCullers.

1. I, Nellie Horne McCullers, defendant in the above entitled action, hereby confess judgment in favor of Dr. E. H. McCullers, plaintiff for the sum of $2,600, with interest from this date ....., and authorize the entry of judgment therefor against me on 28 February, 1929.

2. The confession of this judgment is for a debt justly due by me, the said Nellie Horne McCullers, to the said Dr. E. H. McCullers, plaintiff, arising from the following facts, to wit:

Balance due on account of money advanced by said Dr. E. H. McCullers for affiant from time to time to take care of obligations due by this affiant at banks, which said sum is due to the plaintiff by the defendant over and above all just demands that she has against him.

Nellie Horne McCullers.

Nellie Horne McCullers, being duly sworn, says that the facts set out in the above confession are true, and the amount of judgment confessed is justly due the plaintiff.

Sworn to and subscribed before me, this 28 February, 1929.

Weisner Farmer, N. P.

My commission expires 8-17-29. (N. P. Seal.)

JUDGMENT.

North Carolina—Johnston County. In the Superior Court.

Dr. E. H. McCullers v. Nellie Horne McCullers.

This cause coming on to be heard upon the confession of judgment of the said Nellie Horne McCullers, it is, therefore, considered, adjudged and ordered that the plaintiff, Dr. E. H. McCullers, recover of the defendant, Nellie Horne McCullers, the sum of $2,600, with interest from this date.

Witness my hand and seal, this 28 February, 1929.

H. V. Rose, C. S. C."

From a judgment declaring the deeds and confession of judgment void and of no effect, and ordering their cancellation of record, the defendants appeal, assigning errors.

Parker & Lee, Abell & Shepherd and Ed. F. Ward for plaintiff.

F. H. Brooks and Winfield H. Lyon for defendants.

STACY, C. J. It is conceded that the deeds in question, executed between husband and wife during coverture, which purport to affect or change the real estate of the wife, were not probated as required by C. S., 2515, in that, the officer in each instance failed to certify in his certificate of probate that at the time of its execution and the wife's privy examination, such contract was "not unreasonable or injurious to her." This omission renders the deeds void. *Capps v. Massey,* 199 N. C., 196, 154 S. E., 52; *Caldwell v. Blount,* 193 N. C., 560, 137 S. E., 578; *Garner v. Horner,* 191 N. C., 539, 132 S. E., 290; *Best v. Utley,* 189 N. C., 356, 127 S. E., 337; *Whitten v. Peace,* 188 N. C., 298, 124 S. E., 571.

It may be doubted whether a confession of judgment made, signed, and verified by a wife during coverture in favor of her husband is required to be probated according to the provisions of C. S., 2515. Judgments by confession differ from judgments by consent (*Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350), in that the court exercises a certain amount of supervision over their entry and equitable jurisdiction over their subsequent status. *Farwell v. Huston,* 151 Ill., 239, 37 N. E., 864, 42 A. S. R., 237; 15 R. C. L., 647. The manner and method of their confession and entry are regulated by statute and not by agreement or consent of the parties. *Smith v. Smith,* 117 N. C., 348, 23 S. E., 270; note, 12 L. R. A., 810; 15 R. C. L., 647; 34 C. J., 97.

But without making definite decision on this point, the confession of judgment seems to be void on its face for another reason, hence it would serve no useful purpose to send the case back, even if the reason assigned for vacating it be erroneous. *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32. "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." *Butts v. Screws,* 95 N. C., 215.

A judgment by confession, without action, may be entered of record, either in term by the judge, or out of term by the clerk, (1) for money due or to become due, or (2) to secure against contingent liability, or (3) for both such debts and liability. C. S., 623; *Sharp v. R. R.,* 106 N. C., 308, 11 S. E., 530.

It is essential to the validity of such a judgment, however, that it be confessed and entered of record according to the provisions of the statute, *i. e.,* a statement in writing must be made, signed, and verified by the defendant, setting out the amount for which judgment may be entered, and authorizing the entry of judgment therefor. C. S., 624, subsec. 1. If the confession be for money due or to become due, the statement must contain concisely the facts out of which it arose, and must show that the sum confessed is justly due, or to become due. C. S., 624, subsec. 2.

If the confession be to secure against contingent liability, the verified statement must give concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same. C. S., 624, subsec. 3. If the confession be for both such debts and liability, the statement must set forth concisely the facts out of which the debts arose, and must show that the sum confessed therefor is justly due, or to become due, and also state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same. These are essential matters required by the statute to confer jurisdiction on the court, and to insure validity of the judgment. *Smith v. Smith, supra.*

It is provided by C. S., 625, that the statement or confession may be filed with the clerk of the Superior Court of the county in which the defendant resides, or, if he be a nonresident, of some county in which he has property. The clerk is required to endorse upon it, and enter on his judgment docket, a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment endorsed, thenceforth become the judgment roll, upon which execution may issue and be enforced in the same manner as upon judgments in other cases in such courts. Observance of these provisions is also a prerequisite to the validity of the judgment. *Sharp v. R. R., supra.*

The purpose of requiring the facts out of which the debt arises, or which constitute the contingent liability, to be stated concisely, but accurately, is to prevent fraud and to protect the other creditors of the debtor, over whose claims a preference is thereby sought to be given, for, while the judgment is summary, nevertheless, when docketed, it at once becomes a lien upon the defendant's real estate. As an earnest of the bona fides of the particular debt or liability, the defendant is required to individualize the claim or liability by spreading upon the record the circumstances and transactions out of which it springs so that another debt or liability could not thereafter be substituted in its stead. *Davidson v. Alexander,* 84 N. C., 621; *Clement v. Gerow,* 30 Barb. (N. Y.), 325. In some of the cases it is said that the debt or liability should be identified with such certainty and particularity as would aid a conviction for perjury if the statement of it be false, or support a plea of *res judicata* should a subsequent action be instituted thereon. *Davenport v. Leary,* 95 N. C., 203. The statement should also give assurance that the consideration underlying the judgment is fair and honest. *Sharp v. R. R., supra.* A confession of judgment does not of itself import a consideration; hence, for this reason, the statement must show that the sum confessed is justly due, or to become due, or does not exceed the contingent

liability. *Martin v. Briscoe,* 143 N. C., 353, 55 S. E., 782; *Bank v. Cotton Mills,* 115 N. C., 507, 20 S. E., 765.

In the instant case, all that the judgment roll discloses, relative to the circumstances out of which the debt arose, is "balance due on account of money advanced . . . from time to time to take care of obligations due . . . at banks." But it is not stated over what period of time these advancements were made, or how much was advanced at any particular time. Nor does it appear that said advancements were not gifts on the part of Dr. McCullers to his wife. *Arrington v. Arrington,* 114 N. C., 116, 19 S. E., 278; *Loyd v. Loyd,* 113 N. C., 186, 18 S. E., 200; 30 C. J., 702; 13 R. C. L., 1381. This renders the judgment entered on the confession void as against creditors. *Smith v. Smith, supra;* 34 C. J., 114 *et seq.*

In *Stratton v. Wilson,* 170 Ky., 61, 185 S. W., 522, Ann. Cas., 1918B, 917, it was held (as stated in the 11th headnote): "Where a husband had on a trip abroad given his wife express checks for their expenses amounting to $800, and at another time had sent her $2,000 in a draft, and there is no showing that he intended that she should account therefor, she is entitled to retain the same on his death."

With the deeds and judgment in question void, for the reasons herein stated, the proceeding will be upheld, as the correct result has been reached.

No error.

T. A. BAUM v. THE NORTH RIVER INSURANCE COMPANY, OF THE CITY OF NEW YORK, INCORPORATED.

(Filed 7 October, 1931.)

1. Insurance J c—Incomplete negotiations for sale of property does not violate condition requiring sole ownership by insured.

Incomplete negotiations by the insured for the sale of property covered by a policy of fire insurance does not violate the condition of the policy that the insured must be the sole owner, the transaction not having been consummated at the time of the loss covered by the policy, and where there is evidence to this effect the granting of a judgment as of nonsuit is erroneous.

2. Insurance J a—In this case held: evidence should have been submitted to jury on question of forfeiture of policy.

Where a policy of insurance is ambiguous it will be construed in favor of the insured, and forfeitures are not favored by the law, and the policy should be construed with reference to the purpose for which the insurer knew the property was to be used, and *held:* where a policy of fire insurance on a boat provides for forfeiture in case gasoline is kept thereon,

but attached thereto is a writing permitting the use of oil for fuel, and the evidence discloses that a small quantity of gasoline necessary for the starting of the crude oil engine was kept on the boat, and that the loss was not caused by the gasoline catching fire, the evidence should be submitted to the jury, and the granting of defendant's motion as of nonsuit is error.

CONNOR, J., dissents.

APPEAL by plaintiff from *Cowper, Special Judge,* at May Term, 1931, of DARE. Reversed.

Ehringhaus & Hall for plaintiff.
McMullan & McMullan for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant made motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below allowed the motion, and in this we think there was error.

The evidence was to the effect that the plaintiff was the owner of a ferry boat, "Rebecca." After some correspondence with agents of the defendant company, in which plaintiff stated that no gasoline would be used thereon, and that it was a crude oil boat, a policy of insurance in the amount of $3,500 was issued plaintiff for a period of one year, from 6 July, 1926, upon the payment of $105 premium, to cover fire damage to the boat. The plaintiff valued the boat at $6,000 and it was burned 13 May, 1927, a total loss. This policy contained provisions requiring (1) unconditional or sole ownership and (2) prohibiting the keeping, using or allowing of gasoline on the boat. Attached thereto was a rider containing the words "Privilege to use oil for fuel."

First, as to the unconditional or sole ownership:

The policy in controversy is of the North Carolina standard form, C. S., 6436-6437, and among other things, provides, "This entire policy shall be void unless otherwise provided by agreement in writing added hereto, (a) if the interest of the insured be other than unconditional or sole ownership; or (d) if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance." This and like provisions have at all times been held valid by this Court. *Hardin v. Ins. Co.,* 189 N. C., p. 423; *Johnson v. Ætna Ins. Co., ante,* 362.

In 26 C. J., "Fire Insurance," page 231, part section 282 (b), we find: "A void conveyance or one that is incomplete at the time the property is destroyed does not violate the condition against change of title or interest. This is the rule where a bill of sale or a deed is not delivered, or where the deed is void for failure to designate the grantee."

Page 233, section 285(e) in part: "An executory contract of sale entered into by insured, and not consummated before loss, is not a breach of a condition that the interest of insured shall remain 'sole and unconditional.'"

The testimony of plaintiff was to the effect that the agreement to sell the ferry boat was tentative. Plaintiff was in possession of the boat when it burned, plaintiff's venture was contemplated but not consummated. The agreement in regard to a corporation was *in fieri*. We think plaintiff was, from his testimony, the unconditional and sole owner of the ferry boat "Rebecca" at the time it was burned.

Second, as to prohibiting gasoline:

The policy in its printed form uses this language, "unless otherwise provided by agreement in writing and added hereto, this company shall not be liable for loss or damage occurring . . . while there is kept, used or allowed, on the described premises . . . gasoline. . . ." The rider to the policy contains the typewritten language: "Privilege to use oil for fuel."

The plaintiff testified, in part: "At the time I made this application there was a gasoline tank on the boat. It is common to carry some gasoline on a boat for starting. Yes, there was gasoline on the boat for starting the main engine at the time I applied for insurance. That's the only way we had of starting the main engine with gasoline. . . . It was necessary to have enough gasoline to run the blow torches at all times. . . . At the time I made application for this insurance there was no gasoline engine on board the boat. At the time the fire occurred there was. The motor power of the boat was still crude oil, and we had a crude oil engine on it. In addition to that we had a gasoline engine on it and we were carrying a five-gallon can of gasoline. At the time of this fire I should say there was around two and a half gallons, in there. The fire occurred from the back-firing of the gasoline engine. I don't say it set the gasoline on fire, it set something on fire on the bottom of the boat. The fire occurred from the back-firing when the engine went to start it for some purpose—started it for the purpose of pumping the boat out. . . . It did not start from gasoline in the can. The gasoline engine referred to was one that operated the pump on the boat. It was a mere auxiliary engine, only requiring a small amount of gasoline to operate. The pump which we installed was equipped as it was necessary for the proper protection and operation of the boat. It was a small pump engine, put in there to fight fire. It was fueled with gasoline. Except for starting the main engine gasoline was used for no other purpose than as fuel for this small pump engine. Starting the engine with gasoline had nothing in this world to do with the fire. I mean the main

engine. The fuel used in the pump was gasoline. It required no large quantity, a gallon would run her two or three hours. . . . The crude oil engine of the type on the boat could not be started without gasoline priming. Referring to the pump, at the time that pump was installed the language "privilege to use oil for fuel" had been inserted in a rider to my policy for the purpose of putting the pump on. Gasoline is an oil."

In *Allgood v. Ins. Co.*, 186 N. C., at p. 420-1 (30 A. L. R., 652; 119 S. E., 561), the following observations are made: "'While we should protect the companies against all unjust claims, and enforce all reasonable regulations necessary for their protection, we must not forget that the primary object of all insurance is to *insure*.' *Grabbs v. Ins. Co.*, 125 N. C., 399. *Walker, J.*, in *Bray v. Ins. Co.*, 139 N. C., at p. 393, says: 'If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed.' See *Guarantee Corp. v. Electric Co.*, 179 N. C., 406; *Underwood v. Ins. Co.*, 185 N. C., 540, and cases cited." *Poole v. Ins. Co.*, 188 N. C., 468; *Rhyne v. Ins. Co.*, 196 N. C., at p. 719; *Mewborn v. Assurance Corp.*, 198 N. C., at p. 160; *Jolley v. Ins. Co.*, 199 N. C., at p. 271.

In Cyc. of Insurance Law, Vol. 4 (Couch), section 966b, p. 3347, the following principle is laid down: "A condition against the use or keeping of gasoline on the insured premises is not broken by its use to an extent necessary to carry on the business for which the insured knew that the property insured was used, and where both parties must have known either that the business insured must be discontinued, or gasoline used therein." (Note) "The keeping upon insured premises of a very small quantity of gasoline for use in an engine used to operate the machinery necessary for the business does not nullify insurance upon the property, although the keeping of gasoline is prohibited by the policy, if premiums were paid and accepted. *McClure v. Mutual F. Ins. Co.*, 242 Pa., 59, 48 L. R. A. (N. S.), 1221, 88 Atl., 921."

In *Bouchard v. Dirigo Mut. Fire, etc., Co.*, 113 Me., 17, L. R. A., 1915D, 187, it is held: "That both clauses should be construed in the light of the entire contract, the situation and character of the property insured and the natural and necessary uses to which it must be put by the owner, and the application of this rule of construction confirms the inference already drawn from the language of the clauses themselves. That the policy is not avoided when the use made of the prohibited

articles or the general use and operation of the property is necessarily incident to the business of the insured, and therefore presumed to be recognized and impliedly permitted by the insurer."

The premium was paid by plaintiff to defendant and the plaintiff contends that the policy was in full force and effect when the fire occurred that destroyed plaintiff's boat, which was valued at $6,000. The amount sought to be recovered in this action is $3,000 (reduced to give jurisdiction to State court). Law and equity abhors a forfeiture. To make void a policy like the present, the language of the provision in the policy and the rider in controversy, must be free from ambiguity. The provision in the policy and rider must also be construed in connection with the purpose of the business for which the insurer knew the property insured was used. From the testimony of plaintiff the matter should have been left to a jury. For the reasons given, the judgment below must be

Reversed.

CONNOR, J., dissents.

WM. T. ALEXANDER AND HIS WIFE, ETHEL P. ALEXANDER, v. VIRGINIA-CAROLINA JOINT STOCK LAND BANK AND SOUTHERN TRUST COMPANY, TRUSTEE.

(Filed 7 October, 1931.)

1. Evidence J d—Parol evidence is admissible to show mutual mistake in an action for reformation of instrument.

In an action to reform a deed of trust or mortgage on real property, parol evidence is competent to sustain the allegations of the complaint that an additional tract of land was included in the description of the land in the instrument by the mutual mistake of the parties, this being an exception to the ordinary rule that evidence of this character is not admissible to vary the terms of a written instrument.

2. Judgments L b—Held: mortgagor was not barred by decree of foreclosure from bringing suit for reformation of description in mortgage.

Where in an action to foreclose a deed of trust the description in the complaint and in the prayer for relief is ambiguous, the decree of foreclosure will not estop the trustor or mortgagor as a matter of law from bringing an action to reform the description in the deed of trust on the ground that through the mutual mistake of the parties more land was included within the description than had been intended or agreed upon, and in this case it further appears that the trustee was not made a party to the suit for foreclosure.

3. Mortgages H e—Trustee is necessary party in suit for foreclosure.

The legal title to lands conveyed by mortgage or deed of trust remains in the mortgagee or trustee until the lands have been sold and conveyed

by him under power of sale or under a decree of court, and in an action to foreclose a mortgage or deed of trust the mortgagee or trustee is an indispensable party.

APPEAL by defendants from *Moore, Special Judge,* at June Special Term, 1931, of WASHINGTON. No error.

This action was begun on 24 February, 1929. It was tried on the issue raised by the pleadings at June Special Term, 1931, of the Superior Court of Washington County.

On the allegations of the complaint, plaintiffs prayed that a deed of trust, dated 1 December, 1924, and executed by plaintiffs, conveying a tract of land containing 1,500 acres more or less, described therein by metes and bounds, to the defendant, Southern Trust Company, trustee, to secure their note payable to the defendant, Virginia-Carolina Joint Stock Land Bank, be reformed so as to exclude from the description in said deed of trust, a tract of land known as part of the Mountain Hill farm, owned by plaintiffs, which was included in said description by the mutual mistake of the parties.

In their answer, defendants denied the allegations of the complaint on which plaintiffs pray for relief in this action; in further defense to the action, defendants alleged that the deed of trust from the plaintiffs to the defendant, Southern Trust Company, trustee, was foreclosed by a judgment and decree rendered in the Superior Court of Washington County, on 19 March, 1928, in an action entitled, "Virginia-Carolina Joint Stock Land Bank v. Wm. T. Alexander and his wife, Ethel P. Alexander"; and that pursuant to said judgment and decree, the land described in the deed of trust was sold and conveyed to the defendant, Virginia-Carolina Joint Stock Land Bank, by W. A. Worth, commissioner. Defendants alleged that plaintiffs are now estopped from maintaining this action by said judgment and decree, which defendants expressly plead as a bar to plaintiff's recovery in this action.

In their reply to the further defense alleged in the answer, plaintiffs denied that the judgment and decree alleged therein is a bar to their recovery in this action; they alleged that the description of the land contained in the complaint in the action entitled "Virginia-Carolina Joint Stock Land Bank v. Wm. T. Alexander and his wife, Ethel P. Alexander," does not include that part of the Mountain Hill farm owned by the plaintiff, Wm. T. Alexander, which was included in the description of the land conveyed by the deed of trust by the mutual mistake of the parties to said deed of trust.

The issue submitted to the jury was answered as follows:

"Was the part of the Mountain Hill farm of plaintiffs, being the land shown on the map offered in evidence to the north of the red line, in-

cluded in the deed of trust from plaintiffs to Southern Trust Company as trustee for the Virginia-Carolina Joint Stock Land Bank, dated 1 December, 1924, and recorded in Book 89, at page 22, included in said deed of trust by reason of the mutual mistake of the parties? Answer: Yes."

On the verdict it was ordered, adjudged and decreed that the description in the deed of trust from plaintiffs to Southern Trust Company recorded in the office of the register of deeds of Washington County, in Book 89, at page 22, and in the deed from W. A. Worth, commissioner, to the Virginia-Carolina Joint Stock Land Bank, recorded in Book 97, at page 389, is incorrect, and includes land belonging to the plaintiffs. It was further ordered, considered and decreed that said descriptions be and the same were reformed as specifically directed in the judgment and decree in this action.

From the judgment, both defendants appealed to the Supreme Court.

MacLean & Rodman and Zeb Vance Norman for plaintiffs.
Worth & Horner for defendants.

CONNOR, J. Defendants' assignments of error on their appeal to this Court, based on their numerous exceptions to the admission of evidence offered by the plaintiffs at the trial of this action, cannot be sustained.

The testimony of the plaintiff, Wm. T. Alexander, was competent as evidence tending to show that it was the intention of both the plaintiffs and the defendants that the plaintiffs should convey by their deed of trust to the Southern Trust Company, trustee for the Virginia-Carolina Joint Stock Land Bank, only the Shepherd Farm, and that it was not the intention of either party to the deed of trust that any part of the Mountain Hill Farm, which adjoined the Shepherd Farm, should be conveyed thereby.

In *Archer v. McClure,* 166 N. C., 140, 81 S. E., 1081, it is said: "The doctrine is elementary that parol evidence is not, in general, admissible between the parties to vary a written instrument, but it is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to the universal principle, and parol evidence, in any case brought within one of the exceptions, is admitted to vary the writing so far as to make it accord with the true intention and agreement of the parties. These exceptions rest upon the highest motives of policy and expediency, or otherwise an injured party would generally be without remedy."

In this action, the remedy sought by the plaintiffs is the reformation of the deed of trust, so that it will accord with the true intention and agreement of the parties thereto, with respect to the land conveyed by

the deed of trust. Plaintiffs allege that in that respect the deed of trust does not accord with the true intention and agreement of the parties, because of their mutual mistake. On this allegation, if established by the proof, plaintiffs are entitled to the equitable remedy of reformation.

There was evidence other than the testimony of the plaintiff, Wm. T. Alexander, tending to establish the essential allegations of the complaint. It appears from the application to the defendant, Virginia-Carolina Joint Stock Land Bank, which is in writing, and signed by the plaintiff, Wm. T. Alexander, that the loan, if made, was to be secured by a first mortgage on "A tract of land, situate in Scuppernong Township, Washington County, North Carolina, adjoining Lake Phelps, and the lands of A. G. Walker, A. S. Holmes, the Woodley heirs and others, containing 1,500 acres more or less." In the complaint filed by the Virginia-Carolina Joint Stock Land Bank in the action against the plaintiffs herein, for the foreclosure of the deed of trust, the land sought to be sold is described as "a certain tract or parcel of land situated in Scuppernong Township, Washington County, North Carolina, containing 1,500 acres, more or less, known as the Shepherd Farm, adjoining Lake Phelps, the lands of A. G. Walker, A. S. Holmes, the Woodley heirs and others, a detailed description of said land being set out in the aforesaid deed of trust, which is recorded in the office of the register of deeds of Washton County in Book 89, at p. 22." It is admitted that the description in the deed of trust includes part of the Mountain Hill Farm.

The judgment and decree relied upon by the defendants in this action, as a bar to plaintiff's recovery, was rendered in an action entitled, "Virginia-Carolina Joint Stock Land Bank v. Wm. T. Alexander and his wife, Ethel P. Alexander." The Southern Trust Company, trustee in the deed of trust, was not a party to that action. In this jurisdiction it is uniformly held that the legal title to land conveyed by a mortgage or deed of trust, to secure the payment of a note or bond, is in the mortgagee or trustee. *Weathersbee v. Goodwin,* 175 N. C., 234, 95 S. E., 491. In an action to foreclose the mortgage or deed of trust, the mortgagee, or trustee is an indispensable party. 42 C. J., 44, sec. 1557. The legal title remains in the mortgagee or trustee until the land is sold and conveyed by him under the power of sale or by a commissioner under a decree rendered in an action to which he is a party.

Upon the facts of the instant case, whether the absence of the trustee as a party to the action to foreclose the deed of trust rendered the decree of foreclosure void, or was a mere irregularity, the judgment and decree in the action entitled, "Virginia-Carolina Joint Stock Land Bank v. Wm. T. Alexander and his wife, Ethel P. Alexander," does not as a matter of law bar the plaintiffs' recovery in this action. The descrip-

tion in the complaint in said action of the land which plaintiff therein prayed should be sold was at least ambiguous. *Ward v. Gay,* 137 N. C., 397, 49 S. E., 884.

Defendants excepted to the refusal of the court to allow their motion at the close of all the evidence for judgment dismissing the action as of nonsuit. They also excepted to the refusal of the court to instruct the jury that if they believed all the evidence and found the facts to be as testified, they should answer the issue "No." Assignments of error based on these exceptions cannot be sustained. The evidence was properly submitted to the jury under a charge to which there was no exception.

We find no error in the trial or in the judgment. It is affirmed.

No error.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK v. WM. T. ALEXANDER AND HIS WIFE, ETHEL P. ALEXANDER.

(Filed 7 October, 1931.)

Judgments K f—Suit to reform deed of trust is not sufficient notice of motion to set aside decree of foreclosure previously rendered.

Notice of a motion to set aside a judgment must ordinarily be given as required by C. S., 912, and the pleadings in an action to reform a deed of trust upon allegations of mutual mistake are insufficient as notice of a motion to set aside the decree of foreclosure for irregularity and surprise, etc., the pleadings in the suit for reformation containing no allegations of irregularities in the foreclosure or of surprise. The distinction between treating an independent action to set aside a judgment as a motion in the original cause is pointed out.

APPEAL by plaintiff from *Moore, Special Judge,* at June Special Term, 1931, of WASHINGTON. Reversed.

The summons and verified complaint in this action were duly served on both defendants on 14 February, 1928. No answer or other pleading was filed in the action by either defendant.

It was alleged in the complaint that on 1 December, 1924, the defendants executed and delivered to the plaintiff their note in the sum of $33,000, payable on the amortization plan in sixty-six semiannual installments; that default was made in the payment of the semiannual installment due on 1 December, 1927; and that because of said default, the said note by its terms became due and payable on 1 December, 1927. It was alleged that the amount due on said note, at the date of the commencement of the action, was $32,124.18, with interest from 1 December, 1927.

It was further alleged in the complaint that contemporaneously with the execution of their note and for the purpose of securing the same, the defendants executed and delivered a deed of trust by which they conveyed to the Southern Trust Company, trustee, the tract of land described in the complaint.

The plaintiff prayed judgment that it recover of the defendants the sum of $32,124.18, with interest from 1 December, 1927; and that the land described in the complaint be sold by a commissioner to be appointed by the court for that purpose.

On Monday, 19 March, 1928, judgment by default final, for want of an answer to the complaint, was rendered by the clerk of the Superior Court of Washington County. It was adjudged therein that plaintiff recover of the defendants the sum of $32,124.18, with interest from 1 December, 1927, and the costs of the action. It was further ordered and decreed in said judgment that the land described in the complaint be sold by the commissioner appointed therein for that purpose, and that said commissioner report the sale to the court for confirmation.

On 21 April, 1928, the commissioner appointed by the court, filed his report in this action, from which it appeared that he had offered the land described in the complaint for sale as directed by the judgment, and that the plaintiff was the last and highest bidder for said land in the sum of $19,500.

On 21 May, 1928, the sale made by the commissioner was duly confirmed, and thereafter the commissioner by his deed dated 23 May, 1928, conveyed the land described in the complaint to the plaintiff.

On 24 February, 1930, an action was begun in the Superior Court of Washington County, entitled, "Wm. T. Alexander and Ethel P. Alexander v. Virginia-Carolina Joint Stock Land Bank and Southern Trust Company, trustee." In their complaint in said action, the plaintiffs alleged that because of the mutual mistake of the parties to the deed of trust executed by the plaintiffs, Wm. T. Alexander and his wife, Ethel P. Alexander, to the defendant, Southern Trust Company, trustee, to secure their note payable to the defendant, Virginia-Carolina Joint Stock Land Bank, the description of the land contained in said deed of trust is erroneous, for that said description includes a tract or parcel of land, owned by the plaintiff, Wm. T. Alexander, which it was not intended by said parties should be conveyed by said deed of trust. The said action was for the reformation of the deed of trust in accordance with the allegations of the complaint.

The defendants in said action in their answer denied the allegations of the complaint on which plaintiffs prayed for the reformation of the deed of trust; they further pleaded in defense of the action, as an

estoppel against the plaintiffs, the judgment in the action entitled, "Virginia-Carolina Joint Stock Land Bank v. Wm. T. Alexander and his wife, Ethel P. Alexander."

In their reply to the further defense alleged in the answer of the defendants, plaintiffs alleged that the said judgment is not a bar to their recovery in said action, for that the description of the land ordered to be sold by said judgment does not include the tract or parcel of land which was included by the mutual mistake of the parties in their deed of trust to the Southern Trust Company, trustee, or that if the said description does include said tract or parcel of land, such inclusion was by the mutual mistake of the parties to said deed of trust.

The action entitled, "Wm. T. Alexander and his wife, Ethel P. Alexander, v. Virginia-Carolina Joint Stock Land Bank and Southern Trust Company, trustee," was on the calendar for trial at the June Special Term, 1931, of the Superior Court of Washington County. When said action was called for trial, the plaintiffs therein, who are the defendants in the above entitled action, moved in said action "that the court hear the evidence in the case called for trial, and consider said evidence on plaintiff's motion to set aside the judgment in the action entitled, 'Virginia-Carolina Joint Stock Land Bank v. Wm. T. Alexander and his wife, Ethel P. Alexander,' for irregularities and for mistake, surprise and excusable neglect, treating the pleadings in the action entitled, 'Wm. T. Alexander and wife, Ethel P. Alexander, v. Virginia-Carolina Joint Stock Land Bank and Southern Trust Company, trustee,' as a motion for that purpose."

The Virginia-Carolina Joint Stock Land Bank, plaintiff in the above entitled action, objected to the hearing of said motion, on the ground, (1) that said motion was not in writing; and (2) that no notice of said motion had been served on said plaintiff, as required by the statute. The objection was overruled, and plaintiff excepted.

The court heard the motion, and ordered that the judgment in the above entitled action rendered by the clerk on 19 March, 1928, and the decree confirming the sale of the land sold by the commissioner pursuant to said judgment, dated 21 May, 1928, be and the same were set aside and vacated for irregularities appearing therein. Plaintiff excepted to this order, and appealed therefrom to the Supreme Court.

Worth & Horner for plaintiff.
MacLean & Rodman and Zeb Vance Norman for defendants.

CONNOR, J. The defendants in this action, who are the plaintiffs in the action entitled "Wm. T. Alexander and his wife, Ethel P. Alexander, v. Virginia-Carolina Joint Stock Land Bank and Southern Trust Com-

pany, trustee," in their complaint filed in the latter action did not attack the regularity of the judgment and decree rendered by the clerk of the Superior Court in this action; they do not allege in their reply to the further defense alleged in the answer to their complaint, that said judgment and decree were irregular in any respect, or that the same were rendered because of their mistake, surprise or excusable neglect. They deny that said judgment and decree are a bar to their recovery in this action.

The pleadings in the action entitled, "Wm. T. Alexander and his wife, Ethel P. Alexander, v. Virginia-Carolina Joint Stock Land Band and Southern Trust Company, trustee," are not sufficient as a motion in this action that the judgment and decree rendered by the clerk on 19 March, and on 21 May, 1928, respectively, be set aside and vacated, or as notice to the plaintiff that such motion would be made at June Special Term, 1931, of the Superior Court of Washington County. For this reason, *Craddock v. Brinkley,* 177 N. C., 125, 78 S. E., 280, cited in the brief filed in this Court for the appellees is not applicable. In that case it is said that when a party by mistake brings an independent action to set aside a judgment, when his remedy is by a motion in the cause, the court may in its discretion treat the summons and complaint as a motion. This principle manifestly has no application, when the relief sought in the independent action is the reformation of a deed, and not the setting aside or vacation of a judgment and decree in another action between the same parties.

It was error for the court to hear or consider the motion in this action, in the absence of a notice served on the plaintiff as required by C. S., 912. For this reason, the order setting aside and vacating the judgment and decree rendered in this action on 19 March and 21 May, 1928, respectively, is

Reversed.

SOUTHERN PRINTERS SUPPLY COMPANY v. R. S. PRESCOTT, M. B. PRESCOTT, AND H. W. RENFREW.

(Filed 7 October, 1931.)

Bills and Notes C d—Endorser before delivery to payee is liable to holder in due course although payee has sold security and failed to apply proceeds to payment of note.

Where the payee of a note secured by a chattel mortgage transfers the note for value before maturity by endorsement to another, the endorsee is a holder in due course and may recover on the note although the payee

has sold the property mortgage and has failed to apply the proceeds to the payment of the note, the holder in due course not being affected by the subsequent change in the relationship of the parties, and an endorser before delivery to the payee may not claim that as to him the note was discharged.

APPEAL by M. B. Prescott from *Devin, J.*, at March Term, 1931, of PITT. No error.

H. W. Renfrew sold R. S. Prescott certain printing machinery and equipment at an agreed price, payable in installments of $500 each evidenced by notes secured by a chattel mortgage on the machinery. The note sued on is one of this series. It was signed by R. S. Prescott, endorsed by M. B. Prescott before delivery to the payee (Renfrew), and afterwards endorsed and delivered by the payee to the plaintiff for value before maturity. Neither the maker nor the endorser paid the note when due, and Renfrew sold the property under his mortgage. He did not pay the proceeds or any part thereof to the plaintiff. The verdict was as follows:

1. Are the defendants indebted to the plaintiff on the note sued on, and if so, in what amount? Answer: Yes, $500 and interest from 8 April, 1929.

2. Are the defendants, R. S. Prescott and M. B. Prescott primarily liable on the note sued on and set out in the complaint? Answer: No.

3. Is the defendant, R. S. Prescott, indebted to the defendant, H. W. Renfrew, on the account set out in defendant Renfrew's answer? Answer: Yes, $400.

Judgment for plaintiff; appeal by defendant M. B. Prescott.

Albion Dunn for appellant.

F. G. James & Son for appellee.

PER CURIAM. It is contended that Renfrew's failure to pay the note in controversy out of the proceeds arising from the foreclosure of his chattel mortgage releases the appellant from liability. The plaintiff became a holder in due course and was not deprived of his legal rights by virtue of any change in the subsequent relation of the defendants. We have examined the several exceptions and find

No error.

MARCELLUS REDDICK, DECEASED, MRS. WINNIE HARRIS, CLAIMANT, v. GREENVILLE CAFE.

(Filed 7 October, 1931.)

Master and Servant F b—Where death of employee results from his wilful intention to injure fellow employee compensation is properly denied.

Under the provisions of section 13 of the Workmen's Compensation Act the finding of fact by the Industrial Commission supported by evidence that the employee's death resulted from his wilful intention to injure or kill his fellow employee is sufficient to uphold the ruling of the Commission denying the application for compensation.

APPEAL by the claimant from *Devin, J.*, at May Term, 1931, of PITT.

J. C. Lanier for appellant.
Albion Dunn for appellee.

PER CURIAM. This is a proceeding before the Industrial Commission for compensation. The cause was heard by T. A. Wilson, commissioner, who found the following facts:

1. That the deceased was a regular employee of the defendant employer on 12 August, 1930.

2. That the accidental injury and death of the deceased on 12 August, 1930, was due to his wilful intention to injure or kill his fellow employee.

3. That the average weekly wage was $14.50.

4. That Winnie Harris, mother of Marcellus Reddick, was wholly dependent upon the deceased at the time of his accidental injury and death.

Upon the facts found the commissioner dismissed the proceeding and upon appeal the full Commission adopted and affirmed his findings of fact and conclusions of law. The claimant then appealed to the Superior Court and the order of the Industrial Commission was ratified, approved, and affirmed, and the action was dismissed.

The claimant excepted and appealed to the Supreme Court.

Section 13 of the Workmen's Compensation Law contains this provision: "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another."

Under this provision the facts as found and set out in the record are sufficient to sustain the judgment.

Affirmed.

WINNIE BARWICK DEBNAM AND HUSBAND, D. W. DEBNAM, v. G. A. ROUSE.

(Filed 7 October, 1931.)

1. Trial D a—Motion of nonsuit must be renewed at close of all evidence in order to present question of sufficiency of evidence.

Failure of the defendant to renew his motion as of nonsuit at the close of all the evidence introduced on the trial of a civil action is a waiver by him of his motion theretofore made at the close of the plaintiff's evidence. C. S., 567.

2. Appeal and Error A a—On appeal in civil action the Supreme Court is limited to matters of law or legal inference.

The Supreme Court may only review matters of law or legal inference properly made to appear on the case appealed, and a verdict supported by sufficient legal evidence will be sustained. Const., Art. IV, sec. 8.

APPEAL by defendant from *Devin, J.*, and a jury, at June Term, 1931, of GREENE. No error.

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

"1. Were the plaintiff, Winnie Barwick Debnam and defendant, G. A. Rouse, partners in the operation of the Standard Laconic as alleged in the complaint? Answer: Yes.

2. Is the defendant indebted to the plaintiff, Winnie Barwick Debnam, for her share of its profits in said business, and if so in what amount? Answer: $441.

3. Is the plaintiff, Winnie Barwick Debnam, indebted to the defendant, G. A. Rouse, and if so, in what amount? Answer: No.

4. Is the plaintiff D. W. Debnam, indebted to the defendant, G. A. Rouse, and if so, in what amount? Answer: No."

Walter G. Sheppard for plaintiffs.
John Hill Paylor for defendant.

PER CURIAM. The defendant, at the close of plaintiffs' evidence, made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below refused the motion, and in this we can see no error.

The defendant introduced evidence, but did not renew the motion to nonsuit at the close of all the evidence.

In *Lee v. Penland,* 200 N. C., at p. 341, citing numerous authorities, is the following: "When the plaintiff in a civil action has introduced his evidence and rested his case the defendant may move for dismissal

of the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal; if it is not allowed the defendant may except, and if he introduces no evidence the jury shall pass upon the issues, and he may have the benefit of the latter exception on appeal. A motion for dismissal or for judgment of nonsuit made at the close of the plaintiff's evidence and not renewed at the close of all the evidence is waived." *Price v. Ins. Co., ante,* 376.

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference," etc. Const., Art. IV, sec. 8. On this record there was sufficient evidence to be submitted to the jury, the weight and probative force was for them to determine and not us. From the evidence they could have decided with the defendant, but they did not. We are bound by their findings of fact.

We think the issues submitted arise on the pleadings and determinative of the controversy, but it may be noted that defendant tendered no issues.

We think the evidence of plaintiffs constituted a partnership, under the authorities in this jurisdiction, and sufficient to be passed on by a jury. On the whole record we find in law no reversible or prejudicial error.

No error.

ETHEL JENKINS v. JESSEE W. WOOD.

(Filed 14 October, 1931.)

1. **Evidence J a—Parol evidence held admissible to show that plaintiff had not received amount for which she had signed receipt.**

   Where a receipt is an acknowledgment of the payment of money or the delivery of goods it is but prima facie evidence of the amount stated thereon and may be contradicted by parol, and *Held:* in this case, the action of the trial judge in ruling out the evidence of the plaintiff, a substitute employee of the United States Postoffice, that though she had signed a government receipt for the amount of her salary at the government rate of a fixed sum per hour, that she had actually received a less amount in monthly payments from the local postmaster is reversible error in her action against the postmaster for the money had and received by him to her use, and this rule is particularly insistent where there is evidence of fraud and mistake.

2. **Money Received B a—Complaint held sufficient to support action for money had and received.**

   Where a complaint alleges that a certain sum of money belonging to the plaintiff with interest was paid to the defendant and wrongfully

converted by him to his own use it is broad enough, when liberally construed, to support an action for money had and received, and the objection that the complaint failed to sufficiently allege fraud is untenable.

3. Pleadings G b—Defendant can avail himself only of defenses pleaded.

In order to avail himself of the defense of the effect of the plaintiff's conduct after knowledge that the defendant had obtained more money for her than she had received, it is necessary that the defense be set up in the answer.

CIVIL ACTION, before *Cranmer, J.*, at March Term, 1931, of HALIFAX.

The defendant is postmaster in the town of Littleton, N. C., and the plaintiff alleged that she was employed as a substitute clerk in the postoffice by the defendant, who represented to her that she would receive $50.00 per month for her services. Plaintiff further alleged that she began work in the month of September, 1926, and that the employment was terminated on or about July, 1930. Plaintiff further alleged that the United States Government allowed her as compensation the sum of sixty-five cents an hour, and that the defendant received from the government such sum of money, but paid to the plaintiff only $50.00 per month, and that the difference between the amount paid to her and the amount allotted to her for her services by the government and received by the defendant was $1,665. It was further alleged "that the defendant falsely and fraudulently represented to the plaintiff that the amount included in her check over and above the amount which he agreed to pay her was for janitor service and other expenses incident to the operation of the postoffice, when in truth it was the amount allowed the plaintiff as salary for her services by the United States postoffice." Whereupon, plaintiff prayed judgment for the sum of $1,665.

The defendant demurred to the original complaint upon the ground that fraud had not been properly alleged. An amended complaint was filed substantially identical with the original complaint except that the amount in controversy was alleged to be $1,532.90 with interest, and that the defendant fraudulently acquired the funds of plaintiff and wrongfully converted same to his own use. The defendant filed an answer setting up all the payments which had been made to plaintiff in detail and entering a general denial to all other allegations.

The evidence tended to show that the plaintiff went to work about 1 September, 1926, and remained in the service until about 18 July, 1930. It further appeared that at the end of each month during the period of service plaintiff had signed receipts and the substitute clerk's time record and semimonthly payroll. All of these receipts and payrolls were introduced in evidence. Each of these vouchers specified that the plaintiff was to receive sixty-five cents an hour, and the only dif-

ference in any of the vouchers is the number of hours of service specified therein. Each of the vouchers concludes as follows: "Received from the postmaster at Littleton, N. C., the amounts entered opposite my signature in full for services rendered, less 3½ per cent retirement deduction, which I certify to be correct."

The plaintiff offered to testify that at the time these receipts were signed that she did not receive the amount specified in the receipts, but only received $50.00 per month, and that she did not read the receipts because the defendant did not give her a chance to do so. She further stated that the defendant brought the receipts "to me hurriedly when there were several in the office and said, 'Sign this right quickly, please mam,' and I signed the receipt." The plaintiff further offered to testify that the postmaster told her that the difference between the receipt she signed and the $50.00 per month she was actually paid was used for extra help and for extra compensation for the defendant, who did the night work. The plaintiff was asked why she had signed receipts for more money than she received, and, if permitted to answer, would have testified: "Because he hired me for $50.00 . . . and I was satisfied, knowing he had hired me for $50.00 per month." Plaintiff further offered to testify that she did not know that she was signing receipts for more money than she was receiving until after she had been working about thirteen months, and that when she discovered the facts she went to defendant and asked him why it was she was signing for more money than she was getting and he replied: "Don't you know you agreed to work for $50.00, and when you were paid that don't you know that is what I told you I would pay, and besides I have to do the night work, and George Pickford has to have something for delivering the mail." Plaintiff further testified that she relied upon what the defendant told her, and that for such reason she did not read the receipts.

The trial judge struck out all of the evidence offered by plaintiff as to why she signed the receipts, and at the conclusion of plaintiff's evidence, there was judgment of nonsuit, from which judgment the plaintiff appealed.

E. L. Travis and George C. Green for plaintiff.
John M. Picot and Parker & Allsbrook for defendant.

BROGDEN, J. Is it permissible for a party signing a receipt for money, to explain or contradict the same by oral testimony?

The evidence tended to show that the plaintiff was employed by the defendant as substitute clerk in the postoffice at Littleton, N. C., and

agreed to work for $50.00 per month. The United States Government paid for such service the sum of sixty-five cents per hour. The hours of service rendered by plaintiff computed at the government price, amounted to much more than $50.00 per month. The defendant received pay from the government for the services of plaintiff the sum of sixty-five cents per hour, but paid to plaintiff the fixed sum of $50.00 per month.

The plaintiff from time to time was required to sign receipts for the amount received by the defendant from the government. All of these receipts showed that she was paid at the rate of sixty-five cents an hour, and that the amount of the receipt so signed by her was in excess of the sum actually paid to her by the defendant. When the plaintiff made protest the defendant explained that the difference was used by him in paying for extra services rendered by him and other employees in the postoffice.

The trial judge excluded the proffered testimony of plaintiff in explanation and contradiction of the receipts. The general rule of law applicable to the facts is stated in *Norwood v. Grand Lodge,* 179 N. C., 441, 102 S. E., 749, in these words: "When a receipt is evidence of a contract between parties it stands on the same footing with other contracts in writing, and cannot be contradicted or varied by parol evidence; but when it is an acknowledgment of the payment of money or of the delivery of goods, it is merely *prima facie* evidence of the fact which it recites, and may be contradicted by oral testimony." The principle is particularly insistent where there is evidence of fraud or mistake. *Grant v. Hughes,* 96 N. C., 177, 2 S. E., 339.

The defendant insists that fraud is not sufficiently pleaded, but the facts warrant a recovery for money had and received, and the complaint, by liberal construction, is broad enough to support such theory. *Stroud v. Ins. Co.,* 148 N. C., 54, 61 S. E., 626; *Mitchem v. Pasour,* 173 N. C., 487, 92 S. E., 322.

The effect of plaintiff's conduct, after acquiring knowledge of all the facts, is not presented for decision for the reason that no such defense appears in the answer.

The Court is of the opinion that the judgment of nonsuit was erroneously entered.

New trial.

NORTH CAROLINA BANK AND TRUST COMPANY v. J. F. WILLIAMS, ADMINISTRATOR OF J. C. WILLIAMS, DECEASED; CHARLES TEACHEY, MAURY WARD, D. W. FUSSELL, HENRY FUSSELL, D. B. HERRING, AND C. W. BONEY.

(Filed 14 October, 1931.)

1. Bills and Notes B c—Bond indemnifying liquidating bank from loss is not negotiable.

A bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, the bond being payable to the liquidating bank and not to its order, is not a negotiable instrument within the meaning of C. S., 2982, and its transfer by endorsement to another is an assignment of a chose in action, and the assignee is not a holder in due course, C. S., 3033, and the obligors may set up such defenses against the assignee as they might have had against the liquidating bank.

2. Assignment A a—Bond indemnifying liquidating bank from loss is assignable.

With certain exceptions, a chose in action is now usually assignable, and the assignee may bring an action thereon in his own name, C. S., 446, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable, and the assignee may bring action thereon to recover the loss sustained by the assignor by reason of the insufficiency of the assets, and may recover against the obligor and sureties on the bond within the penalty stated, subject to any offset or defense which the latter may have as against the assignor.

APPEAL by defendants, J. F. Williams, administrator, D. B. Herring and Charles Teachey, from *Daniels, J.*, at July Term, 1931, of DUPLIN. Affirmed.

This action was heard on demurrers to the complaint filed by the defendants, J. F. Williams, administrator, D. B. Herring and Charles Teachey. Each of these defendants by his demurrer challenged the right of the plaintiff to maintain this action, and also its right to recover on the facts alleged in the complaint.

From judgment overruling their demurrers, the said defendants appealed to the Supreme Court.

Bryan & Campbell for plaintiff.
Beasley & Stevens for defendant, J. F. Williams, administrator.
John A. Stevens for defendants, D. B. Herring and C. Teachey.

CONNOR, J. On or about 15 July, 1926, the Bank of Duplin, doing business in the town of Wallace, N. C., took over all the assets of the Bank of Rose Hill, of Rose Hill, N. C., and agreed with the Bank of

Rose Hill that it would liquidate said assets, and pay off and fully discharge all its debts and liabilities. As an inducement to this agreement, and as a consideration for the same, the Bank of Rose Hill delivered to the Bank of Duplin a bond in the penal sum of $30,000, payable to the Bank of Duplin. The purpose of this bond, as appears from the recitals therein, was to indemnify the Bank of Duplin against all loss or damage that the said bank might suffer or sustain by reason of the performance of its agreement to pay off and discharge all the debts and liabilities of the Bank of Rose Hill. The bond was executed by the Bank of Rose Hill, as principal, and by the defendants in this action, except the defendant, J. F. Williams, administrator of J. C. Williams, as sureties. J. C. Williams, who executed said bond as surety, is dead. The defendant, J. F. Williams, is his administrator.

Pursuant to its agreement with the Bank of Rose Hill, the Bank of Duplin has liquidated the assets taken over by the said bank, and has paid off and fully discharged all the debts and liabilities of the Bank of Rose Hill to its depositors and other creditors. The assets of the Bank of Rose Hill were not sufficient, in amount, when liquidated, to satisfy all its debts and liabilities. On or before 16 January, 1930, the Bank of Duplin had sustained and suffered loss and damage by reason of the performance of its agreement with the Bank of Rose Hill, in a sum in excess of $30,000, the penal sum of said bond. Prior to said date, the Bank of Duplin had made demand on the sureties on said bond for the payment of the amount of its loss and damage, not in excess of $30,000. The sureties on said bond, who are the defendants in this action, have failed to pay said amount or any part thereof.

On or about 16 January, 1930, the Bank of Duplin, for a valuable consideration, transferred and assigned said bond to the plaintiff in this action, as collateral security for the indebtedness of the Bank of Duplin to the plaintiff. At the date of the said transfer and assignment, this indebtedness exceeded, and now exceeds, the sum of $30,000. The plaintiff is now the holder of said bond, claiming title thereto under the transfer and assignment by the Bank of Duplin dated 16 January, 1930.

On the foregoing facts alleged in the complaint in this action, plaintiff prays judgment that it recover of the defendants, and of each of them, as sureties on said bond, the sum of $30,000, with interest and costs.

The bond sued on in this action is payable to the Bank of Duplin. It is not payable to the order of said bank. For this, as well as for other reasons, the bond does not conform to the statutory requirements for a negotiable instrument. C. S., 2982. It is, therefore, not negotiable, within the meaning of the Negotiable Instruments Law. C. S., 2976, *et*

seq. The plaintiff is not the holder of the bond in due course, as defined in C. S., 3033; it holds the bond subject to all defenses available to the defendants as against the Bank of Duplin.

By their respective demurrers to the complaint, the appealing defendants challenged the right of plaintiff to maintain this action, contending that the bond executed by them and payable to the Bank of Duplin is not assignable. This bond is a chose in action, on which prior to 16 January, 1930, the Bank of Duplin had a right of action. The amount recoverable on the bond, if any, was payable to the Bank of Duplin.

The law with respect to the assignability of choses in action, arising out of contract, is stated in 2 R. C. L., at page 595, as follows: "Except in cases within the law merchant, it was an established principle of the common law, that a chose in action, which is defined as a personal right not reduced into possession but recoverable by a suit at law, could not be assigned, and that no man could purchase another's right to a suit either in whole or in part. At a later period this rule of the early common law was substantially modified, both by judicial decision and by statutory enactment, so that today in nearly all jurisdictions a right of action arising out of a breach of a contract is assignable."

"The test of assignability is sometimes said to be whether or not, upon the death of a party, his executor or administrator would succeed to his rights and liabilities; but the true test is the intention of the parties, to be ascertained from a consideration of the nature of the acts or services to be performed, and of the language used in the contract." 5 C. J., p. 877.

A chose in action, arising out of contract is ordinarily assignable in this jurisdiction by virtue of both judicial decisions, and statutory enactment. The assignment is without prejudice to any setoff, or other defense existing at the time of, or before notice of the assignment. The assignee may maintain an action in his own name to recover a chose in action which has been duly assigned to him, for he is the real party in interest. C. S., 446. *High Point Casket Co. v. Wheeler,* 182 N. C., 459, 109 S. E., 387, 19 A. L. R., 391; *Vaughan v. Davenport,* 159 N. C., 369, 74 S. E., 967; *Anders v. Gardner,* 151 N. C., 604, 66 S. E., 665; *R. R. v. R. R.,* 147 N. C., 368, 61 S. E., 185, 23 L. R. A. (N. S.), 223. In the last cited case, *Hoke, J.,* says:

"While at common law the rights and benefits of a contract, except in the case of the law merchant, and in cases where the Crown had an interest, could not be transferred by assignment, a doctrine which Lord Coke attributes to the 'wisdom and policy of the founders of our law in discouraging maintenance and litigation, but which Sir Frederick Pollock tells us is better explained as a logical consequence of the

archaic view of a contract as creating a strictly personal obligation between the debtor and creditor,' the rule in its strictness was soon modified in practical application by the common-law courts themselves, and more extensively by the decision of the courts of equity; and the principles established by these cases have been sanctioned and extended by legislation until now it may be stated as a general rule that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that actions for breach of same can be maintained by the assignee in his own name."

This principle established by statutory enactment in this State, and consistently applied by this Court, enhances the practical value of every business contract, and works no harm to the party who is liable under its terms. If a party to a contract is liable for its breach, it is immaterial to him who shall recover the damages, for upon payment of the damages which have accrued by reason of its breach, to the party or to his assignee who is entitled to recover the same, such party is discharged of all liability arising out of his contract.

In the instant case, the facts alleged in the complaint are sufficient to constitute a cause of action on which the plaintiff is entitled to recover. *Bank v. Bank,* 198 N. C., 477, 152 S. E., 403. Each of the defendants is liable for the loss or damage sustained or suffered by the Bank of Duplin as the result of the performance of its agreement with the Bank of Rose Hill, subject to any offset or counterclaim to which such defendant may be entitled as against the Bank of Duplin. The judgment overruling the demurrers to the complaint is

Affirmed.

B. G. WILLIS v. MRS. EVA TAYLOR AND MRS. GEORGIA CARRAWAY, TRADING AS MOTOR SERVICE COMPANY, AND B. O. TAYLOR.

(Filed 14 October, 1931.)

Mechanic's Liens A c—Held: Person ordering repairs was not owner or legal possessor of car and mechanic's lien did not attach thereto.

Where the purchaser of an automobile gives the seller a title-retaining contract to secure the balance of the purchase price, and thereafter gives a second lien on the car to another, and later the second lienor takes possession from the purchaser without legal process and has the car repaired, *Held:* the second lienor was not the owner or legal possessor of the car within the intent and meaning of C. S., 2435, and the one making the repairs obtains no lien therefor under the statute and is not entitled to possession as against the first lienor.

WILLIS *v.* TAYLOR.

CIVIL ACTION, before *Harris, J.*, at May Special Term, 1931, of PITT.

W. R. Willis, brother of the plaintiff, bought an automobile from the defendants, trading as Motor Service Company, on 16 April, 1928, and executed as security for the payment of the balance of the purchase price a conditional sales contract which was duly recorded. Said conditional sales contract was transferred to the C. I. T. Corporation for value, and subsequently the plaintiff became the owner of the paper by transfer from the C. I. T. Corporation. There is a balance due the plaintiff on said contract of $371.00. The purchaser, W. R. Willis, mortgagor, was permitted to use the car and did use the same continuously from the date of purchase. On 5 May, 1930, W. R. Willis executed a second lien to the defendant, Motor Service Company, upon the car to secure the payment of $302.88. This second paper was duly transferred to the C. I. T. Corporation. In October or November, 1930, the C. I. T. Corporation, under and by virtue of the second lien, above referred to, took possession of the car, without legal process, and turned the same over to the defendant, Motor Service Company, in order to have certain repairs made. The defendant, Motor Service Company, made repairs upon the car amounting to $362.53. Thereafter, on or about 3 January, 1931, the plaintiff issued claim and delivery papers for the possession of the car, but the same was held by the defendant, Motor Service Company, by virtue of its claim for repairs and the lien provided by C. S., 2435.

The car was sold under said mechanic's lien by the defendants.

The jury found that the amount due the plaintiff on the first lien was $371.88. The second issue was as follows: "Is the plaintiff entitled to the possession of said car as alleged in the complaint?" The trial judge instructed the jury to answer the second issue "Yes."

From judgment upon the verdict the defendants appealed.

W. G. Sheppard, John B. Lewis and W. D. Pruden for plaintiff.

R. T. Martin for defendants.

BROGDEN, J. Is a mechanic's lien for work done on an automobile by the procurement of the second mortgagee or lien holder, superior to the rights of the first mortgagee?

No point is made as to whether W. R. Willis, the mortgagor, was in default upon his payments on the first mortgage, payable to his brother, B. G. Willis, the plaintiff in this action. The car was in the possession of the mortgagor apparently with the consent and approval of the holders of both the first and second liens. Upon this state of facts the defendants contend that by virtue of provisions of C. S., 2435, the mechanic's lien for repairs on said car has priority over the claim of

the plaintiff, the holder of the first mortgage or lien. It was decided in *Johnson v. Yates,* 183 N. C., 24, 110 S. E., 603, and in *Sales Co. v. White,* 183 N. C., 671, 110 S. E., 607, that if a mortgagor of an automobile was permitted to hold possession thereof and use the same, such mortgagor had implied authority to contract for repairs upon the car and the lien prescribed by C. S., 2435, for such repairs, was entitled to priority over the claim of the holder of the first mortgage. The decision was built upon the idea that a mortgagor was such "owner or legal possessor of such property" as to make a valid contract for repairs, thus giving priority to the mechanic doing the work. The law as announced in the *Yates case* interpreted the words "owner or legal possessor of such property" to include "all owners of property and all persons in possession and use of same with the knowledge and assent of the owner and under circumstances giving express or implied authority from him to have such reasonable and necessary repairs made as may be required in the use of the property contemplated by the parties."

In the case at bar the second mortgagee or lien holder was never in possession of the property and never used the same. Hence it was not the "owner or legal possessor of such property" within the contemplation of C. S., 2435. See *Harris v. R. R.,* 190 N. C., 480, 130 S. E., 319; *Motor Co. v. Motor Co.,* 197 N. C., 371, 148 S. E., 461; *Reich v. Triplett,* 199 N. C., 678, 155 S. E., 573.

It follows, therefore, that the instruction given by the trial judge was correct.

Affirmed.

A. L. CAVENAUGH AND R. E. QUINN, EXECUTORS OF O. W. QUINN, DECEASED, V. R. J. THOMPSON ET AL.

(Filed 14 October, 1931.)

Receivers A d—Surety on bond filed to prevent receivership held liable for loss of rents and profits for one year only.

Where an order is given requiring a bond with sureties for a specified crop year as a condition for permitting the mortgagor to retain possession, otherwise a receiver to be appointed, and the order stipulates that if the case is not tried within a year that another bond should be given to prevent the appointment of a receiver, the order and the bond given in pursuance thereof will be construed together to determine the liabilities of the obligors thereon, and where the case is not tried within a year and no further bond is given, but a receiver is appointed who fails to take possession of the property, the bond covers a period of one year only, and a judgment against the sureties thereon for a three-year period to the extent of the penalty of the bond is error.

CAVENAUGH *v.* THOMPSON.

APPEAL by the defendant, Z. J. Quinn, from *Grady, J.*, at February Term, 1931, of LENOIR. Reversed.

This was an action for the foreclosure of two mortgages executed by the defendants, R. J. Thompson and his wife, Ella Carter Thompson, to secure their notes recited therein and owned by the plaintiffs. The action was begun on 21 December, 1927, and was tried at June Term, 1930, of the Superior Court of Lenoir County. There was a judgment for the plaintiffs and a decree for the sale of the lands described in the mortgages. The sale made pursuant to the decree has been confirmed. The proceeds of the sale were not sufficient in amount for the satisfaction of the judgment.

During the pendency of the action, on the motion of the plaintiff, an order was made therein by Hon. Henry A. Grady, resident judge, appointing a receiver, who was authorized to take possession of the lands described in the complaint, and to rent the same for the year 1928. The appointment of the receiver was to be effective upon his filing a bond in the sum of $300.00, for the faithful performance of his duties. It was provided in said order that "If the defendants file a like bond in the sum of $300.00, for the payment of all damages that may be recovered for rents and profits in this action, within 10 days, then this order for a receiver shall be of no effect. At the end of the year 1928, if this action is not tried, then a new bond is to be fixed by the judge having jurisdiction." This order is dated 16 February, 1928.

Pursuant to this order, defendants filed a bond in the action dated 20 February, 1928, in the sum of $300.00, payable to the plaintiffs. The condition of this bond is as follows:

"The conditon of the above obligation is such that whereas the above named A. L. Cavenaugh *et als.*, have brought suit to foreclose a mortgage on property belonging to R. J. Thompson and have asked that a receiver be appointed for the same. On motion, Hon. Henry A. Grady, resident judge, has ordered that the defendants give bond in the above amount in lieu of a receivership;

Now, therefore, the condition of the above obligation is such that the sureties agree to pay any damage up to $300.00 that may be recovered for rents and profits in the above set out action; otherwise, this obligation to be void."

The foregoing bond was signed by the defendants, R. J. Thompson, Ella Thompson and Z. J. Quinn.

On 4 December, 1928, it was made to appear to the court that the action had not been tried, but was still pending. It was thereupon ordered, on motion of plaintiffs that "defendants on or before 10 December, 1928, executed a bond in the penal sum of $300.00 conditioned

to pay to the plaintiffs rent for the lands described in the complaint in this cause in a sum not exceeding $300.00 and in the event that said bond is not given, it is ordered and adjudged that Murphy Thigpen be and he is hereby appointed receiver, to take charge of the lands described in the complaint in this cause, and rents therefor, and to pay the same out under the orders of the court."

No bond was filed pursuant to this order. The receiver appointed therein did not take possession of the land, or rent the same for the year 1929. After the lands described in the complaint were sold under the decree of foreclosure, and it was ascertained that the proceeds of said sale were not sufficient to satisfy the judgment, plaintiffs moved for judgment in this action on the bond dated 16 February, 1928. This motion was called for hearing at February Term, 1931, of the Superior Court of Lenoir County. At this hearing, the reasonable rental value of the lands for each of the years 1928, 1929 and 1930 was found by a jury to be $100.00.

Upon this finding it was ordered and adjudged that plaintiffs recover of the defendants, R. J. Thompson, Ella Thompson and Z. J. Quinn, the sum of $300.00 for rents and profits for the land described in the complaint for the years 1928, 1929 and 1930.

From this judgment, the defendant, Z. J. Quinn, appealed to the Supreme Court.

No counsel for appellee.

S. H. Newberry and Dawson & Jones for appellant.

CONNOR, J. The appellant, Z. J. Quinn, contends that as surety on the bond for $300.00, dated 20 February, 1928, he is liable only for the rent for the year 1928, and that he is not liable for the rents for the years 1929 and 1930. He assigns as error the judgment that plaintiffs recover of him as surety on the bond the sum of $300.00 for the rents for the years 1928, 1929 and 1930. This assignment of error is sustained.

The bond dated 20 February, 1928, was executed and filed pursuant to the order dated 16 February, 1928. The order was made on motion of the plaintiffs to secure the rent for the year 1928 and expressly provided that at the end of that year, a new bond for the rents and profits should be given by the defendants, and that upon their failure to give such bond, a receiver should be appointed by the judge having jurisdiction. The bond executed by the appellant and the order pursuant to which it was filed, must be construed together in order to determine the liability of the obligors. As thus construed, the appellant is liable only for the rent for the year 1928. He is not liable for the rent for the years 1929 and 1930. There is error in the judgment. It is

Reversed.

IN RE CHARLES EDWARD HUBBARD.

(Filed 14 October, 1931.)

1. **Extradition B a—Where crime is charged, asylum state should deliver the fugitive regardless of the nature of the crime or policy of the law.**

Under the provisions of the Constitution of the United States, Art. IV, sec. 2, relating to extradition of fugitives from justice, the right to demand implies the correlative obligation to deliver the fugitive without regard to the nature of the crime or the policy of the law of the demanding state.

2. **Extradition A b—Congress has provided procedure for extradition.**

While there is no express grant to Congress by Art. IV, sec. 2, of the Constitution of the United States relating to extradition between the states of fugitives from justice, the duty devolves upon the legislative branch of providing by law for regulations necessary to carry the constitutional provisions into execution, in pursuance of which Congress enacted U. S. C. A., sec. 662, under which the executive of the demanding state issues extradition papers to the executive of the asylum state.

3. **Extradition B c—Validity of requisition may be challenged by writ of *habeas corpus* issuing from state court.**

Where the executive authority of one state demands any person, as a fugitive from justice, of the executive authority of another state, the requisition may be challenged by a writ of *habeas corpus* issuing from a state court, Congress having failed to invest the judicial tribunals of the United States with exclusive jurisdiction in respect thereto.

4. **Extradition B a—Where extradition papers fail to charge the commission of a crime when liberally construed the accused will be discharged.**

Where extradition papers have been issued by the executive of another state to the executive of this State for the delivery of one having violated the criminal laws of the demanding state, it is necessary for the papers upon which the requisition is issued to show at least that a crime has been committed by the person against the laws of the demanding state, and where the requisition papers, construed liberally, fail to charge substantially that a crime has been committed against the laws of the demanding state the person arrested will be discharged upon the hearing of the writ of *habeas corpus* in our courts.

5. **Same—In this case requisition papers failed to substantially charge the commission of crime.**

Where the offense charged in the extradition papers is the drawing of checks upon a bank which have been returned by the bank with notice of insufficient funds, and the statute of the demanding state makes the drawer's fraudulent intent and knowledge of the insufficiency of the funds an essential element of the crime, the failure of the extradition papers to charge these essential elements is fatal, and, upon the hearing of a writ of *habeas corpus* by our courts, the prisoner will be discharged from custody.

IN RE HUBBARD.

CERTIORARI to review a judgment of *Frizelle, J.*, refusing on a writ of *habeas corpus* to discharge the petitioner from custody; at Chambers in Beaufort County.

J. S. Smith made the following affidavit in the State of Virginia:

"State of Virginia—City of Norfolk, to wit:

This day, J. S. Smith, of 157 Bank Street, in the city of Norfolk, State of Virginia, personally appeared before me the undersigned justice of the peace in and for the city of Norfolk, State of Virginia, and who having been by me first duly sworn, made oath as follows:

I am connected with the Monticello Hotel in the capacity of house officer. On 18 September, 1930, C. E. Hubbard was a guest at the hotel where he contracted a hotel bill amounting to $74.75, and at the same time we cashed for him several checks totaling $190.00, drawn on the Farmers Bank of Belhaven, North Carolina, dated 18 September, 1930, $20.00; 19 September, 1930, $20.00; 19 September, 1930, $50.00, and on 20 September, 1930, two checks in the sum of $50.00 each, all of which said checks have been returned by the said bank for lack of sufficient funds.

On account of knowing Lieutenant Hubbard as we did we had no hesitancy in extending his credit on the promise that he had $300.00 in the aforesaid bank. Since that time we have made repeated demands for the payment of the aforesaid checks which have met with no response, and the said C. E. Hubbard has been duly notified according to the statute in such cases made and provided that the said checks were returned by the aforesaid Farmers Bank of Belhaven, North Carolina, for insufficient funds.

And further this affiant saith not.

(Signed) J. S. Smith.

Subscribed and sworn to before me, Chas. H. Addison, a justice of the peace for the city of Norfolk and State of Virginia, this 24 July, 1931.

(Signed) Chas. H. Addison, J. P."

Upon this affidavit Charles H. Addison issued the following warrant:

"Commonwealth of Virginia—City of Norfolk, to wit:

To any of the police officers of the city of Norfolk:

Whereas, J. S. Smith of the Monticello Hotel, No. ....., of the city of Norfolk, has this day made complaint and information on oath, before me, Chas. H. Addison, a justice of the peace of said city, that on 20 September, 1930, in said city, C. E. Hubbard, hereinafter called

accused, did unlawfully utter two worthless checks for the sum of $50.00 each, drawn on the Farmers Bank, Belhaven, N. C., and signed by C. E. Hubbard, there not being sufficient funds to pay same in full when presented, and whereas, I see good reason to believe that an offense has been committed:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and take before the police justice of said city, in the police court thereof, the body of said accused to answer said complaint, and to be further dealt with according to law:

And moreover, upon the arrest of the said accused, by virtue of this warrant, I command you in the name of the Commonwealth of Virginia, to summon to appear at the same time and place to testify as witnesses on behalf of the Commonwealth touching the matter of said complaint, the following persons:..... and have there and then this warrant with your return thereon.

Given under my hand and seal, this 27 May, 1931.

(Signed) Chas. H. Addison,
Justice of the Peace. (Seal.)"

There were three other warrants of the same character and verbiage.

The several warrants and the affidavit upon which they were issued were certified to the Governor of Virginia, who thereupon issued a requisition demanding for the reasons therein stated the extradition of the petitioner. Acting upon this requisition the Governor of North Carolina ordered the arrest of the petitioner; and after being taken into custody the petitioner sued out a writ of *habeas corpus,* which was heard on 28 August, 1931. His Honor held that the affidavit and the warrant charged the petitioner with a violation of the criminal law of the State of Virginia of the grade of felony and that the petitioner is a fugitive from justice, and adjudged that the petitioner be held in custody to the end that he be taken to Virginia and delivered to the proper officers of the law. The petitioner applied for a *certiorari,* which was granted. Pending the hearing in this Court he is in the custody of the sheriff of Beaufort County.

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

Ward & Grimes for petitioner.

ADAMS, J. A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he

fled be delivered up, to be removed to the state having jurisdiction of the crime. Constitution of United States, Art. IV, sec. 2. This section includes every offense punishable by the law of the state in which it was committed and gives the right to demand the fugitive; and the right to demand implies the correlative obligation to deliver the fugitive without regard to the nature of the crime or the policy or laws of the demanding state. *Kentucky v. Dennison,* 24 How., 66, 103, 16 L. Ed., 717, 728.

There is no express grant to the Congress of legislative power to execute this provision, but in the opinion delivered in the case just cited *Chief Justice Taney* said that upon this body devolved the duty of providing by law the regulations necessary to carry the compact into execution. These regulations embrace the several statutes pertaining to the extradition of fugitives from justice, one of which is in the following words: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged." U. S. C. A., sec. 662.

When pursuant to this statute, the executive authority of a state demands any person as a fugitive from justice, of the executive authority of another state, the requisition may be challenged by the writ of *habeas corpus* issuing from a state court, the Congress not having undertaken to invest the judicial tribunals of the United States with exclusive jurisdiction to issue writs of *habeas corpus* in proceedings for arrest of fugitives from justice. *Robb v. Connolly,* 111 U. S., 624, 28 L. Ed., 542.

In the event of such challenge it must appear that the person demanded is charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or affidavit certified as authentic by the executive of the demanding state, and that the person demanded is a fugitive from justice. The first of these requisites is a question of law which upon the face of the papers is open to judicial inquiry; the second is a question of fact, which the governor

upon whom the demand is made must, in the first instance, decide upon such evidence as is satisfactory to himself. *Roberts v. Reilly,* 116 U. S., 80, 29 L. Ed., 544; *Cook v. Hart,* 146 U. S., 183, 36 L. Ed., 934; *Munsey v. Clough,* 196 U. S., 364, 49 L. Ed., 515. But on neither of these points is the warrant issued by the executive of the asylum state necessarily conclusive; the person demanded may by *habeas corpus* contest the requisition on the ground that he is not charged with the commission of a crime in the demanding state or that he is not a fugitive from justice. *In re Veasey,* 196 N. C., 662.

Upon these two grounds the petitioner rests his demand for release from custody, but particularly upon the first—that the affidavit and the warrant do not technically or substantially charge him with a violation of the law of Virginia. This contention, as pointed out, involves a question of law which must be determined exclusively upon the face of the record. *United States v. Pridgeon,* 153 U. S., 48, 38 L. Ed., 631; *S. v. Edwards,* 192 N. C., 321; *In re Holley,* 154 N. C., 163.

It was of course within the power of the State of Virginia, except as restrained by the Constitution of the United States, to declare what acts shall be offenses against its laws and to establish the forms of its process and pleadings; and if it is found that the affidavit and warrant charge the petitioner with a crime substantially in the language of the statute upon which they purport to be based they will not be held ineffective for want of precise or technical accusation. *Ex Parte Reggel,* 114 U. S., 642, 29 L. Ed., 250. For this reason we are concerned not with the sufficiency of the affidavit as a criminal pleading but with its sufficiency as a charge of crime, the question being whether in a "broad and practical sense" it charges the petitioner with crime in the state from which he is said to have fled. *Pierce v. Creecy,* 210 U. S., 386, 52 L. Ed., 1113. In passing upon the latter question we should not set up an "impracticable standard of particularity," or refer to a warrant all the technicalities of an indictment or information, but we should adhere to the established rule that the instrument charging an offense must substantially charge all its essential elements. *United States v. Standard Brewery,* 251 U. S., 210, 64 L. Ed., 229; *United States v. Mann,* 95 U. S., 580, 24 L. Ed., 531; *United States v. Cruikshank,* 92 U. S., 542, 23 L. Ed., 588.

This in effect is the provision of the Uniform Criminal Extradition Act passed by the General Assembly of 1931, and effective since the seventh of March. P. L., 1931, ch. 124. Section 3 provides that the affidavit made before the magistrate must substantially charge the alleged fugitive with crime; and section 5 provides that a warrant of extradition must not be issued unless the documents presented by the

executive authority making the demand show that the accused is lawfully charged by . . . affidavit made before a magistrate of the demanding state with having committed a crime under the laws of that state.

The statute with a breach of which the warrant purports to charge the petitioner is as follows:

"First. Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money, upon any bank, banking institution, trust company, or other depository, knowing, at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with, such bank, banking institution, trust company, or other depository, for the payment of such check, draft or order, although no express representation is made in reference thereto, shall be guilty of larceny.

Second. Any person who, under the provisions of this act, would be guilty of grand larceny shall, in the discretion of the jury or the court trying the case without a jury, be confined in the penitentiary not less than one year nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars.

Third. In any prosecution under this section, the making or drawing or uttering or delivery of a check, draft, or order, payment of which is refused by the drawee because of lack of funds or credit, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank, banking institution, trust company, or other depository, unless such maker or drawer shall have paid the drawee thereof the amount due thereon, together with interest and protest fees, within five days after receiving notice that such check, draft, or order has not been paid to the drawee.

Fourth. The word credit, as used herein, shall be construed to mean any arrangement or understanding with the bank, banking institution, trust company, or other depository for the payment of such check, draft, or order.

Fifth. In any civil action growing out of an arrest under this section no evidence of statements or representations as to the status of the check, draft, order or deposit involved, or of any collateral agreement with reference to the check, draft, or order, shall be admissible unless such statements, or representations, or collateral agreement, be written upon the instrument." Virginia Code of 1930, sec. 4149(44).

We are mindful of the burden that would be imposed by a critical examination of the laws of states with whose jurisprudence, as suggested in *Pierce v. Creecy, supra,* we can have only a general acquaintance, if we should hold it necessary to show more than that the accused was

substantially charged with crime; but when tested by the liberal rule of a "substantial charge," the papers in question are fatally defective.

In *Turner v. Brenner*, 121 S. E., 510, the Supreme Court of Appeals of Virginia held that the gravaman of the offense denounced by the foregoing statute is the "intent to defraud." There is no such averment in the affidavit. It should be charged that the petitioner knew he had not sufficient funds in or credit with the bank to make payment of the checks. This averment likewise is wanting. Indeed, there is no charge that he did not have sufficient funds on deposit when the checks were cashed; and the assertion that he drew the checks can be supported only as an inference or by a somewhat strained construction of words.

We apprehend that the third paragraph of the statute can avail the State only when the warrant or indictment charges the fraudulent intent and the drawer's knowledge that his funds were insufficient.

We are of opinion that the affidavit and the warrant do not charge a crime and that the petitioner should be discharged. Judgment Reversed.

DILL-CRAMER-TRUITT CORPORATION v. D. W. DOWNS.

(Filed 14 October, 1931.)

1. **Deeds and Conveyances D d—Testimony of declaration against interest by plaintiff's predecessor in title held competent.**

   Where the dividing line is in dispute in an action involving title to lands and trespass, testimony of declarations against his interest by the plaintiff's predecessor in title is competent against the plaintiff when the declarations are relevant to the issue and a circumstance tending to prove the correct location of the boundary.

2. **Evidence D b—Testimony in this case held incompetent as being of transaction with deceased by party interested in event.**

   The interest of one who temporarily held the title to the lands in dispute prior to the defendant is a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. C. S., 1795.

APPEAL from *Harris, J.*, and a jury, at March Term, 1931, of MARTIN. New trial.

Plaintiff brought this action alleging title to the timber on the land in dispute, some 126¾ acres describing same (evidence indicating 148 acres in controversy), together with the usual rights of ingress and egress and an unlawful trespassing in cutting of the timber by the de-

fendant, and secured a restraining order. The plaintiff offered evidence of a grant from the State in 1890 to P. E. Gatlin, the wife of R. H. Gatlin, and then a connected chain of title by will of P. E. Gatlin to R. H. Gatlin for his life and then by the remaindermen under such will as grantees of the timber and rights of the land to the plaintiff in this action. Plaintiff also offered evidence of actual possession from 1890 to the date of the institution of this action under the paper title of its grantees and their predecessors, together with evidence of damage for the alleged trespass of the defendant.

The defendant denied the material allegations of the complaint and claimed title by a connected chain going back 40 to 50 years, and alleged absolute ownership of the land in controversy. The defendant claimed title in his further answer by adverse possession for 20 years and adverse possession for 7 years under color of title, and alleged damages in the sum of $1,500 by the plaintiff by reason of the injunction issued in the case. The defendant offered evidence of paper title which he contended covered the land in dispute and also offered evidence of adverse possession of the requisite number of years, together with evidence of damage caused by the plaintiff.

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

"1. Is the plaintiff the owner and entitled to the timber on the tract of land described in the complaint? Answer: No.

2. What damage, if any, is plaintiff entitled to recover of the defendant for the wrongful cutting of the timber on said tract of land? Answer: .....

3. Has the defendant and his grantors before him occupied the lands in controversy and used the same adversely and to the exclusion of all others, under known and visible metes and bounds and claiming the title thereto for a period of twenty years prior to the institution of this action? Answer: Yes.

4. Has the defendant in this action and his predecessors in title been in the possession of and using the lands in controversy under known and visible metes and boundaries to the exclusion of all others and under color of title for a period of seven years prior to the institution of this action? Answer: Yes.

5. What damage, if any, is defendant entitled to recover of plaintiff? Answer: $3,000."

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones necessary for the decision of the case will be considered in the opinion.

T. J. Pearsall and Henry C. Bourne for plaintiff.
Geo. M. Fountain, A. R. Dunning and B. A. Critcher for defendant.

CLARKSON, J. This action has heretofore been before this Court. The plaintiff appealed and was granted a new trial. In the former appeal it was held: "In actions involving title to real property, where the State is not a party, other than in trials of protested entries laid for the purpose of obtaining grants, the title is conclusively presumed to be out of the State, and neither party is required to show such fact, though either may do so. C. S., 426; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627; *Pennell v. Brookshire,* 193 N. C., 73, 136 S. E., 257. And in actions between individual litigants, as here, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. C. S., 428 and 430; *Power Co. v. Taylor,* 191 N. C., 329, 131 S. E., 646; *S. c.,* 194 N. C., 231." *Dill Corp. v. Downs,* 195 N. C., at p. 190. *Johnson v. Fry,* 195 N. C., 832.

The first contention of plaintiff: "Is it error for the court to permit the defendant to offer evidence of acts and conduct of plaintiff's predecessor in title pertaining to lands other than the tract of land in dispute?" We do not think the evidence of the defendant objected to goes to the extent complained of by plaintiff.

In this connection, it will be noted that Middle or Horse Branch was the northern boundary line of the lands as contended for by the defendant. The testimony of the witness, as objected to by the plaintiff, was that Captain Gatlin and Savage proceeded from a point four hundred yards north of Middle or Horse Branch in a southerly direction to Middle or Horse Branch, and that they made a corner in Middle or Horse Branch, and then instructed the witness to keep off for that same belonged to Captain Gatlin, when in truth and in fact, witness stated that he knew the lands so marked off north of Middle Branch belonged to one Bell. By the testimony of witness, if same is believed, he established the fact that plaintiff's predecessor in title, Gatlin, of his own accord, blazed a line down into the very line that defendant's evidence tended to establish was defendant's northern boundary. "That was towards Middle Branch, they chopped all the way and made a corner in that branch."

It is well settled that collateral matters foreign to the issues should be excluded and when they are prejudicial the admission constitutes reversible error. We think the evidence has some slight relevancy to the controversy, was a circumstance, and admissible.

In *Godfrey v. Power Co.,* 190 N. C., at p. 33, it is said: "There is a fundamental postulate of evidence that circumstances which are irrelevant to the existence or nonexistence of the disputed facts are not admissible."

Where the evidence is relevant it is admissible as a declaration against interest. Self-interest induces men to be cautious in making admissions that would be to their injury, therefore what was said concerning their interest would be the truth and the probability of falsehood would be slight.

"The admissibility of such evidence was fully discussed in the case of *Smith v. Moore,* 142 N. C., 277, where it was said in an elaborate opinion by *Walker, J.,* reviewing the authorities on the subject, that declarations against interest, as to facts relevant to the inquiry, are admissible in evidence, even as between third parties, when it appears (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; and (4) that he had no probable motive to falsify the fact declared." *Carr v. Bizzell,* 192 N. C., at p. 213. *Ins. Co. v. R. R.,* 195 N. C., 693; *Thompson v. Buchanan,* 198 N. C., 278.

The second contention of plaintiff: "Is it error for the court to permit a witness through and under whom defendant claims title to testify to a personal transaction and conversation concerning the matter in dispute with a party deceased, under and through whom plaintiff claims title?" We think so under the facts and circumstances of this case.

In 1915 L. W. Leggett owned the land in controversy. He was a witness for defendant. He testified, in part: "I kept title for two or three years and then conveyed to J. K. Leggett. During the time I owned it neither Captain Gatlin nor any one for him attempted to claim the 148-acre tract as I know of. Had a conversation with Captain Gatlin in 1918 or 1919, after I had conveyed to my brother, I was looking after the land for my brother who had gone to the army. Q. Tell us the circumstances under which you had a conversation with Captain Gatlin and where you were? A. We cut some timber along Middle Branch close to the pocosin and Mr. Gatlin objected to it, said he was going to have me indicted. I told him to go ahead and do it, that I didn't have any objection because I could show my right to the land. Q. Did you stop cutting? A. No. Q. Continued on? A. I finished cutting what timber I needed. Q. Did he ever indict you? A. No, sir. Q. Ever do anything else about it? A. Never heard anything more from it."

To the foregoing questions and answers plaintiff in apt time objected the objections were overruled and plaintiff assigned error. We think the objections should have been sustained by the court below.

This brings us to the consideration of C. S., 1795, which is as follows: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication." The application of this statute to evidence in certain cases has been troublesome. The interesting legal discussion between *Chief Justice Clark* and *Associate Justice Walker,* in *Brown v. Adams,* 174 N. C., 490, over the application of the statute in that case, is worth reading, as it indicates the different attitudes of great minds.

We are not the lawmakers. Our province is to construe the law as made. There is no question but that the testimony was "concerning a personal transaction or communication" between L. W. Leggett, witness for the defendant successor in title to the land in controversy, and Capt. Gatlin, who is dead and through whom plaintiff claims title to the land in controversy, at least the timber on same. The witness L. W. Leggett once owned the land and conveyed it to his brother, J. K. Leggett. The interest of the witness L. W. Leggett, the "person interested in the event" is remote.

In 5 Jones, Com. on Ev. (2d ed.), part sec. 2236, pp. 4282-3, it is said: "In order to disqualify a witness as one 'interested' in the event of the action, it must appear, in addition to the fact that the estate of a decedent or incompetent is involved in the action, that the interest of such proposed witness is real, direct, and pecuniary. Under the wording of many statutes the interest, to disqualify, must also be adverse to that of the representatives of the deceased in their representative capacity. Other authorities state that the interest, in order to disqualify, must be present, certain and vested; legal, certain, and immediate; or direct and immediate. The extent of the interest if of the nature indicated

is immaterial." *Mull v. Martin,* 85 N. C., 406; *Bunn v. Todd,* 107 N. C., 266; *Helsabeck v. Doub,* 167 N. C., 205; *Sherrill v. Wilhelm,* 182 N. C., 673; *R. R. v. Hegwood,* 198 N. C., 316.

We think it refined law, but apparently within the statutes, that Leggett's evidence was incompetent. It is in the province of the lawmaking power to change or modify the statute, not ours. It may be of interest to note that Dean Wigmore says "There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound." Vol. 1, Wigmore on Evidence (2d ed.), p. 1006, part sec. 578. For the reasons given, there must be a

New trial.

A. L. PATRICK v. W. C. WORTHINGTON AND WIFE, MARY WORTHINGTON; T. R. WORTHINGTON AND WIFE, SUE WORTHINGTON, W. I. BISSETT, ADMINISTRATOR OF W. W. DAWSON; AND CECIL COBB, ADMINISTRATOR OF G. T. GARDNER.

(Filed 14 October, 1931.)

Vendor and Purchaser B b—Held grantee could recover for number of acres tract conveyed failed to equal number stipulated in deed.

Where an area comprising a number of acres of land is conveyed by metes and bounds in a deed and sold at a fixed price per acre, the bargain and sale is not in gross and where the vendee has paid the purchase price for a greater number of acres than the number conveyed he may recover the value of the shortage at the fixed price per acre.

APPEAL by plaintiff from *Grady, J.,* at February Term, 1931, of LENOIR. No error.

F. M. Wooten and Wallace & White for appellant.
Dawson & Jones and Whitaker & Allen for appellees.
Rouse & Rouse for W. I. Bissett, administrator.

PER CURIAM. On 30 September, 1919, the plaintiff and his wife executed an agreement or covenant to convey to W. W. Dawson and G. T. Gardner, or to such persons as they should direct, a tract of land containing 361 acres, in consideration of $72,200, of which $18,150 was paid in cash and $54,150 was to be paid in ten equal installments. Dawson and Gardner had the land subdivided and requested the plaintiff to execute a deed for one of the subdivisions to W. C. Worthington and T. R. Worthington in fee. On 9 October, 1919, the plaintiff and his wife made this deed, reciting 240 acres as the quantity conveyed.

The plaintiff was to sell the land to Dawson and Gardner at $200 an acre, and they were to receive from the Worthingtons $250 an acre. The consideration for the 240-acre tract was $60,000. The purchasers (Worthingtons) paid $40,000 and executed to Dawson and Gardner ten notes for $2,000 each and a mortgage on the land to secure the payment. The notes were signed by W. C. Worthington, Mary Worthington, T. R. Worthington, and Sue Worthington, and were endorsed by Dawson and Gardner and transferred to the plaintiff.

The defendants contend that the plaintiff sold the land at $200 an acre, that there was a shortage of 3 1/16 acres, and that they are entitled to a rebate of $612.50 from the note in suit and to a judgment for $153.10 against the personal representatives of Dawson and Gardner.

The verdict established these facts: The Worthingtons signed the note and mortgage to Dawson and Gardner and they transferred the papers to the plaintiff; the plaintiff is not a holder in due course; the plaintiff bargained the land to Dawson and Gardner at the rate of $200 an acre and they bargained it to the Worthingtons at the rate of $250 an acre; there was a shortage of 3 1/16 acres; and the defense is not barred by the statute of limitations.

Upon these findings and the amount awarded in response to the last issue, it was adjudged that the plaintiff recover of all the defendants $2,000 with interest from 1 December, 1925, interest payable annually, less $612.50, with interest from 1 January, 1920, interest payable annually, and that the Worthingtons recover of the personal representatives of Dawson and Cobb $153.10 with interest from 1 January, 1920.

We have examined all the exceptions taken by the appellant and have found no error. The main controversy turned on the question whether the purchasers were entitled to relief for shortage in the number of acres conveyed. Evidence for the defendants tended to show that the sale was not in the gross but by the acre. In fact the plaintiff testified that he was to have $200 an acre for whatever the Phillips survey called for, and that it called for 361 acres. But the specific controversy related to the alleged shortage in the 240-acre tract, and the jury found from the evidence that this tract was bargained by the plaintiff at the price of $200 an acre. The distinction between a purchase in the gross and by the acre is pointed out in *Turner v. Vann,* 171 N. C., 127, and *Henofer v. Realty Co.,* 178 N. C., 584.

No error.

THE EDENTON-MACKEYS FERRY COMPANY v. FAIRBANKS-MORSE AND COMPANY.

(Filed 21 October, 1931.)

Sales H d—Held: seller waived conditions as to replacement of defective parts and acceptance of machinery and buyer could recover damages.

Where the contract for the sale of machinery provides that in case any part is defective the seller should replace it with other suitable parts, and that the acceptance by the buyer of any part should be a waiver of damages due to delay and that the seller should be liable only for the rental value of other parts, and in the buyer's action thereon the seller's evidence is to the effect that the buyer, although aware of the defects of the machinery and that it did not come up to specifications, failed to demand replacements and accepted the machinery and paid the purchase price, and the buyer's evidence discloses that the agents of the seller sent by it to adjust the matter, promised that "everything would be adjusted satisfactorily," *Held:* the representations of the agents of the seller inducing the payment of the purchase price amounts to a waiver of the stipulations as to replacement of defective parts and as to the acceptance of the machinery, and the buyer may recover his damages under the rules for assessment of damages in such cases, and a verdict in the buyer's favor in accordance therewith will be upheld.

CIVIL ACTION, before *Stack, J.,* at April Term, 1931, of CHOWAN.

The plaintiff was the owner of a certain motor vessel known as "Shady Side," and said vessel was used in conducting a ferry between Edenton and Mackeys. In October, 1926, the plaintiff was in need of a certain engine and equipment for said vessel and entered into negotiations with the defendant for the purchase of necessary machinery. On 12 October, a written contract was entered into between the parties, in which contract the defendant agreed to furnish and deliver to the plaintiff a one-hundred-horsepower used engine, with propeller equipment and air tank. The defendant agreed to deliver the machinery at Elizabeth City "when notified, but said date of delivery is not guaranteed by the company." The written contract contained the following clauses: "The machinery and materials herein specified are guaranteed by the company to be well made of good material, and in a workmanlike manner. If any parts of said machinery herein proposed to be furnished, or hereafter furnished in compliance with the provisions of this paragraph, fail, through defect in material or workmanship, within one year from the date of shipment thereof, respectively, the company shall replace such defective parts, free of charge; . . . but the company shall not be liable for repairs, or alterations, unless the same are made with its written consent and approval. The company shall not be liable

for damages or delays caused by such defective material or workmanship, and it is agreed that the liability of the company under all guarantees, either expressed or implied, is specifically limited to the replacement free of charge, f.o.b. its factory, of parts failing, through defect in workmanship or materials, within the time and in the manner aforesaid. Parts claimed to be defective are to be returned by the purchaser to the company, at its option, transportation prepaid." It was further provided in said contract "that the company shall not be liable for any damages due to delay in delivery caused by fires, strikes, combinations of labor, or other causes beyond its control, and the receipt upon arrival of any part of said machinery and materials shall constitute a waiver of any claim for damages due to any delay. Should the purchaser, because of delayed delivery, be held to have justifiably declined to receive said machinery or materials upon arrival, any damage due to such delay shall be measured solely by the rental value of similar machinery for the period of the delay, and the company's liability shall, in no event, exceed such amount," etc.

The plaintiff offered evidence tending to show that negotiations were entered into with the "manager of the marine department" of defendant and the general agent of defendant at Wilson, North Carolina, and that in response to a telegram, dated 2 October, addressed to the defendant, Mr. Hill and Mr. Cross, agents aforesaid, came to see plaintiff and informed it that the defendant had at Elizabeth City, ready for immediate use, engine, propeller, stuffing box, shaft and all equipment which plaintiff desired to purchase. Plaintiff further offered evidence that it was disclosed to the agents that it was the owner of the vessel named Shady Side, and that such equipment was necessary for said vessel, and that thereafter, to wit, on 1 November, 1926, it notified the defendant that it would be ready to install the engine within ten days. Plaintiff further offered evidence that the agents of defendant were informed that the boat should be ready not later than 1 December, and that plaintiff had a boat chartered and was compelled to pay $50.00 per day for the use thereof in making the schedule. The agents of defendant assured plaintiff that as the engine and other equipment was in Elizabeth City, it would only require a few days for their mechanic to put it in first class order. Plaintiff further offered evidence tending to show that when the defendants, in response to the notice, undertook to install the machinery in the boat they found that the equipment was not in Elizabeth City, and thereupon the defendant undertook to furnish to the plaintiff a propeller wheel, a shaft and a stuffing box. These three items of equipment, which are part of the propeller equipment and belong to the engine, were too small. The defendant sent one of its engineers to

install the equipment and the evidence tended to show that this engineer stated that the equipment furnished by the defendant was unsuitable and could not be used. The shaft was eight inches too short, and the defendant purchased other equipment, and the same was installed in the boat on or about 10 January, 1927. The plaintiff offered evidence tending to show that it was compelled to pay $50.00 per day for a boat to run the schedule until 10 January, 1927, and thereafter it was compelled for a period of ten days to pay the sum of $75.00 per day for a suitable boat. On cross-examination the agent of plaintiff testified: "We knew the wheel was too small, and that the stuffing box was too small, and that the shaft was too short. We knew all conditions then, and knowing these conditions we paid everything we owed to the defendant, fifteen notes aggregating the balance of the purchase price of the engine." In explanation of why payment was made under the circumstances, the witness said: "I had the assurance of Mr. Hill and Mr. Cross that everything would be adjusted satisfactorily to us. That everything would be taken care of. It was put in there wrong; it was shipped wrong. . . . In December, 1926, and prior thereto they had told me with reference to the propeller wheel and shaft that these matters would be adjusted. They told me so afterwards when we had to buy them. . . . After a lot more breakdowns Mr. Cross came across the ferry and assured me everything would be taken care of satisfactorily. This was as late as 1929."

Issues were submitted to the jury as to the execution of the contract, the breach thereof, and damages. These issues were found in favor of plaintiff and damages awarded in the sum of $1,825 with interest.

From judgment upon the verdict the defendant appealed.

Ehringhaus & Hall and L. E. Griffin for plaintiff.

M. B. Simpson and McMullan & McMullan for defendant.

BROGDEN, J. The defendant resists recovery, chiefly upon two grounds:

1. That the contract provides that the defendant "shall not be liable for damages or delays caused by such defective material or workmanship, and it is agreed that the liability of the company under all guarantees, either expressed or implied, is specifically limited to the replacement free of charge, . . . of parts failing, through defect in workmanship or materials, within the time and in the manner aforesaid."

2. That the contract provides that "the company shall not be liable for any damages due to delay in delivery caused by fires, strikes, combinations of labor, or other causes beyond its control, and the receipt upon arrival of any part of said machinery and materials shall consti-

tute a waiver of any claim for damages due to any delay. Should the purchaser, because of delayed delivery, be held to have justifiably declined to receive said machinery or materials upon arrival, any damage due to such delay shall be measured solely by the rental value of similar machinery for the period of the delay, and the company's liability shall, in no event, exceed such amount."

These grounds of resistance to recovery are based upon the testimony of the agent of the plaintiff to the effect that, although plaintiff knew that the propeller wheel, the shaft and the stuffing box delivered by the defendant were too small, still no request or demand was made upon the defendant to supply such equipment with other equipment suitable for the purposes contemplated by the parties. The testimony for plaintiff further disclosed the fact that, although it knew of the failure of the defendant to furnish materials contemplated by the contract, nevertheless it accepted and paid the purchase money for the engine.

The plaintiff, however, contended and offered evidence tending to show that the propeller wheel, the shaft, and the stuffing box were parts of the propeller equipment of the engine, and that without the propeller equipment in controversy the boat could not be operated. The plaintiff further offered evidence tending to show that assurances were given it by the general agents of defendant that the defendant "would arrange all matters satisfactorily." The exact language of witness for plaintiff was: "I had the assurance of Mr. Hill and Mr. Cross that everything would be adjusted satisfactorily to us; that everything would be taken care of. . . . In December, 1926, and prior thereto, they had told me with reference to the propeller wheel and shaft that was there, that these matters would be adjusted. They told me so afterwards when we had to buy them, just before the boat left the railway, the latter part of December or January." The evidence further disclosed that the defendant furnished an engineer or mechanic to install the equipment, and that said engineer informed the defendant that the equipment complained of could not be used in the boat.

These contentions and the evidence supporting them raise the legal question as to whether the assurances of adjustment given by general agents of the defendant after the controversy arose warranted the submission of the case to the jury. A contract substantially similar to the one involved in this case was discussed and construed in *Fairbanks v. Supply Co.*, 170 N. C., 315, 86 S. E., 1015. In that case the Court remarked: "Contracts like this one are somewhat one-sided and should not be too strictly enforced in favor of the seller, but with some regard to the just rights of the buyer." Declaring the law applicable to the facts, the Court said: "It will be found that, in most of the above cited

cases, the courts held that such a transaction as the one here between the agent of the seller, who is specially commissioned to adjust the matter of controversy between the parties, and the buyer, by which, upon representations and promises that the machine will be put in good or satisfactory working order, the agent obtains the notes for the price, will amount to a waiver of the stipulation as to supplying new parts for those proved to be defective or for a return of the machine, and enable the buyer to recover his proper damages to the extent he has been injured and within the well settled rules relating to the assessment of damages in such cases." *Kester v. Miller,* 119 N. C., 475, 26 S. E., 115; *Allen v. Tompkins,* 136 N. C., 208, 48 S. E., 655.

In the case at bar the plaintiff offered evidence tending to show that defendant, in response to a telegram sent by plaintiff on 30 November, 1926, replied: "Our Mr. Hill expects to be in Edenton tomorrow and will discuss this matter in person with you," and that thereafter the general agents of the defendant from time to time gave assurances that "everything would be adjusted satisfactorily." This testimony and other testimony of like tenor bring the case squarely within the principles of law announced in *Kester v. Miller* and *Fairbanks v. Supply Co., supra.*

No error.

MARY DAIL DIXON AND HER HUSBAND, J. W. DIXON, v. N. W. OSBORNE, W. B. NEWCOMBE AND SEABOARD CITIZENS NATIONAL BANK.

(Filed 21 October, 1931.)

1. Appeal and Error F a—Only assignments of error supported by exceptions will be considered on appeal.

Where there are no exceptions stated in the case on appeal, appearing of record, to support assignments of error, the assignments of error will not be considered on appeal.

2. Mortgages H g—Decree of foreclosure directing that commissioner report sale to clerk for confirmation is irregular.

A decree of foreclosure is an exercise of the equitable jurisdiction of the Superior Court, and the confirmation of the sale under the decree involves the exercise of judicial discretion, and it would seem that the clerk of the Superior Court does not have jurisdiction to order the confirmation of a sale under such decree although the decree specifies that the commissioners appointed by the court should report to the clerk, the clerk having only such jurisdiction as is given him by statute, but in this case the question is not presented, there being no exception appearing of record in regard thereto.

3. Appeal and Error E h—Appeal is an exception to judgment and to matters appearing upon face of record.

An appeal to the Supreme Court is itself an exception to the judgment and to any other matters appearing upon the face of the record.

4. Courts A c—Upon appeal from clerk it is error for Superior Court judge to dismiss appeal and affirm order appealed from.

Where upon appeal from the clerk the judge of the Superior Court dismisses the appeal he is without further jurisdiction to consider the matter, and after dismissal it is error for him to affirm the order appealed from, and upon appeal to the Supreme Court the action will be remanded.

APPEAL by plaintiffs from *Grady, J.*, at May Term, 1931, of WAKE. Error and remanded.

This action, begun on 3 February, 1930, was to restrain the sale of the land described in the complaint, under the power of sale contained in a deed of trust executed by the plaintiffs to secure their notes or bonds now held by the defendants, N. W. Osborne and W. B. Newcombe. At February Term, 1930, a judgment and decree was entered by consent. It was adjudged therein that defendants recover of the plaintiffs the sum of $13,500, with interest from 5 March, 1930. It was ordered, considered and decreed that said judgment was a lien upon the land described in the complaint, and if plaintiffs failed to pay said judgment on or before 1 January, 1931, the commissioners appointed by the court should sell said land, and report their sale to the court for confirmation. Upon plaintiffs' default in the payment of said judgment on 1 January, 1931, the commissioners, after advertisement, sold the land as directed by the court on 23 February, 1931. This sale was reported to the court and because of defects in the publication of the notices of sale, was not confirmed. At March Term, 1931, there was a decree, directing the commissioners to sell the land at the courthouse door in Wake County on 4 May, 1931, and to report said sale within ten days to the clerk, or to the assistant clerk of the Superior Court of Wake County, for confirmation. On 5 May, 1931, the commissioners filed their report showing that they had sold the land as directed by the court. Plaintiffs filed objections to the confirmation of this sale. These objections were heard by the assistant clerk of the court, who overruled the same, and on 16 May, 1931, confirmed the sale and ordered the commissioner to convey the land to the purchasers. From the order of the assistant clerk of the court, plaintiffs appealed to the judge holding the Superior Court of Wake County.

This appeal was heard by Judge Grady, at May Term, 1931, of the Superior Court of Wake County, who rendered judgment as follows:

"This cause coming on to be heard on 26 May, 1931, A.D., before his Honor, Henry A. Grady, judge of the Superior Court, holding the Superior Courts of Wake County, upon appeal from an order signed by E. Lloyd Tilley, assistant clerk of the Superior Court of Wake County, confirming the sale of the lands described in this action and the deed of trust recorded in Book 509, page 162, records of Wake County, said sale having been made under two judgments, by Paul F. Smith and W. L. Spencer, commissioners, to N. M. Osborne and W. B. Newcombe, the highest bidders, on 5 May, 1931, at public auction, at the courthouse door, after notice and publication as required in said judgments of this court;

And the said assistant clerk of this court having confirmed the said sale by an order of this court; and the said Mary Dail Dixon and her husband, J. W. Dixon, having appealed from this order; and the matter having been fully heard on the day above mentioned by the said judge of the Superior Court; said Dixon and wife being represented by Donald R. Jackson, their attorney, and the said N. M. Osborne and W. B. Newcombe, being represented by their attorney, Jos. B. Cheshire, Jr.;

And the said court having given the said Dixon and wife until Friday, 29 May, 1931, to secure a better bid on the property; and no such bid having been secured or reported to the judge of this court as required by him; and the court finding it a fact that the objections and exceptions made by the said Dixon and wife to the said sale and to the said order confirming same, are without merit:

Now, therefore, it is hereby ordered and adjudged by the court as follows:

1. That the appeal from the order of the assistant clerk of this court confirming the said sale, said appeal having been entered by the said Dixon and wife, be and the same is hereby dismissed.

2. That the said sale by Paul F. Smith and W. L. Spencer, commissioners, and order of the assistant clerk of this court confirming same, be and the same are hereby approved and confirmed."

From this judgment, plaintiffs appealed to the Supreme Court.

N. Y. Gulley, F. C. Harding and D. R. Jackson for plaintiffs.
Joseph B. Cheshire, Jr., for defendants.

CONNOR, J. The only assignment of error which can be considered on this appeal is that based upon the exception to the judgment in this action at May Term, 1931. There are no exceptions stated in the case on appeal, appearing in the record, to support the other assignments of

error relied upon by the plaintiffs. These assignments of error, therefore, cannot be considered on this appeal. Only exceptions taken at the trial or assigned in the case on appeal will be considered by this Court. *Howell v. R. R.*, 186 N. C., 239, 119 S. E., 198; *Rawls v. R. R.*, 172 N. C., 211, 90 S. E., 116; *Worley v. Logging Co.*, 157 N. C., 490, 73 S. E., 107.

We have not considered, for the purpose of deciding whether it is valid or not, the contention of the plaintiffs that the provision in the judgment in this action at March Term, 1931, that the commissioners appointed by the court in the judgment at February Term, 1931, to sell the land described in the complaint, should report the sale made by them to the clerk or the assistant clerk of the court, for confirmation, is void, and that for this reason the confirmation of the sale made by the commissioners on 5 May, 1931, contained in the order of the assistant clerk dated 16 May, 1931, is likewise void. This contention is not presented on the record in this appeal. It has been held, however, by this Court that a decree for the sale of land in an action to foreclose a mortgage or deed of trust should direct the commissioner appointed by the court to make the sale, to report the sale to the court, for confirmation, before conveying the land to the purchaser. In *Mebane v. Mebane,* 80 N. C., 34, referring to the judgment in that case, *Smith, C. J.*, says: "No report of the sale is required to be made to the court in order that it may be set aside or confirmed, and title ordered, but this is left to the uncontrolled discretion of the commissioner. This is entirely at variance with the nature of judicial sales. The commissioner acts as agent of the court, and must report to it all his doings in execution of its order. The bid is but a proposition to buy, and until accepted and sanctioned by the court, confers no right whatever upon the purchaser. The sale is consummated when that sanction is given and an order for title made and executed. This power will not be delegated to the agent who exposes the property to public biddings, 2 Jones Mort., sections 1608, 1637; Rover on Jud. Sales, 55, 58." In that case a judgment vacating the sale which had not been confirmed by the court was affirmed. The foreclosure of the deed of trust in the instant case was by a decree of the court, and not under the power of sale contained in the deed of trust. The decree was made by the court in the exercise of its equitable jurisdiction. This jurisdiction exists as well for the protection of the mortgagor as for the benefit of the mortgagee. *McLarty v. Urquhart,* 153 N. C., 339, 69 S. E., 245. It is certainly irregular, and not in accordance with the practice in this State, for the court in an action to foreclose a mortgage or deed of trust to direct or authorize the commissioner appointed by the court to sell the property conveyed by the

mortgage or deed of trust to report the sale to the clerk of the court, for confirmation. Whether an order of confirmation made by the clerk, under a provision in the judgment or decree of the court directing the commissioner to report the sale to the clerk for confirmation, is valid, is at least doubtful. It has been uniformly held that the clerk of the Superior Court has no equitable jurisdiction. *McCauley v. McCauley,* 122 N. C., 288, 30 S. E., 344. His jurisdiction is altogether statutory. See *In re Wright Estate,* 200 N. C., 620, 158 S. E., 192. As the confirmation of a judicial sale involves the exercise of judicial discretion, it would seem that only the judge has the power to confirm a sale under a decree of the court, and that an order confirming the sale signed by the clerk of the court, although authorized by the decree so to do, is void and without effect.

Plaintiffs contend that there is error in the judgment in this action rendered at May Term, 1931. This contention is presented by their appeal from the judgment. It has been uniformly held by this Court that an appeal is itself an exception to the judgment and to any other matter appearing on the face of the record. *Casualty Co. v. Green,* 200 N. C., 535, 157 S. E., 797; *Parker Co. v. Bank,* 200 N. C., 441, 157 S. E., 419; *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713; *R. R. v. Stewart,* 132 N. C., 248, 43 S. E., 638; *Baker v. Dawson,* 131 N. C., 227, 42 S. E., 588; *Wilson v. Lumber Co.,* 131 N. C., 163, 42 S. E., 565; *Delozier v. Bird,* 123 N. C., 689, 31 S. E., 834; *Reade v. Street,* 122 N. C., 301, 30 S. E., 124; *Clark v. Peebles,* 120 N. C., 31, 26 S. E., 924.

The judge holding the May Term, 1931, of the Superior Court of Wake County heard this action on plaintiffs' appeal from an order of the assistant clerk of said court. After the appeal was dismissed, it was error for the judge to confirm the order of the clerk, and also the sale made by the commissioners on 5 May, 1931. Having dismissed the appeal, the judge was without jurisdiction to further consider the matter.

The action is remanded to the Superior Court in order that plaintiffs' appeal may be heard by the judge, and decided on plaintiffs' exceptions to the order of the assistant clerk.

Error and remanded.

STATE v. JAMES SMITH.

(Filed 21 October, 1931.)

1. **Criminal Law I f—Motion to require State to elect between two crimes charged in bill of indictment held properly denied.**

A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the court not being able to intelligently pass upon the motion before knowing what the evidence would be, and the two offenses being of the same class, which under our statute, C. S., 4622, may be joined in one indictment in separate counts, it being within the sound discretion of the trial court as to whether he should compel an election between the counts and, if so, at what stage of the trial.

2. **Criminal Law I l—Where there is no evidence of commission of less degree of crime, refusal to instruct thereon is not error.**

The provisions of C. S., 4640, in regard to conviction of a less degree of the crime charged in a bill of indictment applies only where there is some evidence that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to the effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error.

3. **Criminal Law L e—Error, if any, in refusal to charge as to lesser degrees of burglary held harmless in view of conviction of rape.**

Where the bill of indictment charges the defendant with burglary in the first degree and rape under separate counts, and the jury renders a verdict of guilty as charged, on both counts, it is immaterial whether the trial court committed error in failing to charge upon the lesser degree of the crime of burglary, the verdict of guilty of rape being sufficient to support the judgment.

APPEAL by prisoner from *Cranmer, J.*, at June Term, 1931, of VANCE. No error.

The prisoner was prosecuted upon a bill of indictment in which it was charged "that James Smith on 23 May, 1931, about the hour of 9 in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling-house of Benny Cross and his wife, Estelle Cross, there situate, and then and there actually occupied by the said Estelle Cross, unlawfully, wilfully, feloniously and burglariously did break and enter, with the felonious intent, her, the said Estelle Cross, a female person, violently and against her will feloniously to ravish and rape, and carnally know; and then and there in the said dwelling-house, he, the said James Smith, unlawfully, wilfully, feloniously and burglariously did assault the said Estelle Cross, a female person, in the said

dwelling-house, then and there being and her, the said Estelle Cross unlawfully, feloniously and burglariously, by force and against her will, did ravish, rape and carnally know, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The jury returned for its verdict, "Guilty of burglary in the first degree and of rape." Thereupon the prisoner was sentenced to death by electrocution and from the sentence pronounced he appealed to the Supreme Court upon assigned error.

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

A. A. Bunn and J. M. Peace for prisoner.

ADAMS, J. The record contains seven assignments of error, only one of which is discussed in the prisoner's brief. The fifth, sixth, and seventh are formal, and the first and third, which embody exceptions to the court's refusal to quash the indictment and to dismiss the action, are clearly without merit.

The second assignment consists of the prisoner's exception to the denial of his motion to require an election between the two counts in the bill. The ruling was correct. The motion was made before any evidence had been introduced, and at this stage the judge was not required to restrict the trial to any special count. He could not then intelligently have restricted it because he did not know what the evidence would be. *S. v. Parrish,* 104 N. C., 679; *S. v. Davenport,* 156 N. C., 596. Besides, as suggested in the first of these cases, the weight of authority has established the rule that it rests in the sound discretion of the *nisi prius* judge to determine whether he will compel an election at all, and if so, at what stage of the trial, particularly when the offenses charged are of the same grade and subject to identical punishment. *S. v. Switzer,* 187 N. C., 88; *S. v. Jarrett,* 189 N. C., 516. In fact the principle maintained in these and other decisions of like tenor is crystallized in the act of 1917: "When there are several charges against any person for the same act or transactions, or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses which may be properly joined, instead of several indictments the whole may be joined in one indictment in separate counts." C. S., 4622.

The fourth exception, on which the appellant chiefly insists, is addressed to the court's failure to instruct the jury that upon the evidence in the case it would be permissible to convict the prisoner of "lesser

degrees of the major offenses charged in the bill of indictment." If the court erroneously declined to give the substance of this instruction with respect to both counts, the prisoner is entitled to a new trial. Whether the evidence was such as to justify the instruction is the question to be determined.

The crime of burglary as defined at common law has been divided by statute into two degrees. If committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of the dwelling or apartment at the time the act is done, the crime is burglary in the first degree; but if committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time the act is committed, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time the act is committed, it is burglary in the second degree. C. S., 4232.

The crime of rape includes an assault with intent, punishable as prescribed by statute. C. S., 4205. Also, it is provided by statute that upon the trial of any indictment the person may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. C. S., 4640.

The statute last cited is applicable to prosecutions for rape and for burglary in the first degree. There are no degrees in the crime of rape; but in proper cases the person charged in an indictment may be acquitted of the capital felony and convicted of a less degree of the same crime, or of an attempt to commit either the crime charged or a less degree of the crime charged. The term "proper cases" is used to indicate those instances in which the law and the facts would warrant a conviction of the lesser offense or of an attempt to commit it.

This Court has repeatedly disapproved the theory that the degree of guilt may arbitrarily be determined in the discretion of the jury without regard to the facts in evidence. The jury, having "no discretion against the obligation of their oath," should never award a verdict independently of all proof. *S. v. Fleming,* 107 N. C., 905. The primary object of a verdict is to inform the court as to how far the facts established by the evidence conform to those which are alleged or charged and put in issue. If neither the specific act charged nor a lesser degree thereof nor an attempt to commit either of them is supported by proof, neither the principal nor the subordinate act can properly be made the basis of an affirmative verdict. In *S. v. Johnston,* 119 N. C., 883, the prisoner requested an instruction "that when the crime charged

in the bill of indictment is burglary in the first degree the jury may render a verdict in the second degree if they deem it proper to do so." The prayer was denied and on appeal the Court said: "Shields, a witness for the State, testified that at the time of the burglary he and his wife and daughter were occupying rooms in the house; that he was sleeping in a room on the first floor and his wife and daughter were sleeping in a room upstairs. Upon this testimony, if the jury believed it, the defendant was guilty of burglary in the first degree. There was no proof tending to show that the burglary might have been committed under circumstances which would make it burglary in the second degree under the statute. If his Honor had charged as he was requested it would have been error." So, likewise, in *S. v. Allen,* 186 N. C., 302. A verdict for a lesser degree of the crime charged is logically permissible only when "there is evidence tending to support a milder verdict," although there are decisions to the effect that if without such supporting evidence a verdict is returned for the lesser offense it will not be disturbed because it is favorable to the prisoner. *S. v. Ratcliff,* 199 N. C., 9; *S. v. Allen, supra.*

All the evidence for the State tends to show that the prisoner committed the crime of rape as charged in the indictment. It is utterly inconsistent with any related offense of which there might have been a conviction on the second count. The evidence supporting the assault supports also the capital felony; for the assault can be severed from the graver crime and treated as a minor offense only by an analysis of the evidence which is unreasonable and unwarranted.

There is no evidence in contradiction of the prosecutrix except that of an alibi. According to her testimony, which contains a full recital of the crime, the prisoner was guilty of rape; according to his own evidence he was guilty of no offense. There is no aspect of the case that would justify a verdict merely of a simple assault or an assault with intent, and refusal to instruct the jury in reference to the lesser offense did not constitute reversible error. *S. v. White,* 138 N. C., 704; *S. v. Kendall,* 143 N. C., 659.

This familiar principle has often been applied—particularly to cases of homicide in which it was held that the prisoner was guilty of murder in the first degree or not guilty. *S. v. Rose,* 129 N. C., 575; *S. v. Dixon,* 131 N. C., 808; *S. v. Spivey,* 151 N. C., 676; *S. v. Walker,* 170 N. C., 716; *S. v. Wiggins,* 171 N. C., 813; *S. v. Wiseman,* 178 N. C., 784.

The two counts in the indictment charge the prisoner with burglary in the first degree and rape. Each crime is a capital felony, and on each count the prisoner was convicted. If there is any phase of the evidence relating to the charge of burglary in which the jury would

have been justified in returning a verdict for a lesser offense there is none with respect to the charge of rape. Where a general verdict of conviction is rendered on an indictment containing several counts judgment may be pronounced on each; *a fortiori* may it be pronounced where there is a separate verdict on each count. *S. v. Mills,* 181 N. C., 530.

We must not be understood to intimate that there is any merit in the prisoner's position in reference to the count for burglary, but if there is, the verdict returned on the count for rape justifies and sustains the judgment of the court. We find

No error.

ALEX BARHAM v. J. E. SAWYER, CITY CLERK.

(Filed 21 October, 1931.)

Elections J a: Mandamus A b—Plaintiff failed to show clear legal right for certification of recall petition and mandamus was properly denied.

Mandamus is only available to enforce a clear legal right, and where the writ is sought to compel a city clerk to certify to the sufficiency of a petition for the recall of an elected officer of the city under the provisions of the city charter, and it appears that the original petition, after the elimination of duplicates, contained five less names than the number required for the recall, and the record fails to show that an amended petition thereafter filed, purporting to contain the names of fifty-eight additional electors, was ever acted upon by the clerk or that it did contain the names of as many as five additional qualified electors, the plaintiff has failed to show a clear legal right and the writ of mandamus is properly denied, and the question of whether the clerk had the authority to remove the names of electors from the petition upon their written application is not presented for decision.

APPEAL by plaintiff from *Harris, J.,* at Chambers, Raleigh, N. C., 30 July, 1931. From WAKE.

Application for a writ of mandamus to compel the clerk of the city of Raleigh to certify to the sufficiency of a petition for the recall of Carl L. Williamson, commissioner of public safety of said city.

It is alleged that on 1 July, 1931, a recall petition was duly filed with the defendant as required by Article XI of the city charter, the pertinent part of which is as follows:

"Within ten days from the date of filing such petition the city clerk shall examine and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified electors, and he shall attach to said petition his certificate, showing the result of such

examination. If, by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the board of commissioners without delay."

The clerk returned said petition 10 July, 1931, with accompanying certificate as follows:

"I, J. E. Sawyer, city clerk, in and for the city of Raleigh, county and State aforesaid, do hereby certify that there was filed in my office on 1 July, 1931, thirty-one petitions, duly sworn to and attested, each petition being headed as follows:

'Petition for the recall of Carl L. Williamson, commissioner of public safety of the city of Raleigh.'

I further certify that, as required by Article XI of the city charter, I have examined and checked the names on said petitions with the registration books for the several precincts on file in my office, and that I have withdrawn from said petitions, by authority of a ruling from the Attorney-General of the State of North Carolina, certain names from said petitions, after written application was received for such withdrawals.

I further certify that the results of such examination, checking and withdrawal, are as follows:

Number of qualified electors necessary to complete petition			901
Number of names on original petitions		926	
Number withdrawn by application	238		
Number eliminated (duplicates, etc.)	30	268	
Number of qualified names remaining on list		658	
Number deficient			243

All withdrawn names were qualified electors.

I further certify that I have this day returned petition to the petitioners for the purpose of filing an amended or a new petition, as authorized by said Article XI of the city charter.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of the city of Raleigh, this 10 July, A.D., 1931.

(Corporate seal.) J. E. Sawyer, city clerk."

Thereafter, on 20 July, 1931, the petition was refiled with the defendant, together with an additional petition purporting to contain the names of 58 additional qualified electors of the city of Raleigh.

The record is silent as to what action, if any, was taken by the clerk upon this amended or new petition. Summons in this action was issued the same day, 20 July, 1931.

From an order denying the writ, plaintiff appeals, assigning error.

J. S. Griffin for plaintiff.
Clem B. Holding and Robert N. Simms for defendant.

STACY, C. J. It is the contention of the plaintiff that the signers of the original recall petition are not permitted by law to withdraw their names therefrom and that the defendant was and is without authority to remove from said petition the name of any qualified elector. *Non constat* the original petition was signed by only 896 qualified electors—admittedly 5 less than the required number, and there is nothing on the record to show that this deficiency was met by the supplemental petition purporting to contain 58 additional names. It may or may not have been signed by as many as 5 qualified electors. So far as the record discloses, no action was ever taken upon this amended or supplemental petition. For this reason, if for no other, the writ of mandamus, which is only available to enforce a clear legal right, was properly denied. *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169; *Umstead v. Board of Elections,* 192 N. C., 139, 134 S. E., 409; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

Affirmed.

SILLIC SAWYER v. JOHN S. WESKETT, EXECUTOR OF ESTATE OF W. H. MISKELL, DECEASED.

(Filed 21 October, 1931.)

1. Appeal and Error J e—Where same evidence is elicited from others, error in admission of privileged testimony of physician is not reversible.

Although it is error for the trial court to require a physician to disclose confidential information acquired in the course of treating a patient without a finding that the testimony was necessary to a proper administration of justice, C. S., 1798, where there is no such finding of record, but other witnesses have testified to the identical information elicited from the physician, the admission of his testimony cannot be held for reversible error.

2. Executors and Administrators D a—Testimony of value of decedent's estate is incompetent in action for services rendered decedent.

In an action to recover for services rendered a decedent upon a *quantum meruit*, testimony as to the reputed wealth of the decedent is incompetent, the question at issue being the value of the services rendered and not the value of the estate of the decedent.

CIVIL ACTION, before *Frizzelle, J.*, at May Term, 1931, of PAMLICO.

The evidence tended to show that W. H. Miskell, an old man, broken with the infirmities of age and the ravages of an incurable disease, went to the home of the plaintiff to be cared for, on or about 17 September, 1928. He died on 4 December, 1928. The plaintiff instituted this action against the executor of the estate of the deceased, claiming compensation for nursing and caring for the deceased for a period of eighty days. The defendant entered a general denial and pleaded the statute of limitations. Issues were submitted to the jury and answered in favor of plaintiff, and the verdict awarded $700 to cover services rendered by the plaintiff to the deceased.

From judgment upon the verdict the defendant appealed.

Julius G. Dees and Ward & Ward for plaintiff.
Z. V. Rawls for defendant.

BROGDEN, J. Two questions of law are presented by the record:

1. Under what circumstances may a physician be compelled by a trial judge to disclose confidential information respecting the physical condition of his patient?

2. In a suit for compensation for services rendered a deceased, is it permissible to offer evidence as to the financial condition of the deceased?

The first question of law arises upon the testimony of a physician who treated the deceased in his last illness, in response to inquiries respecting the physical condition of his patient. The physician declined to disclose confidential information which he had acquired during the course of treatment, stating that he had been taught that physicians were not permitted to divulge such information unless ordered to do so by the court. The court thereupon directed the physician to answer and the ruling was complied with. C. S., 1798, prescribes the privilege protecting physicians in disclosing confidential information acquired in the course of employment in treating a patient. This statute was construed in *Ins. Co. v. Boddie,* 194 N. C., 199, 139 S. E., 228, and in *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187. The opinion in the *Newsome case, supra,* declares: "If the statements were privileged under this statute, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a

proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded." In the case at bar no finding was spread upon the record. However, it appears that other witnesses testified to the physical condition of the deceased, which testimony disclosed the identical information sought to be elicited from the physician. Hence, the ruling of the trial judge with respect to the testimony of the physician cannot be held for error.

The second question of law grows out of the following testimony elicited in behalf of plaintiff: Q. "Mr. Miskell was a man of some wealth, was he not?" A. "Yes sir." There was objection to the question and answer and motion that the answer be stricken out. The objection was overruled and the witness continued: "He was a man of some wealth. I don't know how much. He had some money. All I saw or the principal asset of his estate consists of two old buildings on Main Street that are about to fall down. I don't know that all of his property will not rent for enough to pay taxes."

It has been generally held in this State that evidence of the reputed wealth of a defendant is incompetent except in cases warranting the award of punitive damages. *Tucker v. Winders,* 130 N. C., 147, 41 S. E., 8; *Arthur v. Henry,* 157 N. C., 393, 73 S. E., 206; *Edwards v. Finance Co.,* 196 N. C., 462, 146 S. E., 89. The theory upon which such evidence is excluded is manifestly built upon the fact that the value of a given service does not depend upon the ability of the party charged to make payment. The question at issue is the value of services and not the size of the estate of the person receiving the services. Hence, the admission of such evidence constitutes error.

New trial.

NAN LEE McKERLEY v. COMMERCIAL CASUALTY INSURANCE COMPANY.

(Filed 21 October, 1931.)

1. Trial F a—Where there is insufficient evidence to support issue tendered by defendant the refusal to submit the issue is not error.

A plea in bar to the right of plaintiff to recover in his action must be supported by evidence sufficient in law for an affirmative finding by the jury or the question will not be submitted for its determination.

2. Insurance R a—In this case held: whether death resulted from accident within terms of policy was determined by the verdict.

In an action to recover upon an accident insurance policy the defense of the insurer that the death of the insured was not caused from the

effect of bodily injury sustained solely through external, violent or accidental means, as the policy provided, is answered against the insurer by the verdict of the jury under the facts of this case.

3. Insurance J d—Held: insurer waived right to maintain that notice and proof of loss had not been given as required by policy.

In this action upon a policy of accident insurance, *Held:* the right of the insurer to maintain the position that the beneficiary had not conformed to the provisions of the policy as to the time of bringing action and notice and proof of loss was waived by an agreement upon the trial that the court give judgment against it in a certain amount if the jury answered the issue fixing it with liability in the affirmative.

APPEAL by defendant from *Midyette, J.*, at May Term, 1931, of NEW HANOVER.

Civil action by beneficiary to recover on a policy of health and accident insurance issued to George M. McKerley 1 November, 1929. The assured died 27 November, 1929. This action was instituted 10 November, 1930.

Notwithstanding plaintiff's possession of the policy and receipt for first premium, it was the contention of the defendant that the delivery of the policy was upon condition and that the policy had never become operative, the premium not having been paid.

The court declined to submit an issue upon this plea. Exception.

It was further contended by the defendant that the death of the assured was not caused from the effects of bodily injury sustained solely through external, violent and accidental means as insured against in the policy.

The jury returned the following verdict:

"Was the death of George M. McKerley caused from the effects of bodily injury sustained solely through external, violent and accidental means during the time the said policy was in force? Answer: Yes."

A third position taken by the defendant is, that compliance with the following provision of the policy has not been shown:

"No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy."

Judgment on the verdict, from which the defendant appeals, assigning errors.

Bryan & Campbell for plaintiff.

Burney & McClelland for defendant.

STACY, C. J., after stating the case: The plea of the defendant that the policy in suit was delivered conditionally and has never become operative is not supported by the evidence. *Grier v. Ins. Co.*, 132 N. C., 542, 44 S. E., 28; *Kendrick v. Ins. Co.*, 124 N. C., 315, 32 S. E., 728; *Rayburn v. Casualty Co.*, 138 N. C., 379, 50 S. E., 762. When the evidence is not sufficient to warrant an affirmative finding on a plea in bar, the court is not required to submit the question to the jury. *Falkner v. Pilcher Co.*, 137 N. C., 449, 49 S. E., 945.

The second contention of the defendant that the death of the assured was not caused from the effects of bodily injury sustained solely through external, violent and accidental means, as insured against in the policy, is answered by the verdict.

The third position taken by the defendant that proof of loss and suit after sixty days from such filing and within two years, as provided by the policy, has not been shown, is not available to the defendant on the present record, for at the close of the evidence, the amount of recovery, if any, was agreed upon, and further, "if the jury shall answer the first issue yes, then the court may find the amount as herein stated, and enter judgment accordingly." Furthermore, plaintiff testified that she offered to reimburse defendant's agent for the amount of the premium after her husband's death, "because when I went to him to sign the papers to get the insurance papers started he told me he had paid the insurance himself, and I said I will pay it to you." This is some evidence that proof of loss was signed in the presence of defendant's agent. But the point seems not to have been mooted in the court below. The verdict and judgment will be upheld.

No error.

STATE PLANTERS BANK AND TRUST COMPANY v. R. E. WHITEHURST AND EDNA E. WHITEHURST.

(Filed 21 October, 1931.)

Appeal and Error A d—Appeal in this case is dismissed as premature.

Where one claiming as a holder in due course of a negotiable instrument by endorsement before maturity from the payee brings action on the note against the payer who claims that the plaintiff was not a holder in due course, and that he had made payment on the note to the payee which had not been credited, *Held:* an appeal will not lie from an order of the court before trial making the payee a party, it appearing that no harm had come to the plaintiff, and the appeal so taken will be dismissed as premature.

VAN KEMPEN *v.* LATHAM.

APPEAL by plaintiff from *Devin, J.*, at January-February Term, 1931, of CRAVEN.

Civil action to recover on a 30-day, negotiable, promissory note for $2,785, alleged to have been executed by R. E. Whitehurst to the First National Bank of New Bern, endorsed by Edna E. Whitehurst, duly transferred and endorsed to the plaintiff for a valuable consideration, before maturity and without notice of any defect or equity, constituting the plaintiff a holder thereof in due course.

The defendants answered, alleging that before the note was due a payment of $2,385 was made thereon to the First National Bank of New Bern; that plaintiff was not a holder in due course, and asked that the receiver of the payee bank be made a party to this action, to the end that they might have judgment over in case the plaintiff be awarded judgment on the note in suit.

From an order directing that the receiver of the First National Bank of New Bern be made a party, the plaintiff appeals.

W. H. Lee for plaintiff.
W. B. R. Guion for defendants.

STACY, C. J. As no harm has come to the plaintiff from the order directing that the receiver of the payee bank be made a party, and none is apparent on the record, the appeal must be dismissed as premature. *Etchison v. McGuire,* 147 N. C., 388, 61 S. E., 196; *Joyner v. Fiber Co.,* 178 N. C., 634, 101 S. E., 373; *Barbee v. Cannady,* 191 N. C., 529, 132 S. E., 572.

The case of *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705, is not unlike the present one in the steps thus far taken.

Appeal dismissed.

J. C. VAN KEMPEN, RECEIVER OF ESTATE OF H. H. BLIJDENSTEIN, v. J. E. LATHAM, TRUSTEE OF E. B. HACKBURN AND J. E. LATHAM, EXECUTOR OF ESTATE OF E. B. HACKBURN, DECEASED.

(Filed 21 October, 1931.)

1. Aliens A a—Receiver appointed by court of friendly foreign nation may maintain action in courts of this State under comity.

A receiver appointed by a foreign nation for the estate of a friendly alien may be permitted by our courts to sue herein under the spirit of comity when there is nothing involved in the action that may be construed as against our public policy or the rights of our citizens, although a receiver appointed in a foreign jurisdiction has no extra territorial right to maintain an action in the courts of this State.

2. Same—Permission to sue is not necessary in order for receiver of friendly alien to sue in courts of this State.

Where the foreign receiver of a friendly alien has had turned over to him or in his possession under an order of court negotiable notes, properly endorsed, he may sue thereon in the spirit of comity in the courts of our State without special permission from our court therefor.

3. Limitation of Actions B g—Held: action by receiver of friendly alien was not barred, action being brought within year from voluntary nonsuit.

Where a foreign receiver, under the mistake that special permission was necessary for him to sue in the courts of our State, has taken a voluntary nonsuit, and obtains permission to sue in our courts, and brings the identical action again within one year from the nonsuit, the permission obtained to sue will be regarded as surplusage, and if the former action has not been barred by a statute of limitations applicable (441(1), the second action is in time if brought within one year from the time of the voluntary nonsuit, C. S., 415, *Battle v. Davis*, 66 N. C., 256, cited and distinguished, in the present case the receiver bringing action on negotiable notes properly endorsed and in his possession by order of the Supreme Court of the District of Columbia.

4. Same—Where voluntary nonsuit is taken and second action brought within a year the second action is regarded as continuation of first action.

Where a plaintiff elects to abandon his action for any cause, except the ruling of the court against him, it is a voluntary nonsuit and he may commence another action within one year, and it will be considered a continuation of the first action, and will not be held barred by a statute of limitations if the first action nonsuited was not so barred. C. S., 415.

5. Receivers F a — Receiver may bring action in own name without first obtaining permission of court to sue.

Distinctions between actions at law and suits in equity are not regarded under our practice, and a receiver may bring action to realize upon the assets entrusted to him in his own name without special permission of court, under the presumption that he is invested with full power to maintain the action in his own name.

APPEAL by defendant from *Devin, J.*, and a jury, at May Term, 1931, of CRAVEN. No error.

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

"1. Is the defendant, J. E. Latham, as trustee and executor of E. B. Hackburn, indebted to the plaintiff, and if so, in what amount? Answer: $30,000, and interest.

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

The court below charged the jury as follows: "(In this action brought by J. C. Van Kempen, receiver, against J. E. Latham, as trustee and executor, the plaintiff having offered evidence tending to show the execution of two notes sued on, the evidence tending to show their execution by the defendant's testator and trustor, E. B. Hackburn, and evidence tending to show the endorsement and transfer of the same to the plaintiff; and, also, evidence as to the authority and right of the plaintiff to maintain this action; and the evidence in support of the plaintiff's action being uncontradicted resolves itself into a matter about which I will give you the following instructions.) To the foregoing portion of the charge in parentheses defendant excepted. The first issue: 'Is the defendant, J. E. Latham, as trustee and executor of E. B. Hackburn, indebted to the plaintiff, and, if so, in what amount? (The court charges you, if you find by the greater weight of the evidence the facts to be as testified by the witnesses, and as shown by the evidence in the case, to answer that issue the sum of the said two notes, to wit, $30,000 and interest.) To the foregoing portion of charge in parentheses defendant excepted. Second issue: 'Is the plaintiff's cause of action barred by the statute of limitations?' (The court charges you, if you find by the greater weight of the evidence the facts to be as testified to by the witnesses and as shown by all the evidence in the case, to answer that issue, No.) To the foregoing portion of charge in parentheses defendant excepted. (That being the view of the law the court takes upon this testimony in the present situation. Therefore, gentlemen, if you find by the greater weight of the evidence the facts to be as testified by the witnesses, and as shown by the evidence, you will answer the issue $30,000, and interest. If you find those are the facts under the instructions of the court.) To the foregoing portion of charge in parentheses defendant excepted. (If you wish me to write those figures for you I will do so. You having so found I will write your answer to the first issue $30,000, and interest.) To the foregoing portion of charge in parentheses defendant excepted. (And the second issue, if you find by the greater weight of the evidence the facts to be as testified you will answer the second issue, No. If you find those are the facts and wish me to write that for you I will do so. You having so found I will write at your request as answered that issue, No.) To the foregoing portion of charge in parentheses defendant excepted. So say you all, gentlemen."

Upon the verdict the court below rendered judgment. Defendant made numerous exceptions and assignments of error, including the exceptions to the charge of the court below as above set forth, and appealed to the Supreme Court. The material exceptions and assignments of error will be considered in the opinion.

VAN KEMPEN *v.* LATHAM.

Frank C. Lee, George T. Willis and Abernathy & Abernathy for plaintiff.

Moore & Dunn for defendant.

CLARKSON, J. This action was before this Court on appeal by plaintiff from a demurrer filed by defendant and sustained by the court below. This Court reversed the court below and held that the demurrer should have been overruled. *Van Kempen v. Latham,* 195 N. C., 389. In that case, at p. 394, is the following: "Ordinarily a receiver cannot maintain an action in another jurisdiction. As a rule, they have no extra territorial jurisdiction. But the weight of authority is to the effect that the privilege may be granted as a courtesy, not as an obligation—by way of comity—and then only when it will not work a detriment to the citizen of the state in which the jurisdiction is sought. In the progress of the age, the rapid transit and quick means of the intercommunication have brought the states of the union and the nations of the earth in closer alliance than ever before. Commerce is extended to every part of the globe—commercial paper travels with commerce. The present action is based on negotiable notes admitted by the demurrer to be due and unpaid and executed by defendant's testator. The demurrer is founded solely on the ground that a receiver appointed in a court of a foreign nation should not be allowed to sue in this jurisdiction, although the receiver alleges ownership of the notes due and owing, permission granted to sue, order in the foreign court giving authority and direction to bring this suit, and on trial would have to produce the notes in this jurisdiction. We must be friendly with other states and nations if we want other states and nations to be friendly with us. On the facts and circumstances of this case, we think the complaint states a cause of action." Textwriters and decisions are cited by this Court in that opinion, to sustain the position in overruling the demurrer.

On this appeal it seems as if there is a repetition of the position heretofore taken by defendant, that a foreign receiver could not sue in this jurisdiction. For example, in defendant's brief we find cited to sustain his contentions, the Federal case of *Moore v. Mitchell,* 281 U. S., 18. In that case, we find the following, at p. 24: "He is the mere arm of the state for the collection of taxes for some of its subdivisions and has no better standing to bring suits in courts outside Indiana than have executors, administrators, or chancery receivers without title, appointed under the laws and by the courts of that state. It is well understood that they are without authority, in their official capacity, to sue as of right in the Federal courts in other states." 65 A. L. R., 1354, see anno.

"In *Converse v. Hamilton* (1911), 224 U. S., 243, 56 L. Ed., 749; Am. Cases, 1913D, 1292), the Supreme Court of the United States has reviewed *Booth v. Clark,* and a receiver of a Minnesota corporation was allowed to sue in the courts of another state to recover the double liability imposed by the laws of Minnesota, the Court saying: 'While an ordinary chancery receiver cannot exercise his powers in jurisdictions other than that of the court appointing him, except by comity, one who is a *quasi*-assignee and invested with the rights of his *cestui que trustent* may sue in other jurisdictions, and his right to do so is protected by the full faith and credit clause of the Federal Constitution." 1 Clark on Receivers, 2d ed., chap, 19, sec. 591(f), at p. 811.

It will be noted that defendant cites and discusses the jurisdiction of the United States courts, and relies on the *Moore case, supra,* which is a suit involving a revenue law of another state. Our former decision in this case was based upon comity between foreign nations and different states of the Union. Conceding that the United States courts do not allow or permit a receiver in another jurisdiction, as a matter of comity, to sue for a debt, yet the Federal Court has no control over the state courts in a matter of this kind. The decisions are merely persuasive. *Van Kempen v. Latham,* 195 N. C., at p. 393; 23 R. C. L., part sec. 151-2, at p. 142-3.

The whole matter is well stated in Tardy's Smith on Receivers, Vol. 2, p. 1924: "The general principles involved in the question of the extent of the right of a receiver to sue or assert rights in respect to the receivership property outside of the jurisdiction of his appointment have been a source of controversy for many years. . . . (p. 1925) The international effect to be given to transfers of property by operation of law through the instrumentality of assignees and receivers, and the extra-territorial operation of the title of such officers as established in England, and other foreign countries, is based upon the broad and constantly growing system of international comity, and recognition of the fact that on account of the quickness of transportation of every character, freedom of business relations and easy transference of property rights should be fostered both among states and nations. Following the line of decisions of the earlier English courts upon the subject the courts in the American colonies prior to the Revolution, and many of the state and United States courts since that period, established the doctrine that an assignee or receiver's title to personal property extended only to such property of the debtor as had a *situs* within the state of the assignee or receiver's appointment, and that beyond the state line he had no title or right of possession, or at least such as the court would enforce. As a corollary of this doctrine it was held that a

foreign receiver could not sue or defend and had no standing in a court of foreign jurisdiction. While some of the features of the earlier doctrine are still recognized and enforced in some of the American courts upon the principle of *stare decisis,* yet the modern doctrine as to the receiver's rights to sue in a foreign jurisdiction, and reduce to possession the assets of his principal, or recover his choses in action is well established by the great weight of authority as well as by reason, though there are still some limitations that will be noticed hereafter. Courts of this country have recognized the justice and cogent reasoning of the modern English courts and jurists and have sought to break away from the doctrine of the Court in *Booth v. Clark* (17 How., 322, 58 U. S., 15 L. Ed., 164), which, though not the earliest, yet has been regarded as the leading case upon the subject, sometimes by compelling the debtor to make a formal transfer of his property to the receiver and thus vesting in him the absolute legal title by act of the parties which is recognized and enforced in all jurisdictions. Sometimes the same end has been accomplished by the establishment of a species of interstate comity, by which the judgment, and decrees of other states, and the rights and powers of receivers thereunder have been given an extra-territorial virtue and force, and the right of the receiver to sue and enforce his property rights in a foreign jurisdiction recognized and respected."

Minor, Conflict of Laws (1901), part sec. 118, p. 266: "A receiver, strictly speaking, has no more right to sue in a foreign state than to do any other act. But if a suit instituted by a foreign receiver will not work a detriment or an injustice to the citizens of the forum, he will generally, upon principles of comity, be permitted to appeal to its courts."

Goodrich on Conflict of Laws (1927), p. 442-3: "There is a considerable body of authority, however, which allows suit to be brought locally by a foreign receiver, even though he is not a statutory successor or *quasi*-assignee as described above. Allowing him to sue is frequently called an instance of comity."

"The appointment of a receiver in a court of another state will have no extra-territorial effect, and he can have no recognition in another state, except by comity. Where a receiver was appointed for a foreign corporation in a court of the state where it was created, he may be allowed to become a party to litigation in this State by comity, and not as a right, and this will not be allowed where it would injuriously affect the rights of citizens of this State. But, when such receiver is allowed to come in and sue, his authority should be shown by a duly certified copy of his appointment; and it is said to be a better rule

to have a receiver appointed regularly in the courts here." N. C. Prac. & Proc. (McIntosh), sec. 898, p. 1014.

In *Berger v. Stevens,* 197 N. C., at p. 235-6: "The major contest of defendants is founded on the allegation in the complaint that the plaintiff is a nonresident alien and is living in Nice, in the Republic of France. The question arises: can a nonresident alien sue in the courts of this State? We think a resident of any friendly nation can sue. In 1796 the question arose in this jurisdiction and an English subject was allowed to sue. In a *Per Curiam* opinion, in *Executors of Cruden v. Neale,* 2 N. C., at p. 344, the following observations are made: 'All persons in general, as well foreigners as citizens, may come into this Court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between our country and theirs. . . . It is incompatible with a state of national friendship, and is a cause of war, if the citizens of another country are not allowed to sue for and obtain redress of wrongs in our courts.' "

We reiterate the position laid down in the former opinion in this case and cite additional authorities, as the defendant again so earnestly argued against the position taken by this Court in the *Van Kempen case, supra.* We are mindful of the Rule 44 and decisions thereunder that there cannot be a rehearing by means of a second appeal. 200 N. C., p. 839-40.

The sole material question on this appeal is whether the three-year statute, C. S., 441(1), is applicable, which defendant sets up in the answer? We think not.

The notes, the subject of this controversy, were dated New Orleans, La., 5 August, 1919, (1) $5,000, due 5 August, 1921; (2) $25,000, due 5 August, 1922, signed by E. W. Rosenthal and E. B. Hackburn. They are negotiable notes.

On 11 December, 1923, J. C. Van Kempen, receiver of the estate of H. H. Blijdenstein, brought an action against defendant, J. E. Latham, trustee for E. B. Hackburn, deceased, on these two negotiable notes. Summons was served on defendant 12 December, 1923, and complaint duly filed. The action was on the two notes above set forth. "Wherefore, the plaintiff prays judgment against the defendant, J. E. Latham as trustee, of E. B. Hackburn, deceased, and J. E. Latham, executor of the estate of E. B. Hackburn for the sum of $30,000, with interest on the said $30,000 from 5 August, 1919; at 4 per cent; for the cost of this action, and for such other and further relief as the plaintiff may be entitled to."

A judgment of voluntary nonsuit at May Term, 1926, was entered. On 13 April, 1927 (service 16 April, 1927), within a year after the nonsuit, this action was instituted and complaint filed for the recovery on said two notes of $30,000, and interest. "When the plaintiff elects to abandon his action for any cause, except the ruling of the court against him, it is a voluntary nonsuit, and he may commence another action, but he has no right of appeal." N. C. Prac. & Proc., *supra,* sec. 627, p. 700; C. S., 415; *Merrick v. Bedford,* 141 N. C., 504; *Midkiff v. Ins. Co.,* 198 N. C., 568; *Davis v. R. R.,* 200 N. C., 345. The record discloses after a voluntary nonsuit a petition filed by plaintiff setting forth in detail the history of the two notes mentioned above, headed "Petition of J. C. Van Kempen, receiver of estate of H. H. Blijdenstein to sue in Superior Court of Craven County."

On 13 October, 1926, Judge N. A. Sinclair, presiding in the Superior Court of Craven County, found the following facts: "It appearing to the undersigned judge of the Superior Court riding the courts of the Fifth Judicial District, and the court finding as a fact that on 10 December, 1923, there was duly instituted in the Superior Court of Craven County the suit entitled J. C. Van Kempen, receiver of the estate of H. H. Blijdenstein v. J. E. Latham, trustee of E. B. Hackburn and J. E. Latham, executor of estate of E. B. Hackburn, deceased, defendants, and the court further finding that a voluntary judgment of nonsuit was entered in the said action, and the court further finding as a fact that this petition to sue by the plaintiff against the same defendants was made within one year from the entering of judgment of nonsuit in said original action, and it further appearing to the court that a cause of action exists in favor of J. C. Van Kempen, receiver of the estate of H. H. Blijdenstein v. J. E. Latham, trustee of E. B. Hackburn and J. E. Latham, executor of estate of E. B. Hackburn, deceased." An order was made allowing and permitting plaintiff to bring this present action.

The final decree in the Supreme Court of the District of Columbia, filed 19 April, 1921, contained the following: "It appearing unto this Court that the plaintiff, J. C. Van Kempen, is the receiver of the estate of H. H. Blijdenstein, duly appointed and acting pursuant to the order of the District Court of Amsterdam, the Netherlands; . . . That there is now held by the Alien Property Custodian the following money and other property: . . . Note made by Edward W. Rosenthal and E. B. Hackburn jointly for $5,000, due 5 August, 1921. Note made by Edward W. Rosenthal and E. B. Hackburn jointly for $25,000, due 5 August, 1922. It is therefore, adjudged, ordered and decreed that Thomas W. Miller, as Alien Property Custodian, do forthwith convey,

transfer, assign, deliver and/or pay to J. C. Van Kempen, receiver of the estate of H. H. Blijdenstein, the money and other property heretofore specified as held by him as Alien Property Custodian."

These notes were negotiable and were duly endorsed and in the possession of plaintiff at all times and at the time the first suit in this action was instituted. The court order was to "convey, transfer, assign, deliver and/or pay to," etc. We think that under the facts and circumstances of this case that plaintiff in the first suit was entitled to sue. Taking a voluntary nonsuit, and getting permission to sue in the second action was mere surplusage, and this action is not barred by the three-year statute of limitations.

"The time is extended because the new action is considered as a continuation of the former action, and they must be substantially the same, involving the same parties, the same cause of action, and the same right; and this must appear from the record in the case, and cannot be shown by oral testimony." N. C. Prac. & Proc., *supra,* part sec. 126, p. 119; *Young v. R. R.,* 189 N. C., 238; *McLeod v. McNeill,* 195 N. C., at p. 423.

The question arises: Can a receiver sue for the recovery of a money judgment on negotiable notes as in this case and under the assignment to plaintiff, without obtaining special authority from the court? We think so. We find in the case of *Weill v. Bank,* 106 N. C., at p. 10: "While the court may exercise very great control over the receiver, and may direct, in appropriate cases that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate necessary actions without special leave or direction of the court."

In *Battle v. Davis,* 66 N. C., at p. 256, it is written: "A receiver cannot commence any action for the recovery of outstanding property without an order of the court and when such order is made the action must be brought in the name of the legal owner and he will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects, under the control of the court. 3 Dan'l Ch. Pr., 1977, 1991." See High on Receivers, 3d ed., sec. 208. Note at p. 184, "*Battle v. Davis,* 66 N. C., 252. But see *Gray v. Lewis,* 94 N. C., 392. And in *Weill v. Bank,* 106 N. C., 1, it is held under the provisions of the Code of Procedure that a receiver in aid of judgment creditors, upon proceedings supplemental to execution, might sue to recover property of the debtor without leave of court."

"It has been stated as a general rule that a receiver should obtain leave of court before bringing any action. As explaining the former practice, the Court says: 'A receiver cannot commence any action

for the recovery of outstanding property without an order of court, and when such order is made the action must be brought in the name of the legal owner, and he will be compelled to allow the use of his name, upon being properly indemnified out of the estate and effects under the control of the court.' The rule is different now, depending upon the general powers conferred in the order of appointment, or in the statute under which the order is made. While the court may limit the powers, yet, when the receiver is invested with full power as a receiver, he may sue without special leave of court; and under the statutes regulating receivers, in the case of banks and other corporations, he is expressly authorized to sue. Under the present practice, where there is no distinction between actions at law and suits in equity, a receiver authorized to sue may sue in his own name or in the name of the person or corporation represented." N. C. Prac. & Proc., *supra,* part sec. 894, at p. 1010.

In the appointment of a receiver, unless specially limited, ordinarily the presumption is that he is invested with full power as receiver and thus may sue without special leave of court. The allegation in the original complaint so indicates.

The present case is distinguishable from the *Battle case, supra.* The negotiable notes here were transferred, assigned and delivered to plaintiff under the court order, but in the *Battle case* the note was not transferred. Plaintiff was the assignee, but under the general power, the receiver *ex mero motu* had the authority to sue without "special leave or direction of the Court." This seems to be the sensible holding and permissible. It may be before a court order could be obtained the receiver may lose valuable rights, which quick action would save. See Norton on Bills and Notes (4th ed.), p. 279-280. *Thompson v. Osborne,* 152 N. C., 408; *Bank v. Rochamora,* 193 N. C., 1; C. S., 446; *Martin v. Mask,* 158 N. C., 436; *Sheppard v. Jackson,* 198 N. C., 627. We see no good reason, under the facts and circumstances of this case, why by comity plaintiff, a foreign receiver, cannot also sue, and it was not necessary for plaintiff to have taken a voluntary nonsuit and thereafter obtained an order to sue. Even the permission could have been allowed in the original action. *S. v. Scott,* 182 N. C., 865. The statute of limitation is not applicable. In *May v. Menzies,* 186 N. C., at p. 144, we find: "Merchants, in trading with each other, should know their rights and responsibilities. Settled law often has the effect of making people certain and careful in their dealings. Honesty in dealing with each other at home, with those of other states, and with the nations of the earth, is the golden cord to bind us together. Good faith—keeping of contracts."

Defendant does not deny the debt, or that it is an honest one. For years plaintiff has attempted to collect these notes, and has been baffled by technical defenses. We think the charge of the court below correct. For the reasons given, in the judgment of the court below we find

No error.

W. A. HIATT AND HIS WIFE, MATTIE D. HIATT, v. CITY OF GREENSBORO.

(Filed 21 October, 1931.)

1. Municipal Corporations I a—Abutting owner has easement in city street.

While the public has, ordinarily, only the right to the use of public streets for travel so long as the streets are maintained for that purpose by public authority, an abutting owner has an easement in the street to have it kept open as a means of egress and ingress to and from his property, and he may not be deprived of his right without just compensation.

2. Eminent Domain A c—Held: abutting owner was entitled to compensation for damage resulting from closing street at railroad crossing.

Where a city, with statutory authority, makes a contract with a railroad company whereby the city agrees to build certain underpasses across certain of its streets and to close certain other streets where they cross the railroad tracks at grade in the city limits, and in pursuance of the contract the city closes a street at a grade crossing, *Held:* an owner of a lot abutting the street closed under the agreement, whose property is thus placed in a *cul de sac* and cut off from the use of the street as a means of travel to and from the business section of the city and made less valuable by reason of the stopping of traffic along the street from one direction, is entitled to compensation for the damage to his property by reason thereof, less any special benefits, he having suffered special damage not common to the public generally.

BROGDEN, J., dissents.

APPEAL by defendant from *Small, J.*, at October Term, 1930, of GUILFORD. No error.

Plaintiffs are the owners and in possession of a lot of land situate on the east side of South Spring Street, in the city of Greensboro. This lot fronts on said street sixty feet and has a depth of about one hundred and twelve feet. There is located on this lot a one-story, frame dwelling-house, containing five rooms.

Plaintiffs have owned and have occupied said property as their home since 1914. The desirability of this property for residential purposes,

and its market value are largely dependent upon its location on South Spring Street, which is now and was at the time plaintiff purchased said property, included within the general system of streets established and maintained by the city of Greensboro. The said street is and has been for more than thirty years one of the improved, hard-surfaced streets of the city, and extends in a northerly direction from West Lee Street in the southern, to Battle Ground Avenue in the northern section of the city. The direct route from plaintiffs' property to the northern or business section of the city is over and along Spring Street, which is known as South Spring Street in the southern, and as North Spring Street in the northern section of the city.

As Spring Street extends in a northerly direction from West Lee Street through the city of Greensboro to Battle Ground Avenue, the said street intersects and crosses numerous streets, which run east and west through the city, and which are parallel with West Lee Street and Battle Ground Avenue. About 500 feet to the north of plaintiffs' property, South Spring Street intersects and crosses the main line tracks of the North Carolina Railroad Company and the Southern Railway Company, which run east and west through the city of Greensboro. There is no street running east and west between plaintiffs' property and the tracks of said railroad companies. West Lee Street, which runs east and west through the city, is about 150 feet to the south of plaintiffs' property. This property is, therefore, situate on the east side of South Spring Street in a block, which is about 650 feet in length, and is bounded on the north by the railroad tracks, and on the south by West Lee Street. Prior to the closing of South Spring Street by the city of Greensboro, at its intersection with the railroad tracks, there was much travel over and along Spring Street from West Lee Street in a northerly direction toward Battle Ground Avenue, and from Battle Ground Avenue and the streets of the city, which run east and west and cross Spring Street, north of the railroad tracks, in a southerly direction toward West Lee Street. The travel in both directions on Spring Street passed plaintiffs' property and enhanced its value for residential and other purposes. Spring Street was a direct and convenient route for travel through the city from the northern to the southern, and from the southern to the northern section of the city. There were other streets running north and south through the city, parallel with Spring Street, which intersected the tracks of the North Carolina Railroad Company and with Southern Railway Company.

Prior to November, 1926, there were sixteen railroad crossings in the city of Greensboro, resulting from the intersection of the tracks of the North Carolina Railroad Company and the Southern Railway Com-

pany by the streets of the city, which run north and south. All these crossings were at grade, and because of the heavy travel over and along the said streets, which was constantly increasing in volume, and because of the large number of trains, both passenger and freight, operated daily over and along said railroad tracks, the said crossings were menaces to both life and property. They also retarded travel over and along the said streets, and hindered the development of the southern section of the city, which was connected by these streets with its northern or business section.

On 29 November, 1926, the city of Greensboro, acting through its governing body, the city council, entered into a contract or agreement with the Southern Railway Company, lessee of the North Carolina Railroad Company, by which the said railway company agreed to pay one-half of the cost and expense to be incurred by the city in the elimination of said grade crossings, by means of underpasses and overhead bridges to be constructed by the city. This agreement was amended by a supplemental agreement between the city and said railway company, dated 27 January, 1927.

At its regular session held in 1927, the General Assembly of North Carolina enacted a statute which is chapter 158, Private Laws of North Carolina, 1927, and is as follows:

"An act to validate a contract between the city of Greensboro and the Southern Railway Company, providing for the elimination of certain grade crossings in the city of Greensboro.

The General Assembly of North Carolina do enact:

Section 1. That there be and hereby is confirmed and declared valid in all respects a certain contract or agreement dated 29 November, 1926, as amended by a supplemental agreement dated 27 January, 1927, between the city of Greensboro and the Southern Railway Company, providing, among other things, that said city shall build certain underpasses at certain grade crossings of streets and tracks of said company in accordance with a general plan map heretofore determined upon and with detailed plans and specifications to be hereafter prepared by certain architects and engineers, subject to the approval of the said city and company, or by arbitration, one-half of the costs thereof, including damages, to be paid said city by said company over a period of years with interest, and providing, also, that the city shall permanently close and forever abandon certain other grade crossings of streets and tracks of said company, subject to the right of the governing body in the interest of requirements of public interest or necessity at any time in the future to re-open any such closed crossing or crossings, and to open elsewhere within the corporate limits any street or streets across

the property and tracks of the company, upon condition that at the crossing so opened or reopened the city shall construct and maintain at its own cost an underpass, for which the railway company shall grant a suitable easement, or shall pay to the company as liquidated damages an amount equal to the cost of any underpass which the city shall so fail to construct.

Section 2. That all laws and parts of laws in conflict with this act are hereby repealed in so far as they affect this act.

Section 3. That this act shall be in effect from and after its ratification.

Ratified this 4 March, A.D. 1927."

Pursuant to its contract or agreement with the Southern Railway Company and under the authority of the statute enacted by the General Assembly of this State, the city of Greensboro caused to be constructed at certain grade crossings within said city underpasses or overhead bridges, and thereby eliminated said grade crossings. On 2 July, 1929, with respect to the grade crossing at the intersection of the tracks of the railroad companies by South Spring Street, the city council of the city of Greensboro, adopted an ordinance as follows:

"An ordinance closing Spring Street where the same crosses the main line tracks of the Southern Railway Company.

Whereas Spring Street crosses at grade level the main line tracks of the Southern Railway Company; and

Whereas, an underpass has been constructed beneath said railroad tracks at a point between Spring and Cedar streets which is less than one-half of a block west of Spring Street; and,

Whereas, the said underpass is convenient and easily accessible to travel and traffic on Spring Street; and,

Whereas, the present grade crossing on Spring Street across the main line tracks of the Southern Railway Company is extremely dangerous and constitutes a menace to life and property; and,

Whereas, in the opinion of the city council of the city of Greensboro, public necessity requires the closing of the said grade crossing on Spring Street;

Now, therefore, be it ordained by the city council of the city of Greensboro;

Section 1. That the right of way of Spring Street between the north side and the south side of the railroad tracks of the Southern Railway Company be and the same is hereby closed and discontinued for public travel so long as the underpass beneath said tracks at a point between Spring and Cedar streets continues to be maintained in a good, safe and proper condition.

Section 2. That this ordinance is enacted in the interest of public safety and shall become effective immediately upon its publication."

Pursuant to said ordinance, the city of Greensboro has closed Spring Street by the erection across said street of two fences, one just to the south and the other just to the north of the tracks of the Southern Railway Company. By the closing of said street, plaintiffs are deprived of its use as a direct route from their property situate on the east side of South Spring Street to the northern or business section of the city of Greensboro, and travel from the northern section of the city toward West Lee Street is diverted from Spring Street north of the railroad tracks, so that such travel no longer passes the property of the plaintiffs. There is no longer any travel from West Lee Street in a northerly direction over and along South Spring Street. Plaintiffs' property is no longer on a public street of the city of Greensboro, affording access thereto from both the northern and southern sections of the city; it is in a *cul de sac,* or blind alley. *S. v. Gross,* 119 N. C., 868, 26 S. E., 91.

The charter of the city of Greensboro, which is chapter 37, Private Laws of North Carolina, 1923, was amended by chapter 230, Private Laws of North Carolina, 1927, and contains the following provision:

"If any claim against the city for damages resulting to the real property of any person, firm or corporation from the construction of any overpass or underpass in the city or from the closing of any street at a grade crossing of a railroad is disallowed by the city council, the council shall adopt a resolution appointing a board of appraisers consisting of three disinterested, competent freeholders of the city to examine such claims and to determine the amount of the damage, if any. Such resolution shall fix the time when said appraisers shall meet on the premises for the purpose of hearing evidence as to such damage. A copy of said resolution shall be served upon the owner or owners of said premises personally or by publication for five days in a newspaper published in the city. At the time fixed for said meeting, or at some subsequent time fixed by the appraisers therefor, said appraisers, after being duly sworn to act fairly and impartially, shall meet on the premises and shall hear any evidence offered by the city or by the owner as to the nature and extent of such damage. The appraisers shall, in determining the amount of damage, take into consideration any special benefits resulting from the construction of the overpass or underpass or the closing of the street, and the amount of such special benefit shall be deducted from the amount of damage. The amount of such damage and of such special benefit shall be reported by the appraisers to the city council, and such report of the appraisers, or a majority thereof, shall, to the extent of the excess of damages over special benefits, have

the effect of a judgment against the city of Greensboro. From such report either the city or the owner may, within ten days after the same is ordered spread upon the minutes of the city council, appeal to the Superior Court. The method provided in this section for the determination of real property damages resulting from the construction by the city of overpasses or underpasses, or from the closing of streets at grade crossings shall be exclusive; and no action shall be maintained by any property owner to recover damages therefor until the city shall have failed for six months after the filing by the owner of his notice of claim to appoint a board of appraisers to determine such damages as herein provided. This section shall not be deemed in any way to change the measure of damages now applicable or to confer a right to recover damages when none now exists. Any number of claims may be submitted by the city council to a single board of appraisers."

Subsequent to the closing by the city of Greensboro of South Spring Street, at its intersection with the tracks of the railroad companies, the plaintiffs, W. A. Hiatt and his wife, Mattie D. Hiatt, filed with the city council of the city of Greensboro, notice of their claim for damages to their property, resulting from the closing of said street. The claim was disallowed by the city council, on the ground that the city of Greensboro was not liable to plaintiffs for damages, if any, resulting from the closing of South Spring Street. Pursuant to the provision in the chapter of the city of Greensboro, the city council appointed a board of appraisers to examine the claim of plaintiffs. On 7 January, 1930, the board of appraisers filed its report with the city council, in which said board fixed the amount of damages to be paid to plaintiffs by the city of Greensboro, on account of the closing of South Spring Street by said city, at $500.

From the award made by the board of appraisers, both the plaintiff and the defendant, city of Greensboro, appealed to the Superior Court of Guilford County.

At the trial in the Superior Court, both plaintiffs and the defendant, city of Greensboro, offered evidence in support of their respective contentions. The issues submitted to the jury were answered as follows:

"1. Are the plaintiffs the owners of the property described in paragraph 1 of the defendant's notice of appeal? Answer: Yes.

2. What amount, if any, are the plaintiffs entitled to recover of the defendant? Answer: $1,165."

From judgment that plaintiffs recover of the defendant the sum of $1,165, and the costs of the action, defendant appealed to the Supreme Court.

Frazier & Frazier and O. L. Sapp for plaintiffs.
Andrew Joyner, Jr., and Robert Mosely for defendants.

CONNOR, J. On its appeal to this Court, the defendant, city of Greensboro, contends that upon all the evidence introduced at the trial in the Superior Court, plaintiffs are not entitled to recover of the defendant the damages, if any, resulting to their property situate on the east side of South Spring Street, from the closing by defendant of said street at its intersection with the tracks of the North Carolina Railroad Company and its lessee, the Southern Railway Company, and that it was, therefore, error for the trial court (1) to refuse to allow its motion made at the close of all the evidence, for judgment as of nonsuit, and (2) to decline to instruct the jury, as requested by the defendant, in writing and in apt time, that upon all the evidence the jury should answer the second issue, "Nothing." The defendant, by its assignments of error in this Court, presents for decision the single question involved in these contentions.

The question of law to be decided may be stated as follows:

Where a municipal corporation, by statute charged with the duty and vested with the power to establish, construct and maintain streets within its corporate limits, over which the public may travel in reasonable safety and with reasonable convenience, pursuant to its contract or agreement with a railroad company, which has agreed to pay part of the cost and expense incurred by such corporation in carrying out a comprehensive program for the elimination of grade crossings within its corporate limits, caused by the intersection of its tracks by certain streets established, constructed and maintained by such corporation, and under express statutory authority, has closed one of its streets and has thus deprived the owner of a lot abutting on such closed street of the use of said street as a means of egress from and of ingress to said lot, which he had theretofore enjoyed, is such corporation liable to the owner of the lot for damages resulting from the closing of the street?

This question does not seem to have been heretofore presented to this Court for decision. Counsel for defendant cite *Crowell v. Monroe,* 152 N. C., 399, 67 S. E., 989, and rely upon the decision in that case as an authority in support of defendant's contention in this case. In the cited case it was held that the plaintiff was not entitled to recover of the defendant on her claim for damages resulting from the closing of a street by the defendant. It is said, however, in the opinion for the Court: "The record does not present the question of taking private property for public use, nor the question of the permanent closing of a public street in which the abutting owner has certain recognized rights. *Moose v. Carson,* 104 N. C., 431, 10 S. E., 689. The facts

disclose nothing more than a closing of a railway crossing in order that an overhead bridge immediately above the crossing may be erected for the use of the public, and evidently for public safety and convenience. It may be that plaintiff is inconvenienced and temporarily damaged, but it is *damnum absque injuria.*" In the instant case, the plaintiffs are the owners of a lot abutting on the closed street. As the result of the closing of the street, the lot is now on a *cul de sac,* whereas prior to the closing it was on a public street which afforded access to said lot from two directions. The closing of the street deprives plaintiffs of the use of the street as a means of access to their lot from one direction, and stops all travel along the street from the other direction. The decision in the cited case is not controlling in the instant case, and is not an authority in support of defendant's contention that upon all the evidence plaintiffs are not entitled to recover of the defendant the damages which have resulted to their property from the closing of the street by the defendant.

The law in this and in other jurisdictions recognizes a distinction between the rights of an owner of a lot abutting on a public street, and the rights of the public in and to such street. Ordinarily, the public has the right only to pass and repass over and along the street so long as it is maintained by public authority for that purpose. In addition to this right, which he has as a member of the public, the owner of the abutting lot has the right to have the street kept open as a means of egress from and of ingress to his property. He has an easement in the street, which is appurtenant to his lot. This easement is his private property of which he cannot be deprived even for the use of the public, without just compensation. It is said: "An abutting owner has two distinct kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. These rights are property of which he may not be deprived without his consent, except upon full compensation and by due process of law. They include the easement of access, and of light and air, the right of lateral support, and the right to have the highway kept open as a thoroughfare to the whole community for the purpose of travel. . . . An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes and this is a property right which cannot be damaged or taken from him without due compensation." 29 C. J., p. 547. See *Colvin v. Power Co.,* 199 N. C., 353, 154 S. E., 678.

In the instant case, plaintiffs, the owner of a lot abutting on South Spring Street, by the closing of said street have been deprived of their

easement of access to their property over and along said street, with the result that the value of their property for residential and other purposes has depreciated. In 13 R. C. L., at page 71, it is said: "It has been held that the vacation of a highway or street is not an injury to the abutting owners within the provisions of the Constitution requiring compensation, and in the absence of legislative provisions for damages, none can be recovered. But the general rule is that persons specially injured by the vacation are entitled to recover such damages as they may sustain even in the absence of a statute providing therefor." See note in 49 A. L. R., at page 351, where it is said: "The weight of authority supports the proposition that if, by the vacation or closing of the street, access to property from the general system of streets in that direction is obstructed, and the property is left fronting on a *cul de sac,* the owner may recover damages." This statement is supported by numerous decisions of courts in many jurisdictions, which are cited by the author of the note.

We are of opinion, after careful consideration, that the question of law presented by this appeal should be answered in the affirmative. The plaintiffs in the instant case have suffered special damages in the depreciation of the value of their property resulting from the deprivation of their right of access to their property from the northern section of the city and from the stopping of all travel by their property from the southern section of the city. They have been deprived of rights which differ in kind and degree from the rights of the public. They are entitled to recover the damages assessed by the jury and the judgment is affirmed.

No error.

BROGDEN, J., dissents.

CRAVEN COUNTY v. THE INVESTMENT COMPANY, A CORPORATION, ET AL.

(Filed 21 October, 1931.)

1. Pleadings D b—Motion to dismiss for misjoinder of parties and causes held properly overruled in this case.

While at common law the object was to confine the litigation to one issue, in equity the object was to end all disputed matters between the parties having an interest therein in one suit, and under our code procedure in which both actions at law and suits in equity are tried in one forum, and under the provisions of C. S., 507, permitting the plaintiff in certain instances to unite several causes of action in the same com-

plaint, *Held:* where there is but one subject-matter of the suit or action in which several parties have divergent interests, and they may all be united in one suit without undue increase of cost or inconvenience to the parties, a motion to dismiss for multifariousness and misjoinder of parties is properly denied.

2. **Same—Multifariousness is to be determined according to rules of equity pleading.**

In interpreting our statute with regard to multifariousness and misjoinder of parties our courts will take into consideration the principles of the old practice formerly existing exclusively in suits in equity. C. S., 507.

3. **Election of Remedies A c—Under the facts of this case plaintiff was not put to his election between action on contract or in tort.**

Generally under our reformed procedure several causes of action may be united if they arise out of the same transaction or a transaction connected with the same subject-matter of the action, whether legal or equitable or in contract or tort, and in this action *Held:* the elements of contract and tort are so closely related that defendant's motion calling for the election of the plaintiff to sue either in contract or tort was properly denied.

APPEAL by The Investment Company, a corporation, and other defendants from *Devin, J.*, at May Term, 1931, of CRAVEN.

The appealing defendants made a motion to strike certain allegations from the complaint, or upon refusal thereof to require the plaintiff to make an election as to the allegations upon which it will rely in the prosecution of its suit. The motion was denied and an exception was noted. Exception was taken also to the order appointing a receiver of The Investment Company.

The material allegations of the complaint may be summarized as follows:

1. The National Bank of New Bern conducted a general banking business in New Bern and suspended its business on 20 March, 1929. It assigned certain assets and property to the First National Bank of New Bern, which undertook to assume its obligations, its affairs not disposed of by this assignment being in the hands of W. W. Griffin, a liquidating agent. During this time W. W. Griffin was president of the National Bank of New Bern, E. C. Rae was vice-president, W. J. Caroon was cashier, and W. W. Griffin, E. H. Meadows, Harvey M. Jacobs, W. J. Caroon, E. C. Rae, A. D. Ward, and J. Haywood Jones were directors, all of whom are appealing defendants.

2. The First National Bank of New Bern was chartered 20 March, 1929. J. Vernon Blades was president, Hugh P. Beal was vice-president, and W. J. Caroon was cashier. The directors were J. Vernon Blades, F. H. Whitty, Hugh P. Beal, W. F. Dowdy, W. W. Griffin, and C. Wal-

ker Hodges. This bank closed its doors 26 October, 1929, and in November, 1929, R. E. Schumacher was appointed receiver by the Comptroller of the Currency.

3. On 16 June, 1928, The Investment Company was incorporated. The stockholders were E. H. Meadows, W. W. Griffin, and E. C. Rae. Rae was president, Meadows vice-president, and Griffin secretary and treasurer. The capital stock was fixed at $300, the authorized capital at $50,000.

4. .....

5. The National Bank of New Bern procured deposits and loans from the county of Craven aggregating more than $400,000. The Comptroller of the Currency called upon the bank to strengthen its cash and reserves and to eliminate worthless credits, and the officers procured the organization of The Investment Company, which was controlled by the bank, having the same officers and directors. The object of organizing the company was to get other funds from the county to relieve its condition; and without giving the county adequate information of its condition the officers continued their efforts to procure additional funds.

6. On or about 12 March, 1929, the county of Craven had funds from a note issue amounting to $500,000 or more in funds, and the said officers of the National Bank of New Bern, the First National Bank of New Bern, and The Investment Company, entered into and formed the plan of organizing a new national bank with a capital stock of $150,000, and a surplus of $30,000, which was to be organized for the purpose of taking over and carrying on the general banking business of the National Bank of New Bern and undertook thereby to transfer the liabilities of the National Bank of New Bern to said newly organized corporation, the charter for which was to be procured at the instance of the officers.

7. J. Vernon Blades was at the time heavily indebted to the National Bank of New Bern as principal and as endorser on the notes of numerous corporations, in each of which he was the largest or a large stockholder and officer, and by virtue of his endorsement was indebted to the National Bank of New Bern in the sum of $50,000 or more, which his said corporations had been unable to pay. Blades was called into conference with the directors of the National Bank of New Bern and the condition of the bank was fully discussed and the plan of organizing a new bank to take over the banking business of the National Bank of New Bern and to assume its liabilities, was arranged for, and at said time it was understood and agreed that in such new organization Blades, who was reputed to be a man of substantial means and resources, was

to be chosen as president of the new organization. Certain other business men in New Bern were selected to become stockholders and directors of the First National Bank of New Bern, to wit, the defendants Hodges, Dowdy, Whitty, who were associated with Blades, and W. W. Griffin and Hugh P. Beal, who were managing officers and directors of the National Bank of New Bern, which board was to constitute the board of directors of the First National Bank of New Bern.

8. The officers of the National Bank of New Bern and the officers of the First National Bank of New Bern, and of The Investment Company, a subsidiary, subordinate and owned corporation of the National Bank of New Bern, applied to the plaintiff county of Craven to procure a loan of $180,000 to be made to and in the name of The Investment Company and by The Investment Company to be immediately turned over to the defendants Blades, Meadows, Jacobs, Hodges, Whitty, Dowdy, Griffin, and Beal, who knew the funds were advanced to them individually by the plaintiff and that The Investment Company was simply an instrument and conduit therefor.

9. By the methods hereinbefore alleged, Blades took and accepted from the county of Craven of the funds belonging to said county the sum of $160,000 and used the same for his own purposes, and became thereby liable to the county of Craven for money had and received in the sum of $160,000, with interest thereon from 12 March, 1929, until paid.

10. In the same way Hodges accepted from the county of Craven the sum of $3,000 and used the same for his own purposes and became thereby liable to the county of Craven for money had and received in the sum of $3,000, with interest thereon from 12 March, 1929, until paid.

11, 12, 13, 14, 15, 16. The same allegations as to the receipt of certain sums by Dowdy, Griffin, Whitty, Beal, Meadows, and Jacobs.

17. The sum of $180,000 was procured by representations that it would enable the First National Bank of New Bern to pay off the obligations of the National Bank of New Bern and save the depositors and the county from loss.

18. The amount received by each of the defendants is set out, and it is alleged that they used the several amounts in the purchase of stock in the First National Bank of New Bern.

19. The sum of $180,000 was received by the defendants named in paragraphs 11-16 and not by The Investment Company, although the company executed its note to the plaintiff for this amount. The money was procured by a collusive scheme worked out as alleged. The Investment Company is insolvent, never having had a capital of more than $300.

20. The procurement of the funds of the county of Craven to the extent of $180,000 by the officers of the defendant corporations was fraudulent and collusive and a device and scheme instigated and set up for the purpose of getting the funds belonging to the county of Craven, without giving just, adequate, and sufficient securities therefor as required by law.

21. The Investment Company has no assets and no officers, and has never transacted any business of a corporate character; a receiver should be appointed for it.

22. The defendants are in possession of all the books, records, and accounts of the transactions hereinbefore set out, and the plaintiff is without full knowledge or information concerning the same, and it is necessary for the plaintiff to have a full and complete accounting and statement from the defendants and each of them, and from the books of said corporations as to the matters and things particularly set out, and with particular reference to the plan and manner of transfer of the $180,000 belonging to this plaintiff to the personal and individual accounts of the defendant directors and stockholders of the First National Bank of New Bern.

23. By reason of the wrongful, unlawful and fraudulent scheme and device this plaintiff has been damaged in the sum of $180,000.

24. At the time of the transaction hereinbefore alleged, the defendant Blades was a man of large means and was worth several hundred thousand dollars.

25. Several large judgments have been recovered and docketed against Blades.

26. On several of his obligations the Neuse Lumber Company was the principal debtor, and is the owner of large property. It is still engaged in business. Executions on judgments recovered against Blades and the Lumber Company have issued only against Blades, under which his property has been advertised for sale. He procured this procedure to the end that his property may be sold and the property of the Lumber Company exempted so as to deprive the plaintiff of its remedy against him.

27. Advertisement of Blades' property attached.

28. This plaintiff is entitled to have and compel the judgment plaintiff in the several actions to exhaust its remedy against the Neuse Lumber Company, the principal debtor therein, to the end that the property of the said Blades may be thereafter subjected to the payment of the obligations due the plaintiff.

29. If the sale under execution is allowed to proceed, the property advertised for sale will bring much less than its true value and little if

any surplus will be realized therefrom, and Blades will undertake and attempt to procure the purchase of the same at such depressed values as will entirely destroy any remedy which the plaintiff may have for the collection of the obligations due to it by Blades.

The plaintiff prays judgment against the defendants jointly and severally; for the appointment of a receiver of The Investment Company; that the defendants be required to answer on oath; that the banks and The Investment Company make a full statement from their books; and that the sale of the Blades property be restrained.

The appealing defendants moved the court to strike from the complaint allegations 20 to 29 inclusive because redundant, irrelevant, and prejudicial, and because the complaint is multifarious; asking an election, in any event, between the alleged causes in contract and in tort.

The motion was denied and the defendants excepted.

Moore & Dunn and Warren & Warren for plaintiff, appellee.

J. C. B. Ehringhaus, William F. Ward, H. P. Whitehurst, R. E. Whitehurst, W. B. R. Guion, and D. L. Ward for appellants.

ADAMS, J. With respect to parties and causes of action there is a distinction between proceedings in courts of law and proceedings in courts of equity. The object of the common-law courts as originally constituted was to reduce the litigation to a single issue and upon such issue to obtain a decision—on an issue of law from the court and on an issue of fact from the jury; but by statutory enactment several distinct issues were permissible in the same action. In courts of equity the object sought is a complete decree on the general merits—the administration of justice by settling the rights of all parties interested in the subject-matter of the suit. Hence it is that all persons materially interested therein, whether legally or beneficially, should be made parties, however numerous, so that all may be bound by the final decree. Story's Equity Pleadings, sec. 72, *et seq.*

This does not imply that a suit may be prosecuted on a bill or complaint which is multifarious. It is not permissible to unite in one complaint several matters of an entirely distinct and independent nature against several defendants, thereby compelling the joinder of several defenses upon unrelated matters. "But," says Story, "the objection must still be confined to cases where the case of each particular defendant is entirely distinct and separate in its subject-matter from that of the other defendants; for the case against one defendant may be so entire as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only

of the case stated. In the latter case, the objection of multifariousness could not be allowed to prevail. So, it is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and they are connected with the others." Eq. Pl., sec. 271(a).

Prior to the adoption of Code of Civil Procedure this practice prevailed in equitable proceedings in this State. It was applied in *Bedsole v. Monroe,* 40 N. C., 313. In discussing the objection of multifariousness the Court held that the principle can apply only when two things concur: (1) when the different grounds of suit are wholly distinct and (2) when each ground would sustain a bill. In explanation of the principle *Ruffin, C. J.,* said: "If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction or series of transactions, forming one course of dealing and all tending to one end; if one connected story can be told of the whole, then the objection cannot apply."

A change in the practice was made when the Code of Civil Procedure was adopted and it was provided that the plaintiff may in certain cases unite in the same complaint several causes of action. C. S., 507.

It was the purpose of the Code substantially to conform to the old equity practice and "to look to those old landmarks for a guide through the mist that enveloped the subject." *Young v. Young,* 81 N. C., 92. In the cited case *Ashe, J.,* who delivered the opinion, remarked that while it was the object of the General Assembly by adopting the Code of Civil Procedure to avoid a multiplicity of suits and prevent protracted and vexatious litigation, the first subdivision of the section has given rise to more unprofitable litigation and fine-spun disquisitions upon its construction than any other section."

By reason of the unsuccessful attempt to define and definitely to limit the scope of the section providing for the joinder of causes, the Court suggested in *Heggie v. Hill,* 95 N. C., 303, that it makes no substantial change in the rules which formerly prevailed in courts of equity except to enlarge the right of uniting several causes in one action, the purpose being, as stated by *Pearson, C. J.,* "to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of actions which a plaintiff may have against a defendant arising out of the same subject of action." *Hamlin v. Tucker,* 72 N. C., 502. It is said in the opinion that the court may of its own motion refuse to pass upon matters which are not germane if the action becomes so complicated and confused as to embarrass the court in its investigation. The attempt to conform these provisions to the practice

in equity brought about the following as one of the results: "No general rule has been or can be adopted with regard to multifariousness. It is most usually a question of convenience, in deciding which the courts consider the nature or the causes united, and if they are of so different and dissimilar a character as to put the defendant to great and useless expense they will not permit them to be litigated in the same records; but where the different causes of action are of the same character and between the same parties plaintiffs and defendants, and none other, and no additional expense or trouble will be incurred by the joinder of the several causes, the courts, in the exercise of a sound discretion, on the ground of convenience, usually refuse to entertain an objection to the joinder." *Quarry Co. v. Construction Co.,* 151 N. C., 345.

The motion to strike out certain allegations is based upon the contention that the complaint sets out two causes of action which are distinct and unrelated, one in contract, another in tort. It is insisted that the cause stated in the first nineteen paragraphs is *ex contractu* and that the cause stated in the remaining paragraphs is *ex delicto,* and that the two cannot properly be united in one action. True, at common law there could be no such joinder. *Logan v. Wallis,* 76 N. C., 416; *Doughty v. R. R.,* 78 N. C., 22. But under the reformed procedure it is held as a general proposition that several causes may be united if they arise out of the same transaction or a transaction connected with the same subject of action, whether legal or equitable, whether in contract or in tort. *Cook v. Smith,* 119 N. C., 350; *Daniels v. Fowler,* 120 N. C., 14; *Reynolds v. R. R.,* 136 N. C., 345; *Hawk v. Lumber Co.,* 145 N. C., 47; *Worth v. Trust Co.,* 152 N. C., 242.

There was, therefore, no error in denying the motions of the defendants. The elements of contract and tort are so closely related as to preclude the defendants' right to require an election, and to make the allegations of the complaint the recital of a series of transactions connected with the same subject of action, and not objectionable as multifarious. *Hosiery Mill v. Hosiery Mill,* 198 N. C., 596.

The Investment Company is a party defendant and as it is insolvent it is properly represented by a receiver. Judgment

Affirmed.

NORTH CAROLINA COTTON GROWERS CO-OPERATIVE ASSOCIATION v. J. W. TILLERY.

(Filed 28 October, 1931.)

1. Agriculture E c—In this case held: evidence failed to show that marketing association sold prior to time stipulated in contract.

In an action brought by the Cotton Coöperative Association against one of its members to recover an amount alleged to have been overpaid the member on his cotton, the member admitted the overpayment but set up a counterclaim alleging that the association was to sell his cotton in its "long pool" and that the discretion of the association was limited under the contract to selling in a period of time not less than four nor more than twenty-four months from date of delivery, and that the association sold prior to the expiration of the four months, resulting in loss to the member, but the only evidence introduced by the member in support of the counterclaim was the report of the average price of cotton during the period, *Held:* the evidence created only a conjecture or speculation as to whether the association had sold the cotton prior to the expiration of the four months, and a directed verdict for the plaintiff was not error.

2. Appeal and Error J g—Where answer to one issue determines controversy exceptions relating to other issues are immaterial.

Where the verdict of the jury upon one issue determines the rights of the parties it is not necessary to consider exceptions relating to another issue, *Semble:* where a counterclaim setting up a separate and distinct cause of action is alleged in an amended answer the statute of limitations runs until the filing of the amended answer containing such new matter.

CIVIL ACTION, before *Moore, Special Judge,* at March Term, 1931, of WAKE.

It was alleged by the plaintiff and evidence was offered in support of the allegations, that during the year 1925 the defendant pooled a certain quantity of cotton with the plaintiff to be sold by the plaintiff in the same manner as the cotton of all other members was marketed. It was further alleged that in making settlement for the 1925 crop the plaintiff had overpaid the defendant in the sum of $5,097.90, and this action was instituted for recovery of such overpayment. The suit was instituted on 16 April, 1929. The defendant filed an answer in November, 1929, setting up a counterclaim, based upon the theory that the plaintiff in violation of the agreement to hold the cotton of defendant in the "long pool" sold the same in March, 1926, when the market was low, whereas, at a later date the price of cotton had increased to approximately twenty cents a pound, and that, as a result thereof, the defendant suffered a loss of a large amount of money by reason of failure of plaintiff to exercise reasonable diligence, skill and care in marketing

the crop of defendant member, and in violation of the agreement between the parties. Thereafter on 18 November, 1930, the defendant filed an amendment to the answer amending the counterclaim so as to claim damages for the failure of plaintiff to market the 1926 crop of cotton. To the amended answer the plaintiff filed a reply pleading the statute of limitations. At the trial the defendant admitted that he was indebted to the plaintiff in the sum of $5,097.90 and interest thereon, thus narrowing the controversy to a determination of the counterclaim set up in the amended answer. The evidence tended to show that on 3 December, 1926, the defendant, who was a member of plaintiff Market Association signed an agreement placing his cotton with the plaintiff and directing that his 1926 crop be placed in the "long pool," to be marketed in a period of time, probably six to twenty-four months in the discretion of the directors." The plaintiff sold the cotton from time to time, sending accounts of sale to the defendant, but it appears that the defendant lost these accounts or they were destroyed by fire. The cotton was shipped in September and on 22 July, 1927, the plaintiff sent a statement of the settlement to the defendant of the 1926 cotton crop. This statement shows that the cotton was sold in lots from time to time for various prices, the lowest price that any lot brought being apparently .1004 cents per pound and the highest price being apparently .1623 cents per pound. There was nothing to show the grade of the cotton except that 199 bales were below middling, and that the average price was thirty-three points below middling. The defendant attempted to prove the price of cotton by offering evidence of the average price of cotton during the various months of 1927 as shown by the tabulated report kept by Barbee and Company, cotton brokers of Raleigh. The defendant further offered a bulletin showing the monthly price for cotton for the year 1927, published by the Department of Agriculture of North Carolina.

The following issues were submitted to the jury:

1. "In what amount, if any, is the defendant indebted to the plaintiff by virtue of the matters alleged in the pleadings in this action?"

2. "In what amount, if any, is the plaintiff indebted to the defendant on his alleged counterclaim?"

3. "Is the defendant's alleged cause of action set out in his counterclaim barred by the statute of limitations?"

The trial judge instructed the jury to answer the second issue "nothing," and the third issue "yes."

From judgment upon the verdict the defendant appealed.

Burgess & Baker and Biggs & Broughton for plaintiff.

E. L. Travis for defendant.

BROGDEN, J. The contract between the parties with respect to the 1926 cotton crop of defendant specified that the cotton was to be placed in the "long pool," to be marketed in a period of time, probably six to twenty-four months in the discretion of the directors." The defendant contends that the "discretion of the directors" was limited by the language of the contract so that they could not sell in less than six months and must sell within twenty-four months. Conceding, though not deciding, that the interpretation of the contract urged by defendant, is correct, nevertheless it does not appear that the cotton was sold in less than six months from the time it was placed in the long pool. All the record discloses is that a final statement was submitted by the plaintiff to defendant on 22 July, 1927. Hence it necessarily follows that the cotton was sold sometime prior to that date.

The defendant, however, undertakes to establish the date of sale by attempting to offer evidence showing either the average price of cotton during the year 1927 on certain dates, or the monthly price of cotton during the year 1927, but such proof, at most, raises a haze of conjecture and a fog of speculation, and does not constitute evidence of the necessary and vital facts. Therefore, the instruction given by the trial judge on the second issue was correct.

As the ruling upon the second issue determines the merit of the controversy, it is not deemed necessary to decide whether the defendant's counterclaim, set up in the amended answer, for damages sustained by the negligent handling of the 1926 crop, is barred by the statute of limitations. It is said in 37 C. J., page 1082, section 522, that: "Where a counterclaim or set-off is pleaded in an amended answer or plea, and not in the original, the statute runs against it until the filing of the amended answer." This declaration of law finds direct and unequivocal support in *Christmas v. Mitchell,* 38 N. C., 535; *Gill v. Young,* 88 N. C., 58; *Hester v. Mullen,* 107 N. C., 724, 12 S. E., 447, and *Sams v. Price,* 121 N. C., 392, 28 S. E., 486. The theory upon which the decisions turn is that the amendment introduces a separate and distinct cause of action and such cause of action so alleged is subject to any and all legal defenses that the adverse party may interpose, including the statute of limitations. See, also, *R. R. v. Dill,* 171 N. C., 176, 88 S. E., 144; *Jones v. Vanstory,* 200 N. C., 582. Implications to the contrary may be deduced from *Brumble v. Brown,* 71 N. C., 513.

No error.

BLACKSTONE GUANO COMPANY, A CORPORATION, v. W. G. BALL AND A. W. PERRY, TRADING AS W. G. BALL AND COMPANY, AND R. G. BAILEY, RECEIVER.

(Filed 28 October, 1931.)

1. **Appeal and Error J e—Error in exclusion of evidence is harmless when evidence of same import is later admitted on the trial.**

   Where a party objects to the ruling out of certain evidence and later during the trial evidence of the same import is admitted of which he gets the benefit, the error, if any, committed in ruling out the evidence is harmless.

2. **Same—Where it does not appear what testimony of witness would have been, its exclusion cannot be held for prejudicial error.**

   Upon an assignment of error to the exclusion of certain testimony tendered, the record must disclose what the testimony rejected would have been or the assignment of error will not be considered on appeal.

3. **Partnership D b—Where firm receives benefit of purchase on credit the members are liable although purchase on credit was not authorized.**

   Where a member of a partnership violates a partnership agreement not to buy on credit, and there is evidence that his copartner had informed the seller's agent of the agreement prior to the sale, but the undisputed evidence is to the effect that the partnership received the benefit of the transaction, *Held:* the partnership is liable for the purchase price, and an instruction upon the undisputed evidence that if the jury found it to be true to answer the issue for the plaintiff is not error, and the fact that the partnership was later placed in a receiver's hands and that one of the partners was indicted is not relevant to the issue.

APPEAL by defendant W. G. Ball from *Moore, Special Judge,* and a jury, at February Term, 1931, of FRANKLIN. No error.

The issue submitted to the jury and their answer thereto, were as follows: "In what sum, if any, are the defendants indebted to plaintiffs? Answer: $466.50, with interest from 15 May, 1929."

The court below charged the jury as follows: "If you believe the evidence as testified to, I charge you to answer the issue $446.50 and interest." Judgment was rendered in accordance with the verdict. Defendant W. G. Ball made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Edward F. Griffin for plaintiff.
White & Malone and Yarborough & Yarborough for W. G. Ball.

CLARKSON, J. This is a civil action brought by plaintiff, a corporation, against the defendants to recover the sum of $466.50, and interest,

due by note dated 15 May, 1929, due at five months made to plaintiff. Said note signed "W. G. Ball and Company, by A. W. Perry, manager." W. G. Ball and A. W. Perry were partners engaged in the mercantile business, selling fertilizer, etc. The note was given for a car of fertilizer bought by defendants from plaintiff. A. W. Perry testified, in part: "Yes, sir, we received the car of fertilizer for the company. Yes, sir, it was sold by me for the company. Yes, sir, the proceeds were used for the company and by the company."

W. G. Bergman testified, in part: "I am vice-president and manager of the Blackstone Guano Company. This check was received by our firm. It was for a car of fertilizer shipped to W. G. Ball and Company. It is for $466.50. That check was put in the bank in the due course of our business and deposits. It was not paid. During the year 1929, we sold W. G. Ball and Company, certain fertilizer. We had carried on cash transactions prior to this. What we termed cash. Yes, sir, we did sell them on credit, and had credit trade with them. This note was delivered to me. It was delivered to Blackstone Guano Company, by mail from W. G. Ball and Company, A. W. Perry, manager. The amount is $466.50. Yes, sir, it was to take care of a check which the bank charged to our account. The check was duly deposited by us. We made demands on W. G. Ball and Company for the payment of this note when it became due. I didn't call on Mr. Ball personally at its actual maturity, but my letter addressed to W. G. Ball, at Alert, N. C., dated 22 January, 1930. This letter tells we are drawing draft against him. About the time of our letter we received one from Mr. Ball asking us for a statement of the business with W. G. Ball and Company for the years 1928 and 1929, and stating in his letter that the firm was in the process of dissolution."

The defendant, W. G. Ball, admitted the partnership, but contended that he notified plaintiff "in express terms more than once, that no sale of fertilizer could be made to said firm, except for cash, and that the defendant, A. W. Perry, had no right or authority to purchase any fertilizer in the name of the firm on credit."

The defendant, W. G. Ball, contended further that the court below erred in excluding testimony on his part as to the nature of the agreement with Perry in regard to dealing on a cash basis. He would have testified: "We were to handle fertilizer, hay and galvanized roofing on a cash basis, everything to be paid for before it was ever unloaded, not a dime's worth to be unloaded until paid for—that was our agreement." But we find the following in the record as testified to by Ball: "Q. Did you give Mr. Perry any authority to buy or sell anything on credit? Ans.: No, sir, I did not. Q. Did you have a distinct agreement not to buy or sell anything on credit? Ans.: Yes, sir, that was our agree-

ment. Mr. Perry sent a man from the Blackstone Guano Company down there to see me one day, Mr. Chambers, and he tried to sell me a car of fertilizer—thought I would be interested. Kept insisting, said Mr. Perry said if I would buy one car, said he would double the order. I said I haven't got the money. I said don't sell me or him neither unless you get the money. Yes, sir, I told him that Mr. Perry had no authority to buy anything on credit; that was in 1928, the last of March the representative came to see me one more time. He just came by there and tried to sell me some fertilizer. I told him I was not interested. I didn't have any money. I didn't have anything to do with the business over there in the selling line."

If there was any error in the exclusion of the evidence, we think the defendant Ball substantially got the benefit of the evidence from his subsequent testimony above, which was admitted (*Nichols v. Bradshaw,* 195 N. C., 763); but, from the view we take of this case, this evidence was immaterial.

An exception and assignment of error was to the effect: "Defendant tenders evidence to show that the firm got no benefit from the fertilizer." The record does not disclose what the evidence was; therefore the assignment of error cannot be sustained. *Campbell v. R. R., ante,* at p. 109. The fact that the firm is in the hands of a receiver, and Mr. Perry has been indicted, is not relevant to this issue.

In *Johnson v. Bernheim,* 76 N. C., at p. 140, is the following: "But even in that case if the terms are violated, as if a partner buy on time when he ought to buy for cash and the thing bought come into the partnership and the partnership take the benefit, the partnership must pay for it." See same case, 86 N. C., 339.

The defendant contends "That the court was in error in giving instructions here complained of. The case of *Sladen v. Lance,* 151 N. C., 493, is almost on all-fours with the instant case."

In *Oakley v. Morrow,* 176 N. C., at p. 136, we find: "The contract in question here was for labor performed and money lent to the firm during the year to enable it to carry on its ordinary business, and, in the absence of any facts or circumstances creating an estoppel, defendant is liable by reason of his position as member of the firm, and whether plaintiff knew of his effort and purpose to withdraw or not. *Johnson v. Bernheim,* 86 N. C., 339. In the case of *Sladen v. Lance,* 151 N. C., 492, it is not opposed, but in direct recognition of the principle. That was the case of a partnership which, by its terms, imposed special restrictions on the power of the partner who made the contract, and it was held that a creditor selling to the firm with knowledge of these restrictions was bound by them; but in our case, as stated, the defendant

is a general partner; the contracts were made with a member having full powers, and the firm has received full consideration." See *Machine Co. v. Morrow,* 174 N. C., 198.

The undisputed evidence in the record is to the effect that the defendants partners received the car of fertilizer purchased by A. W. Perry for the company, and "the proceeds were used for the company and by the company." The partnership got the benefit of the fertilizer and must pay for it. "The firm has received full consideration." From the facts in this case, the charge of the court below was correct. In the judgment of the court below, we find

No error.

C. M. SPENCER v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 28 October, 1931.)

Master and Servant E b—Evidence of defectiveness of brake causing injury held sufficient to be submitted to the jury.

Upon the question of whether an injury received by a brakeman while making a flying switch on a freight car in interstate commerce was caused by a defective brake, for which injury the carrier would be liable under the provisions of the Federal Safety Appliance Act, the insufficiency of the brake may be shown by the failure of the brake to function properly when operated with due care by an experienced brakeman in the normal, natural and usual manner, and where there is evidence of this character, defendant's motion as of nonsuit should be overruled and the case submitted to the jury.

APPEAL by defendant from *Grady, J.,* at Second May Term, 1931, of WAKE.

Civil action to recover damages for an alleged negligent injury due to defective or inefficient hand brakes on a freight car.

The defendant is a common carrier by railroad, engaged in interstate commerce, and the plaintiff was employed by the defendant in such commerce as a brakeman on a local freight train running from Norlina, N. C., to Richmond, Va., at the time of his injury 10 October, 1929. The accident occurred about 8:30 p.m., in a switching operation at Creamery, Va., when two coal cars, loaded with crushed stone, were being moved from the main line to a side track. It was found convenient to effect this movement by making a running or flying switch, and plaintiff, who had had twenty years experience as a brakeman, was placed on the cars to stop them by use of the hand brakes before they

reached other cars standing on the siding. The brakes failed to work, and plaintiff was unable to control the movement of the cars.

Plaintiff testified: "I used all the force I had in an effort to stop the cars, but it had no effect. The cars gained speed. When I discovered that it had no effect, I used the brake stick, trying to get more leverage. I put the brake stick in position to use the ordinary way. I tightened and it did no good. I took it out—wanting a better hold— put it in again and put all my weight against it. I wanted to get all the braking power I could, and something gave loose and threw me from my position to the ground. . . . If the cars had been equipped with efficient hand brakes, I could have controlled them without the use of the hand stick. . . . When I fell, the wheel of the car I was riding passed over my leg and cut it off."

C. D. Elmore, conductor in charge of the train, and witness for the defendant, testified: "When I ordered Capt. Spencer to assist in this switching operation, I expected the hand brake to control the movement on that side track. . . . He was obeying my orders. . . . A brake that will not control a car on that siding, loaded as those cars, is not an efficient brake. . . . If the hand brakes were efficient and in working order, they would control those cars without the use of a brake stick."

Defendant's witness, J. J. Flowers, an inspector, with seventeen years experience, testified: "If the brake was applied by an experienced brakeman and did not slow the speed down, I would say that it was an inefficient brake. I would say that if it was properly put on and did not stop the speed of the car, it was not efficient at the time."

At the close of plaintiff's evidence, and again at the close of all the evidence, the defendant moved for judgment as in case of nonsuit. Overruled; exception. Motion and prayer by defendant for directed verdict. Declined; exception.

The jury found that the plaintiff was injured "by reason of the fact that the car in question was not equipped with efficient hand brakes," and assessed damages.

Judgment on the verdict, from which the defendant appeals, assigning errors.

Clyde A. Douglass and Robert N. Simms for plaintiff.
Murray Allen for defendant.

STACY, C. J., after stating the case: The appeal presents the single question whether, under the Federal law, the evidence is sufficient to carry the case to the jury and to warrant a verdict for the plaintiff. We think it is.

It is conceded that, if the hand brakes on the car in question were inefficient and this caused the injury, there is inescapable liability under the Safety Appliance Act. *Hamilton v. R. R.*, 200 N. C., 543, 158 S. E., 75. But defendant says plaintiff's proof leaves the cause of the injury in conjecture. *Collins v. Great Northern Ry. Co.*, 231 N. W. (Minn.), 797. His testimony that the brakes were used in the normal and usual manner and failed to work, coupled with that of defendant's witnesses, was such evidence of inefficiency as to make an issue for the jury. *Detroit T. & I. R. Co. v. Hahn*, 47 Fed. (2d), 59; *Didinger v. Pa. R. Co.*, 39 Fed. (2d), 798.

Narrowed, as the appeal is, to the sufficiency of the evidence to carry the case to the jury and to warrant a verdict for the plaintiff, it would serve no useful purpose to elaborate the testimony. Inefficiency of hand brakes, like the ones here in question, may be shown from some particular defect, or by a failure to function when operated with due care, in the normal, natural and usual manner. *Altman v. A. C. L.*, 18 Fed. (2d), 405. The plaintiff pursued the latter method in his proof.

No error.

H. R. WHITLEY v. NORTH CAROLINA STATE HIGHWAY COMMISSION, SELF-INSURER.

(Filed 28 October, 1931.)

Master and Servant F b—In this case held: injury to employee did not arise out of the employment and compensation was properly denied.

In order for an injury to be compensable under the Workmen's Compensation Act it must not only arise in the course of the employment but also arise out of the employment with a causal connection between the accident and the employment, and where an employee of the State Highway Commission, while engaged in his employment, is accidentally shot by a hunter, the injury does not arise out of the employment and is not compensable even under a liberal interpretation of the statute.

APPEAL by plaintiff from *Devin, J.*, at May Term, 1931, of PITT. Affirmed.

Plaintiff was an employee of the State Highway Commission. On 5 February, 1930, he was accidentally shot by one O. S. Kittrell, while bird hunting, in the left eye and lost the vision. When shot plaintiff was at defendant's truck shed about a mile or so from Greenville, N. C., on Highway No. 91.

Plaintiff's version of the occurrence is as follows: "I had eaten dinner and started working on the truck—and I started to wipe some grease off the truck so we could put the transmission in and not get greasy. I had been at work a while and near one o'clock I was standing beside the truck on the other side of the truck. The truck was headed toward the shed. I was wiping grease out of the foot board. All of a sudden I felt something stinging me and several things hit me on the shoulder. I heard a gun fire and I felt this and my eye started hurting and I knew I was shot. I called to the one that shot me and he came over there and Mr. Kittrell took me on to the car and Mr. Morton took me to Dr. Brown's office."

The North Carolina Industrial Commission made an award to plaintiff. The defendant appealed to the Superior Court and the decision of the Commission was reversed on the ground "that the injury complained of did not arise out of the plaintiff's employment, the decision of the Industrial Commission is reversed, and the award denied." From the judgment plaintiff appealed to the Supreme Court.

Blount & James for plaintiff.
Charles Ross for defendant.

CLARKSON, J. Plaintiff, in his request to the North Carolina Industrial Commission that his claim be allowed, states: "We have been unable to agree because I believe the accident happened while I was in the performance of my duties to the State Highway Commission, and therefore, I am entitled to compensation." Plaintiff's contention was correct, in part, he was on duty when the unfortunate accident happened by which he lost the vision of his left eye. An unfortunate and deplorable occurrence and the sorrow of the party who did the injury is thus expressed: "I am willing to do anything for him I can. I hated the accident so bad. I have never hit anything when I hunted before. I would not have done it for anything in the world. I did not sleep any for two or three nights worrying about it."

Recovery by the workman can be only "compensation for personal injury or death by accident arising out of and in the course of the employment," etc. Public Laws 1929, chap. 120, part sec. 4.

From plaintiff's request it may be noted that he says "the accident happened while I was in the performance of my duties." This is correct, but the law goes further—it must not only be when he is on duty "in the course of the employment," but the compensation is "for personal injury or death by accident *arising out of* and in the course of the employment." Humanitarian ideals prompted the passage of the act and

this Court in considering the high purpose, has given it a liberal construction, but we cannot stretch the act to say the unfortunate accident to plaintiff arose out of the employment. The general principle stated by plaintiff in cases cited is correct, but not applicable to the facts in this action.

We think there is no causal relation between the accident and the employment. For the reasons given the judgment of the court below is

Affirmed.

STATE v. BENNIE GRIFFIN.

(Filed 28 October, 1931.)

1. **Homicide G a—Evidence of guilt of murder in the first degree held sufficient to be submitted to the jury.**

   Where in a prosecution for murder there is evidence tending to show that the defendant and three others went to the home of the deceased in a borrowed car to get some whiskey, that, instead of paying for the whiskey, the defendant told the deceased to "get to the bushes" and shot him twice, inflicting injuries resulting in death, that after shooting the deceased the defendant, in answer to a question from one of his companions as to why he had done so, said "S. O. B. ought to be dead, he didn't have any liquor," with further evidence that the gun with which the murder was committed had been bought by one of the "gang" for use in "high-jacking and taking folks' liquor," is *Held:* sufficient evidence of premeditation and deliberation to take the case to the jury on the capital felony of murder in the first degree.

2. **Criminal Law G j—Where the defendant testifies in his own defense he is subject to cross-examination as other witnesses.**

   Where a defendant in a criminal prosecution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses, C. S., 1799, and on a prosecution for murder it is competent to ask the defendant on cross-examination whether he did not kill another with the same pistol with which he shot the deceased, it being admitted that the same pistol was found in room after the second shooting.

APPEAL by defendant from *Frizzelle, J.*, at June Term, 1931, of ORANGE.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one McIver Trice.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals.

STATE *v.* GRIFFIN.

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

Gates & Thompson for defendant.

STACY, C. J. At the June Term, 1931, Orange Superior Court, the defendant herein, Bennie Griffin, was tried upon an indictment charging him with the murder of McIver Trice, which resulted in a conviction and sentence of death. He was allowed to appeal *in forma pauperis.*

It appears from the record that on 15 May, 1931, the prisoner and two others, Henry Rainey and Gyp Riley, borrowed an automobile from Tim Wilcox in Durham and drove out to the home of McIver Trice in Orange County to get some liquor. Instead of paying for the liquor, which belonged to Major Trice, the defendant told the deceased to "get to the bushes," and shot him twice, inflicting wounds from which he died the following morning. After shooting the deceased, the prisoner jumped into the automobile and said to his companion, who was driving the car, "get the hell out of here." One of the occupants of the car later inquired: "What did you shoot that fellow for, Bennie? Defendant replied: "S. O. B. ought to be dead, he didn't have any liquor."

In accounting for the possession of the pistol, the prisoner testified on cross-examination: "The gun belonged to all three of us. We bought the gun for the purpose of high-jacking and taking folks' liquor and things. Gyp said we needed a gun in the gang and he bought the pistol. . . . This is not my gun, but the gun that was bought for the gang."

The principal question presented by the appeal is whether there is sufficient, competent evidence of premeditation and deliberation to carry the case to the jury on the capital felony of murder in the first degree. We think there is. *S. v. Evans,* 198 N. C., 82, 150 S. E., 678, and cases there cited.

The prisoner was asked by the solicitor on cross-examination if he did not kill Katherine Mangum with the same pistol he shot the deceased. Objection; overruled; exception. His answer was: "No sir, I did not." It was admitted that the same pistol was found in Katherine Mangum's room after she was shot. The exception is without merit. *S. v. Maslin,* 195 N. C., 537; *S. v. Jeffreys,* 192 N. C., 318; *S. v. Spencer,* 185 N. C., 765.

It is provided by C. S., 1799, that a defendant on trial in this jurisdiction, charged with a criminal offense, is, at his own request, but not otherwise, a competent witness to testify in his own behalf, but every such person examined as a witness "shall be subject to cross-examination as other witnesses," and he waives his constitutional privilege not to answer questions tending to incriminate him. *S. v. Simonds,* 154 N. C.,

197, 69 S. E., 790; *S. v. Allen,* 107 N. C., 805, 11 S. E., 1016. He may be asked impeaching questions. *S. v. Thomas,* 98 N. C., 599, 4 S. E., 518; *S. v. Lawhorn,* 88 N. C., 634. And whether he has not been convicted of offenses calculated to affect his standing as a witness. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Garrett,* 44 N. C., 357; *S. v. Patterson,* 24 N. C., 346. "By availing himself of the statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness."—*Ruffin, J.,* in *S. v. Efler,* 85 N. C., 585.

In no view of the evidence could the trial court have granted the prisoner's motion for judgment as in case of nonsuit. C. S., 4643. The verdict and judgment will be upheld.

No error.

STATE v. ERNEST HERRING.

(Filed 28 October, 1931.)

1. **Criminal Law I g—Failure to instruct jury as to presumption of innocence is not reversible error.**

   Where upon the trial for a homicide the judge has fully and sufficiently charged the jury that the State must satisfy them of the guilt of the defendant beyond a reasonable doubt, the failure to instruct them as to the legal presumption of the defendant's innocence is not sufficient to warrant the granting of a new trial, this presumption not being considered as evidence in the case.

2. **Same—Failure to define "reasonable doubt" is not reversible error.**

   The failure of the trial judge to define the term "beyond a reasonable doubt" in his charge to the jury will be considered as a failure to charge upon subordinate elaboration and will not be held for reversible error.

3. **Criminal Law G j—Testimony of accomplice if believed is sufficient for conviction.**

   The testimony of an accomplice if believed by the jury is sufficient for a conviction, and it is within the sound discretion of the trial judge to charge that the testimony of an accomplice should be scrutinized carefully and cautiously.

APPEAL by defendant from *Small, J.,* at April Term, 1931, of SAMPSON. No error.

The defendant was convicted of murder in the first degree of one F. F. Newton, on 28 June, 1930 (Saturday), and sentenced to be electrocuted.

The facts: Mr. Newton had been postmaster at Kerr for 24 years, he was 70 years old, and in good health, weighed about 200 pounds. Newton always walked home at noon for dinner, between 12 and 1 o'clock, and followed the path that led through Seller's field, and usually brought a white sack with the home mail and business letters in it. When he left home that Saturday morning to go to work at the postoffice, he was wearing a light shirt, light trousers and a straw hat. He wore a watch attached to his trousers by a red string. Newton was found a little before sundown some distance from the road that leads to his home. A trail indicated that something had been dragged off, the grass mashed down flat, following the trail in the woods about 15 to 20 steps was found a slip of paper in Newton's handwriting. After a few steps the grass gave out and the trail was through bushes and shrubbery, it went to the edge of the bay and it looked like scuffling had taken place. Further into the bay where the bushes had been dragged down and separated, and about 20 steps further down behind a clump of bushes, Mr. Newton was found. When found he was called to; he opened his mouth and threw up his right hand and drew up his left knee; when called again he didn't move. He was bare from his waist line to his neck. His eyes were blue and swollen, and his head had been badly beaten, and on his head and back of his neck there were many lacerations, and his head was lying in a pool of blood. He had lost considerable blood. His breast and shirt and trousers were bloody. The top of his head had been severely beaten, about eight or ten times, one at the base of his neck was about three inches long. He died the next day. About a hundred yards from the scene of the killing the mail sack was found. A small piece of paper was found which led to the belief that the sack was near and about 20 feet into the bay the sack was found hanging to the trees, the family mail and newspapers in it. While bringing the sack out, two packs of cigarettes were found. The sack was found in about 35 yards from the road traveled by Newton and in the direction of Newton's home, and the defendant's home. Tracks were found "and they were made with leather bottom or stiff bottom shoes and they had been turned side wise and made a side wise track, and there were tracks that looked like they were made with rubber bottom shoes. The tracks were near the stump about fifty-five yards from where the body was found. On the trail that led into the bay, about twenty-five yards from the road, was a scuffled place in the bushes. There were two or more different sets of tracks. The main track was the rubber bottom track. About thirty yards from this stump on the left-hand side of the road going towards Mr. Newton's home, there was a place that looked like somebody had laid down on the grass and pressed their

elbows and knees down. One could see from this stump about one hundred yards up the road towards Kerr. Next morning about day parties started an investigation. Along the trail where Newton was dragged, on each side of this trail about two feet wide, there was a trail where someone had walked. Also there was a good sized scuffled place and some pens and nickels and other articles that were in Newton's pockets, and four or five steps along the trail was found a long club and two short clubs. The short clubs had been freshly broken. These were found about fifteen steps away from where Newton was found.

W. L. McPhail testified, in part: "Across the road from the stump we found where someone had laid behind the stump facing Kerr. Could see one hundred and ten yards towards Kerr. We observed rubber bottom tracks that made a round impression on the sand. We took the trail and went down side of the bay, crossed Deer Ford, and about three hundred yards down a path. There was a leather bottom track about the stump. We followed the track about a half mile in the direction of the defendant's home. Defendant lived about a mile and a quarter from the scene of the crime. I know the defendant. After we found the tracks and clubs we went to Kerr to show the sheriff the clubs and hat, and when we got there the sheriff had Ernest. They went and got Chevis and came back and the sheriff and some of the deputies went off with Chevis and asked me to keep Ernest until they returned. It was between eight and nine o'clock the morning of 29 June. Ernest had on brown tennis shoes, rubber bottoms. The right shoe was bursted out on the side. The tracks in the swamp were bursted out on the right shoe. We followed that track across the Deer Ford for about one-half mile. I asked him (Ernest) what he was arrested for and he told me it was for stealing gasoline. I asked him if he had on those shoes the day before and he said he did."

Ebb Newkirk testified, in part: "I saw the defendant, Ernest Herring, and his brother, Chevis Herring, sitting on Mr. Carter's store porch about six o'clock the day before Mr. Newton was murdered, 27 June, 1930. Mr. Newton went into the postoffice carrying some money that he was preparing to send off that evening, and Ernest and Chevis went into the postoffice. Mr. Newton was handling money, and Ernest and Chevis both saw him with it. They left the postoffice and went back to Mr. Carter's store porch and seemed to be engaged in a conversation. They stayed in the postoffice just a few minutes, did not ask for any mail and did not have any letters to mail. I heard nothing that was said between them after they left the postoffice."

The defendant went on the witness stand and denied his guilt. When taken to the scene of the crime at night by the officers, under most trying circumstances, he denied his guilt.

Dr. V. R. Small, testified, in part: "It is my opinion that the witness, Chevis Herring, is not crazy, but that he shows a decided mental deficiency. His mental development has been arrested at about the age of eight years. The fact that he is grown physically and apparently is a normal man physically has no bearing upon his mentality. He has the mentality of a child of eight years of age. (In answer to a hypothetical question) I have an opinion, satisfactory to myself as an expert on mental and nervous disorders, that in consideration of the fact that the witness, Chevis Herring, has the mentality of a child of eight years of age, that neither of his statements would have any more weight and should be no more worthy of belief than another. . . . If the jury should find from the evidence that the witness, Chevis Herring, and the defendant on trial had had a fight and that the witness, Chevis Herring, has slapped the defendant in the mouth and that the defendant had jerked Chevis out of the car, and that Chevis had taken a pump and struck the defendant with it, having the defendant down on his back on the ground, and that the defendant had cut the witness, Chevis Herring, with a knife and it required ten stitches to sew it up; and if the jury should find that the officers had this witness, Chevis Herring, in their custody and had put him through the third degree, and said: 'Now, we want you to confess and not take all the blame on yourself,' I have an opinion, satisfactory to myself, that under those circumstances a child with the mentality of eight years of age would have a tendency to strike back and implicate another through a spirit of revenge, or in a spirit of shirking responsibility and shifting the blame to someone else. (On cross-examination): If the jury should find that the deceased had a watch on him and that witnesses have testified that he had a watch and identified the watch here as being the watch he had on at the time, and if the jury should further find from the evidence that Mr. Newton carried that watch attached to his pants pocket with a red string, and if the jury should further find from the evidence that Chevis Herring said that he got that watch of Mr. Newton's and carried it off some distance a mile or more and concealed it, and then several days afterwards he should go with the officers and find that watch where he said that he had placed it, I think that he knew what he was doing."

Defendant offered in evidence the following:

"State's Prison—Raleigh, N. C.

I, Chevis Herring, was convicted of the murder of Mr. F. F. Newton at Kerr Station on 28 June, 1930. My brother, Ernest Herring, was also convicted of the murder of Mr. Newton. I was tried and convicted first, and at the trial of Ernest Herring I was put on the stand by the State, and I testified that Ernest was with me and helped me kill Mr.

Newton. Sheriff Moore told me that when I told about it not to take all the blame on myself.

I have now sent for Mr. H. H. Hubbard, who is my lawyer, and for Mr. A. L. Butler and Mr. H. A. Grady, Jr., who are Ernest's lawyers, and I now state that Ernest was not with me at the time I killed Mr. Newton. He knew nothing about it. I saw Ernest on Thursday, 26 June, before the killing, and nothing was said about killing Mr. Newton. I did not see Ernest again until Sunday morning, 29 June, after the killing.

I killed Mr. Newton myself, and Ernest is absolutely innocent, knew nothing about it, and had nothing to do with it.

Signed. Chevis Herring.

Witness:

H. H. Honeycutt, Warden; A. O. Honeycutt."

On the trial Chevis Herring testified in part: that Ernest Herring hit Mr. Newton with a large stick, and described the killing.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

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

Algernon L. Butler and Henry A. Grady, Jr., for defendant.

CLARKSON, J. Defendant was heretofore convicted of murder in the first degree and sentenced to be electrocuted. He appealed to this Court and a new trial was granted him. In that case we find: "To avoid repetition we may say that the evidence appearing on the present record is sufficient to carry the case to the jury. . . . Throughout the entire colloquy, Ernest Herring continually challenged the correctness of his brother's statements. He at no time declared his own complicity in the crime; and we think it was error to admit this evidence as against the present defendant. The whole conversation amounted to no more than an accusation by Chevis against Ernest, which the latter denied." *S. v. Herring,* 200 N. C., at p. 309.

On the present appeal, the defendant contends that the questions involved are: (1) Is it error for the court to fail to charge the jury as to the presumption of innocence of the defendant? We think not. (2) Is it error for the court to fail to define to the jury the meaning of the term "reasonable doubt?" We think not.

The defendant contends that "it is the duty of the trial judge in a proper instruction to the jury to give him the benefit of the doctrine of the presumption of innocence, and that under the settled law of

North Carolina this presumption is an instrument of proof and is to be treated as evidence. The defendant further contends that the failure of the court to define to the jury the meaning of the term 'reasonable doubt' is likewise error, which was rendered all the more prejudicial in view of the failure to charge presumption of innocence, in that the use of the words 'reasonable doubt' alone, without regard being had for the presumption of innocence, is held to be insufficient, as it presents to the jury a gauge by which to measure a condition of mind necessary for acquittal while withholding from them an instrument of proof which goes to bring the condition of mind from which reasonable doubt arises. *S. v. Sears,* 61 N. C., 146; *S. v. Knox,* 61 N. C., 312; *Coffin v. U. S.,* 156 U. S., 432." We have examined the above cases and also the following North Carolina cases cited by defendant: *S. v. Woodly,* 47 N. C., 276; *S. v. Massey,* 86 N. C., 658; *S. v. Adams,* 138 N. C., 688; *S. v. McLeod,* 198 N. C., 649; *S. v. Spivey,* 198 N. C., 655; *S. v. Hardy,* 189 N. C., 799; *S. v. Sigmon,* 190 N. C., 684. The brief of defendant's counsel is able and well prepared, but we see no good reason to overrule the *Boswell case,* 194 N. C., 260, which defendant says "is contrary to the position of the defendant in this appeal."

The first contention of defendant, is not sustained by the decision of this Court in *S. v. Boswell, supra,* where the matter is thoroughly considered. At p. 262, speaking to the subject: "It is obvious that if the 'presumption of innocence' is evidence in favor of a defendant, charged with crime, then it would be the imperative duty of the trial judge to instruct the jury as to such presumption. The question as to whether the presumption of innocence is evidence or not has created a wide and divergent opinion among eminent writers and the courts of last resort. Dean Wigmore in his Treatise on Evidence, 2d ed., Vol. 5, sec. 2511, writes: 'No presumption can be evidence; it is a rule about the duty of producing evidence. . . . But when this erroneous theory is made the ground for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice. And, because of a temporary aberration of doctrine in the Federal Supreme Court, in *Coffin v. U. S., supra* (156 U. S., 432, 29 L. Ed., 481), such harm was for a time impending. A notable academic deliverance, however, by a master in the law of evidence, laid bare the fallacy with keen analysis; and it was soon afterwards discarded in the court of its origin. In some state courts the contagious influence of the original error was for a time noticeable; but sound views have gradually come to prevail in the greater number of jurisdictions." *S. v. Hege,* 194 N. C., 526; *S. v. Leonard,* 195 N. C., 242.

In *S. v. Rose,* 200 N. C., at pp. 344-5, the following is said: "In its charge the court had instructed the jury that if they found the facts to be as the evidence tended to show, beyond a reasonable doubt, they should return a verdict of guilty. Having correctly imposed upon the State the burden of proof beyond a reasonable doubt, the court declined to instruct the jury that defendant was presumed to be innocent. While the court might have well complied with the request of defendant's counsel, under the authority of *S. v. Boswell,* 194 N. C., 260, 139 S. E., 374, we cannot hold that the refusal to give the instruction as requested was error for which the defendant is entitled to a new trial, as a matter of law."

The second contention of defendant is not sustained by the decision of this Court in *S. v. Wilcox,* 132 N. C., at p. 1137: "His Honor charged the jury as follows: 'What is meant by the term "reasonable doubt" is, fully satisfied, or satisfied to a moral certainty. The words "reasonable doubt" in themselves are about as near self-explanatory as any explanation that can be made of them.'"

The court below charged the jury: "The State contends that the defendant murdered or aided and abetted in the perpetration of the murder of the deceased while attempting to rob the deceased; and if you are satisfied from the testimony beyond a reasonable doubt, that the defendant murdered the deceased, or aided and abetted in murdering the deceased while attempting to rob the deceased, and you are so satisfied of that beyond a reasonable doubt, you will return a verdict of guilty of murder in the first degree. . . . Now, *the burden is upon the State, that is the burden of proof is upon the State.* Before you can return a verdict of guilty of murder in the first degree, you will have to find from the evidence beyond a reasonable doubt that this defendant, the prisoner, Ernest Herring, killed the deceased, not only with malice but with premeditation and deliberation. And the court charges you if you should find beyond a reasonable doubt that prior to the time the prisoner killed the deceased, he formed a fixed purpose in his mind to kill him, and pursuant to that purpose he did kill the deceased, because of the purpose in his mind, and not because of any legal provocation that was given by the deceased, then the Court charges you that he would be guilty of murder in the first degree and it would be your duty to so find."

The court below defined accurately murder in the first and second degrees; premeditation and deliberation, and malice. "As you find the facts to be from the evidence, you may render one of three verdicts, either guilty of murder in the first degree, or guilty of murder in the second degree, or not guilty. . . . Chevis Herring admits that he

is an accomplice in the killing or murder of F. F. Newton. It is, therefore, my duty to instruct you that it is your duty to not repose hasty confidence in the testimony of Chevis Herring. You must scrutinize the testimony of Chevis Herring carefully and cautiously; look into his testimony with care and caution, deliberately and carefully, and ascertain whether you are satisfied beyond a reasonable doubt that Chevis Herring has told the truth under oath on the witness stand in this trial relative to whether Ernest Herring killed the deceased, or aided and abetted in murdering the deceased. If you are not satisfied beyond a reasonable doubt as to the truth of Chevis Herring's testimony here on the witness stand in this trial, you cannot convict the defendant of any crime. Without the testimony of Chevis Herring, there would not have been sufficient testimony to have submitted the case to you as a jury. . . . If you are satisfied and beyond a reasonable doubt that the defendant while attempting to rob or aid and assist in robbing the deceased, killed the deceased, it would be your duty to bring in a verdict of murder in the first degree. If you are not so satisfied, but satisfied beyond a reasonable doubt that he killed the deceased with malice aforethought, it would be your duty to bring in a verdict of murder in the second degree. If you are not satisfied beyond a reasonable doubt that he committed the murder while attempting to rob, but are satisfied beyond a reasonable doubt that he committed the murder with malice, it would be your duty to return a verdict of guilty of murder in the second degree. *If you are not so satisfied beyond a reasonable doubt, that is, to a moral certainty,* that Ernest Herring killed the deceased or aided and abetted in killing the deceased, it would be your duty to return a verdict of not guilty."

The court below carefully, accurately and in detail gave the contentions of the State and defendant.

In *S. v. Merrick,* 171 N. C., at pp. 795-6, the following is written: "The authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. Charged with the duty of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds and made imperative with us by statute law. Revisal, 535 (C. S., 564): 'He shall state in a plain and correct manner the evidence in the case and explain the law arising thereon,' and a failure to do so, when properly presented, shall be held for error. When a judge has done this, charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or

some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but, as stated, on the substantive features of the case arising on the evidence, the judge is required to give correct charge concerning it. *S. v. Foster,* 130 N. C., 666; *S. v. Barham,* 82 Mo., 67; *Carleton v. State,* 43 Neb., 373; *Simmons v. Davenport,* 140 N. C., 407."

The courts below ordinarily in the charge to the jury apply the "presumption of innocence" in the interest of life and liberty, and enlarge on "reasonable doubt," "fully satisfied" or "satisfied to a moral certainty." *S. v. Sigmon,* 190 N. C., 687-8; *S. v. Tucker,* 190 N. C., 709; *S. v. Walker,* 193 N. C., at p. 491. When instructions are prayed as to "presumption of innocence" and to enlarge on "reasonable doubt" it is in the sound discretion of the court below to grant the prayer.

The court below told the jury "my duty is to instruct you that it is your duty to not repose hasty confidence in the testimony of Chevis Herring. You must scrutinize the testimony of Chevis Herring carefully and cautiously," etc. The court could have instructed the jury that the uncorroborated testimony of an accomplice, if believed by the jury beyond a reasonable doubt, is sufficient to convict, but the court below rightly gave the caution. This is in the sound discretion of the court. *S. v. Ashburn,* 187 N. C., at p. 728.

The court below told the jury that without the testimony of Chevis Herring there would not be sufficient evidence to submit the case to the jury, and if they were not satisfied beyond a reasonable doubt that Chevis Herring told the truth that Ernest Herring committed the homicide, they would return a verdict of not guilty. There was evidence to corroborate Chevis Herring. The evidence tended to show that the evening before both Ernest and Chevis Herring were at the postoffice together, and they saw deceased handling money and the two engaged in conversation. They knew the usual movements of deceased, as they lived in his neighborhood. That the deed was committed by two persons and the indications on the ground were that one was laying down in wait watching along the path the deceased usually went to dinner. That the deceased weighed 200 pounds, and that he was dragged some distance down into the bay, that the trail was about two feet wide and the indications were that a person walked on each side dragging the deceased, the grass was mashed down. Two packages of cigarettes were found in the vicinity. That tracks led from the body towards defendant's father's home, where defendant was staying. That a track with a bursted shoe, right foot, such as was worn by defendant was followed

to within a quarter to half a mile of defendant's home. There was evidence to the effect that defendant had a bad reputation.

When the jury returned a verdict of guilty of murder in the first degree, the record discloses: "The following took place: 'Ernest Herring, stand up. You remember that before this you have been indicted for this felony by you done and committed; you have been arraigned and pleaded not guilty, and for your trial you have put yourself upon your God and your country, which country have found you guilty. What can you now say for yourself, why, according to the verdict passed against you, you should not have the judgment to die? What say you, Ernest Herring?' Ernest Herring: 'Your Honor, I would like to say this. I am before God innocent, and I would say so with my hand on the Bible. I didn't do what they say I did, and I want you all to help me. I want you to pray for me.' "

From the entire record it appears that the able judge in the court below gave the defendant a fair and impartial trial. We find in the Bible the first murderer was asked: "Where is Abel thy brother? And he said, I know not. Am I my brother's keeper?" Gen., chap. 4, v. 9. For the reasons given, we find in the judgment of the court below

No error.

ROCKY MOUNT SAVINGS AND TRUST COMPANY AND MRS. ANABEL ROSS, ADMINISTRATORS OF T. N. ROSS, DECEASED, v. THE ÆTNA LIFE INSURANCE COMPANY.

(Filed 28 October, 1931.)

1. Insurance E d—Insurer must act on application for reinstatement within reasonable time.

There is a material difference between an application for a policy of life insurance and an application for the reinstatement of a policy which has lapsed for nonpayment of premiums, the terms of the policy for reinstatement being in the nature of an agreement to revive the original policy after forfeiture upon certain conditions, and the insurer may not act upon an application for reinstatement arbitrarily or disregard it by failure to act thereon within a reasonable time.

2. Same—Evidence failed to show that insurer did not act on application for reinstatement within reasonable time.

Although the insurer must act upon an application for reinstatement of a policy of life insurance within a reasonable time, where all the evidence tends to show that the insurer, upon receipt of the application, acted with the diligence required, and that the insured came to his last

illness before a conclusion could thus be reached, an instruction that the jury should return a verdict for the insurer if they found the facts to be as testified by all the witnesses is not error.

3. Trial D b—Instruction to answer issue in the negative if the facts are found to be as testified by the witnesses is not a directed verdict.

An instruction for the jury to answer the issue in the negative if they should find the facts to be as testified by all the witnesses is not a peremptory charge, and the verdict thus returned is not directed, the credibility of the evidence being passed upon by the jury.

CLARKSON, J., dissents.

CIVIL ACTION, before *Harris, J.*, at February Term, 1931, of NASH.

This cause was heard on a former appeal, reported in 199 N. C., p. 465, 154 S. E., 743, where the facts are set out.

The cause came on for another hearing upon the opinion of the court upon the following issue: "Did the defendant, Ætna Life Insurance Company, fail to act within a reasonable time under all the facts and circumstances surrounding the parties when the application for reinstatement was filed, and thereby waive the forfeiture of policy No. 515135?" The jury answered the issue "Yes."

It is to be noted that at the former trial the defendant offered no evidence explaining the delay of sixty-two days. Evidence was offered by both parties at the trial now under consideration, and certain additional facts are necessary to an understanding of the principles of law involved. The deceased failed to pay in full the premium due 1 July, 1927. On 7 November, 1927, Upshaw, general agent of defendant, wrote to the insured, calling his attention to the fact that he had a right to submit a request for reinstatement of his policy, and stating: "If you are not prepared to pay the full amount of premium of $26.72, we will be glad to accept a partial payment of $10.00 and extend the balance of the premium if you will sign enclosed extension note partially filled out." On 8 November, the insured signed an application for reinstatement to the effect that he was in good health so far as he knew, signed the extension agreement and drew a check payable to defendant for $10.00, and left all of these papers with Bartholomew, local agent of the defendant. On 10 November, Upshaw, the general agent, acknowledged receipt of the check and other papers. Upshaw, the general agent, then forwarded the application for reinstatement to the home office in Hartford, Connecticut, and it was received there on 18 November. On 21 November, the home office referred the application for reinstatement to the medical department. The medical department required further physical examination. On 22 November, the home office notified Upshaw, general agent at Raleigh, that a complete medical examination of the

insured was necessary before passing upon the application for reinstatement. On 26 November, Upshaw wrote to Bartholomew, local agent with whom the insured had left the original papers, and requested the local agent to notify the insured that a complete medical examination was necessary. Receiving no response to his letter, Upshaw again wrote Bartholomew, the local agent, on 21 December, inquiring when the medical examination of the insured would be available. In reply to his letter Bartholomew, the local agent, advised Upshaw that the insured was sick in bed. On 24 December, Upshaw advised the home office of defendant that the insured was sick. The insured died on 27 December, 1927.

The defendant tendered certain special instructions as follows:

(a) If you believe the defendant's evidence, you will answer the issue, "No."

(b) If you find the facts to be as testified to by defendant's witnesses, you will answer the issue, "No."

The court refused to give the instructions, and the defendant excepted.

From judgment upon the verdict, the defendant appealed.

Vaughan & Yarborough and Cooley & Bone for plaintiff.

Murray Allen for defendant.

BROGDEN, J. This action has been instituted upon the contract of insurance and not in tort to secure damages for the negligent failure of defendant to pass upon the application of the insured. Many courts have permitted recovery for negligent delay in accepting an original application for insurance. *Duffy v. Bankers Life Association,* 139 N. W., 1087, 46 L. R. A. (N. S.), 25; *Handlier v. Knights of Columbus,* 183 N. W., 300; *In re Coughlin's Estate,* 205 N. W., 14; *Strand v. Bankers Life Ins. Co.,* 213 N. W., 349; *Kukuska v. Home Mut. Hail-Tornado Ins. Co.,* 235 N. W., 403; *Jackson v. N. Y. Life Ins. Co.,* 7 Fed. (2d), 31. The authorities are discussed in an illuminating note in Yale Law Journal, Vol. 40, page 121. The author of the article says: "Half a century ago the Supreme Court of the United States voiced the judicial opinion of the time when it declared: 'It was competent for the insurance company to pause as long as they might deem proper and finally to accept or reject the application as they might choose to do.' Since then, however, the insecure fortune of an individual pitted against the security of an actuary table has caused courts to construct new and distort old legal concepts in an endeavor to protect that individual." See Annotation 15 A. L. R., p. 1026. In North Carolina the Court held that delay in passing upon an original application for insurance gave no cause of action upon the contract. *Ross v. Ins. Co.,* 124 N. C., 395, 32

S. E., 733. Subsequently, in *Fox v. Ins. Co.,* 185 N. C., 121, 116 S. E., 266, the Court held that an action for damages was maintainable upon allegation and evidence tending to show negligent delay in the delivery of a policy. The *Fox case,* however, is distinguished in *Sturgill v. Ins. Co.,* 195 N. C., 34, 141 S. E., 280.

The case at bar does not involve the question of negligent delay in passing upon an original application for insurance, but upon an application for reinstatement of a policy already issued and in force until it lapsed by failure to pay the premium. The Michigan Court in *N. Y. Life Ins. Co. v. Max Buchberg,* 228 N. W., 770, 67 A. L. R., 1483, said: "The reinstatement of an insurance policy is not a new contract of insurance, nor is it the issuance of a policy of insurance; but rather is it a contract by virtue of which the policy already issued, under the conditions prescribed therein, is revived or restored after its lapse." To like effect is the reasoning in *Muckler v. Guarantee Fund Life Ass'n,* 208 N. W., 787, cited by defendant. In that case the Court quoted with approval from the Colorado Court, as follows: "that the rights of an insured, making an application for reinstatement of a lapsed policy, are widely different from the rights of those making an original application for insurance, must be conceded, and this principle is so plain as to need neither elaboration nor citation of authorities." Couch, Encyclopedia of Insurance Law, Vol. 6, sec. 1375, states the proposition as follows: "And a contract for reinstatement of a life policy is not a new contract; rather, it is merely a waiver of forfeiture, so that the original policy is restored and made as effective as if no forfeiture had occurred, unless the contract for reinstatement is itself tainted with such fraud as would justify the company in repudiating."

As stated in the former opinion, the right of reinstatement prescribed by the terms of the policy in controversy is a substantial property right. The insurance company had the right to pass upon the question of insurability and the evidence thereof submitted by the insured. This power of the insurer to pass upon the right of the insured imposed a legal duty and obligation which the company could not arbitrarily determine or disregard by failure to act for an indefinite and unreasonable time.

The evidence, as disclosed by the present record, shows that the defendant acted promptly in disposing of the application. The only delay that could possibly be urged as unreasonable was the delay of Bartholomew, local agent, who received a letter from Upshaw, general agent, on or about 27 November, and did not reply thereto until 21 December, which constitutes a period of approximately twenty-four days. It ap-

pears that in the meantime the insured was already sick, and the record does not disclose how long he had been sick between the dates specified.

Upon these facts now appearing, the court is of the opinion that the prayers for instruction requested by the defendant should have been given. *Bank v. Fountain,* 148 N. C., 591, 62 S. E., 738; *Grain Co. v. Feed Co.,* 179 N. C., 654, 103 S. E., 375.

In the *Grain Co., case, supra,* the Court said: "As there was substantial difference between the parties as to the essential facts, and, as the evidence was practically one way in regard to them, it was not error to instruct the jury that, if they found the facts to be as stated in the testimony of the witnesses, they should answer the issues as indicated in the charge. . . . The charge was not a peremptory one, and the verdict was not directed. The credibility of the witnesses was left to the jury."

New trial.

CLARKSON, J., dissents.

CHARLES HENRY WEST, DECEASED; MRS. CHARLES HENRY WEST, WIDOW; AND NELLIE WEST, MINOR; DEPENDENTS OF CHARLES HENRY WEST, DECEASED, v. EAST COAST FERTILIZER COMPANY, AND EMPLOYER'S LIABILITY ASSURANCE CORPORATION.

(Filed 28 October, 1931.)

1. **Master and Servant F i—Findings of fact of Industrial Commission are conclusive when supported by sufficient evidence.**

   The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the full Commission on appeal, are conclusive upon the courts when supported by any sufficient evidence.

2. **Master and Servant F b—Evidence held to sustain finding that injury was from accident arising out of employment.**

   Where there is evidence tending to show that the deceased received the injury that caused his death while on duty as a night watchman in defendant's manufacturing plant, and that he had been robbed by his assailant when the injury was inflicted, is sufficient to sustain a finding by the Industrial Commission that the injury was received in the course of, and arising out of the employment and the award for compensation by the Industrial Commission will be sustained.

APPEAL by defendant from *Midyette, J.,* at May Term, 1931, of NEW HANOVER. Affirmed.

This is an action brought under the Workmen's Compensation Act by the dependent widow and daughter of Charles Henry West, deceased, to recover compensation for the death of their husband and father, who received injuries, from which he died while in the employ of the defendant, East Coast Fertilizer Company, as a night watchman.

The facts: Charles Henry West, who was employed by the East Coast Fertilizer Company, as a night watchman, at a salary of $20.00 per week, reported for duty at the warehouse of the defendant on the evening of 4 July, 1930, and was found with a big hole in his head, and a piece of iron lying near him, about 6:30 a.m., 5 July, 1930, by one Robert Shaw. The deceased was found just inside the warehouse of the defendant, lying behind a closed door. There are two doors on the shed at this point, but only one was closed. The watchman's time clock was on the deceased at the time of the injury, and the key was in the clock, having broken loose from the post when West was injured. At the time West was found he said something fell on him; something it seemed fell all over him; it was done so quick he didn't know what it was. His watch pocket was turned wrong side out, and $1.20, which he said he had, was missing. He had been paid off Thursday evening, 3 July, 1930. Tracks were seen in the dirt outside of the warehouse leading from the river, on the outside of the railroad track to the platform, going in.

Mrs. Charles Henry West is the widow of the deceased, and Nellie West is the daughter of the deceased, under 18 years of age. Both the widow and daughter were wholly dependent upon the deceased.

The North Carolina Industrial Commission allowed award to plaintiffs. Defendants appealed to the Superior Court. The court below affirmed the award, and defendants excepted, assigned error and appealed to the Supreme Court.

Burney & McClelland for plaintiffs.
Carr, Poisson & James for defendants.

CLARKSON, J. On the hearing before the full Commission, we find: "The full Commission has carefully reviewed the evidence in this case and we are of the opinion that the claimants are entitled to recover and the full Commission adopts as its own the findings of fact, conclusions of law and award of the hearing Commissioner and directs that compensation in this case be paid by the defendants."

The finding of fact by the hearing Commissioner, adopted by the full Commission, is as follows: "On 5 July, 1930, Charles Henry West, while regularly employed by the East Coast Fertilizer Company, at an

average weekly wage of $20.00, suffered an injury by accident arising out of and in the course of his employment. As a result of the injury by accident on 5 July, 1930, the employee died on 12 July, 1930. At the time of the injury by accident and the death of the deceased employee, he had dependent upon him for support his wife, Mrs. Chas. Henry West, and one daughter, Nellie West, both were wholly dependent upon the deceased for support."

"The award of the Commission, as provided in section fifty-eight, if not reviewed in due time, or an award of the Commission upon such review, as provided in section fifty-nine, shall be conclusive and binding as to all questions of fact." Public Laws 1929, chap. 120, part sec. 60.

In *Southern v. Cotton Mills Co.,* 200 N. C., at p. 165, it was held: "The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the full Commission upon appeal, is conclusive upon the courts when supported by any sufficient evidence."

We think there was sufficient evidence to support the finding of the full Commission that the death of Charles Henry West was "by accident arising out of and in the course of the employment." Public Laws 1929, chap. 120, part sec. 4.

In *Harden v. Furniture Co.,* 199 N. C., at p. 736, we find: "In the present appeal we do not find any fact or circumstance indicating any causal connection between the conditions under which the deceased was working and the injury he suffered, or by which we may trace the injury to the employment of the deceased as a contributing proximate cause. . . . The motive which inspired the assault was unrelated to the employment of the deceased and was likely to assert itself at any time and in any place. In this respect the present case differs from those cases in which the injury complained of was directly traceable to and connected with the employment."

This case is different from the *Harden case, supra.* In that case there were domestic troubles and ill-will between the men arising out of the domestic troubles. In the present case, there was evidence that the injury complained of was directly traceable to and connected with the employment.

In *American Mutual Liability Ins. Co., et al., v. Herring,* (Ga.) (filed 20 April, 1931, writ of *certiorari* denied 24 June, 1931), 158 S. E., at p. 449, the Court said: "Herring was employed by Southeastern Compress and Warehouse Company as night watchman at its plant in Athens, Ga., and the evidence authorized the inference that while going upon his regular round he was shot and injured by some person whose only motive was to commit a robbery upon him. The evidence warranted

also a finding that owing to the location of the plant, together with the nocturnal and solitary nature of the employment, the employee was subjected to special danger from persons inclined to robbery or other violence, and thus that the particular injury arose out of the employment."

In the matter of the claim of *Nellie Heidemann v. Amer. Dist. Tel. Co.*, 230 N. Y., 305, it was held: (Headnote)"A night watchman employed by a corporation engaged in the business of furnishing its subscribers with protection against burglary, whose duty was to patrol the streets in a given section of the city, try the doors, and keep watch and ward until relieved, and who, while engaged in this work was killed by a shot fired by a police officer then in pursuit of burglars, died in the performance of his duty and from a peril arising out of and in the course of his employment and an award for his death is properly granted under the Workmen's Compensation Law." *Justice Cardozo,* writing the opinion of the Court, at p. 307, says: "For him, in a measure not common to the public generally, there was exposure to the perils that come from contact with the criminal and lawless. . . . (p. 308.) Causal and irregular is the risk of the belated traveler, hurrying to his home. Constant, through long hours, was the risk of Heidemann, charged with a duty to seek where others were free to shun. The difference is no less real because a difference of degree. The tourist on his first voyage may go down with the ship if evil winds arise. None the less, in measuring his risk, we do not class him with the sailor for whom the sea becomes a home. The night too has its own hazards, for watchman and for wayfarer. Death came to Heidemann in the performance of his duty, face to face with a peril to which the summons of that duty called him."

West, by the character of his occupation, was brought "within the zone of special danger." Being a watchman, a menace usually flows therefrom, and he was exposed to contact with the thief, burglar, trespasser—his was a dangerous calling. He was on duty, looking after his master's premises, and the evidence indicates that he died in the master's service. The statute under the facts disclosed in this case should have a broad and liberal interpretation, and we so give it. The judgment below is

Affirmed.

JOHNNIE PORTER WOOTEN v. TIDE WATER POWER COMPANY.

(Filed 28 October, 1931.)

Electricity A c—Held: complaint alleged cause of action against electric company for negligent installation of wiring.

Every person specially injured by the breach of duty of an electric company can maintain an action for his individual compensation, and where a complaint in an action against an electric company for damages caused by the negligent installation of electric wiring, refers throughout to the house damaged as the plaintiff's "house" or "home" it is a sufficient allegation of ownership upon which to deny a motion of nonsuit entered upon the ground of failure to allege ownership.

APPEAL by plaintiff from *Moore, Special Judge,* at August Term, 1931, of BLADEN. Reversed.

Burney & McClelland and Herbert McClammy for plaintiff.
Carr, Poisson & James for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for the burning of her house alleged to have been caused by the defendant's negligent installation of electric wires therein. She alleged that the defendant furnished an electric current for the purpose of lighting her home, after having installed the electric wires; that the work was negligently done by the defendant; and that in consequence her property was destroyed by fire. The defendant filed an answer denying the material allegations of the complaint.

The case came on for trial and the defendant demurred *ore tenus* on the ground that the complaint does not state a cause of action. The demurrer was sustained, judgment was rendered for the defendant, and the plaintiff excepted and appealed.

The judgment does not set forth the ground upon which the demurrer was sustained but on the argument here the reason was said to be the want of an allegation that the plaintiff was the owner of the property.

We think there is error in this conclusion. In her complaint the plaintiff describes and repeatedly refers to the building as her "house," and her "home." It is elementary that every person specially injured by an electric company's breach of duty can maintain an action for his individual compensation. Under the allegations of the complaint the question whether the plaintiff owned the property and the extent of her loss are matters for the jury to determine from the evidence. Judgment Reversed.

STATE OF NORTH CAROLINA EX REL. B. L. PHIPPS, GUARDIAN OF FLORENCE BAGWELL AND LEROY F. BAGWELL, v. ROYAL INDEMNITY COMPANY.

(Filed 4 November, 1931.)

1. Guardian and Ward H a—Recovery may be had against surety on guardian's bond without first determining liabilities on other bonds covering default.

Where an assistant clerk of the Superior Court has been appointed guardian of the estate of a minor by the clerk and has given bond and has defaulted, causing loss to the estate of the minor, upon the minor's coming of age he and the new guardian appointed may sue upon the guardianship bond (C. S., 2161) and where he sues upon the guardianship bond neither the clerk of the Superior Court nor his sureties on his bond is a necessary party, so far as his action is concerned, and the refusal of a motion to make them parties is not error.

2. Same—Surety on guardian's bond is estopped to deny validity of appointment of guardian when bond recites that appointment was duly made.

The surety on a guardianship bond is estopped to deny the validity of the appointment of a guardian when the bond signed by the surety recites that the guardian had been duly appointed.

STACY, C. J., not sitting.

APPEAL by defendant from *Midyette, J.*, at March Term, 1931, of NEW HANOVER. Affirmed.

The judgment in the court below is, in part: "The court is of the opinion that W. N. Harriss, M. J. Shuffler and the United States Fidelity and Guaranty Company are not necessary parties to this action, and the court, in its discretion, denies said motion . . . and this cause is retained for further order."

The defendant's only exception and assignment of error is as follows: "His Honor was in error in signing the judgment set out in the record and in holding that W. N. Harris and M. J. Shuffler and the United States Fidelity and Guaranty Company, were not proper or necessary parties to this action, for that the said M. J. Shuffler was the assistant clerk of the court, and money in question was paid in to the office of the clerk of the court and the clerk of the court received the benefit thereof, and was the depository thereof, and the clerk of the Superior Court appointing his said assistant as guardian, was the same as appointing himself as guardian, and the money then being deposited in his office, that he was a proper party, and also the United States Fidelity and Guaranty Company, the surety on his bond, for the proper accounting of all moneys in the clerk's office and being the surety on the bond of M. J. Shuffler, assistant clerk of the Superior Court, to

the said W. N. Harris, clerk of the Superior Court, and that this honorable court should not maintain a suit about a guardian's funds exercising its probate and equitable jurisdiction against a surety when its own court and registry and clerk, through his assistant clerk, have the funds in question without making them parties."

Woodus Kellum and Burney & McClelland for plaintiff.
I. C. Wright for defendant.

CLARKSON, J. The main question involved in this appeal: In an action against the surety on a guardian's bond, when the guardian has defaulted and his whereabouts unknown, and the defendant is the sole surety, and claims that the guardian, who was assistant clerk of the Superior Court, had given to the clerk of the Superior Court a bond in another bonding company for his faithful performance of his duties as assistant clerk of the Superior Court, is the clerk of the Superior Court or the bonding company on the assistant clerk of the Superior Court bond necessary or proper parties to said action? We think not under the facts and circumstances of this cause.

Under N. C. Code, 1927 (Michie), 934(a), Pub. Laws 1921, chap. 32, 3 C. S., 934(a), each clerk of the Superior Court by and with the written consent and approval of the resident judge, may appoint an assistant clerk. The assistant clerk to take the oath prescribed for clerks, shall have same powers and duties, and it is further provided: "The several clerks of the Superior Court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover the acts of their assistant clerks."

M. J. Shuffler was duly appointed and qualified as assistant clerk of the Superior Court of New Hanover County, North Carolina, in accordance with the above statute.

C. S., 2150, is as follows: "The clerks of the Superior Court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell Training School."

C. S., 2157: "The clerk of the Superior Court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office."

C. S., 2161: "No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of an infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, under the direction of the court."

About 18 January, 1929, M. J. Shuffler, assistant clerk, was duly appointed by the clerk and qualified as guardian of Florence and LeRoy F. Bagwell, minors, and received as such guardian from the administrator of the estate of said minors' father, the sum of $1,386.56, on 6 August, 1929. The said Shuffler, when appointed guardian as aforesaid, gave bond in the sum of $2,600, and the defendant Royal Indemnity Company, defendant, signed same as surety. The obligation was to the State of North Carolina for the benefit of said minors. The following appears in the bond: "The condition of this obligation is such, that whereas *the above bounden, M. J. Shuffler, is constituted and appointed guardian to LeRoy Floyd Bagwell and Florence Bagwell, minor orphans.* Now, if the said M. J. Shuffler shall faithfully execute his guardianship and particularly shall well and truly secure and improve all of the estate of the said LeRoy F. Bagwell and Florence Bagwell until he (they) shall arrive at full age, or be sooner thereto required, and shall render a plain and true account of his guardianship on oath before the clerk of the Superior Court for New Hanover County, and obey the law in all cases as required by the acts of assembly, and deliver up, pay or possess the said LeRoy F. Bagwell and Florence Bagwell of all such estates as he (they) ought to be possessed of, when lawfully required by said LeRoy F. Bagwell and Florence Bagwell or to such other persons as shall be lawfully empowered or authorized to receive the same, and the profits arising therefrom, then this obligation to be void, otherwise to remain in full force and virtue."

At November Term, 1930, of the Superior Court of New Hanover County, North Carolina, from the report of the grand jury that the said Shuffler, guardian as aforesaid, had defaulted and misapplied the funds belonging to said wards (C. S., 2197), it was ordered by the court that said Shuffler be removed as guardian of said Florence and LeRoy Bagwell's estate. On 11 December, 1930, B. L. Phipps was duly appointed and qualified as guardian of Florence Bagwell. LeRoy F. Bagwell had attained the age of 21 years and had demanded from said Shuffler his part of the funds, and had only received $40.00. It is alleged in the complaint that said Shuffler "has defaulted and misappropriated said funds and that he had fled the jurisdiction of this court and that his whereabouts are unknown," the latter the defendant admits.

In *Loftin v. Cobb,* 126 N. C., at p. 61, the following principle is laid down: "When the wards have remedy against different persons in different capacities and against several bonds and bondsmen, they are at liberty to elect whom they will pursue, and the question of contribution and adjusting equities does not arise until the debt is paid by some

one of them, with which matters the plaintiffs have no concern. These questions, and many others of like nature, are so thoroughly considered and well expressed in the following case that we refer and call attention to it—*Harris v. Harrison,* 78 N. C., 202."

In *State ex rel. Barnes v. Lewis,* 73 N. C., 138, it is held: "Where A. was appointed guardian of B. by a county court, of which at the time of his appointment he was an acting justice: *Held,* that the fact that he was so acting, did not render nugatory his appointment, so as to discharge C., as surety on the guardian bond, from liability to the ward." At p. 139, the Court said: "There can be no doubt of the general proposition that no man is allowed to act as judge in a matter in which he has an interest, except to make such formal orders as may be necessary in order to continue the case, or to send it to some other court competent to try it. . . . But it is unnecessary to pursue the investigation of this subject on general principles. We consider that the liability of the defendant is established by the act of 1842, Revised Code, chap. 78, sec. 9 (C. S., 324), which enacts, in effect, that every bond taken under the sanction of a court of record for the performance of any duty belonging to any officer, etc., shall be valid, notwithstanding any irregularity or invalidity in the conferring of the office. *S. v. Poole,* 5 Ire., 105. Independently of this statute, the defendant is estopped to deny that Speight was rightfully appointed guardian of the relator. It is so recited in the bond, and it is established law that although a mere *general* recital in the body of the bond does not create an estoppel, yet a *particular* recital, that is, of such facts as were the inducement moving to the execution of the bond, does. *Hays v. Askew,* 5 Jones, 63; Bigelow on Estoppel, 295, 313; *Cutter v. Dickinson,* 8 Rik., 386; *Bruce v. United States,* 17 How., 437."

"Surety upon bonds estopped from denying the recitals of the bond." See Starnes on Suretyship, 3d ed. sec. 134, p. 215, at p. 216: "Where the bond recites that the principal has been appointed as agent, or to some other position of trust, the surety will be estopped from denying the appointment."

As to the next question involved: Will an appeal lie from an order, made in the court's discretion, denying defendant's motion to make additional parties defendants, or is same premature? We do not think it necessary to pass on this question. See *Trust Co. v. Whitehurst, ante,* 504. For the reasons given, the judgment of the court below is

Affirmed.

STACY, C. J., not sitting.

IN RE WILL OF A. J. BADGETT.

(Filed 4 November, 1931.)

1. **Wills D j—The correct form of the one issue of devisavit vel non is sufficient to present all issuable matters to the jury.**

   Where upon the trial of a caveat to a will two issues, one of mental capacity and the other of undue influence, are raised for the determination of the jury with conflicting evidence as to each, and the judge has fully charged the jury upon the evidence and there is but one issue submitted to the jury, a verdict for the propounders will be construed as an answer both as to mental capacity and undue influence, and no reversible error will be found on appeal.

2. **Appeal and Error J e—Exception to exclusion of testimony will not be considered where it does not appear what testimony would have been.**

   Upon an exception to the exclusion of evidence by the trial judge the record on appeal must show what the proposed testimony would have been in order for the appellate court to pass upon it, and where the record does not so show the exception will not be considered on appeal.

3. **Same—Exception to the exclusion of evidence will not be sustained where substantially the same evidence is later admitted.**

   An exception to the exclusion of evidence will not be sustained where it appears that substantially the same evidence was later admitted of which the appellant received the benefit.

APPEAL by caveators from *Harwood, Special Judge,* at March Special Term, 1931, of SURRY. No error.

The issue submitted to the jury and their answer thereto, were as follows: "Is the paper-writing propounded and introduced in evidence, and every part thereof, the last will and testament of A. J. Badgett, deceased? Answer: Yes."

The court below signed judgment in accordance with the verdict. The caveators made numerous exceptions and assignments of error and appealed to the Supreme Court.

H. O. Woltz for caveators.
Folger & Folger for propounders.

CLARKSON, J. The testator, A. J. Badgett, when he executed his will, in conformity with the statute, on 12 October, 1929, was about 76 years of age and died on 2 February, 1930. He had three sons and two daughters living at his death.

Robert married in 1901 and left the testator's home. Thomas married in 1902 and about 5 years thereafter left home. George married in 1910 and shortly thereafter left home. Two daughters, Rosella and

Bertha Badgett (who married one Paul McConnell), have lived on the land mentioned in the will all their lives except a short time, when Bertha taught school. They have both lived with their father since their mother died 28 January, 1919. They attended to all the household duties, and also matters connected with the farm, and worked some in the field. Rosella, at the time of her father's death was about 43 years of age, and has been a cripple since she was 6 years of age. At the time of the execution of the will, George was the owner of 59 acres of land, Robert 258 acres, and Thomas the owner of some land, the evidence not disclosing the quantity.

Robert Badgett testified: "Rosella was feeble a long time like she is now, but she worked." Among other things, the draftsman of the will testified: "He (testator) said: 'I can't figure much with a pencil, but I can figure in my head, and if the boys would account for what I have given them and interest was counted on that and I should have paid the girls for the work they have done since they became of age, and they had put the money in the bank on interest, I figure I have not given them any more than I have the boys, and I want you to put part of that in the will, explaining why.' He said: 'George owes me a little money, now $130.00, and I don't want him to pay that and I want the note given back to him and I want that stated in the will.'"

Bertha Badgett McConnell, testified, in part: "Me and my sister did the work. We worked in the field when it was necessary, if it was loading hay or cutting tobacco, and I have gone to the field and helped him haul wood and his boys could have done it if they would. There never has been a day's washing done at home except when my mother died that I didn't help do it. I worked under my father's direction. He directed about the farm—rented the land and collected the rents. I kept the accounts and accounted up his accounts, under his advice, and turned the money over to him, but when we were settling, it was in his presence. I was in the room on 12 October, 1929, when the paper-writing was written. In my opinion my father had sufficient mental capacity to know what his property was, who his relatives were, what claim they had upon him, if any, and, if he had wanted to dispose of his property, to whom he intended to give it."

Testator had about 300 acres of land. He left his two daughters executrices of his will. In his will he gave to his son George the $130.00, and in Item 3, is the following: "Since I have helped my other children to get started in life and since Bertie Badgett McCormick (McConnell) and Rozella Badgett have lived with me all their lives and have helped me and my deceased wife in our old age and sickness, I will, devise and bequeath unto said Bertie Badgett McCormick (Mc-

Connell) and Rozella Badgett, my two girls, all my real and personal property including money on hand and in banks, land, household and kitchen furniture, and such tools, horses, notes, accounts and any and all other real and personal property of whatsoever kind and description that I own at the time of my death, to have and to hold the same to them and their heirs in fee simple forever, share and share alike, in one-half of said property to each of them."

The sons caveated the paper-writing propounded as the last will and testament of A. J. Badgett on the ground (1) undue influence on the part of the two daughters, particularly one of them, (2) that the testator did not have sufficient mental capacity to execute same. Only one issue was submitted to the jury, but the court below charged the law arising on the facts fully as to the undue influence and lack of mental capacity.

In re Creecy, 190 N. C., 301, the issues submitted to the jury were on both aspects. The jury in the present case, having answered the issue "Yes," it is presumed that they found that testator had the mental capacity to make the will, and there was no undue influence. Many of the exceptions and assignments of error made by caveators do not disclose what the witnesses would have testified to if permitted to answer the questions objected to. We cannot assume that the answers would have been favorable to the caveators. The record must disclose what the witnesses would have testified to, if permitted, so this Court can determine the materiality. *Snyder v. Asheboro,* 182 N. C., 710; *Guano Co. v. Ball et al., ante,* 534.

Many of the exceptions and assignments of error made by the caveators to the admission and exclusion of evidence, we think immaterial and have no relation to the issue, and properly excluded. Also incompetent evidence was excluded. *In re Mann,* 192 N. C., 248.

It appears that much of the evidence excepted to and for which assignments of error were made by caveators, was later admitted or was substantially before the jury to be considered by them. There were numerous witnesses on both sides of the controversy who testified. Some that he did and some that he did not possess sufficient mental capacity to know what property he had, who his relations were and what claims they had upon him, if any, and if he wanted to dispose of his property to whom he intended to give it. The controversy hinged mainly on questions of fact, which it is the province of the jury to pass on. The court below gave a most elaborate charge of the law on every aspect of the case and correctly applied the law to the facts in the case, to which no exception was taken. On the entire record, we see no prejudicial or reversible error.

No error.

JAMES ALLEN v. HILL YARBOROUGH.

(Filed 4 November, 1931.)

Trial E h—Where verdict is not inconsistent and is sufficient to support judgment the trial court may not require jury to reconsider.

The power of the trial court to accept or reject a verdict is restricted to the exercise of a limited legal discretion and he may instruct the jury to reconsider their verdict only when it is imperfect, informal, insensible, repugnant, or not responsive to the issues, and where in an action involving the issues of negligence, contributory negligence and damages, a verdict answering the first and second issues in the affirmative and awarding damages under the third is not essentially inconsistent, the answer to the second issue eliminating the award of damages as a matter of law, and it is error for the trial judge to return this verdict to the jury for further consideration with the explanation that the answers to the issues were inconsistent, nor is the error cured by the intimation of a single juror that they had not understood the charge, and where, upon redeliberation, the jury has answered the second issue in the negative, a new trial will be awarded.

APPEAL by defendant from *McRae, Special Judge,* at June Term, 1931, of DURHAM. New trial.

On 6 November, 1929, there was a collision between the plaintiff's car and a car driven by the defendant. In December the plaintiff brought suit to recover damages alleged to have been caused by the negligence of the defendant. At the trial the jury returned the following verdict:

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

2. If so, did the driver of the plaintiff's automobile, by his own negligence, contribute to the damage of the plaintiff's automobile, as alleged in the complaint? Answer: Yes.

3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $70.00.

After reading the issues and the answers the clerk inquired, "So say you all?" to which inquiry all of the jurors signified their assent.

Upon announcement of the verdict by the jury and the examination by the court of the issues and the written answers thereto, the court said, "Gentlemen, your verdict is inconsistent. If you answer the second issue yes, you should not answer the issue as to damages; you can award damages only in the event you answer the first issue yes and the second issue no. You will retire, gentlemen, and reconsider your verdict."

Thereupon a member of the jury told the court that they had misunderstood his former instructions; that they had understood they

must answer the second issue yes in order to allow the plaintiff damages. The defendant in apt time excepted to the instruction of the court.

The defendant moved for judgment upon the verdict. The motion was overruled and the defendant excepted.

The jury then returned their verdict, answering the first issue yes, the second no, and the third $70. Judgment was given for the plaintiff and the defendant excepted and appealed.

W. H. Yarborough for appellant.
W. L. Foushee for appellee.

ADAMS, J. Before a verdict is complete it must be accepted by the court for record. *S. v. Godwin,* 138 N. C., 582; *S. v. Bagley,* 158 N. C., 608; *S. v. Snipes,* 185 N. C., 743. This does not imply, however, that in accepting or rejecting a verdict the presiding judge may exercise unrestrained discretion. It is his duty to scrutinize a verdict with respect to its form and substance and to prevent a doubtful or insufficient finding from becoming a record of the court. *S. v. Bazemore,* 193 N. C., 336. But his power to accept or reject the jury's finding is restricted to the exercise of a limited legal discretion. He may direct the jury to reconsider their verdict if it is imperfect, informal, insensible, repugnant, or not responsive to the issues or indictment, or if it cannot sustain a judgment. *Willoughby v. Threadgill,* 72 N. C., 438; *S. v. Hudson,* 74 N. C., 246; *S. v. Whitaker,* 89 N. C., 473; *S. v. Whitson,* 111 N. C., 695; *S. v. Godwin, supra; S. v. Parker,* 152 N. C., 790; *Ayscue v. Barnes,* 190 N. C., 859; *Oates v. Herrin,* 197 N. C., 171. In *S. v. Arrington,* 7 N. C., 571, it was said, "When a jury returns with an informal or insensible verdict, or one that is not responsive to the issues submitted, they may be directed by the court to reconsider; but not where the verdict is not of such description."

Was the verdict in the present case "of such description?" Was it insensible or repugnant or so indefinite that no judgment could be rendered? We think not. As at first returned the verdict was a plain and explicit response to the issues submitted. It was not essentially inconsistent. It meant simply this: the drivers of the two cars were negligent; their concurrent negligence produced the injury complained of; and although the plaintiff suffered loss in the sum of $70, being himself in fault, he could not recover a judgment. This principle has been applied in a number of cases. *Baker v. R. R.,* 118 N. C., 1015; *Sasser v. Lumber Co.,* 165 N. C., 242; *Holton v. Moore, ibid.,* 549; *McKoy v. Craven,* 198 N. C., 780.

The appellee relies in part upon *Ayscue v. Barnes, supra,* and *Oates v. Herrin, supra.* The record in *Ayscue's case* shows that the three

issues of negligence, contributory negligence, and damages were submitted to the jury and that only the first and third were answered. As a response to the second issue was necessary the court declined to accept the verdict and directed a reconsideration, again instructing the jury in reference to the effect of their answer. The jury retired and answered the second issue in the affirmative; whereupon the judge inquired whether the jury had understood his charge. He received a negative answer and the issues were again returned to the jury for consideration. The conduct of the court was approved in that case because the instructions were not understood; and if this were the only circumstance in the case before us we should feel bound by that decision. But here his Honor returned the issues on the ground, not that his instructions had been misunderstood, but that the answers were inconsistent; and this implied that on account of such inconsistency no judgment could be pronounced.

This instruction constituted error which was not cured by the intimation of a juror that the charge had not been understood. There is nothing in the record, nothing beyond conjecture, to indicate that this juror expressed the conviction of the entire body.

In *Oates v. Herrin, supra,* the answer to the fourth issue being impossible of calculation by the court, a definite answer was required of the jury. The defendant is entitled to a new trial.

New trial.

E. E. EARP v. HILL YARBOROUGH.

(Filed 4 November, 1931.)

(For digest see *Allen v. Yarborough* next preceding case, p. 568.)

APPEAL by defendant from *MacRae, Special Judge,* at June Term, 1931, of DURHAM. New trial.

W. H. Yarborough for appellant.
W. L. Foushee for appellee.

ADAMS, J. The disposition of the present appeal is controlled by the decision in *Allen v. Yarborough, ante,* 568.

New trial.

STATE v. ARTHUR SPAIN.

(Filed 4 November, 1931.)

1. **Criminal Law E d—Statement of solicitor that he would not ask for conviction on higher count has effect of nolle prosequi thereon.**

The statement of the solicitor at the trial of an indictment for burglary in the first and second degree that he would not ask for a conviction on the count charging the higher degree of the crime has the effect of a *nolle prosequi* with leave on that count, and withdraws it from the case, leaving only the question of guilt of the lesser degrees of the crime.

2. **Criminal Law I l—Where there is no evidence of guilt of less degree of crime nonsuit on count charging less degree should be entered.**

The principle upon which a defendant may be convicted upon a less degree of the same crime charged in the bill of indictment applies only where there is evidence of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the count charging the first degree of the crime is withdrawn, and the evidence shows that the dwelling-house was occupied at the time the alleged crime was committed, the evidence does not support the charge of second degree burglary, and the defendant's motion for the judgment as of nonsuit on that count should be allowed, C. S., 4643, *Semble:* under the provisions of C. S., 4640, the case could have been submitted to the jury on a charge of breaking into or entering a dwelling-house other than burglariously with intent to commit a felony or other infamous crime therein, contrary to the provisions of C. S., 4235.

APPEAL by defendant from *Frizzelle, J.*, at May Term, 1931, of DURHAM.

Criminal prosecution tried upon an indictment in which it is charged that the prisoner did, about the hour of 12 o'clock on the night of 29 April, 1931, with force and arms, at and in the county of Durham, feloniously and burglariously break and enter the dwelling-house of one Mrs. S. P. Arrington, then and there actually occupied by the said Mrs. S. P. Arrington and others, "with intent the goods and chattels of the said Mrs. S. P. Arrington and others in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take and carry away, against the peace and dignity of the State."

There is a second count in the bill charging the felonious breaking and entry of the said occupied dwelling-house, in the night time, "with intent the goods and chattels of the said Mrs. S. P. Arrington, in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take and carry away and then and there in the said dwelling-house of the value of the goods and chattels . . .

of the said Mrs. S. P. Arrington, in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take and carry away against the peace and dignity of the State."

The following testimony of Miss Nellie McLennon was the principal evidence offered against the defendant:

"I room with Mr. and Mrs. S. P. Arrington, No. 713 Shepherd Street, where I was on the morning of 29 April. I was awakened around four o'clock in the morning with something cold clasped around my left wrist and ankle and I took my right hand to discover what the trouble was and it was a man's hand and, of course, I was not expecting a man to be in my room, and I began to scream for help. I think I was held about a minute and I called the young lady, Miss Laura Breeze, who was in bed with me to put on the light; a man was in the room; and she could not understand what was happening and I could not wake her right away, and so she finally realized something was the matter, and both of us together screamed, waked Mrs. Arrington. Mrs. Arrington, after hearing my screams came and put on the hall light and then I asked her to put on the room light and she put on the room light, and by that time no one was in the room. She went to the telephone trying to get the police station and they did not answer at first. I was looking at the window all the while and I called her. I said he is coming back, he is coming back. I raised up in the bed and talked to him at the window."

The witness further stated that the window was raised; that she saw a yellow man at the window—saw his face and head inside the screen—that it was the defendant; that she had seen him a number of times before, as he had worked around in the neighborhood for about two years. "I heard Arthur Spain lived in Mr. Christian's home for one or two years. During that time I saw him three or four times a day, because I walked by there on my way to work. I have no idea how many times I have seen him, and know his face."

When the case was called for trial, and before the jury was empanelled, the solicitor announced that the State would not ask for a verdict of more than burglary in the second degree.

The defendant demurred to the State's evidence and rested his case.

Verdict: Guilty of burglary in the second degree.

Judgment: Imprisonment in the State's Prison of not less than 25 nor more than 30 years.

The defendant appeals, assigning errors.

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

B. Ray Olive and M. M. Leggett for defendant.

STACY, C. J., after stating the case: The announcement of the solicitor that the State would not ask for a verdict of more than burglary in the second degree, was tantamount to taking a *nolle prosequi* with leave on the capital charge. *S. v. Hunt,* 128 N. C., 584, 38 S. E., 473.

It is established by the record that the dwelling-house in question was actually occupied at the time of the alleged offense. This precluded the court from submitting the case to the jury on the charge of burglary in the second degree as defined by C. S., 4232. *S. v. Smith, ante,* 494; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605; *S. v. Allen,* 186 N. C., 302, 119 S. E., 504; *S. v. Johnston,* 119 N. C., 883, 26 S. E., 163; *S. v. Alston,* 113 N. C., 666, 18 S. E., 692.

True, it is provided by C. S., 4641, that upon an indictment for burglary in the first degree, the jury may render a verdict of burglary in the second degree "if they deem it proper so to do." But this, according to our previous decisions, does not, as a matter of law, authorize the judge to instruct the jury that such a verdict may be rendered independent of all the evidence. *S. v. Cox, ante,* 357; *S. v. Johnston, supra; S. v. Fleming,* 107 N. C., 905, 12 S. E., 131. Though it has been said that, on a trial for burglary in the first degree, a verdict of burglary in the second degree, being favorable to the prisoner, would be permitted to stand, notwithstanding evidence of occupancy of the dwelling-house at the time of the alleged crime. *S. v. Smith, supra; S. v. Allen, supra.* In the instant case, however, the defendant was not tried for the capital offense. Therefore, his motion for judgment as in case of nonsuit, made under C. S., 4643, should have been allowed so far as the charge of burglary in the second degree is concerned.

Nor is there any evidence tending to support the charge of larceny. The failure to fix the value of the goods in this count is not regarded fatally defective, as C. S., 4251, is, in terms, inapplicable to a charge of this kind.

But it seems that the case might have been submitted to the jury on the charge of breaking or entering the dwelling-house in question, other than burglariously, with intent to commit a felony or other infamous crime therein, contrary to the provisions of C. S., 4235, or of an attempt to commit such offense. *S. v. Spear,* 164 N. C., 452, 79 S. E., 869; *S. v. Fleming, supra.* It is provided by C. S., 4640, that upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. *S. v. Ratcliffe, supra; S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Brown,* 113 N. C., 645, 18 S. E., 51.

New trial.

A. GOLDSMITH, ADMINISTRATOR OF FREEMAN SAMET, v. MRS. S. SAMET.

(Filed 4 November, 1931.)

1. Parents and Child B a—Unemancipated child living with parents may not maintain action in tort against them.

An unemancipated child living with his parents may not maintain an action in tort against them, nor can the administrator of the child recover damages against them for the child's wrongful death, as the statute, C. S., 160, gives a right of action for wrongful death only where the injured party, if he had lived, could have maintained such action.

2. Equity A c—A person will not be allowed to benefit by his own tort.

Where an action for the wrongful death of a child is brought by his administrator against his mother, the complaint alleging that the death was caused by the negligent driving of the mother's car by her agent, the father, a recovery if permitted under the facts of this case would pass under the law of descent and distribution to the parents, C. S., 137(6), and the policy of the law would not permit them to benefit by their own tort.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at July Term, 1931, of SURRY.

Civil action to recover damages for an alleged wrongful death.

It is alleged that plaintiff's intestate, 15-year-old son of the defendant, living in the household of his parents, was killed by the negligent act of his father while driving the defendant's automobile, as her agent, from his home in Surry County to Greensboro, N. C.

From a judgment sustaining a demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, the plaintiff appeals.

E. C. Bivens and Folger & Folger for plaintiff.
Carter & Carter for defendant.

STACY, C. J. It was held in *Small v. Morrison,* 185 N. C., 577, 118 S. E., 12, that an unemancipated, minor child, living in the household of its parents, could not maintain an action in tort against its parents or either of them, upon the ground that no such action was known at the common law and none had been authorized by statute.

The policy of the law was not changed in this respect by C. S., 160, for there the right of action for death by wrongful act is limited to "such as would, if the injured party had lived, have entitled him to an action for damages therefor." Moreover, the amount recovered in such action is not liable to be applied as assets, in the payment of debts or

legacies, but is to be disposed of as provided "in this chapter" for the distribution of personal property in case of intestacy. *Hood v. Tel. Co.*, 162 N. C., 92, 77 S. E., 1094; *Carpenter v. Power Co.*, 191 N. C., 130, 131 S. E., 400. It is provided "in this chapter," C. S., 137, subsection 6, that if, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. In the instant case, therefore, if recovery were allowed, the amount would be divided between the two wrongdoers. This is also contrary to the policy of the law. *Parker v. Potter*, 200 N. C., 348, 157 S. E., 68; *Bryant v. Bryant*, 193 N. C., 372, 137 S. E., 188, 51 A. L. R., 1100.

Affirmed.

ELVIRA FUQUAY, ADMINISTRATRIX OF JOHN FUQUAY, DECEASED, v. ATLANTIC AND WESTERN RAILROAD COMPANY.

(Filed 4 November, 1931.)

Appeal and Error L c—Held: Supreme Court passed upon sufficiency of evidence on former appeal and will not again pass on this question.

Where, upon an appeal by the plaintiff from a judgment sustaining a demurrer on the ground that the plaintiff was estopped from bringing the action, the Supreme Court reverses the judgment, and upon the defendant's request, also passes upon the sufficiency of the evidence to sustain the cause of action, and holds the evidence sufficient, upon a subsequent appeal by the defendant the Court will not again consider the question of the sufficiency of the evidence, the question having been decided upon the former appeal.

APPEAL by defendant from *Lyon, Emergency Judge*, at January Term, 1931, of LEE. No error.

This is an action to recover damages resulting from personal injuries sustained by plaintiff's intestate while he was at work as an employee of the defendant.

On 28 January, 1929, John Fuquay, plaintiff's intestate, and Ellis Nordan, both employees of the defendant, were loading cross-ties on a flat car standing on defendant's tracks near the town of Lillington, N. C. They were using certain appliances furnished them by the defendant to enable them to load the cross-ties on the car, known as "ramps." As they were loading a crooked cross-tie on the flat car by means of the "ramps," the cross-tie suddenly turned and struck plaintiff's intestate, inflicting on his person serious and permanent injuries. As the result of these injuries, plaintiff's intestate suffered damages.

It is alleged in the complaint that the "ramps" furnished by defendant and used by plaintiff's intestate and his fellow-employee in loading the cross-ties on the flat car, were defective; that defendant was negligent in furnishing to plaintiff's intestate, to enable him and his fellow-employee to load the cross-ties on the flat car, defective "ramps," and that this negligence was the proximate cause of the injury sustained by plaintiff's intestate. This allegation was denied in the answer filed by the defendant.

The issues involving defendant's liability to plaintiff were answered by the jury in accordance with the contentions of the plaintiff.

From judgment that plaintiff recover of the defendant the sum of $1,500, the damages assessed by the jury, the defendant appealed to the Supreme Court.

A. A. McDonald and K. R. Hoyle for plaintiff.
Williams & Williams for defendant.

CONNOR, J. This action was first tried at July Term, 1930, of the Superior Court of Lee County. From the judgment at this trial, dismissing the action as of nonsuit, plaintiff appealed to this Court. The appeal was heard at Fall Term, 1930, when the judgment was reversed, and the action remanded to the Superior Court for a new trial. *Fuquay v. R. R.*, 199 N. C., 499. The question presented on said appeal was whether there was error in the judgment dismissing the action, as of nonsuit, on the ground that plaintiff was estopped from maintaining this action, as contended by defendant. We held that there was error in dismissing the action on that ground. The defendant contended that even if there was error in dismissing the judgment on the ground that plaintiff was estopped from maintaining the action, this error was not prejudicial for the reason that the evidence offered at the trial was not sufficient to sustain the allegation of the complaint with respect to actionable negligence on the part of the defendant. At the request of the defendant, we considered this contention, and held that it could not be sustained. For this reason we remanded the action for a new trial. Manifestly, if the contention had been sustained, notwithstanding the error in the judgment dismissing the action on the ground that plaintiff was estopped, we would not have remanded the action for a new trial, but would have affirmed the judgment of nonsuit.

The evidence at the trial at January Term, 1931, as appears from the record in this appeal, is identical with the evidence at the trial at July Term, 1930. The only question presented on this appeal from the judgment at January Term, 1931, is whether the evidence at said

trial was sufficient to sustain the allegations of the complaint with respect to the liability of defendant. The question was answered, at the request of the defendant, on the former appeal, and will not be considered on this appeal. *Soles v. R. R.*, 188 N. C., 825, 125 S. E., 24.

An examination of the evidence, however, seems to sustain the action of the trial court in refusing to allow defendant's motion for judgment as of nonsuit. The judgment is affirmed.

No error.

J. L. ABBITT v. WILLIS N. GREGORY AND DAVISON CHEMICAL COMPANY.

(Filed 4 November, 1931.)

1. Corporations D h—Sellers of stock could recover of one negotiating sale and the purchaser for misrepresentation as to price purchaser would pay.

Where, upon sufficient evidence, a referee finds that the general manager of a corporation was authorized by certain other officers and stockholders to negotiate for the sale of their controlling shares to another corporation, that the general manager was a close business and personal friend of the selling shareholders and that they had a right to, and did rely on his business judgment and integrity, and that he represented to the selling shareholders that the purchasing corporation would pay only $106.00 a share whereas in fact, under a secret agreement between the general manager and the purchasing corporation, the purchasing corporation paid him about $158.00 a share, and that he retained the difference for his personal use, with the knowledge and connivance of the purchasing corporation, *Held:* the selling shareholders are entitled to recover of the general manager negotiating the sale and the purchasing corporation, jointly and severally, the difference wrongfully retained by the general manager, there being a fiduciary relationship between the general manager and the selling shareholders and the purchasing corporation knowing the facts constituting such relationship, and the judgment of the lower court confirming the findings of fact and conclusions of law to this effect will be affirmed on appeal.

2. Trial C b—Actions against the same defendant involving same questions of law and fact may be consolidated by trial court.

Where several actions against the same defendant have been referred to a referee and heard by him at the same time by consent of the parties, and his findings of fact and conclusions of law are substantially the same in each action, upon the hearing of exceptions to his reports an order of the trial judge consolidating the actions on his own motion is not error.

3. Reference D c—In this case held: exceptions to report of referee were sufficiently passed upon by trial court.

While the trial court must consider and rule upon each exception to the referee's report upon a hearing before him on the exceptions, where, for the purpose of rendering judgment, the trial court restates in his own language the findings of fact deemed by him pertinent to the judgment, and affirms the findings of the referee, and the statement of the facts by the court and the findings of fact by the referee are substantially the same, his order overruling all exceptions to the findings of fact which do not conform to his statement of the facts is not subject to the objection that the court failed to pass on each exception, it appearing that the court had carefully considered the referee's report and the exceptions thereto before rendering judgment.

4. Fiduciaries A a—Fiduciary relationship exists where special confidence is reposed in one bound in equity to act in good faith.

It is difficult to define legally the exact extent of the meaning of the term "fiduciary" to include every relationship of that character, but the relationship exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and in due regard to the one reposing the confidence.

APPEAL by defendants from *Grady, J.*, at June Term, 1931, of PASQUOTANK. Affirmed.

This and thirteen other actions were begun in the Superior Court of Perquimans County, North Carolina, by summons issued on 25 May, 1927. The plaintiff in each of said actions was formerly a stockholder of the Eastern Cotton Oil Company, a corporation organized and doing business under the laws of this State, with its principal office in the town of Hertford, N. C. The defendants in each action are Willis N. Gregory, a citizen of the State of Virginia, residing in the city of Norfolk, Va., and the Davison Chemical Company, a corporation organized and doing business under the laws of the State of Maryland, with its principal office in the city of Baltimore, Md.

During the months of May and June, 1926, the plaintiff in each of said actions sold and delivered to the defendant, Davison Chemical Company, the shares of stock in the Eastern Cotton Oil Company owned by him. These sales were negotiated by the defendant Willis N. Gregory, who was the general manager of the Eastern Cotton Oil Company. The relations, both business and social, between the said Willis N. Gregory and the plaintiff in each of said actions, at the time of said negotiations and sales, were such that each of said plaintiffs had and was justified in having implicit confidence in the said Gregory. It is alleged in each of said actions that the defendant Willis N. Gregory and the defendant Davison Chemical Company, pursuant to a secret agreement entered into by and between them during said negotiations, and prior to said sales, falsely

and fraudulently misrepresented to the plaintiffs in said actions the price which the said Davison Chemical Company was willing to pay and did pay for the shares of stock in the Eastern Cotton Oil Company owned by said plaintiffs, and that the said Davison Chemical Company wrongfully paid to the said Willis N. Gregory, and the said Willis N. Gregory wrongfully received from the said Davison Chemical Company, a sum of money in excess of the amount paid by the said Davison Chemical Company to each of said plaintiffs for the shares of stock in the Eastern Cotton Oil Company sold and delivered by said plaintiff to the said Davison Chemical Company. The plaintiff in each of said actions prays judgment that he recover of the defendants the amount wrongfully paid by the Davison Chemical Company to Willis N. Gregory, and wrongfully received by Willis N. Gregory from the Davison Chemical Company in excess of the amount which was paid to said plaintiff by the Davison Chemical Company for his shares of stock in the Eastern Cotton Oil Company.

After the complaint had been filed in each of said actions, on the petition of the defendants therein, said action was removed from the Superior Court of Perquimans County to the District Court of the United States for the Eastern District of North Carolina for trial. Thereafter eight of said actions, on motion of the plaintiff in each action, were remanded by the judge of the United States District Court to the Superior Court of Perquimans County. The remaining six actions were retained in the District Court of the United States for the Eastern District of North Carolina for trial in said Court. Subsequently an order was entered in each of the actions pending in the Superior Court of Perquimans County removing said action from said court to the Superior Court of Pasquotank County, for the trial in the latter court.

At February Term, 1930, of the Superior Court of Pasquotank County, each of the actions then pending in the Superior Court of Pasquotank County, was referred to Hon. D. H. Bland, as referee, for trial, in accordance with the provisions of C. S., 572, *et seq.* There were no exceptions to the orders of reference made in said actions; the parties to each action expressly waived the right to trial by jury.

At or about the time the actions pending in the Superior Court of Pasquotank County were referred to Hon. D. H. Bland, referee, orders were entered in the actions which had been retained in the United States District Court by the judge of said District Court, under Equity Rule 59, referring said actions also to Hon. D. H. Bland, as special master. Thereafter it was agreed that the Hon. D. H. Bland, as referee appointed by the State Superior Court, and as special master appointed by the United States District Court, should hear all said actions at the

same time and place, and should file his reports as referee in the actions referred to him by the State Superior Court, in said court, and should file his reports as special master in the actions referred to him by the United States District Court, in said Court. This agreement was entered into by and between the parties to all said actions, because the causes of actions alleged in the complaints therein, and the defenses set up in the answers filed in said actions, are identical. The facts alleged in the complaint in each action as constituting the cause of action on which the plaintiff therein prays judgment against the defendants, Willis N. Gregory and Davison Chemical Company, are substantially the same.

Pursuant to the foregoing agreement, the Hon. D. H. Bland, sitting both as referee and as special master, heard all said actions at Elizabeth City, N. C., beginning on 24 June, and continuing through 27 June, 1930, when by consent the hearing was continued to 10 July, 1930, on which day the taking of testimony was concluded. Thereafter, having first heard arguments by counsel for all the parties in said actions, the Hon. D. H. Bland filed his reports as special master in the actions referred to him by the United States District Court, in said District Court, and at the same time filed his reports as referee in the actions referred to him by the Superior Court of Pasquotank County, in said Superior Court. He filed a transcript of the evidence taken by him at the hearing of said actions in each of said courts. In his report in each of the actions pending in the Superior Court of Pasquotank County, the referee referred to his findings of fact and conclusions of law in his report in the action entitled "T. S. White v. Willis N. Gregory and Davison Chemical Company," pending in the United States District Court, and by such reference embodied said findings of fact and conclusions of law in said report in so far as same are applicable in said action.

Upon his findings of fact and in accordance with his conclusions of law set out in his report in the above entitled action, the referee recommended that judgment be entered in favor of the plaintiff, J. L. Abbitt, and against the defendants, Willis N. Gregory and Davison Chemical Company, for the sum of $3,753.06, with interest on said sum from 6 May, 1926, and the costs of the action.

Both the plaintiff and the defendants in each of the actions pending in the Superior Court of Pasquotank County filed exceptions to the report of the referee in said action. The exceptions in all said actions were identical. At June Term, 1931, of said court, all said actions came on for hearing upon the reports of the referee and the exceptions thereto, before his Honor, Henry A. Grady, judge presiding, who rendered judgment as follows:

"J. L. Abbitt v. Willis N. Gregory and Davison Chemical Company.

Mae Wood Winslow v. Willis N. Gregory and Davison Chemical Company.

F. E. Winslow v. Willis N. Gregory and Davison Chemical Company.

Susan Frances White v. Willis N. Gregory and Davison Chemical Company.

J. H. Aydlett v. Willis N. Gregory and Davison Chemical Company.

Cornie White Abbitt v. Willis N. Gregory and Davison Chemical Company.

T. S. White, Jr., who sues by T. S. White, as next friend, v. Willis N. Gregory and Davison Chemical Company.

Mattie Toms White v. Willis N. Gregory and Davison Chemical Company.

Each one of the above named plaintiffs, together with certain other stockholders of the Eastern Cotton Oil Company, prosecuted a civil action against the defendants, Willis N. Gregory and Davison Chemical Company, in the Superior Court of Perquimans County, North Carolina. Because of a diversity of citizenship, some of said actions were removed to the United States District Court for the Eastern District of North Carolina; and by order, duly entered, the causes named in the caption hereof, were removed to Pasquotank County for trial. As the same questions were presented in the several causes, both as to the law and the facts, an order was made in the State Court appointing David H. Bland, of Goldsboro, N. C., as referee in each of said cases, and a similar order was entered in the United States District Court, appointing the said David H. Bland as special master in chancery, to hear and determine the several causes pending in that Court.

All of said causes were thereupon heard by said referee and special master, and his reports in each case were filed in the respective courts from which he derived his authority; and upon the incoming of said reports, it was agreed between the parties plaintiff and defendant that all exceptions filed might be heard and argued before the undersigned judge of the Superior Court, sitting in Chambers with Hon. Isaac M. Meekins, U. S. District Judge for the Eastern District of North Carolina; and thereupon said exceptions were heard by the said two judges, sitting together, in the U. S. District Court building, in Elizabeth City, North Carolina, during the second week of the June Civil Term, 1931, of Pasquotank Superior Court.

It was agreed by all parties that each of said judges might take with him the papers in the cases over which he had jurisdiction, and render judgment in said causes, out of the county and out of term, to have the same effect as if entered at term time, and in the county.

It is alleged by all of the plaintiffs in their respective complaints, that they were stockholders in the Eastern Cotton Oil Company; that Willis N. Gregory, Thos. S. White and Edward D. Winslow were all stockholders and directors in said company, White being the nominal president, and Willis N. Gregory being the active and actual general manager of the business; that White and Edward D. Winslow each represented certain of their kinsmen and relatives in handling their stock; that there was an agreement between White and Winslow on the one part, representing themselves and their family groups, and Gregory on the other part, that Gregory was to act as agent for the stockholders represented in making sale thereof to the defendant Davison Chemical Company; that while acting as such agent, he entered into an agreement with said Davison Chemical Company that he would sell said stock to it for $106.00 per share, but that he himself was to receive a larger amount, to wit: $166.00 per share, all of which was concealed by both Gregory and the Davison Chemical Company from the several plaintiffs in interest; that Gregory was guilty of fraud, of a breach of trust, that he made certain false and fraudulent representations to the plaintiffs, upon which they relied, had a right to rely, and that they were damaged in the amounts set out in the complaints.

The complaints as drawn, involving the questions of breach of trust and confidence on the part of the defendant Gregory, and the participation in said breach by his codefendant, Davison Chemical Company, as well as the question of fraud and false representation, raise certain issues of fact, which the referee has passed upon. These allegations are denied by the defendants, and it now becomes the duty of the court to ascertain from the evidence whether or not said allegations have been proven by the greater weight thereof. Are the defendants liable to the plaintiff, or is either one of them liable for said alleged breach of trust and confidence? Are they guilty of false pretense, or is either one of them guilty?

A correct answer to these questions will determine the respective rights of the parties.

For the sake of convenience, and saving and reserving unto the several parties all of their rights of exception and appeal, the court, *ex mero motu* does hereby consolidate the several actions above referred to and pending in the Superior Court of Pasquotank County; and this consolidated judgment shall hereafter be taken, deemed and accepted as the judgment in each case, as if separately entered therein.

After a careful consideration of the referee's report, the evidence taken before him, the exceptions filed by plaintiffs and defendants, the oral arguments made by counsel; and pretermitting all things inconsequential and extraneous, but looking rather to the substance than the form of the matters at issue, the court is led irresistibly to the findings of certain facts, which are determinative of the rights of the parties; and without needlessly repeating the findings of the referee, which are amply supported by the evidence, but referring to and reaffirming such findings as appear to be pertinent to the inquiry, the court does now set forth in detail those facts which seem to be proven by the greater weight of the evidence, and which are convincing in arriving at a just and fair settlement of all matters in dispute, that is to say:

1. The Eastern Cotton Oil Company, a domestic corporation, had its office and principal place of business in the town of Hertford, Perquimans County, North Carolina. Prior to the controversy which forms the basis of these consolidated actions, the common stock of said corporation was owned in part by two groups of stockholders, the first of which will be designated as the Thomas S. White group, and its holdings were as follows:

(a)	Thos. S. White	875 shares
(b)	Susan Frances White, his daughter	1 share
(c)	J. H. Aydlett, his brother-in-law	14 shares
(d)	Clate White Aydlett, his sister	286 shares
(e)	J. L. Abbitt, a brother-in-law	71 shares
(f)	Cornie White Abbitt, his sister	286 shares
(g)	Willie White Weeks, a sister	286 shares
(h)	Mattie Toms White, his wife	10 shares
(i)	Thos. S. White, Jr., a son	1 share
	Total of the Thos. S. White group	1,830 shares

The second group is known as the Edward D. Winslow group and the holdings of said group were as follows:

(a)	Edward D. Winslow	300 shares
(b)	Tudor F. Winslow, his brother	100 shares
(c)	Mae Wood Winslow, his niece	10 shares
(d)	Frank E. Winslow, his nephew	10 shares
(e)	Mrs. T. H. Willcox, his niece	1 share
(f)	Mrs. W. H. Hudson, a niece	1 share
	Total of the Winslow group	422 shares

In addition to the above stock, Dr. E. S. White was the owner of 65 shares, and the defendant, Willis N. Gregory, was the owner of 1,260 shares of the capital stock of said Eastern Cotton Oil Company, making a total of 3,577 shares owned by the several plaintiffs in the State and Federal courts, and the defendant, Willis N. Gregory. Said stock had a par value of $100.00 per share and constituted a majority of all of the stock issued by said company, and a controlling interest therein.

2. The management and control of the 1,830 shares of stock belonging to the Thos. S. White group, was in Thos. S. White, who acted as the agent and representative of his kinsmen and kinswomen in the matters and things hereinafter referred to; and in like manner, Edward D. Winslow was in the control of, and managed the sale of the stock belonging to the Winslow group, as agent and representative of his kinsmen and kinswomen; the members of said two groups looking to them for guidance, advice and direction in practically all things connected with the operation of the Eastern Cotton Oil Company. This relationship between the parties was well known to, and acted upon by the defendant, Willis N. Gregory, in making the sales of stock as hereinafter mentioned.

3. Prior to the break in the relationship between Thos. S. White and Edward D. Winslow on the one part, and Willis N. Gregory on the other part, which break and disagreement forms the basis of this controversy the said Thos. S. White, Edward D. Winslow and Willis N. Gregory were on terms of intimacy, both in a business and social aspect, each having implicit faith and confidence in the other. There had never been a rift in the mantle of confidence and good fellowship which enveloped them until the happening of the events in the spring of 1926, which formed the basis of these several actions. Thos. S. White and Willis N. Gregory had been boyhood friends and companions; each looked upon the other with affection and regard; indeed, it appears that they each cherished for the other that feeling which is so common between men of similar social standing, who have played together in their youth; and while Edward D. Winslow was a much older man than either of them, they had grown up under his personal observation in Perquimans County, in the same locality, and they both regarded him with real affection and esteem. So far as these three men were concerned, it was a pleasant association of business companions, among whom no contention had ever arisen. Each had faith in the other and trusted him unstintedly and whole-heartedly.

4. The Eastern Cotton Oil Company was organized in 1905 with a small capital of $25,000. Under the fine management of Willis N.

Gregory this business venture grew with phenomenal success, and in 1926, at the time of the breach between the three principal stockholders, White, Winslow and Gregory, the capital stock had increased to $450,000 and the business had acquired an enviable reputation due largely to the business acumen and astuteness of its general manager, Willis N. Gregory.

For several years prior to 1926, Thos. S. White had been the nominal president of said company, serving without salary. White, Edward D. Winslow and Willis N. Gregory, were all members of the board of directors, but Gregory was the active and actual general manager of the business. He possessed a business capacity of the highest degree, and it was largely through his energy and sagacity that the growth of the business was due. Thos. S. White and Edw. D. Winslow were engaged in other business, and did not give to the Eastern Cotton Oil Company any special or personal attention; however, they were both alert business men, and from regular attendance upon the meetings of the board of directors, knew the workings of the company, and knew, or ought to have known the value of their holdings therein.

5. In the spring of 1926, there was an effort made by the directors of the Eastern Cotton Oil Company, participated in by the White and Winslow groups of stockholders, to sell the entire corporate assets of said company; and the defendant Gregory thereupon entered into negotiations with divers parties in an attempt to make sale of said property. His efforts in this respect were fully authorized by the interested stockholders, including the several plaintiffs in the above entitled actions, as well as those pending in the Federal Court. Finally, in conversation with an officer of the defendant, Davison Chemical Company, Gregory discovered that said company was probably interested in purchasing said Eastern Cotton Oil Company, and he so reported to White and Winslow, and through them to their respective groups of stockholders, including the plaintiffs in the several actions referred to in the premises of this judgment. Gregory was thereupon authorized to make a sale of said property.

Later on, it was intimated by Davison Chemical Company, or its officers, that said company did not desire to purchase the entire business of the Eastern Cotton Oil Company, but was interested only in acquiring a majority of the common stock thereof, or about 51 per cent of said stock; and this attitude on the part of Davison Chemical Company was reported by Gregory to the White and Winslow groups, through Thos. S. White and Edw. D. Winslow. In the negotiations between the officers of the Davison Chemical Company and Willis N. Gregory, said company informed him that they wished him to retain his stock in the

Eastern Cotton Oil Company, and to remain as general manager thereof. This condition was also reported by Gregory to the White and Winslow groups. None of the members of said White and Winslow groups ever had any personal transactions with the Davison Chemical Company, or its officers, but all of the negotiations, looking to the sale of stock, were conducted by Gregory, alone, as the agent and representative of said White and Winslow groups. Gregory stated to White and Winslow that the Davison Chemical Company would pay $106.00 per share for a majority of the stock in said company, but would not pay any more, this figure representing the par value with a 6 per cent dividend. It was also understood in the negotiations that Thos. S. White was to retain 10 shares of his stock, and was to remain as president of the company, and Edw. D. Winslow was to retain 2 shares of his stock, so that both of them would retain some contact with the business. There was no misunderstanding as to these facts.

6. At said time, however, and without the knowledge or consent of White and Winslow, or any member of their respective family groups, there was a secret contract and agreement existing between Willis N. Gregory and the Davison Chemical Company, that said company would pay to him, Willis N. Gregory, $166.00 per share for 2,500 shares of the capital stock of the Eastern Cotton Oil Company, which was to include 2,305 shares, belonging to the persons named in the first finding of fact of this judgment; which included all of the stock of the several plaintiffs, both in the State and Federal actions, except 10 shares which were to be retained by Thos. S. White, and 2 shares which were to be retained by Edw. D. Winslow, under which agreement the Davison Chemical Company was to acquire a controlling interest in the Eastern Cotton Oil Company. This agreement between Gregory and his codefendant, Davison Chemical Company, is fully set out at length in the referee's report, and his findings in that respect are fully approved and confirmed by the court.

7. It was also agreed between the defendant Gregory and his codefendant, Davison Chemical Company, that in the event he could not acquire a sufficient amount of stock from the plaintiffs and their associates to give to the Davison Chemical Company a controlling interest in the Eastern Cotton Oil Company, he would transfer to the defendant, Chemical Company, a sufficient number of shares of his own stock which added to the stock so purchased, would make a majority of all of the stock issued by said company; and the said Gregory did, in fact, make a transfer of certain shares of stock owned by him, in order to make up said majority interest; but later this stock was returned to him, after the requisite number of shares had been purchased from the plaintiffs

and other parties, and transferred to the Davison Chemical Company on the books of the Eastern Cotton Oil Company.

8. Acting upon the representations made to them by Gregory, their agent, general manager and trusted fellow stockholder, the plaintiffs transferred their stock in blank and delivered it to the Davison Chemical Company, and received therefor an amount equal to $106.00 per share, that is to say:

J. L. Abbitt	$ 7,526.00
Mae Wood Winslow	1,060.00
Frank E. Winslow	1,060.00
Susan Frances White	106.00
J. H. Aydlett	1,484.00
Cornie White Abbitt	30,316.00
Mattie Toms White	1,060.00
Thos. S. White, Jr.	106.00

At the same time, or within a few days thereafter, sales of stock were consummated with other stockholders who are plaintiffs in the causes now pending in the U. S. District Court, which sales were negotiated through the agency of Willis N. Gregory, as follows:

Thos. S. White, 865 shares	$91,690.00
Clate W. Aydlett, 286 shares	30,316.00
Willie W. Weeks, 286 shares	30,316.00
Edw. D. Winslow, 298 shares	31,588.00
Tudor F. Winslow, 100 shares	10,600.00
Dr. E. S. White, 65 shares	6,890.00

9. Upon the delivery of said stock, transferred in blank, and which was afterwards transferred on the books of the Eastern Cotton Oil Company to the defendant, Davison Chemical Company, said Davison Chemical Company, pursuant to the secret treaty and agreement hereinbefore referred to, paid to Willis N. Gregory, in cash, or its equivalent, the sum of $52.86 for each share of stock so sold and transferred. This amount, $52.86 per share, was due to a collateral agreement made between said contracting parties, Gregory and the Davison Chemical Company, that his profit on the stock should be reduced from $60.00 per share to whatever amount, in addition to $106.00 per share, would represent the real value thereof. This money paid to Gregory, as aforesaid, in equity and good conscience belonged to the plaintiffs in the several actions first referred to, in the proportion of the stock held and

transferred by them to Davison Chemical Company; so that, as to each of said parties, the amount withheld by Gregory and for which he should now be held accountable is as follows:

Thos. S. White, 865 shares at $52.86 per share	$45,723.90
Susan Frances White, 1 share at $52.86 per share	52.86
J. H. Aydlett, 14 shares at $52.86 per share	740.04
Clate W. Aydlett, 286 shares at $52.86 per share	15,117.96
J. L. Abbitt, 71 shares at $52.86 per share	3,753.06
Cornie W. Aydlett, 286 shares at $52.86 per share	15,117.96
Willie W. Weeks, 286 shares at $52.86 per share	15,117.96
Thos. S. White, Jr., 1 share at $52.86 per share	52.86
Mattie T. White, 10 shares at $52.86 per share	528.60
Edw. D. Winslow, 298 shares at $52.86 per share	15,752.28
Tudor F. Winslow, 100 shares at $52.86 per share	5,286.00
Mae Wood Winslow, 10 shares at $52.86 per share	528.60
Frank E. Winslow, 10 shares at $52.86 per share	528.60
Dr. E. S. White, 65 shares at $52.86 per share	3,435.90

It appears from the evidence and is found as a fact, that at the time Thos. S. White delivered his 865 shares of stock to the defendant, Davison Chemical Company, he received in addition to the purchase price of said stock, the sum of $7,500, which was represented to be 3 years salary as president of the Eastern Cotton Oil Company at $2,500 per year. It will be remembered that prior to this time he had received no salary as president of the said company. The referee finds very properly, and his finding is approved by the court, that said sum of $7,500 ought, in good conscience, to be deducted from any recovery had by the said Thos. S. White as against either of the defendants. The court finds, with the referee, that said sum of $7,500 was paid for services never rendered, although said services were tendered by the said Thos. S. White, and would have been performed had the defendant Davison Chemical Company, so desired. However, as said sum of money was not paid by the Eastern Cotton Oil Company, but was paid by the purchaser of the stock from the said Thos. S. White, the court holds that he was not entitled to the same, and that said sum of $7,500 should be deducted from any recovery had by him in this action.

10. The representations made by Willis N. Gregory to the White and Winslow groups of stockholders, that Davison Chemical Company would not pay and was not paying more than $106.00 per share for the stock owned by them, was false in fact; at least, it was a fraudulent and intentional concealment of a material fact, intended to deceive and which did deceive the said White and Winslow, the several members

of their respective family groups, as well as the plaintiff, Dr. E. S. White; and said fraudulent concealment of fact was well known to the Davison Chemical Company. Said Davison Chemical Company knew that Willis N. Gregory was acting for the plaintiffs and their associates in making said sale; it knew that Gregory was contracting for them and in their behalf at a price of only $106.00 per share for the stock owned by them; it knew that Gregory was to receive $60.00 per share for said stock, over and above the amount actually paid to the owners thereof, or such sum as was thereafter determined upon, which added to the amount paid to the stockholders, would represent the real value thereof; and which figure was settled upon at $52.86 per share; the Davison Chemical Company knew that said facts were concealed from the said White and Winslow and their associates, and knew that said stockholders were transferring their stock to it, under a false assumption of fact.

11. The court is compelled to find from the evidence, and does so find, that there was a breach of faith and confidence on the part of the defendant Gregory in conducting the sale of stock belonging to the plaintiffs and their associates; that they had a right to rely upon him by reason of his official position as general manager of the company, by reason of his past life and conduct, and their friendship for and association with him, and also by reason of the relationship of principal and agent which subsisted between them at the time; that his conduct in respect to the sale of stock is so tainted with fraud and greed that it cannot pass unnoticed by the court. It is true that the referee finds, and the court approves said finding, that Thos. S. White and Edw. D. Winslow were endorsers on notes of the Eastern Cotton Oil Company in a large amount; that in the general settlement and sale of stock, negotiated by Gregory, they were to be released from said obligations, and the fact that they were released cannot remove from Gregory the taint of fraud which the evidence stamps upon him. The referee also finds that both White and Winslow were under the impression, during the negotiations for the sale of their stock, that Gregory was to receive an additional salary as manager of the Eastern Cotton Oil Company, and that such additional salary was to be his reward for negotiating the sale of their stock to the Davison Chemical Company. As a matter of fact, his salary was greatly increased upon the taking over of the company, or the stock, by the defendant, Davison Chemical Company.

The court does not see how such fact or belief on the part of White and Winslow could relieve Gregory of his plain obligation to tell them the truth in making sale of their stock and that of their associates. It is perfectly apparent that both White and Winslow would have

been glad to see Gregory receive a larger salary; they were very friendly with him and his prosperity would have gladdened them; but for him to receive a bonus on their stock of something like $120,000 over and above what he represented to them as its sale price, he at the time acting as their agent and representative, cannot be forgiven or overlooked by the court in administering justice between the parties.

12. The referee finds as a fact that the Davison Chemical Company had actual knowledge of all of the facts in connection with the sale of the plaintiffs' stock and that of their associates, and the court finds as a fact that said Davison Chemical Company participated in the fraud practiced by Gregory upon his associates, the plaintiffs above named, as well as those whose causes are pending in the Federal Court. The court also finds that the Davison Chemical Company participated in the concealment of the real facts, in concealing the real purchase price agreed upon between itself and Gregory, and the court concurs in the referee's conclusion that said Davison Chemical Company is liable to the plaintiffs in these causes in the same manner and to the same degree as its codefendant Gregory.

The foregoing findings in respect to Thos. S. White as to his receipt of an additional sum of $7,500 from Davison Chemical Company, are not intended as having any bearing upon the plaintiffs in interest, in the consolidated causes, pending in this court, for the action in which he is involved is pending in the U. S. District Court, and said finding cannot bind any of the parties to this action. They are set out in this judgment for the sole purpose of explaining the entire transaction between Gregory on the one part and White and Winslow on the other part.

All of the exceptions filed by the plaintiffs and the defendants, which do not conform to the foregoing findings are overruled; and as to all exceptions which do so conform to the court's findings, the same are sustained. All findings and conclusions of the referee which are in harmony, or which do not conflict with the findings of the court, are reaffirmed, and those findings and conclusions which fail to so conform to the findings and conclusion of the court are rejected and disaffirmed, and now, upon the facts as found by the court and the referee, it is considered, ordered and

Adjudged that the plaintiffs have and recover of the defendants and each one of them jointly and severally, the following amounts, to wit:

J. L. Abbitt	$ 3,753.06
Mae Wood Winslow	528.60
Frank E. Winslow	528.60

Susan Frances White	$ 52.86
J. H. Aydlett	740.04
Cornie W. Abbitt	15,117.96
Thos. S. White, Jr.	52.86
Mattie Toms White	528.60

Said respective recoveries as to each of the plaintiffs above named, will bear interest at the rate of 6 per cent per annum from 6 May, 1926, and it is further ordered and adjudged that the plaintiffs have and recover of the defendants the costs of the several actions as consolidated by the court, which shall include an allowance of $500.00 to David H. Bland, referee.

Done at Clinton, N. C., this 20 July, 1931.

HENRY A. GRADY, *Judge Presiding.*"

From this judgment both the defendants appealed to the Supreme Court, assigning errors therein based upon their exceptions duly taken.

McMullan & McMullan, Ehringhaus & Hall, Wilcox, Cooke & Wilcox and Battle & Winslow for plaintiff.

W. R. L. Taylor and L. I. Moore for defendant, Willis N. Gregory.

Jesse N. Bowen, Whedbee & Whedbee and MacLean & Rodman for defendant, Davison Chemical Company.

CONNOR, J. The exceptions filed by the defendants, Willis N. Gregory and the Davison Chemical Company, to the findings of fact set out in the report of the referee in this action, and also in his reports in the other actions pending in the Superior Court of Pasquotank County against these defendants, were chiefly on the ground that there was no evidence at the hearing of said actions by the referee to support said findings of fact. These exceptions were without merit, and were properly overruled by Judge Grady. There was ample evidence, as the learned and careful judge found, to support these, as well as the other findings of fact made by the referee, and set out in his several reports. These findings of fact were substantially the same.

The essential facts on which the plaintiffs in these actions rely as constituting their cause of action against the defendants, certainly as distinguished from inferences and conclusions from these facts, are not seriously controverted. It was admitted that the plaintiff in each of these actions was a stockholder of the Eastern Cotton Oil Company, owning the number of shares of said stock as alleged by him in his complaint; that all said plaintiffs sold and delivered to the defendant, Davison Chemical Company, the shares of stock in said company owned

by them; and that these sales were made as the result of negotiations conducted by the defendant, Willis N. Gregory, with the defendant Davison Chemical Company. It was admitted that at the time these negotiations were begun, and at the time these sales were made, the defendant, Willis N. Gregory, was the general manager of the Eastern Cotton Oil Company, and that his relations, both business and social, with each of the plaintiffs, were such that said plaintiffs had and were justified in having implicit confidence in the said Willis N. Gregory, not only as the general manager of the corporation, but also as a friend of long standing. It was admitted that each of the plaintiffs received from the defendant, Davison Chemical Company, as the price of his stock, the sum of $106.00 per share, and that prior to the sale of said stock, and during the negotiations for its purchase by the Davison Chemical Company, the defendant, Willis N. Gregory, with the full knowledge of the defendant, Davison Chemical Company, told the plaintiffs, or their representatives, that the sum of $106.00 per share was the highest price which the said Davison Chemical Company would pay for said stock. It was not denied that during the progress of the negotiations, which the defendant, Willis N. Gregory, conducted with the defendant, Davison Chemical Company, for the sale of the stock in the Eastern Cotton Oil Company owned by the plaintiffs, a secret agreement was entered into by and between the said Willis N. Gregory and the said Davison Chemical Company, by which the defendant, Davison Chemical Company, agreed to pay to the defendant, Willis N. Gregory, upon the conclusion of said negotiations, and upon the sale of said stock to the said Davison Chemical Company by the plaintiffs, the sum of $150,000 in cash; nor was it denied that pursuant to said secret agreement, upon the sale of said stock to the Davison Chemical Company by the plaintiffs, the defendant, Davison Chemical Company, paid to the defendant, Willis N. Gregory, a sum of money aggregating about $150,000, which added to the total amount paid by said company to the plaintiffs in these actions, for their stock in the Eastern Cotton Oil Company, resulted in the payment by the defendant, Davison Chemical Company, for each share of said stock, of the sum of $158.86; of this sum, each of said plaintiffs received for his stock $106.00 per share; the balance, to wit: $52.86 was paid by the defendant, Davison Chemical Company to the defendant, Willis N. Gregory. There was ample evidence to justify, if not to require, the inference and conclusion made by both the referee and the judge, that the defendant, Davison Chemical Company, entered into the secret agreement with, and paid the sum of $52.86 per share, to the defendant, Willis N. Gregory, with full knowledge that the said Willis N. Gregory was the general manager of the

Eastern Cotton Oil Company, and also that his relations, both business and social, with the stockholders of said company, whose stock it proposed to buy, were such that said stockholders had implicit confidence in the business judgment and personal integrity of the said Willis N. Gregory, and because of such confidence would act and did act upon his representation that said company would not pay more than $106.00 per share for their stock in the Eastern Cotton Oil Company. There was ample evidence also tending to show that the defendant Davison Chemical Company paid to the defendant, Willis N. Gregory, and that the defendant, Willis N. Gregory, received from the defendant, Davison Chemical Company, the sum of $52.86 per share for the stock sold to the said Davison Chemical Company by the plaintiffs, as compensation for his services in procuring for said company the control of the Eastern Cotton Oil Company by the purchase from the plaintiffs of their stock in said company at $106.00 per share. The contention of the defendants that the said sum of $52.86 per share was paid by the Davison Chemical Company to Willis N. Gregory as compensation for his "changed position" as a stockholder in the Eastern Cotton Oil Company resulting from the sale by the plaintiffs of their stock to the Davison Chemical Company, and also as compensation for his agreement to retain an official connection with the Eastern Cotton Oil Company, after the purchase of said stock from the plaintiffs by the Davison Chemical Company, while colorable, was not sustained by either the referee who heard, or by the judge, who reviewed the evidence. All the evidence justifies their rejection of this contention. The records of the Davison Chemical Company, which appear in the evidence, refute this contention of the defendants. Their contention that these records were made for the purpose of concealing the true transaction with respect to the purchase of the stock in the Eastern Cotton Oil Company from the plaintiffs, in order to comply with the laws of the State of Maryland, and in order to meet the requirements of the New York Stock Exchange, at least, does not aid the defendants in a court which requires of all litigants that they come within its portals with clean hands and which looks beneath the forms of all transactions to discover, if it can, the true intention of the parties.

On their appeal to this Court, the defendants contend that there were errors in procedure at the hearing by the judge of their exceptions to the report of the referee in this action, and that for these errors, which appear therein, the judgment should be set aside, and a new trial ordered.

Defendants contend, first, that it was error for the judge, on his own motion, to consolidate the several actions pending in the Superior Court

of Pasquotank County against the defendants, for the purpose of hearing the exceptions filed by both the plaintiffs and the defendants to the reports of the referee in said actions; and, second, that it was error for the judge to fail to rule on each exception, specifically, and in lieu thereof to rule generally that such exceptions as it appeared from his judgment were not overruled, were sustained, and that such exceptions as it appeared therefrom were overruled, were not sustained.

With respect to the power of a trial judge to order the consolidation of two or more actions for purposes of trial and judgment, it is said in *Durham v. Laird,* 198 N. C., 695, 153 S. E., 261, that "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. Green,* 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." Prof. McIntosh says: "The Court has arranged the cases in which a consolidation may be made into three classes: '(1) where the plaintiff could have united all his causes of action in one suit, and has brought several, and these causes of action must be in one and the same right, and a common defense is set up to all; (2) where separate suits are instituted by different creditors to subject the same debtor's estate; (3) where the same plaintiff sues different defendants, each of whom defends on the same grounds, and the same question is involved in each.' These may not embrace all the cases, but they serve to illustrate the rule by which the court is governed in ordering such union. The last class might also include actions by different plaintiffs against the same defendant, where the facts are substantially the same."

The principle on which the rule governing the consolidation of two or more actions is founded, supports the order of the judge in the instant case, consolidating the actions tried by him on the exceptions to the reports of the referee, and there was no error in said order, notwithstanding there were different plaintiffs in said actions. The actions were against the same defendants, and involved the same questions both of fact and of law. They had been heard by the referee at the same

time and at the same place by consent of all parties, and his findings of fact and conclusions of law, as shown by his several reports in said actions, were substantially the same.

It is undoubtedly the practice in this State on the hearing of exceptions to the report of a referee for the judge to consider and rule on each exception, and in accordance with his rulings to sustain or overrule the exceptions, specifically. It is ordinarily his duty to do so. *Miller v. Groome,* 109 N. C., 148, 13 S. E., 840. In that case it is said that when either party to an action which has been tried by a referee files exceptions to his report, it is the duty of the judge, in reviewing the report, to consider and rule on the exceptions, and to set aside, modify or confirm the report according to his judgment. It is error for the judge to decline to consider the evidence set out in the referee's report, and to confirm the report without ruling on the exceptions. He must consider and rule on the exceptions, judicially, before rendering his judgment.

In *Thompson v. Smith,* 156 N. C., 345, 72 S. E., 379, it is said: "When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee, and a safeguard against any possible errors on his part, but because he cannot review the referee's report in any other way. The point was presented clearly and directly in *Miller v. Groome,* 109 N. C., 148, and it controls this case."

In *Dumas v. Morrison,* 175 N. C., 431, 95 S. E., 775, where the real question involved in the appeal by the plaintiff was whether the judge had the power to set aside the findings of fact made by the referee, and to find the facts anew from the evidence taken and reported to the court by the referee, it is said:

"It is not denied that the judge has the power to review and revise the report, but the contention is that he must restrict his rulings to the specific exceptions which has been taken by either party. If this be true, and the judge's power is not any broader than as stated by the plaintiff, we have shown that the exceptions are of such a nature and so comprehensive as to bring this case well within the restricted statement of the rule. The statute, however, gives a wider scope to the judge's power in dealing with the report of a referee. Revisal, sec. 524 (now C. S., 578), provides that the report of the referee shall be made to the clerk of the court in which the action is pending; either party,

during the term, or upon ten days notice to the adverse party, out of term, may move the judge to review such report, and set aside, modify or confirm the same, in whole or in part, and no judgment shall be entered on any reference except by order of the judge."

In *Trust Co. v. Lentz,* 196 N. C., 398 (at page 406), 145 S. E., 776, it is said: "In view of the position taken by some of the parties that the judge was without authority to change the report of the referee—the reference being by consent—it is sufficient to say that, in a consent reference, as well as in a compulsory one, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, may affirm, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. *Contracting Co. v. Power Co.,* 195 N. C., 649, 143 S. E., 241; *Mills v. Realty Co.,* 196 N. C., 223, 145 S. E., 26."

In the instant case, after a careful consideration of the referee's report, and of the exceptions thereto filed by both the plaintiff and the defendants, and after fully reviewing all the evidence taken by the referee at the hearing of this and the other actions pending in both the State and the Federal Court against the defendants, the judge concluded that the findings of fact made by the referee and set out in his report in this and in each of the other actions, were amply supported by the evidence. In accordance with these conclusions, the judge overruled all the exceptions to the findings of fact made by the referee. He approved these findings of fact, and for the purpose of rendering his judgment in this action, he restated, in his own language, such findings of fact as he deemed pertinent to said judgment. In this, there was no error. There is no substantial difference between the facts as found by the referee, and as stated by the judge in his judgment. The action of the judge is fully supported by the authorities above cited.

Upon the findings of fact made by him, the referee concluded as a matter of law, that during the negotiations which the defendant, Willis N. Gregory, conducted with the defendant, Davison Chemical Company, for the sale of the stock in the Eastern Cotton Oil Company owned by the plaintiff, a fiduciary relation existed between plaintiff and the said Willis N. Gregory, with respect to the sale of plaintiff's stock; that by reason of such fiduciary relation, it was the duty of the defendant, Willis N. Gregory, to disclose to plaintiff the existence of any and all personal interest which he had or might have in the successful termination of such negotiations; that the failure of the said Willis N. Gregory to disclose to the plaintiff the existence of the agreement between him and the defendant, Davison Chemical Company,

as the result of which the said Davison Chemical Company paid to the defendant, Willis N. Gregory, upon the successful termination of said negotiations, for each share of stock sold by the plaintiff to the said Davison Chemical Company, the sum of $52.86 in addition to the sum of $106.00 which the said Davison Chemical Company paid to the plaintiff for such share of stock, was a breach of the duty which the defendant, Willis N. Gregory, owed to the plaintiff; and that because of this breach of duty, the plaintiff is entitled to recover of the defendant, Willis N. Gregory, the sum of $52.86, for each share of stock sold by the plaintiff to the Davison Chemical Company, the said sum having been received by the said Willis N. Gregory, and wrongfully retained by him.

Upon his findings of fact that the defendant, Davison Chemical Company, knew of the existence of the fiduciary relation between the plaintiff and the defendant, Willis N. Gregory, and with such knowledge entered into the secret agreement with the said Willis N. Gregory, as the result of which the said defendant paid to the said Willis N. Gregory the sum of $52.86 for each share of stock in the Eastern Cotton Oil Company, sold to said company by the plaintiff, the referee concluded as a matter of law that the plaintiff is entitled to recover of the defendant, Davison Chemical Company, the sum of $52.86 for each share of stock sold by the plaintiff to said company, the said sum having been wrongfully paid by the said Davison Chemical Company to the defendant, Willis N. Gregory, who with its knowledge and by its aid has failed to account to plaintiff therefor.

The foregoing conclusions of law were approved and confirmed by the judge. In accordance therewith, judgment was rendered that plaintiff recover of the defendants the sum of $3,753.06, with interest at six per cent from 6 May, 1926. Defendants contend that there is error in this judgment for that upon all the facts found by the referee, and approved by the judge, the plaintiff is not entitled to recover of the defendants, or of either of them.

For the purpose of determining the correctness of the conclusion of law made by both the referee and the judge on the facts found by them, that a fiduciary relation existed between the plaintiff and the defendant, Willis N. Gregory, with respect to the sale by the plaintiff of his stock in the Eastern Cotton Oil Company to the Davison Chemical Company, it is immaterial whether the relation between them was that of principal and agent, as suggested by the referee in his report. This is a fiduciary relation, but it is by no means the only relation which the law regards as fiduciary in its nature. And so, upon the facts found by both the referee and the judge, it is not necessary in the instant

case for this Court to decide whether the facts that the defendant, Willis N. Gregory, was the general manager, and the plaintiff was a stockholder of the Eastern Cotton Oil Company, are sufficient, in law, to constitute a fiduciary relation between them with respect to the sale of said stock. The courts generally have declined to define the term "fiduciary relation" and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property of either. In this, the courts have acted upon the same principle and for the same reason as that assigned for declining to define the term "fraud." The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. "It not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust,* but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." 25 C. J., 1119. In Pomeroy's Equity Jurisprudence, Vol. 2, sec. 956 (3d ed.), it is said: "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal."

There was no error in the conclusion of law, upon the facts established in this case, that a fiduciary relation existed between the plaintiff and the defendant, Willis N. Gregory, with respect to the sale of plaintiff's stock to the defendant, Davison Chemical Company. By reason of this relation the law imposed upon the defendant, Willis N. Gregory, the duty to make a full disclosure of all the facts and circumstances affecting the proposition of the Davison Chemical Company to buy plaintiff's stock in the Eastern Cotton Oil Company. This the defendant, Willis N. Gregory, did not do. He not only failed to advise plaintiff of the true value of his stock, this value being determined largely by what the Davison Chemical Company would pay for it, but he falsely and, we think, fraudulently concealed from the plaintiff and his fellow-stockholders the admitted fact that the Davison Chemical

Company had agreed to pay for said stock a sum of money which in fact amounted to at least the sum of $158.86 per share. The Davison Chemical Company has paid this sum per share for plaintiff's stock. Plaintiff has received of this sum only $106.00. Willis N. Gregory has received the balance, to wit: $52.86, which he wrongfully retains. In equity and good conscience, he must pay this sum to the plaintiffs, as the court has adjudged.

The defendant, Davison Chemical Company, entered into the secret agreement with Willis N. Gregory to pay to him, and pursuant to said agreement did pay to him the sum of $52.86 per share for each share of stock purchased by said company from the plaintiff, with full knowledge of the facts which constituted a fiduciary relation between the plaintiff and the said Willis N. Gregory. For this reason, the defendant, Davison Chemical Company, is liable to plaintiff for said sum of money. There is no error in the judgment that plaintiff recover of the defendants, Willis N. Gregory and Davison Chemical Company, the sum of $3,753.06, with interest at the rate of six per centum from 6 May, 1926. The judgment is

Affirmed.

C. C. SATTERFIELD v. ECKERD'S OF RALEIGH, N. C., INCORPORATED, AND H. C. MAEYER.

(Filed 4 November, 1931.)

Libel and Slander A b—Whether words spoken were slanderous held properly submitted to the jury in this case.

In an action against a mercantile corporation to recover damages for words spoken of and concerning the plaintiff by its manager, *Held:* the words spoken in the presence of others in the store, charging the plaintiff with being a rogue, thief and shoplifter are sufficient upon the question of slander to be submitted to the jury and sustain a judgment for damages.

APPEAL by defendants from *Barnhill, J.*, at March Term, 1931, of WAKE. No error.

This is an action to recover damages for an assault and for slander.

It is alleged in the complaint that on 24 December, 1929, the defendant, H. C. Maeyer, manager of a store of the city of Raleigh owned and operated by the defendant, Eckerd's of the city of Raleigh, N. C., Incorporated, wrongfully and unlawfully assaulted the plaintiff, while plaintiff was lawfully in said store.

It is further alleged in the complaint that on said day and in said store, while engaged in the performance of his duties as manager of

said store, the defendant, H. C. Maeyer, in the presence of plaintiff and of others, wrongfully and falsely spoke of and concerning the plaintiff words by which the said defendant intended to charge and did charge that plaintiff was a rogue, a thief, and a shoplifter; and that said words were spoken by the said defendant with actual malice, and in a reckless and wanton manner.

These allegations are denied in the answer filed by the defendants.

The issues submitted to the jury were answered as follows:

"1. Did the defendant Maeyer assault the plaintiff as alleged in the complaint? Answer: No.

2. Did the defendant Maeyer wrongfully and falsely utter to and of the plaintiff in the hearing of others in substance the words set out in the complaint, as alleged therein? Answer: Yes.

3. If so, did said defendant thereby intend to charge the plaintiff with being a rogue, thief, or shoplifter, and was the same so understood by those hearing the same? Answer: Yes.

4. Did the defendant Maeyer wrongfully utter of and concerning the plaintiff in the hearing of A. H. Tilley in substance the words set out in the complaint, as alleged therein? Answer: Yes.

5. If so, did said defendant thereby intend to charge plaintiff with being a rogue, thief or shoplifter, and was such language so understood by the hearers? Answer: Yes.

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

7. Were said statements by the defendant, Maeyer, of and concerning the plaintiff uttered with actual malice, or in a reckless and wanton manner as alleged in the complaint? Answer: Yes.

8. If so, what punitive damages, if any, is plaintiff entitled to recover of the defendants? Answer: $500.

After the issues had been answered by the jury as above, on motion of the defendants, the court set aside the answers to the 7th and 8th issues.

From the judgment that plaintiff recover of the defendants the sum of $1,500, and the costs of the action, the defendants appealed to the Supreme Court.

Clyde A. Douglass and Robert N. Simms for plaintiff.
Winston & Brassfield for defendants.

PER CURIAM. The assignment of error chiefly relied on by defendants on their appeal to this Court is based on their exception to the refusal of the trial court to allow their motion for judgment as of nonsuit. C. S., 567. This assignment of error cannot be sustained.

Whether the words which the evidence shows were spoken of and concerning the plaintiff by the defendant, H. C. Maeyer, are actionable as slanderous, was properly submitted to the jury. *Castelloe v. Phelps,* 198 N. C., 454, 152 S. E., 163.

The principle on which the defendant Eckerd's of Raleigh, N. C., Incorporated, is liable for the damages sustained by plaintiff, resulting from slanderous words spoken of and concerning him by its manager, the defendant, H. C. Maeyer, is discussed and applied in *Cotton v. Fisheries Products Co.,* 177 N. C., 56, 97 S. E., 712. We find no error. The judgment is affirmed.

No error.

H. A. SOMERS v. UNIVERSAL CREDIT COMPANY.

(Filed 4 November, 1931.)

Damages E a—Evidence held insufficient to support issue as to punitive damages.

Punitive damages for the wrongful seizure of the plaintiff's car are not recoverable when the evidence tends to show that the car was seized with the consent of the plaintiff, and where the jury awards punitive damages on such evidence in addition to compensatory damages for the wrongful seizure, the judgment rendered on the verdict will be modified by striking out the answer to the issue relating to the punitive damages.

APPEAL by defendant from *Frizzelle, J.,* at Second May Term, 1931, of ALAMANCE. Modified and affirmed.

The jury returned the following verdict:

1. Did the defendant wrongfully seize the car of plaintiff, as alleged in the complaint? Answer: Yes.

2. What amount, if any, is the plaintiff entitled to recover as compensatory damages? Answer: $149.00.

3. What amount, if any, is the plaintiff entitled to recover as punitive damages. Answer: $500.00.

4. In what amount, if any, is the plaintiff indebted to the defendant on the contract price of the automobile? Answer: Nothing.

Judgment for the plaintiff; appeal by the defendant.

Lewis C. Allen for appellant.

John S. Thomas for appellee.

PER CURIAM. We have discovered no evidence sufficient to sustain the answer to the third issue. His Honor instructed the jury to award punitive damages if they found from the evidence that the defendant seized the car in a rude and oppressive manner indicating malice, wantonness, and ill-will. The plaintiff testified that he laid the car key on his counter and said to the defendant's agent, "If he desired to take it, there it was; if he wanted to take the car, there was the key; if he desired to take it, there it was." This was equivalent to consent.

The jury awarded compensatory damages possibly because the plaintiff subsequently told the agent not to take the car away.

The answer to the third issue will be stricken out, and as thus modified the judgment is affirmed.

Modified and affirmed.

CITY OF ELIZABETH CITY v. A. L. AYDLETT.

(Filed 10 November, 1931.)

1. Municipal Corporations H b—Where zoning ordinance is reasonable and fair and does not unjustly discriminate it is valid.

A municipal corporation, in the interest of the public welfare, may establish areas within its limits and prescribe regulations as to the use of property within each area under its inherent police power, and this power is not static but expands to meet the changing conditions of progress, and although it may cause inconvenience or hardship in particular cases, the exercise of the zoning power is valid if the classifications are reasonable and fair and if the restrictions apply to all property within the district without unjust discrimination.

2. Same—Zoning ordinance in this case held constitutional and valid.

Where a city in the exercise of its inherent police power and under legislative authority enacts a reasonable and valid zoning ordinance which divides the city into certain districts and regulates the use of property in each by a uniform rule, but provides that the operation of lawful businesses already established at the time of the passage of the ordinance might be continued although not in conformity with the zoning provisions, and provides further that gasoline filling stations should not be erected in districts of specified classifications: *Held*, the city may enjoin an owner of property in the prohibited district from completing the erection of a filling station therein, and the ordinance will not be declared void as being discriminatory in that it permitted the continued operation of filling stations erected in the district prior to the passage of the ordinance. The distinction between zoning ordinances and ordinances regulating the erection of gasoline filling stations only is pointed out by ADAMS, J.

3. Same—Zoning ordinance will not be declared void as being confiscatory because resulting in financial loss in particular instance.

The test of the validity of a zoning ordinance of a municipal corporation is whether the classifications therein set out are fair and the scheme of development is sound, and the ordinance will not be declared invalid as being confiscatory because resulting in financial loss in a particular instance to an owner by restricting the use of his property in a district of a specified classification.

CLARKSON, J., dissents.

APPEAL by defendant from *Moore, Special Judge,* at May Term, 1931, of PASQUOTANK.

A. Laurence Aydlett, M. B. Simpson and McMullan & McMullan for appellant.

J. B. Leigh, John H. Hall and Thompson & Wilson for appellee.

ADAMS, J. The plaintiff is a municipal corporation. Private Laws 1923, ch. 15. The defendant, a resident thereof, is the owner of a lot situated on the northwest corner of Main and Road streets. In July, 1928, the board of aldermen passed an ordinance prohibiting the construction or maintenance of filling stations within specified municipal areas. The defendant's lot is within a district from which filling stations were excluded by the terms of this ordinance. Sometime before September, 1929, the defendant applied to the proper authorities of the city for permission to build a filling station on his lot and his application was denied. He then commenced the erection of the building and the city procured a warrant from a justice of the peace charging the defendant in a criminal proceeding with a breach of the ordinance. At the hearing the defendant was discharged; whereupon the city instituted a civil action to enjoin him from going on with the work. On appeal from a judgment rendered in the Superior Court this Court held upon the facts then appearing that the city was not entitled to injunctive relief. *Elizabeth City v. Aydlett,* 198 N. C., 585.

On 7 October, 1929, the city enacted a zoning ordinance pursuant to authority conferred by the General Assembly. Public Laws 1923, ch. 250. The ordinance was adopted in the interest of the public health, safety, morals, comfort, prosperity, and general welfare of the city and was designed to regulate and restrict the location of buildings to be used for trade, industry, residence, or other specified purposes; to divide the city into zones or districts; to classify buildings on the basis of the kind or character of the business to be done; and to prescribe a general method of administration. To this end the city was divided into

Residence A Districts, Residence B Districts, Business A Districts, Business B Districts, and Industrial Districts. With respect to each class the ordinance purports to be uniform and, not only to secure the public safety, but to facilitate provision for transportation, water, schools, and other public requirements.

The defendant's lot is in Business A District; and the zoning ordinance prohibits the erection of filling stations in this district at any time after the ordinance became effective.

After the adoption of the zoning ordinance the defendant undertook to complete the filling station without a permit from the city, and the plaintiff brought suit on 15 April, 1930, to restrain the defendant from proceeding in his enterprise. The restraining order issued at the commencement of the action was dissolved at the hearing, and upon appeal to the Supreme Court the judgment was reversed. *Elizabeth City v. Aydlett,* 200 N. C., 58. The cause again came on for hearing in the Superior Court of Pasquotank County at the May Term, 1931, and the judge, upon a waiver of trial by jury, found from the evidence that the zoning ordinance had been duly adopted by the governing body of the city, not arbitrarily or with a purpose to discriminate against the defendant or any other person, but in the proper exercise of the police power for the promotion of the objects set out in the title of the ordinance, and that the regulations are reasonable, valid, and lawful.

The judgment which the appeal brings up for review is assailed on the ground that the ordinance in question is not only confiscatory but invalid and unenforceable because it does not operate uniformly and subject to its provisions all persons within the defined locality. The latter position is based upon the finding that at the time the zoning ordinance was passed four other filling stations were in operation in the district in which the defendant's lot is situated "without molestation, actual or threatened, by the plaintiff or its agents," and that the station erected by the defendant compares favorably as to structure and operation with the other four.

The zoning ordinance provides that if at the time it was enacted any lot, building, or structure was being used in a manner or for a purpose which did not conform to the ordinance and was not prohibited by some other ordinance, the manner of use or purpose might be continued. Section 2(2). There is no finding that either of the four filling stations erected and operated before the zoning ordinance was adopted, and now operated, in territory covered by Business A District is prohibited by some other ordinance. The ordinance of 1928 was intended

to regulate the location and use of filling stations "and other business of like kind." It was not a zoning ordinance. It laid out certain districts described as "strictly residential or for church or school location" and contained the clause, "There is no filling station located therein." The ordinance of 1929 is a city zoning ordinance. Neither of its districts is coterminous with the boundaries of the former ordinance. It is a contention of the defendant that the law does not presume the existence of an independent ordinance which prohibits the maintenance of filling stations in any particular district and that the defendant's lot, therefore, is not subject to such prohibition. For the present purpose let us concede the defendant's position. The situation, then, is this: When Business A District was laid off and included in the city zoning ordinance, four filling stations were maintained within its boundaries. Does the ordinance which prohibits the subsequent construction and use of such stations within the district create an unlawful discrimination?

The word "zoning" signifies the division of a municipal corporation into separate areas and the application to each area of regulations which generally pertain to the use of buildings or to their structural or architectural design. Such municipal action finds its authority in the police power which may be exercised, not only in the interest of the public health, morals, and safety, but for the promotion of the general welfare. This power embraces the whole system of internal regulation and cannot be bargained away. *S. v. Vanhook,* 182 N. C., 831; *Pearsall v. R. R.,* 161 U. S., 646, 40 L. Ed., 838, 845. Its nature and extent have been defined in these words: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States,* 167 U. S., 518, 42 L. Ed., 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell,* 219 U. S., 104, 55 L. Ed., 112.

The police power is not static. It expands to meet conditions which necessarily change as business progresses and civilization advances. This is adverted to in *Euclid v. Ambler Realty Company,* 272 U. S., 365, 71 L. Ed., 303, in which a zoning ordinance was upheld against an attack on the question of its constitutionality: "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity

of which, as applied to existing conditions, are so apparent that they are uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained under the complex conditions of our day for reasons analogous to those which justify traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."

The objection of discrimination under an ordinance similar to one under consideration was raised in *City of Aurora v. Burns,* 149 N. E., (Ill.), 784, and was declared untenable. In a district of the city there were twelve grocery stores; the defendants had another under construction; and the city brought suit to enjoin them from constructing or using the building in violation of the ordinance, which contained this provision: "Any lawful use existing at the time of the adoption of this ordinance of any building or premises may be continued, although such use does not conform to the provisions of this ordinance for the district in which such use is situated." We quote from the opinion which states the principle which is controlling in the present exception: "Zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs. An arbitrary creation of districts, without regard to existing conditions or future growth and development, is not a proper exercise of the police power and is not sustainable. No general zoning plan, however, can be inaugurated without incurring complaints of hardship in particular instances. But the individual whose use of his property may be restricted is not the only person to be considered. The great majority, whose enjoyment of their property rights requires the imposition of restrictions upon the uses to which private property may be put, must also be taken into consideration. The exclusion of places of business from residential districts is not a declaration that such places are nuisances, or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development.

"The building zone ordinance of the city of Aurora, pursuant to the requirement of the Enabling Act (Laws 1921, p. 180), permits lawful uses of buildings at the time of the passage of the ordinance, although not in conformity with its provisions, to continue thereafter. This

exception is made so that the ordinance shall not have a retroactive operation. It would be manifestly unjust to deprive the owner of property of the use to which it was lawfully devoted when the ordinance became effective. Fire limits are established within which the subsequent erection of wooden buildings is prohibited, yet existing wooden buildings are permitted to remain. *King v. Davenport,* 98 Ill., 305, 38 Am. Rep., 89; *County of Cook v. City of Chicago, supra.* Limitations upon the height of buildings, varying according to different districts, have been sustained. *Welch v. Swasey,* 193 Mass., 364, 79 N. E., 745, 23 L. R. A. (N. S.), 1160, 118 Am. St. Rep., 523, affirmed in 214 U. S., 91, 29 S. Ct., 567, 53 L. Ed., 923. The fact that an ordinance which prohibits the piling of lumber for storage or drying within 100 feet of a residence does not apply to one built after the lumber is piled does not render the ordinance invalid for unjust discrimination, since the difference between vacant property and property already occupied by a residence is, in view of the object of the ordinance, a reasonable classification. *City of Chicago v. Ripley,* 249 Ill., 466, 94 N. E., 931, 34 L. R. A. (N. S.), 1186, Ann. Cas., 1912A, 160.

"These, among many others, are police regulations which create discriminations, and yet are of undoubted validity. To exempt buildings already devoted to a particular use from a prohibition against such use of buildings thereafter erected in a specified area is not an unlawful discrimination. Such a classification has a sound basis and is reasonable. *Quong Wing v. Kirkendall,* 223 U. S., 59, 32 S. Ct., 192, 56 L. Ed., 350; *Welch v. Swasey, supra; Ayer v. Commissioners on Height of Buildings,* 242 Mass., 30, 136 N. E., 338; *Spector v. Building Inspector of Milton, supra; Commonwealth v. Alger,* 7 Cush. (Mass.), 53. Even if appellants' property could be used more profitably for business than for residential purposes, that fact would be inconsequential in the broad aspects of the case. Every exercise of the police power relating to the use of land is likely to affect adversely the property rights of some individual. Uncompensated obedience to proper police regulations has been often required. *Fischer v. St. Louis,* 194 U. S., 361, 24 S. Ct., 673, 48 L. Ed., 1018; *California Reduction Co. v. Sanitary Reduction Works,* 109 U. S., 306, 26 S. Ct., 100, 50 L. Ed., 204; *Reinman v. Little Rock,* 237 U. S., 171, 35 S. Ct., 511, 59 L. Ed., 900; *Hadacheck v. City of Los Angeles, supra.*"

In particular cases inconvenience, even hardship may result; but as said in *Euclid v. Ambler Realty Company, supra,* "This is no more than happens in respect of many practice-forbidding laws which this Court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves."

The zoning ordinance adopted by the plaintiff was carefully drawn in conformity with the prevailing opinion and is not subject to the objection of unlawful discrimination. Metzenbaum's The Law of Zoning, 150, *et seq.; Welch v. Swasey,* 214 U. S., 91, 53 L. Ed., 923; *Hadacheck v. Sebastian,* 239 U. S., 394, 60 L. Ed., 348; *Zahn v. Board of Public Works,* 274 U. S., 325, 71 L. Ed., 1074; *Gorieb v. Fox,* 274 U. S., 603, 71 L. Ed., 1228; *Berry v. Houghton,* 204 N. W. (Minn.), 569; *Appeal of Ward,* 137 At. (Pa.), 630; *S. v. Hillman,* 147 At. (Conn.), 294; *Adams v. Kalamazoo Ice & Fuel Co.,* 222 N. W. (Mich.), 86; *Spector v. Building Inspector,* 145 N. E., 265; *Turner v. New Bern,* 187 N. C., 541.

We are also of opinion that the ordinance is not invalid because confiscatory. The fact that the erection of a filling station would increase the rent of the lot is not decisive. Financial loss is not the test; the question is whether the scheme is sound and the classification fair. If the question is fairly debatable the court will not substitute its judgment for that of the legislative body which creates the ordinance. *Zahn v. Board of Public Works, supra; S. v. Hillman, supra;* The Law of Zoning, 71.

In support of the principle that ordinances must be uniform the appellant cites *Bizzell v. Goldsboro,* 192 N. C., 348, *Clinton v. Oil Co.,* 193 N. C., 434, *MacRae v. Fayetteville,* 198 N. C., 51, and *Burden v. Ahoskie, ibid.,* 92. These cases deal exclusively with one enterprise—the construction and operation of gasoline filling stations. The ordinances were held inoperative because they created an unlawful discrimination between individuals engaged in the same business. They were altogether unrelated to municipal zoning, which, affecting the whole population, is intended to promote the health, safety, and welfare of the public by separating the commercial or industrial districts of the city from those which are set apart for other purposes, such as residences, schools, and churches. They are differentiated from zoning ordinances in *Elizabeth City v. Aydlett,* 200 N. C., 58. Unless the theory of nonconforming uses is practically applied it will be well-nigh impossible to zone the cities and towns of the State. It is an almost invariable rule to find a filling station in that part of a town or city which in the interest of the public welfare should, under the zoning system, be devoted to other uses. If the ordinance destroys an existing business it is retroactive; if it cannot be enforced because such business exists zoning as a practical matter is not possible.

We have referred to the police power as inherently necessary to the maintenance of government; but the General Assembly has expressly

empowered cities and towns to adopt zoning regulations and to restrain, correct, or abate their violation, and this power the appellant does not question. *Harden v. Raleigh,* 192 N. C., 395; *Little v. Raleigh,* 195 N. C., 793. Judgment

Affirmed.

CLARKSON, J., dissents.

COMMERCIAL CREDIT COMPANY v. N. W. GREENHILL, SWIFT MOTOR COMPANY AND C. A. STELL.

(Filed 10 November, 1931.)

Principal and Agent A a—Evidence held sufficient to raise issue as to whether one of defendants was collecting agent of the plaintiff.

Where there is evidence that an automobile dealer had repeatedly collected notes sold by it to a credit company, and that a purchaser from the dealer, a defendant in an action by the credit company for possession of the car, had paid the dealer the purchase price of the car, and that the credit company had looked to the dealer for payment of the note endorsed to it, and that payment had not been made to the credit company because of a dispute between the credit company and the dealer as to the amount due: *Held,* the evidence is sufficient to raise an issue as to whether the dealer was authorized by the credit company to collect the notes, and a directed verdict in favor of the credit company for possession of the automobile is error.

APPEAL by defendant, N. W. Greenhill, from *Devin, J.,* at April Term, 1931, of DURHAM. New trial.

This is an action to recover of the defendant, N. W. Greenhill, the automobile described in the complaint, and of the defendants, Swift Motor Company and C. A. Stell, the amount due on a note executed by the defendant, C. A. Stell, payable to the defendant, Swift Motor Company, and transferred and assigned by said Motor Company to the plaintiff.

The consideration for the note sued on was the balance due on the purchase price of the automobile described in the complaint. This automobile was sold to the defendant, C. A. Stell, by the defendant, Swift Motor Company, on or about 8 February, 1928. The note was secured by a conditional sale contract executed by the defendant, C. A. Stell, by which the title to said automobile was retained by the defendant, Swift Motor Company, until the note was paid in full. The conditional sale contract was duly recorded in Durham County on 9 February, 1928.

Both the note and the conditional sale contract were transferred and assigned by the defendant, Swift Motor Company, to the plaintiff, for value and before the maturity of the note. At the date of the commencement of this action, the plaintiff was the holder of both the note and the conditional sale contract. The amount due on the note was $703.80. No part of this amount had been paid by the defendant, C. A. Stell, the maker of the note, or by the defendant, Swift Motor Company, its endorser.

After the note and conditional sale contract had been transferred and assigned to the plaintiff, the defendant, C. A. Stell, delivered the automobile which he had purchased from the Swift Motor Company, and which is described in the conditional sale contract held by the plaintiff, to the defendant, Swift Motor Company, and received from said Motor Company, in exchange for said automobile, another automobile. Thereafter, on 29 March, 1929, the defendant, Swift Motor Company, with the consent of the defendant, C. A. Stell, sold said automobile to the defendant, N. W. Greenhill. The defendant, N. W. Greenhill, paid to the defendant, Swift Motor Company, as the purchase price for said automobile, the sum of $800.00, in cash. At the time he purchased and paid for said automobile, the defendant, N. W. Greenhill, had no actual notice of the title thereto held by the plaintiff, by virtue of the conditional sale contract. He had no such notice until 7 May, 1928, when he was informed by an agent of the plaintiff that plaintiff claimed title to the automobile by virtue of the recorded conditional sale contract.

Within a few days after the defendant, N. W. Greenhill, purchased the automobile, and paid to the defendant, Swift Motor Company, the sum of $800.00, in cash, as the purchase price therefor, the Swift Motor Company notified the plaintiff that the automobile described in the conditional sale contract executed by C. A. Stell, and then held by the plaintiff, had been sold to the defendant, N. W. Greenhill, and that said defendant had paid to it, as the purchase price for said automobile, the sum of $800.00, in cash. The plaintiff was instructed by the defendant, Swift Motor Company, to draw on said company, through the First National Bank of Durham, N. C., for the amount due on the note executed by the defendant, C. A. Stell, and then held by plaintiff. Pursuant to this instruction, plaintiff drew on the defendant, Swift Motor Company, for the amount which plaintiff claimed was due on the note. Plaintiff's draft was not paid because of the contention of the Swift Motor Company that the amount of the draft exceeded the amount due on the note. The controversy between plaintiff and the Swift Motor Company, with respect to the exact amount due on the note pended until 4 May, 1928. On this day the draft was returned to plaintiff

by the First National Bank of Durham. During the pendency of the controversy between plaintiff and the Swift Motor Company, for more than thirty days, the Swift Motor Company at all times had on deposit with the First National Bank of Durham, to its credit, a sum of money sufficient in amount, and available for the payment of the amount due on the note. During this time, the financial condition of the Swift Motor Company was bad. This condition was known to the plaintiff. On or about 4 May, 1928, the Swift Motor Company was duly adjudged insolvent, and upon such adjudication, a receiver was appointed for said company. The amount on deposit with the First National Bank of Durham to the credit of the Swift Motor Company, at the date of its adjudication as insolvent, was applied by said bank as a payment on its claims against the Swift Motor Company.

For several years prior to the transactions out of which this action arose, the Swift Motor Company, a corporation organized under the laws of this State, was engaged in business at Durham, N. C., as a dealer in automobiles. From time to time, the said company sold to the plaintiff, Commercial Credit Company, notes secured by conditional sales contracts executed by its customers for the balance due on the purchase price of automobiles. These notes were payable in monthly installments. Notices of payments due on these notes were sent to the makers by the plaintiff. In some instances the makers, in response to these notices, remitted direct to the plaintiff; in other instances, the makers paid the amounts due on the notes to the Swift Motor Company. From time to time, the Swift Motor Company remitted to the plaintiff the sums paid to said company by its customers on account of notes held by the plaintiff. Plaintiff received these sums from the Swift Motor Company, without objection, and applied the same as payments on said notes.

The plaintiff knew within two days after the defendant, N. W. Greenhill, bought and paid for the automobile, that said defendant had paid to the defendant, Swift Motor Company, the sum of $800.00, in cash, as the purchase price for the automobile. After plaintiff was instructed by the Swift Motor Company to draw on said company for the amount due on the note executed by the defendant, C. A. Stell, plaintiff looked to said company for the payment of said note; it made no demand on the defendant, C. A. Stell, or on the defendant, N. W. Greenhill, for the payments due on said note. Notwithstanding the controversy between plaintiff and the Swift Motor Company, with respect to the exact amount due on said note, the plaintiff did not "push" the Swift Motor Company for settlement, because it knew that said company was "hard up," and because it had other claims against said company which it did

not care to jeopardize. Plaintiff did not notify the defendant, N. W. Greenhill, that it claimed title to the automobile, until after a receiver of the Swift Motor Company had been appointed.

The only issue submitted to the jury involving the controversy between the plaintiff and the defendant, N. W. Greenhill, was as follows:

"1. Is the plaintiff entitled to the possession of the automobile described in the complaint?"

With respect to this issue, the court instructed the jury as follows:

"If you find the facts to be as testified and as shown by all the evidence, you should answer this issue, 'Yes.'"

Under this instruction, the jury answered this issue, "Yes."

From judgment that plaintiff is the owner and entitled to the possession of the automobile, the defendant, N. W. Greenhill, appealed to the Supreme Court.

R. H. Sykes for plaintiff.
Bryant & Jones for defendant.

CONNOR, J. At the trial of this action in the Superior Court, the defendant, N. W. Greenhill, contended that there was evidence tending to show facts from which the jury could reasonably infer that the defendant, Swift Motor Company, was the agent of the plaintiff, Commercial Credit Company, and as such agent received the money paid to it by the defendant, N. W. Greenhill, as the purchase price of the automobile, for and in behalf of the plaintiff. On his appeal to this Court, the said defendant contends that for this reason it was error for the trial court (1) to decline to submit to the jury issues tendered by him involving this contention; and (2) to instruct the jury in effect, to answer the first issue submitted to the jury by the court, "Yes."

The contentions of the defendant in this Court are supported by the decisions in *Bank v. Howell,* 200 N. C., 637, 158 S. E., 203, and in *Buckner v. C. I. T. Corporation,* 198 N. C., 698, 153 S. E., 254. In these cases it is held that where there is evidence tending to show that an alleged agent has repeatedly collected money upon debts owed to the alleged principal, and the alleged principal has received the money collected by the alleged agent, and applied same as payments on his debts, the inference is permissible that an agreement to that effect had been made by and between them, and that the evidence is sufficient to make out a prima facie case of agency. On this principle, it was error for the trial court to instruct the jury in effect to answer the first issue, "Yes," and to decline to submit to the jury the issues tendered by the defendant, N. W. Greenhill. For these errors the defendant is entitled to a new trial.

Whether the principle on which the appeal in *Wilkins v. Welch,* 179 N. C., 266, 102 S. E., 316, was decided, is applicable in the instant case, need not now be decided. In one aspect of this case, it seems that the principle may be applicable and determinative of the right of the plaintiff to recover the automobile of the defendant, N. W. Greenhill.

New trial.

LILLIAN C. MOSES v. W. T. MAJOR.

(Filed 10 November, 1931.)

1. Judgments G a—Judgment is lien on all land to which judgment debtor has title at time of docketing of judgment.

Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of ten years from the time of its docketing, C. S., 614, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor.

2. Same—Judgment lien is not affected by adverse possession against the judgment debtor.

Adverse possession against the judgment debtor for a period of seven years under color of title does not affect the lien of the judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. C. S., 428.

3. Execution C a—Leave of court is not now necessary to execution on judgment after three years from date of docketing.

C. S., 668, providing that after the lapse of three years from the entry of judgment execution could be issued only by leave of court, was repealed by the act of 1927, and leave of court is not necessary for execution upon a judgment after the lapse of three years where the execution is issued after the effective date of the act of 1927 and within ten years from the date of the docketing of the judgment. C. S., 614.

APPEAL by plaintiff from *Clement, J.,* at April Term, 1931, of FORSYTH.

Action to enjoin the sale of land under execution and to cancel a judgment. The trial court found the following facts:

1. The defendant obtained a judgment against S. E. Case and E. S. Porter on 30 January, 1922, for $919, with interest thereon from 19 June, 1920, and for costs; and had the judgment docketed on 8 February, 1922.

2. At the time the judgment was docketed the record title to the property described in the complaint was in S. E. Case and E. S. Porter.

3. On or about 15 June, 1920, Harvey Allen executed a deed of trust on the property described in the complaint to E. P. Yates, trustee for S. E. Case, for a certain sum and said deed of trust was recorded in the office of the register of deeds of Forsyth County on or about 1 September, 1920.

4. On or about 25 January, 1921, a deed was executed by E. P. Yates, trustee, for the property described in the complaint, to A. F. Moses, and said deed was recorded on 9 February, 1921, in the office of the register of deeds of Forsyth County, and thereafter the said A. F. Moses conveyed said property to R. W. Tise; and in the latter part of 1929, R. W. Tise executed a quitclaim deed to said property to Lillian C. Moses, the plaintiff, which was recorded in the office of the register of deeds of Forsyth County, on 4 June, 1929; and the deed from A. F. Moses and wife to R. W. Tise was recorded in the office of the register of deeds of Forsyth County, on 7 January, 1928.

5. The defendant, on 9 August, 1929, caused an execution to be issued upon the judgment heretofore referred to, and caused the sheriff of Forsyth County to advertise for sale, for the satisfaction of said judgment, all the right, title and interest of S. E. Case and E. S. Porter in and to the land described in the complaint; the said execution was returned by the sheriff and thereafter another execution was issued and placed in the hands of the sheriff of Forsyth County, who advertised the land described in the complaint for sale under said execution on 2 December, 1929.

6. On or about 30 November, 1929, the plaintiff commenced the present action and restrained the defendant and the sheriff of Forsyth County from selling said land.

7. The judgment entitled W. T. Major v. S. E. Case and E. S. Porter is a valid lien on the property described in the complaint, known as lots numbered 5, 6, and 7, on the plat of A. F. Moses, recorded in the office of the register of deeds of Forsyth County, in Plat Book No. 2, at page 28A, and is superior to the claim of the plaintiff.

The jury returned the following verdict:

1. Have the plaintiff and those under whom she claims title been in open, notorious, and adverse possession, under known and visible metes and bounds, of the property described in the complaint, for a period of seven years prior to 9 August, 1929, as alleged in the complaint? Answer: Yes.

The trial judge being of opinion that the plaintiff and those under whom she claims did not hold the real property adversely to the defendant adjudged that the restraining order be dissolved and that the defendant recover his costs. The plaintiff excepted and appealed.

N. S. Crews, H. Bryce Parker and Fred S. Hutchins for plaintiff.
Lacy M. Butler for defendant.

ADAMS, J. So far as the record disclosed the title to the land described in the complaint was in Case and Porter when the defendant recovered his judgment against them. The judgment was docketed on 30 January, 1922, and was a lien on the land for a period of ten years from that date. C. S., 614.

In her complaint the plaintiff alleged that Case and Porter conveyed the property to Harvey Allen on 15 June, 1920, but the defendant denied the allegation and there is no finding that such conveyance was made. There is nothing in the record to show that title was ever conveyed by Case and Porter; and the docketed judgment fixed the lien upon the land when they had the title. The execution was issued on 9 August, 1929, within ten years from the date the judgment was docketed.

The plaintiff seeks to enjoin the execution and to vacate the judgment on the ground that the sale would create a cloud upon her title and would impair its value. She has no complete chain of title and relies upon adverse possession for seven years prior to the time the execution was issued as determined by the verdict. She says, also, that no execution was issued on the judgment during this period.

With respect to this proposition we may suggest that the statute relating to the possession of real property for seven years (C. S., 428) restricts an entry upon land or an action to recover it by a person claiming title or the right of possession. The defendant is a judgment creditor; he has no right of entry upon the plaintiff's land or cause of action for its possession; he has neither *jus in re* nor *jus ad rem* in the judgment debtor's land but a mere right to make his lien effectual by following the course prescribed by law. *Dail v. Freeman,* 92 N. C., 351. As to him the plaintiff's possession was not adverse. The land is not relieved of the judgment lien by a transfer of the debtor's title, and adverse possession cannot defeat the efficacy of a valid judgment lien. C. S., 668, which provided that after the lapse of three years from the entry of judgment execution could be issued only by leave of the court, was repealed by the act of 1927, before the issuance of the execution in question; and section 667 was made to conform to the new law. Pub. Laws 1927, ch. 24.

We are of opinion that none of the cases cited by the appellant sustains her several contentions.

No error.

MOLLIE BUNCH HOLLOWELL, WIDOW OF JOHN W. HOLLOWELL, DECEASED, v. NORTH CAROLINA DEPARTMENT OF CONSERVATION AND DEVELOPMENT, SELF-INSURER, EMPLOYER.

(Filed 10 November, 1931.)

Master and Servant F i—An appeal from an award by a member of the Industrial Commission will lie only to the full Commission.

An appeal from the award of a single member of the Industrial Commission in a hearing before him will not lie directly to the Superior Court, the Workmen's Compensation Act not providing that the findings of fact of a single commissioner should be conclusive or for the judge of the Superior Court to find the facts, but the act provides for review by the full Commission upon application, and for the right of appeal from the award of the full Commission to the Superior Court upon questions of law, and where an appeal has been taken from the award of a single commissioner directly to the Superior Court the case will be remanded with leave to the respondent to appeal to the full Commission.

APPEAL by petitioner from *Grady, J.*, at May Term, 1931, of WAKE.

This is a claim from Chowan County for the death of John W. Hollowell, a deputy forest warden, who was killed 30 August, 1930, by John, Kermet, and Levi Nixon.

The claim was heard before M. H. Allen, chairman of the Industrial Commission, who found that the petitioner is the sole dependent of the deceased; that the deceased at the time of his death was in the employ of the Department of Conservation and Development as a deputy forest warden and *ex officio* game warden; that it was his duty to enforce the fishing laws and regulations; that the Department of Conservation and Development dealt with him as an *ex officio* fish warden; that the deceased was its employee upon a commission contract; that the parties are bound by the Workmen's Compensation Act; and that the accident and death of deceased arose out of and in the course of his employment.

Upon these facts compensation was awarded the claimant. The defendant appealed directly to the Superior Court without applying to the full Commission for a review. In the Superior Court the award of the Industrial Commission was set aside and it was adjudged that the petitioner recover nothing by the suit. The petitioner excepted and appealed.

Privott & Privott for petitioner.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Siler for defendant.

ADAMS, J. The respondent appealed from the order made by the chairman of the Industrial Commission directly to the Superior Court

of Wake County without applying to the full Commission for its review of the proceedings. This mode of obtaining a review of the hearing by one member of the Commission is not within the contemplation of law. Public Laws 1929, chap. 120, secs. 58, 59, 60. When made by only one member of the Commission, the award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall be sent to the parties. If no further action is taken this award is final. Within seven days from the date when notice of the award shall have been given, application for a review of the award may be made to the full Commission. The decision of the full Commission is conclusive and binding as to all questions of fact, but within the time prescribed either party may appeal upon questions of law from such decision to the Superior Court.

There is no provision that findings of fact made by a single member of the Commission shall be conclusive on appeal, or that the judge on appeal shall find any facts from the evidence. It was the obvious purpose of the Legislature to authorize an appeal to the Superior Court only from a decision of the full Commission.

The judgment that the petitioner recover nothing is reversed, and the cause is remanded with leave to the respondent to apply for a hearing by a full Commission.

Error and remanded.

H. H. MOORE, EMPLOYEE, DECEASED, MRS. MAUDE MOORE, v. PINE HALL BRICK AND PIPE COMPANY ET AL.

(Filed 10 November, 1931.)

(For digest see *Hollowell v. Department of Conservation, ante,* 616.)

APPEAL by plaintiff from *Clement, J.,* at April Term, 1931, of FORSYTH. Error and remanded.

Peyton B. Abbott and Hastings & Booe for appellant.
Ralph V. Kidd for appellee.

ADAMS, J. In *Hollowell v. North Carolina Department of Conservation and Development, ante,* 616, we held that an appeal from the award of one member of the Industrial Commission cannot be taken directly to the Superior Court but must first be reviewed by the full Commission. The cause is remanded with leave to the appellant to appeal to the full Commission as provided by law.

Error and remanded.

STATE v. DUDLEY MOORE.

(Filed 10 November, 1931.)

1. Criminal Law L a—Appeal in capital case not prosecuted according to rules will be dismissed, no error appearing on record.

Where an appeal in a capital case *in forma pauperis* is not prosecuted according to the Rules of Court, and after the expiration of time for filing the statement of case on appeal, an *ex parte* statement is filed, and later, upon suggestion of the Attorney-General, the record of the case as agreed to by the solicitor and counsel for defendant is certified up by the clerk of the Superior Court, but is not signed by either and contains no assignments of error, the Supreme Court, not withstanding the insufficiency of the papers to constitute a proper statement of the case, will examine the *ex parte* statement and the "record of the case," and upon no error appearing upon either or on the face of the record proper, the judgment will be affirmed and the appeal dismissed.

2. Appeal and Error F b—A broadside exception to the charge will not be considered.

An unpointed or broadside exception to the charge of the trial court will not be considered on appeal.

APPEAL by defendant from *Warlick, J.*, at August Term, 1931, of DAVIDSON.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one Mrs. Jacob G. Berrier.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals.

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

Hosie V. Price and P. A. Escoffery for defendant.

STACY, C. J. At the August Term, 1931, Davidson Superior Court, the defendant herein, Dudley Moore, was tried upon an indictment charging him with the murder of Mrs. Jacob G. Berrier, which resulted in a conviction and sentence of death. The prisoner gave notice of appeal to the Supreme Court, and was allowed 30 days within which to make out and serve his statement of case on appeal, which was not done, although *in forma pauperis* was authorized.

The time for serving case on appeal expired 28 September, 1931, and as nothing had been done by the prisoner towards perfecting his appeal, the clerk of the Superior Court on 29 September certified the facts to the Attorney-General pursuant to C. S., 4654.

Thereafter, the prisoner employed counsel, other than those assigned by the trial court to defend him, and an *ex parte* "statement of case on appeal" was filed in this Court, with request that the same be considered by the Court, notwithstanding patent irregularities and defects appearing on the face of it.

After suggestion by the Attorney-General to counsel for the prisoner that this *ex parte* statement had never been served on the solicitor or settled in any way as the case on appeal, the entire "record in the case" was certified up by the clerk of the Superior Court. This seems to be the stenographer's notes reduced to narrative form, and while the clerk's certificate recites that it is the "record in the case as agreed to by the solicitor for the State and the attorney for the defendant," it nowhere purports to be signed by the solicitor or counsel for the defendant, and it contains no assignments of error.

Fourteen exceptions were apparently noted throughout the trial, the last being: "The defendant assigns as error the judge's charge." It was said in *McKinnon v. Morrison,* 104 N. C., 354, 10 S. E., 513, that a broadside exception "to the charge as given" would not be considered. Unpointed exceptions to the charge are unavailing on appeal. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175.

Notwithstanding the patent insufficiency of these papers to constitute a proper statement of the case on appeal, we have examined both the prisoner's *ex parte* statement and the "record of the case," and find no error appearing on either, or on the face of the record proper. *S. v. Goldston, ante,* 89.

Judgment affirmed. Appeal dismissed.

STATE OF NORTH CAROLINA ON RELATIONSHIP OF COMMITTEE ON GRIEVANCES OF THE NORTH CAROLINA BAR ASSOCIATION v. H. L. STRICKLAND, ATTORNEY AT LAW.

(Filed 10 November, 1931.)

Costs B a—The State is liable for the costs in a proceeding for disbarment where judgment is rendered in respondent's favor.

Where the proceedings for disbarment of an attorney has not been sustained the costs are taxable against the State under the provisions of C. S., 1236, 214, and an order erroneously taxing them against the county in which the matter was tried will be vacated. *Blount v. Simmons,* 119 N. C., 50, cited and applied.

BROGDEN, J. This cause was disposed of by the opinion of the Court reported in 200 N. C., at page 630. The costs of the action were taxed against Mecklenburg County. Thereupon Mecklenburg County duly filed in this Court a motion to retax the costs upon the theory that the county was not a party to the action, and consequently, not liable for costs.

A disbarment proceeding is regulated by C. S., 208, *et seq.* C. S., 214, provides that "the proceedings must be conducted in the name of the State, and in all cases the solicitor of the district shall appear and prosecute the accusation and be responsible for the faithful discharge of the duties required of him under this article, and he may be assisted by other counsel." C. S., 1236, provides that "in all civil actions prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases and to the same extent as private parties." C. S., 1236, was originally Code, section 536, and was construed in *Blount v. Simmons,* 119 N. C., 50. The Court said: "We find nothing in the Constitution depriving the Legislature of power to enact Code, sec. 536, and we do not think it will impair the sovereign character of the State to meet its just liabilities, whether in the form of costs or otherwise."

The Court is of the opinion that the case of *Blount v. Simmons, supra,* is decisive upon the question of costs, and it is ordered and adjudged that the costs be taxed against the State of North Carolina, and the order heretofore issued taxing the costs against Mecklenburg County is hereby vacated.

STATE v. HERMAN CASEY.

(Filed 10 November, 1931.)

1. Criminal Law J c—After affirmance of judgment by Supreme Court the Superior Court has jurisdiction to hear motions for new trial.

Where the Supreme Court has affirmed the judgment on an appeal in a criminal case and the judgment has been certified to the clerk of the Superior Court, C. S., 1412, the case is in the latter court for the purpose of the execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence, C. S., 4644, and the motion is made in apt time if made at the next succeeding term after the case is certified down.

2. Same—Jurisdiction of trial court to hear motions for new trial after affirmance of judgment by Supreme Court applies to capital cases.

An appeal in a criminal case does not vacate the judgment of the Superior Court, C. S., 4654, and although C. S., 4663 as amended by chap. 55, Public Laws of 1925, provides that the clerk of the Supreme Court

shall notify the warden of the penitentiary of the affirmance of the judgment in a capital case for execution of the sentence, yet the judgment to be executed is the judgment of the Superior Court, and it will not be held that the law intended to be less mindful of the rights of one condemned to die than of those convicted of less offenses, and under the provisions of the Federal Constitution, Art. XIV, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws" it is *Held*, a motion for a new trial for newly discovered evidence and for disqualification of jurors may be made in a capital case in the trial court at the next succeeding term of court after the affirmance of the judgment by the Supreme Court. C. S., 4644.

3. Statutes B a—Courts will adopt construction of statute which is constitutional.

Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the Court will adopt the former and reject the latter.

4. Appeal and Error J b—Where court exercises discretion under erroneous belief that it was without jurisdiction the case will be remanded.

Where a motion for a new trial for disqualification of jurors and for newly discovered evidence has been denied by the trial court under the erroneous belief that it lacked jurisdiction to hear the motion, and denied also in the exercise of the discretion, the case is appealable, and as the court's erroneous belief as to its jurisdiction might have affected the exercise of the discretionary powers, the case will be remanded on appeal.

ADAMS, J., dissents.

BROGDEN, J., concurring.

CLARKSON, J., dissenting.

APPEAL by defendant from *Devin, J.*, at August Term, 1931, of LENOIR.

Motion by defendant for new trial on grounds of disqualification of certain jurors by reason of alleged fraud and prejudice, and for newly discovered evidence, made in the Superior Court at the next succeeding term following affirmance of judgment on appeal.

At the September Special Term, 1930, Lenoir Superior Court, Hon. W. A. Devin, judge presiding, the movant, Herman Casey, was tried upon an indictment charging him with the murder of one James C. Causey, which resulted in a conviction and sentence of death. On appeal to the Supreme Court the verdict was upheld and the judgment affirmed, opinion filed 27 June, 1931.

Several weeks after the adjournment of the September Special Term of court at which the case was tried, the movant learned for the first time of the matters affecting the jury and of the newly discovered evidence. Thereupon, at the December Term, 1930, Lenoir Superior Court, the next succeeding term after the discovery of said matters, a motion was made before Hon. G. V. Cowper, special judge presiding, for a new trial, upon the grounds stated, which was denied for want

of power to entertain the motion, as the case was then pending in the Supreme Court on appeal. This ruling was affirmed, *ante,* 185; *Bledsoe v. Nixon,* 69 N. C., 82.

On 29 June, 1931, two days after the filing of the opinion in this Court, and before it had been certified to the Superior Court of Lenoir County, the movant, without filing a petition to rehear, lodged a motion here for "Mistrial and New Trial" on the same grounds set out in his original affidavits, to wit, disqualification of certain jurors by reason of alleged fraud and prejudice, and newly discovered evidence. This was denied 2 July, 1931, and rightly so under the decisions in *Moore v. Tidwell,* 194 N. C., 186, 138 S. E., 541, and *Teeter v. Express Co.,* 172 N. C., 620, 90 S. E., 927.

The movant, thereafter, renewed his motion at the regular August Term, 1931, Lenoir Superior Court, the next succeeding term following affirmance of the judgment here, which was denied by Hon. W. A. Devin, judge presiding, on the ground that "this court at this term is without power to set aside said verdict and judgment and grant a new trial for the causes set forth in said motion and affidavit, being of opinion that the defendant's case is not now pending in the Superior Court of Lenoir County."

And further:

"2. The court is further of the opinion after consideration of said affidavits for the defendant and the State that the allegations tending to show that three of the jurors were disqualified has not been sustained. The court finds that the three jurors whose conduct is sought to be impeached on this motion were competent jurors and that they and each of them acted fairly and honestly in arriving at the verdict in said case.

"3. Upon the defendant's motion for a new trial for newly discovered evidence as alleged in his motion and affidavits the court is of the opinion that it is without power to set aside the verdict and judgment and grant a new trial for this cause and denies the same. The court further finds that the alleged newly discovered evidence seems to be in contradiction and cumulative, and considering the great mass of testimony offered at the trial from more than 100 witnesses, doubts that this evidence would have changed the result reached by the jury."

From the order denying his motion, the movant appeals, having applied to the Governor in the meantime for a respite or reprieve of his sentence until the matter could be heard by the courts.

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

Shaw & Jones for defendant.

STACY, C. J., after stating the case: The appeal calls for a ruling upon an important question of practice: When may the courts entertain a motion in a criminal case for a new trial on the grounds of information affecting the competency of jurors, and for newly discovered evidence, which come to the attention of the defendant after trial and conviction?

Undoubtedly, if knowledge of the matters and things, now urged as grounds for a new trial, had come to the movant during the term of court at which he was tried and convicted, the judge at that term, the trial term, would have been clothed with the power, as well as the duty, to hear and determine the motion upon its merits. *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402; *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *S. v. Trull,* 169 N. C., 363, 85 S. E., 133; *S. v. Jimmerson,* 118 N. C., 1173, 24 S. E., 494; *S. v. Fuller,* 114 N. C., 885, 19 S. E., 797; *S. v. DeGraff,* 113 N. C., 689, 18 S. E., 507; *S. v. Morris,* 109 N. C., 820, 13 S. E., 877; *Turner v. Davis,* 132 N. C., 187, 43 S. E., 637. And unless some question of law or legal inference were involved in his ruling, it would not be subject to review on appeal. *S. v. DeGraff, supra; Fleming v. R. R.,* 168 N. C., 248, 84 S. E., 270; *Munden v. Casey,* 93 N. C., 97.

It is the ruling in a number of cases that when the matter, or new evidence, is discovered *during the term,* the motion must be made to the court that tried the cause, and its ruling thereon, whether for or against a new trial, is ordinarily conclusive. *Turner v. Davis, supra; Redmond v. Stepp,* 100 N. C., 212; *Carter v. King,* 174 N. C., 549, 94 S. E., 4.

Indeed, unless the case is kept alive by appeal, such motion can be entertained only at the trial term. *Lancaster v. Bland,* 168 N. C., 377, 84 S. E., 529; *Stilley v. Planing Mills,* 161 N. C., 517, 77 S. E., 760; *S. v. Bennett,* 93 N. C., 503.

Both the trial and appellate courts have exercised the right to grant new trials for newly discovered evidence in civil cases, and the rules governing such applications, in cases appearing on the civil side of the docket, are well established by a number of decisions. But on account of the abuse to which such applications are susceptible, the courts have found it necessary to admit them cautiously, under somewhat stringent rules, to prevent the endless mischief which a different course would undoubtedly produce. *Chrisco v. Yow,* 153 N. C., 434, 69 S. E., 422; *Vernon v. Hankey,* 2 T. R. (Eng.), 120; *S. v. Carr,* 21 N. H., 166, 53 Am. Dec., 179; *Linscott v. Orient Ins. Co.,* 88 Me., 497, 51 Am. St. Rep., 435; *S. v. Stain,* 82 Me., 472; *Commonwealth v. Sacco and Vanzetti,* 259 Mass., 128; *Davis v. Boston Elevated Ry.,* 235 Mass., 482 at p. 495; Baylies' Trial Practice, 507; 20 R. C. L., 289.

The applicant in all cases, civil as well as criminal, has the laboring oar to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial. *Brown v. Sheets,* 197 N. C., 268, 148 S. E., 233; *Brown v. Hillsboro,* 185 N. C., 368, 117 S. E., 41; *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690. In other words, laches must be negatived and probable or manifest injustice shown. *Alexander v. Cedar Works,* 177 N. C., 536, 98 S. E., 780; *Wilkie v. R. R.,* 127 N. C., 203, 37 S. E., 204; *Carson v. Dellinger,* 90 N. C., 226. To do justly is the goal of the courts in every case, but this does not mean to favor the negligent at the expense of the diligent party. He who sleeps upon his rights may lose them. *Lex reprobat moram. Battle v. Mercer,* 188 N. C., 116, 123 S. E., 258.

As prerequisites, therefore, to the granting of new trials on the ground of newly discovered evidence, it is settled by the decisions in this jurisdiction that it must appear by affidavit:

1. That the witness or witnesses will give the newly discovered evidence. *Brown v. Hillsboro, supra; Aden v. Doub,* 146 N. C., 10, 59 S. E., 162; *Dupree v. Ins. Co.,* 93 N. C., 237; *Holmes v. Godwin,* 69 N. C., 467.

2. That such newly discovered evidence is probably true. *Brown v. Hillsboro, supra; Mottu v. Davis,* 153 N. C., 160, 69 S. E., 63; *Aden v. Doub, supra.*

3. That it is competent, material and relevant. *Brown v. Sheets, supra; Brown v. Hillsboro, supra; Henry v. Smith,* 78 N. C., 27.

4. That due diligence was used and proper means were employed to procure the testimony at the trial. *Brown v. Sheets, supra; Everett v. Sneed,* 186 N. C., 766, 119 S. E., 5; *Brown v. Hillsboro, supra; Alexander v. Cedar Works, supra; Chrisco v. Yow,* 153 N. C., 434, 69 S. E., 422; *Shehan v. Malone,* 72 N. C., 59; *Bledsoe v. Nixon,* 69 N. C., 82.

5. That the newly discovered evidence is not merely cumulative. *Brown v. Sheets, supra; Scales v. Wall,* 194 N. C., 804, 140 S. E., 80; *Coleman v. McCullough,* 190 N. C., 590, 130 S. E., 508; *Brown v. Hillsboro, supra; Alexander v. Cedar Works, supra; Chrisco v. Yow, supra; S. v. DeGraff, supra; Land Co. v. Bostic,* 168 N. C., 99, 83 S. E., 747; *S. v. Starnes,* 97 N. C., 423, 2 S. E., 447; *Simmons v. Mann,* 92 N. C., 12.

6. That it does not tend only to contradict a former witness or to impeach or discredit him. *Hilton v. Ins. Co.,* 195 N. C., 874, 142 S. E., 782; *Young v. Stewart,* 191 N. C., 297, 131 S. E., 735; *Brown v. Hillsboro, supra; Land Co. v. Bostic, supra; Turner v. Davis, supra; S. v. DeGraff, supra; Brown v. Mitchell,* 102 N. C., 347, 9 S. E., 702; *Sikes v. Parker,* 95 N. C., 232.

7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. *Brown v. Sheets, supra; Brown v. Hillsboro, supra; Alexander v. Cedar Works, supra; Mottu v. Davis, supra; Simmons v. Mann, supra; Carson v. Ins. Co.,* 165 N. C., 135, 80 S. E., 1080; *Warwick v. Taylor,* 163 N. C., 68, 79 S. E., 286.

In civil cases, when the matter, or newly discovered evidence, comes to the attention of the applicant after the adjournment of the term of court at which the case was tried, and pending the appeal, the motion should be made in the Supreme Court. *Moore v. Tidwell,* 194 N. C., 186, 138 S. E., 541; *In re Edens,* 182 N. C., 398, 109 S. E., 269; *Allen v. Gooding,* 174 N. C., 271, 93 S. E., 740. If discovered after filing of the opinion in the Supreme Court, and before it is certified down, a petition to rehear should be filed for the purpose of making the motion here. *Allen v. Gooding, supra; Shehan v. Malone,* 72 N. C., 59. Compare *Fleming v. Barden,* 127 N. C., 214, 37 S. E., 219. But when the judgment of the Superior Court has been affirmed and the opinion certified down, and the matter finally disposed of here, the motion (or action in the nature of a bill of review, as was resorted to in *Matthews v. Joyce,* 85 N. C., 258) should be made or begun in the Superior Court at the next succeeding term. *Allen v. Gooding, supra; Black v. Black,* 111 N. C., 300, 16 S. E., 412; *Smith v. Moore,* 150 N. C., 158, 63 S. E., 735; *Banking Co. v. Morehead,* 126 N. C., 279, 35 S. E., 593.

Notwithstanding the establishment of the above rules as applicable to civil cases, and C. S., 4644, which provides that "the courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases," nevertheless, in view of Art. IV, sec. 8, of the Constitution which empowers the Supreme Court "to review on appeal any decision of the courts below, upon any matter of law or legal inference," it is the practice with us, established by a long line of decisions, that new trials will not be awarded by the Supreme Court for newly discovered evidence in criminal prosecutions. *S. v. Griffin,* 190 N. C., 133, 129 S. E., 410; *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *S. v. Williams,* 185 N. C., 643, 116 S. E., 570; *S. v. Jenkins,* 182 N. C., 818, 108 S. E., 767; *S. v. Ice Co.,* 166 N. C., 403, 81 S. E., 956; *S. v. Arthur,* 151 N. C., 653, 65 S. E., 758; *S. v. Turner,* 143 N. C., 641, 57 S. E., 158; *S. v. Lilliston,* 141 N. C., 857, 54 S. E., 427; *S. v. Register,* 133 N. C., 746, 46 S. E., 21; *S. v. Edwards,* 126 N. C., 1051, 35 S. E., 540; *S. v. Rowe,* 98 N. C., 629, 4 S. E., 506; *S. v. Starnes,* 94 N. C., 973.

It is said in some of the cases that by reason of the language in the above section of the Constitution the jurisdiction of the Supreme Court in criminal prosecutions is limited to matters of law or legal inference, and that it does not extend to applications for new trials on the ground of newly discovered evidence. *S. v. Lilliston, supra; S. v. Turner, supra; S. v. Arthur, supra.* The decision in each of these cases, however, was by a divided Court. For like reason, petitions to rehear are not allowed in criminal cases. *S. v. Council,* 129 N. C., 511, 39 S. E., 814; *S. v. Jones,* 69 N. C., 16.

The case of *S. v. Starnes,* 94 N. C., 973, and 97 N. C., 423, in which the defendant was convicted of rape and sentenced to death, is essentially parallel to the one at bar. There, as here, application was made in the Supreme Court for a new trial on the ground of newly discovered evidence, which came to the attention of the applicant after his conviction in the Superior Court and pending the appeal. This was denied as a matter of procedure without passing upon its merits. *S. v. Hartsfield, supra; S. v. Turner, supra.* At the next succeeding term of Union Superior Court, following affirmance of the judgment here, when the prisoner was called for resentence, as was the practice at that time, and inquiry made of him if he had aught to say why judgment of death should not be pronounced against him, he renewed his application for a new trial upon the same ground of newly discovered evidence, supporting his motion by a number of affidavits. The motion was entertained, but denied for insufficient showing, and on appeal it was said: "While in this case, the judge puts his refusal upon the ground that the case made does not come up to the rule in one essential particular, he does not abnegate the power to make the order when all its requirements are met, and this in the pending application, and there is no error in law in his ruling."

But it is questioned whether the decision in *Starnes' case,* rendered in 1886, is controlling at the present time in view of chapters 191 and 192, Laws 1887, now C. S., 657 and 4654, which provide that in all cases, civil and criminal actions alike, an appeal shall not be construed to vacate the judgment, and C. S., 4663, as amended by chapter 55, Public Laws 1925, which provides that on appeal in capital cases, should no error be found in the trial, the condemned person shall be executed on the third Friday after filing of the opinion, and the clerk of the Supreme Court is required to notify the warden of the penitentiary of the date of such filing, no resentence of the prisoner in the Superior Court being contemplated in such cases. But the judgment to be executed is the judgment of the Superior Court, which was not vacated by the appeal.

It will be observed that C. S., 4663, as amended, deals only with the fixing of the new date of execution, when for any cause a stay of execu-

tion has been granted or brought about by operation of law (C. S., 4662), while the third proviso of C. S., 1412 is to the effect that in criminal cases the decision of the Supreme Court shall be certified to the Superior Court from which the case was transmitted, which Superior Court shall proceed to judgment agreeably to the decision of the Supreme Court and the laws of the State. Indeed, C. S., 4661 provides that after the execution of a death sentence, that fact shall be certified to the clerk of the Superior Court in which the sentence was pronounced and the certificate made a part of the papers in the case and entered upon the records.

In all criminal cases, other than capital, where the judgment is affirmed on appeal, it is provided by C. S., 4656, that the clerk of the Superior Court, on receipt of the certificate of the opinion of the Supreme Court, shall forthwith notify the sheriff, who is thereupon directed to proceed with the execution of the sentence. In such cases, however, it has been the practice on the circuit for the Superior Courts to entertain motions for new trials on the ground of newly discovered evidence at the next succeeding term following affirmance of the judgment on appeal. The most recent instance of such practice, coming to our attention, occurred in the case of *S. v. Cox and Whitley, ante,* 357, affirmed on appeal at the present term.

It is not supposed that the law in this respect is less mindful of the rights of a prisoner condemned to die, than it is of the rights of a defendant in a prosecution other than capital, or of the rights of a party in a civil action. *S. v. Hartsfield, supra.* "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV, U. S. Const.

Construing the above statutes in the light of the decisions, and considering the circumstance that no execution of the sentence in the instant case had been entered upon at the time of the last motion, we are of opinion that the judge of the Superior Court to whom the application was addressed had the power and discretion to hear and to dispose of the matter. To hold otherwise would perhaps threaten the validity of C. S., 4663, as amended, by causing it to offend against the constitutional assurance of the equal protection of the laws (*S. v. Fowler,* 193 N. C., 290, 136 S. E., 709), and there is a presumption against an interpretation which renders an act unconstitutional. *Green v. Asheville,* 199 N. C., 516, 154 S. E., 852; *Tob. Asso. v. Bland,* 187 N. C., 356, 121 S. E., 636. Where a statute is fairly susceptible of two interpretations, one constitutional and the other not, the rule of the courts is to adopt the former and reject the latter, for every presumption is to be indulged in favor of the validity of an act of the law-making body. *S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216; *S. v. Revis,* 193 N. C.,

192, 136 S. E., 346; *Sutton v. Phillips,* 116 N. C., 502, 21 S. E., 968; *McGwigan v. R. R.,* 95 N. C., 428; *Comrs. v. Ballard,* 69 N. C., 18; *S. v. Manuel,* 20 N. C., 144; *Adkins v. Children's Hospital,* 261 U. S., 525; *St. Louis S. W. Ry. v. Ark.,* 235 U. S., 350; *Abby Dodge v. U. S.,* 223 U. S., 166; *U. S. v. Del. & Hud. Co.,* 213 U. S., 366; *Bridgeport Irr. Dist. v. U. S.,* 40 Fed. (2d), 830; *People v. City Prison,* 144 N. Y., 529, 39 N. E., 686; 25 R. C. L., 1000.

The authority which the applicant invokes is available in all other proceedings, both civil and criminal, up to and including the next succeeding term following affirmance of judgment on appeal, and it is difficult to perceive upon what basis of equality, or equal protection of the laws, it can be said that in capital cases—and in capital cases alone—the power of the judiciary to entertain such motions is exhausted with the adjournment of the trial term of court. *S. v. Fowler, supra.*

We are not called upon to say, nor do we decide, whether the statutes, as now written, leave an interstice or hiatus in the law, with respect to the jurisdiction of the Superior Court in capital cases after judgment of affirmance on appeal, as debated on argument and in brief. Suffice it to say, that, in the instant case, the door of the temple of justice has not been closed to the prisoner; he has been or is to be heard, and, in this respect, he is in no position to complain.

It is clear, we think, that the application for a new trial on the ground of newly discovered evidence was denied, not upon its merits, but under the misapprehension that the court was without authority to entertain the application. Where the exercise of a discretion is refused upon the ground that the court is without jurisdiction in the premises, the ruling is reviewable. *Gilchrist v. Kitchen,* 86 N. C., 20; *Hudgins v. White,* 65 N. C., 393.

"It is familiar learning that where a *nisi prius* judge rests his refusal to exercise his discretion upon the mistaken opinion, either that it is not vested in him or that the facts are not such as to call for its exercise, it is error. The rule is so established, because a judge, acting under a misapprehension of the law, might, in cases like that before us, refuse to follow the dictates of a sound discretion solely because he had been misled by an erroneous view as to his power"—*Avery, J.,* in *S. v. Fuller, supra.*

We express no opinion upon the merits of the matter. The motion will be passed upon by the judge of the Superior Court, to whose discretion it is committed (*S. v. Morris, supra*), and to that end the same is remanded to the Superior Court of Lenoir County.

Error and remanded.

ADAMS, J., dissents.

BROGDEN, J., concurring: I concur in the opinion of the Court. It seems to be conceded that the courts have power to rehear causes and to entertain motions for newly discovered evidence where a nickel's worth of property was concerned, but that the same courts, under the same constitutional provision, are powerless and impotent where life is concerned. I concede further that we have many decisions and promulgated rules preventing the courts from entertaining motions for new trials for newly discovered evidence or petitions to rehear in criminal cases. All of these decisions and rules are directly in defiance of the Constitution and are judge-made in their entirety. If the Constitution is inadequate, then it should be changed in pursuance of the prescribed method and not by bare judicial decree.

Furthermore, if the courts have power to hear in misdemeanors, but no power to hear in capital felonies, then it is manifest that criminal procedure is more concerned with the mote than the beam.

CLARKSON, J., dissenting: The evidence in this case was to the effect, which was believed by the jury, that James C. Causey, in charge of the logging operations, of the Atlas Plywood Corporation, of Goldsboro, N. C., on 3 July, 1930, was going through an isolated woodland section of Lenoir County, N. C. That he was driving a Hudson Coach, on a narrow road, about 12 o'clock noon, and met defendant Herman Casey, driving a truck. Both stopped facing each other. Casey got out of his truck walked around on the right-hand side of Causey's car, reached in his pocket and got a pistol and shot Causey twice in the head. He then dragged the body of Causey out of the car to the ground, searched his pockets and got some money. He then took the body up from the ground and after two or three lunges got it back in the back seat of the car. He then got a pint bottle and raised the hood of the car and detached the carburetor and got some gasoline and poured about one-half on Causey's clothing, struck a match and set fire to same. The rest of the gasoline he poured on the car and set fire to it and burned the body and car almost beyond identification. Prior to this he had a dispute with the company which Causey worked for in the logging operations about stopping some money being paid him for timber sold off of land claimed by Causey's company. Among the numerous and like *quasi-threats,* is the following: "The G—d d— son of a bitch, he was going down there, said wherever he met with G—d d— son of a bitch, wherever he met him he was going down with him."

Defendant was tried at the September Special Term, 1930, of Lenoir County Superior Court. He was convicted of murder in the first degree, and sentenced to be electrocuted. He appealed to this Court and no error was found in the trial below. The opinion was filed 27 June,

1931. At August Term, 1931, after this Court had found that there was no error in the trial, the defendant filed this motion to set aside the judgment for newly discovered evidence and that certain jurors were disqualified. His Honor Judge W. A. Devin refused to hear the motion on the ground that he had no power, as the cause was not pending in the Superior Court of Lenoir County, also "the court further finds that the alleged newly discovered evidence seems to be in contradiction and cumulative, and considering the great mass of testimony offered at the trial from more than 100 witnesses, doubts that this evidence would have changed the result reached by the jury."

I think the main opinion granting the power of the court below, after affirmance of judgment in a criminal case in this Court, to entertain a motion for newly discovered evidence is contrary to our well settled rule of practice and procedure, the Constitution and statutes applicable to the subject, and the ruling of Judge Devin is correct. In fact, the practice was so well settled in this jurisdiction that the Superior Court could not grant this motion after affirmance of judgment in this Court, that "The Rules of Practice in the North Carolina Superior Courts," 200 N. C., at p. 843, *et seq.*, prepared by this Court, makes reference to no such power and in regard to this practice as set forth in the main opinion, is as silent as the tomb. "Rules of Practice of the Supreme Court of North Carolina," 200 N. C., at p. 811, annotated by the learned *Chief Justice*. At p. 840, we find the following:

"New trial for newly discovered evidence in civil cases.—*Moore v. Tidwell,* 194—186; *Smith v. Moore,* 150—158; *Black v. Black,* 111—301.

Requirements stated.—*Johnson v. R. R.,* 163—431.

Motion in Superior Court after affirmance on appeal.—*Allen v. Gooding,* 174—271.

Newly discovered evidence not considered in criminal cases.—*S. v. Griffin,* 190—133; *S. v. Lilliston,* 141—857."

This annotation is in bold type "Newly discovered evidence not considered in criminal cases." Why? Because the practice and procedure was well settled in this jurisdiction and the *Chief Justice* had it put in bold type.

In the case of *Allen v. Gooding, supra,* speaking of *civil cases,* at p. 272, we find: "The first case raising this question, after the changes in procedure following the adoption of the Constitution of 1868, was *Bledsoe v. Nixon,* 69 N. C., 81, in which it was held that an appeal took the whole case to the Supreme Court, and that when an appeal was taken the Superior Court could not entertain the motion. This con-

tinued to be the law until the act of 1887, was passed, and since then it has been settled that the case remains in the Superior Court, and that while a motion for a new trial for newly discovered evidence may be considered in the Supreme Court while the appeal is pending therein, upon the judgment and opinion of the Supreme Court being certified to the Superior Court, the motion may be heard in the Superior Court at the next term. *Black v. Black*, 111 N. C., 303; *Banking Co. v. Morehead*, 126 N. C., 282; *Smith v. Moore*, 150 N. C., 159."

In *S. v. Lilliston*, 141 N. C., at p. 865, speaking of *criminal cases*, we find: "In *S. v. Rowe*, 98 N. C., 630, *Davis, J.*, says: 'Upon careful consideration, we must adhere to the principle that in criminal actions the appellate jurisdiction of this Court is limited to a review and correction of errors of law committed in the trial below. *S. v. Jones*, 69 N. C., 16; *S. v. Starnes*, 94 N. C., 973.' The cases cited show that the Court adhered to its previous rulings on grounds broad enough to apply both to motions for 'new trials for newly discovered evidence' and for 'rehearings.' The Court then proceeded to point out that there was no ground for the innovation which was sought, since the governor could look into the entire merits of the case and render any relief justice should demand. . . . (p. 866.) The prisoner rests his argument to overrule the uniform decisions and settled practice of this Court upon the following section 3272 of the Revisal (C. S., 4644) which reads: 'The courts may grant new trials in criminal cases when defendant is found guilty under the same rules and regulations as in civil cases.' This clearly refers to the time '*when* he is found guilty,' and when that section is turned to, it will be found further that it is under sub-head 'Trials, Superior Court,' under which are grouped all the provisions peculiar to trials in that court, etc. . . . The Constitution, Art. IV, sec. 8, is conclusive: 'The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of *law or legal inference*, and the jurisdiction of said court over 'issues of fact' or 'questions of fact' shall be the same as exercised by it before the adoption of the Constitution of 1868.'"

In *S. v. Griffin*, 190 N. C., at p. 135, *Adams, J.*, speaking for the Court, says: "Pending the appeal, and immediately before the argument, the defendant filed a written motion for a new trial on the ground of newly discovered evidence. The motion, of course, must be denied. In *S. v. Lilliston*, 141 N. C., 857, it is said that because the Court has no jurisdiction it has never entertained a motion of this kind, and that by uniformity of practice and decision the point has been definitely settled against the defendant's present contention. There are many cases to this effect. *S. v. Flood, post, (per curiam)*; *S. v. Hartsfield*, 188 N. C., 357; *S. v. Williams*, 185 N. C., 643, 664; *S. v. Jenkins*, 182 N. C., 818;

S. v. Ice Co., 166 N. C., 403; *S. v. Arthur,* 151 N. C., 653; *S. v. Turner,* 143 N. C., 641; *S. v. Register,* 133 N. C., 747; *S. v. Council,* 129 N. C., 511; *S. v. Edwards,* 126 N. C., 1051; *S. v. Rowe,* 98 N. C., 629; *S. v. Starnes,* 97 N. C., 423; *S. c.,* 94 N. C., 973."

It will be noted that the case of *S. v. Starnes,* 94 N. C., 973, *S. c.,* 97 N. C., 421; *S. v. Hartsfield,* 188 N. C., 357, and *S. v. Turner,* 143 N. C., 641, are all cited in the *Griffin case, supra,* to *sustain the lone position* that it cannot be done in the Supreme Court, and is as silent as death as to any power to grant new trial in the Superior Court after affirmance of the judgment in this Court. Nor do any of the above cases cited in the main opinion sustain the opinion. The nearest approach is *S. v. Starnes,* 97 N. C., 423. In that case, at p. 426, is the following: *"Without stopping to inquire whether at this late stage in the proceedings, and after an unsuccessful appeal to the Supreme Court upon alleged errors in law, such an application can be entertained in the Superior Court,* to whose jurisdiction the cause has been remitted, we proceed, as did the judge who assumed the right to act upon the application, to consider the case upon its merits, as if made in due and apt time, and to a court having jurisdiction." (Italics mine.) Then this case was decided at February Term, 1887, and on an indictment found in 1886, before the act of 1887, chapter 192 (*Black v. Black,* 111 N. C., 300) went into effect, and at a time when the appeal vacated the judgment in the Superior Court.

In *S. v. Turner,* 143 N. C., at p. 643-4, we find: "But this Court has uniformly held that under the Constitution it has no power to entertain such motions in criminal cases, and has no desire to assume a function which can be more efficiently performed by the Executive. The authorities and the reasons governing us are too recently set forth in *S. v. Lilliston,* 141 N. C., 863-9, to require their repetition here. The jury did not act solely upon the testimony of Walker, for it acquitted the codefendant of the prisoner, who was also implicated by his testimony. At common law there was no appeal in any criminal case, the sole remedy being by application to the home office, which is equivalent to the application to the Governor here. To this day, this is still the law in England. Our Constitution has changed this only to allow an appeal for error of law below, 'on any matter of law or legal inference.' The organic law did not change the common law further so as to give criminals an appeal upon the facts, and did not allow us to review them upon affidavits as to facts not submitted to the jury. We have no right, as this Court has always held, to assume a power which the Constitution has left, as at common law, with the Executive Department. It is unnecessary for us to review the facts."

In *S. v. Hartsfield,* 188 N. C., at p. 358, is the following: "The defendant, *in limine,* lodged a motion for a new trial upon the ground of newly discovered evidence. It is alleged that the information which the defendant considers vital and important to his defense, came to his attention after the adjournment of the term of court at which the case was tried, and after the appeal was docketed here. *Allen v. Gooding,* 174 N. C., 271. It is the settled rule of practice with us, established by a long and uniform line of decisions, that new trials will not be awarded by this Court in criminal prosecutions for newly discovered evidence. *S. v. Williams,* 185 N. C., p. 664; *S. v. Jenkins,* 182 N. C., 818; *S. v. Lilliston,* 141 N. C., 857, and cases there cited. Such motion may be entertained in the Superior Court, *at least during the term at which the case was tried,* and allowed or not in the discretion of the judge presiding. *S. v. Trull,* 169 N. C., p. 370; *S. v. Starnes,* 97 N. C., 423. And ordinarily, the action of the trial court and his findings of fact on such motion are not subject to review on appeal. *S. v. DeGraff,* 113 N. C., p. 694." (Italics mine.)

The present *Chief Justice* wrote the *Hartsfield case.* In that case he cites the *Starnes case* and does not cite it as holding that the Superior Court, after affirmance of judgment in this Court has the power that he now contends it has. In *S. v. Jackson,* 199 N. C., 326-7, *Connor, J.,* quoting the *Hartsfield case,* takes the same view. These cases did not give the power. If they ever did, it was taken away by Pub. Laws 1925, chap. 55, sec. 1, which is as follows: "That section four thousand six hundred and sixty-three of the Consolidated Statutes of North Carolina (acts of one thousand nine hundred and nine, chapter four hundred and forty-three, section six) be amended by striking out said section entirely and substituting the following section in its place: 4363. In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court, or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the expiration or termination of such reprieve; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal, as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such

court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State Penitentiary of the date of the expiration of such reprieve."

The act of 1925 is directly contrary to the position in the main opinion. There is nothing in it giving this power, and, in fact, "Such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court," etc.

It would be practically impossible for a Superior Court at term to hear a petition for a new trial under this act in so short a time, in about three weeks, allowed to the condemned man, showing none was contemplated by the act. In fact, in numerous counties the Superior Courts do not meet more than two or three times each year. To grant a hearing of this kind, the Governor is bound to grant a reprieve as was done in this case, a hiatus in the law. Under the 1925 act the Governor is the only agency that could and has intervened. "The legislative, executive and judicial powers of the government ought to be forever separate and distinct from each other." Const. of N. C., Art. I, sec. 8. This act does recognize that the condemned man, after affirmance of the judgment by this Court, has, under the Constitution of the State a place to flee—a city for refuge (for the manslayer). Numbers, chap. 35, verse 6. Now the Governor under our Constitution in all cases of homicide is the city for refuge. Art. III, sec. 6, gives the power: "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, of all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall biennially communicate to the General Assembly each case of reprieve, commutation or pardon granted, stating the name of each convict, the crime for which he was convicted, the sentence and its date, and date of commutation, pardon or reprieve, and the reasons therefor."

This horrible killing and cremation of Causey by defendant took place on 3 July, 1930, nearly one year and a half ago. Another Superior Court does not convene in Lenoir County until 14 December, 1931. Then, again, an appeal perhaps to this Court. If the judgment is affirmed, then, again in the Superior Court at term a motion for newly discovered evidence, then again, an appeal to this Court. Where and when is a criminal case ended? For a generation the position taken in this dissent has been well settled law and universally recognized by the profession.

The main opinion has no act of the General Assembly to support it, and is in the very teeth of the written law (Laws 1925, chap. 55). To allow this motion the practice and procedure in criminal cases will be, as it were, in quick-sand.

In Underhill's Crim. Ev. (3d ed.), part sec. 785, p. 1088, we find the general law contrary to the main opinion, as follows: *"In the absence of a permissive statute, a court has no power to grant a new trial in case of a felony on account of newly discovered evidence.* As regards misdemeanors, a court possessing general jurisdiction has inherent power at common law to grant a new trial on a motion, if it shall appear that justice will be advanced thereby. *So far as felonies are concerned, the right of the accused to a new trial, upon the grounds of newly discovered evidence, is wholly the creature of statutes, which usually provide for the cases in which the right may be recognized, and the mode in which its exercise may be secured. The right to a new trial is never absolute."* (Italics mine.) In a note is the following: "It may be well in this place to call attention to a rule, which, in the absence of a statute prescribing when a motion for a new trial must be made, requires that it shall be made *before the expiration of the term at which the trial was had. People v. Bradner,* 107 N. Y., 1; 13 N. E., 87; *Ex Parte Holmes,* 21 Nebr., 324, 32 N. W., 69; *People v. Hovey,* 20 Hun. (N. Y.), 345." (Italics mine.)

As to equal protection of the law, thrown into the main opinion, it may be said that our Constitution gives the Governor sovereign and plenary power in dealing with those convicted of crime. It makes a distinction between human and material things by giving the Governor a sovereign power after conviction, of all offenses, "to grant reprieves, commutations and pardons, . . . upon such conditions as he may think proper."

This is a new departure, without precedent, provides for delay and fraught with possibilities of untold evil. Orderly government is the very foundation of our civilization. Mob violence for any crime is abhorrent, therefore it is incumbent to have speedy trials "and right and justice administered without sale, denial or delay." Const. N. C., Art. I, sec. 25. Applications for new trials on newly discovered evidence are not favored by the courts and are subjected to the closest scrutiny to prevent as far as possible fraud and imposition, which defeated parties may be tempted to practice.

MRS. IDA C. HUNT v. MEYERS COMPANY, INCORPORATED.

(Filed 10 November, 1931.)

1. **Trial D a—On motion of nonsuit all the evidence is to be taken in light most favorable to the plaintiff.**

   Upon defendant's motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from defendant's witnesses, is to be taken in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Negligence A c—Evidence of negligent condition of store held sufficient to be submitted to the jury.**

   Evidence that the plaintiff, a customer in defendant's store, stumbled over a stool left in the aisle of the store, and that the room was poorly lighted so that the plaintiff did not see the stool, is *held* sufficient under the circumstances of this case to be submitted to the jury on the question of the defendant's negligence.

3. **Appeal and Error J d—Where charge does not appear of record it is presumed correct.**

   Where the charge of the trial court is not set out in the record it is presumed that the court correctly charged the law applicable to the facts.

4. **Appeal and Error J c—Exclusion of evidence will not be held for reversible error where evidence of same import is admitted.**

   The exclusion of testimony on the trial will not be held for reversible error when testimony of substantially the same import has been admitted.

BROGDEN, J., dissenting.

STACY, C. J., concurs in dissent.

APPEAL by defendant from *Sink, J.*, and a jury, at April Special Term, 1931, of DAVIDSON. No error.

The evidence on the part of plaintiff was to the effect that about 12 July, 1929, she went to defendant's store to buy a raincoat and some shoes for her boy. That she was directed to the basement department, which was poorly lighted and dark, where the shoes were kept. That there was an aisle or passage way between the tables on which were shoes, and there was a stool between the tables. The stool could be moved around and was one that the clerk sits on to fit shoes, but was out of place and in the aisle, and in going along the aisle between the two tables to look for the shoes, plaintiff testified, in part: "The next step I took, I caught my foot in this stool that was directly in my path. I was looking for shoes on the table, at the time I fell over the stool. . . . The shoe department is dark, it is under the balcony. No electric lights there. . . . Q. It was a movable stool and you were just along there and happened to hit the stool? A. Well, the stool—

you didn't usually put stools in the aisle for people to fall over. Q. I didn't ask you that, you just happened to hit the stool; did you step on the stool? A. No, I did not step on it. Q. You stepped against it? A. The stool was directly in the aisle and I hooked my foot in it. . . . Q. Then it was light enough to see the shoes, the stairway, the clerk, that is right, isn't it? A. Yes, and if the stool had been sitting on the table I would have seen the stool. Q. If you had looked for the stool you could have seen it? A. We were not supposed to go along looking for the stool. Q. You did see it after you stepped on it? A. Yes, I saw the girl pick up the stool and push it under the table. I was looking for that then."

In describing her injury, plaintiff testified: "Was in bed three weeks and after that was on crutches for three weeks. Not able to get out of the house, went around inside. I have never been strong in that limb since. In fact there is scarcely a time when there is not a misery there, and just real often I have to sit with that foot elevated to keep the blood out of it, and the evidence is still there of the injury. I struck the stool and the bone is indented and the flesh has grown to the bone, the shin bone, and part of the flesh is on the side. Now, when I walk to the postoffice and back, that place swells and I have to lie down to get any comfort at all."

The defendant denied any negligence and set up the plea of contributory negligence.

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

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

2. Did the plaintiff negligently contribute to her own injury as alleged in the answer? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000."

Spruill & Olive for plaintiff.
Raper & Raper for defendant.

CLARKSON, J. The defendant at the close of plaintiff's evidence, and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S., 567. The motions were overruled and in this we can see no error.

It is the well settled rule of practice and accepted position in this jurisdiction, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action,

whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

We think the evidence sufficient to be submitted to the jury. The charge of the court below is not in the record, the presumption is that the court charged the law applicable to the facts. We see no prejudicial error in excluding the evidence of defendant's witness in regard to the way in which the shoe department was lighted. This witness had already stated "The room was I consider very well lighted." Defendant offered other evidence to the same effect. We find

No error.

BROGDEN, J., dissenting: There is no law requiring a merchant to keep chairs and stools used by his clerks and customers, at any particular point or place in the store. Necessarily, in the due course of business, these articles of furniture are designed to be moved from place to place to suit the convenience of both clerks and customers. Hence, the fact that the stool was not at its accustomed place would constitute no evidence of negligence. A shoe store without chairs or stools for the convenience and comfort of customers and the necessary use thereof for fitting purposes, would be somewhat of a novelty. The plaintiff, however, seeks to avoid the consequence of her own negligence by alleging that the store was poorly lighted. She admits, however, that there was light enough for her to see shoes, the stairway, and the clerk. Obviously, if there was enough light for her to see and select a shoe, there was enough light for her to see as large an object as a stool, and I think the case should have been nonsuited.

STACY, C. J., concurs in dissent.

CHARLES F. HOLT, BY HIS NEXT FRIEND, WILLIAM H. HOLT, v. THE NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 10 November, 1931.)

Negligence B c: Railroads D b—Railroad is not liable where negligence of third person is sole proximate cause of accident at crossing.

Where the collision between an automobile and a train at a grade crossing is caused solely by the negligence of the driver of the automobile, an occupant of the automobile injured in the collision may not recover damages against the railroad company.

APPEAL by plaintiff from *Clement, J.*, at April Term, 1931, of FORSYTH. Affirmed.

This is an action to recover damages for personal injuries caused by a collision between an automobile in which plaintiff was riding, and defendant's train at a grade crossing.

From judgment dismissing the action as of nonsuit, C. S., 567, plaintiff appealed to the Supreme Court.

Wallace & Wall for plaintiffs.

F. M. Rivinus, Parrish & Deal and Craige & Craige for defendant.

PER CURIAM. All the evidence at the trial of this action tended to show that the sole proximate cause of the collision which resulted in plaintiff's injuries, was the negligence of the driver of the automobile. Conceding that there was evidence tending to show negligence on the part of defendant's engineer, as contended by plaintiff, such negligence was not the proximate cause of the collision between the automobile in which plaintiff was riding and defendant's train. For this reason, there is no error in the judgment dismissing the action as of nonsuit.

Where as in the instant case the evidence offered by the plaintiff shows that his injury was due to the negligence of a third party, and not to that of the defendant, it is proper to nonsuit the action, for in that event the plaintiff has failed to make out a case against the defendant. *Herman v. R. R.*, 197 N. C., 718, 150 S. E., 361. The judgment is

Affirmed.

MATTIE BROADWAY v. GATE CITY LIFE INSURANCE COMPANY.

(Filed 10 November, 1931.)

1. Trial D a—Upon motion of nonsuit all the evidence is to be considered in the light most favorable to the plaintiff.

Upon a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Torts C b—Evidence that release was obtained by fraud held sufficient.

Evidence in this case is held sufficient to sustain the allegations of fraud in procuring a release in settlement of a claim against an insurance company; courts of equity will not attempt to define the meaning of the term "fraud."

BROADWAY *v.* INSURANCE CO.

APPEAL by defendant from *Oglesby, J.*, at September Term, 1931, of FORSYTH.

This was an action brought by plaintiff against defendant to recover on an insurance policy. The defendant set up a release, plaintiff replied and alleged that the release was procured by fraud. The action was tried before Oscar O. Efird, judge presiding, at the June 8th Term, 1931, of the Forsyth County Court, and a jury.

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

"1. Did the defendant issue and deliver the policy of life insurance as alleged in the complaint? Answer: Yes (by consent).

2. Was the paper-writing purporting to be a release obtained by fraud or undue influence? Answer: Yes.

3. What amount, if any, is the plaintiff entitled to recover from the defendant? Answer: $220.50."

The defendant made several exceptions and assignments of error and appealed to the Superior Court. The judgment of the Superior Court is as follows: "This cause coming on to be heard on an appeal from a judgment rendered in the Forsyth County Court in favor of the plaintiff and against the defendant, and being heard before his Honor, J. M. Oglesby, judge presiding and holding the September, 1931, Term Superior Court of Forsyth County, and after examination of the record in the case and hearing argument of counsel for plaintiff and defendant, the court finds no error in the trial of causes in the Forsyth County Court. It is therefore considered, ordered and adjudged that the judgment rendered in the Forsyth County Court be and the same is hereby in all respects affirmed."

The defendant made the same exceptions and assignments of error on appeal to this Court that it made on appeal from the Forsyth County Court to the Superior Court, which were overruled.

William Porter for plaintiff.
Wallace & Wall for defendant.

PER CURIAM. The defendant at the close of plaintiff's evidence and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S., 567. The motions were overruled and in this we can see no error.

It is the well settled rule of practice and accepted position in this jurisdiction, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's wit-

nesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The sole material question was the evidence sufficient to be submitted to the jury on the second issue: "Was the paper-writing purporting to be a release obtained by fraud or undue influence?" We think so.

"Fraud is the overreaching of one person by another, and yet this definition is as broad as the term itself. It has been said that fraud, actual or constructive, is so multiform as to admit of no rules or definitions. 'It is indeed, a part of equity doctrine not to define it,' says *Lord Hardwicke,* 'lest the craft of men should find a way of committing fraud which might escape such a rule or definition.' *Oil Co. v. Hunt,* 187 N. C., p. 159." *Furst v. Merritt,* 190 N. C., at p. 404. We see no error in the judgment of the court below.

Affirmed.

HOWARD MARTIN, BY HIS NEXT FRIEND, D. T. MARTIN, v. REIDSVILLE MOTOR COMPANY, INCORPORATED.

(Filed 10 November, 1931.)

Process D a—Action for abuse of process is properly nonsuited where the evidence shows that the case was orderly and regularly prosecuted.

Where a criminal action for false pretense has been nonsuited, but the evidence shows that it was regularly and orderly prosecuted according to the procedure therefor, and there is no evidence to the contrary, it will not sustain an action by the defendant therein for malicious abuse of process, and a motion as of nonsuit on the evidence in the civil action will be sustained on appeal. *Stanford v. Grocery Co.,* 143 N. C., 419. *Lockhart v. Bear,* 117 N. C., 298, where a demurrer to the complaint was filed, is distinguished.

APPEAL by plaintiff from *Clement, J.,* at February Term, 1931, of ROCKINGHAM.

On 24 October, 1927, Howard Martin purchased an automobile from the Reidsville Motor Company, falsely representing that he was of age. *Morris Plan Co. v. Palmer,* 185 N. C., 109, 116 S. E., 261; *Hight v. Harris,* 188 N. C., 328, 124 S. E., 623. Later, after the automobile had been stolen or disposed of, he brought an action to rescind the contract and to recover back the purchase money paid. *McCormick v. Crotts,* 198 N. C., 664, 153 S. E., 152; *Collins v. Norfleet-Baggs,* 197 N. C., 659, 150 S. E., 177. Thereafter, the said Howard Martin was indicted

and tried on a charge of obtaining said automobile under false pretense. 14 R. C. L., 265. The court nonsuited the case on the ground that the defendant was a minor. He was not under sixteen years of age at the time of the purchase of the automobile, so as to come within the Juvenile Court Act. *S. v. Burnett,* 179 N. C., 735, 102 S. E., 711; *S. v. Coble,* 181 N. C., 554, 107 S. E., 132. "He looked to be 21, if not more. He said he was going on 22."

This action was then instituted for malicious abuse of process, alleged to have arisen out of said criminal prosecution.

From a judgment of nonsuit, the plaintiff appeals.

Sharp & Sharp, Hunter K. Penn and Glidewell, Dunn & Gwyn for plaintiff.

Brown & Trotter for defendant.

PER CURIAM. Conceding, without deciding, that the criminal action against the plaintiff was instituted for retaliatory purposes only, nevertheless there is no evidence of any act done therein contrary to the orderly and regular prosecution of the case. *Stanford v. Grocery Co.,* 143 N. C., 419, 55 S. E., 815.

The case of *Lockhart v. Bear,* 117 N. C., 298, 23 S. E., 484, cited and relied upon by the plaintiff, was decided upon a demurrer to the complaint, rather than on a demurrer to the evidence, and is quite different in the facts alleged.

Affirmed.

B. H. LOWDER v. GEORGE SMITH.

(Filed 18 November, 1931.)

1. Arbitration and Award E b—Executed agreement to arbitrate disputed boundary held to estop plaintiff from bringing proceeding under C. S., 361.

In a special proceeding to establish the true dividing line between adjoining lands under the provisions of C. S., 361, *et seq.,* the defendant introduced in evidence an undisputed agreement between the defendant and the plaintiff's predecessor in title, under which a surveyor established and plainly marked the line in question in the presence of the interested parties who had by the terms of the agreement obligated themselves to faithfully keep and observe it as its true location, and which was thereafter observed by the parties for several years, *Held:* the plaintiff was estopped in the pending proceeding from denying the line so established, and further, it was not error for the court to order the same surveyor and his assistants to run the line by the existing marked corners and courses they had theretofore made and established.

2. Trial D c—In this case held: no issues of fact requiring determination of jury were raised by pleadings.

Where in proceedings to establish the disputed boundaries between adjoining lands, C. S., 361, a binding executed agreement between the parties has been established by uncontradicted evidence, no issue of fact is raised which requires the determination of the jury, C. S., 543, 580, and there is no error in the court's holding that the completed agreement of arbitration operated as an estoppel as a matter of law.

3. Appeal and Error J e—Only prejudicial error will entitle appellant to a new trial.

A new trial will not be granted on appeal unless there is some prospect that the result of the trial would be different, and where the appellant's rights are not prejudiced the judgment will be affirmed.

APPEAL by plaintiff from *Stack, J.*, at February Term, 1931, of STANLY. Affirmed.

This is a petition in a special proceeding brought by plaintiff against defendant before the clerk of the Superior Court of Stanly County, N. C., C. S., 361, *et seq.*, Code of 1931 (Michie), chap. 9 "Boundaries," to establish disputed dividing lines between them. The plaintiff alleges that he owns two tracts of land, one 16 acres and being Lot 8 in the division of the Lindsay Lowder estate land, and the other 5¼ acres, also Lot 8 aforesaid, and that defendant is the owner of a certain tract of land lying on the south side of the above tracts. That there is a dispute between the plaintiff and the defendant as to the location of that line of tract No. 1 described as follows: "Thence with said line south 25 east 1140 feet to the beginning." That there is a dispute between the plaintiff and the defendant as to the location of that line of tract No. 2 described as follows: "Thence with the old south 25 east 525 feet to the beginning."

The prayer of the petitioner is "that said disputed lines may be established according to law."

The defendant in his answer denied the material allegations of the complaint, and "further says that during the life of Lindsay Lowder, the former owner of said lands, under whom the plaintiff claims, there was a disputed line between the said Lindsay Lowder and this defendant; and that on or about 19 March, 1913, the said Lindsay Lowder and this defendant entered into a written contract in regard to the settlement of said disputed line, a copy of which contract is hereto attached and marked 'Exhibit A,' and asked to be made a part of this answer. That after the signing of said contract the said Charlie Howard (Harward), surveyor, was given all the papers, deeds and plats belonging to both parties, and that he went upon the ground, and after making a thorough study of the papers of both Lindsay Lowder and this defendant, the

said Charles Howard (Harward) in accordance with the terms of said written agreement, did survey and establish said dividing line or boundary; that said line as established by the said Charlie Howard (Harward) and fixed according to the terms of said written contract as the proper boundary line between the said Lindsay Lowder and this defendant, is described as follows: 'Beginning at a stone, which stone is located by beginning at an ash, one of the old established corners in the Smith tract on the west bank of Clover Fork Creek, and runs thence S. 82¼ E. 2.95 chs.; that from said stone the dividing line runs thence S. 23 E. 38.31 chs. to the corner of the Pennington Ferry Road.' This defendant says that said line at the time was fixed by established corners and by a marked line leading from one corner to the other; that said corners are still up and the line is still plainly and accurately marked. This defendant says that he is informed and believes that this is the line that the plaintiff claims is now in dispute between the plaintiff and the defendant. This defendant further says that he is informed and believes that the plaintiff, in the division of his father's land, recognized this line as the proper boundary line of his father's land, and that the deeds of the plaintiff and also the deed of the defendant's brother, J. Y. Lowder, who owns lot No. 9 in said division, all call for and recognize this established boundary line as the correct line between the plaintiff and the defendant.

The defendant further says that since said line was established in 1913 according to the written agreement by all the deeds and papers of the said Lindsay Lowder and this defendant, as the correct boundary line between the parties, the plaintiff and those under whom he claims, and all other interested parties have recognized said line as the correct boundary, and this defendant pleads same as an estoppel against the plaintiff to now change said line. This defendant further says that there is no need of a survey or any cost to be added in this matter between the plaintiff and the defendant, as the line fixed and established according to the terms of said agreement is a plainly marked line with the corners established, and is now recognized by Young Lowder, who also owns land adjoining said line, as the correct boundary line between this defendant and the lands formerly owned by Lindsay Lowder and now owned by the said Young Lowder and the plaintiff, B. H. Lowder. Wherefore, this defendant asks that the said action be dismissed at the cost of the plaintiff."

The agreement above referred to, in part, is as follows: "The boundary or line, in particular, over which this controversy or difference arises being the last call in the boundaries of the tract belonging to the said Lindsay Lowder and the second from the last call in the boundaries

of the tract belonging to the said Geo. F. Smith, the same being the dividing boundary or line between the lands belonging to the said Lindsay Lowder and Geo. F. Smith. Witnesseth: That, for the purpose of deciding upon a location for this particular boundary or dividing line and ending this controversy, it is mutually agreed, by and between the said Lindsay Lowder and Geo. F. Smith, that they will employ Charlie Howard (Harward) whom they believe to be a competent surveyor, to survey and establish said dividing line or boundary, from the papers, deeds and plats belonging to both parties; that they will assist said surveyor in any way they can in arriving at a correct location of said dividing line or boundary and when said dividing line or boundary is located and established by the said surveyor, *we do mutually agree to and with each other, that said dividing line or boundary as established, located and marked by said surveyor, be well and faithfully kept, observed and recognized by us as the correct location of the dividing line or boundary between the lands, as above described, belonging to the said Lindsay Lowder and Geo. F. Smith.*"

The judgment of the court below, is as follows: "The above entitled case coming on to be heard and being heard at this term and after the empanelling of the jury and the reading of the pleadings, it appears to the court that in the year 1913 the ancestor of the plaintiff and the defendant entered into a written arbitration agreement that Mr. Charlie Harward, surveyor, should take the papers and plats and go upon the land and survey the line in dispute, and that he should establish and locate the true dividing line between the parties, and that they agreed in said writing to abide by his location of the line, and it further appearing to the court that the surveyor, with the chain carriers chosen by the parties, went upon the land and that both Mr. Lindsay Lowder, ancestor of the plaintiff, and the defendant were present at the survey; that marks were put up, the line chopped and that Mr. Lindsay Lowder lived for some three years thereafter and brought no suit to set aside the award of the arbitrator, and it appearing to the court further from an examination of the surveyor and the chain carriers that they can locate the line as located by the surveyor in 1913, the court is of the opinion that as a matter of law both parties are bound by the location and establishment of the line in 1913, and that as a matter of law there is nothing for the jury to pass upon—it being admitted that the agreement was executed—and it appearing from an examination of the surveyor that he established and located the line. And the court is of the opinion that the only question is where the line was located in 1913 and that that is the true dividing line between the parties, therefore, it is ordered by the court that Mr. Charlie Harward forthwith go upon

the lands again and carry with him the two chain carriers who carried the chains in 1913 when the line was located, and run the line again exactly where he ran it and located it in 1913, and that he put up at each end of the line large rocks or iron stakes, and that if any of the marks on trees still remain that he rechop them and that he report to the clerk of this court what he did, whether he relocated and established the line according to the survey in 1913, and that the clerk of this court is directed to certify his report to the register of deeds and the register of deeds of Stanly County is ordered and directed to record the same. The surveyor is further directed to stick up metal stakes along the line between the two corners. It is further ordered that the plaintiff pay the costs of this action except the costs of certifying to the register and the recording of same, which said costs shall be divided equally between the parties. The judgment heretofore rendered in this cause by the clerk of this court is in all respects confirmed."

The record discloses that Charlie Harward, the surveyor, took with him P. C. Litaker and S. H. Sibley, who were with him as chain carriers when the survey was made in 1913. The surveyor and they on 5 and 6 February, 1931, in accordance with the judgment, reported that they again ran "the identical line" they ran in 1913; began at iron stake corner, marks the same as in 1913, survey and everything done in exact compliance with judgment.

The plaintiff excepted and assigned error as to the court below's refusal to submit the issues tendered by him, and "That the court erred in signing the judgment shown in the record for that the said judgment is not based on findings of fact by the jury and for that the plaintiff objects to the finding of said facts by the court and insists upon his right of trial by a jury. The judgment which is in this record sets forth that the court instead of the jury found the facts upon which the judgment was based."

H. C. Turner and W. L. Mann for plaintiff.
R. L. Smith & Sons for defendant.

CLARKSON, J. We do not think that the exceptions and assignments of error made by plaintiff can be sustained. We do not think, from the facts appearing of record, that plaintiff was entitled to a jury trial.

Defendant contends that "In March, 1913, Charlie Harward, the arbitrator selected by Lindsay Lowder, the ancestor of the plaintiff, and by George F. Smith, together with the chain carriers, selected and paid by each, went upon the ground in the presence of the parties and took all the papers of each of the parties, and determined, surveyed and

fixed and marked plainly the dividing line in the presence of all the parties, and the same was recognized by Lindsay Lowder and the plaintiff, who claims under his father, Lindsay Lowder, and by this defendant, for 16 years." We think the record sustains defendant's contentions and the principle of estoppel applies to plaintiff. In fact, defendant could have had the petition dismissed, as there were no *lines in dispute* between the parties. The arbitration agreement between Lindsay Lowder, ancestor of plaintiff and through whom he claims, and defendant, is binding between the parties and estops the plaintiff as to all matters and acts done under this agreement. *Wright v. Fertilizer Co.,* 193 N. C., 305; *Winstead v. Farmer,* 193 N. C., 405.

C. S., 361, is as follows: "The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the Superior Court of the county in which the land or any part thereof is situated."

The judgment of the court below set forth the facts fully and we think on the whole record, if there was error, it was not such prejudicial or reversible error as would entitle plaintiff to a new trial. From the whole record we think plaintiff was estopped to bring this petition as under the statute it can only be brought when the *"boundary lines are in dispute."* All the evidence was to the effect that plaintiff's father and predecessor in title to the land, had a settlement of this disputed line or lines between himself and defendant. The lines as settled were recognized in the division of plaintiff's father's land among the heirs-at-law, plaintiff being one of them and in the division, Lot 8 was allotted to him. The line was not in dispute. *Wood v. Hughes,* 195 N. C., 185. This is not an action in which title is involved. It is a laudable statutory method to settle differences among neighbors concerning their boundary lines *which are in dispute.* We can find on the record no denial by plaintiff in the pleading of the agreement between plaintiff's father and predecessor in title and defendant, which defendant sets up in his answer. See C. S., 525, 543; *Simon v. Masters,* 192 N. C., 731. In the judgment of the court below is the following: "It being admitted that the agreement was executed—and it appearing from an examination of the surveyor that he established and located the line."

Plaintiff contends that in *Tucker v. Satterthwaite,* 120 N. C., at p. 122-3 (and numerous cases) it is held: "What we now say is, that section 395 of the Code (C. S., 580), is mandatory, binding equally upon the court and upon counsel; that it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues, or admissions of record

equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this Court will remand the case for a new trial."

It may be noted that the decision says "and that in the absence of such issues *or admissions of record equivalent thereto,*" etc.

"Admissions implied under the section (C. S., 543, *supra*) by failure to controvert allegations of the opposite pleading constitute evidence against the party making them in all actions and proceedings against him, wherein they may be pertinent and competent, just as are admissions and declarations of a party made adverse to his right on any occasion. Their weight depends always upon whether or not they were made with deliberation or incautiously, and they are subject to proper explanation." N. C. Code, 1931 (Michie), under C. S., 543, p. 216, and cases cited. We think there was sufficient evidence, undisputed, to sustain the judgment of the court below as to the estoppel. *Walker v. Walker, ante,* 183.

Then again, in *Booth v. Hairston,* 193 N. C., at p. 281, we find: "Our system of appeals is founded on public policy and appellate courts will not encourage litigation by granting a new trial which could not benefit the litigant and the result changed upon a new trial, and the non-granting was not prejudicial to his rights. *Bateman v. Lumber Co.,* 154 N. C., p. 253; *Rierson v. Iron Co.,* 184 N. C., p. 363; *Davis v. Storage Co.,* 186 N. C., 676. 'They will only interfere therefore, where there is a prospect of ultimate benefit.' *Cauble v. Express Co.,* 182 N. C., p. 451."

On the facts and circumstances of this case, and for the reasons given, the judgment is

Affirmed.

LUKE B. SMITH v. DR. J. C. McCLUNG.

(Filed 18 November, 1931.)

1. Physicians and Surgeons C b—Evidence held insufficient to be submitted to the jury in action against dentist for malpractice.

A dentist is not held as a warrantor in the exercise of his professional duties, and the doctrine of *res ipsa loquitur* only applies when from the result there is more than an inference of improper treatment, and where a dentist extracts a tooth from the mouth of a patient on Sunday at the patient's request, and the point of a hypodermic needle used in the operation breaks off in the gum of the patient, and the dentist, without informing the patient of the fact, leaves the broken point in the gum, and tells the patient to return the following day, at which time he tells patient the facts and offers to extract the broken point without pain, and thereafter again requests to be allowed to do so, but the patient refuses to allow

him or anyone else to attempt to extract it, *Held:* the doctrine of *res ipsa loquitur* does not apply to the facts of the case, and in the absence of evidence of some unskillfulness of the dentist or of improper work, or improper or defective instruments to perform it, the case should have been dismissed on motion as of nonsuit.

2. Negligence A e—Applicability of the doctrine of res ipsa loquitur.

The doctrine of *res ipsa loquitur* does not apply where more than one inference can be drawn from the evidence as to the cause of the injury, or where the existence of negligence is not the more reasonable probability and the matter is left in mere conjecture, or where the injury results from an accident as defined and contemplated in law.

CIVIL ACTION, before *Harwood, Special Judge,* at February Special Term, 1931, of FORSYTH.

The plaintiff alleged and offered evidence tending to show that on Sunday, 25 November, 1928, he was suffering severe pain from toothache and had suffered from said cause all night the preceding night. About two o'clock on Sunday he went in search of a dentist and found the defendant going to his office. The office assistant of defendant was not in the office, but plaintiff told the defendant that the tooth was "hurting so bad and giving me so much trouble that I wanted it out at once." Thereupon, the defendant directed the plaintiff to be seated in a dental chair and undertook to extract the tooth. The tooth was a jaw tooth, and, according to the usual custom and practice, the defendant inserted novocaine into the gum with what appeared to be a proper needle. In some way the point of the novocaine needle, about a quarter of an inch long, broke off in the gum. The defendant, however, proceeded to extract the tooth and to treat an abscess at the root of the tooth and undertook to remove the needle. After working for some time in an effort to extract the needle the defendant told the plaintiff to come back to his office the following day at twelve o'clock. The plaintiff went to work Monday morning and came back to defendant's office about twelve-thirty. It seems that the defendant had taken an X-ray picture of plaintiff's tooth, and when the plaintiff returned to the office on Monday the defendant informed him for the first time that the point of the needle had been broken off in the gum, and that he had been unable to remove it Sunday because he had no help in his office, but that if plaintiff would have a seat in the dental chair he would remove the needle then and there without pain. The plaintiff refused to permit the defendant to attempt to remove the needle. Thereupon, the plaintiff went to see another dentist who treated his mouth. Plaintiff further testified when he was in the office of defendant on Monday he told the defendant he had planned to take a trip on Thanksgiving and asked the defendant if in his opinion the trip could be made safely. The

defendant informed him that there was no reason for delaying the trip. On 11 December, the defendant called the plaintiff and again insisted that he be permitted to remove the needle, and told him he had arranged with a physician who had a fluoroscope to assist in removing the needle. Again the plaintiff refused to permit the defendant or anyone else to remove the needle. The needle is still in plaintiff's gum and he testified he had suffered considerable pain and inconvenience.

There was further evidence that the defendant informed the plaintiff that the reason he had not told him of breaking off the point of the needle when the tooth was extracted on Sunday was because the plaintiff was very nervous and suffering pain, and he thought it was better not to disturb him until Monday. There was no evidence of any defect in the needle or that the needle used to insert novocaine was not the usual and customary instrumentality used by dentists and surgeons for such purposes. Nor was there any evidence of negligence or want of due care in treating or extracting the tooth. Dr. Flowers, a dental surgeon, was offered as a witness for the plaintiff and testified that he saw the plaintiff on Tuesday following the extraction of the tooth, and that there was some swelling in the upper gum of plaintiff's mouth, but that "the swelling of the gum was just that which would be expected of an operation of that kind." Said physician further testified that his record showed that on 17 December, he examined the plaintiff and that "the cavity where the tooth was pulled was healing up nicely."

At the close of plaintiff's evidence there was motion for nonsuit, which was denied, and the defendant excepted.

Issues of negligence and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $300.

From judgment upon the verdict the defendant appealed.

Parrish & Deal for plaintiff.
Manly, Hendren & Womble for defendant.

BROGDEN, J. Does the principle of *res ipsa loquitur* apply when the point of a novocaine needle breaks off in the gum or jaw of a patient when the dentist is using the needle to insert novocaine preparatory to extracting a tooth?

The evidence does not disclose any defect in the needle or that the needle was not of the type approved and in general use for the purpose of inserting novocaine. There is no evidence that the dentist did not possess the degree of skill and learning contemplated and prescribed by law; nor was there any evidence that the tooth was otherwise extracted in a careless or negligent manner or not according to the usual

practice and custom of skillful dentists in performing such operations. Hence, if the principle of *res ipsa loquitur* does not apply, the case should have been nonsuited.

Dentists, in their particular fields, are subject to the same rules of liability as physicians and surgeons. *McCracken v. Smathers,* 122 N. C., 799, 29 S. E., 354; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. Nevertheless, neither dentists nor physicians or surgeons have been held to be insurers. This idea was expressed many years ago by *Judge Taft,* afterwards President of the United States and *Chief Justice* of the Supreme Court of the United States, in *Ewing v. Goode,* 78 Fed., 442. In that case he wrote: "A physician is not a warrantor of cures. If the maxim, *'res ipsa loquitur,'* were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'"

The Iowa Court, in *Evans v. Roberts,* 172 Iowa, 653, discussing the liability of a surgeon who cut off a portion of plaintiff's tongue in performing an operation for adenoids, said: "If a surgeon, undertaking to remove a tumor from a person's scalp, lets his knife slip and cuts off his patient's ear, or, if he undertakes to stitch a wound on the patient's cheek, and, by an awkward move, thrusts his needle into the patient's eye, or if a dentist, in his haste, leaves a decayed tooth in the jaw of his patient and removes one which is perfectly sound and serviceable, the charitable presumptions which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful, are not here available. It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery."

The Virginia Court discussed the question in *Henley v. Mason,* 153 S. E., 653. The doctrine of *res ipsa loquitur* was held inapplicable upon the facts as disclosed by the record, even though the surgeon in performing a tonsil operation knocked out two of plaintiff's front teeth. The same question was considered in *Hill v. Jackson,* 265 S. W., 859. In this case the Missouri Court held that the principle did not apply, although the dentist had dislocated the jaw in extracting a tooth. These cases do not deny the application of the principle where the facts warrant it, but merely hold that the facts of the particular cases do not justify the application.

There are two cases directly in point. The first is *Ernen v. Crofwell,* 172 N. E., 73. In this case a dentist inserted a novocaine needle into

a patient's gum in order to deaden pain and the needle broke. The dentist made no effort to remove the needle and did not inform the patient of the fact that a portion of the needle had broken off in administering the novocaine. The Supreme Judicial Court of Massachusetts said: "It is plain that the mere breaking of the needle inserted in the plaintiff's jaw was not evidence of negligence. We are of the opinion, however, that the jury would have been warranted in finding that, if the defendant had exercised that degree of skill and care reasonably to be expected that he possessed, he would have discovered that the needle had been broken; and that he should either have removed the part remaining in the plaintiff's jaw or have informed her of its presence there so that she could have had it removed."

The other case is *Alonzo v. Rogers,* 283 Pac., 709. In this case the Supreme Court of Washington held that the principle of *res ipsa loquitur* applied and carried the case to the jury.

The general proposition of law, together with the authorities upon various aspects of the question, appears in a note in Illinois Law Review of November, 1931, page 350, and also, in the United States Law Review of November, 1930, page 609.

Irrespective of the theories of application of the principle held by the courts in other jurisdictions, this Court has held that the principle does not apply: (1) Where more than one inference can be drawn from the evidence as to the cause of the injury; (2) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture; (3) where the injury results from accident as defined and contemplated by law. *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251.

In the case at bar, the defendant did not manufacture the needle which broke. There is nothing tending to indicate there was any defect in the needle or that if any defect existed the same could have been discovered by the most rigid inspection. There is no evidence that the needle was used in a careless or negligent manner or by an unskilled or incompetent dentist. Indeed, the dentist discovered the broken needle and undertook to remove it with all facilities available to him at the time. He requested the plaintiff to return to his office next day and assured him that he could remove the needle readily and without pain, but the plaintiff refused not only on that occasion but on subsequent occasions to permit either the defendant or any other surgeon, physician or dentist to remove the needle. He was at work next day, and so far as the record discloses never lost an hour from his accustomed duties. Therefore, to hold that the doctrine of *res ipsa loquitur* applies to the

facts of this case, is to all practical purposes, to impose the liability of insurer upon a dentist, physician or surgeon, and no court has ever gone that far. Manifestly, there may be particular states of fact which warrant the application of the principle in determining the liability of dentists, physicians and surgeons, but the court is of the opinion and so holds that the facts in this case do not warrant the application of the principle, and the motion for nonsuit should have been allowed.

Reversed.

A. B. BENTON, ADMINISTRATOR OF WOODROW BRAFFORD, v. BOARD OF EDUCATION OF CUMBERLAND COUNTY, GREAT NATIONAL INSURANCE COMPANY, J. L. REAVES, J. E. REAVES AND W. T. REAVES.

(Filed 18 November, 1931.)

1. **States E a—Ordinarily no action sounding in tort can be maintained against the State or its political subdivisions or agencies.**

   No action sounding in tort can be maintained against the State, or, ordinarily, against any political subdivision or agency thereof exercising a governmental function in performing duties required of it by statute.

2. **Schools and School Districts H b—Action cannot be maintained against board of education for negligence in transporting pupils.**

   A county board of education is a political subdivision or agency of the State authorized by statute in specific instances to provide transportation of teachers and pupils from the county school fund for their attendance at the public schools of the county, and an action for damages for negligent injury by those thus transported may not be maintained against such board, there being no permissive statute to that effect, and where so brought a demurrer to the sufficiency of the complaint to state a cause of action will be sustained. C. S., 5410, 5428, 5489.

3. **Same—Doctrine of estoppel will not apply to prevent board of education from setting up defense that action in tort will not lie against it.**

   The doctrine of estoppel does not apply where a private person brings an unauthorized action against a county board of education founded upon the alleged negligent act of one under contract with the board to transport teachers and pupils to and from public schools of the county as authorized by C. S., 5489.

4. **Principal and Surety B c—One injured by negligence of school bus driver may not sue on bond given by him to board of education.**

   Where one under contract to transport teachers and pupils to and from a public school as authorized by C. S., 5489, has given bond with sureties payable to the board of education conditioned upon the faithful performance of the services required under the contract, *Held:* in an action by the administrator of a pupil to recover damages for a negligent injury result-

ing in death while the pupil was being thus transported, the plaintiff's intestate was not a party or privy to the contract or a beneficiary thereof, and the plaintiff's action against the sureties thereon will not lie.

5. Pleadings D b—Action of trial court separating actions upon demurrer for misjoinder is upheld in this case.

Where one under contract with the county board of education to drive a school bus operated in a district is sued for a negligent injury to a pupil being thus transported, and in the same action the sureties on a bond given by him to the board for the faithful performance of the contract are joined with him as defendants, the sureties are not liable to the plaintiff on the bond, and upon a demurrer for misjoinder of parties and causes an order of the trial court separating the actions and permitting the action against the driver to be proceeded with is proper.

APPEAL by plaintiff from *Midyette, J.*, at August Term, 1931, of CUMBERLAND. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, Woodrow Brafford, who at the date of his death was twelve years of age, and attending Long Hill School in Cumberland County, as a pupil in said school.

It is alleged in the complaint that the proximate cause of the death of plaintiff's intestate was the negligence of the defendants, Board of Education of Cumberland County, and J. L. Reaves, in the operation of the automobile or school bus in which plaintiff's intestate was being transported from his home to Long Hill School, at the time he suffered the injuries which resulted in his death. This school bus was provided by the defendant, Board of Education of Cumberland County, as authorized by C. S., 5489, and was operated by the defendant, J. L. Reaves, under his contract with said board, for the transportation of teachers and pupils in the Long Hill School District. At the time plaintiff's intestate suffered his fatal injuries, the school bus was over-crowded with pupils, and he was required to stand near a door of the bus. He was pushed against this door which suddenly opened because of a defective latch. Plaintiff's intestate fell through the open door to the ground and thereby suffered the injuries from which he died.

The defendant, Great National Insurance Company, had insured the defendant, Board of Education of Cumberland County, against loss by reason of liability for bodily injuries or death accidentally suffered by the operation of the school bus, in which plaintiff's intestate was riding at the time he was injured, within the limits set out in its policy. This policy was in force at the date of the death of plaintiff's intestate. The premium for said policy was paid by the defendant, Board of Education of Cumberland County, out of the school fund of said county. It is provided in said policy that the insurance provided thereby should extend to any person or persons while riding in or legally oper-

ating said school bus for the transportation of teachers and pupils in the Long Hill School District in Cumberland County.

The defendants, J. E. Reaves and W. T. Reaves, are sureties on the bond given by the defendant, J. L. Reaves, to the defendant, Board of Education of Cumberland County, in the sum of $1,000, conditioned for the faithful performance by the said J. L. Reaves of his contract with the Board of Education of Cumberland County for the operation of school buses provided in part by said board for the transportation of teachers and pupils in the Long Hill School District. The defendants, J. L. Reaves, J. E. Reaves and W. T. Reaves, are now insolvent.

It is further alleged in the complaint that by reason of the matters and things set out therein, "and more particularly their knowledge at the time of the issuance of said policy and the payment and acceptance of the premium therefor from the public school fund of the county, that the Board of Education of Cumberland County is a governmental agency or instrumentality of the State, the defendants thereby waived immunity from liability, if any existed, on such or similar grounds, and they are and ought to be in equity and good conscience forever estopped from claiming the same or setting up such or any similar defense in this action."

Each of the defendants, other than the defendant, Great National Insurance Company, demurred to the complaint on the ground, among others, that the facts stated therein are not sufficient to constitute a cause of action against said defendant.

At the hearing of the action in the Superior Court, on the several demurrers of the defendants, Board of Education of Cumberland County and J. L. Reaves, J. E. Reaves and W. T. Reaves, and on an appeal by the defendant, Great National Insurance Company, from an order of the clerk denying the petition of said defendant for the removal of the action to the Federal Court, for trial, judgment was rendered as follows:

"This cause coming on to be heard at this term of the court upon the demurrers filed by the Board of Education of Cumberland County, and by J. L. Reaves, J. E. Reaves and W. T. Reaves, and also upon the appeal by the defendant, Great National Insurance Company, from the order of the clerk of the Superior Court of this county, denying the petition of that defendant to remove the cause to the United States District Court for the Eastern District of North Carolina; and being heard, after argument of counsel on both sides;

It is considered, ordered and decreed by the court:

1. That the demurrers filed by the defendant, Board of Education of Cumberland County, and the defendants, J. E. Reaves and W. T. Reaves,

be and they are hereby sustained, and the action is dismissed as to all defendants other than J. L. Reaves.

2. That the demurrer filed by J. L. Reaves for misjoinder of parties defendant be and it is hereby sustained, and the action ordered separated as to said defendant, J. L. Reaves, with permission granted to the plaintiff to replead as to said defendant, with time to such defendant to answer.

3. That the order of the clerk of the Superior Court of this county denying the petition for removal by the defendant, Great National Insurance Company, be and the same is hereby affirmed, and said petition for removal be and it is hereby denied."

From the foregoing judgment, the plaintiff appealed to the Supreme Court.

Dye & Clark for plaintiff.
Rose & Lyon for defendants.

CONNOR, J. There was no error in the judgment in this action. No cause of action is stated in the complaint against the defendant, Board of Education of Cumberland County, or against the defendants, J. E. Reaves and W. T. Reaves.

In *Scales v. Winston-Salem,* 189 N. C., 469, 127 S. E., 543, it is said: "Negligence cannot be imputed to the sovereign, and for this reason, in the absence of statute, no private action for tort can be maintained against the State. It follows that such action will not lie against a municipal corporation for damages resulting from the exercise of governmental functions as an agency of the sovereign power." The Board of Education of Cumberland County is not a municipal corporation. It is, however, a governmental agency, created by statute, for the purpose of performing governmental functions. No action can therefore be maintained against said board to recover damages for a tort, alleged to have been committed by said board in the performance of its statutory duties.

The Constitution of this State provides 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 children of the State between the ages of six and twenty-one years; that each county 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 that the General Assembly may by statute require that each child of sufficient mental and physical ability shall attend a public school during the period between the ages of six and eighteen

years, for a term of not less than sixteen months, unless educated by other means.

The county boards of education in this State are created by statute, C. S., 5410, and are required to provide an adequate school system for the benefit of all children of their respective counties, as directed by law, C. S., 5428. Where a county board of education, as authorized by statute, C. S., 5483, has consolidated two or more school districts into one, the said board is authorized and empowered to make provision for the transportation of pupils in the consolidated district who reside too far from the schoolhouse to attend without transportation. C. S., 5489. In performing this statutory duty, the county board of education is exercising a governmental function, and is acting as an agency of the State. No action can therefore be maintained against a county board of education to recover damages for a tort alleged to have been committed by the board in the transportation of pupils to and from the school which they are required to attend or which they do attend. The principle of estoppel cannot be invoked against a county board of education, in order to hold the board liable in an action, which, in the absence of a statute, cannot be maintained against it. Both well settled principles of law and a sound public policy forbid this.

The bond on which the defendants, J. E. Reaves and W. T. Reaves, are sureties for the defendant, J. L. Reaves, is payable to the defendant, Board of Education of Cumberland County. These sureties are not liable to the plaintiff under the terms of the bond or on the principle upon which *Gorrell v. Water Supply Co.*, 124 N. C., 328, 32 S. E., 720, was decided. Plaintiff's intestate was not a party or privy to said bond, nor was he a beneficiary of the bond. Plaintiff therefore cannot recover in this action of these defendants. There was no error in the judgment sustaining their demurrer.

The action was properly dismissed as to the defendant, Board of Education of Cumberland County, and as to the defendants, J. E. Reaves and W. T. Reaves. The order directing the separation of the action against the defendant, J. L. Reaves, from the action against the defendant, Great National Insurance Company, is supported by the decision of this Court in *Clark v. Bonsal*, 157 N. C., 270, 72 S. E., 954.

Whether the defendant, Great National Insurance Company, upon the facts alleged in the complaint, is liable to the plaintiff, or may be held liable to the defendant, J. L. Reaves, under the terms of its policy, is not presented or decided on this appeal. We find no error in the judgment. It is

Affirmed.

W. S. HODGIN AND WIFE, CORNELIA HODGIN, v. TOWN OF LIBERTY.

(Filed 18 November, 1931.)

1. **Trespass to Try Title A f—Objection to admission of deed where the probate is not defective is properly overruled.**

Where, for the purpose of establishing title, the plaintiff offers a deed in evidence, an objection to its admission on the ground that it did not convey title is properly overruled where the probate is not defective, the relevancy and legal effect of the deed being reserved until a subsequent stage of the trial.

2. **Adverse Possession C b—Deed held properly admitted in evidence to show extent of boundaries claimed by plaintiff.**

Where the plaintiff attempts to establish title to lands by adverse possession in an action in which the State is not a party, a deed, insufficient to convey title or to constitute color of title, is competent evidence to show, by the description in the deed, the metes and bounds up to which the plaintiff claims title by adverse possession for a period of twenty years. C. S., 430, 426, and evidence that the plaintiff had received the deed and paid the agreed purchase price is competent to show that the possession was adverse to all others and was in the character of owner.

3. **Municipal Corporations E f—Held: charge limited recovery to damage to land owned by plaintiff and was free from error.**

Where, in an action to recover damages to lands caused by the defendant's sewerage system, the trial court instructs the jury that it should restrict its award to the acreage owned by the plaintiff, an exception to the introduction in evidence of testimony of the value of contiguous lands will not be held for reversible error when such evidence relates to the value of the lands in controversy, nor will the instruction be held erroneous as implying that a recovery could be had for damages to such contiguous lands although the jury might have considered the testimony in arriving at the value of the land owned by the plaintiff.

4. **Same—Charge of court relating to plaintiff's right to recover damages to lands resulting from sewerage system held correct.**

Where in an action to recover damages resulting to lands from the defendant's sewerage system the trial court correctly defines a nuisance as anything which works hurt, inconvenience, or harm, or which essentially interferes with the enjoyment of life or property, and correctly applies the principles of law to the evidence in the case, the charge is correct and the defendant's exception thereto will not be sustained.

5. **Same—Charge relating to recovery of permanent damages resulting to plaintiff's land from defendant's sewerage system held correct.**

Where, in an action to recover damages to land resulting from the defendant's sewerage system, the charge, containing a concise statement of the rule for assessing permanent damages, will not be held for reversible error because stating the rule in general terms, it being incumbent on the defendant to request special instructions if a more specific explanation was desired.

HODGIN *v.* LIBERTY.

APPEAL by defendant from *Frizzelle, J.*, at Second May Term, 1931, of ALAMANCE. No error.

The plaintiffs brought suit to recover damages for injury to their property alleged to have been caused by sewage emptied by the defendant into Rocky River. Upon the pleadings filed the jury returned the following verdict:

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

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

3. What permanent damages are the plaintiffs entitled to recover of the defendant on account of the installation and maintenance of said sewerage system? Answer: $1,350.

Judgment for plaintiffs; appeal by defendant upon error assigned.

J. A. Spence and J. Dolph Long for appellant.
J. Elmer Long and Louis C. Allen for appellee.

ADAMS, J. For the purpose of establishing their title the plaintiffs offered in evidence a written instrument purporting to be a deed executed on 22 October, 1904, by D. J. Staley and his wife. The writing contains the recital of a conveyance to "said Hodgins" (not previously named) and his heirs of a one-half interest in 6½ acres described by metes and bounds. The defendant objected to the introduction of the paper and entered an exception to its admission. The exception must be overruled on the principle that such an objection will not be sustained as a rule unless the probate is defective. *Wilhelm v. Burleyson,* 106 N. C., 381. To the introduction of a deed in evidence no objection lies except to the regularity of the probate and registration, the court having the power to reserve the question of relevancy and legal effect until a subsequent stage of the trial. *Everett v. Newton,* 118 N. C., 919. The probate is in due form but the legal effect of the paper is subject to challenge.

The appellant says that the instrument is void and that it conveys no title. If this position be conceded is there any view in which the purported deed may be considered?

Title to real property may be established by adverse possession with or without color of title. Let us grant the appellant's contention that the paper is not color of title. In all actions involving title to real property title is conclusively presumed to be out of the State unless the State is a party to the action. C. S., 426. Title, when it is out of the State, may ripen against all persons not under disability by adverse possession

under known and visible lines and boundaries for twenty years. C. S., 430; *Mobley v. Griffin,* 104 N. C., 112; *Campbell v. Everhart,* 139 N. C., 502; *Stewart v. Stephenson,* 172 N. C., 81.

With respect to the issues the court instructed the jury that the plaintiffs were restricted to the area described in the instruments under which they claim title; and it was competent to show by the description in these instruments the metes and bounds up to which the plaintiffs claimed adverse possession. *Mobley v. Griffin, supra; Barfield v. Hill,* 163 N. C., 262.

Evidence tending to show that W. S. Hodgin had received the contested deed and had paid the agreed price was competent. In fact on cross-examination in response to a question asked by the defendant he said that he bought and paid for "what my deeds call for." He testified, in addition, that the plaintiffs had been in possession of the land up to the described boundaries for about thirty years. His testimony, as we understand it, shows that continuous and adverse possession was exercised in the character of owner, in opposition to the right or claim of any other person. *Loftin v. Cobb,* 46 N. C., 406.

We do not interpret the instruction to which the fiftieth assignment of error relates as implying that title to land outside the boundaries in the purported deeds was in controversy or that damages could be awarded for the several tracts aggregating forty acres. There was testimony on each side as to the value of this land but the court restricted the award of damages to the acreage described in the deeds. Consideration of the value of the entire forty acres may have aided the jury in determining the damages to which the plaintiffs were entitled for injury to the restricted area. At any rate we are of opinion that the instruction was in no way prejudicial to the defendant.

We have examined assignments 18-42 and deem it unnecessary to discuss them seriatim. While some of the testimony may be remote it all relates to the question of the market value of the property in controversy and as the court specifically instructed the jury that the plaintiffs were restricted to the area described in their deeds and that this instruction should be construed by the jury in passing upon the third issue, we find no sufficient cause in these assignments for granting a new trial. The same principle applies to assignments 9, 25-41.

Assignments 51, 52, and 53 are based on the contention that the jury was instructed in substance that if the defendant had polluted or contaminated the water of Rocky River by discharging sewage in it the action was such an interference with life and property as constituted a nuisance. This, we think, is not the substance of the instruction. The judge defined a nuisance as anything which works hurt, inconvenience,

or harm, or which essentially interferes with the enjoyment of life or property, almost literally following the definition approved in *Cook v. Mebane,* 191 N. C., 1. The instruction immediately following was a practical application of the definition to the testimony of the witnesses, and is free from error; and the instruction in reference to permanent damages substantially conforms to the previous decisions of this Court, *Moser v. Burlington,* 162 N. C., 141; *Cook v. Mebane, supra; Wagner v. Conover,* 200 N. C., 82.

The charge in the present case is not subject to the objectionable clause in *Moser v. Burlington, supra.* It contains a concise statement of the rule for the assessment of permanent damages. We cannot say that it was reversible error for the court to have instructed the jury in general terms on the issue of permanent damages. *Simmons v. Davenport,* 140 N. C., 407. If a specific explanation of any essential feature of the rule was desired the appellant to this end should have tendered a prayer for special instruction.

The familiar principles which are controlling in this case have been fully discussed in recent opinions and we see no adequate reason for reviewing the decisions or restating the principles. We find

No error.

STATE OF NORTH CAROLINA ON THE RELATION OF T. B. HARRIS v. W. W. WATSON.

(Filed 18 November, 1931.)

1. **Public Officers A b—County commissioner is a public officer under the State.**

The provisions of our Constitution, Art. XIV, sec. 7, that "no person who shall hold an office or place of trust . . . under this State . . . shall hold or exercise any other office or place of trust or profit under the authority of this State" applies to the position of county commissioner, a county commissioner being a public officer of the State within the meaning of the section.

2. **Same—A notary public is a public officer under the State.**

A notary public exercises a judicial or *quasi*-judicial function under the government of this State, C. S., 3175, and holds a public office within the contemplation of Art. XIV, sec. 7, of our Constitution although there is no supervisory power given him and he may not be compelled to act in any given case, and to some extent holds his office at the will of the Governor. *S. v. Knight,* 169 N. C., 335, cited and applied. The instance of a special commissioner appointed for a special purpose is distinguished.

3. Public Officers B c—Where public officer accepts another State office he makes his election and the first office is eo instanti vacated.

Where one holding an office as county commissioner accepts a commission from the Governor as a notary public he may not hold both offices, Art. XIV, sec. 7, and his right of election is exercised by his acceptance of the second office, and his position as county commissioner is *eo instanti* vacated, and where he continues to exercise the duties of county commissioner he may be removed therefrom in an action in the nature of a *quo warranto.*

BROGDEN, J., dissenting.

STACY, C. J., concurs in the dissent.

APPEAL by relator from *Grady, J.*, at Chambers, on 30 April, 1931. Reversed.

This is an action in the nature of a *quo warranto* brought by the Attorney-General of the State of North Carolina on the complaint of the relator, a citizen of this State, and a resident and taxpayer of Hyde County, to oust the defendant from the office of county commissioner of Hyde County, on the ground that defendant now unlawfully and wrongfully holds and exercises said office. C. S., 870(1).

The facts alleged in the complaint are as follows:

1. At the election held in November, 1930, the defendant, W. W. Watson, was duly elected as a county commissioner of Hyde County for a term of two years; pursuant to said election, on the first Monday in December, 1930, the defendant was duly inducted into said office of county commissioner of Hyde County, and since said date has held and exercised said office, and continues so to do.

2. On 24 March, 1931, while he was holding and exercising the office of county commissioner of Hyde County, pursuant to his election thereto in November, 1930, the Governor of North Carolina appointed the defendant, W. W. Watson, a notary public in and for this State, and duly issued to said defendant a commission as notary public; on 3 April, 1931, the defendant accepted said appointment and duly qualified as a notary public, as provided by statute.

3. Since his acceptance of his appointment by the Governor of North Carolina as a notary public, and his qualification for the performance of his duties as such, the defendant has been requested by citizens of this State, who are residents and taxpayers of Hyde County, to vacate the office of county commissioner of said county; the defendant has declined and refused to vacate the office. He continues to hold and exercise the office of county commissioner of Hyde County, and to hold himself out as qualified to act as a notary public in this State, notwithstanding the provisions of section 7 of Article XIV of the Constitution of North Carolina.

4. Section 7 of Article XIV of the Constitution of North Carolina is as follows:

"No person who shall hold an office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other State, or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly; *Provided,* that nothing contained herein shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes."

The action was heard on a demurrer filed by the defendant, on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action on which the relator is entitled to the relief prayed for. The demurrer was sustained, and the action dismissed.

From judgment dismissing the action, the relator appealed to the Supreme Court.

O. L. Williams for relator.

T. S. Long and MacLean & Rodman for defendant.

CONNOR, J. The question of law presented by this appeal is whether a person who lawfully holds and exercises the office of county commissioner of one of the counties of this State, and who while holding and exercising said office, accepts an appointment as a notary public by the Governor of North Carolina, made under C. S., 3172, thereby forfeits and vacates the office of county commissioner, by reason of the provisions of section 7 of Article XIV of the Constitution of North Carolina. The answer to this question involves the nature of the position of notary public, under the laws of this State.

Referring to the provisions of section 7 of Article XIV of the Constitution of this State, *Faircloth, C. J.,* in *Barnhill v. Thompson,* 122 N. C., 493, 29 S. E., 720, says: "This provision is plain and leaves no room for construction whenever the two places under consideration are found to be public offices." *Smith, C. J.,* in *Doyle v. Raleigh,* 89 N. C., 134, says that the manifest intent of the provision is to "prevent double office-holding—that offices and places of public trust should not accumulate in a single person and the super-added words of 'places of trust or profit' were put there to avoid evasions in giving too technical a meaning to the preceding word." The prohibition is expressed in language which is clear and unambiguous, and must be enforced, notwithstanding the character or relative importance of the two offices. In view of the language of the Constitution, the question as to whether the two offices,

which one person undertakes to hold and exercise at the same time are or are not compatible, is immaterial.

The question as to whether the place of county commissioner of a county of this State is an office held under this State, within the meaning of section 7 of Article XIV of the Constitution, is not open to debate. It was so held in *Barnhill v. Thompson, supra.* In that case, *Faircloth, C. J.,* says: "An office is defined by good authority as involving a delegation to the individual of some of the sovereign functions of government to be exercised by him for the benefit of the public, by which it is distinguished from employment or contract." Under this definition, which is supported by authoritative judicial decisions, in this and other jurisdictions, and is in accord with definitions of approved text-writers, the position of county commissioner of a county of this State, is clearly an office held under this State, within the meaning of section 7 of Article XIV of the Constitution. Section 1 of Article VII of the Constitution provides that in each county of the State there shall be elected biennially by the qualified voters thereof the following officers: a treasurer, register of deeds, surveyor and *five commissioners.* The powers to be exercised by the county commissioners of a county are prescribed by statute. C. S., 1297. These powers clearly require the exercise of governmental functions. In the instant case, it is conceded that at the date of his appointment and qualification as a notary public, the defendant, W. W. Watson, was lawfully holding and exercising an office under this State, within the meaning of section 7 of Article XIV of the Constitution, to wit, county commissioner of Hyde County.

Is the position of notary public, to which the defendant was appointed by the Governor of North Carolina, and for which he has qualified as provided by statute, an office held under this State, within the meaning of section 7 of Article XIV of the Constitution? If it is such office, then, without regard to its relative importance, and without regard to whether or not the powers conferred by statute upon one who holds and exercises the position, are compatible with the powers of a county commissioner, the defendant, by his acceptance of the appointment thereto by the Governor, and his qualification therefor as provided by statute, elected to vacate his office of county commissioner of Hyde County, and now unlawfully holds and exercises said office. Otherwise he has not made, and was not required to make an election. In *Barnhill v. Thompson, supra,* it was held that the acceptance of a second office by one already holding another office under this State operates *ipso facto* to vacate the first office. In the opinion in that case, it is said: "The right of election must be admitted in all such cases. If the acceptance in this case, and entry did not vacate the first, what did it do? It is difficult to understand how the defendant could accept the second and hold the

first in the same breath, and thereby do what is expressly forbidden by the Constitution. Reason as well as public policy forbids it." In *Midgett v. Gray,* 159 N. C., 443, 74 S. E., 1050, it is said: "It is well settled that the acceptance of and qualification for one office vacates *eo instanti* one office already filled by the same incumbent." This principle is referred to with approval in *S. v. Wood,* 175 N. C., 809, 95 S. E., 1050. It is well settled as the law in this State.

In *S. v. Knight,* 169 N. C., 335, 85 S. E., 418, one of the questions of law discussed and decided by this Court was whether the position of notary public, under the law in this State, is a public office. This question was directly presented in that case. It was held that the position is a public office, within the meaning of section 7 of Article VI of the Constitution of North Carolina. In that case, the question chiefly involved, and which was determinative of the appeal, was whether a woman was eligible, under the law then in force in this State, for appointment as a notary public. It was held that as a woman was not a voter under section 1 of Article VI of the Constitution of North Carolina, she was not eligible for election or appointment to an office. Section 7 of Article VI, Constitution of North Carolina. The Court was of opinion, and so held, that the position of notary public is a public office within the meaning of section 7 of Article VI of the Constitution, and for that reason a woman was not eligible for appointment as notary public, notwithstanding an act of the General Assembly of this State (chap. 12, Pub. Laws 1915), expressly authorizing the Governor to appoint women as well as men as notaries public, and declaring that the position of notary public should be deemed a place of trust and profit and not an office. The act of the General Assembly was held to be void, on the ground that the General Assembly was without power to declare that a position which by reason of the powers which were conferred on one holding the position was a public office, was not such office, but only a place of trust and profit.

The decision in *S. v. Knight, supra,* that the position of a notary public, under the laws of this State in force at the date of the decision, is a public office within the meaning of section 7 of Article VI of the Constitution, was made after an exhaustive examination of the authorities in this and other jurisdictions, and after a full and careful consideration of the principles of law applicable to a decision of the question. *Allen, J.,* writing the opinion for the Court, says: "In Mechem on Public Officers, section 1, it is said that an office is a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public; this definition was adopted and approved in a unanimous opinion of this Court in *S. ex rel. Wooten v. Smith,*

145 N. C., 476, 59 S. E., 649, and again at this term in *Groves v. Barden*, 169 N. C., 8, 84 S. E., 1042, and in the latter case it was also said that the performance of an executive, legislative or judicial act is the test of a public office." This test was applied to the position of a notary public. It was said that one of the duties which a notary public may perform is taking the probate of deeds, and that this is a judicial act. The powers which are conferred upon notaries public in this State are judicial in their nature. C. S., 3175.

It is true as pointed out in the brief filed in this Court by the learned counsel for the defendant that *Clark, C. J.*, and *Brown, J.*, dissented in *S. v. Knight*. *Justice Brown*, however, concedes that the weight of authority supports the decision of the Court in that case. He cites no authority to the contrary, nor does he discuss the principles relied on by the Court as sustaining its decision. He rests his dissent solely on his opinion that the defendant in that case, although a woman, was qualified to perform the duties of a notary public. Manifestly, this was not involved in the case, and would doubtless have been conceded by the three members of the Court, whose opinions upon the questions of law involved resulted in the decision. A careful reading of the dissenting opinion of *Clark, C. J.*, may well leave the reader under the impression that the learned and prophetic *Chief Justice* was more concerned with what he thought the law as applied to the facts in that case ought to be than with what it had been declared to be in this and other jurisdictions. One may well sympathize with this view, without being able to reach the conclusion on which the *Chief Justice* in part rests his dissent.

It is needless, we think, to reëxamine the authorities or to discuss again the principles of law on which this Court relied in its decision in *S. v. Knight*, that the position of a notary public, under the law of this State, is a public office. If the position is a public office within the meaning of section 7 of Article VI of the Constitution of North Carolina as was held in that case, it seems to follow that it is a public office within the meaning of section 7 of Article XIV. The test by which to determine whether a position created by statute is a public office, adopted and approved in *S. v. Knight*, was applied by this Court in *S. v. Scott*, 182 N. C., 865, 109 S. E., 789. Applying this test, this Court has held that the position of notary public, created by statute in this State is a public office, and this holding must be regarded as authoritative. The powers conferred by statute upon a notary public are judicial, or at least *quasi*-judicial, in their nature. Upon this principle it was held in *Long v. Crews*, 113 N. C., 256, 18 S. E., 499, that where a notary public was interested in a deed of trust as a preferred creditor therein, he was disqualified to take the acknowledgment and his attempted action was a nullity. In that case it was said by *Clark, J.*, "In this State it is settled

law that an acknowledgment of a deed by the husband, and privy examination of the wife taken before a justice of the peace, commissioner or notary, is a judicial, or at least a *quasi*-judicial act."

It has been suggested that since the enactment of chapter 117, Public Laws 1927, authorizing the Governor in his discretion to revoke a commission issued by him or by his predecessor to a notary public, a notary public in this State holds his office at the will of the Governor, and not for a fixed term, and that by reason of this statute the decision in *S. v. Knight* is no longer controlling. This suggestion is, we think, not well founded, but even if the statute has the effect suggested, it does not affect the question involved in this case. The test as to whether a position created by statute is an office is not the term of one holding the position, but the power conferred upon him while he is lawfully holding the position. Upon this principle, it is immaterial that a notary public cannot be required to exercise any of the powers conferred on him by statute. When he does exercise any of these powers, he acts judicially, and therefore cannot ordinarily be held for damages resulting from his acts. *Yates v. Ley,* 121 Va., 265, 92 S. E., 837; *Henderson v. Smith,* 26 W. Va., 829, 53 Am. Rep., 139.

Counsel for defendant in their brief filed in this Court, concede that the authorities are apparently against the contention that the position of a notary public is not a public office. They suggest that it may be held that the position is that of a commissioner for a special purpose, within the meaning of the proviso in section 7 of Article XIV of the Constitution. We do not think this suggestion is well founded. A commissioner for a special purpose exercises no governmental power, and is therefore not a public officer.

The learned judge of the Superior Court by whom this case was tried was not inadvertent to the decisions of this Court with which his decision is in conflict. In his judgment, he expresses his disapproval of these decisions, and suggests that this Court, as now constituted, may overrule these decisions. We are not inadvertent to the practical situation which the judge of the Superior Court had in mind when he made the suggestion, but are of the opinion that these decisions are well supported by the authorities, and are in accord with well settled principles of law. The practical situation which gave rise to the suggestion would not justify this Court, as now constituted, in overruling decisions made by our predecessors which have been justly regarded as the law of this State. It cannot be said too often that it is the function of a court to declare what the law is, and not what its members as individuals think it ought to be.

There is error in the judgment dismissing the action. The judgment must therefore be

Reversed.

BROGDEN, J., dissenting: Is a notary public a judicial officer of the State? All the courts are in accord upon the proposition that an officer is one who exercises in some degree the sovereignty of the State. Under our system of government this sovereignty is allocated to three units, to wit: legislative, executive, and judicial. No court has ever suggested that a notary public exercises any legislative or executive functions. Consequently, any power he may exercise must fall within the judicial classification. The main question propounded may be conveniently considered under two aspects: First, is a notary public a State officer? Second, if so, is he a judicial officer of the State? A notary public is not mentioned in the Constitution, and, therefore, if he be an officer at all, his official character and quality must rest either upon the common law or upon a statute. It is familiar learning that the common law, like the air, pervades the whole structure except when it has been displaced by a statute. In this State the entire subject rests upon statute, and hence the common-law concept disappears from the discussion. Prior to 1927 a notary had a fixed term of office, but chapter 117 Public Laws of 1927 made a radical change in the status of a notary public. In substance, that chapter provided that a notary public hold office for two years from and after the date of appointment. This was the same provision appearing in prior statutes. The statute of 1927 provided that "any commission so issued by the governor . . . shall be revocable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of the said commission." That is to say that, if complaint be made to the governor, he can remove a notary without cause, without a hearing, and without notice. This radical change of the statute may well be interpreted to mean that a notary now has no fixed term, and in a sense, and by analogy, is merely a tenant at the will of the governor. But conceding that he has a fixed term, the very fact that he is removable without notice, without a hearing, and in the discretion of the appointive authority, takes him out of the status of any other officer known to our law. C. S., 3204, provides in substance that every officer "shall be held, deemed, and taken, . . . to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void." Prior to 1927 a notary was removable by *quo warranto,* which was the exclusive remedy recognized by law for removing public officers of the State. This remedy was pursued in *S. v.*

Knight, 169 N. C., 333, 85 S. E., 418. Furthermore, this Court has held that an office or place of trust within the meaning of Article XIV, section 7, of the Constitution was such as to be determined by *quo warranto. Eliason v. Coleman,* 86 N. C., 236; *S. v. Smith,* 145 N. C., 476, 59 S. E., 649. Without undertaking to quote or discuss the various statutes applicable, the status of a notary public may be fairly summarized as follows: (a) If he is an officer of the State, then he is removable without hearing, without notice, and without cause, and in this respect his status differs from that of any other State officer known to the law. (b) If he be a State officer, then he is an officer who is not required to perform any public duty whatsoever, and no court can issue a mandamus against him to require the performance of any act. A notary public is authorized to take the acknowledgment of deeds, and to take depositions provided he chooses to do so and the parties are able and willing to pay the fee fixed by the statute. No law makes it the duty of a notary to administer an oath to anybody or to take the acknowledgment to any sort of instrument. His services rest upon his own choice and contract with the parties seeking such services. (c) If he be a State officer, then he is an officer who is not responsible to any person or tribunal in the performance of his official acts. He is required to keep no records and to make no reports, and is subject to no supervisory power in the method of the performance of his official duties.

Notwithstanding, it is conceded that practically all of the courts have declared that a notary public is an officer. In some instances he has been classified as a State officer and in others as a county officer. An array of the cases are assembled in *S. v. Knight,* 169 N. C., 333, 85 S. E., 418. In many of these cases, the question arose upon the qualifications of a woman to act as notary, in view of constitutional provisions limiting office holding to males. The leading cases, which are most frequently cited are: *Opinion of the Justices,* 62 Atl., 969, from New Hampshire; *Opinion of the Justices,* 23 N. E., 850, from Massachusetts; *S. v. Davidson,* 92 Tenn., 531; *S. v. Hodges,* 107 Ark., 272; *Opinion of the Justices,* 21 Pac., 473, from Colorado. In all of the foregoing cases, the question for decision was whether a woman was qualified to act as a notary. Hence it is hard to escape the conclusion that the policy of woman suffrage, as in *S. v. Knight, supra,* was the sub-soil out of which the decisions grew.

Omitting any discussion of the qualifications of a woman to perform the duties of a notary, an examination of the authorities leads the mind to inquire: Why have the courts held that a notary is an officer? The answer is as variable as the lights and shadows of a summer dawn. Some courts refer to the fact that a notary was an officer at common law. In others, statutory and constitutional provisions constitute the basis for the

conclusion. These provisions also, are frequently dissimilar. For instance, the Massachusetts case, *Opinion of Justices,* 43 N. E., 927, discloses a constitutional provision as follows: "Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the governor, with the consent of the council, upon the address of both houses of the legislature."

In New York, when the *Rathbone case* was decided, 40 N. E., 305, notaries were appointed by the governor, with the consent of the senate and their duties are set forth in statutes prescribing the duties of judicial officers.

The New Hampshire law in force at the time of the decision of "*Opinion of Justices,* 73 N. H., 621" provided that notaries should hold office "subject to be removed by the senate upon impeachment, or by the governor with the consent of the council on the address of both houses of the legislature, etc. At the time of the rendition of the decision of *S. v. Hodges,* 107 Ark., 272, *supra,* the Constitution of Arkansas provided that militia officers, officers of public schools and notaries may be elected to fill any executive or judicial office.

The whole aspect of this phase of the subject is tersely stated by the Tennessee Court in *S. v. Davidson, supra:* "The matter depends in each state upon the provisions of the Constitution and the statutes."

The term "officer," employed in many of our statutes and decisions is elastic and variable. For instance, an attorney is frequently referred to as an officer of the court. He takes a public oath, and is authorized to practice by the supreme judicial authority of the State. In time past, his fees, in many instances, were prescribed by law. Manifestly, he discharges a public function, but no court has ever held that he was a State officer. Indeed, he is not an officer at all, because his services rest upon choice and contract.

It would seem to be obvious that the term "officer" has a primary and a secondary signification. In its primary signification, it denotes a person who exercises, in some degree, the sovereign power of the State. In its secondary signification, it denotes merely a public employment or the performance of some act of a public nature, not involving the exercise of the sovereignty of the State.

As I construe the statute now in force, after the amendment of 1927, a notary is not a State officer, and it was not contemplated that he should in any sense exercise the mighty powers of sovereignty.

The Constitution deals with sovereignty. It undertakes to define and parcel out sovereign power. Hence, I am persuaded that the words: "office or place of trust," used in the Constitution, Art. XIV, sec. 7, em-

ployed the terms in their primary signification, and that a notary is not within the purview or contemplation of that provision.

Nevertheless, this Court has held in several decisions, culminating in the *Knight case, supra,* in which all the cases are assembled, that a notary public is a judicial officer. The judicial function is supposed to reside in the act of taking the private examination of a married woman. The notary is supposed to question her privately as to whether she is afraid of her husband or signs the instrument through fear, but when the married woman answers his questions there is nothing he can do about it. He can fill up the certificate or not as he likes. If the married woman admits that she signed the instrument through fear of her husband, he can certify that fact to the clerk or not. If she says that she did sign without fear or compulsion, he can certify that fact to the clerk or not.

But, at all events, there is nothing for him to pass upon or adjudge. He is the maker of a certificate of facts and no more. Of course, the law adds a certain verity to his certificate when properly attested, but it adds the same verity to the certificate of a commissioner of affidavits and deeds appointed under C. S., 963, and it has never been suggested in this State that a commissioner of deeds, residing in a foreign state, is either an officer or a judicial officer of the State of North Carolina.

No useful purpose will be served by debating the question as to whether a notary is a judicial officer. This is purely a matter of opinion and of individual interpretation of the statutes. The records in the office of the Governor disclose that there are now five thousand five hundred and sixteen qualified notaries in North Carolina, and if all of these be judicial officers of the State, it is obvious that the judiciary is blessed with an overwhelming variety of personnel.

S. v. Knight, supra, was decided by a divided Court. Nevertheless, it stands as the law, although it may be reasonably contended that the amendment of the notary law, contained in Public Laws 1927, chapter 117, changes in an essential degree the entire concept of a notary public. Be that as it may, my mind is unable to follow either the reasoning or the interpretation of precedents as contained in *S. v. Knight.* I concede that the discussion as to whether a notary public is a judicial officer of the State is like loading a shotgun with buckshot to shoot a sparrow, but in the case at bar, a man, who has been duly elected by the people to an important office, forfeits his office because he has been authorized by the Governor to make and sign a certificate as to what a married woman says when she signs a deed, when it must be conceded that there is nothing at all he can do about it.

I am authorized to say that *Stacy, C. J.,* concurs in this opinion.

RUBY SANDERS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 November, 1931.)

1. Trial D a—On motion of nonsuit all the evidence is to be considered in the light most favorable to the plaintiff.

Upon a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Railroads D b—Where negligence of driver and railroad concurrently causes injury to guest in car the guest may recover of railroad.

Where the plaintiff is a guest in an automobile driven by her husband and is injured in a collision with a railroad train at a grade crossing at a much used street of a city, and there is evidence that both the driver of the automobile and the defendant's employees were negligent, *Held:* in an action against the railroad company the negligence of the driver of the car will not be imputed to the plaintiff, and will not bar her right of recovery against the railroad company unless it was the sole exclusive proximate cause of the injury, and the evidence is properly submitted to the jury on the questions of the railroad company's negligence and proximate cause.

3. Same—Evidence of railroad company's negligence held sufficient to be submitted to the jury.

Where there is evidence that the defendant railroad company's through train approached a grade crossing in a city without giving warning by blowing its whistle or ringing its bell as required by an ordinance of the city, and that it was running at a rate of speed greatly in excess of that allowed by the ordinance, and that such negligence was a proximate cause of a collision at the crossing, the evidence is sufficient to be submitted to the jury in an action for damages by one injured in the collision, the violation of the ordinance being negligence *per se*, and the question of negligence and proximate cause being for the jury.

4. Negligence B d—Where defendant's negligence is one of the efficient, proximate causes of the injury he is liable.

Where an injury is the result of the concurrent negligence of the defendant and another, the injured person may recover against the defendant if any amount of the causal negligence is attributable to him and if the injured person is not guilty of contributory negligence.

5. Railroads D b—Where ordinance regulates speed of trains and imposes fine for violation on engineer, its violation is negligence on part of railroad.

Where a city ordinance provides that no railroad company or engineer in charge of a train passing through the city shall exceed the speed limit therein stipulated, and imposes a fine on any engineer who violates the ordinance, *Held:* although the fixed penalty applies solely to the engineer, by a correct interpretation of the ordinance its violation is also negligence on the part of the railroad company for which damages may be recovered in a civil action if the proximate cause of injury.

6. Appeal and Error J e—Where alleged error does not prejudice rights of appellant a new trial will not be granted.

An objection to the charge of the court on the last clear chance on the ground that the evidence was not sufficient to sustain it, will not be held for reversible error where, upon the record, the rights of the appellant could not be prejudiced thereby.

APPEAL by defendant from *Harris, J.*, and a jury, at May Term, 1931, of WILSON. No error.

The evidence was to the effect that plaintiff, on a dark night, about seven o'clock p.m., 1 February, 1930, while riding with her husband in a two-door Ford coach, going west on Green Street in Wilson, N. C., was seriously injured by defendant's train at the crossing of defendant's railroad and Green Street.

Dr. T. P. Lane, a physician and surgeon (local surgeon for defendant), after describing her injuries, testified, in part: "During the first few days she was in the hospital, which I include in the first five days, this lady's condition was very grave. We were very apprehensive about her. It looked as though she was going to die in spite of all we could do, required stimulation in various forms and injection of fluids into her veins and after that she showed signs of improvement."

Plaintiff, at the time of the injury, was 38 years of age, and was the mother of three little children.

Green Street in the town of Wilson, where plaintiff was injured, at the point where the line of railway of the defendant crosses said street, bears a heavy and congested traffic of automobiles, motor trucks, wagons, bicycles and pedestrians. It is one of the principal streets of the town of Wilson, a town of about 15,000 people, and the double track of the railroad of the defendant crosses said street about midway the length thereof. The passenger station of the defendant is situate between Nash and Green streets and the umbrella sheds of the passenger station extend from Nash Street to Green Street along by the side of the railroad track. The defendant operated a great number of trains, switching and yard engines, each day on its tracks, all of which run over and across Green Street. There was a quantity and a congestion of street traffic along said street. Large number of trains regular and special, on stated schedules and without schedule, and a number of shifting and yard engines and cars are operated by the defendant over said crossing.

J. O. Hearne, a witness for plaintiff, testified, in part: "Cars cross there almost continuously when traffic is heavy, makes heavy traffic. What I mean to say is this—in the busy season at certain hours of the day it is a great deal of traffic. From five o'clock in the afternoon until eight at night the traffic is pretty heavy at that crossing."

Lloyd Lucas, a witness for plaintiff, a police officer, testified in part: "I would say from 350 to 400 cars a day pass there at that time of the year. I am familiar with all that territory. That house on the east side of the railroad track, situate on your left going up towards the track, that house from the first railroad track, from the main line, I don't know exactly how far it is, but not over 25 steps from the main line to the house. The ice cream factory is situate just across on the other side."

Plaintiff's husband, who was driving the Ford, going westward, on approaching the defendant's tracks on Green Street, slowed down to 3 or 4 miles an hour and crept upon the track at practically no rate of speed to cross the tracks. The defendant's train gave no signal of its approach to the crossing, it was rolling, practically making no noise. It was a fast passenger train going north, only runs during the winter months, running between 25, 30 and 40 miles an hour as it approached Green Street. It was a fast Florida train from Florida to New York, carrying winter tourists. It does not stop in Wilson. When plaintiff's husband saw the train he brought his car to a stop and was able to get out. A witness testified "I saw a man sail out." But plaintiff was struck and the auto badly torn up.

C. P. Hocutt, a traffic officer in Wilson, witness for plaintiff, testified, in part: "Since I was in court yesterday I have been to Green Street crossing and measured the distance with a tape line from the northbound track to the corner of the house on Green Street. The exact distance from the corner of the house to the end of the cross tie nearest the railroad is 46½ feet."

A. C. Sanders, husband of plaintiff, testified, in part: "I own the car . . . My wife is not in business with me and she has nothing whatever to do with my business. . . . As we turned into Green Street going west we were driving towards the railroad. Leaving the buildings beyond the first block the ice cream factory is on the north side of Green Street next to the railroad, and a couple of little frame buildings on the left. Very poor lights on the east side. I don't think any lights on it. . . . After passing the corner of the house if there had been any obstruction it was dark and I couldn't see. There were lights across the railroad. The railroad shelter was brilliantly lighted across the track. When I passed the house you could see the corner of the shed. That extends up almost to Green Street. I couldn't see anything else that night. The station is beyond the shed. I don't know what kept me from seeing the train which was on my side of the shed. I looked. When I saw it it was right on me. The light was absolutely burning on the train. I don't know what would have kept me from seeing the train if I had cut my eyes and had turned my head. I did look and

when I saw it I stopped. The first time I saw the train I was right on the track. Just time I saw it I was right on the track. On the other side, looking from west to the east it was no light. Looking west from my side it was brilliantly lighted from the station clear on down to the filling station. If I had looked I don't know what there was to keep me from seeing. When I saw it I stopped. My engine was right on the track, right at the track and the train hit it. I jumped out and my wife didn't have time to get out. . . . I seen the train when it was right on me. I was right in front of it then. I didn't see it before. I had not heard it. I did not hear the whistle blow nor the bell ring. I said yesterday I did not hear it. If I had heard it I would have stopped. I didn't hear either the bell or the whistle."

L. W. Brady, a witness for plaintiff, testified, in part: "If I am any judge of speed he (the engineer) was running between 35 and 40 miles an hour. . . . I can hear pretty good but this train ran pretty fast and it is on you before you know it."

An ordinance of the town of Wilson, is as follows: "Section 1. No railroad company or engineer in charge of any train of any railroad company shall run or operate in or through the town of Wilson any locomotive or car or trains of cars at a higher rate of speed than ten miles per hour, and every engineer in charge of any train or locomotive running through the town of Wilson shall ring the bell of such locomotive while same is being run and operated through said town; no railroad train or locomotive shall block any street crossing for a longer period than five minutes, and any engineer in charge of any train or locomotive of any railroad company violating any of the provisions of this section, shall be fined not more than ten dollars for each and every offense; provided, nevertheless, that the rate of speed hereinbefore prescribed shall not apply to any train running in or through the said town between the hours of 11 o'clock p.m., and six o'clock a.m., but all trains operating between such hours may be run and operated at a reasonable rate of speed."

The defendant denied negligence and set up the plea of contributory negligence.

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

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

2. In what amount was the plaintiff damaged? Answer: $2,500."

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. A. Lucas and W. D. P. Sharpe, Jr., for plaintiff.
Thos. W. Davis, F. S. Spruill and Finch, Rand & Finch for defendant.

CLARKSON, J. The defendant, at the close of plaintiff's evidence and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S., 567. The motions were overruled and in this we can see no error.

It is the well settled rule of practice and accepted position in this jurisdiction, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefits of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The evidence, taken in its most favorable light for plaintiff, was to the effect that A. C. Sanders was the owner of the automobile in which plaintiff was riding. He was driving the automobile and plaintiff had no control over the car or driver. She was an occupant, guest or gratuitous passenger (if she can be so designated) of her husband. Ordinarily, under such circumstances, negligence on the part of the driver of the car cannot be imputed to the occupant or guest. *Bagwell v. R. R.*, 167 N. C., 611; *White v. Realty Co.*, 182 N. C., 536; *Williams v. R. R.*, 187 N. C., 348; *Albritton v. Hill*, 190 N. C., 429; *Earwood v. R. R.*, 192 N. C., at p. 30; *Dickey v. R. R.*, 196 N. C., 726; *Campbell v. R. R.*, *ante*, 107.

Of course if the negligence of the driver, A. C. Sanders, was the sole, only proximate cause of the injury, plaintiff could not recover. *Campbell case, supra.*

In the present case we cannot say that the negligence of Sanders, if any, was the sole, only proximate cause of the injury. The injury occurred on a dark night, about 7:00 p.m., in an unlighted place, the driver of the automobile operating at 3 or 4 miles an hour. In approaching the crossing, Sanders, the driver, testified that there were a couple of little frame buildings on the left side the train was approaching, which would obscure the view of the driver, also "very poor lights on the east side (side train was coming). I don't think any lights on it." Witness (plaintiff's husband) further testified: "After passing the corner of the house if there had been any obstruction it was dark and I couldn't see. . . . I seen the train when it was right on me. I was right in front of it then. I didn't see it before. I had not heard it. I did not hear the whistle blow nor the bell ring. I said yesterday I

did not hear it. If I had heard it I would have stopped. I didn't hear either the bell or the whistle." *Madrin v. R. R.*, 200 N. C., 784.

The case of *Herman v. R. R.*, 197 N. C., 718, cited by defendant, is not applicable. In that case "The evidence discloses that the automobile in which plaintiff was riding when it collided with the defendant's locomotive at a highway crossing in the village of Raynham, Robeson County, was running about 30 to 35 miles an hour; it skidded approximately 90 feet, presumably due to the driver's effort to stop, before striking the rear driving wheel just under the fireman's seat. 'I saw the car hit and rear up like a bucking horse,' said one of the plaintiff's witnesses. The train was approaching, slowing down for the station stop, at a rate of from 10 to 12 or 15 miles an hour."

Nor is *Eller v. R. R.*, 200 N. C., 527 applicable. The collision in that case occurred about 8:26 o'clock in the morning. At p. 530 it is said: "The evidence of plaintiff further showed that when you 'come in line with Park Avenue you can see up the railroad several hundred yards.' This distance was estimated at 300 to 400 yards, and there was no evidence to the contrary."

The evidence in the present case was to the effect that defendant ran its fast Florida train 25, 35 to 40 miles an hour through the town of Wilson (with a population of about 15,000 people), over a grade crossing, Green Street, on a dark night, gave no signal of its approach and had no gongs, safety gates, flagman, or watchman, at the crossing. At that time of the year it was in evidence that 350 to 400 automobiles crossed the railroad at Green Street each day. The traffic at the Green Street crossing was pretty heavy, especially at the time of the evening that the injury occurred. The evidence as to the heavy traffic was permissible as some evidence to be considered by the jury; in fact, defendant made no objection to this evidence.

In *Moseley v. R. R.*, 197 N. C., at p. 637, the following charge in the court below was approved: "Before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or watchman at a crossing, it must first be shown that such crossing is more than ordinarily hazardous, as for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects proper in themselves. The frequency with which trains are passing, and the amount of travel, or noise, are also material circumstances in considering the question of danger." *Cummings v. Penn. R. R. Co.*, 71 A. L. R., 1156.

The ordinance of the town of Wilson prohibited a railroad or engineer from running its train through the town over 10 miles an hour, and it was incumbent on the engineer to ring the bell while so doing.

In *Hendrix v. R. R.*, 198 N. C., at p. 144, is the following: "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."

In *Collett v. R. R.*, 198 N. C., at p. 762, we find: "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 a proximate result of such negligence injury is inflicted the company is liable in damages. *Russell v. R. R.*, 118 N. C., 1098; *Perry v. R. R.*, 180 N. C., 290; *Moseley v. R. R.*, 197 N. C., 628."

In *Kimbrough v. Hines*, 180 N. C., at p. 280, the Court quotes from cases as follows: "It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury!' . . . Persons approaching a railroad crossing are not required, as a matter of law, to stop before attempting to cross, but his omission to do so is a fact for the consideration of the jury."

This Court approved the following language in the case of *Finch v. R. R.*, 195 N. C., at p. 199: "The court, gentlemen, instructs you that it is a rule of law that a person who voluntarily goes on a railroad track at a point where there is an obstructed view of the track, and fails to look or listen for danger, cannot recover for an injury which may have been avoided by looking and listening; but where the view is obstructed or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury." *Moore v. R. R., ante*, 26.

From the facts and circumstances of this case, the law applicable is stated in *Earwood v. R. R.*, 192 N. C., at p. 30, as follows: "However, in the present case, there was evidence tending to show negligence on the part of the defendant in failing to give reasonable signals as required by law. There was also evidence that the driver of the car was guilty of negligence. Under this aspect of the case the doctrine of concurrent negligence applies, as stated by *Stacy, J.*, in *White v. Realty Co.*, 182 N. C., 536, as follows: 'But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to

recover; because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others. When two efficient, proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' *Wood v. Public Service Corp.,* 174 N. C., 697; *Hinnant v. Power Co.* 187 N. C., 288; *Albritton v. Hill,* 190 N. C., 429"; *Smith v. R. R.,* 200 N. C., 177.

The court below instructed the jury as follows: "If the jury shall find from the evidence, and by its greater weight, that on 1 February, 1930, at about 7 o'clock at night the defendant's train was being operated in or through the town of Wilson, in violation of the ordinance, that is, at a greater rate of speed than ten miles per hour, or was being operated in or through the town without ringing the bell of the locomotive—either or both—then the court charges the jury that such act on the part of the defendant was negligence and if the jury shall further find from the evidence and by its greater weight that such violation of the ordinance was the proximate cause or one of the proximate causes of the injury to the plaintiff, it would be the duty of the jury to answer the first issue yes."

The pertinent part of the ordinance complained of by defendant, is as follows: "And every engineer in charge of any train or locomotive running through the town of Wilson shall ring the bell of such locomotive while the same is being run and operated through said town."

The defendant contends that the instruction set forth above was reversible error. We cannot so hold.

Defendant cites the case of *S. v. R. R.,* 168 N. C., 103. That was a case construing the present ordinance of Wilson. That case decides that "It will hardly be contended that the town did not have the right to make the engineer solely responsible for the blocking of the crossing, if it saw fit to do so, and we think it is equally clear that the ordinance was intended to penalize the engineer alone for doing, or permitting to be done, the forbidden act. Defendant is not charged with running its train at an excessive rate of speed, and the portion of the ordinance where that is prohibited is the only one in which the words 'railroad company' are used. When requiring the ringing of the bell and forbidding the blocking of the crossing, the engineer only is mentioned, it being reasonably supposed by the draftsman of the ordinance and the town board that if the prohibited acts were committed, the engineer would be the one directly responsible for it, and the only one who could well prevent it, and they very wisely and justly restricted the imposition of a penalty for disobedience of the ordinance to him. It may be seriously questioned if the part of the ordinance relating to the speed of

trains is not also confined to him; but we do not decide this, as it is not before us. The ordinance is too plainly worded for any doubt to be entertained as to the intention that the penal clause should be confined to the engineer." The ordinance is valid. In the penal enforcement of portions of the ordinance, the engineer who violated it must suffer. The ordinance placed a duty on the railroad company and the engineer, the employee of the railroad, under certain aspects of the ordinance was the person to perform the duty imposed on the master, and if he did not he must suffer the penalty.

We do not think the charge of the court below on the last clear chance, which defendant complains of, if the evidence is not sufficient to sustain the charge, is prejudicial on this record. See *Redmon v. R. R.*, 195 N. C., 764. We see no prejudicial inconsistencies in the charge and cannot hold that it impinges on C. S., 564. The court below fully and fairly gave the contentions on both sides of the controversy, and the law applicable to the facts. We find

No error.

J. M. DANIEL v. TALLASSEE POWER COMPANY.

(Filed 18 November, 1931.)

Appeal and Error J c—New trial will not be granted where rights of appellant have not been prejudiced by alleged error.

A judgment will not be upset on appeal even though irregularly entered when no harm has resulted to the appellant and none is likely to follow from allowing the judgment to stand.

APPEAL by plaintiffs from *Warlick, J.*, at September Term, 1931, of DAVIDSON.

Civil action for damages to two tracts of land (one owned by plaintiff, his brother T. W. Daniel, and the defendant as tenants in common, and the other by plaintiff and his brother as tenants in common) caused by defendant's dam ponding water back upon said lands.

Demurrer interposed for defect of parties and misjoinder of causes sustained, the two causes separated, and T. W. Daniel ordered to be made a party plaintiff in both causes of action (C. S., 516), from which the plaintiff appeals, assigning error.

Phillips & Bower and J. M. Daniel, Jr., for plaintiff.
Raper & Raper and R. L. Smith & Sons for defendant.

PER CURIAM. Without regard to the correctness of the ruling on the demurrer, as the result reached was within the power and discretion of the trial court, and apparently no harm has come to the plaintiff, the judgment will not be disturbed.

It is not the practice of appellate courts to upset judgments, even though irregularly entered, where no harm has come to appellant, and none is likely to result from allowing the judgment to stand. *Bank v. McCullers, ante,* 440; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32.

Affirmed.

T. W. DANIEL v. TALLASSEE POWER COMPANY.

(Filed 18 November, 1931.)

Appeal and Error G c—Appeal will be dismissed where no briefs have been filed.

Where neither party has filed a brief the appeal will be dismissed.

APPEAL by plaintiff from *Warlick, J.,* at September Term, 1931, of DAVIDSON.

Phillips & Bower and J. M. Daniel, Jr., for plaintiff.
Raper & Raper and R. L. Smith & Sons for defendant.

PER CURIAM. This is a companion case to *J. M. Daniel v. Tallassee Power Company, ante,* 680. The complaints in the two cases are similar, with like judgments entered in the Superior Court.

No briefs have been filed by either side, for which reason the appeal will be dismissed.

Appeal dismissed.

LULA WATKINS, ADMINISTRATRIX OF J. H. WATKINS, v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 18 November, 1931.)

1. Insurance P b—Where policy sued on is not offered in evidence and there is no evidence that it was in force a nonsuit is proper.

In an action on an insurance policy a nonsuit is correctly entered in the court below when the policy contract is not offered in evidence and it is not made to appear that it was in force at the time in question.

2. Pleadings H a—Order of trial court allowing filing of pleadings after expiration of statutory time is upheld.

An order of the trial court allowing the defendant to file answer after the expiration of the statutory time is upheld upon authority of *Howard v. Hinson*, 191 N. C., 366.

APPEAL by plaintiff from *Sink, J.*, at June Term, 1931, of GUILFORD.

Civil action to recover on a policy of group life insurance.

On 1 October, 1917, the defendant issued to Pomona Mills, Inc., its Group Policy of Life Insurance No. 369, covering the lives of certain employees.

On 1 February, 1922, the Pomona Mills, Inc., issued to J. H. Watkins, one of its employees at that time, certificate No. 1867, showing that his life was insured for $300 under the defendant's Group Policy No. 369, "while you are in the employ of this company and during the continuance of the policy," to be automatically cancelled, however, "if you are absent for more than two weeks without permission of the superintendent. . . . Permission will be granted for sickness or other unavoidable causes, provided you make application to the superintendent."

Plaintiff's intestate, the holder of this certificate, did no work for the Pomona Mills after April, 1928. He died 26 December, 1929. It is alleged that he was unable to give notice, etc., because of immediate mental derangement on leaving the mill. *Rhyne v. Ins. Co.*, 196 N. C., 717, 147 S. E., 6, and 199 N. C., 419, 154 S. E., 749.

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

E. D. Kuykendall and O. W. Duke for plaintiff.
Murray Allen for defendant.

PER CURIAM. The contract of insurance issued by the defendant to Pomona Mills, Inc., under which plaintiff claims, was not offered in evidence. Nor does it appear that it was in force when plaintiff's intestate left the Pomona Mills or when he died. The judgment of nonsuit was properly entered.

The order made by the judge allowing defendant to file answer, after statutory time for filing had expired, is supported by the decision in *Howard v. Hinson*, 191 N. C., 366, 131 S. E., 748.

Affirmed.

J. C. MEDLIN v. F. S. MILES AND HIS WIFE, LOTTIE MILES, AND C. GRESHAM.

(Filed 25 November, 1931.)

1. Bills and Notes B b—Transfer in this case held to be by qualified endorsement and transferer was liable only as assignor.

A negotiable instrument transferred by an endorsement reading "for value received I hereby sell, transfer and assign all my right, title and interest to within note to M." assigns title to the instrument by qualified endorsement, exempting the transferer from all liability as a general endorser, except that he is still chargeable with implied warranties as a seller. C. S., 3019, 3047.

2. Same—Words qualifying endorsement may either precede or follow signature.

The words qualifying an endorsement of a negotiable instrument, such as "without recourse" and words of like effect, may either precede or follow the signature of the transferer of title. C. S., 3019, 3047.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at March Term, 1931, of GUILFORD. Affirmed.

This is an action to recover on certain notes executed by the defendants, F. S. Miles and his wife, Lottie Miles, and payable to the order of the defendant, C. Gresham.

Plaintiff is the holder in due course of the notes sued on. Each of said notes was endorsed, before delivery to the plaintiff, as follows: "For value received, I hereby sell, transfer and assign all my right, title and interest to within note to J. C. Medlin. This 9 July, 1929. C. Gresham."

There was judgment by default final, for want of an answer, against the defendants, F. S. Miles and his wife, Lottie Miles, makers of the notes, from which judgment there was no appeal.

The defendant, C. Gresham, by his answer to the complaint, denied liability to the plaintiff on the notes sued on, as alleged therein.

At the trial, the execution of the endorsement on each of the notes was admitted by the defendant, C. Gresham. The plaintiff testified that there is now due on said notes the sum of $2,734. No other or further evidence was offered by plaintiff or defendant.

From judgment dismissing the action as of nonsuit, plaintiff appealed to the Supreme Court.

L. Herbin for plaintiff.

Z. H. Howerton and E. B. Gresham, Jr., for defendant.

CONNOR, J. Do the words appearing on the back of each of the notes sued on in this action, over the name of the defendant, as endorser, qualify his endorsement so that he is a mere assignor of the title to said notes, and not a general endorser? This is the question of law involved in this appeal.

It is provided by statute that "a qualified endorsement constitutes the endorser a mere assignor of the title to the instrument. It may be made by adding to the endorser's signature the words 'without recourse,' or any words of similar import. Such an endorsement does not impair the negotiable character of the instrument." C. S., 3019.

It is further provided by statute that "every endorser who endorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two and three of the next preceding section; and (2) that the instrument is at the time of his endorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent endorser who may be compelled to pay it." C. S., 3047.

Where the words "without recourse" are added to the signature of the endorser on a negotiable instrument, his endorsement is qualified, and the endorser is not liable as a general endorser under the provisions of C. S., 3047. The words appearing on the back of each of the notes sued on in this action, are of similar import as the words "without recourse." In *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847, it was said by *Walker, J.,* that these words are sufficient when appearing on the back of a negotiable instrument, over the signature of the endorser, to constitute the endorsement a qualified endorsement within the meaning of the statute, with the result that the endorser is not liable to the holder of the instrument as a general endorser. This is the law in this jurisdiction and therefore there is no error in the judgment in this action.

The usual mode of making a qualified endorsement is by adding to the signature of the endorser the words "without recourse," and it is immaterial whether these words follow or precede his signature. Such an endorsement is sufficient to transfer title, but it exempts the transferer from all liability as endorser, except that he is still chargeable with implied warranties as a seller of the paper unless it is otherwise provided by statute. 8 C. J., 369, sec. 550.

An endorsement may be qualified not only by the use of the words "without recourse," but also by the use of words of similar import. In

Arkansas, Illinois and North Carolina such words as those appearing on the back of the notes sued on in this action are held to make the endorsement a qualified one, and to exempt the endorser from liability on the theory that having expressed one of the two legal implications flowing from a general endorsement, the endorser is deemed to have intended to exclude the other implication. The contrary is held in other jurisdictions. 8 C. J., 370, sec. 551.

Upon examination of the decisions involving the question presented by this appeal, and upon consideration of the principles involved, we are of the opinion that the statement of the law by *Walker, J.*, in *Evans v. Freeman, supra,* should be and it is therefore declared to be the law in this State. The judgment is

Affirmed.

W. J. SHUFORD, RECEIVER OF THE Y. & B. CORPORATION, v. B. L. SCRUGGS.

(Filed 25 November, 1931.)

1. Evidence N b—Mere scintilla of evidence, raising only suspicion or conjecture, is insufficient to be submitted to the jury.

A mere scintilla of evidence, raising only a suspicion, conjecture, guess or speculation as to the issue to be proven, is insufficient to take the case to the jury. C. S., 567.

2. Corporations H c—Evidence of purchase of its stock by corporation when insolvent held insufficient to be submitted to the jury.

In an action by the receiver of an insolvent corporation to recover the purchase price of stock alleged to have been sold by the defendant to the corporation when it was insolvent, evidence tending only to show that the defendant sold the stock to the president of the corporation in his individual capacity and accepted the president's personal notes in payment, that the notes were collected by the defendant through a bank, and that the defendant had no knowledge of from what source the money came to make the payments, is *Held:* insufficient to show that the corporation purchased the stock, and the defendant's motion as of nonsuit should have been granted.

3. Trial D d — Competency, admissibility and sufficiency of evidence is question for the court, the weight and credibility for the jury.

The competency, admissibility and sufficiency of the evidence is for the court to determine, the weight, effect and credibility is for the jury.

APPEAL by defendant from *Harding, J.*, and a jury, at February Term, 1931, of MECKLENBURG. Reversed.

This is an action brought by plaintiff against the defendant to recover the sum of $350.00 and interest thereon from May, 1927. The plaintiff contends that the suit was grounded upon allegations that the Y. & B. Corporation was insolvent in 1926 and 1927; that the defendant was a stockholder in 1926, holding 100 shares of its stock (par value of $10.00 a share); that defendant with the knowledge of its insolvency or believing it to be insolvent, went to J. A. Yarborough, its president, treasurer and general manager, desiring and designing to be quit of said stock and get his money back upon it before the corporation might fail in business, and thus advantage himself to the detriment of creditors and other stockholders, and prevailed upon said officer of the corporation to redeem said stock with the money of the corporation, and that in this way he did obtain $350.00 of its funds in violation of the law governing such cases.

This contention of plaintiff was denied by defendant, and he for further answer and defense contended: That the defendant owned $1,000 in stock in the Y. & B. Corporation, and sold same about 26 November, 1926, to J. A. Yarborough, personally, and accepted from Yarborough a note in payment of said stock, $750.00, which note was renewed from time to time, and now $400.00 remains unpaid. That this defendant dealt with J. A. Yarborough and not the Y. & B. Corporation. That J. A. Yarborough bought said stock from this defendant personally, and executed his personal note in payment of said stock. That this defendant made no unlawful attacks upon the Y. & B. Corporation treasury, and has none of its money.

Defendant sold his $1,000 worth of stock for $750.00 to J. A. Yarborough, who gave his note on which two payments of $250.00 and $100.00 were made, for which this action was instituted.

The issues submitted to the jury and their answer thereto were as follows: "Is the defendant indebted to plaintiff, and if so, in what amount? Answer: $350.00 with interest from the date of the checks." (It is agreed by counsel for plaintiff and defendant that date of checks referred to is $250.00, 23 May, 1927; $100.00, 21 July, 1927.)

Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

E. B. Cline and Preston & Ross for plaintiff.

G. T. Carswell and Joe W. Ervin for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we think there was error. This action was tried at February

Term, 1931. The case of *Shuford v. Brown,* was handed down 20 May, 1931, *ante,* 17. In that case we set forth the facts and law applicable thereto. The present case is similar, and we see no good reason to go over the matter again.

In the above case we said, at p. 25: "Mere scintilla of evidence, or evidence raising only suspicion, conjecture, guess, surmise or speculation, is insufficient to take the case to the jury."

In *Denny v. Snow,* 199 N. C., at p. 774, the principle is thus stated: "'A verdict or finding must rest upon facts proved, or at least upon facts of which there is substantial evidence, and cannot rest upon mere surmise, speculation, conjecture, or suspicion. There must be legal evidence of every material fact necessary to support the verdict or finding, and such verdict or finding must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities.' 23 C. J., pp. 51-52. *S. v. Johnson, ante,* 429."

In the present case all the evidence was to the effect that the stock was sold in good faith *by defendant* to J. A. Yarborough personally, who gave his note to defendant for same. The payments on the note were made by Yarborough to the bank, where defendant had the note discounted, and defendant had no knowledge from what source the money came to make the payments.

It is well settled that the competency, admissibility and sufficiency of the evidence is for the court to determine, the weight, effect and credibility is for the jury. The duty imposed on the court is one that should be carefully and jealously guarded so that there should be no judicial despotism.

The learned and able attorney who argued this case, called attention to the fact of the jury finding in this case and the weight that should be given it. In this he is correct. Const., Art. I, sec. 19, is as follows: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." It may be that the eloquence of the counsel, as it is often said, "swept the jury off of their feet."

Pilate asked "What is truth? and would not stay for an answer." Bacon's Essay on Truth. It is related, and the incident is worthy of preservation, that the great John Wesley was a firm believer in *vox populi, vox Dei,* and one morning at the breakfast table he was quoting and discussing this idea, when his sister turned to him and said: "John, whenever I hear you quote 'the voice of the people is the voice of God', there rings in my ears 'Crucify Him! Crucify Him.'"

Plaintiff's own witness, J. A. Yarborough, on cross-examination by defendant, stated *"My original note was for $750.00, on which I paid $350.00, leaving a balance of $400.00."* And "the Y. & B. Corporation did not ever redeem any stock for Mr. Scruggs or take up any stock for B. L. Scruggs. In November, 1926, the Y. & B. Corporation was a going and solvent concern." The judgment below is

Reversed.

WILLIAM T. USSERY v. ERLANGER COTTON MILLS AND ÆTNA LIFE INSURANCE COMPANY.

(Filed 25 November, 1931.)

1. **Master and Servant F b—Findings of fact necessary to support award for hernia.**

   In order to award compensation to an employee for an accident resulting in hernia there must be evidence that the hernia immediately followed the accident, was accompanied by pain, and that the applicant did not have hernia prior thereto, and it is sufficient for the Commission to find these facts and award compensation if the pain immediately followed the accident although the hernia was not discovered until diagnosis by a physician some days thereafter, ten days in this case. N. C. Code (Michie), 8180.

2. **Master and Servant F i—Where fact necessary to support award has not been found the case will be remanded, the evidence being sufficient.**

   In order for the Industrial Commission to award compensation to an employee suffering from hernia as a result of an accident arising out of and in the course of his employment it required that the Commission find the necessary facts upon the evidence, and in the absence of such findings, where the evidence is sufficient, on appeal to the Supreme Court the case will be remanded to the Superior Court for the latter court to remand it to the Industrial Commission, the last named being the only jurisdiction in which the evidence may be considered and passed upon.

APPEAL by defendant, Ætna Life Insurance Company, from *Harwood, Special Judge,* at July Term, 1931, of DAVIDSON. Remanded.

This is a proceeding under the provisions of the North Carolina Workmen's Compensation Act, chapter 133A, Code, 1931. The plaintiff is an employee of the defendant, Erlanger Cotton Mills; the defendant, Ætna Life Insurance Company, is the carrier for its codefendant. Both plaintiff and defendants are subject to the provisions of the act, Code, 1931, sec. 8081K.

The facts found at the hearing before the North Carolina Industrial Commission are as follows:

"1. That the plaintiff was regularly employed by the defendant employer on 10 November, 1930, at an average weekly wage of $15.83.

2. That the plaintiff sustained an accidental injury resulting in a left inguinal hernia on 10 November, 1930, which appeared suddenly with pain following an accident, and he did not have said hernia prior.

3. That the plaintiff has lost no time from his regular work because of said hernia."

On the foregoing facts, the Commission awarded the plaintiff "an operation to cure the left inguinal hernia and compensation at $9.50 (60 per cent of $15.83) per week for such period of time as the plaintiff is unable to work because of said operation, as provided by section 2(r) of the North Carolina Workmen's Compensation Act.

The defendant shall pay to the proper parties all necessary medical and surgical and hospital costs in this case. The defendant will pay the costs of this hearing."

From this award, the defendant, Ætna Life Insurance Company, the carrier for its codefendant, appealed to the judge of the Superior Court of Davidson County. From judgment affirming the award, the defendant appealed to the Supreme Court.

Martin & Brinkley for appellee.
Sapp & Sapp for appellant.

CONNOR, J. Section 2(r), chapter 129, Public Laws of North Carolina, 1929, (section 8081(i), Code, 1931), is as follows:

"In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

First, That there was an injury resulting in hernia or rupture;

Second, That the hernia or rupture appeared suddenly;

Third, That it was accompanied by pain;

Fourth, That the hernia or rupture immediately followed an accident;

Fifth, That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femeral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. . . . In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will

be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this act."

In this case the appellant contends that the facts found by the Industrial Commission are not sufficient to support the award made by said Commission, for the reason that it is not found that the hernia for which the employee claims compensation immediately followed an accident, resulting in injury. This contention must be sustained because of the express provisions of the statute.

The evidence at the hearing before the Industrial Commission tended to show that the plaintiff suffered the injury by accident on 10 November, 1930, which arose out of and was in the course of his employment. Ten days thereafter an examination by a physician disclosed that he then had a sliding inguinal hernia on the left side. The plaintiff testified that at the time of his injury he felt a sharp pain. This pain continued for ten days when he first consulted the physician. He testified that he did not have a hernia prior to the accident. This testimony, if found to be true by the Industrial Commission, would be sufficient, we think, to support a finding by said Commission that the hernia discovered by the physician on 20 November, 1930, immediately followed the accident on 10 November, 1930. It is immaterial that the plaintiff did not know until advised by the physician that he had a hernia. If in fact the hernia immediately followed the accident, that is sufficient under the statute.

As there was evidence from which the Industrial Commission, which alone under the statute may find the facts in a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act, may find that the plaintiff suffered a hernia which immediately followed the accident, the proceeding is remanded to the Superior Court of Davidson County with direction that it then be remanded to the North Carolina Industrial Commission that said Commission may consider the evidence and find whether or not the hernia which plaintiff suffered followed immediately the accident which occurred on 10 November, 1930. In the absence of such finding, specifically and definitely made by the Industrial Commission, the plaintiff upon the facts disclosed by the evidence, is not entitled to compensation, and his claim should be disallowed. We do not reverse the judgment of the Superior Court on this appeal, as there was evidence at the hearing before the Industrial Commission tending to establish all the facts required by the

statute to support the award made by the said Commission. Of course, neither this Court nor the Superior Court, upon appeal from the award of the Industrial Commission, can consider the evidence and determine therefrom what the facts are. This is a matter exclusively for the Industrial Commission.

Remanded.

MRS. JAMES F. PARKER v. GREAT ATLANTIC & PACIFIC TEA COMPANY.

(Filed 25 November, 1931.)

1. **Negligence A c—Res ipsa loquitur does not apply to injury caused by falling on oiled 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 that oil had been applied to floor in a negligent manner, causing injury, held sufficient.**

   Where in an action by a customer to recover damages for an injury sustained by slipping and falling on the oiled floor of a grocery store there is evidence that the injury occurred on Monday after the floor had been oiled on the preceding Saturday night and that the oil had accumulated in streaks and that the customer slipped and fell where there was an unusual accumulation of oil at a place where customers were invited to inspect merchandise displayed, is *Held:* sufficient evidence that the oil had been negligently applied to take the case to the jury upon the issue of the defendant's negligence.

3. **Appeal and Error J e—Exclusion of evidence, if error, held harmless, the excluded evidence being argued to the jury without objection.**

   Where, in an action by a customer to recover damages sustained from slipping and falling on the oiled floor of a grocery store, the trial court excludes evidence offered by the defendant that there were three hundred other customers in the store on the same day and none of them were injured, but the evidence excluded is argued to the jury without objection, *Held:* if the evidence was competent and was erroneously excluded, it was not error to defendant's prejudice who received the full benefit in the argument of the case before the jury.

CIVIL ACTION, before *Cowper, Special Judge,* at April Term, 1931, of WAYNE.

The plaintiff alleged and offered evidence tending to show that on 10 March, 1930, at about eight o'clock in the morning, she entered the store of the defendant and walked toward the milk counter. Her narrative of the occurrence is as follows: "I entered the door and gave a casual glance over the display of groceries that were in the store and

went on toward the milk counter, and just half way, a little closer to the meat counter, suddenly both feet went out and I fell. Both feet slipped out from under me. I fell backward, that is, my feet went forward and I struck the floor. . . . There was a damp place on the floor, looked like oil. It appeared to be oil and had dried more in some places than in others. Where I stepped was one of the damp places. Some of the planks at this place looked practically dry, and then there were streaks on them that looked damp as if it was damp with oil and it was more so in the place where I walked. I walked through the place that seemed to be more than any other part of the floor. There seemed to be on part of the boards little streaks that didn't seem to be perfectly dry. I could detect the exact point where I slipped and at that point there was a greater accumulation of oil where I stepped. . . . My hose had a big spot of oil on them." There was evidence corroborating the testimony of plaintiff, and other evidence tending to show that she had sustained permanent and painful injury as a result of the fall.

The defendant denied all allegations of negligence and offered evidence tending to show that the floor was oiled Saturday night and that the plaintiff fell Monday morning shortly after the store opened for business.

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 $3,500.

From judgment upon the verdict the defendant appealed.

Langston, Allen & Taylor for plaintiff.
Dickinson & Freeman for defendant.

BROGDEN, J. The fact that a floor is oiled constitutes no evidence of negligence. Oiling is both customary and necessary, particularly in stores of the type and character described in the evidence. Nor does the mere fact that a customer falls in a store constitute evidence of negligence for the reason that judicial utterances upon the subject concur in the view that *res ipsa loquitur* does not apply to injuries resulting from slipping or falling, occasioned by the presence of grease or oil upon the floors of a store.

Considering the evidence in the case at bar with that liberality which the law requires, it would appear as a reasonable inference that the floor was not properly oiled, in that oil had been permitted to accumulate on the floor at a place where customers were invited to inspect the merchandise displayed. The ultimate question is whether the evidence brings the case within the rules of liability heretofore announced in *Bowden v. Kress,* 198 N. C., 559, 152 S. E., 625. The Court is of the

opinion that there was some evidence of negligence to be submitted to the jury, and hence *Bowden v. Kress, supra,* would govern.

The defendant undertook to show that three hundred customers entered the store on the day plaintiff fell, and that no one else sustained injury. Doubtless this evidence was offered for the purpose of refuting the theory that the floor was improperly oiled. The trial judge excluded the evidence, but it appears from a notation in the record that counsel on each side, without objection, argued to the jury that there were three hundred people present in the store on the day plaintiff was injured. So that, if it be conceded that the excluded evidence was competent, nevertheless, the defendant had the full benefit of every inference which could be drawn from such testimony.

There are other exceptions in the record, but a careful examination of them fails to produce the conviction that substantial error was committed in the admission of evidence.

No error.

A. S. GRADY, RECEIVER OF FARMERS AND MERCHANTS BANK OF MOUNT OLIVE, v. S. L. WARREN AND OTHERS, AND CITIZENS BANK OF MOUNT OLIVE.

(Filed 25 November, 1931.)

Pleadings D b—Demurrer for misjoinder of parties and causes held properly sustained in this case.

Where the receiver of an insolvent banking corporation brings action against its directors, alleging mismanagement resulting in insolvency, and against another banking corporation with which the insolvent corporation was later merged, alleging breach of a contract with the directors of the insolvent corporation in regard to liquidation, resulting in loss, there is a misjoinder of parties and causes of action and the action will be dismissed upon the defendant's demurrer, there being no allegation in the complaint of a conspiracy or of a general or continued course of dealing or systematic policy or wrongdoing participated in by all the defendants, C. S., 511(4), (5), C. S., 456, as amended by chapter 344, Public Laws of 1931, applying only when the plaintiff is in doubt as to the persons from whom he is entitled to relief.

APPEAL by plaintiff from *Cowper, Special Judge,* at April Term, 1931, of WAYNE. Affirmed.

From judgment sustaining the demurrers to the complaint, for misjoinder of parties and causes of action, and dismissing the action, plaintiff appealed to the Supreme Court.

J. Faison Thomson, Kenneth C. Royall and Teague & Dees for plaintiff.

R. D. Johnson, Langston, Allen & Taylor, and Dickinson & Freeman for defendants.

CONNOR, J. This is an action by the receiver of an insolvent banking corporation against the directors of said corporation, and also against another banking corporation, with which the insolvent corporation, prior to its insolvency, was merged or consolidated.

The plaintiff alleges as his cause of action against the defendants, directors of the insolvent corporation, while it was engaged in business, and prior to its merger or consolidation with the defendant banking corporation, acts of negligence, resulting in its insolvency; he alleges as his cause of action against the defendant banking corporation that after the merger or consolidation, said banking corporation breached its contract with the directors of the insolvent corporation, with respect to its liquidation, resulting in loss to said corporation. There were no allegations in the complaint of a conspiracy between the defendants, or of a course of dealing between them with respect to the assets of the insolvent corporation, amounting to a conspiracy.

There is a misjoinder of parties (*R. R. v. Hardware Co.*, 135 N. C., 73, 47 S. E., 234) and of causes of action (*Huggins v. Waters*, 167 N. C., 197, 83 S. E., 334) in the complaint in this action. For this reason there is no error in the judgment sustaining the demurrers (C. S., 511(4) and (5) and dismissing the action. *Shuford v. Yarborough*, 198 N. C., 5, 150 S. E., 618.

There is no allegation in the complaint of a general and continued course of dealing, or of a systematic policy of wrong doing, participated in by all the defendants, and resulting in loss to the plaintiff. For this reason *Trust Co. v. Peirce*, 195 N. C., 717, 143 S. E., 524, cited and relied on by plaintiff, is not applicable in this case.

C. S., 456, as amended by chapter 344, Public Laws 1931, applies only when the plaintiff is in doubt as to the persons from whom he is entitled to redress on his cause of action; in that case he may join two or more persons as defendants to determine which is liable. The statute manifestly does not authorize a misjoinder of causes of action and of parties. Such was not its purpose. A complaint is demurrable now as before the amendment of C. S., 456, for a misjoinder of parties, and of causes of action. C. S., 511(4) and (5).

Affirmed.

LILLIE EPPS v. GATE CITY LIFE INSURANCE COMPANY.

(Filed 25 November, 1931.)

Insurance J f—Intentional shooting of insured by another held to prevent recovery under terms of the policy contract.

Where a policy of life insurance provides that no recovery should be had thereon if the death of the insured is caused by the intentional act of another, the provision is valid, and upon evidence tending to show that the insured was intentionally shot by a police officer to prevent the insured from shooting another officer, and that the insured died as a result thereof, an instruction that if the jury believed the evidence to answer the issue in the insurer's favor is not error, for although the officer did not intend to kill the deceased the injury resulting in death was intentionally inflicted.

APPEAL by plaintiff from *Oglesby, J.,* at September Term, 1931, of FORSYTH. Affirmed.

This is an action to recover on a policy of insurance issued by the defendant on the life of Sam Epps, deceased, in which plaintiff is named as beneficiary.

The action was tried in the county court of Forsyth County before Efird, J., and a jury.

It is provided in the policy that "no benefits will be paid for death resulting within two years from suicide, immorality, intemperance, or as a punishment for violation of the law, or death caused by the beneficiary, or caused wholly or in part by the intentional act of any person (assault committed on the insured for the sole purpose of burglary, or robbery excepted), but in all of the above events the beneficiary shall in case of the death of the insured be entitled to receive the reserve held for this policy according to the American Experience Table and 3½ per cent interest."

The only issue submitted to the jury was as follows:

"Was the death of Sam Epps caused wholly or in part by the intentional act of any person?"

All the evidence offered at the trial tended to show that Sam Epps, the insured, was shot and killed on the night of 6 December, 1930, by a police officer of the city of Winston-Salem, N. C.; that at the time he was shot by the police officer, Sam Epps was about to shoot another officer, who had been called upon to arrest him for a violation of the law; and that the act of the police officer who shot Sam Epps was intentional and not accidental. The officer testified that he did not intend to kill Sam Epps, but shot to prevent him from killing the other officer.

The policy of insurance on the life of Sam Epps was issued on 6 October, 1930. It had no reserve value at the date of his death on 6 December, 1930.

At the close of the evidence, the court instructed the jury that the burden of proof on the issue was upon the defendant, and that if the jury believed the evidence and found the facts to be as the evidence tended to show, they should answer the issue, "Yes." The jury answered the issue, "Yes."

From judgment that plaintiff recover nothing of the defendant, the plaintiff appealed to the judge of the Superior Court of Forsyth County. At the hearing of the appeal, the judgment was affirmed, and plaintiff appealed to the Supreme Court.

F. W. Williams for plaintiff.
Wallace & Wall for defendant.

CONNOR, J. There was no error in the instruction of the judge of the county court to the jury.

The evidence for the defendant, uncontradicted by evidence for the plaintiff, tended to show that the death of the insured was caused by the act of the police officer, and that this act was intentional, and not accidental, as contended by the plaintiff. It is immaterial that the officer did not intend to kill the insured; he did intend to shoot him, and this was the act which caused his death.

The provision of the policy on which the defendant relied, is valid. 1 C. J., sec. 101, page 442, and cases cited in support of the text. See, also, 56 A. L. R., note page 685. There is no ambiguity in the language of this provision as applied to the facts of this case. The judgment is

Affirmed.

J. T. PRUITT v. L. V. PARKER ET AL.

(Filed 25 November, 1931.)

1. Chattel Mortgages B b—Chattel mortgage first indexed and cross-indexed in chattel mortgage index has priority.

The indexing and cross-indexing of chattel mortgages is an essential part of their registration, and where separate indexes for real estate mortgages and chattel mortgages are kept by the register of deeds of a county, a duly recorded chattel mortgage which is indexed and cross-indexed in the general chattel mortgage index has priority over a mortgage covering the same personal property and also certain real estate which is previously executed and recorded and indexed in the general

real estate mortgage index but subsequently indexed and cross-indexed in the general chattel mortgage index. C. S., 3560, 3561, as amended by chapter 327, Public Laws of 1929.

2. Chattel Mortgages B c—Recitation in chattel mortgage in this case held not to affect its priority of lien.

The priority of a chattel mortgage which is properly recorded and indexed is not affected by the fact that its warranty excluded "encumbrances of record" when the alleged prior encumbrance is not indexed and cross-indexed as required by the statute.

APPEAL by defendants from *Barnhill, J.,* at Chambers in Raleigh, 15 April, 1931. From FRANKLIN. Affirmed.

The following judgment was rendered in the court below: "This cause coming on to be heard upon return of notice to show cause why the temporary restraining order heretofore granted should not be continued to the final hearing, before Honorable M. V. Barnhill, judge presiding and holding the courts of the Seventh Judicial District, at Chambers in Raleigh, on 15 April, 1931, the plaintiff being present in person, and through his counsel, Biggs and Broughton, and W. H. Yarborough, and the defendants being present in person and represented by their counsel, George C. Green, Esq.; and being heard upon the admissions in the pleadings and admissions made in open court, the court finds the following facts:

First: That the plaintiff holds a chattel mortgage upon certain personal property as set out and described in the complaint executed by L. V. Parker and recorded in Franklin County registry on 28 May, 1930, in Deed Book 294, at pages 129 and 130, and the defendant, R. W. Jordan, holds a note executed by L. V. Parker secured by a trust deed or chattel mortgage to the defendant, G. C. Fanney, trustee, conveying certain real estate in Warren County therein described, and the identical personal property described in the chattel mortgage from L. V. Parker to the plaintiff, J. T. Pruitt, and said instrument was recorded in the registry of Franklin County on 28 May (20th), 1930, in Deed Book 294, at pages 123 and 124.

Second: The instrument from L. V. Parker to G. C. Fanney, trustee, securing the notes held by R. W. Jordan was indexed and cross-indexed in the front portion of Deed Book 294, in which the same was recorded on the same day on which it was filed for registration, and it was indexed and cross-indexed upon the general real estate cross-index maintained and kept by the register of deeds of Franklin County in his office on the day of its registration, and was indexed and cross-indexed upon the general chattel mortgage cross-index maintained and kept by the register of deeds of Franklin County on a date subsequent to the indexing and cross-indexing of the chattel mortgage held by the plaintiff.

Third: The chattel mortgage from L. V. Parker to J. T. Pruitt, held by the plaintiff, was indexed and cross-indexed in the front portion of Deed Book 294, in which it was registered on 28 May, 1930, the day of its registration, and was likewise indexed and cross-indexed in the general chattel mortgage cross-index maintained and kept by the register of deeds of Franklin County on 28 May, 1930.

Fourth: That as a part of the system of registration of instruments maintained and kept by the county of Franklin at the time of the registration of the respective instruments above recited, there was maintained and kept in addition to the several books of registration a separate system of cross-indexes for real property and a separate system of cross-indexes for chattel mortgages and other instruments concerning personal property. Instruments affecting title to real property under the system maintained in Franklin County are indexed and cross-indexed in the front of the respective registration books in which such instruments are recorded, and in addition thereto, are indexed and cross-indexed in the separate cross-index system for real estate instruments, and chattel mortgages and other instruments concerning personal property are likewise indexed and cross-indexed in the front portion of the registration book in which the same are recorded, and in addition thereto, are indexed and cross-indexed in the separate cross-index system kept for chattel mortgages and other instruments concerning personal property.

Fifth: That defendant Parker, who is the mortgagor in each instrument in controversy is now and was at the time of the execution of the said instruments and the recording thereof, a resident of Franklin County.

Upon the foregoing facts the plaintiff contends and asserts that the chattel mortgage now held by him constitutes a prior lien upon the personal property therein described by virtue of its prior indexing system kept and maintained for chattel mortgages and other instruments concerning personal property, and the defendants contend and assert that the indexing and cross-indexing of the instrument from L. V. Parker to G. C. Fanney, trustee, in the front portion of Deed Book 294, in which the same is recorded, and in the general index system for real property, prior to the registration, indexing and cross-indexing of the chattel mortgage held by the plaintiff, gives the defendants a prior lien upon said property.

Upon the finding of the foregoing facts and after hearing argument of counsel, the court, being of the opinion that the lien held by the plaintiff is prior to the lien held by the defendants upon the personal property described in the said chattel mortgage and the complaint, so adjudges and it is, therefore, ordered, considered and adjudged that the

temporary restraining order herein issued be and the same is hereby continued to the final hearing of this cause."

The defendants excepted and assigned error "to the judgment of the court" and appealed to the Supreme Court.

Yarborough & Yarborough and Biggs & Broughton for plaintiff.
George C. Green for defendants.

CLARKSON, J. This action, in effect, is brought to determine the rights of plaintiff and defendants to certain personal property.

(1) On 26 May, 1930, L. V. Parker, defendant (L. V. Parker trading as Carolina Box Lumber Company) being indebted to J. T. Pruitt, the plaintiff, and to secure the indebtedness executed a chattel mortgage to plaintiff on certain personal property describing same. This chattel mortgage was duly recorded in the office of the register of deeds of Franklin County, on 28 May, 1930, in Book 294, at pages 129-30.

(2) On 1 January, 1929, L. V. Parker being indebted to R. W. Jordan, the defendant, and to secure the indebtedness executed a deed in trust to G. C. Fanney, trustee defendant, on certain personal property describing same. In said deed in trust is the *same personal property* that is set forth *in plaintiff's chattel mortgage.* This deed in trust was duly recorded in the office of the register of deeds of Franklin County, on 20 May, 1930, in Book 294, pages 123-4.

Plaintiff's chattel mortgage was indexed and cross-indexed on 28 May, 1930, upon the general chattel mortgage cross-index maintained and kept by the register of deeds of Franklin County, before the deed in trust to G. C. Fanney, trustee, was indexed and cross-indexed upon the general chattel mortgage cross-index maintained and kept as aforesaid.

The first question presented by defendant: Is the deed of trust from L. V. Parker to G. C. Fanney, trustee for R. W. Jordan, recorded in the same book and indexed in the same book ahead of the chattel mortgage from said Parker to plaintiff J. T. Pruitt inferior in lien because indexed in the general chattel mortgage book subsequent to the Pruitt mortgage? We think so, as it was not properly indexed and cross-indexed as is provided by the statute.

This action involves the construction of chapter 327 of the Public Laws of 1929, entitled "An act to amend section 3560 and 3561, of the Consolidated Statutes, relating to the indexing of instruments in the office of the register of deeds for the several counties." Section 1 amends section 3560 giving authority to the county commissioners to install the "Family" index system and providing that no instrument shall be lawfully recorded until indexed and cross-indexed according to the particular system in use. Section 2 strikes out all of section 3561, and inserts in lieu thereof the following:

"3561. *Index and Cross-Index of Registered Instruments.* The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names and the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well bound books, and shall state in full the names of all parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and wherever the 'Family' index system shall be in use, to also show the name of each party under the appropriate family name and the initials of said party under the appropriate alphabetical arrangement of said index; and all instruments shall be indexed according to the particular system in use in the respective office in which the instrument is filed for record. Reference shall be made, opposite each name to the page, title, or number of the books in which is registered any instrument; *Provided,* that where the 'Family' system hereinbefore referred to has not been installed, but there has been installed an indexing system having subdivisions of the several letters of the alphabet, a registered instrument shall be deemed to be properly indexed only when the same shall have been indexed under the correct subdivision of the appropriate letter of the alphabet; *Provided, further,* that no instrument shall be deemed to be properly registered until the same has been properly indexed as herein provided; *Provided, further,* that all counties where a separate index system is kept for chattel mortgages or other instruments concerning personal property, no instrument affecting the title to real estate shall be deemed to be properly registered until the same has been properly registered and indexed in the books and index system kept for real estate conveyances; *Provided, further,* that it shall be the duty of the register of deeds of each county, in which there is a separate index for conveyances of personal property and for those of real estate, to double index every such conveyance, provided that such conveyance shall contain both species of property. A violation of this section shall constitute a misdemeanor."

Section 3. That this act shall not affect pending legislation (litigation) or instruments heretofore registered."

The act of 1929 provides that no instrument shall be deemed to be properly registered until the same has been properly indexed as provided in the act, and where a separate index system is kept for chattel mortgages (4th finding of fact), as was this case in Franklin County, chattel mortgages must be indexed and cross-indexed in the chattel mortgage index system.

In *Story v. Slade,* 199 N. C., at p. 597, citing a wealth of authorities, in this jurisdiction, it is held: "The indexing and cross-indexing of instruments required to be registered is an essential part of their registration."

We do not think *Whitehurst v. Garrett,* 196 N. C., 154 relied on by defendants, is applicable. That decision was rendered 10 October, 1928, before the act of 1929, *supra,* and the facts were also different.

We think the intention of the present act clear and not ambiguous, and on the facts in this case plaintiff, on this aspect, had a prior lien.

The second question presented: But defendants further contend: "If any additional notice is required, it is to be found in the mortgage to Pruitt itself, as follows: 'that the same (the property herein described) are free and clear from all encumbrances except encumbrances of record.'" Defendants contend that "While it is the established rule that no notice however full and formal can take the place of registration where the subsequent mortgage of the same property recites that it is made subject to a prior mortgage, such recitation is more than a mere notice of prior encumbrance; and it establishes a trust in equity in favor of the prior encumbrances, even though his instrument is not registered. *Bank v. Vass,* 130 N. C., 590; *Bank v. Smith,* 186 N. C., 635."

We do not think the above cases cited by defendant are applicable, but in *Story v. Slade, supra,* at pp. 597-8, we find: "The present case, therefore, comes squarely within the decisions in *Hardy v. Abdallah,* 192 N. C., 45, 133 S. E., 195 and *Piano Co. v. Spruill,* 150 N. C., 168, 63 S. E., 723, in which similar references are held to be insufficient to take the place of proper registration of alleged prior encumbrances." *Lawson v. Key,* 199 N. C., 664. For the reasons given, the judgment below is

Affirmed.

MRS. SAM T. HODGES, WIDOW OF SAM T. HODGES, DECEASED, DEPENDENT AND PLAINTIFF, v. HOME MORTGAGE COMPANY, EMPLOYER, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, CARRIER, DEFENDANTS.

(Filed 25 November, 1931.)

1. Master and Servant F a—Executive, while engaged in duties relative to policy of company, is not an employee within meaning of the act.

The scope of the term "employee" as used in the Workmen's Compensation Act is to be determined in the light of the entire act, giving significance to its provision for compensation based upon a per centum of the

average weekly wage and its title and theory to award compensation to workmen and their dependents, and *Held:* executives, while engaged in their duties directing or relating to the policy of the business are not employees within the intent and meaning of the act, the test being the nature and quality of the act at the time of the injury.

2. Same—Evidence in this case disclosed that executive was injured while discharging duties relating to policy of the business.

Upon evidence tending to show that an injury made the basis for a claim under the Workmen's Compensation Act was received by the vice-president of a mortgage company whose remuneration was fixed upon a commission on the loans he secured for the company, and that the accident occurred while he was on his way to catch a train to meet the treasurer of the company to negotiate certain trust contracts: *Held*, the injury was not compensable under the Workmen's Compensation Act, the vice-president not being an employee at the time within the intent and meaning of its provisions.

CIVIL ACTION, before *Daniels, J.*, at Special Term, 1931, of DURHAM.

Sam T. Hodges, executive vice-president of the Home Mortgage Company, died on 13 June, 1930, as a result of an automobile accident. A claim for compensation was filed and a hearing was held in Durham on 16 March, 1931. An award was made by the hearing commissioner, and thereupon the defendants, Home Mortgage Company and United States Fidelity and Guaranty Company, carrier, appealed to the full Commission as provided by statute. The full Commission affirmed the award and the defendants appealed to the Superior Court of Durham County.

Hodges, the deceased, at the time of his death, was executive vice-president and directing head of the Home Mortgage Company. He had no immediate superior. No one issued orders to him. He was responsible to the board of directors. All of the employees were subject to his orders." There was a contract made between Mr. Hodges and the Home Mortgage Company, dated 5 April, 1927, which provided that Mr. Hodges was "to enter upon the production of mortgages for the said company, . . . to devote his entire time to the production of mortgage loans for the said Home Mortgage Company through agencies to be established and directed by him. The said Sam T. Hodges hereby agrees that through his local agents he will produce loans for the said Home Mortgage Company, the borrower to furnish and pay for a photograph of the premises, survey of the property, examination of title," etc.

In return for his services the contract further provided: "The said Home Mortgage Company hereby agrees to pay to the said Sam T. Hodges a commission of one per cent on all loans accepted by the Home Mortgage Company." Said contract further specified: "It is hereby

agreed that this contract is to remain in force so long as the said Sam T. Hodges produces minimum business after the first year, of at least three million dollars a year on good first mortgage applications. It is the sense of this contract that Sam T. Hodges, as vice-president of the Home Mortgage Company is to be in charge of the production of business subject, in his relations with the company to the executive committee and board of directors as any employee would be and in the event that said Sam T. Hodges should become undesirable as vice-president of the said company this contract may be canceled by the board of directors upon a basis reasonable to both parties. . . . Should the volume of desirable and acceptable monthly repayment applications for loans procured through the efforts of said Sam T. Hodges and the agents set up by him after two months from this day fall below three million dollars a year the directors are to have the right to cancel this contract upon reasonable notice to the said Sam T. Hodges, and should the mortgage company be unable to handle the volume of business offered by the said Sam T. Hodges to the company, the said Sam T. Hodges is to have the right to cancel the contract with the company upon reasonable notice."

The evidence disclosed that the commissions earned by deceased from June, 1929, to June, 1930, amounted to $31,957.00. Mr. Hodges was not on the payroll of the company, and hence his commissions or earnings were not included in ascertaining the premium to be paid to the carrier in the compensation policy of insurance. On 12 June, 1930, the deceased had come to Hendersonville for the purpose of "lining up the sale of protected investment bonds all over the State. . . . He expected to spend a week over there organizing and getting sales force completed. We had distressed mortgages in Western North Carolina. . . . He was to assume the bond end of directing the company's affairs, and after we had corrected the frozen situation we were in at that time, then the matter of compensation would be taken up, but until that time he was to actively direct the company's affairs without compensation."

On 9 June, the treasurer of the company went to New York on business for the company. He testified: "While up there I ran into some complications in connection with out trusts and found it necessary to come back to Durham to assemble some figures, and because Mr. Hodges was intimately acquainted with the work I was on in New York, I thought it necessary that he go back with me to get the matter adjusted. So after I got my data assembled, I called him over long distance to get him to go back with me that night to complete the work in connection with the trust with the Metropolitan Casualty Insurance Company. Mr.

Hodges agreed to meet me in Greensboro." On the way to Greensboro to catch the train for New York Mr. Hodges was killed in an automobile accident.

The Industrial Commission found as a fact that the death of claimant was caused by accident at a time when he was on official business for the Home Mortgage Company, and that his average weekly earnings exceeded $30.00. The Commission further found that he "was an employee of the Home Mortgage Company, working on a commission basis in lieu of a salary."

Upon the foregoing facts the Industrial Commission made an award, from which award the Home Mortgage Company and the United States Fidelity and Guaranty Company, carrier, appealed to the Superior Court. The trial judge was of the opinion that at the time of his death the claimant was not an employee of the Home Mortgage Company within the contemplation of the Workmen's Compensation Act and set aside the award made by the Industrial Commission, and the plaintiff appealed to the Supreme Court.

W. S. Lockhart for plaintiff.
Biggs & Broughton for defendant.

BROGDEN, J. Is an executive vice-president and managing head of a corporation an employee thereof within the contemplation of the Workmen's Compensation Act?

Section 2(b) of the compensation act provides: "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer," etc. This definition must be interpreted in the light of the entire act. In the first instance, the title and theory of the act import the idea of compensation for workmen and their dependents. The awards provided in the statute are based upon a per centum of average weekly wages." These terms and terms of similar significance, interpreted according to their ordinary meaning, point out and designate working men as the beneficiaries of the act, and would not ordinarily be deemed to refer to executive officers receiving large salaries and engaged exclusively in designing and executing the general policies of the business.

The courts of various states have debated the question and arrived at different conclusions. The divergence of conclusion upon the subject

has resulted from different theories of interpretation as well as from differences in the wording of particular statutes providing compensation. For instance, the Oklahoma Court in *Southern Surety Company v. Childers,* 209 Pac., 927, said: "Obviously, where the claimant was the chief executive officer of a large corporation and his duties did not require that he perform manual or mechanical labor, he could not be regarded as the employee within the meaning of the act or the terms of the policy, and if he sustained injuries while performing manual or mechanical labor, which was no part of his duties, but in which he acted as a mere volunteer, he would not be entitled to compensation. On the other hand, although the claimant was the owner of the majority of the stock and was the chief executive officer of a corporation, yet if he performed manual or mechanical labor as a part of his duties, such an official in his capacity as a workman might measure up in all respects to the conception of an employee within the meaning of the act." The Pennsylvania Court in *Eagleson v. Harry G. Preston Co.,* 109 Atlantic, 154, allowed compensation to a salesman, but remarked: "This is not the case of a higher executive officer of a corporation claiming an award under the compensation act; that point will be met and decided when we come to it, and not before."

The Court of Appeals of New York, in *Skouitchi v. Chic Cloak & Suit Co.,* 130 N. E., 299, allowed compensation to the president-treasurer and manager of a small corporation. The Court, however, stated "that the claimant performed ordinary detail and manual work, such as would be required of a typical employee." Distinguishing *Browne v. Browne Co.,* 116 N. E., 364, the Court further said that the *Browne case* simply held that "higher executive officers of a corporation are not, as such, its employees in the ordinary use of the word."

Likewise, the Supreme Judicial Court of Maine, in *Higgins v. Bates Street Shirt Co.,* 149 Atlantic, 147, said: "When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office, he is not an employee within the meaning of the statutory definition." The Wisconsin Court in *Milwaukee Toy Co. v. Industrial Commission,* 234 N. W., 748, allowed compensation to the president, manager and general manager of the corporation. The decision was based upon the language of the compensation act in force in that state, which provided that an injured person, in order to recover, must be performing "services of another under any contract of hire, express or implied." The opinion proceeds upon the theory that the corporation was a separate entity from its officers, and, therefore, whether a person was an officer or not, he was in the "service of another." Recovery was also permitted in the case of *Columbia Casualty*

Co. v. Industrial Commission, 227 N. W., 292. In that case the injured person was secretary and treasurer of the corporation, but at the time of the injury the claimant was running a can-capping machine. Other cases discussing the question are: *In re Raynes,* 118 N. E., 387; *Millers' Mutual Casualty Co. v. Hoover,* 235 S. E., 863; *Zurich Accident & Liability Ins. Co. v. Industrial Commission,* 213 N. W., 630; *Cleveland Commercial Auto Body Co. v. Frank,* 155 N. E., 567; *Emery's case,* 170 N. E., 839; *Erickson v. Furniture Co.,* 229 N. W., 101; *Donaldson v. Donaldson Co.,* 223 N. W., 227. See 44 A. L. R., 1213.

The majority of the decided cases adhere to what may be called the dual capacity doctrine; that is to say, that executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. Hence, one of the fundamental tests of the right to compensation is not the title of the injured person, but the nature and quality of the act he is performing at the time of the injury. This theory is undoubtedly sound. Certainly, it is supported by the weight of authority.

Hence, the remaining inquiry is whether at the time of his death Sam T. Hodges was engaged in the performance of such duties as bring him within the purview of the compensation act.

A few days prior to his death he had gone to Hendersonville, North Carolina, for the avowed purpose of lining up "salesmen who would produce mortgage loans for the company," and also to institute plans for efficient handling of distressed property. While engaged in the performance of these duties he is requested to go to New York "to complete the work in connection with the trust with the Metropolitan Casualty Insurance Company." On his way to New York for such purpose, he met his death by accident. Manifestly, the duty of negotiating trust contracts or assisting in solving the complications and complexities of a trust business would not lie within the field of the duties of an ordinary employee or workman. Such duty requires a highly specialized knowledge and efficiency, and pertains exclusively to the function of setting up and supervising the policies of the employer rather than executing the routine work of the business. Therefore, upon a consideration of the entire record, the Court is of the opinion that the trial judge properly interpreted the law, and the judgment is upheld.

Affirmed.

W. SCOTT HUNT, ADMINISTRATOR OF THE ESTATE OF DAVID ELDER HUNT, DECEASED, v. STATE OF NORTH CAROLINA, ADJUTANT GENERAL'S DEPARTMENT, SELF-INSURER.

(Filed 25 November, 1931.)

1. Master and Servant F b—Definition of words "arising out of and in the course of the employment" as used in the Compensation Act.

The terms "out of" and "in the course of the employment" as used in the Workmen's Compensation Act are not synonymous; the words "in the course of" refer to the time, place, and circumstances under which the accident occurs, and the words "out of" to its origin, it being necessary that the risk be incidental to the employment.

2. Same—Whether accident arises out of the employment is usually a mixed question of law and fact.

Whether an accident arises out of the employment is usually a mixed question of fact and law, but if the facts are admitted and the case does not depend upon inferences of fact to be drawn therefrom, the question is one of law.

3. Same—Injury in this case held not to have arisen out of and in the course of the employment.

A member of the North Carolina National Guard acting under the order of his superior officer, as he was required to do, attempted to go into encampment at a certain place some distance from his home by means of an automobile furnished at his own expense, and while his pay for the military district camp began when he began his journey, there was no agreement either express or implied that the government would furnish the transportation, *Held:* an injury resulting in death received in an accident occurring en route did not arise out of his employment by the State Government and is not compensable under the provisions of the Workmen's Compensation Act. The distinction between an accident arising in the course of the employment and arising out of the employment is pointed out by ADAMS, J.

APPEAL by defendant from *Small, J.*, at September Term, 1931, of WAKE.

The defendant appealed from a judgment of the Superior Court reversing an order of the Industrial Commission which denied compensation for personal injury and death by accident arising out of and in the course of the employment of the plaintiff's intestate as a member of the North Carolina National Guard. The Industrial Commission denied compensation upon the facts found by it, a concise statement of which is as follows: At the time of the injury the deceased was a member of the North Carolina National Guard and was serving a second enlistment in the First Battalion Headquarters Company of the North Carolina National Guard located at Oxford. E. E. Fuller was

the commanding officer of the company. Pursuant to orders from the military authorities of the State and the United States the company was ordered to go to Morehead City on 6 July, 1930, for military services connected with the annual encampment of the North Carolina National Guard. Transportation was furnished for the company by the War Department of the United States on trains of the Seaboard Air Line and the Norfolk-Southern Railway Company. It had been the custom of the military authorities to authorize and direct designated members of the military units to proceed to the place of the annual encampment of the National Guard in advance of the unit or company, or subsequently thereto, in such way as the military authorities authorized or permitted. In accordance with this custom the commanding officer gave the deceased a leave of absence during the first week of the encampment and ordered him to report for duty at Camp Glenn on 13 July, 1930, at 6 a.m. At that time the commanding officer knew that the deceased was in the employ of druggists in Oxford; that his duties required him to remain there in his work until 11 p.m. on 12 July, 1930; and had cause to believe that he would travel to the Camp at Morehead City by automobile. The deceased left Oxford at 11:15 p.m. 12 July, and proceeded on the nearest and most direct route to Morehead City. At 1:30 a.m. between Raleigh and Clayton on State Highway No. 10 he suffered an injury by accident in a collision between his automobile and another automobile on the highway. As a result of the injury death followed. The deceased was 19 years of age and left no one either wholly or partially dependent on his earnings for support. W. Scott Hunt is his administrator. The average weekly earnings of deceased at the time of his death were $18.88 in civil employment. Under the terms of his enlistment he was required to obey the orders of his commanding officer and to leave his home in Oxford and to proceed to Camp Glenn in time to report by 6 o'clock a.m. on 13 July, 1930. Transportation was furnished by the deceased and not by the employer. The injury which resulted in death occurred during the period of employment of the deceased who was entitled to receive compensation from the time he left his home in Oxford and who would have received pay for that time if he had lived.

The Industrial Commission affirmed the award of Commissioner Wilson denying the claimant compensation, holding that the accident occurred during the course of the employment of the deceased but that it did not arise out of the employment; that had transportation been furnished by the employer the claimant would be entitled to compensation, but that the evidence is to the effect that the cost of transportation from Oxford to Morehead City would not have been paid by the em-

ployer but was a private matter with the National Guardsman himself.

From this order of the Industrial Commission the claimant appealed to the Superior Court which reversed the order of the Commission, the judge holding that the claimant was entitled to compensation. From the judgment of the Superior Court the defendant appealed, assigning error.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Siler for appellant.

Royster & Royster and Parham & Lassiter for appellee.

ADAMS, J. By the terms of the North Carolina Workmen's Compensation Act compensation may be paid to an employee or in case of his death to his dependents or legal representatives for personal injury by accident arising out of and in the course of his employment. Code, 1931, sec. 8081(i), (b), (f), (j), (k). We have said in previous decisions that it is not easy to give the phrase "out of and in the course of the employment" an accurate definition within which all facts calling for an application of the provisions of the act may be embraced. Obviously the terms are not synonymous; probably the one was meant to qualify the other.

The Industrial Commission was of opinion that the deceased at the time of the accident was in the course of his employment, drawing its conclusion from evidence that the deceased, had he lived, would have received pay from the time he left Oxford. The Superior Court adjudged that the injury arose out of and in the course of the employment.

The words "out of" as used in the act refer to the origin or cause of the accident. Whether the accident arose out of the employment is usually a mixed question of fact and law; but if the facts are found or are not in dispute and the case does not depend upon inferences of fact to be drawn from the facts admitted the question is not one of fact but of law. *Conrad v. Foundry Co.*, 198 N. C., 723; *Harden v. Furniture Co.*, 199 N. C., 733; Willis's Workmen's Compensation, 16.

The accident occurred on a public highway between one and two o'clock at night while the deceased was on his way to Camp Glenn. He was riding in his own car; the defendant had nothing to do with his mode of travel. It was his duty to obey the order of the commanding officer to go to the camp, but he had no work to do until he got there. He was to report his presence at six o'clock in the morning, and then his term of actual service was to begin.

In *Wilkie v. Stancil*, 196 N. C., 794, the material facts were these: Gilmers, Incorporated, had employed Stancil as the superintendent of

its store building and had instructed him to go to the building on the evening of holidays for the purpose of turning on the electric lights. While driving his car from his home to the store on a legal holiday he ran over and injured the plaintiff, who brought suit against him and his employer. There was no evidence that the employer exercised any control over his means of going to and from the building. This Court denied recovery against the employer and held that the rule of respondeat superior should not be enlarged to the extent of making the employer liable for the act of an employee while going to or from his place of work in a vehicle of his own selection, over which the employer had no control and in which he had no interest.

This was an action for negligence and the question was whether Stancil at the time of the injury was acting within the scope of his authority; in the present case the question is whether the injury arose out of and in the course of the intestate's employment.

There is highly reputable authority which maintains the proposition that the words "in the course of employment" and "during the period of employment" connote entirely different implications—that there is a difference between the beginning of employment and the beginning of work; that an employee is acting in the course of his employment only when he is doing something he was employed to do or when he is doing something in discharge of a duty which he owes his employer and which is imposed upon him by his contract.

As previously stated the words "in the course of" refer to the time, place, and circumstances under which the accident occurs and the words "out of" to its origin and cause. "Arising out of" means arising out of the work the employee is to do or out of the service he is to perform. The risk must be incidental to the employment. Willis's Workmen's Compensation, 16, *et seq.; Davidson v. M'Robb*, Appeal Cases 1918, 304; 25 Harvard Law Review, 401; Annotation, L. R. A., 1916A, 41; *Conrad v. Foundry Co., supra; Harden v. Furniture Co., supra.* It has accordingly been held that an injury is so received if it occurs while the employee is doing what a man in like employment may reasonably do within a time during which he is so employed and at a place where he may reasonably be during that time. *Larke v. Ins. Co.*, 97 Atl. (Conn.), 320; *Bryant v. Fissell*, 86 Atl. (N. J.), 458.

So, "while there is a difference between the beginning of employment and the beginning of work, or going to work on the employer's time, an accident to a workman on his way to work is not ordinarily in the course of employment." I Honnold on Workmen's Compensation, sec. 107. True, the moment when he begins his work is not necessarily the moment when he gets into the employment, because a reasonable margin must be al-

lowed him to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided. *Davidson v. M'Robb, supra.* "The workman is not regarded to be outside the scope of his employment unless actually at work or in the receipt of wages, nor is he regarded as within it because what he is doing is something which has relation only to his work. The test finally adopted lies between the two. The place at which the injury is sustained becomes the determining factor among those things which he does solely because he is engaged in a particular employment; only those are regarded as in the course of the employment which are done within the master's premises or upon some means of conveyance to or from his place of work which is provided by the master for the sole use of his servants and which the servant is required or entitled to use by virtue of his contract of employment." 25 Harvard Law Review, 403. This is also Honnold's conclusion. He says: "The rule has been established in accordance with sound reason that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employee, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. Pursuant to this rule, the employee is in the course of employment if he has a right to the transportation, but not if it is gratuitous, or a mere accommodation. A workman injured while riding to or from his work in the conveyance of a third person is not ordinarily entitled to compensation." Honnold, sec. 110. This is the principle underlying the decision in *Dependents of Phifer v. Dairy,* 200 N. C., 65, to the effect that if an employer furnishes transportation for his employee as an incident of the employment, or as a part of the contract, an injury is compensable if suffered by the employee while going to or returning from the place of work in the vehicle furnished by the employer and under his control.

When injured the plaintiff had not reached the place where he could do any work for his employer; he was not in a car provided by or under the control of his employer; he was not within the ambit of the camp or the sphere of the proposed service; he would have entered upon his work where he would have left it off. The injury, therefore, did not arise out of and in the course of the employment.

Our position is not in conflict with the principle that an injury arises out of and in the course of employment if it is suffered by an employee who after entering upon the service is sent into the streets or upon the highways on his employer's business in performance of his contract.

Dennis v. White, Appeal Cases (1917) 479, 15 Neg. Corn. Cases, 294; *Kinsman v. Hartford Courant Co.,* 94 Conn., 156; *Bendett v. Mohican Co.,* 98 Conn., 544; *Reese v. Nat. Surety Co.,* 203 N. W. (Minn.), 442. Nor is it in conflict with the cases cited in the appellant's brief. The judgment of the Superior Court is

Reversed.

JEM ROBINSON v. J. B. BENTON ET AL.

(Filed 25 November, 1931.)

1. Reformation of Instruments C d—Evidence held sufficient to be submitted to jury on issue of mutual mistake.

In an action upon a note given by the owner of a newspaper there was in evidence a bill of sale made by him to another who was made a party defendant in the present action. A controversy arose between the defendants as to whether by inadvertence or mutual mistake of the parties an agreement was omitted from the writing in the bill of sale that the purchaser would assume liability upon the note in suit. Before the vendor would sign the bill of sale an exception from the covenant and warranty of title was inserted, excepting "a certain suit pending in the Superior Court" of the county (the present action): *Held,* it was error for the trial court to withdraw from the jury the relevant issues as to these matters, there being sufficient evidence thereon; and, *Held further:* the wording of the exception was ambiguous admitting parol evidence in explanation.

2. Evidence J a—Where writing is ambiguous parol evidence is admissible to make certain the agreement of the parties.

Where a written instrument is so expressed as to leave its meaning doubtful parol evidence is ordinarily admissible to show and make certain what the actual agreement between the parties really was.

APPEAL by defendants McD. Morrison, George R. Robinson and J. A. Chestnutt, and also Henry Vann from *Grady, J.,* at March Term, 1931, of SAMPSON. New trial.

No counsel for plaintiff.
A. McL. Graham for Morrison et al.
Butler & Butler for Henry Vann.

CLARKSON, J. McD. Morrison *et al.,* excepted and assigned error and appealed to this Court on the charge of the court below: "Now gentlemen of the jury, there are two issues which you will see on this paper, which I will hand you later on, as to whether or not there was such an agreement and whether or not it was left out of the paper by mutual

mistake of the parties, or inadvertence of the draftsman. You need not answer those issues '1 and 2,' they are withdrawn from your consideration, and I am now withdrawing from your consideration, any evidence bearing upon the issues one and two, and you need not consider any of the evidence bearing upon those two issues." Issues one and two are as follows:

"1. At the time of the execution of the bill of sale from W. E. Matthews to Henry Vann on 8 January, 1929, was it understood and agreed between the parties that said bill of sale should contain a stipulation on the part of the said Henry Vann that he would indemnify and save harmless the said W. E. Matthews and his sureties on a certain note in the sum of $1,000, which at that time was being sued on in this action as alleged in the answer of George R. Robinson *et al.*?

2. If so was said stipulation omitted from said contract and bill of sale through the inadvertence of the draftsman, or by the mutual mistake of the parties, as alleged in the answer?"

We have read the record and briefs of the parties carefully. We think that the first and second issues are material to determine the controversy.

On 8 January, 1929, W. E. Matthews made a transfer of certain personal property to Henry Vann, a part of the bill of sale is as follows: "A newspaper known as the *Sampson Observer,* located at Clinton, North Carolina, together with the subscription list, good will and good name of said paper and any and all things which goes to make up and constitute said *Sampson Observer.* To have and to hold the same unto the said Henry Vann, his heirs and assigns. And the said W. E. Matthews hereby warrants the said property as above set out to be free from any and all liens, claims and encumbrances, and he does hereby warrant the title to be good and indefeasible, *except as to a certain suit pending in Sampson Superior Court entitled Jem Robinson v. J. B. Benton et al.*" (Italics ours—which is the interlineation inserted.) The interlineation was inserted by said Matthews before he would sign said bill of sale. This is a controversy between the defendants, and the suit referred to is the present action, and thereafter Henry Vann was made a party defendant.

Under the facts and circumstances of this action, we think the evidence sufficient to be submitted to the jury on the first and second issues, and further, the *interlineation* in the bill of sale seems to be ambiguous, without parol. If the writing leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent to show and make certain what was the real agreement. *Hite v. Aydlett,* 192 N. C., at p. 170. See, also, *Cumming v. Barber,* 99 N. C., 332; *Evans v. Freeman,*

142 N. C., 61. In the suit pending referred to (in the "except" clause) which is the present action, a contention was being made in the suit that on the same property transferred by this bill of sale there was a prior encumbrance to secure certain sureties—McD. Morrison *et al.* The personal property in the bill of sale could not be warranted to be free from any and all liens, claims and encumbrances, and the title to be good and indefeasible, if there was a lien to secure the sureties in the suit referred to in the "except" clause, which is the present action.

The record is not very well gotten up. Morrison, Robinson and Chestnutt are appellees contending the judgment below was correct. Henry Vann, appellant, contending the judgment below was incorrect. Morrison, Robinson and Chestnutt, are also appellants contending, if the judgment of the court below is erroneous, that the first and second issues should be submitted to the jury.

The exception and assignment of error made by appellant Morrison *et al.*, is well taken, and the issues should have been submitted to the jury. We do not discuss other matters presented, as the case goes back for a new trial. For the reasons given, there must be a

New trial.

STATE v. J. L. DOWD.

(Filed 25 November, 1931.)

Perjury A a—In order to constitute perjury the false swearing must be wilfully and corruptly done.

Where the complaint in a civil action has been verified the answer must also be verified, and where the defendant swears to it before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of C. S., 4364, it must be shown that he "wilfully and corruptly" committed the offense, and where there is evidence in his behalf that he was reasonably mistaken as to the import of his allegations an instruction to the effect that if the jury believed all the evidence to find him guilty is reversible error. The distinction is made as to perjury under the common-law definition.

APPEAL by defendant from *MacRae, Special Judge,* at August Term, 1931, of MOORE. New trial.

The Page Trust Company instituted a civil action for the collection of a note signed by K. M. Phillips and the defendant. The plaintiff filed a verified complaint alleging the due execution of the note by the

makers and the payment thereon of only four dollars and a half. Phillips filed no answer; the defendant filed a verified answer denying that he had executed the note. Thereafter he was prosecuted upon an indictment charging him with the unlawful, corrupt, wilful, and felonious commission of perjury "in a verified answer to a certain action pending in the Superior Court for the county of Moore," etc., and was convicted. From the sentence pronounced he appealed, assigning error.

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

W. R. Clegg for defendant.

PER CURIAM. Lord Coke defined perjury at common law as "a crime committed when a lawful oath is administered, by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue or cause in question, by their own act, or by the subornation of others." 3 Coke Inst., 164. The requisites are the false oath, lawfully administered in a judicial proceeding or in the course of justice, and wilfully and corruptly taken, in regard to a matter material to the issue or inquiry. *Pegram v. Stoltz*, 76 N. C., 349. At common law false swearing is a distinct offense. In several states laws have been passed enumerating certain acts which, though not within the common law definition, are yet defined as perjury.

The defendant's prayer for instructions to the jury, his motion to quash the indictment, and his motion to dismiss the action seem to be based on the theory that the defendant was prosecuted for perjury at common law, but he was not; and for this reason, if for no other, his prayer and his motion were properly denied. Neither was there any error in refusing his motion to amend the bill. An indictment duly returned upon oath cannot usually be amended by the court without the concurrence of the grand jury by whom it was found or the consent of the defendant. *S. v. Sexton*, 10 N. C., 184; *S. v. Cody*, 119 N. C., 908.

The defendant is entitled to a new trial, however, for error in the judge's instructions. The indictment charged a breach of the following statute: "If any person shall wilfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or State's prison not less than four months nor more than ten years." C. S., 4364.

The complaint was verified; it was necessary to verify the answer to make it available. C. S., 528. The defendant swore to the answer and the oath was administered to him concerning a matter "whereof he was lawfully required to be sworn." But he cannot be convicted unless in the terms of the statute he "wilfully and corruptly committed perjury."

The defendant testified that he signed the note as surety, not as principal; that his attorney prepared the answer and read it to him; that he understood the answer to the second allegation of the complaint merely as a denial that he had signed the note as principal; that his attorney advised him to verify the answer and that he did so because he thought the affidavit was both necessary and true. Under these circumstances whether he took the oath wilfully and corruptly was a matter for the jury to determine and not a conclusion of law. The following instruction, therefore, entitles the defendant to a new trial: "If you find the facts to be as testified to and believe all the evidence in the case, you will return a verdict of guilty."

New trial.

JUANITA O'BRIEN GARDNER v. NATIONAL LIFE INSURANCE COMPANY.

(Filed 2 December, 1931.)

Insurance J b—Insured did not elect to have dividends applied to paid-up insurance and policy was forfeited for nonpayment of premiums.

Where, in an application for insurance attached to and made a part of the policy contract, the insured elects to leave his dividends, as declared, with the company at interest unless otherwise ordered, and thereafter, upon notification that a premium was due, he fails to pay the premium and allows the policy to lapse, and informs the company's agent that he would take the dividend then due in cash, and gives the company no further notification, *Held:* it was the duty of the insurer to abide by the election of the insured as to the application of dividends, and upon the insured's death during a period in which the dividend, if applied to paid-up insurance, would have kept the policy alive, the beneficiary cannot maintain that the insurer should have so applied the dividend, and she is entitled to recover only the dividend left with the company with interest.

APPEAL by plaintiff from *Grady, J.*, at May Term, 1931, of BEAUFORT. Affirmed.

Plaintiff is the widow of Claud G. Gardner, who died on 24 August, 1930. She is the beneficiary in a policy of insurance issued by the

defendant on 11 May, 1928, by which the defendant, in consideration of the application therefor, and of the payment of premiums as provided therein, promised to pay to plaintiff, as the beneficiary named in said policy, upon the death of the insured, Claud G. Gardner, the sum of $5,000.

This is an action to recover on said policy of insurance. The action arises out of a controversy between the parties, as to whether the policy was in force at the date of the death of the insured, to wit: 24 August, 1930. The defendant contends that the policy lapsed prior to said date because of the nonpayment of the semiannual premium due on 11 May, 1930; the plaintiff contends that by its terms the policy was extended beyond said date, because of the dividend due to the insured on 11 May, 1930, and not paid to him prior to his death.

By consent, a trial by jury was waived. It was agreed that the judge should hear the evidence, and find the facts therefrom. The facts found by the judge from the evidence offered by both plaintiff and defendant, are as follows:

The policy was issued on 11 May, 1928. The premiums were due and payable on 11 May and 11 November of each year. All premiums due prior to 11 November, 1929, were paid by the insured, and the policy was in force at said date.

The semiannual premium due on 11 November, 1929, was paid by the insured, partly by cash, and partly by a sum of money advanced to the insured by the defendant for that purpose. This sum was secured by an assignment of the policy to the defendant by the insured. It was agreed that the defendant had a lien on the policy for the sum advanced by it to the insured on 11 November, 1929, with interest at the rate of six per centum. This sum with accrued interest was $57.99.

The semiannual premium due on 11 May, 1930, was not paid by the insured. The cash surrender or loan value of the policy at that date was $60.30. Upon default in the payment of the semiannual premium due on 11 May, 1930, the defendant applied the sum of $57.99 of the cash surrender or loan value of the policy to the payment of the sum advanced by it to the insured on 11 November, 1929. The balance, to wit: $2.31, was applied by the defendant to the purchase of term insurance as provided in the policy. This term insurance expired on 30 May, 1930. The application by the defendant of the cash surrender or loan value of the policy on 11 May, 1930, to the payment of the sum advanced to insured on 11 November, 1929, and to the purchase of term insurance, was in accordance with the express provisions of the policy. It is conceded that this application was proper.

It is provided in the policy that it "shall participate in the surplus upon payment of the premium due on the first anniversary, and the company will annually determine and account for the portion of the divisible surplus applicable hereto. Dividends as declared shall become absolutely the property of the insured, and at his option may be: first, withdrawn in cash; or second, applied toward the payment of any premium; or third, converted at net single premium rates into additional paid-up participating insurance, which may be surrendered for its cash value at any time on the sole signature of the insured; or fourth, deposited with the company subject to the payment annually of three per cent interest thereon, and the share of surplus interest apportioned thereto by the directors, which deposits may be withdrawn at any time, or will be included in any cash settlement of this policy. Unless the insured shall elect otherwise prior to thirty days after any dividend is due, the same will be held at interest as provided in Option 4."

In the application for the policy, a copy of which is attached thereto, and made a part thereof, the insured expressly elected that dividends of surplus should be "left with the company at interest unless otherwise ordered."

A dividend amounting to $24.35 was declared on the policy at the end of the first year, to wit: 11 May, 1929. This sum was paid to the insured and accepted by him, in cash.

At the end of the second year, to wit: 11 May, 1930, a dividend amounting to $25.30 was declared on the policy. This sum was retained by the company, at interest, in accordance with the election of the insured, as shown by his application for the policy. He gave no direction to the company to the contrary. After the death of the insured, the defendant tendered to plaintiff the amount of this dividend, which she declined to accept. If this dividend had been applied by the defendant to the purchase of term insurance the policy would have been extended beyond the date of the death of the insured, and would have been in force on said date.

During the month of June, 1930, a local agent of the defendant company, called upon the insured at his home in Washington, N. C., and urged him to renew the policy, which had lapsed on 11 May, 1930, because of his default in the payment of the semiannual premium due at said date. The insured informed the agent of the defendant that he did not wish to renew the policy, but intended to take another policy in another company, and to use the dividend due him by the defendant in payment of the premium on the policy which he intended to take with the other company. He directed the agent of the defendant to notify its State agent that he did not care to keep his policy with the defendant company.

Upon the foregoing facts, the court was of opinion that the defendant had no right to apply the dividend declared on the policy and due on 11 May, 1930, to the purchase of term insurance and thereupon ordered and adjudged that plaintiff is not entitled to recover on the policy sued on in this action.

From judgment that plaintiff recover nothing by this action and that defendant recover of the plaintiff its costs to be taxed by the clerk, the plaintiff appealed to the Supreme Court.

L. C. Warren and MacLean & Rodman for plaintiff.
Pou & Pou and Ward & Grimes for defendant.

CONNOR, J. There is no error in the judgment in this action. The insured had directed in his application for the policy of insurance sued on, a copy of which is attached to and made a part of the policy, that dividends declared thereon in accordance with its provisions, should be left with the company, at interest, unless otherwise ordered by him. The policy provides that unless the insured shall elect otherwise prior to thirty days after any dividend is due, the same shall be held by the company, at interest, to be withdrawn by the insured at any time, or to be included in any cash settlement of the policy. Although he had notice of the dividend due on 11 May, 1930, and of his right to direct its application to the payment on the premium due on said date, or to the purchase of extended insurance, the insured did not order such application. He elected that the dividend should remain with the defendant, at interest, in accordance with his direction given in his application for the policy. In view of the express provisions of the contract between the insured and the defendant, as clearly and plainly expressed in the policy, the defendant had no right, in law or in equity, to apply the dividend declared prior to 11 May, 1930, and due at said date, as a payment on the semiannual premium due on 11 May, 1930, or to the purchase of extended insurance. If in violation of its contract with the insured, with respect to this dividend, the defendant had so applied it, it would have nevertheless been liable to the insured for the amount of the dividend, with interest, when called upon by him for its payment. There is no principle of law or equity upon which the defendant can be held liable to the plaintiff because after the death of the insured within the time for which the policy would have been extended, if the insured had directed that the dividend be applied to the purchase of extended insurance, it appeared that such application would have been to the interest of the plaintiff, as beneficiary in the policy.

It is true as said in *Mutual Life Insurance Co. v. Breland* (Miss.), 78 So., 862, L. R. A., 1918D, 1009, that it is well settled that the law

abhors a forfeiture. In that case it was held that upon nonpayment of a premium due on a life insurance policy, when surplus and dividends have accrued upon the policy sufficient to pay the premium, the company must in the absence of notice to the insured to exercise his option as to application, apply it to the premium so as to prevent a forfeiture, although the policy provides that upon failure of the insured to exercise his option, the dividends shall be applied to purchase of paid-up additions to the policy. In the instant case, the option had been exercised by the insured when he applied for the policy, and he had notice after the dividend had been declared and was due that he had the right to elect as to its application. By the terms of its contract with the insured, the defendant had no option as to the application of the dividend. Having applied the dividend as directed by the insured, the defendant cannot be held liable, after the death of the insured, upon the contention of the beneficiary, that it should have applied it otherwise. The judgment is

Affirmed.

MRS. EMMA D. BURCH v. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY.

(Filed 2 December, 1931.)

1. **Insurance J b—Held: policy was forfeited for nonpayment of premium, local agent not having authority to charge premiums on his books.**

   Where a policy of accident insurance provides for renewal from year to year upon prepayment of the stipulated annual premium to the local agent in cash, and that the local agent should have no authority to modify or change the conditions of the policy, an extension of credit given solely by the local agent for the payment of a premium for a renewal period, done without knowledge of the company, will not bind the latter, and evidence of a course of dealing between the local agent and the insured tending to establish such extension of credit by the local agent is insufficient to resist the insurer's motion as of nonsuit, there being no evidence of ratification by the insurer by acceptance of the premium after the due date, or otherwise.

2. **Insurance K a—The distinction between agreements made by local agent at inception of policy and after it is in force is pointed out.**

   There is a distinction between agreements relating to a modification of the terms of a policy made by the local agent at the inception of the policy and such agreements made by him after the policy has been in force in regard to whether the insurer is bound thereby.

CIVIL ACTION, before *Shaw, J.*, at April Term, 1931, of PERSON.

On 17 July, 1923, the defendant executed and delivered to J. T. Burch, plaintiff's intestate, an accident insurance policy. The plaintiff is the wife of said J. T. Burch and is the beneficiary named in said policy of insurance. The policy provided for the payment of $1,000 in the event of accidental death caused by an automobile, which said face amount was automatically increased at the rate of ten per cent per annum each year the policy was left in force. The premium had been paid on the policy prior to 17 July, 1929. The insured was killed in an automobile accident on 31 July, 1929, and the plaintiff beneficiary brought suit for $1,500. The defendant denied liability upon the policy, alleging that the premium due on 17 July, 1929, had never been paid. The policy was a renewable contract and was kept in force by the payment of $5.00 annual premium. The policy provided that: "This policy may be renewed by the payment in advance of the annual premium of $5.00, and a receipt signed by the secretary and countersigned by a licensed agent of the company shall be the only evidence binding upon the company of the payment of a renewal premium. . . . This insurance contract is in force only for the term mentioned in the renewal receipt, and the amount of premium specified herein must be actually paid in cash to a duly licensed and authorized agent of the company; otherwise this receipt is null and void. If payment of the renewal premium shall be made and accepted after the date of expiration of the policy, the acceptance of such premium by the company or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained. . . . No person except the president or the secretary of the company is authorized to change or modify the insurance contract in any particular or to waive forfeiture."

The facts with respect to the payment of the premium are substantially as follows: J. S. Walker was the local agent of defendant at Roxboro, and was engaged in the general insurance business, writing fire, automobile liability, health and accident insurance. Burch, the deceased, procured fire, automobile liability insurance from said Walker as well as the accident policy in controversy. The local agent renewed Burch's policies as they became due and charged the premiums on his books whether he had seen Burch or not. The said agent Walker testified as follows: "As to this particular policy, from time to time, he said renew it. As a rule, he had it charged. Perhaps the first and second year it was not charged. Mr. Burch would come and tell me if he wanted his policy renewed, or ask me if I would renew it and carry it until he could pay it. . . . I do not recall that I ever renewed this particular policy at any time without his request. It was his custom

with regard to renewing this policy, to first speak to me about it. I had no right to give him an official receipt until the policy was paid for. . . . I do not recall that I ever renewed the policy unless he had requested it. . . . The premium on this policy was due 17 July. Before this premium became due he did not give me any instructions about it at all. When the policy became due I did not do anything about it. When I reported it to the company I marked him dead, because he had been killed before that, that is, before the report was made. I did not charge the premium on my books to Mr. Burch before he was killed. My bookkeeper charged it. It was not under my instructions. I did not give the bookkeeper authority to charge this on my books. She just did it voluntarily in the routine work of the office." The evidence further disclosed that the bookkeeper of the local agent on 1 August, the day the deceased died, sent out a monthly statement to the deceased in the regular routine of office work for insurance charges amounting to $26.04, which said bill included the premium on the policy in controversy. Thereafter, on 19 September, nearly three weeks after the death of Burch, an attorney for his estate paid to the local agent said bill of $26.04. The local agent, Mr. Walker, was not in the office at the time the payment was made, and the check was received by the bookkeeper. As soon as Walker, the local agent, discovered that the premium had been paid he offered to return the money to the estate of the injured, but the tender was declined. The evidence further disclosed that the insurance company sent blank receipts to the local agents and list of the names of those carrying policies, and the local agent was authorized to collect premiums and to deliver the official receipt upon receiving the money.

It was admitted in open court that the local agent had no authority to change the provisions of the contract of insurance.

Upon the foregoing facts the trial judge entered a judgment of nonsuit, from which judgment plaintiff appealed.

Nathan Lunsford for plaintiff.
Luther M. Carlton for defendant.

BROGDEN, J. The question of law presented by the record is whether the local agent of defendant was authorized to extend credit to the insured in the payment of premium due on 17 July, 1929, and thus keep the policy alive.

At the outset it must be borne in mind that there is a vital and fundamental distinction between liability arising from agreements made by an agent of an insurance company at the inception of the contract and that arising from agreements made by the agent with the insured after

the contract has taken effect, resulting in the modification of the terms and conditions of the written engagement of the parties. This distinction was pointed out in *Foscue v. Insurance Co.,* 196 N. C., 139, 144 S. E., 689.

The plaintiff relies upon *Home Ins. Co. v. Gilliam,* 13 N. E., 118, but it appears that the question involved in that case grew out of the delivery of a policy of insurance containing a recital that the first premium had been paid. Furthermore, the company received the money. There are many cases in North Carolina and elsewhere built upon the same idea as that announced in the *Gilliam case, supra.* However, that line of cases is not applicable to the facts disclosed by the present record. In the case at bar the policy had been in force for a period of five years and the contract expressly provided that "the amount of premium specified herein must be actually paid in cash to a duly licensed and authorized agent of the company; otherwise this receipt is null and void."

There are many cases disclosing an effort to pay the premium in merchandise or things of value other than cash, and the overwhelming weight of authority denies the validity or the efficacy of such payments. *Turlington v. Ins. Co.,* 193 N. C., 481, 137 S. E., 422; *Tomsecek v. Ins. Co.,* 88 N. W., 1013 (where the agent agreed to accept meat from the market of insured in payment of a premium); *Allen v. Metropolitan Life Ins. Co.,* 229 N. W., 879 (where the agent undertook to have the premium credited on the purchase price of a washing machine sold by the insured); *Cohen v. New Zealand Ins. Co.,* 120 Atlantic, 417 (where the agent agreed to take shirts and underwear in payment of premium). Furthermore, it has been held that if an insurance agent holds for collection the note of insured given in payment of a premium that such agent has no authority to extend the time of payment of such note. *Bank of Commerce v. N. Y. Life Ins. Co.,* 54 S. E., 643; *Iowa Life Ins. Co. v. Lewis,* 187 U. S., 335, 47 L. Ed., 204. This point, however, is not before the Court for a decision and is referred to merely to indicate the trend of judicial thinking upon the general subject.

There are two cases directly in point. The first is *Cayford v. Metropolitan Life Ins. Co.,* 91 Pac., 266. In this case it is written: "Authority to collect premiums does not imply authority to extend the time for the payment of such premiums, or to waive a forfeiture, resulting from nonpayment." The other case is *Farmers' & Mechanics' Benevolent Fire Ins. Association v. Horton.* This case was decided by the Supreme Court of Appeals of Virginia on 17 September, 1931, and is reported in 160 S. E., 315. The Court wrote: "It is next said that where credit is extended to an agent, who in turn extends it to the insured, no forfeiture can be enforced for nonpayment of premiums, and we are cited, as

sustaining that proposition, to 32 Corpus Juris, 1312; *Perea v. State Life Ins. Co.*, 15 N. M., 399, 110 Pac., 559; Cooley's Briefs on Insurance, Vol. 1, p. 484; and *Wytheville Insurance Co. v. Teiger*, 90 Va., 277, 18 S. E., 195. With it we have quarrel. In such cases the company looks to its agent for payment, and he extends credit to the insured at his peril. Here there was no such course of dealing. No agent was ever asked to pay, or expected to pay, a dollar which he did not collect. When tickets are turned over for collection, a memorandum of them and of their amount is made, and so, loosely speaking, it might be said that an agent is charged with them; but such a statement would be misleading. A man cannot possibly be charged with something which he is never expected to pay, and which he will never be asked to pay. Upon the facts, the rule invoked has no application."

It is contended that the evidence discloses a course of dealing between the insured and the agent of the insurer with respect to the payment of premium, but there is no evidence that the defendant Insurance Company had any knowledge of such course of dealing other than such knowledge as would be imputed to it through the local agent, nor is there evidence of ratification, as defined by law, on the part of defendant. The premium was not charged to the local agent by the Insurance Company, and such agent was expressly prohibited by the terms of the contract from accepting anything but cash in the payment of the premium or from delivering the receipt until the premium had been paid. The receipt was never delivered, and while an attempted payment was made after the death of the insured to the bookkeeper of the local agent, such payment was never recognized or ratified by the defendant. Indeed, the local agent, upon the facts presented, had no authority to waive the terms of the policy or extend credit for the premium, and, therefore, in the absence of evidence tending to invoke the principle of ratification, the ruling of the trial judge was correct.

Affirmed.

STATE v. BURCH DURHAM.

(Filed 2 December, 1931.)

1. Homicide G a—Evidence of identity of defendant held sufficient to be submitted to the jury in prosecution for manslaughter.

Upon a prosecution for involuntary manslaughter, evidence tending to show that the defendant was driving his car in the vicinity of the crime shortly prior thereto and that an automobile of the same kind and make of that of the defendant was seen at the time and place of the crime, and that there were no other cars at the time in the vicinity, that the

front of the car striking the deceased was damaged by the impact, that a radiator cap of the same peculiar shape as that on the defendant's car was found after the accident, and that the defendant took his car to a garage for repair and gave conflicting statements as to the way in which the car was injured, and as to why the radiator cap was missing, is *Held:* sufficient evidence of the identity of the defendant as the one driving the car at the time of the accident to be submitted to the jury.

2. Homicide C a — Evidence of criminal negligence of defendant in prosecution for manslaughter held sufficient to be submitted to jury.

Evidence tending to show that the defendant was driving his automobile upon a straight and unobstructed road at a speed in excess of that allowed by the law, that he attempted to pass a pedestrian without giving the required warning, and that he struck the pedestrian while driving on the wrong side of the road, inflicting injuries resulting in death and that he sped on without stopping, is sufficient evidence that the defendant was driving unlawfully in several respects in violation of our statutes and killed the deceased while driving in a reckless manner in disregard of the safety of others who might then be upon the highway, and is properly submitted to the jury in a prosecution for manslaughter, the burden of proof being upon the State to establish guilt beyond a reasonable doubt. Code (Michie), 2621(51), (54), 2623(55), 2616.

3. Criminal Law I j—Upon motion of nonsuit all the evidence is to be taken in light most favorable to the State.

On a motion to dismiss as of nonsuit in a criminal action the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. C. S., 4643.

4. Homicide C a—Degree of negligence necessary to be established in a prosecution for involuntary manslaughter.

The degree of negligence necessary to be shown on an indictment for manslaughter where an unintentional killing is established is such recklessness or carelessness as is incompatible with a proper regard for human life, and it is sufficient to carry the case to the jury where it reasonably appears that death or great bodily harm was likely to occur from the acts of the defendant.

5. Same—Negligence of defendant must be proximate cause of death in order to constitute manslaughter.

The statutes prescribing rules for the driving of automobiles upon the highway were enacted in the interest of public safety, and disregard of them by one driving an automobile upon the highway is negligence, and when amounting to a wanton disregard for the safety of others it is sufficient to be submitted to the jury in a prosecution for manslaughter, but such negligence must be the proximate cause of death in order to constitute the crime.

6. Same—Fact that motorist sped on without stopping after hitting pedestrian is competent circumstance in prosecution for manslaughter.

Evidence that a driver of an automobile upon a public highway struck and killed a pedestrian thereon and went on his way without stopping may be considered with other relevant evidence upon the trial by the jury upon the issue of defendant's guilt in a prosecution for manslaughter.

7. Criminal Law I g—Instruction in this case held not to have impinged on C. S., 564.

Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions in a trial for unintentional manslaughter, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of C. S., 564, in expressing his opinion upon the weight and credibility of the evidence, is untenable.

8. Same—Instruction will be construed contextually as a whole.

Held: on this trial for involuntary manslaughter, construing the charge contextually as a whole the judge correctly charged upon the evidence respecting the identity of the defendant as the driver of the automobile at the time of the injury, the law applicable to the offense, and proximate cause, and the burden and quantum of proof necessary for conviction.

9. Same—Defendant desiring subordinate elaboration in charge should submit request for special instructions.

Where the trial judge clearly and substantially charges the law arising from the evidence when the instructions are viewed contextually as a whole, the elaboration of any particular phase of the case should be presented by prayers for special instructions, and the judge is not required to instruct the jury on academic propositions of law which have no substantial relation to the case.

CONNOR and BROGDEN, JJ., dissent.

APPEAL by defendant from *Shaw, J.*, and a jury, at August Special Term, 1931, of GUILFORD. No error.

This was an indictment against the defendant for the murder of one Woodrow Medlin. The solicitor only asked for a verdict of manslaughter. The jury found the defendant guilty of manslaughter and the court sentenced the defendant to be confined to the State prison for not less than seven years, and not more than twelve years.

The evidence, on the part of the State, was to the effect that Woodrow Medlin was a newspaper carrier, about 16 years of age, and was killed on Springfield Road near High Point, on 13 February, 1931. Friday evening, between sundown and dark, but not dark. The Medlin boy was killed by a Ford roadster, 1929 model A, a car like the one usually driven by defendant, the car did not stop. It had on its lights, although it was not necessary to have the lights on. It was running 40 to 45 miles an hour when it hit the boy. The defendant had taken a young woman home near dark, and a witness testified that a Ford roadster, 1929 model, came from the direction of the young woman's house and came out on the Springfield Road going toward High Point and in the direction of the newsboy. The witness followed the roadster some distance, and just before the newsboy was killed. The roadster was the

only car then in that immediate vicinity of where the newsboy was killed. A witness, who was driving an automobile, testified that he turned and went on past the paper boy, who was some 100 to 125 feet from where he turned in to his home, he stopped waiting for the paper. Before he turned in he noticed an automobile coming up the road. He heard "Bang," something like a rock hitting an automobile and went to the scene. "I didn't see the car when it hit the boy. I heard the lick and looked around. I didn't see the boy fall off the car. I saw something fall off the front of the car. The boy was lying lengthwise on the left-hand side of the road, which was the boy's right-hand side, and the left-hand side of the driver of the Ford car." He further testified: "When I came by and passed the boy I was traveling the same way that he was."

The newsboy was traveling east and the roadster was traveling west. The road was straight 800 to 900 feet and about 25 to 30 feet wide, and nothing to obstruct the view of the driver of the roadster. A metal quail or partridge was usually used on the radiator cap of the roadster of defendant. One like it was found about 25 feet from where the newsboy, who was lying on the left of the road and the quail ornament on the right-hand side of the road, in the side ditch, a fresh break on it. The quail ornament was built on the cap that screwed on the radiator. The radiator of defendant's roadster was taken next day to a shop, at about 10 o'clock in the morning, for repair, there was no bird cap on the radiator when it was taken to be repaired.

Different witnesses testified: "I fixed the radiator. You see it was knocked against the fan and bursted a hole in it. I fixed this. I think the fan belt was off of it. There were no bursted places on the front of it. It was just mangled on the inside. Q. Kinder mashed in, the front of it was not bursted? A. No, sir. It was a 1929 model Ford. Q. What caused the damage, if you could tell? A. Something hit it from the front." . . . "The metal cap was found on the right-hand side of the road and the boy was over on the left-hand side." . . . "Some glasses were there and the glasses were about three or four feet from the radiator cap. The boy wore glasses. They looked like the same glasses that the boy wore. The glasses were not broken." . . . Speaking of the car: "It was bruised pretty bad on the back side next to the motor." Q. How far was the (boy's) cap found from the body? A. The cap was between 30 and 31 steps. Q. From the body? A. From the body on the opposite side of the road. Q. On the right-hand side, going towards the Asheboro road? A. Yes, sir. There was a pair of glasses found in the side ditch." A great deal of something that looked like blood was found between the radiator and horn of defendant's car. "The spots resembled blood spots."

The doctor testified, in part: "I examined the body of Woodrow Medlin. He had a broken neck, his jaw was crushed and right leg was crushed just above the knee, and practically broken off. He was dead at the time I saw him."

The defendant made sundry contradictory statements in regard to the injury to his car and the bird ornament on his radiator cap. Defendant told the officers that he was not on the road the boy was killed on that night, and that he took the bird ornament cap off his car as it rattled.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

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

Gold, York, and McAnally for defendant.

CLARKSON, J. The defendant introduced no evidence and at the close of the State's evidence made a motion to dismiss the action or for judgment as in case of nonsuit. C. S., 4643. The court below overruled the motion and in this we can see no error.

It will be noted that although defendant was not indicted for that offense, the evidence was sufficient for a jury to pass on that the defendant was the driver of the car that struck the newsboy and violated the statute in failing to stop in event of accident involving injury or death to a person. N. C. Code, 1931 (Michie), sec. 2621(71); 2621(103); Pub. Laws 1927, chap. 148, sec. 29(a); sec. 61. There was evidence that he violated the "hit and run" statute.

We think the evidence sufficient to be submitted to the jury that defendant was the driver of the car that killed the newsboy and sufficient to sustain the verdict of manslaughter.

It is the settled rule in this jurisdiction that where the charge as a whole correctly covers all legal points involved and the court below charges the law applicable to the facts, it meets the requirements of the law. The charge must be considered contextually and not disjointedly. *Milling Co. v. Highway Com.*, 190 N. C., at p. 697. The charge, at some length, gave the contentions of the State and defendant clearly, and covered every aspect of the case both as to law and facts, and applied the law applicable to the facts.

The following portion of the charge is set forth, showing that the law in regard to involuntary manslaughter is correctly stated, and in fact there was no exception to it: "The solicitor having announced that he would not ask for a verdict of murder in the second degree, then

the only question you are to pass upon is whether or not the defendant is guilty of manslaughter. Manslaughter is the unlawful killing of a human being without malice and without excuse. There are two kinds of manslaughter. One is what is known as voluntary manslaughter, that is, where one kills another in the heat of passion induced by an adequate or legal provocation, or where two men upon a sudden affray get into a fight and one kills the other. Involuntary manslaughter, gentlemen of the jury, is where the death of another is caused by an unlawful act, unaccompanied by any intent to kill or purpose to kill."

In Cyc. Criminal Law, Vol. 2 (Brill), sec. 666, p. 1116, the law is thus stated: "Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice, express or implied, but in the commission of some unlawful act not amounting to a felony, or some lawful act in an unlawful or negligent manner. An intent to kill is not an essential element of the offense, and its absence distinguishes it from voluntary manslaughter." *S. v. Turnage,* 138 N. C., 566.

We find in Bishop on Criminal Law (9th ed.), sec. 314(2), p. 223-4, the following: "'If,' says Archbold, 'a person by careless or furious driving unintentionally run over another and kill him, it will be manslaughter; or, if a person in command of a steamboat by negligence or carelessness unintentionally run down a boat, etc., and the person in it is thereby drowned, he is guilty of manslaughter. Such negligence will be considered as a sufficient substitute for a deliberate intention."

The court below further charged: The State contends in this case, "that the defendant is guilty of what is known in law as involuntary manslaughter. . . . The State does not contend that the defendant wilfully and intentionally ran his car against Woodrow Medlin, thereby causing his death, but the State contends, gentlemen, that at the time that Woodrow Medlin was killed that the defendant was driving his car in a reckless manner, in an unlawful manner, and that the unlawful manner in which he was driving his car was the direct and proximate cause of the death of this boy, and the State, while not contending that he was doing it wilfully or intentionally, that is, that he killed the boy wilfully or intentionally, contends that he was driving his car recklessly, and by reason of the fact that he was driving his car recklessly, why that he ran against this boy and caused his death. Now to make one guilty, gentlemen of the jury, of manslaughter in a case of this kind he must be guilty of more than simply a want of ordinary care, but the negligence that he has to be guilty of is what we call criminal negligence, not simply a want of ordinary care. That would make him liable in a civil action, but would not make him guilty of a crime if he had run against the body of this boy and thereby caused his death.

Now the statute provides, gentlemen of the jury, with reference to reckless driving: 'Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.' (N. C. Code, 1931 (Michie), 2621(45); Pub. Laws 1927, chap. 148, Art. 2, sec. 3.) Now the State contends that this boy was killed by the defendant driving his car unlawfully, in an unlawful manner, and that he was driving recklessly—or if he was driving recklessly he was driving in an unlawful manner—*and that his reckless driving was the proximate cause of the death of the boy.*"

The court below charged correctly the law as to circumstantial evidence, to which there was no exception. *S. v. Wilcox,* 132 N. C., at p. 1137; *S. v. Lawrence,* 196 N. C., 562.

The court further charged: "Now, gentlemen of the jury, *every person charged with a crime is presumed to be innocent,* and the burden is upon the State to satisfy you beyond a reasonable doubt of the defendant's guilt before the jury can convict." See *S. v. Herring, ante,* 543.

N. C. Code, 1931 (Michie, 2621(51), is as follows: "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right-half of the highway and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitation applicable in overtaking and passing set forth in section 2621(54) and 2623(55). (1927, chap. 148, sec. 9.)"

N. C. Code, 1931 (Michie), part 2616: "Upon approaching a pedestrain who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway or a curve, or a corner in the highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling. (1917, chap. 140, sec. 15.)"

There is evidence on the part of the State, to the effect that the newsboy was on the right-hand side of the road traveling east and that the defendant was driving the roadster and was going west. Something fell off the front of the defendant's car and the newsboy was found lying lengthwise on the left-hand side of the road. It can be inferred from this evidence, that defendant was not observing the law of the road, *supra.* Then again, a witness testified that he passed the

newsboy on the road and stopped waiting for the paper. The first thing he heard "Bang," something like a rock hitting an automobile. The newsboy was on the traveled part of the highway, the defendant did not slow down, according to the law of the road, *supra,* and it can be inferred from the evidence that no timely signal was given. It was not dark. Defendant driving the roadster was traveling west, facing the newsboy traveling east. The road was straight 800 to 900 feet and about 25 to 30 feet wide, and nothing to obstruct the view of defendant driving the roadster. It was in evidence that the driver of the roadster did not stop after the newsboy was struck. Flight is ordinarily a circumstance to be considered by the jury in connection with other circumstances. *S. v. Lawrence,* 196 N. C., at p. 577.

"On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom." *S. v. Lawrence, supra,* at p. 564.

In *S. v. Rountree,* 181 N. C., at p. 538, the law as stated is as follows: "The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for human life. *S. v. Gash,* 177 N. C., 595; *S. v. McIver,* 175 N. C., 761; *S. v. Tankersley,* 172 N. C., 955. The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to carry the case to the jury in a criminal prosecution where it reasonably appears that death or great bodily harm was likely to occur. *S. v. Gray,* 180 N. C., 697. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Goetz,* 83 Conn., 437; 30 L. R. A. (N. S.), 458. Again, it is generally held that where one is engaged in an unlawful and dangerous act, which is itself in violation of a statute, intended and designed to prevent injury to the person, and death ensues, the actor would be guilty of manslaughter at least. *S. v. McIver, supra.*" *S. v. Crutchfield,* 187 N. C., 607; *S. v. Trott,* 190 N. C., 674; *S. v. Leonard,* 195 N. C., 242; *S. v. Satterfield,* 198 N. C., 682.

In *S. v. McIver,* 175 N. C., at p. 766, the following observation is made: "If the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous and death ensues,

that the person violating the statute is guilty of manslaughter at least, and under some circumstances of murder."

"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." *Burke v. Coach Co.,* 198 N. C., at p. 13. *Lancaster v. Coach Co.,* 198 N. C., 107.

The defendant excepted and assigned error to the following in the charge: "Now the State contends that all of these facts are established by the evidence in the case, and the court, gentlemen of the jury, instructs you that it is a question for you to determine from the testimony what facts have been established, if any, beyond a reasonable doubt. Now if you find, gentlemen of the jury, that the boy was killed by coming in collision with a car, as testified to by Mr. Arthur Jones and his son, then the next question would be as to who was the guilty party, who was the party who was driving this car."

The defendant contends that this impinged C. S., 564. We cannot so hold. The court below was giving the contentions of the State, and after the above part objected to, went on in giving the contentions, and said: "Now the State contends that the defendant was driving it, and that while no witness testified that he saw him driving the car along there, the State contends that someone was driving it," etc. This part of the contentions related to the identification of the driver of the car. We see no error.

The defendant excepted and assigned error to that part of the charge below, between "G" and "H," when the court was giving the contentions of the State: "Now the State contends, gentlemen of the jury, from all the facts and circumstances in this case that you ought to be fully satisfied that the defendant was driving his car along Springfield Avenue that night, and that he ran his car against the boy and thereby caused his death. (G) Now suppose you find that to be true, gentlemen of the jury, beyond a reasonable doubt, that the defendant was driving his car on this occasion in question and ran his car against the boy and thereby caused his death, that would not be sufficient for you to return a verdict of guilty on, gentlemen of the jury, but in addition to that the burden is upon the State to show you that *at the time of the killing the defendant was guilty of criminal negligence, not simply want of ordinary care, but of criminal negligence;* and the State contends that you ought to find that he was from the facts and circumstances. (H.)"

The court goes on further and gives the facts as contended for by the State, and says: "And the State contends that from these facts and circumstances that you ought to find *that the defendant was guilty of reckless driving at the time, and that the reckless driving was the proximate cause of the death of this boy,* and that you ought to find from the evidence that the boy was killed by reason of the collision with the car being driven by the defendant, and the State asks you to return a verdict of guilty."

From the entire charge on this aspect, we can see no error. The court had theretofore defined involuntary manslaughter.

The court below gave also the contentions of the defendant, and closed the charge, in part, as follows: "The defendant contends that you do not know how this accident occurred; do not know what the boy was doing; that when last seen by Mr. J. D. Jones he was walking down the road; that no one saw him any more after that, and no one knows what the boy was doing, whether he had been out to one side of the road and came on the road suddenly ahead of the car, or how the accident occurred; whether or not it was carelessness at all, if he were the one driving the car, and if you should find that he was driving the car that ran into the boy, that you ought not to find that he was guilty of criminal negligence. So that the defendant contends under this whole case that your verdict ought to be not guilty. Whereas, the State contends your verdict ought to be guilty. The State contends that you ought to be satisfied from the evidence and circumstances in the case that the defendant's car was the car that ran against the boy and killed him. If you find that to be true, beyond a reasonable doubt, then the State contends that you ought to be further satisfied beyond a reasonable doubt that the defendant was guilty of criminal negligence in driving his car in a reckless, wanton manner at the time, and collided with the boy and thereby caused his death; and that you ought to convict him of the crime of manslaughter. (I) It is all a question of fact for you, gentlemen of the jury, the burden being on the State to satisfy you beyond a reasonable doubt of defendant's guilt. If you are so satisfied why you would convict him of the crime of manslaughter, gentlemen of the jury, if you are satisfied beyond a reasonable doubt that he is guilty of that crime. If you have a reasonable doubt as to his guilt you will acquit him. (J.)"

The defendant contends that "Nowhere in his charge did he instruct the jury that they would have to find (1) that the defendant was guilty of criminal negligence and (2) that criminal negligence was the proximate cause of the death of Woodrow Medlin. To hold a person criminally responsible for a homicide, his act must have been a proximate cause of the death."

Taking the charge as a whole, we think the charge covered the above aspect complained of. The defendant excepted and assigned error to that portion between the letters "I" and "J," *supra.* It will be noted that just prior to the part of the charge complained of, we find the court below uses the language "That you ought to be further satisfied beyond a reasonable doubt that the defendant was guilty of criminal negligence in driving his car in a reckless, wanton manner at the time, and collided with the boy and thereby caused his death."

"The proximate cause is that which is most proximate in the order of responsible causation." 37 W. Va., 180. The above sets forth the responsible causation.

If the defendant wanted "subordinate elaborations," he should have presented prayers for instruction embodying same. The court is not required to instruct on academic propositions of law which have no substantial relation to the case.

It may be noted that in the case of *S. v. Eldridge,* 197 N. C. (cited by defendant), at p. 627, is the following: "But the defendant is entitled to show, if he can, that the deceased met her death, wholly as a result of her own misfortune and not because of any culpable negligence on his part."

The judge in the court below tried the case with his usual fairness and ability, and, taking the charge as a whole, we can see no reversible or prejudicial error.

No error.

CONNOR and BROGDEN, JJ., dissent.

J. M. EVERETT v. JAS. S. GOODWIN AND STARMOUNT GOLF CLUB, INCORPORATED.

(Filed 2 December, 1931.)

1. Golf A a—Evidence of golfer's negligence in driving ball from tee held sufficient to be submitted to the jury.

A player upon a golf course must exercise ordinary care commensurate upon the surrounding circumstances at the time, particularly in driving the ball, and where there is evidence that the defendant, playing in a threesome behind a twosome in which the plaintiff was playing, failed to give any warning by shouting "fore" or otherwise, and that he drove the ball while the plaintiff was shortly in front of him on the fairway in violation of a rule of the club that a player should be allowed two drives before following players should proceed, with evidence in contra-

diction and evidence that the twosome and threesome had merged into one game, *Held:* the conflicting evidence was properly submitted to the jury upon the issue of the defendant's negligence.

2. Golf B a—Evidence that golf club failed to exercise due diligence in enforcing rules held sufficient to be submitted to the jury.

The owners of golf courses for hire are obligated by law to promulgate reasonable rules for the protection of persons who are rightfully on the course, and to exercise due care for the enforcement of the rules, and where a golf club has adopted, for the safety of players, rules regulating the distance to be observed between successive players upon the course, and has supplied "rangers" to enforce the rules, and there is evidence that the rules were continuously violated by a player in playing a threesome behind a twosome in which the plaintiff was playing, and that the "rangers" made no attempt to enforce the rules, if they saw their violation, and that the plaintiff was injured as a result of the violation of the rules, *Held:* in an action against the golf club the evidence was properly submitted to the jury on the question of the club's negligent failure to enforce the rules.

CIVIL ACTION, before *Finley, J.,* at May Term, 1931, of GUILFORD.

This is an action to recover damages for personal injury as a result of being struck by a golf ball driven by the defendant Goodwin upon the golf course of defendant Starmount Golf Club, Incorporated.

The following issues were submitted to the jury:

1. "Was the plaintiff injured by the negligence of defendant, James S. Goodwin, as alleged in the complaint?"

2. "If so, was such negligence of the defendant, Goodwin, wanton and wilful, as alleged in the complaint?"

3. "Was the plaintiff injured by the negligence of the defendant, Starmount Golf Club, Incorporated, as alleged in the complaint?"

4. "Did the plaintiff, Everett, by his own negligence contribute to his own injury, as alleged in the answer?"

5. "What damage, if any, is the plaintiff entitled to recover of the defendants?"

The evidence introduced upon the issues submitted was substantially as follows:

On Sunday, 3 August, 1930, the plaintiff and a companion named C. W. Elkins went to the golf course of defendant, Starmount Golf Club, in order to engage in a game of golf. A fee of one dollar for each player was charged by the defendant, Golf Club, and paid by plaintiff and his companion. The plaintiff and his companion, playing what is called a twosome, began their game and before they had proceeded very far the defendant, Goodwin, with two companions, named Land and Fagan, came upon the course and began playing a threesome behind the plaintiff. Plaintiff testified as follows: "As we were starting

on the fifth hole I drove, and Mr. Elkins then drove, and I got a bad drive on my first ball, which did not go any further than from here to the door back there, and I went out and was preparing to drive again and as I did I looked around and Mr. Goodwin was getting ready to drive his ball off and was swinging, and I hollered, 'Look out, don't drive this way,' and as he drove, the ball went over my head and he hollered and said, 'Get out of the way.'" Plaintiff further testified that the defendant and his companions were driving balls in and about him and his companion from the fifth hole up to the fourteenth. The occurrence at the fourteenth hole is narrated by the plaintiff as follows: "They were right there on the tee with us when we finished, and as soon as we would put our ball down and drive off before we had gone more than fifty feet they would have their ball down starting to drive it without any warning whatsoever. In fact, they were so close to us that we did not walk down the middle of the fairway for fear they would hit us. They would drive just immediately after we drove our ball. . . . As we reached the sixteenth tee and Mr. Elkins made his drive, and I made my drive, as I stepped off, a couple of them, I do not know just which it was that had the ball already teed up ready to swat it, I walked over the edge of the fairway in the rough and I had not gone more than fifteen feet when they had driven their ball and Mr. Goodwin put his ball up to drive and he was drawing back to hit it, and I made the remark, 'You are liable to hit me.' I made it loud enough for all to hear. I said, 'Better get out of the way, he is liable to hit us,' and I got off the fairway on the edge of the rough and when I did he drove the ball and the ball hit me on this knee-cap and as it hit me on the knee it knocked me off both feet on the ground and I immediately got up as quick as I could and I said, 'I believe it broke my leg.' Mr. Goodwin walked down there and said he didn't think it was broken and didn't think it was hurt much."

There was ample evidence that the plaintiff sustained a serious injury. There was also evidence that the defendant, Golf Club, had promulgated certain rules to the effect that the players first using the course and beginning a game, are entitled "to have two drives" before the succeeding match or players are permitted to tee off.

The evidence further disclosed that the defendant, Starmount Golf Club, employed rangers for the protection of players, who are charged with the duty of enforcing the rules of the game so as to prevent one group of players from driving into the group ahead. However, the evidence of plaintiff tended to show that the rangers were not present at the time of his injury, or, if present, they made no protest and failed to enforce the rules of safety prescribed by the defendant Golf Club.

The defendant offered evidence tending to show that there was a merger of plaintiff's twosome and the defendant's threesome, making a fivesome, and that all of the parties were playing together in the same game at the time of plaintiff's injury. The defendant further offered testimony to the effect that he cried "fore" at the time he drove the ball that injured the plaintiff. The testimony further shows that a golf ball travels at a high speed and that it is practically impossible to dodge it when in rapid motion.

The jury answered the issues in favor of the plaintiff and awarded damages in the sum of $500.

From judgment upon the verdict both defendants appealed.

Younce & Younce for plaintiff.

Sapp & Sapp and Brooks, Parker, Smith & Wharton for defendants.

BROGDEN, J. 1. What duty does one golf player owe another in playing the game?

2. What duty does the owner of a golf club owe to its patrons paying a fee for the privilege of using the course?

A writer in Law Notes of November, 1931, says: "Serious accidents resulting from the playing of the Royal and Ancient Game of Golf have been infrequent—that is, if one is to judge from the paucity of authority on the subject. Nevertheless, the few reported cases involving actions of this nature emphasize the fact that there are legal as well as other hazards incidental to the game. The courts are generally in accord on the point that a golfer, when making a shot, must give a timely and adequate warning to any persons in the general direction of his drive." The only decided cases, squarely in point, which the writer has been able to find are as follows: *Toohey v. Webster,* 117 Atlantic, 838, 23 A. L. R., 440; *Biskup v. Hoffman,* 287 S. W., 865; *Schlenger v. Weinberg,* 150 Atlantic, 434, 69 A. L. R., 738. All the foregoing cases are referred to in the issue of Law Notes, *supra,* and also, in 69 A. L. R., 740.

Certain general principles of law are stated in the opinions referred to. For instance, in the *Weinberg case, supra,* the Court said: "A golf course is not usually considered a dangerous place, nor the playing of golf a hazardous undertaking. It is a matter of common knowledge that players are expected not to drive their balls without giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation."

In the *Toohey case, supra,* the defendant testified that he called "fore" before striking the ball. There was other testimony to the effect that

no such warning was given, and, if any at all, it was too late to be effective. The Court said: "This raised an issue of fact as to whether adequate and timely warning was given to the plaintiff, and, therefore, the question of defendant's negligence was properly left to the jury."

The dominating idea bearing upon the subject is that a player upon a golf course must exercise ordinary care in playing the game, and particularly in driving the ball. Of course, the duty to exercise ordinary care is dependent upon the surrounding facts and circumstances of the given case. The evidence tends to show that a golf ball when driven, travels at high speed and is not easily avoided. So that a person of ordinary prudence would reasonably anticipate that injury would probably result to others within the range of the drive.

In the case at bar, the plaintiff was rightfully upon the course, and the defendant Goodwin was fully apprised of his presence. The record discloses that rules of safety were promulgated by the corporate owner of the golf course to the effect that the front match should be allowed at least two drives by the match immediately following, so as to eliminate the probability of being struck by a driven ball. The evidence further tended to show that the defendant was violating this rule of safety. There was also evidence that the defendant gave no warning to plaintiff at the time of making the drive. However, there was positive testimony offered in behalf of defendant that proper warning was given. Hence the question of warning was properly submitted to the jury.

There was evidence tending to show that the match played by plaintiff and his companion, and the match played by the defendant and his companions merged and became one game. This, however, is denied by the plaintiff, and evidence offered by him tends to support his contention. Defendant testified that the parties merged into a fivesome from the 5th to the 16th hole, and between these said holes the game proceeded "strictly according to honors." This is explained to mean that "the man who makes the lowest score is the man who has the honor of making the first play at the next hole." It does not appear who the "honor" man was at the 16th hole, but it is clear that the plaintiff had the "honor" of having his knee cap broken by a ball driven by the defendant, and it is obvious that thereafter all "honors" ceased. Obviously, a different rule of liability would apply if there was a merger of the two matches, but as there was conflicting evidence upon this point, the entire evidence was properly submitted to the jury.

The second question propounded involves the duty imposed by law upon the owner of a golf course. Manifestly, it is the duty of the owner to exercise ordinary care in promulgating reasonable rules for the protection of persons who rightfully use the course, and furthermore, to

exercise ordinary care in seeing that the rules so promulgated for the protection of players are enforced. The owner of a golf course is not an insurer, nor is such owner liable in damages for mishaps, accidents and misadventures not due to negligence. In the case at bar the evidence tends to show that the owner of the course had promulgated certain rules designed to protect players, and in an effort to see that such rules were enforced it had employed rangers who were charged with the duty of supervising the course and enforcing the rules and regulations prescribed by the owner. There is evidence that the rules so prescribed were openly violated, and that the defendant owner, through its agents and employees, made no effort to caution offending players or otherwise to discharge the duties imposed by law. Therefore, the liability of the owner was properly submitted to the jury, and the judgment based upon the verdict, must be upheld.

No error.

STATE OF NORTH CAROLINA ON RELATION OF N. A. COOPER v. T. F. CRISCO.

(Filed 2 December, 1931.)

1. **Trial D a—Voluntary nonsuit is voluntary abandonment of action by plaintiff, after which he may bring another action within a year.**

Ordinarily when the plaintiff submits to a voluntary nonsuit in a civil action he is unable to prove his case, or refuses or neglects to proceed to the trial of the cause at issue, or leaves the matter undetermined, and in that circumstance he is allowed by statute to bring another action upon the same subject-matter within a year if no statute of limitations has run against the former action before it was commenced, and the cost thereof has been paid, unless the action was brought *in forma pauperis*. C. S., 415.

2. **Quo Warranto B a—Where relator takes voluntary nonsuit he must again obtain permission to sue in order to bring subsequent action.**

Common-law procedure by *quo warranto* and proceedings by information in the nature thereof have been abolished, and the remedy in such matters is under the provisions of our statute, C. S., 869, 871, requiring that permission of the Attorney-General be first obtained and bond filed to save the State harmless from costs, and where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject-matter against the same respondent, but fails to obtain permission to bring the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the statute be again complied with before the bringing of the second action.

3. Same—Bond and permission to sue are prerequisite to right to maintain action in the nature of quo warranto.

In proceedings under the statute to try title to a public office the interest of the public is involved and is paramount to the rights of the relator, and the consent of the Attorney-General, the filing of the bond, etc., as required by the statute, is a prerequisite to the right of the relator to maintain the action.

APPEAL by plaintiff from a judgment of *Schenck, J.*, rendered 18 June, 1931. From STANLY. Affirmed.

In the election held in November, 1930, the plaintiff and the defendant were candidates for the office of sheriff of Stanly County. The board of county canvassers declared the defendant elected and the plaintiff instituted proceedings to contest the regularity and validity of his election. On 15 December, 1930, the Attorney-General of North Carolina granted the plaintiff leave to institute an action in the Superior Court of Stanly County to determine the rights of the parties with respect to the office, the plaintiff having tendered security in the sum of $500 to indemnify the State against all the costs and expenses that would accrue in consequence of the action. The clerk issued a summons in the cause on 30 December, and on 29 January, 1931, the defendant entered a special appearance before the clerk and moved to dismiss the action for want of proper service. The clerk granted the motion and the plaintiff appealed, but at the February Term of the Superior Court he took a voluntary nonsuit and was taxed with the cost.

Thereafter, on 11 February, the plaintiff caused another summons to be served on the defendant and duly filed his complaint. The defendant filed an answer and at the May Term the court referred the cause to a referee subject to the defendant's exception. The referee notified the parties that he would proceed with the hearing on 26 May. On 25 May the defendant applied to the judge holding the courts of the district for an order to stay proceedings before the referee for the assigned reason that the defendant neglected to apply to the Attorney-General within ninety days after the defendant's induction into office for leave to sue in this action in the name of the State; that he brought his action without leave of the Attorney-General, without filing a bond of indemnity, and without paying the cost in the former suit.

On 9 June, 1931, the plaintiff filed with the Attorney-General a petition to be allowed to proceed with this action, and on the same date tendered a bond in the sum of $1,000 to indemnify the State of North Carolina against any liability on account of costs in this action, and on 17 June, 1931, the leave of the Attorney-General to the said plaintiff, as set out in the record, was granted. Hearing was had upon the re-

straining order theretofore granted on 11 June, 1931, at Wadesboro before the judge, and the ruling and further hearing were continued until 18 June, 1931, before him at Rockingham, in Richmond County.

On the day last named the court vacated the order of reference and dismissed the action. The plaintiff excepted and appealed.

G. Hobart Morton, G. D. B. Reynolds and Walser & Casey for plaintiff.

R. L. Smith & Sons, R. L. Brown, R. L. Brown, Jr., and R. R. Ingram for defendant.

ADAMS, J. The writ of *quo warranto* and proceedings by information in the nature of *quo warranto* have been abolished and the remedies available at common law under these forms may now be obtained by a civil action; but when a private citizen desires to bring such action in the name of the State he must apply to the Attorney-General for leave and tender satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the action. C. S., 869, 871.

After obtaining leave from the Attorney-General the plaintiff instituted his first action against the defendant on 30 December, 1930, and at the term of the Superior Court which convened in February he submitted to a judgment of voluntary nonsuit. He afterwards issued another summons and commenced a second action against the defendant without applying for or obtaining the Attorney-General's permission to sue in the name of the State. In response to the defendant's proposition that the second action could not legally be prosecuted under these circumstances the plaintiff contends that the leave granted him on 15 December, 1930, applied to the second as well as to the first action.

The decision cited in support of this position is *Quelch v. Futch,* 174 N. C., 395. In that case the action was first instituted by Thomas H. Williams, who suffered a nonsuit, and within twelve months J. P. Quelch began another action for the recovery of the land which was in controversy in the former suit. The court held that Quelch could not avail himself of C. S., 415 because he was not the plaintiff in the other action and because it did not appear that Williams was dead and that Quelch was his heir or representative; and further that Quelch was not within the equity and spirit of the statute which is based upon substantial identity of parties, title, and causes of action. The statement that the two actions should be treated as one and that the second was a continuance of the writ in the first has reference, we apprehend, to the identity of the causes of action, because the only question before the court was whether the plaintiff had brought himself within the pro-

visions of C. S., 415 (Revisal, 370), the Court saying that the two suits must be for substantially the same causes.

Nonsuit is the name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of a cause at issue and leaves this issue undetermined. It is provided by statute that if an action is commenced within the time prescribed therefor and the plaintiff is nonsuited he may commence a new action within one year after such nonsuit if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in *forma pauperis.* C. S., 415. The words "new action," "new suit," and "original suit" indicate a difference in the two actions though the causes may be identical. The distinction is observed in decisions referring to the causes of action in the respective suits, to a restatement of the same cause in the latter action, and to "another action," a "second action," the "former action" and a "subsequent action." *Webb v. Hicks,* 125 N. C., 201; *Woodcock v. Bostic,* 128 N. C., 243; *Meekins v. R. R.,* 131 N. C., 1; *Prevatt v. Harrelson,* 132 N. C., 250; *Evans v. Alridge,* 133 N. C., 378; *Hood v. Telegraph Co.,* 135 N. C., 622; *Tussey v. Owen,* 147 N. C., 335; *Lumber Co. v. Harrison,* 148 N. C., 333; *Starling v. Cotton Mills,* 168 N. C., 229; *Hampton v. Spinning Co.,* 198 N. C., 235.

The prosecution bond in the first action was given on condition that it should be void if the plaintiff paid the defendant all costs which the latter recovered from him in that action; and according to the record the bond filed with the Attorney-General was to indemnify the State "in said action."

The cause of action in the first suit may be identical with the cause in the second, but it does not follow that the prosecution bond, the bond of indemnity, or the leave given by the Attorney-General on 15 December, 1930, can avail the defendant in the action last instituted. Our opinion is that they cannot.

The next question is whether the plaintiff can maintain the "new action." When he began it he had not obtained the leave of the Attorney-General to proceed in the name of the State. The summons was issued 11 February; the final judgment was rendered on 18 June; leave to sue was granted on 17 June. Did the plaintiff neglect to comply with the law?

Insisting that he can maintain the action notwithstanding his delay in applying to the Attorney-General, the plaintiff relies in part on *Russell v. Saunders,* 48 N. C., 432, and similar cases, in which it is said that the giving of a prosecution bond is not a condition precedent to the bringing of a suit and hence the bond may be filed after the writ is re-

turned. Such bond is given for the benefit of the adverse party who may waive its execution, *McMillan v. Baker,* 92 N. C., 111; but as pointed out in *Saunders v. Gatling,* 81 N. C., 298, an action in the nature of *quo warranto* is not merely an action to redress the grievance of a private person who claims a right to an office; it is one in which the public has an interest which is paramount to that of private rights.

That the leave of the Attorney-General is necessary is not questioned. C. S., 871; *Mining Co. v. Lumber Co.,* 173 N. C., 593. The case of *Shennonhouse v. Withers,* 121 N. C., 376, suggests an analogy between a suit brought without obtaining the required leave and one brought without giving a prosecution bond. Referring to that case in *Midgett v. Gray,* 158 N. C., 133, *Hoke, J.,* remarked that it must always be made to appear, pending the proceedings, that the leave of the Attorney-General has been given to prosecute the action. In a subsequent report of the same case it was said that in the absence of proof of permission given anterior to issuing the summons the action should be dismissed. 159 N. C., 443.

The case last cited is the only one which designates the specific time when leave should be obtained—*i. e.,* before the institution of the action; but we are advised of no decision in which this Court has approved the practice on which the plaintiff now insists. In *Shennonhouse v. Withers, supra,* consent was obtained before the trial of the action, and in *Midgett v. Gray, supra,* permission to institute the action which is referred to as a condition precedent, "was given in writing as required by law," presumably before the commencement of the action. In North Carolina Practice and Procedure, sec. 970, it is said: "The fact that leave had been obtained should be stated in the complaint." We deem it best to adhere to the decision in *Midgett's case* as reported in 159 N. C., 443, and to hold that the consent of the Attorney-General is a condition precedent to the institution of the action. The plaintiff obtained leave more than four months after the institution of the action and on the day preceding the rendition of the final judgment. His delay was fatal.

The appellant's counsel referred to the irregularity of the final judgment at Chambers dismissing the action but stated on the argument that if the merits of the case were held to be against the plaintiff they would not urge the irregularity. For this reason the question is not considered. The judgment is

Affirmed.

A. E. HOLTON AND MARY E. HOLTON v. NORTHWESTERN OIL COMPANY, INCORPORATED.

(Filed 9 December, 1931.)

1. **Trial D a—On motion of nonsuit all the evidence is to be considered in the light most favorable to the plaintiff.**

   Upon defendant's motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. **Nuisance A b—Operation of gasoline filling station held not to be a nuisance under the evidence in this case.**

   A properly constructed gasoline filling station, built under permit from the proper municipal authorities, and operated in the usual manner is not a nuisance *per se* and may not be abated because of the usual escape of gasoline odors into the atmosphere, causing mere occasional inconvenience to the plaintiff in the enjoyment of his home on adjacent property.

3. **Same—Disorderly conduct at filling station held not sufficient ground to abate its operation as a nuisance.**

   Disorderly conduct at a filling station within the limits and police control of an incorporated town may be controlled by the proper municipal authorities and the filling station will not be abated as a private nuisance on the complaint of an owner of adjacent property.

4. **Same—Operation of filling station will not be abated as a nuisance because natural flow of water therefrom was upon plaintiff's land.**

   A properly constructed and operated gasoline filling station which also sells soft drinks from an ice-box kept therein may not be abated as a private nuisance because of the natural flow of water upon the lower lands of the plaintiff, the lower lands being obliged to receive the natural flow of surface water, and the owner thereof being required, if necessary, to collect the water in a ditch and carry it off to a proper outlet.

STACY, C. J., dissents.

APPEAL by plaintiffs from *MacRae, Special Judge,* at May Term, 1931, of YADKIN. Affirmed.

This is an action brought by plaintiffs against defendant for damages for maintaining a nuisance and for the abatement thereof.

The evidence on the part of plaintiffs is to the effect that they own about two acres of land in the town of Yadkinville, N. C., which has a population of about 590 inhabitants. On the northeast corner of this lot they have a two-story frame dwelling-house with seven rooms and a porch extends all around the east and north sides. This has been the home of plaintiffs, who are man and wife, for some twenty years. The house is

located on the south side of the old sand-clay road, and faces a street running east and west. This road was changed and relocated when the North Carolina Highway Commission hard-surfaced the same leading from Yadkinville to Brooks Cross-roads. The change in the road and relocation of same left a strip of land, between the old sand-clay and new hard-surfaced road, which is the property of Dr. Marler. The defendant built a filling station on this strip of land, which is about 65 feet from plaintiffs' home and across the old sand-clay road, and faces on the new hard-surfaced road and northeast corner of the triangle strip which is 13 feet by 40 to 50 feet. The filling station is built of brick about 10 feet by 15 feet, ordinary gas pump made of concrete 8 feet high, standing open, gas stored in top. The floor is of concrete, the roof is of tile and the floor on which the pumps stand is concrete. The tanks are modern up to date and are put under the ground and buried in the ground. The two pumps are modern up to date in every respect. The defendant got a permit to build the filling station from the commissioners of the town of Yadkinville. There were several filling sations in the town of Yadkinville with tanks under the sidewalk and pumps out in the open. Another gasoline pump was the other side of plaintiffs' home, and east of this filling station, and as near plaintiffs' home. It was where the county kept gas and oil stored, and served county trucks.

A roller mill is back of plaintiffs' house, noise from the mill can be heard to plaintiffs' home and the filling station. A lumber plant is near plaintiffs' home, in which there is a saw and planing machine. The noise from these can be heard at plaintiffs' residence and at the filling station when the planing machine is in operation. There is a barn in which livestock is kept about 800 feet from plaintiffs' residence and on their premises. Dr. Marler's office is directly opposite this filling station and north of it. His home is a little northwest. It is about 500 feet from this filling station to Logan's garage. There are only two residences below Logan Motor Company, and this filling station. Automobiles are stored in Logan Motor Company, and he sells gas and oil. There are 3 tanks there.

Plaintiffs have an ice-box at their home, it drains into a chicken trough, where chickens drink. It was in evidence that the odor of gas, when there was a draft from the filling station, could be smelt in plaintiffs' home, when they filled cars and at other times. The odor was stronger when the tanks were filled with the big trucks. That their home was lower than the filling station and the drainage flowed into a drain ditch. An ice-box was kept along the west end of the filling station house, it drained down towards plaintiffs' home. A barrel of water was kept at the filling station. The water ran down into a little ditch, which

pop bottles dam up, and if it overflowed it ran down across plaintiffs' yard beside the well. Loud talking at the filling station most of the time, stayed open often until midnight and sometimes day and night. One night some boys were cursing and trying to fight. At one time the operator was drunk. The building covered up the sidewalk.

Mrs. A. E. Holton, one of plaintiffs, on cross-examination, testified: "I think we have a chief of police in Yadkinville, did not send for him. Did not send for sheriff; have never gone to the sheriff, his deputies, or any police officer about any of the circumstances, and have never been to any of the officers of the Northwestern Oil Company about any conditions that existed there and asked them to remove it."

J. L. Crater, for plaintiff, testified: "I am clerk of the Superior Court of Yadkin County; and a brother-in-law of the plaintiff. He has owned that property twenty years. (Witness draws diagram showing location of the residence, business houses, garages, filling stations, churches, etc.) I pass up that street by the filling station. I know it is operated in the day time and I have known it to be open at night when I came down town. I just saw some water there on the ground at the rear of the filling station a few times in passing. I didn't detect any odor of any kind. Just what I have seen would not have much effect on the value of the Holton property. I don't think what I have seen and heard at the filling station *would have any effect on the value of the property of Mr. Holton.* The roller mill is situated in the rear of the Holton lot. The broom factory is west of the roller mill. There are only two residences between Logan's garage and the defendant's station. I passed by the filling station two or three times a day."

Williams & Reavis for plaintiffs.
Folger & Folger for defendant.

CLARKSON, J. At the close of plaintiffs' evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. This motion was sustained, and in this we can see no error.

It is the well settled rule of practice and 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.

The principle applicable in this action is set forth in Vol. 1, Wood on Nuisances (3d ed.), sec. 496, at pp. 677-8, as follows: "By an atmosphere free from artificial impurities is meant, not air as free and pure

as it naturally is, entirely devoid of impregnation from artificial cause, but an atmosphere as free and pure as could reasonably be expected, in view of the location and its business. If the strict rule applicable to natural rights should be applied, it would seriously disturb not only the business, but also the moral and social interests of society. Therefore the law relaxes the strict rigor of the rule, and does not recognize every business or use of property as a nuisance that imparts a degree of impurity to the air, for if such were the case, towns could not be built, nor life in compact communities tolerated, and even the *ordinary* uses of property would be seriously interfered with, for in proportion to the spareness or compactness of a population is the air pure or impure. One cannot reasonably occupy a dwelling-house or place of business and use any kind of fuel therein, without imparting more or less of impurity to the atmosphere, and in proportion as these are aggregated in one locality, are these impurities increased; but as these are among the common necessities of life, and absolutely indispensable to its reasonable enjoyment, the law does not recognize them as being actionable interferences with the rights of others, unless exercised in an unreasonable manner, so as to inflict injury upon another unnecessarily. . . . (Sec. 497, p. 679.) The law only deals with *real, substantial* injuries, and such as arise from a wrongful use of property, and will not lend its aid to check one engaged in a lawful pursuit simply because his neighbor is annoyed, or even damaged thereby, unless the use complained of is both in violation of that neighbor's right and unreasonable."

As to what constitutes a private nuisance, we have perhaps as good a definition as elsewhere in Adams' Equity, p. 210: "A private nuisance is an act done, unaccompanied by an act of trespass, which causes a substantial prejudice to the hereditaments, corporeal or incorporeal, of another." Burdick's Law of Torts, 4th ed. sec. 420; Bigelow on Torts, 8th ed., 445.

"The term nuisance means literally annoyance; anything which works hurt, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property." 29 Cyc. L. & P., p. 1152. *Cook v. Mebane,* 191 N. C., at p. 6; *Board of Health v. Lewis,* 196 N. C., 641; *Surratt v. Dennis,* 199 N. C., 757; *Swinson v. Realty Co.,* 200 N. C., 276; *Hodgin v. Liberty, ante,* at p. 660-1.

"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." *MacRae v. Fayetteville,* 198 N. C., at p. 54.

The law only deals with real, substantial injuries—*De minimus non curat lex.* The law does not recognize nervous particularity.

As to the odor of gasoline from the baby filling station built of brick, 10 feet by 15 feet, with the shift of the wind carrying same to plaintiffs' home, some 65 feet away, and such like odors when tanks are filled and at other times, we cannot hold as a substantial injury.

As to the boys cursing and trying to fight, and at one time the operator drunk, plaintiffs could have stopped this annoyance by calling on the chief of police of the town, or other officer; and also to stop, if defendant did so, the filling up of the little ditch with pop bottles, or the little building encroaching on the side-walk across the sand-clay road 65 feet from plaintiffs' home. In fact, it is the duty of all our citizens and the police of the towns and cities to see that all violations of law are punished.

As to the plaintiffs' home being lower than the filling station and the drainage from the filling station in that direction: In *Porter v. Durham,* 74 N. C., at p. 779, the law as stated is as follows: "It has been held that an owner of lower land is obliged 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." *Winchester v. Byers,* 196 N. C., at p. 384; *Sykes v. Sykes,* 197 N. C., 37; *Bonapart v. Nissen,* 198 N. C., 180.

The authorities of the town of Yadkinville gave defendant a permit to build the filling station, it goes without saying that they could not grant permission to create a nuisance. The gasoline station was not a nuisance *per se.* We cannot hold on the entire evidence that the matters complained of were such real, substantial injuries as give the plaintiffs a cause of action for nuisance. The human family ordinarily does not find the simple life in the thickly settled towns and cities, therefore when the matters complained of are such as are common and usual, and no unreasonable and unnecessary injuries are inflicted, the law does not interfere. The judgment below is

Affirmed.

STACY, C. J., dissents.

ELLIE C. BUTNER v. A. L. WHITLOW.

(Filed 9 December, 1931.)

1. **Highways B h—Evidence that skidding resulted from inattention to road held sufficient evidence of negligence to be submitted to jury.**

While the skidding of an automobile upon a highway is not sufficient to apply the doctrine of *res ipsa loquitur*, where there is evidence in an action to recover damages for an injury resulting from the alleged negligence of the driver, that the driver was inattentive to the road and talking to a companion on the seat with him or looking within the automobile instead of on the road ahead, and that the skidding was caused by a sudden turn of the wheel when he found himself on the edge of the hard surface, it is sufficient to be submitted to the jury on the issue of negligence.

2. **Highways B k—Held: Plaintiff was mere guest in automobile without control over driver, and driver was liable to her for negligent injury.**

Where an injury is sustained by the plaintiff while riding in an automobile driven by her brother-in-law on a trip to take the plaintiff's niece, the driver's daughter, to a sanatorium at which the plaintiff was to pay her expenses, the driver may not escape liability for his negligent act causing injury to the plaintiff on the ground that at the time of the injury they were engaged in a common enterprise, when the evidence discloses that the plaintiff had no control or authority over the driver in the operation of the car, and that he was not her agent in its operation.

3. **Appeal and Error J b—Motion for mistrial was addressed to discretion of trial court and his ruling is not reviewable on appeal.**

In an action to recover damages for injuries sustained in an automobile accident the plaintiff's counsel asked the defendant on cross-examination "Did the finance people or the insurance company take your automobile?" The question was stricken out upon objection and defendant moved for a mistrial, the court refused the motion and the defendant appealed. *Held:* the trial court's ruling will not be reviewed on appeal or a new trial granted in the absence of evidence that the defendant was prejudiced by the asking of the question.

APPEAL by defendant from *Oglesby, J.*, at September Term, 1931, of FORSYTH. Affirmed.

This is an action to recover damages for personal injuries resulting from the negligent operation by the defendant of an automobile in which plaintiff was riding. The action was begun and tried in the Forsyth County Court. The issues submitted to the jury at the trial were answered as follows:

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

2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,000."

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

At the hearing of the appeal, defendant's assignments of error were overruled and the judgment of the county court affirmed. Defendant appealed to the Supreme Court.

Manly, Hendren & Womble for plaintiff.
McMichael & McMichael for defendant.

CONNOR, J. On 18 January, 1928, plaintiff was riding in an automobile owned and driven by the defendant on the State Highway between High Point and Asheboro. She was sitting on the rear seat, with her niece and her niece's husband. Defendant, with his wife and son, was on the front seat. Plaintiff is the sister-in-law of the defendant. The party left Winston-Salem at about 7 o'clock a.m., and was going to Southern Pines, N. C., where plaintiff's niece was to enter a sanatorium for treatment.

Plaintiff testified as follows: "It was a little cloudy and just a little bit foggy when we left Winston-Salem that morning. When we got to High Point it began to rain. Mr. Whitlow was driving the car at the time we had the accident. We had passed High Point and were on the road to Asheboro. I just remember seeing the wheel shaking like that (indicating) and that is about all I know. The automobile left the road and ran into a side ditch. That is the last I remember until the automobile righted itself over in the field. We were traveling on a hard-surfaced road, and were on a slight curve. The automobile left the road and stopped in a field—about ten feet beyond the ditch. When the car stopped I just remember looking over to see if my little niece was all right. We were all still in the automobile."

J. L. Ryan, the husband of plaintiff's niece, testified as follows: "Mr. and Mrs. Whitlow and their son were on the front seat. Miss Butner, Mrs. Ryan and I were on the rear seat. When we left Winston-Salem, it was foggy, and after we got to High Point it commenced drizzling rain, and it continued to rain until we got about seven miles this side of Asheboro. There we had the accident. Prior to the accident I did not notice particularly anything about Mr. Whitlow's driving the automobile. Immediately preceding the accident, I was sitting in the rear seat, looking straight ahead. The road was wet. It had been dusty. At the place of the accident there was a curve to the left of the road. I was watching Mr. Whitlow's driving, and just before the accident happened, he was looking to the right, talking to Mrs. Whitlow, and glancing down at the floor of the automobile. While he was doing

this, the automobile eased over almost to the edge of the hard surface on the left. When Mr. Whitlow looked back and saw that the automobile was almost off the road, he pulled the steering wheel around to the right. As he did that, because of the condition of the road, the automobile skidded. Mr. Whitlow tried to right the automobile, made two or three twists of the wheel, and then put on the brakes. While he was trying to right the automobile, it was going from one side of the road to the other. You could feel the automobile whirl. When he turned it sharp around to the right, the automobile went over on the right-hand side of the shoulder, and hit the embankment. The automobile took a nose dive and turned completely over in the field. When it stopped, it was in an upright position. All the passengers stayed in the automobile. At the time of the accident, Mr. Whitlow was driving at a speed of 35 to 40 miles per hour."

There was evidence tending to show that as the result of the accident, plaintiff sustained painful and serious injuries. She was unable to perform her duties as a bookkeeper in the employment of the Forsyth Roller Mills for several months. She paid out large sums of money for medical and hospital bills. At the trial she testified as follows: "My condition now is quite different from what it was before I was hurt. I suffer with my arm and shoulder most all the time, just a dull ache, especially if I over-do myself, or get nervous. My nerves are much worse than they were before the accident."

The evidence at the trial of this action in the county court was properly submitted to the jury, as tending to show that the skidding of the automobile, in which plaintiff was riding, was caused by its negligent operation by the defendant. The mere fact that the automobile skidded was not in itself evidence of negligence on the part of the defendant, but there was evidence from which the jury could find that the skidding was caused by his negligent driving of the automobile. For this reason it was not error for the judge of the Superior Court to overrule defendant's assignment of error based on his exception to the refusal of the judge of the county court to allow his motion for judgment as of nonsuit. *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251. See *Lenden v. Miller,* 172 Wis., 20, 177 N. W., 909, 12 A. L. R., 665. It was held in that case that the rule *res ipsa loquitur* does not apply to the mere skidding of an automobile on a slippery pavement. So it was held in *Klein v. Beeten,* 169 Wis., 385, 172 N. W., 736, 5 A. L. R., 1237, that where an automobile, running on a perfectly smooth road, suddenly turns and runs into a gutter, overturning and killing an occupant, the doctrine is inapplicable. The skidding of an automobile, while being driven on a road or highway, may or may not be due to the fault of the

driver. It is only when it was due to the fault of the driver, as the evidence in the instant case tended to show, that the driver can be held liable for damages resulting therefrom.

Upon the facts shown by all the evidence in this case, the liability of the defendant to the plaintiff was not affected by her relationship to him as the owner and driver of the automobile in which she was riding, and it was therefore immaterial whether she was his guest, or whether she and he were engaged in a joint adventure in the operation of the automobile. Plaintiff had made arrangements for the admission of her niece into a sanatorium at Southern Pines as a patient, and had undertaken to pay all her expenses while at the sanatorium; defendant had undertaken to take the niece of plaintiff, who is his daughter, in his automobile from her home in Winston-Salem to Southern Pines. Plaintiff was not a member of the defendant's family. She is the sister of his first wife, and the aunt of his daughter by his first wife. The defendant was not driving the automobile as the agent of the plaintiff, nor did plaintiff have any control of the operation of the automobile. There is no principle of law upon which the negligence of the defendant in the operation of the automobile can be imputed to plaintiff, with the result that defendant is absolved from liability to her for damages caused by his negligence. See *Schwartz v. Johnson,* 152 Tenn., 586, 280 N. W., 32, 47 A. L. R., 323. In that case it is held that there is no joint adventure between the driver of an automobile and one who is merely his guest, which will prevent the guest from recovering damages for injuries due to the driver's negligence. It is also held that in a joint adventure, in order to impute the negligence of one of the parties to the other, each must have authority to control the means or agencies employed to execute the common purpose. There was no error in the refusal of the judge of the Superior Court to sustain defendant's assignment of error based upon his exception to the refusal of the judge of the county court to submit the issue tendered by the defendant involving the defense set up in the answer with respect to joint adventure.

At the trial counsel appearing for the defendant objected to a question addressed to the defendant on his cross-examination as follows: "Did the finance people take your automobile or did the insurance company take it?" The objection was sustained. Counsel then moved for a mistrial because this question had been asked by counsel for plaintiff. The motion was denied, and defendant excepted. This motion was addressed to the discretion of the trial court. In the absence of any evidence in the record showing that defendant was prejudiced by the asking of the question, the ruling of the trial judge on defendant's motion for a mistrial will not be reviewed on his appeal. *Goss v. Williams,* 196 N. C.,

213 at page 223, 145 S. E., 169; *Fulcher v. Lumber Co.*, 191 N. C., 408, 132 S. E., 9. Counsel who asked the question insisted that he did so in good faith, not for the purpose of suggesting to the jury that defendant was insured against loss by reason of his liability to plaintiff in this action, but for the purpose of off-setting the effect on the jury of defendant's statement on his direct examination that the finance people took his car after the accident. The trial judge evidently found that the question was asked in good faith, although he properly sustained defendant's objection to the question, and did not permit defendant to answer it.

We find no error in the judgment of the Superior Court affirming the judgment of the county court. The judgment is, therefore,

Affirmed.

FIRST NATIONAL BANK OF HENDERSON, FOR ITSELF, AND IN BEHALF OF ALL OTHER CREDITORS OF THE ESTATE OF S. M. BLACKNALL, DECEASED, v. MILDRED W. PURVIS, SOLE LEGATEE AND DEVISEE, AND ADMINISTRATRIX, C. T. A., OF S. M. BLACKNALL, DECEASED, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, AND B. H. HICKS, TRUSTEE.

(Filed 9 December, 1931.)

1. **Mortgage H b—Creditors may not restrain sale of land under deed of trust executed by deceased in absence of fraud, mistake, etc.**

   The creditors of an estate are not entitled to have an order temporarily restraining the execution of the power of sale in a deed of trust continued to the final hearing where it appears that the decedent executed the mortgage and notes secured thereby in consideration of money loaned and that the notes were past due and unpaid and that the trustee was authorized to sell the lands under the terms of the deed of trust, there being no allegations or evidence of fraud or mistake in the execution of the instrument or of other elements that would justify the intervention of a court of equity.

2. **Mortgage H m—Purchaser at foreclosure sale of land used as nursery held entitled to shrubbery growing on land at time of sale.**

   Where a deed of trust is given on lands used as a nursery for the cultivation of ornamental shrubbery and fruit trees, requiring several years growth to be ready for marketing, upon the execution of the power of sale according to the terms of the instrument, the purchaser is entitled to the trees and shrubbery upon the land at the time of the sale, and the devisee and legatee of the deceased mortgagor may not claim the right thereto as personalty, and is not entitled to an order allowing her a reasonable time for their removal after the sale.

APPEAL by defendant, B. H. Hicks, trustee, from *Cranmer, J.*, at Chambers, on 23 June, 1931. From VANCE. Reversed.

This is an action to restrain, until the trial of the issues raised by the pleadings, the defendant, B. H. Hicks, trustee, from selling under the powers of sale contained in two deeds of trust executed by S. M. Blacknall, the land conveyed by the said S. M. Blacknall to the said defendant by said deeds of trust to secure the payment of certain notes described therein, and for other relief.

From judgment continuing the temporary restraining order issued in the action on 26 May, 1931, to the final hearing, the defendant, B. H. Hicks, trustee, appealed to the Supreme Court.

Pittman, Bridgers & Hicks and A. A. Bunn for plaintiff.
Hicks & Stem for defendant.

CONNOR, J. No facts admitted by the parties or found by the judge appear in the judgment continuing the temporary restraining order to the final hearing. The action was heard and considered on the verified pleadings. It was thereupon ordered, considered and adjudged that the temporary restraining order issued on 26 May, 1931, be continued in full force until the final hearing.

It appears from the admissions in the pleadings that the deeds of trust containing the powers of sale under which the defendant, B. H. Hicks, trustee, had advertised the land described in the complaint for sale, were executed by S. M. Blacknall, and were duly recorded. The validity of these deeds of trust is not challenged.

It further appears from the pleadings that the notes secured by the deeds of trust were executed by S. M. Blacknall, and are now due and unpaid. The consideration for these notes was money loaned to S. M. Blacknall, the maker, and expended by him in the improvement of the land conveyed by the deeds of trust. There is no controversy between the parties as to the amount due on these notes. It is not alleged or contended that payments made on the notes have not been duly credited.

There are no allegations in the complaint of fraud, or mistake with respect to the execution of the deeds of trust or of the notes. In the absence of such allegations, or of other allegations upon which the equitable jurisdiction of the Superior Court may be invoked, it was error to continue the temporary restraining order. It should have been dissolved, for it is only in cases whereupon the facts admitted or found by the judge the mortgagor may invoke the equitable jurisdiction of the court, that the court has the power to restrain the sale of land under a power of sale contained in a mortgage or deed of trust. *Hayes v. Pace,* 162 N. C., 288, 78 S. E., 290. In *Lumber Co. v. Conrades,* 195 N. C., 626, 142 S. E., 138, it was said: "The trial judge was

therefore correct in refusing to restrain the sale of the land in accordance with the terms of the deed of trust, and in accordance with the tenor of the note secured thereby." In that case, the trial judge found as a fact that the note secured by the deed of trust was past due. The execution of the note and of the deed of trust was admitted, and there was no allegation of fraud, restraint, oppression, or usury in the transaction. *Brogden, J.*, writing for the Court quotes with approval the statement of the law by *Clarkson, J.*, in *Leak v. Armfield,* 187 N. C., 625, 122 S. E., 393, as follows: "We can see no equitable ingredient in the facts of this case. The mortgage is not a 'scrap of paper.' It is a legal contract that the parties are bound by. The courts under their equitable jurisdiction, where the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage."

It appears from the admissions in the pleadings that for many years prior to his death in April, 1929, S. M. Blacknall had been engaged under the trade name of the Continental Plant Company, in the cultivation on the land described in the deeds of trust, of ornamental shrubbery and fruit trees, which were from time to time removed from the land for purposes of sale; and that at his death there was, and there is now, growing on said land ornamental shrubbery and fruit trees, which are of great value as nursery stock. It requires from three to five years from the time this nursery stock is planted or set out on the land to grow it for the market. The usual time for the sale of nursery stock is from 1 November to 1 April. The land described in the deeds of trust was advertised for sale by the defendant, B. H. Hicks, trustee, on 29 May, 1931.

Plaintiff contends that this nursery stock now growing on the land described in the deeds of trust is personal property and that therefore the title to the same, at the death of S. M. Blacknall passed to and vested in his administratrix, and as such is available as assets for the payment of the indebtedness of S. M. Blacknall, deceased. Plaintiff further contends that the administratrix is entitled to a reasonable time within which to go upon said land and to remove said nursery stock, and that the court should make such orders as may be proper to protect this right as against the purchase at the sale under the power of sale, when the same shall be made by the defendant, B. H. Hicks, trustee. The defendant, B. H. Hicks, trustee, contends, on the contrary, that the nursery stock is not personal property but is part of the land, and will go to and vest in the purchaser at the sale under the powers of sale contained in the deeds of trust.

The question presented by these conflicting contentions is the only question of law discussed in the briefs filed in this Court. This question apparently was not considered or decided by the trial judge. We have, however, in deference to the request of both plaintiff and defendant, considered the question. We are of opinion that whatever may have been the character of the nursery stock growing on the land at the death of S. M. Blacknall—whether real or personal property—when the land described in the deeds of trust shall have been sold under the powers of sale contained therein, and conveyed to the purchaser, he will be the owner of all the nursery stock then growing on the land and that the administratrix of S. M. Blacknall, deceased, will have no right, in law or in equity, to go upon said land and remove therefrom the nursery stock growing thereon at the date of the sale. See *Collins v. Bass*, 198 N. C., 99, 150 S. E., 706. There is error in the judgment. It is

Reversed.

J. L. KENNEDY v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 9 December, 1931.)

1. Master and Servant C b—Conflicting evidence on question of master's liability held properly submitted to the jury.

The lineman of a telegraph company in pursuance of his duty had climbed to the top of a pole to fix the wires, and the pole fell causing personal injuries to him. His evidence tended to show that he was subject to the order of the defendant's maintenance foreman whose duty it was to have inspected the pole, that the pole was rotten under the ground which could not have been discovered by the plaintiff in the exercise of ordinary care and which should have been discovered by the maintenance foreman in the exercise of his duty of inspection. The defendant pleaded contributory negligence and its evidence tended to show that the plaintiff was in charge of the work and was under duty to inspect the pole and should have discovered and avoided the danger. *Held:* the conflicting evidence was properly submitted to the jury on the question of the defendant's failure to exercise due care to provide the plaintiff with a reasonably safe place to work.

2. Trial D a—Where plaintiff gives conflicting testimony it affects his credibility as witness but does not entitle defendant to nonsuit.

Apparent contradictions or inconsistencies in the evidence of a plaintiff testifying in his own behalf in a civil action will not entitle the defendant to a judgment as in case of nonsuit or to a directed verdict, when he has also testified to matters tending to sustain his action, such contradictions going only to his credibility as a witness.

3. Trial E c—Where instructions requested are substantially given in the charge refusal to give instructions requested is not error.

The refusal of the trial judge to give a prayer for special instructions will not be held for error when the instructions requested are substantially given in the general charge.

4. Trial E f—Incorrect statement of contentions of party must be called to attention of trial court in apt time.

An incorrect statement in the charge of the trial judge to the jury as to the contentions of a party will not be held for error unless the complaining party has called the matter to the attention of the judge in time to afford him an opportunity to correct the misstatement.

5. Trial E b: E g—Held: construing charge as a whole the trial court did not express opinion as to weight and credibility of evidence.

Where the trial court charges the jury that if they should find the facts to be as contended by the defendant, that the plaintiff could not recover, and in the next succeeding paragraph states the converse of the proposition, an exception by the defendant to the latter portion of the charge will not be held for error as an expression of opinion by the court on the weight and credibility of the evidence, the charge being correct when construed contextually as a whole.

6. Trial E e—Where court correctly charges the law applicable a party desiring greater elaboration should tender request therefor.

Where the trial court substantially instructs the jury upon the issue of the measure of damages, the objecting party desiring a more elaborate statement of the law should make a special request therefor in order to avail himself of an exception on appeal.

APPEAL by defendant from *Finley, J.*, at April Term, 1931, of GUILFORD. No error.

In his complaint the plaintiff alleged that on 10 April, 1929, he was in the service of the defendant as a lineman, doing work in Dinber, S. C., and was required to climb one of the defendant's poles for the purpose of disconnecting certain wires; that he braced the telegraph pole with four pike poles; that while he was in the act of releasing the wires, or after he had released them, the main pole and one of the pike poles broke; and that he was thrown to the ground and injured. The defendant denied all allegations of negligence and pleaded the plaintiff's contributory negligence in bar of his recovery. The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff and the defendant excepted and appealed.

The principal allegation of negligence is the defendant's failure to use ordinary care to provide for the plaintiff a safe pole and safe pike poles.

The defendant contended that the plaintiff had charge of the work, that it was his duty to inspect the poles, and that if they were defective

he should have discovered the defect and avoided the danger. It was the plaintiff's contention that he was not the supervisor of the work and that he was subject to the orders of a superior officer of the defendant.

H. L. Koonts and Walser & Casey for plaintiff.
Francis R. Stark, King & King and Sapp & Sapp for defendant.

ADAMS, J. The first and second assignments of error are addressed to the question whether the defendant is entitled to a judgment of nonsuit, and the seventh, eighth, and ninth, to the question whether upon all the evidence the court should have instructed the jury to answer the first issue against the plaintiff, the defendant insisting that the plaintiff had supervision of the work and that it was his duty to take such reasonable and available precaution for his own safety as the dangerous character of the service required. The defendant's position conforms to the established rule. *Hicks v. Mfg. Co.*, 138 N. C., 319; *Covington v. Furniture Co., ibid.*, 374; *Mace v. Mineral Co.*, 169 N. C., 143; *Heaton v. Iron Co.*, 191 N. C., 835. But the evidence on this point is not all one way. There is testimony tending to support the defendant's contention; there is other testimony to the effect that the plaintiff was subject to the orders of the maintenance foreman. This conflict in the testimony imposed upon the court the duty of submitting the question to the jury. If the plaintiff's contention is correct, as the jury decided, the plaintiff had a right to assume that the defendant had discharged its duty of inspection unless the defect in the poles was so apparent that the plaintiff should have discovered it by exercising ordinary care. *Chesson v. Lumber Co.*, 118 N. C., 59; *Horne v. Power Co.*, 141 N. C., 50. The plaintiff testified that the pole was "rotten inside and under the ground"; and upon this he rests the contention that the defect was not discoverable by him but should have been discovered by the defendant in performing the duty of inspection.

Error would have been committed if the court had directed a verdict for the defendant on the second issue. Whether the plaintiff exercised proper care was a matter for the jury. He testified that he examined the pole before he went up on it; that he had had ten years experience and knew how to examine it; and that after the examination it seemed to be safe. Any apparent contradiction or inconsistency in his testimony did not destroy its competency; it was merely a circumstance tending to affect his credibility as a witness.

The third, fourth, and fifth assignments cannot be sustained for the reason that in effect they eliminate consideration of the defendant's alleged negligence and absolve the defendant in any view of the evidence from the duty of inspection. The sixth relates to a prayer for instruc-

tion, the substance of which, or so much of it as the defendant was entitled to, is embraced in the charge.

The subject of the tenth assignment is the statement of a mere contention of the defendant, which if objectionable should have been called to the attention of the court at the time so that it might be corrected. *S. v. Ashburn,* 187 N. C., 717; *Snyder v. Asheboro,* 182 N. C., 708.

The instruction referred to in the eleventh exception if taken as a detached portion of the charge is incomplete; but when considered in connection with other portions, the charge being construed in its entirety, the paragraph excepted to does not constitute valid ground for a new trial. After giving specific instructions on the first issue his Honor told the jury that if they should find that the plaintiff had charge of the work and did not exercise reasonable care and that the injury was the result of his negligence he would not be entitled to recover. The ensuing paragraph was a statement of the converse of this proposition and must be construed in its relation to the whole charge.

The instruction as to damages is in substantial compliance with the law. *Ruffin v. R. R.,* 142 N. C., 120; *Wallace v. R. R.,* 104 N. C., 442. If the defendant desired a more elaborate statement of the rule in reference to the present value of the plaintiff's diminished earning capacity he should have requested an instruction to this effect. *Murphy v. Lumber Co.,* 186 N. C., 746; *Hill v. R. R.,* 180 N. C., 490, 493. We find

No error.

IN RE WILL OF JOHN R. HENDERSON.

(Filed 9 December, 1931.)

Trial G b—Verdict in this case held conflicting and ambiguous, entitling appellant from judgment entered thereon to a new trial.

Where on the trial of a caveat of a will the first issue submitted to the jury is whether the paper-writing and every part thereof was the last will and testament of the deceased, and the third issue submitted was whether the testator had sufficient mental capacity to execute the instrument, and the jury answers the first issue "Yes" and the third issue "No," the verdict is conflicting in its result, and is so uncertain and ambiguous that on appeal from judgment entered thereon a new trial will be granted.

CIVIL ACTION, before *MacRae, Special Judge,* at May Term, 1931, of RICHMOND.

There was evidence tending to show that on 30 March, 1927, John R. Henderson executed a paper-writing as follows: "This my last will and testament is as follows: My sister, Lula, shall have all my property

as real estate during her entire lifetime, and after that shall go as described in my will that you will find in my safe. Mae to have my personal property. This 30 March, 1927."

The alleged testator left a wife and a daughter, named Edith Henderson. He also left a sister, Mrs. Mae Dennis, and a half sister, Mrs. Lula Crowson. The deceased married in 1924, but lived with his half sister, Lula Crowson, from 1911, to June or July, 1927, when he went to live with his wife and daughter. There was evidence tending to show that the paper-writing was found among valuable papers of the deceased. The daughter, Edith Henderson, who was a minor, filed a caveat to the will alleging that the signature of J. R. Henderson, testator, was obtained by Mae Dennis and Lula Crowson by means of undue influence and duress, and further, that at the time of executing said paper-writing the deceased did not have sufficient mental capacity to make a will. The alleged testator died on 26 May, 1930. There was evidence tending to show that the testator had sufficient mental capacity at the time the paper-writing was dated, and there was evidence to the contrary.

The court submitted the following issues:

1. "Is the paper-writing propounded, and every part thereof, the last will and testament of John R. Henderson?"

2. "Was the execution of the said paper-writing procured by improper and undue influence on the part of Mrs. Lula Crowson and Mrs. Mae Dennis?"

3. "Did J. R. Henderson, at the time of the execution of the paper-writing purporting to be his last will and testament, to wit, on 30 March, 1927, have sufficient mental capacity to execute the same?"

The court instructed the jury to answer the second issue "No," and thereupon the first issue was answered "Yes," and third issue "No."

The propounders excepted to the issues submitted by the court and tendered the following issues:

1. "Did J. R. Henderson, at the time of the execution of the paper-writing purporting to be his last will and testament, to wit, on 30 March, 1927, have sufficient mental capacity to execute the same?"

2. "Is the paper-writing propounded, and every part thereof, the last will and testament of J. R. Henderson?"

The court refused to submit the issues tendered by the propounders.

From judgment upon the verdict, the propounders appealed.

J. C. Sedberry for propounders.

L. H. Gibbons, Z. V. Morgan and F. W. Bynum for caveators.

BROGDEN, J. The jury found in response to the first issue that the paper-writing and every part thereof was the last will and testament of

John R. Henderson. Nevertheless, in response to the third issue, the jury found that the testator did not have sufficient mental capacity to make a will. The result is that the first issue finds the will to be valid, and the third issue finds it to be invalid. It was held for law in *Crabtree's case,* 200 N. C., 4, 156 S. E., 98, that when a will has been duly executed by the maker, in accordance with all the formalities of law, it is presumed to be a valid paper-writing and the maker presumed to have capacity to make such instrument, in the absence of fraud or undue influence. It is manifest, therefore, that the verdict is materially repugnant. Discussing a repugnant verdict in *Wood v. Jones,* 198 N. C., 356, 151 S. E., 732, *Clarkson, J.,* wrote: "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." See, also, *S. v. Godwin,* 138 N. C., 582, 50 S. E., 277; *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500.

The record discloses that the trial judge instructed the jury as follows: "The law requires the caveators to prove that he did not have sufficient mental capacity to make a will, and if they have satisfied you that he did not have sufficient mental capacity to make a will, then you must answer the first issue "No." In view of this instruction, the fact that the jury answered the first issue "Yes," would tend to show that the testator did have sufficient mental capacity to make a will. It is apparent that the verdict is uncertain and ambiguous so as to warrant a new trial. There are exceptions to certain evidence and to a portion of the charge, but as a new trial must be awarded, the court does not deem it necessary to discuss these exceptions.

New trial.

STATE v. GEORGE GUICE.

(Filed 9 December, 1931.)

Criminal Law J b—Trial court may withdraw a juror and order mistrial in his discretion in criminal prosecutions other than capital felonies.

In misdemeanors and felonies not capital the trial court may withdraw a juror and order a mistrial in his discretion, before verdict, and without finding the facts upon which his action is based, and in capital felonies he may do so upon finding the facts which are subject to review

on appeal, and in this case his judgment ordering a mistrial over the defendant's objection after refusing defendant's motion for judgment as of nonsuit, is affirmed, there being no evidence of abuse of discretion.

APPEAL by defendant from *Sink, J.*, at October Term, 1931, of HENDERSON. Affirmed.

The bill of indictment and record is as follows:

"The jurors for the State, upon their oath present that George Guice, in Henderson County, on 1 September, 1916, did unlawfully, feloniously and wilfully assault, beat and wound one May English, a female person, with a deadly weapon, to wit: a certain rock and knife, with intent then and there to kill and murder the said May English, the said Guice being a man over the age of 18 years, resulting in serious and permanent injury, loss of blood and permanent cuts and bruises, contrary to the statute in such cases made and provided, and against the peace and dignity of the State. J. Will Pless, Jr., Solicitor.

A true bill.

John D. Osborne, foreman of grand jury, October Term, 1931.

To the foregoing bill of indictment the defendant pleads not guilty. In the case at bar, after the State had introduced evidence and rested its case, the defendant, through his counsel, moved for judgment as of nonsuit, which motion was argued by counsel for defendant and by the solicitor for the State.

Before ruling on defendant's motion for judgment as of nonsuit, the court, acting in its discretion and over the objection of defendant's counsel, and exception, withdraws a juror and orders a mistrial, to which the defendant's counsel again objected, and excepted.

After the court had ordered a mistrial the defendant, through his counsel, moved the court for the discharge of the defendant and his bond. The motion was denied and defendant excepted."

To the above exceptions defendant duly assigned error and appealed to the Supreme Court.

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

R. L. Whitmire for defendant.

CLARKSON, J. The only question presented on this appeal: Did the court below, after the State had rested its case, over objection of defendant, who made a motion for judgment of nonsuit, C. S., 4643, have the discretion to withdraw a juror and order a mistrial? We think so.

In misdemeanors, and all cases of felonies not capital, the court below has the discretion to order a mistrial and discharge a jury before verdict in furtherance of justice and the court need not find facts constituting the necessity for such discharge, and ordinarily the action is not reviewable. In capital felonies the facts must be found and the necessity for such discharge is subject to review. *S. v. Bass,* 82 N. C., 570; *S. v. Andrews,* 166 N. C., 349; *S. v. Ellis,* 200 N. C., 77.

In the *Bass case, supra* (a felony), at p. 574-5, speaking to the subject, the Court said: "We hold therefore on a review of the cases in our reports, that his Honor had the discretion to dissolve the jury and hold the defendants for a new jury, and that the security for the proper exercise of his discretion rests not on the power of this Court to review and reverse the judge, but on his responsibility under his oath of office."

This discretion has been jealously guarded by the courts below, and we can see no gross abuse presented on this record.

The question of the statute of limitation is interestingly discussed in the briefs of both the State and defendant. From the present record we are not now called upon to decide this question raised by the briefs. The judgment of the court below is

Affirmed.

T. C. FLETCHER, B. C. FLETCHER, ELIZABETH JENNINGS, J. T. FLETCHER, G. M. FLETCHER AND IDA HELEN FLETCHER, THE LAST TWO SUING BY THEIR GUARDIAN, T. C. FLETCHER, AND L. C. FLETCHER, v. ELLA V. BRAY, SALLIE S. WOODHOUSE AND ANNIE M. BAUM, EXECUTRICES OF IDA F. CARTWRIGHT, DECEASED, AND ELLA V. BRAY, SALLIE S. WOODHOUSE AND ANNIE M. BAUM.

(Filed 9 December, 1931.)

Wills E h—Held: will conveyed life estate in lands to wife with power of disposition of standing timber for her own benefit.

A testator left an estate including lands with timber growing thereon and devised to his wife all of his property of every kind and description for life with remainder over to his nephew and his nephew's children, the testator having no children, and by later provision of the will empowered his wife to dispose of the standing timber as she might think best. The wife sold the timber and deposited the proceeds in the bank. *Held:* by interpretation of the will it appears that the intent of the testator was to provide for his wife more particularly than his nephew and his nephew's children, and that title to the timber was severed from the fee and did not pass with the land, and the wife had the right under the terms of the will to the proceeds of the timber as her own money which she could dispose of by her will, there being no trust in favor of the remaindermen coupled with the wife's power of disposition.

FLETCHER *v.* BRAY.

CIVIL ACTION, before *Grady, J.*, at June Term, 1931, of PASQUOTANK.

G. W. Cartwright died on or about 9 October, 1922, leaving a last will and testament containing the following clauses:

2. "I give and devise to my wife, Ida F. Cartwright, all of my property of every kind and description and wheresoever situate for and during the term of her natural life, in remainder over, after the death of my said wife, Ida F. Cartwright, to T. C. Fletcher and the children of the said T. C. Fletcher, share and share alike, absolutely and in fee simple forever."

3. "It is my will and desire that my said wife, Ida F. Cartwright, shall have the privilege to dispose of any or all of the standing timber on the lands herein devised as she may think best."

Ida F. Cartwright was appointed executrix of the will. The plaintiffs are the children of T. C. Fletcher. The testator had no children, and T. C. Fletcher is a nephew, and the other plaintiffs grand-nephews of G. W. Cartwright, deceased.

The cause was referred to a referee, who heard the evidence and filed a report setting forth the findings of fact and conclusions of law thereon. The facts as found, pertinent to the controversy, are as follows:

14. "That the said Ida F. Cartwright in the exercise of her discretion, and as she thought best, sold some of the standing timber from the lands devised in the will of George W. Cartwright and received for said timber the aggregate sum of $8,886.28," etc.

15. "That the said Ida F. Cartwright during 1928 had some stables built on the land referred to in the will of G. W. Cartwright at a cost of $534.96 and the said stables increased the value of said land to that amount."

16. "That said Ida F. Cartwright died on 25 February, 1929, leaving a last will and testament."

17. "That the defendants are the duly appointed and qualified executrices of Ida F. Cartwright, deceased, and the residuary legatees and distributees named in the last will and testament of Ida F. Cartwright."

18. "That there were found in the safe-deposit box of said Ida F. Cartwright the following securities:

Bonds, Virginia-Carolina Joint Stock Land Bank	$2,500.00
Real estate 6 per cent bonds	3,400.00
Real estate 6 per cent bonds (Country Club)	200.00
7 per cent preferred stock Atlantic Discount Corp.	2,500.00
2 shares Pasquotank Hosiery Co.	200.00
8 shares preferred stock Elizabeth City Hotel Corp.	800.00
	$9,600.00"

19. "Prior to the death of G. W. Cartwright there was an account in the First and Citizens National Bank of Elizabeth City in his name, upon which both he and the said Ida F. Cartwright, as his attorney, drew from time to time; that after the death of George W. Cartwright, the said Ida F. Cartwright opened a bank account in her own name, in the First and Citizens National Bank of Elizabeth City, and also rented a safe-deposit box in said bank; that, prior to said George W. Cartwright's death she carried no account with said bank, and had no safe-deposit box therein, and did not, so far as the evidence discloses, carry any account, or have any safe-deposit box elsewhere; that, after opening said account the said Ida F. Cartwright deposited therein the moneys coming into her hands, as executrix of George W. Cartwright, deceased, the moneys arising from the sales of the timber aforesaid; and certain moneys of her own, arising from interest and dividends from her investments; from rents from the farm referred to in said George W. Cartwright's will for the years 1923 to 1928, inclusive, and from other sources; that, upon said account she from time to time drew checks, some being for claims against the estate of the testator, some for her own personal expenses or uses, and some for repairs to said farm, some in payment for the Atlantic Discount Corporation stock referred to in the preceding section, some in payment for the Virginia-Carolina Joint Stock Land Bank bonds, referred to in the preceding section, and some in payment for the $3,400 worth of real estate six per cent bonds referred to in the preceding section. That there is no evidence to show the exact sources from which were derived the funds which went into the purchase of any of said securities."

Upon the foregoing facts the referee concluded as follows: "That the plaintiffs are entitled to recover of the defendants as executrices of said Ida F. Cartwright the said sum of $8,886.28, being the amount received by said Ida F. Cartwright from timber sold by her from the lands devised in the will of G. W. Cartwright, together with interest on said amount from 25 February, 1929."

Exceptions to the findings of fact and conclusions of law were filed by both parties. Upon the hearing of the exceptions the court adjudged, among other things, that the plaintiffs have and recover of defendants the "further sum of $8,886.28 with interest thereon from 25 February, 1929, said recovery to be credited with the sum of $534.96 as of date of this judgment."

It was further adjudged that the securities found in the possession of Ida Cartwright at her death and set out in finding No. 18, be deposited with the clerk of the court, and that the judgment rendered should "constitute a lien upon all of said stocks, bonds and other evi-

dences of debt, and the same are ordered to be sold by John D. McMullan, Esq., who is hereby appointed a commissioner of the court for that purpose; and he is directed to make sale of said bonds, notes and other evidences of debt at the courthouse door in Elizabeth City, North Carolina, after first advertising said sale for at least three weeks in some newspaper published in Elizabeth City, and also at said courthouse door; and he will apply the proceeds of sale, less such commission as may be allowed him by the court, upon this judgment, in partial satisfaction thereof."

From the foregoing judgment the defendants appealed.

McMullan & McMullan for plaintiffs.
M. Earl Woodhouse and Ehringhaus & Hall for defendants.

BROGDEN, J. The briefs of the parties and the oral argument apparently limit the controversy to the value of the timber; hence the question of law may be stated as follows: Did the life tenant, Ida F. Cartwright, under and by virtue of the last will and testament of George W. Cartwright, have the power to sell the standing timber and use the proceeds thereof for her own benefit?

At the threshold of inquiry two theories of interpretation of the pertinent portions of the will of George W. Cartwright are manifest. The first theory is that item 2 of the will devises to Ida F. Cartwright a life estate in the entire property with remainder over to the plaintiffs. Furthermore, that standing timber is an integral part of the inheritance, and that, therefore, power to convey timber and appropriate the proceeds thereof results in clothing the life tenant with power to convey the fee, and thus destroys or certainly impairs and diminishes the estate of the remaindermen. Upon this aspect of the case the law, as announced in this jurisdiction, is expressed in *Griffin v. Commander,* 163 N. C., 230, 79 S. E., 499. The Court, quoting with approval the rule adopted by the New Jersey Court, said: "Where an estate for life is expressly given and a power of disposition is annexed to it, in such case the fee does not pass under such devise, but the naked power to dispose of the fee. It is otherwise in case there is a gift generally of the estate, with a power of disposition annexed. In this latter case the property itself is transferred. . . . The test in a case of this kind is whether the testator expressly limits the devise of the first taker to a life estate by specific language."

The general principle thus expressed is supported by many decisions in this jurisdiction, notably: *Long v. Waldraven,* 113 N. C., 337, 18 S. E., 251; *Chewning v. Mason,* 158 N. C., 578, 74 S. E., 357; *Darden*

v. Matthews, 173 N. C., 186, 91 S. E., 835; *White v. White,* 189 N. C., 236, 126 S. E., 612; *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *Cagle v. Hampton,* 196 N. C., 470, 146 S. E., 88; *Helms v. Collins,* 200 N. C., 89, 150 S. E., 676.

Planting themselves upon the principles of law announced in the foregoing decisions the plaintiffs assert that Ida F. Cartwright had the right to sell the timber upon the land and vest an indefeasible title thereto in the purchaser, but that when she received the proceeds of the sale of a part of the inheritance, she held the same as trustee for the remaindermen. Consequently, when she invested such proceeds in securities, the remaindermen are entitled to such securities remaining in her possession at her death. Hence, the question arises: Was Ida F. Cartwright a trustee for the remaindermen? Stripped of technicality and legal refinement, a trust rests upon duty; that is to say, if the power of disposition is to be exercised for a particular person or for a particular class, or for a specified purpose, it is the duty of the donee of the power to exercise it. This is illustrated by the case of *Ripley v. Armstrong,* 159 N. C., 158, 74 S. E., 961, and other cases of like tenor. The power in the *Armstrong case* was expressed in these words: "to use as he thinks best for the maintenance of our children." Here the power was to be exercised for the support of the children, and, consequently, a duty was thereby imposed upon the donee of the power to use the property for a specific purpose. In the case at bar, the power of disposition is not coupled with a trust.

The theory of interpretation of the will of George W. Cartwright asserted by the defendants, is that Ida F. Cartwright was authorized and empowered to sell the timber. Hence, her act in making the sale was rightful. Furthermore, as the power of disposition was general, she had a right to appoint herself as the beneficiary of the power upon the principle of law announced in *Hicks v. Ward,* 107 N. C., 392, 12 S. E., 318.

In the final analysis, the conclusion to be reached upon the facts must rest upon an interpretation of the will of George W. Cartwright, and, of course, all the law books teach us that interpretations of a given instrument ordinarily are as variable as the particular mental attitudes of interpreters.

At the outset, it is manifest that George W. Cartwright, having no children, was primarily solicitous of the comforts and welfare of his wife. This solicitude led him to give his entire estate to his wife for life. Moreover, in item 2 he devises the land and consequently the standing timber thereon to his wife for life with the remainder to the plaintiffs. This was a final disposition of his entire estate. But apparently

he was not satisfied with the final disposition so made, and consequently, in a succeeding and separate item of his will, wrote these words: "It is my will and desire that my said wife, Ida F. Cartwright, shall have the privilege to dispose of any or all of the standing timber on the lands herein devised as she may think best." Thus, he excepts the timber from the fee devised in item 2; that is to say, he severs the timber from the fee and authorizes his wife, the life tenant, to exercise uncontrolled dominion thereof. The court holds the opinion that the standing timber was severed by the testator from the fee and the absolute dominion thereof given the wife, and such severance was designed for her benefit rather than for the benefit of a nephew and grand-nephews and grand-nieces. Therefore, if Ida F. Cartwright, upon the sale of the timber, was entitled to hold the proceeds in her own right and as her own property, she had the power to invest the money in securities and to hold the same also in her own right. Consequently, by virtue of her will the defendants are entitled to the proceeds of the timber or the securities purchased by Ida F. Cartwright with such proceeds. The Court is not unmindful of the last paragraph in the opinion of *Darden v. Matthews,* 173 N. C., 186. However, that case involved the sale of the entire property, and the court was evidently proceeding upon the theory that the life tenant had only a naked power to sell without any suggestion of dominion or ownership of the proceeds of the sale.

Reversed.

ABRAM JONES, DECEASED, E. C. BROOKS, JR., ADMINISTRATOR, v. E. H. CLEMENT COMPANY AND UNITED STATES CASUALTY COMPANY.

(Filed 9 December, 1931.)

1. Executors and Administrators A a—Where no one qualified by statute has applied for letters after six months clerk may appoint administrator.

Where a resident dies in a county in which no public administrator has been appointed, C. S., 20, the clerk of the court has jurisdiction to appoint an administrator for his estate after the lapse of six months where no other person qualified under the statute has applied for letters of administration, C. S., 15, and where the clerk has appointed an administrator under the statute a debtor of the estate cannot maintain the position that the appointment of a public administrator was necessary to receive payment of the debt, in this case compensation recoverable under the provisions of the Workmen's Compensation Act.

2. Master and Servant F i—Findings of fact of Industrial Commission, supported by sufficient evidence, are conclusive on appeal.

The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the full Commission upon appeal, are conclusive upon the courts when supported by any sufficient competent evidence.

3. Master and Servant F g—Where deceased employee leaves no dependents compensation is payable to his personal representative.

Where the death of an employee is compensable under the provisions of the Workmen's Compensation Act, and such deceased employee leaves no one either wholly or partially dependent on him, the compensation is payable to his personal representative for the benefit of his heirs under the provisions of the act, and where the Industrial Commission has found as a fact upon sufficient evidence that the employee left no dependents an award to his personal representative, duly appointed will be upheld.

4. Master and Servant F h—Amount of compensation payable to personal representative is commutable under the provisions of the act.

While there is no commuted amount provided by section 38 of the Workmen's Compensation Act for payment to the personal representative of a deceased employee for death from an injury compensable thereunder, the act provides the method by which such amount can be commuted, and in this case the amount of the award by the Industrial Commission is upheld.

APPEAL by defendants from *Devin, J.,* at April Term, 1931, of DURHAM. Affirmed.

The hearing Commissioner, J. Dewey Dorsett, found the facts and rendered an opinion and decided that plaintiff E. C. Brooks, Jr., administrator of Abram Jones, was entitled to an award. The chairman, Matt H. Allen, notified the defendants, as follows: "You and each of you are hereby notified that a hearing was held in the above styled case before Commissioner J. Dewey Dorsett at Durham, N. C., on 6 December, 1930, and an opinion filed on 23 December, 1930, directing an award as follows: Upon the finding that the deceased left no person wholly or partially dependent upon him at the time of the accident and that E. C. Brooks, Jr., has duly qualified as administrator of the estate of the deceased, the defendant will pay to E. C. Brooks, Jr., administrator, in a lump sum, the commuted value of 350 weekly installments at the rate of $7.87 per week which is $2,495.98. The defendants will pay to proper parties funeral expenses not to exceed $200. The costs of the hearing will be taxed against the administrator, and same to be deducted by carrier from above compensation and paid direct to the Commission."

An appeal was taken to the full Commission. It sustained the hearing Commissioner, the chairman writing an opinion in the case. *Brooks v. Clement Co.,* Opinions N. C., Industrial Commission, 1930-1931, p. 188.

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, W. A. Devin, judge presiding in the Tenth Judicial District and holding court at regular term in the county of Durham, upon an appeal from an award of the North Carolina Industrial Commission in the above entitled cause rendered by the said North Carolina Industrial Commission on 26 January, 1931, and it appearing to the court that the said award is in all respects proper and correct: It is therefore, ordered, adjudged and decreed that the said award be and is hereby confirmed and that judgment is hereby entered against E. H. Clement Company and the United States Casualty Company, defendants herein, in the sum of $2,435.35, from which shall be deducted the sum of $200.00 paid by the defendants for funeral expenses; that said judgment is in favor of said plaintiff. This 30 April, 1931. W. A. DEVIN, *Judge Presiding.*"

To the foregoing judgment defendants excepted, assigned error and appealed to the Supreme Court. Several exceptions and assignments of error were made by defendants. The material contentions will be considered in the opinion.

Thomas A. Banks for plaintiff.
Biggs & Broughton for defendants.

CLARKSON, J. Abram Jones, on 19 February, 1930, while regularly employed by E. H. Clement Company of Durham, suffered an injury by accident that arose out of and in the course of his employment. Death resulted from this accident and injury on 19 April, 1930. On 11 March, 1930, an agreement for payment of compensation was entered into by Abram Jones and the defendants. The defendants by that agreement admitted liability to Abram Jones before his death. On 30 October, 1930, E. C. Brooks, Jr., of Durham, was appointed and duly qualified as administrator of the estate of Abram Jones, by the clerk of the Superior Court of Durham County, and gave bond as required. This appointment was made after six months had expired from the date of death of Abram Jones. Durham County has no public administrator. The defendant contended that, under the law, a public administrator should be paid the compensation due in the case instead of E. C. Brooks, Jr., administrator. This contention of defendants cannot be sustained.

C. S., 15, latter part, is as follows: "If no person entitled to administer applies for letters of administration on the estate of a decedent

within six months from his death, then the clerk may, in his discretion, deem all prior rights renounced and appoint some suitable person to administer such estate."

C. S., 20: "The public administrator shall apply for and obtain letters testamentary, or letters on the estates of deceased persons in the following cases: (1) When the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for, and issued to any person," etc.

In *Hill v. Alspaugh,* 72 N. C., at p. 405, speaking to the construction of the statute: "But after the expiration of six months, should the public administrator fail to apply, the field is open to the probate judge (now clerk of the Superior Court) to treat all right of preference as renounced and to appoint, in the exercise of his discretion, some suitable person to administer the estate. This view is in accord with public policy, which requires the estates of decedents to be promptly administered and distributed among the persons entitled thereto." *Withrow v. DePriest,* 119 N. C., 541; *In re Bailey's Will,* 141 N. C., 193; *In re Neal's Will,* 182 N. C., 405.

In *Holmes v. Wharton,* 194 N. C., at p. 473-4, is the following: "When, however, the death of the person upon whose estate the letters were issued, is admitted or proven, the statute confers jurisdiction upon the clerks of the Superior Court of the several counties of the State. The clerk in each county, has jurisdiction in probate matters, within his county when certain facts, as set out in the statute, have been established. When these facts are found by the clerk upon application to him for the issuance of letters of administration, he proceeds at once to exercise his statutory jurisdiction. The validity of his orders, made in the exercise of such jurisdiction, cannot be impeached, collaterally, by evidence tending to show that the facts with respect to the domicile of the deceased, etc., are otherwise than as found by him. His jurisdiction in so far as it is dependent upon the facts set out in the statute, is conclusive, unless made the subject of a direct attack by a party in interest." *Fann v. R. R.,* 155 N. C., 136; *Batchelor v. Overton,* 158 N. C., 396; *Tyer v. Lumber Co.,* 188 N. C., 274.

The defendants' next contention: Whether or not, in the absence of an express finding and judicial determination that a deceased employee left no dependent, an award under the Workmen's Compensation Act should be made to the personal representative of such deceased employee? Under the facts and circumstances of this case, we think the award was properly made to the personal representative of the deceased.

The hearing Commissioner, J. Dewey Dorsett, in the finding of facts has the following: "4. No dependents, either wholly or partially dependent have been located after diligent search for said dependents on the part of the insurance carrier." The formal award issued on 23 December, 1930, set forth, "Upon the finding that the deceased left no person wholly or partially dependent upon him at the time of the accident and that E. C. Brooks, Jr., has duly qualified as administrator, the defendant will pay to E. C. Brooks, Jr., in a lump sum, etc." The defendants appealed to the full Commission, and these findings were approved by the full Commission.

In *Southern v. Cotton Mills Co.,* 200 N. C., 165, it is held: "The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the full Commission upon appeal, is conclusive upon the courts when supported by any sufficient evidence." *Williams v. Thompson,* 200 N. C., 463.

In *Reeves v. Parker,* 199 N. C., at p. 242, the law is stated: "All *through* the act 'personal representative' is mentioned, indicating a fixed purpose by the General Assembly that compensation should be awarded, where there are no dependents, to the personal representative. While there is no commuted amount provided for in section 38, there is an amount which can be commuted."

We think that there was sufficient judicial determination that the employee left no dependents, at least, to base an application for letters of administration on. We see no good reason for defendants to complain, as the carrier was paid a premium for the risk. When the carrier fulfils its obligation to the administrator of the dead man's estate, it does what it was paid a premium to do and in law and good morals should do.

The last contention of defendant: That there was error in the amount of award. What amount is payable to the personal representative in the case of a deceased employee who leaves no dependents? We think the amount awarded by the Commission and confirmed by the court below, correct.

The method of arriving at the award to E. C. Brooks, Jr., administrator, is the same as adopted by the North Carolina Industrial Commission in *Reeves v. Parker,* Vol. 1, Opinions of Commission, p. 277. This opinion was written by the hearing Commissioner Dorsett, and upon appeal adopted and affirmed by the full Commission. On appeal to this Court from the full Commission, in *Reeves v. Parker,* 199 N. C., at p. 239, it is said: "We are now called upon to sustain or reverse the Industrial Commission. We think the opinion of the Commission should be upheld."

The defendants discuss interestingly *commute* and *commuted* amount, as used in sections 38 and 40, of the Workmen's Compensation Act, but we cannot follow the conclusion reached by defendants.

The Workmen's Compensation Act is not as clear as it should be, as may be noted from the many cases brought to this Court; but we think that the reasonable and just construction given it by the Industrial Commission and the court below in this case correct. The judgment is

Affirmed.

J. D. HICKS, ADMINISTRATOR OF O. L. HICKS, v. J. D. LOVE AND R. L. BRUTON v. J. D. LOVE.

(Filed 9 December, 1931.)

1. **Evidence K a—Witness may testify as to speed of automobile without first qualifying as an expert.**

   A man of usual intelligence may testify without previous qualification as to the speed of an automobile moving upon the public highway from his own observation, when material to the inquiry, and while it is the better practice for the party offering him to show by examining him his qualifications, his testimony without such qualification will be given such weight and credibility as the jury considers it entitled to.

2. **Evidence D c—Witnesses sufficiently identified car as that of defendant to admit their testimony as to its speed.**

   Where, in an action to recover damages caused by a collision between two automobiles on a public highway, the plaintiff's witnesses testify to the speed at which the defendant's car was traveling immediately before the accident, an objection to their testimony on the ground that the defendant's car was not sufficiently identified by them will not be sustained when the testimony of all the witnesses sufficiently identifies the car referred to as that of the defendant by descriptions of its make, color and number of occupants, etc., and the defendant's car was the only car under the circumstances that could have fitted the descriptions.

3. **Death B b—Testimony that deceased provided for his family, had a comfortable home, etc., held competent in action for wrongful death.**

   In an action for wrongful death the jury may consider evidence of the plaintiff's intestate's age, habits, industry skill, means and business, C. S., 160, and the admission of testimony in this case that the deceased had a 200-acre farm, a comfortable home, and a plenty for his family to eat and wear, was not error.

4. **Damages F c—Testimony in this case as to damage to property caused by defendant's negligence held competent.**

   In an action to recover damages to the plaintiff's car resulting from a collision of two automobiles on the public highway, testimony of a properly qualified witness as to the value of the injured car before and

after the accident is competent and the admission of the testimony will not be held for error on the defendant's objection that the witness failed to specify that the values as given were the market value when it appears that such was intended and understood by the jury.

5. Trial E b—Held: trial court did not express opinion as to weight and credibility of the evidence.

Where the driver of an automobile attempts to turn out on the highway and the injury in suit was received by his car being struck by a car following, and the question as to whether the driver of the forward car gave the required signal with his hand is material to the controversy, an instruction to the jury giving the plaintiff's contention that he had made the proper signal, but fully and clearly stating the law applicable to the evidence in the case and the burden of proof, is not objectionable as an expression of opinion by the court as to the weight and credibility of the evidence, nor will a charge that the jury should determine the weight of the evidence from the estimate they placed upon the credibility of the witnesses and not the number of witnesses or the volume of their testimony be held for reversible error.

6. Trial D b—A request for a directed verdict upon conflicting evidence is properly refused.

In an action to recover damages for a negligent injury, an instruction requested by defendant that upon the evidence, the plaintiff could not recover is properly refused when the plaintiff denies contributory negligence and was not guilty of it according to his testimony.

7. Death B b—Recovery was not limited to nominal damages under the evidence in this action for wrongful death.

Where damages are sought in an action for the negligent killing of the plaintiff's intestate and the liability of the defendant has been established by the answer of the jury upon the other issues, it is not necessary that the plaintiff introduce evidence of the earning capacity of the deceased in order to recover more than nominal damages, there being other evidence as to the financial worth and industry of the deceased.

APPEAL by defendant from *Moore, J.*, at April Term, 1931, of MONTGOMERY. No error.

On Sunday, 17 August, 1930, Lindsay Bruton, Cora Campbell (since married to Lindsay Bruton), O. L. Hicks and Essie Hall were traveling in a Ford touring car on Highway No. 80 in Stanly County, Bruton and Miss Campbell occupying the front seat and Hicks and Miss Hall the other. Hicks proposed that they stop at a cafe which was on the left side of the highway and get something to eat. Bruton turned the car to the left and it was struck by a Dodge sedan driven by Robert Love, a minor, with the consent of his father J. D. Love, the defendant. The two cars were going in the same direction, the Dodge following the Ford; they stopped 69 feet from the place of collision. Hicks suffered injuries which resulted in his death. The Ford was damaged. Suit was brought by the administrator of Hicks to recover damages for his death

and by R. L. Bruton, the owner of the Ford car, for its impaired value. Each complaint sets out acts of negligence which are supported by the plaintiffs' evidence. The defendant introduced evidence in contradiction. By consent the two cases were tried together upon separate issues. In each case the jury answered the issues of negligence, contributory negligence and damages in favor of the plaintiff. The contentions of the parties so far as they affect the controversy are stated in the opinion.

Armstrong & Armstrong for appellant.
R. T. Poole for appellees.

ADAMS, J. The record contains eighty-two assignments of error, nineteen of which relate to evidence tending to show the speed of the Dodge sedan immediately before the collision occurred. Subject to the defendant's exception several witnesses who saw the sedan and at the time were impressed by its speed were permitted to express their estimate, some saying that in their opinion it was running at the rate of fifty miles an hour and others at a rate not less than sixty.

These exceptions raise the question whether the court committed error by admitting the evidence without requiring preliminary testimony as to the observation of the witnesses, their experience in driving automobiles, and the knowledge upon which they based their judgment. With respect to the first ground it may be said that all these witnesses rested their opinion upon their personal observation of the sedan at the time spoken of; so the specific question is whether a nonexpert witness may testify as to the speed of an automobile without antecedent qualification of his competency to express an opinion on this point.

It is a rule of evidence that where special experience is held to be necessary the possession of the required qualifications by a particular person offered as a witness must be expressly shown by the party offering him. Wigmore on Evidence, sec. 560. But Wigmore says, "There are a variety of rulings on miscellaneous topics, holding that a lay witness suffices; the topics that seem to have called for frequent decision being those of the speed of a train or other vehicle and the existence of a state of intoxication." Sec. 571. In his Commentaries on Evidence, sec. 1264, Jones cites a large number of cases in support of the rule which he states as follows: "A person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed at which an automobile was being operated at a given time. The rate of speed of an automobile on a public highway is a matter of which people generally have some knowledge. It is not a matter exclusively of expert knowledge or skill. As above stated, where the rate of speed of such a

vehicle is material in an action, any person of ordinary ability and means of observation who may have observed the vehicle may give his estimate as to the rate of speed at which it was moving. The extent of his observation goes to the weight of his testimony." In the annotation appended to *Lewis v. Miller,* 70 A. L. R., 532, 540, where many cases are assembled, it is said: "It is a general rule, as to which there is little, if any, conflict, and reaching back to a time long before automobiles came into use, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object. This rule is held applicable to the speed of automobiles or motorcycles, any intelligent person who saw the machine at the time in question being held competent to testify as to its speed."

When the opinion of a witness is based upon the ordinary observations of mankind in the everyday affairs of life, when no great amount of technical training is necessary, it is not always essential for the witness to state his previous experience. It is the better practice for him to do so, but the accuracy of his impressions and their evidential value are subject to the test of cross-examination and are matters for the jury.

A divergent view is entertained by some of the courts, as shown by the cases cited in the appellant's brief; but this Court has adopted the rule heretofore stated. In *Potter v. Dixie Transit Co.,* 196 N. C., 824, a nonexpert witness, who had not qualified himself by a statement of his previous observation and experience, was permitted to testify after objection as to the speed of a bus traveling on the highway, and it was held that there was no error in the admission of the evidence. The exceptions referred to must therefore be overruled.

It is contended that the sedan was not identified by the witnesses and that their testimony as to its speed should for this reason have been excluded. It is reasonably clear, however, that all these witnesses referred to the same car. The time it passed and its proximity to the touring car were relevant circumstances; and it was described as a blue Dodge sedan, "full of boys"—six at least, and driven by the defendant's son.

The appellant excepted to evidence offered by the plaintiff that the deceased provided for his family, that he had a comfortable home, a 200-acre farm, and a plenty for his family to eat and wear.

In determining the pecuniary advantage to be derived from the continuance of a human life it is competent for the jury in an action for wrongful death under C. S., 160, to consider evidence as to the age,

habits, industry, skill, means, and business of the deceased. *Burton v. R. R.*, 82 N. C., 505; *Carter v. R. R.*, 139 N. C., 499; *Carpenter v. Power Co.*, 191 N. C., 130.

A part of this evidence has reference to the industry of the deceased and to the business in which he was engaged and is clearly within the scope of the cases just cited; and we see no convincing reason for holding that the result of his toil as manifested in providing for the support of his family should not be considered as evidence of his constant attention to business. Certainly the admission of the evidence is not adequate cause for a new trial. 17 C. J., 1356, sec. 244(3). We are referred by the appellant to *Kesler v. Smith*, 66 N. C., 154; but a careful perusal of the case will show that the evidence held to be incompetent was, in the first place, proof of the number in the family of the deceased at the time of his death, the proposed argument being that the number in the family ought to affect the damages; and, in the next place, proof that the deceased "was often engaged in fighting" and "was often indicted," which was offered in answer to the plaintiff's evidence that the deceased "furnished supplies to his family and was seen carrying them provisions." The case therefore is not in conflict with the conclusion above stated.

The court admitted evidence as to the value of the Ford car immediately before and immediately after the collision. The appellant excepted because this question was not restricted to the reasonable market value of the car. This is the technical form of the question, but this Court has held that proof of value is competent. *Newsom v. Cothrane*, 185 N. C., 161. We find nothing to indicate that either of the witnesses who testified made his estimate on the basis of the value of the car to the owner individually, apart from its market value.

Exception is taken to a part of his Honor's charge on the ground that it contains an expression equivalent in effect to an instruction that Lindsay Bruton gave the signal required by law when he turned his car in the direction of the cafe. We do not concur in the appellant's interpretation of the charge. After repeating a part of the testimony of the witness the judge proceeded: "And he described and demonstrated to you how he held out his hand, that he stuck his hand out through a place in the curtain prepared for that purpose about four by six inches; that he stuck his hand through that to warn anybody approaching from the rear that wanted to pass; and that he held out his hand according to the rule established by law; that he stuck his hand out straight." This, we think, can reasonably be construed only as a statement of what the witness said and not as a suggestion of the court that the witness had complied with the law.

The appellant excepted to the following paragraph in the charge: "In giving credit to the witnesses, it is not by the volume of the testimony, the preponderance of the testimony, or by its greater weight, and not from the number of witnesses, but it is the estimation you put upon the testimony of the witnesses who have testified and what credence you will give to their testimony, in passing upon these matters."

The judge had repeatedly instructed the jury that the burden was upon the plaintiff in both cases to establish the defendant's negligence by the greater weight or preponderance of the evidence. It was stated so often and so plainly as to amount to emphasis; and in the paragraph excepted to it was not withdrawn or modified. The object was to distinguish between the number of witnesses or the volume of the testimony and the greater weight or preponderance of the proof. Considering the charge as a whole we do not think the jury could have been misled to the prejudice of the appellant.

In reference to the concurrent negligence of the drivers of the two cars, the only instruction requested by the appellant was this: "If the jury believe the evidence, or any part thereof, and find the facts in accordance therewith, they are instructed to answer the second issue 'Yes.'" There was no error in refusing to give this prayer. According to the testimony of the plaintiff's witnesses there was no contributory negligence on the part of Hicks or Lindsay Bruton; but the appellant's evidence tended to establish negligence by each one of them. These respective views were presented to the jury and we find no error which warrants a new trial for failure of the court to deal more minutely with the question of contributory or concurrent negligence in the absence of a more specific request for instructions.

It is finally insisted that there is no evidence that justified the recovery of damages, and that the judge should have told the jury that the plaintiff could recover only a nominal amount. This position seems to be based on the theory that there is no direct evidence of the earning capacity of the deceased or of his net income. Direct evidence is not essential. More than nominal damages are recoverable for the negligent killing of an infant without direct evidence of the pecuniary damage other than sex, age, and health. *Russell v. Steamboat Co.*, 126 N. C., 961; *Davis v. R. R.*, 136 N. C., 115. In the present case the recovery cannot be restricted to nominal damages.

We have considered all the exceptions entered of record in behalf of the appellant and have discovered no reversible error.

No error.

LEWIS BARBER v. J. N. BRUNSON.

(Filed 9 December, 1931.)

Deeds and Conveyances A f—Probate in this case held defective and deed of trust was null and void as notice to purchasers and creditors.

The certificate of a notary public to a deed in trust on lands leaving out the name of the grantor and his wife is defective and its registration thereon is defective, and it is null and void as notice to purchasers and creditors.

APPEAL by defendant from *Stack, J.*, at May-June Term, 1931, of HENDERSON. Affirmed.

Johnson, Smathers & Rollins for plaintiff.
Ray, Redden & Redden for defendant.

PER CURIAM. This is an action to recover possession of a tract of land. The parties claim title under the Henderson Real Estate Company as a common source. One of the links in the chain of title is a deed of trust purporting to have been executed by A. C. Justus, S. L. Jones and J. T. Green, the alleged probate of which is as follows:

"State of North Carolina—County of.....

I, G. P. Grove, a notary public of.....county do hereby certify that ..... and ....., his wife, personally appeared before me this day and acknowledged the due execution of the.....deed in trust; and the said.....being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband, or any other person, and that she doth still voluntarily assent thereto.

Therefore, let said deed in trust, with this certificate, be registered.

Witness my hand and notarial seal this 5 December, A.D. 1925.

G. P. Grove, Notary Public.

(Seal.) .....County.

My commission expires 7 July, 1926."

"North Carolina—Henderson County.

The within certificate of G. P. Grove, notary public of Henderson County, is adjudged to be correct in due form and according to law. Let the deed in trust, with these certificates, be registered.

This 14 December, A.D. 1925.

J. S. Jones, Asst. C. S. C., Henderson County."

The Superior Court adjudged that the probate was defective and that as the deed was registered on a defective probate the registration is defective and the deed of trust null and void as notice to purchasers and creditors and, therefore, ineffective to defeat the plaintiff's claim of title. The judgment is

Affirmed.

STATE v. HOSE HILDEBRAN AND LOIS HILDEBRAN.

(Filed 9 December, 1931.)

1. **Disorderly House A c—Evidence of general reputation and boisterous conversation of inmates is competent in prosecution for disorderly house.**

   In a prosecution for keeping a disorderly house evidence tending to show the lewd and boisterous conversation of the inmates and frequenters of the house, and evidence of the general reputation or character of the house is competent. C. S., 4347.

2. **Same—Evidence in this case of occurrence happening more than two years before indictment is held competent as corroborative evidence.**

   In a prosecution for keeping a disorderly house evidence of occurrences happening more than two years prior to the indictment is competent as corroborative of evidence of such occurrences happening within the two years.

APPEAL by defendants from *Harwood, Special Judge,* at March Term, 1931, of BURKE. No error.

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

D. L. Russell and D. L. Russell, Jr., for defendants.

PER CURIAM. The defendants were indicted and convicted of keeping a disorderly house. They appealed assigning certain grounds of error: (1) That the court refused their motion to dismiss the action as in the case of nonsuit; (2) that the court erroneously admitted evidence as to the general reputation of the house; (3) that the court committed error in the admission of evidence relating to occurrences on the premises which, it is contended, may have taken place more than two years preceding the finding of the bill of indictment; (4) that there was error in the admission and rejection of other evidence, and in the instructions given the jury.

The evidence was amply sufficient to justify the court in submitting to the jury the question of the defendants' guilt. C. S., 4347. This

statute authorizes the admission of evidence tending to show the lewd, dissolute, and boisterous conversation of the inmates and frequenters of the house, and specially provides that evidence of the general reputation or character of the house shall be admissible and competent.

If any of the occurrences referred to in the evidence happened more than two years prior to the finding of the bill of indictment as contended by the defendants, they were not for that reason incompetent. Some of the occurrences took place within the two-year period and evidence of those which happened prior to the bar of the statute of limitations would be competent as corroborative. *S. v. McDuffie,* 107 N. C., 885; *S. v. Guest,* 100 N. C., 410. If the evidence was competent for any purpose it would have been error to exclude it.

We have examined the record as to the admission and rejection of evidence and as to instructions given the jury and find no reversible error.

No error.

J. A. HARWOOD v. CITY OF CONCORD.

(Filed 9 December, 1931.)

Eminent Domain D c—Statutory remedy of appeal from appraisers is exclusive and owner may not maintain independent action for compensation.

The remedy provided by statute for the assessment of damages to the property of a private owner taken by a city for a public use must be observed, and where an owner fails to appeal from the reports of the appraisers or fails to perfect an appeal therefrom he may not bring a separate action in the courts to have his damages assessed.

APPEAL by plaintiff from *Oglesby, J.,* at February Term, 1931, of CABARRUS. No error.

This is an action to recover compensation for part of a lot located in the city of Concord, owned by the plaintiff, and taken by said city, under its right of eminent domain, for street purposes. The action was begun by summons issued out of the Superior Court of Cabarrus County on 17 May, 1930.

On 6 December, 1928, a proceeding for the condemnation of said land, in accordance with the provisions of the charter of the city of Concord, was begun by the board of aldermen of said city. The report of the appraisers appointed by said board of aldermen was filed with said board on 3 January, 1929. Plaintiff had notice of said proceeding and of the report of the appraisers. He objected to said report, contending

before said board that he was entitled to recover a larger amount as his damages than that assessed by the appraisers. The board of aldermen declined to pay to plaintiff the amount of his claim. There was evidence tending to show that plaintiff gave notice of his appeal from the report of the appraisers to the Superior Court of Cabarrus County, in accordance with the provisions of the charter of the city of Concord. Plaintiff did not perfect an appeal, but thereafter began this action.

At the close of the evidence, the court instructed the jury that plaintiff was not entitled to recover of the defendant in this action, and that therefore the jury should answer the issue submitted to them, "Nothing." The jury answered the issue in accordance with this instruction.

From judgment that plaintiff recover nothing by this action, plaintiff appealed to the Supreme Court.

H. S. Williams and B. W. Blackwelder for plaintiff.

Z. A. Morris, Jr., and Hartsell & Hartsell for defendant.

PER CURIAM. Where, as in the instant case, the statute authorizing the condemnation of land under the right of eminent domain provides for the assessment of damages by appraisers, and affords ample remedy for an appeal by the landowner from the report of the appraisers to the Superior Court, where the issue involving the amount of damages may be answered by a jury, the statutory remedy is exclusive, and the landowner cannot ordinarily maintain an action for the recovery of his damages, resulting only from the taking of his land for public purposes. This principle is well settled by decisions of this Court. *Long v. Randleman,* 199 N. C., 344, 154 S. E., 317; *Latham v. Highway Commission,* 191 N. C., 141, 131 S. E., 385; *McKinney v. Highway Commission,* 192 N. C., 670, 135 S. E., 772; *Greenville v. Highway Commission,* 196 N. C., 226, 145 S. E., 31; *Lamb v. Elizabeth City,* 132 N. C., 194, 43 S. E., 628. The instruction of the court to the jury at the trial of this action was in accord with this principle.

Plaintiff having failed to appeal from the report of the appraisers in the condemnation proceeding begun and prosecuted under the order of the board of aldermen of the city of Concord, as he was authorized to do by the charter of said city, or, if he gave notice of his appeal, as he contended, having failed to perfect his appeal as authorized by the statute, cannot recover in this action. The judgment is affirmed.

No error.

L. J. CARTER AND S. W. ANGEL, TRADING AND DOING BUSINESS AS CARTER AND ANGEL, v. J. O. MULLINAX.

(Filed 16 December, 1931.)

1. **Appeal and Error E b—Where charge does not appear in record it is presumed correct.**

   On appeal to the Supreme Court the presumption is that the charge of the judge of the lower court was correctly given when it is not set out in the record.

2. **Appeal and Error A a—Supreme Court can review only matters of law or legal inference on appeal in civil action.**

   On appeal the Supreme Court will consider only matters of law or legal inference, and where the only exception taken is to the refusal of a motion as of nonsuit the judgment of the lower court will be sustained when there is sufficient legal evidence to support the verdict upon which the judgment was rendered. Art. IV, sec. 8.

CONNOR, J., dissents.

APPEAL by defendant from *McElroy, J.*, and a jury, at April Term, 1931, of MADISON. No error.

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

"1. Did the plaintiffs complete their operations under the contract of 12 January, 1929, or surrender their right thereunder to the defendant, as alleged in the answer? Answer: No.

2. Did the defendant breach the contract of 12 January, 1929, as alleged in the complaint? Answer: Yes.

3. What amount of damages, if any, are the plaintiffs entitled to recover? Answer: $700.

4. Did the plaintiffs breach the contract of 12 January, 1929, as alleged in the answer? Answer: Yes.

5. What amount of damages, if any, is the defendant entitled to recover? Answer: $400."

The court below on the verdict rendered judgment for plaintiff against defendant for $300, and interest from 27 April, 1931, and costs. Defendant excepted, assigned errors and appealed to the Supreme Court.

John A. McElroy and John A. Hendricks for plaintiffs.
Carl W. Greene for defendant.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence, the defendant made motions in the court below 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 plaintiffs brought this action against the defendant for breach of a timber contract, alleging that the defendant sold and disposed of a certain portion of the timber that he had theretofore sold to plaintiffs, and for which plaintiffs had paid him the sum of $1,250, and demanded judgment against defendant for $1,500 damages. Defendant denied any breach of the contract and alleged that plaintiffs surrendered their rights under the timber contract and abandoned the premises. Defendant also set up counterclaim that under the contract it was provided that "plaintiffs should use and exercise all due care and caution to preserve the standing young timber, and that no standing timber should be mutilated or damaged in the operations necessary to the cutting and manufacturing of the timber sold under said contract. And did further agree therein that no timber of any kind should be cut below the size of a standard cross-tie, but notwithstanding said agreement, the said plaintiffs during the entire time of their occupation of said premises, wilfully, negligently and carelessly mutilated and damaged a large quantity of standing young timber, and did furthermore wilfully, negligently and carelessly and without regard to the terms of said agreement and in violation thereof, cut a large quantity of standing timber upon said premises below the size of a standard cross-tie, and did manufacture same into lumber and place it upon the market, along with other timber of the size agreed upon therein."

For this breach of contract, defendant demanded judgment against plaintiffs for $1,000 damages.

There is no charge in the record, so the presumption is that the court below charged correctly the law applicable to the facts. There is no exception or assignment of error as to the admission or exclusion of evidence, so the only exceptions and assignments of error are to the motions for nonsuit. From a careful reading of the evidence, we think it ample to have been submitted to the jury. The whole matter was one of fact to be passed on by the jury. We can only consider here "any matter of law or legal inference." Const., Art. IV, sec. 8. There is an impenetrable wall between the law and the facts. The facts are for the jury, the law for the court. *Robinson v. Ivey,* 193 N. C., at p. 810.

It seems as if the outcome of the verdict of the jury was "even-handed justice." The defendant testified, in part: "I sold some of the timber left on the ground to Mr. Justice, I got $300 for it." The judgment for plaintiff was for $300. We find

No error.

CONNOR, J., dissents.

A. L. REINHARDT v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 16 December, 1931.)

1. **Insurance J a—Provision that insurer should not be liable if insured should die within two years from chronic kidney trouble is valid.**

Where a policy of life insurance provides that for a period of two years from its issuance the company should be liable only for the return of the premium if the insured should have been attended by a physician for any serious disease or should have had any chronic disease of the kidneys before the date of its issuance, and the uncontradicted evidence discloses that the insured was being treated for chronic Bright's disease at the time of the issuance of the policy and that in her application therefor she represented that she had no disease of the kidneys and had not been treated by a physician within two years, the provision of the policy is valid and binding and an instruction that the jury should answer the issue against the insured is correct.

2. **Trial D b—Directed verdict may be given in favor of party having burden of proof where evidence is not conflicting and is in his favor.**

While ordinarily a verdict directed in favor of a party having the burden of proof may not be correctly given by the trial court, the rule will not apply when all the evidence and admissions and reasonable inferences therefrom are in his favor.

3. **Costs A d—Where defendant tenders amount recoverable, costs and interest are taxable only to time of tender.**

Where a defendant tenders to the plaintiff the correct amount the latter can recover in his action, the cost and interest are recoverable against the defendant only to the time he made the tender.

CIVIL ACTION, before *Clement, J.*, at May Term, 1931, of CATAWBA.

On 1 August, 1927, the defendant executed and delivered to Lillie R. Reinhardt a policy of life insurance in the sum of $180. The insured died on or about 2 January, 1928. Said policy of insurance contained the following clause: "Limitation of Insurance—Within two years from the date of issuance of this policy, the liability of the company under the same shall be limited under the following conditions, to the return of the premium paid thereon: (1) If any policy on the life of the insured has been issued by this company and is in force at the date hereof, unless this policy contains an endorsement signed by the president or secretary that this policy is in addition to such prior policy. The company shall not be presumed or held to know of the existence of any prior policy and issuance of this policy shall not be deemed a waiver of this condition; (2) If the insured before its date has been rejected for insurance by this or any other company, order or association, or has

been attended by a physician for any serious disease or complaint; or has had before its date any pulmonary disease or chronic bronchitis or cancer, or disease of the heart, liver or kidneys; or, (3) If the insured shall die by his own hands, whether sane or insane, or as a result of acts committed by him while in the commission of or as a punishment for some act in violation of law, or from the malicious or unlawful acts, or the culpable or intentional negligence of any one who is a beneficiary hereunder, whether named herein or not, or from engaging in aeronautic or submarine operations as operator, passenger, guest, or otherwise. But where the statute of the State in which this policy is written contains a different provision on this subject than the above, the language of such statute shall be substituted to the extent of this difference for this clause, but no further."

The uncontradicted evidence disclosed that the insured could read and write and signed a written application stating that she had never suffered with any disease of the kidneys, and that no physician had attended her within two years for any complaint. The uncontradicted testimony further showed that the insured had been treated for chronic Bright's disease from 1926 to 1928. Indeed, the husband of the insured testified that at the time the application was signed he knew that the insured was being treated for high blood pressure by a physician, and that he heard the agent who solicited the application ask the insured if she had been treated by a physician within two years, but did not recall her answer. A daughter of the insured also testified that she heard her father, husband of the deceased, say to the agent soliciting the application that the insured was suffering with high blood pressure and kidney trouble.

At the conclusion of plaintiff's evidence the trial judge instructed the jury to answer the issue "No."

From judgment rendered the defendant appealed.

Clarence Clapp and Russell W. Whitener for plaintiff.
Walter C. Feimster for defendant.

BROGDEN, J. The policy of insurance construed in *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 566, contained a limitation to the effect that if the insured should die from Bright's disease before the policy had been in force for two years that the liability of the insurer was limited to the return of premiums paid on the policy. Such limitation was approved by the court upon authority of *Spruill v. Ins. Co.*, 120 N. C., 141, 27 S. E., 39. In addition the court ruled that the principle announced in *Holbrook v. Ins. Co.*, 196 N. C., 333, 145 S. E., 609, did not apply

to such reasonable limitations contained in the policy itself. The case at bar, therefore, falls directly within the principle of the *Gilmore case, supra.*

The plaintiff, however, insists that there was a directed verdict in favor of the defendant. It appears that the defendant, having admitted the allegations of the complaint, set up as a further defense that the policy was obtained by means of fraud. Thereupon the defendant, assuming the burden of proof, proceeded to offer evidence to sustain the defense. The record discloses that at the conclusion of plaintiff's evidence the court instructed the jury "to answer the issue no." The issue submitted was the usual issue of indebtedness.

It is a general principle of law that the trial judge cannot direct a verdict in favor of the party upon whom the burden of proof rests. *Bank v. McCullers,* 200 N. C., 591, 157 S. E., 869. This principle, however, has been applied to cases in which the trial judge directed a verdict upon the pleadings or in cases where the evidence was conflicting. The case at bar is governed by the principle announced by McIntosh North Carolina Practice & Procedure, p. 632, as follows: "If the facts are admitted or established, and only one inference can be drawn from them, the judge may draw the inference and so direct the jury," etc. The record discloses that there was no dispute with respect to the limitation set out in the policy, nor was there any dispute or conflict of evidence with respect to the fact that the insured was suffering with Bright's disease. Consequently, upon the facts presented, the instruction of the trial judge will not be held for reversible error.

It appears that the defendant had tendered to the plaintiff the amount of premiums, to wit, $4.02, and cost up to the time of tender. Obviously, the plaintiff is entitled to judgment for the amount of premium paid and cost up to the time of tender.

Modified and affirmed.

FIRST NATIONAL BANK OF DURHAM, TRUSTEE, v. M. F. HALL.

(Filed 16 December, 1931.)

1. Husband and Wife G a—Title to land held by entirety is in both husband and wife with common-law right of survivorship.

A deed to a husband and wife, unless requiring them to hold by another character of tenancy, conveys to them the common-law estate by entirety under which each holds the entire estate as one person, with the common-law right of the husband to the use thereof and the rents and profits therefrom, and with the right of survivorship which may not

be defeated by a conveyance by either of them to a stranger, our constitutional provisions relating to married women and the statutes enacted in pursuance thereto making no change in this common-law estate.

2. Mortgages A d—Husband's mortgage on lands held by entirety conveys his rights therein but is extinguished upon his prior death.

Where the husband and wife hold an estate by entirety the husband may execute a valid mortgage without the joinder of the wife only for his incidental common-law rights in the estate, and upon his prior death the mortgage is extinguished and the title goes to the surviving wife free from the mortgage lien, and where after his death the wife has executed a mortgage on the lands, her mortgagee may permanently restrain the foreclosure of the mortgage executed by the husband without her joinder.

APPEAL by defendant from *Clement, J.*, at Chambers in BURKE County, in a controversy without action on an agreed statement of facts.

On or about 28 December, 1925, M. F. Hall, the defendant, conveyed to S. H. Earnest and Roberta Earnest, his wife, an estate by entirety in a parcel of land situated in Lenoir Township, Caldwell County. The deed was duly recorded. On 22 January, 1926, S. H. Earnest and wife executed to the Mutual Building and Loan Association of Lenoir a deed of trust on the land, and said deed of trust was duly paid and canceled of record. On the same day, S. H. Earnest, without the joinder of his wife, executed to the defendant M. F. Hall a note for $495 and a mortgage on the land to secure said note, which was for the balance of the purchase money due by S. H. Earnest and Roberta Earnest. S. H. Earnest died on or about 26 March, 1926, leaving his wife surviving him; and on or about 1 January, 1929, she, Roberta Earnest, executed a deed of trust in which she named the plaintiff, First National Bank of Durham, as trustee and conveyed to it as trustee the lot above described. This deed of trust was duly recorded. The defendant advertised the land to be sold under the power conferred by his mortgage on 4 May, 1931, and after due advertisement according to law, the said lands were sold and one R. S. Hall became the last and highest bidder at the price of $850. Before ten days had expired for raising the bid, the Realty Sales Corporation placed a 5 per cent raise on said bid and the land was again advertised according to law to be sold on 1 June, 1931, and a few hours prior to the sale the plaintiff had an injunction served on the defendant forbidding him to sell the land on said date and ordering him to show cause, if any he had, on 10 June, before Judge Clement, at Morganton, why the injunction should not be made permanent. At the hearing Judge Clement rendered judgment denying the defendant's motion to vacate the restraining order, and continued the injunction to the hearing.

The defendant excepted and appealed.

Williams & Pritchett for plaintiff.
Newland & Townsend for defendant.

ADAMS, J. Tenancy by entireties, or by the entirety, is the tenancy by which husband and wife at common law hold land conveyed or devised to them by a single instrument, which does not require them to hold it by another character of tenancy. Littleton, sec. 291; Tiffany, Real Property, sec. 194. The husband and wife take the whole estate as one person. Each has the whole; neither has a separate estate or interest; but the survivor of the marriage whether husband or wife is entitled to the entire estate, and the right of the survivor cannot be defeated by the other's conveyance of the property to a stranger. The provisions of the Constitution relating to married women and the statutes enacted in pursuance thereof made no change in the estate. *Jones v. Smith,* 149 N. C., 318; *McKinnon v. Caulk,* 167 N. C., 411; *Davis v. Bass,* 188 N. C., 201.

At common law the husband was entitled to the use and control of the estate and to all the rents and profits during the marriage and had a right to execute a mortgage on the property to the extent of his common-law interest. With us it is held that these common-law incidents still adhere to the estate. *Long v. Barnes,* 87 N. C., 330; *West v. R. R.,* 140 N. C., 620; *Dorsey v. Kirkland,* 177 N. C., 520; *Davis v. Bass, supra.*

In the case under consideration the husband, S. H. Earnest, had a right to execute a mortgage "to the extent of its worth," including the rents, profits, and usufruct of the property; but he had no right to encumber the land so as to defeat the interest of the survivor. Upon his death the lien of the mortgage was *ipso facto* canceled and the entire estate was vested in the survivor. *Bynum v. Wicker,* 141 N. C., 95; *Dorsey v. Kirkland, supra; Trust Co. v. Broughton,* 193 N. C., 320.

There was no error in continuing the restraining order to the final hearing.

Judgment affirmed.

STATE v. G. E. KIRBY AND TONY PACE.

(Filed 16 December, 1931.)

Criminal Law L f—Where judge has failed to find facts upon which he refused motion to retax the costs, the case will be remanded.

Upon refusing defendant's motion to retax the costs in a criminal action the judge should find the material facts upon which his ruling is based so that the Supreme Court may determine the correctness of his ruling,

and where this has not been done the case will be remanded; in this case it not appearing whether the State had tendered its witnesses for cross-examination or whether the trial judge made any order with respect to the fees of any witnesses, or whether certificates were given them by the solicitor, C. S., 1287, or whether the witnesses whose fees were taxed were duly under subpœnas, C. S., 1284, and upon remand the costs of the appeal will be taxed against the State.

APPEAL by defendant, G. E. Kirby, from *Schenck, J.*, at Spring Term, 1931, of POLK. Remanded.

The defendants in this action were tried and convicted upon an indictment charging them with an affray. It was adjudged that the defendant, G. E. Kirby, pay a fine of $25.00 and one-half the costs, and that the defendant, Tony Pace, pay the remaining one-half of the costs. The costs as taxed by the clerk amount to $220.20. The defendant, G. E. Kirby, moved that the costs be retaxed, contending that the clerk had erroneously included fees for witnesses who were not entitled under the law to prove their attendance against the defendants. This motion was continued for hearing and was heard at a subsequent term of the court.

From an order denying his motion, the defendant, G. E. Kirby, appealed to the Supreme Court.

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

J. R. Barbour for defendant.

CONNOR, J. It does not appear from his order, or from the record in this appeal, that the judge who heard defendant's motion that the clerk be directed to retax the costs in this action, found the facts upon which he denied the motion. In the absence of such finding, we are unable to determine whether or not there was error in the order from which defendant has appealed to this Court.

It appears from the case on appeal certified to this Court that the clerk included in the costs fees for 12 witnesses, and that only 5 of these witnesses attended the trial under subpœnas duly issued by the clerk. C. S., 1284. Only 4 of these witnesses were called and examined at the trial by the solicitor for the State. It does not appear that the other witnesses were tendered by the solicitor to the defendants for cross-examination, or that the trial judge made any order with respect to the fees of any of the witnesses for the State, or that the solicitor gave to any of these witnesses certificates as required by C. S., 1287.

On the present record it cannot be determined whether or not there was error in the order denying defendant's motion.

It is therefore ordered that the action be remanded to the Superior Court of Polk County, with direction that the judge presiding in said court hear such evidence as may be offered at a rehearing of defendant's motion, and find therefrom the facts which are pertinent to an order disposing of said motion. Upon the facts so found by him, the said judge shall allow or deny defendant's motion in accordance with his opinion as to the law applicable to such facts. The costs of this appeal shall be paid by the State.

Remanded.

MRS. GEORGE F. POORE ET AL. v. ROBERT R. POORE.

(Filed 16 December, 1931.)

Actions A a—Action may not be maintained to determine abstract or moot question.

The Declaratory Judgment Act, chapter 102, Public Laws of 1931, does not extend to a submission of a theoretical question or a mere abstraction, and this proceeding, instituted before the probate of the will to determine whether the mutual will of a husband and wife is revoked by the subsequent marriage of the husband after the wife's death, is dismissed.

APPEAL by defendant from *Harwood, Special Judge,* at October Term, 1931, of BUNCOMBE.

Controversy without action submitted under chapter 102, Public Laws 1931, upon an agreed statement of facts, to have the following *quœre* answered: Is a joint and mutual will of husband and wife revoked by the subsequent marriage of the husband after the death of the wife?

On 25 December, 1928, George F. Poore and wife, Annie E. Poore, executed a joint and mutual will, in which Robert R. Poore, defendant herein, is named executor, as well as beneficiary.

On 12 April, 1929, the said Annie E. Poore died.

On 7 August, 1929, the said George F. Poore married his deceased wife's sister, Maggie D. Cole, who is also one of the beneficiaries under said will.

On 7 April, 1931, the said George F. Poore died.

The plaintiffs, who are beneficiaries under the said joint and mutual will, contend that its validity was not affected by the subsequent marriage of the said George F. Poore, while the defendant, who is named executor therein, has been advised by counsel that said will was revoked by said subsequent marriage. C. S., 4134.

"It is agreed that if, upon the foregoing facts, the court is of opinion that the defendant should probate the said will, the defendant will probate it, qualify as executor and proceed with the administration of the estate, and that judgment shall be entered declaring that the will is not void under the foregoing facts; but if the court should be of opinion that the subsequent marriage of George F. Poore to Maggie D. Cole rendered the will void, then judgment shall be entered so declaring and the defendant will not be required to offer the same for probate."

From a judgment declaring that the joint and mutual will in question was not rendered void by the subsequent marriage of the surviving husband, and directing that the defendant "have the said will admitted to probate and proceed with the administration of the estate," the defendant appeals, assigning errors.

Merrimon, Adams & Adams for plaintiffs.
George M. Pritchard for defendant.

STACY, C. J. The parties have misconceived the scope of the Declaratory Judgment Act, chap. 102, Public Laws 1931. It does not extend to the submission of a theoretical problem or a "mere abstraction." *Barton v. Grist,* 193 N. C., 144, 136 S. E., 344. If it did, its validity might well be doubted. *In re Cryan's Estate,* 301 Pa., 386, 152 Atl., 675. It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter. *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *Muskrat v. U. S.,* 219 U. S., 346, 55 L. Ed., 246. See valuable article by Dean M. T. Van Hecke in North Carolina Law Review, December, 1931, entitled, "The North Carolina Declaratory Judgment Act."

It is provided by C. S., 4163 that no paper-writing or script, purporting to be a will, shall be valid as such, or effectual to pass any real or personal property, unless and until it is duly probated. *Osborne v. Leak,* 89 N. C., 433. And when a paper-writing or script, purporting to be a will, is properly admitted to probate, it becomes a valid will, until vacated on appeal or declared void by a competent tribunal. C. S., 4145; *Holt v. Ziglar,* 163 N. C., 390, 79 S. E., 805.

So, regardless of how we might answer the question propounded, it would in nowise determine the validity or invalidity of the paper-writing or script mentioned as the joint and mutual will of George F. Poore and Annie E. Poore. *In re Davis' Will,* 120 N. C., 9, 26 S. E., 636. It has

not yet been offered for probate. Furthermore, it was admitted on the argument, and also appears from an inspection of the record, that only beneficiaries under the will are parties to this proceeding. The presence of a proper contradicter may be doubted (Freeman on Judgments, sec. 1356), but we put aside any consideration of the Declaratory Judgment Act, further than to say that the present proceeding is not within its terms.

Proceeding dismissed.

STATE v. ARTHUR BRIGMAN.

(Filed 16 December, 1931.)

1. **Criminal Law G q—In prosecution of husband for abandonment of minor children wife is not competent to testify against him.**

   The wife is not competent to testify against her husband in a criminal action, C. S., 1802, unless the action comes within the exceptions enumerated in the statute, and upon the trial of the husband for wilfully abandoning and failing to support his minor children, the admission of the wife's testimony against him is reversible error. C. S., 4447.

2. **Criminal Law E d—Solicitor's statement before trial that State would not prosecute one count is equal to nolle prosequi thereon.**

   Upon the trial of the husband for the abandonment and nonsupport of his wife and minor children, the announcement by the solicitor, made before entering upon the trial, that he would not prosecute the defendant for the abandonment and nonsupport of the wife is tantamount to a *nolle prosequi* or acquittal on this charge.

APPEAL by defendant from *Stack, J.*, at July Term, 1931, of BUNCOMBE.

Criminal prosecution tried upon an indictment charging the defendant with abandonment and nonsupport of his wife and two minor children in violation of the provisions of C. S., 4447.

When the case was called for trial, the solicitor announced that the State would not prosecute the defendant for the alleged wilful abandonment and nonsupport of his wife, but would proceed against him on the charge of wilfully abandoning his two minor children and failing to provide for their support. *S. v. Bell*, 184 N. C., 701, 115 S. E., 190.

The wife of the defendant was called as a State's witness and testified as follows: "Q. What support, if any, has Arthur Brigman given to you and the children during the last two years? (Objection; overruled; exception.) A. He has not given us anything at all."

Verdict: Guilty.

Judgment: Two years on the roads.

Defendant appeals, assigning errors.

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

O. K. Bennett for defendant.

STACY, C. J. Is a wife competent or compellable to give evidence against her husband who is on trial charged with the wilful abandonment and nonsupport of his minor children? C. S., 4447. We think not.

It is provided by C. S., 1802 that, in all criminal actions or proceedings, the husband or wife of the defendant shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense, and further: "Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the State against the husband." The statute declares the incompetency of the wife to give evidence against her husband in any criminal action or proceeding, except in certain cases, but the exception does not include or extend to an action against the husband for the abandonment and nonsupport of his minor children. It was error, therefore, not to sustain the defendant's objection of his wife's testimony. *S. v. Harbison,* 94 N. C., 885.

The announcement of the solicitor, made before entering upon the trial, that the State would not prosecute the defendant for the alleged wilful abandonment and nonsupport of his wife, was tantamount to taking a *nolle prosequi,* or accepting an acquittal, on this charge. *S. v. Spain, ante,* 571; *S. v. Hunt,* 128 N. C., 584, 38 S. E., 473.

New trial.

BEULAH B. GOODMAN v. L. VICTOR GOODMAN.

(Filed 16 December, 1931.)

Appeal and Error D a—Court may disregard attempted appeal from discretionary order setting aside verdict and proceed with second trial.

Where the trial court sets aside a verdict in his discretion as being against the weight of the evidence and the defendant excepts and notes an appeal, and later during the same term the case is again called for

trial, *Held:* the defendant's prayer that further proceedings be stayed until the appeal previously taken could be determined is properly refused, the trial court having the right to set aside a verdict in his discretion at any time during the term while the matter is *in fieri*, and is justified in disregarding the attempted appeal from his order setting the verdict aside.

APPEAL by defendant from *Stack, J.*, at July Term, 1931, of BUNCOMBE.

Application for alimony without divorce.

From an adverse verdict and order awarding an allowance for subsistence and counsel fees, the defendant appeals, assigning errors.

Zeb. F. Curtis and Ellis C. Jones for plaintiff.
Wells, Blackstock & Taylor for defendant.

STACY, C. J. This is the second appeal in this case which was tried twice at the same term of Buncombe Superior Court.

The verdict rendered in the first trial was set aside by the judge, in the exercise of his discretion, because he regarded it as contrary to the weight of the evidence. To this ruling, the defendant objected, excepted, and noted an appeal.

When the case was called for trial again, later in the term, the defendant prayed that further proceedings be stayed until the appeal, previously taken, could be determined, and objected to entering upon another trial of the cause. For this position, he relies upon *Bohannon v. Trust Co.*, 198 N. C., 702, 153 S. E., 263, *Likas v. Lackey*, 186 N. C., 398, 119 S. E., 763, *Pruett v. Power Co.*, 167 N. C., 598, 83 S. E., 830; C. S., 655.

So long as the matter was *in fieri*, the keeping of the verdict resided in the breast of the judge, and he was at liberty, at any time during the term, in the exercise of a sound discretion, to set it aside and to award a new trial, from which ruling no appeal lies. *Goodman v. Goodman, post*, 808. Therefore, the court was justified in disregarding the attempted appeal from the order vacating the verdict returned in the first trial. *Likas v. Lackey, supra.* The remaining exceptions are without substantial merit.

No error.

CITIZENS BANK OF YANCEY v. JOSEPH ROBINSON AND HIS WIFE, ALICE ROBINSON ET AL.

(Filed 16 December, 1931.)

Homestead A d—Where debtor designates land to be laid off for homestead he may not thereafter contend that other lands should have been included.

Where a judgment debtor is present when his homestead in his lands is laid off to him by the appraisers and designates the land he desires for the purpose, he may not successfully contend thereafter that other lands should have been included, it not being contended that the value of the homestead as allotted was less than one thousand dollars.

APPEAL by defendant, Joseph Robinson, from *Harwood, Special Judge,* at August Term, 1931, of YANCEY. Affirmed.

This action was heard upon exceptions filed by the defendant, Joseph Robinson, a judgment debtor, to the report of the appraisers summoned by the sheriff of Yancey County to lay off and allot to the said defendant his homestead as provided by section 2 of Article X of the Constitution of North Carolina, before the sale under execution by the said sheriff of the lands of said defendant.

From judgment overruling the exceptions and affirming the report of the appraisers, the defendant appealed to the Supreme Court.

Watson & Fouts for plaintiff.
J. Scroup Styles for defendant.

CONNOR, J. All the evidence at the trial showed that defendant was present when the appraisers laid off and allotted to him his homestead. The defendant selected as his homestead land on which his dwelling-house and the buildings used in connection therewith were located. This land was laid off and allotted to him by the appraisers. After their report was filed, the defendant filed exceptions thereto, contending that land other than that included in the homestead should have been allotted to him. He does not contend that the land allotted to him as his homestead is worth less than $1,000.

The Constitution provides that a judgment debtor shall have the right to select the land to be allotted to him as his homestead. This selection must be made before the allotment is made by the appraisers, and when so selected is conclusive. It is only when the judgment debtor has not selected the land to be allotted to him as his homestead and has had no opportunity to do so, that he can be heard to object to the allotment made by the appraisers, on the ground that other land should have been

included in his homestead. *McKeithen v. Blue,* 142 N. C., 360, 55 S. E., 85; *McGowan v. McGowan,* 122 N. C., 164, 29 S. E., 572. The decision in *Flora v. Robbins,* 93 N. C., 38, is not applicable to the instant case. There is no error in the judgment. It is

Affirmed.

L. L. REAMS v. W. C. HIGHT ET AL.

(Filed 16 December, 1931.)

Appeal and Error J d—Where record does not set out evidence upon which court directed a verdict his ruling will not be held for error.

Where an action has been referred to a referee and the parties agree that the trial judge may give a directed verdict on the evidence taken before the referee, the instructions accordingly given will not be held for error when the evidence upon which this ruling is based does not appear of record, the presumption being as to the correctness of the instructions.

APPEAL by defendant, W. C. Hight, from *Cranmer, J.,* at March Term, 1931, of VANCE.

Civil action for an accounting and to restrain the defendants from foreclosing deed of trust.

A reference was ordered and the matter heard by Hon. A. W. Graham, Jr., who found the facts and reported the same, together with his conclusions of law, to the court.

Upon exceptions duly filed and issues tendered, the matter came on for hearing at the March Term, 1931, Vance Superior Court, when it was agreed by counsel "that the court might hear the argument in the case, and then directed the jury as a matter of law," which was done.

The court's directions or instructions to the jury are based upon the evidence, none of which is incorporated in the record on appeal.

From a verdict and judgment in favor of the plaintiff, the defendant, W. C. Hight, appeals, assigning errors.

Parker & Allsbrook for plaintiff.

Perry & Kittrell and R. S. McCoin for defendant.

PER CURIAM. In the absence of the evidence taken before the referee, and upon which the judge of the Superior Court based his rulings, we cannot say that there was error in the trial. It is not contended that the evidence is insufficient to support the findings and the verdict. The presumption is otherwise.

Affirmed.

JOHN A. WEAVER ET AL. v. J. W. HAMPTON ET AL.

(Filed 16 December, 1931.)

1. **Counties F a—Where commissioners corruptly refuse to bring action against sheriff the qualified taxpayers may maintain the action.**

   Under the provisions of C. S., 3206, citizens and taxpayers of a county may maintain an action against the commissioners of the county and its defaulting sheriff to enforce collection of the amount of the default upon allegations that the county commissioners have corruptly refused to perform their duties in this respect.

2. **Judgments K c—Consent judgment may be set aside for fraud.**

   A consent judgment is one entered by the agreement of the parties to the action with the consent and approval of a court of competent jurisdiction but it may be vacated in an independent action upon allegations and proof of fraud.

3. **Judgments L d—Where consent judgment between commissioners and sheriff is obtained by fraud it will not bar subsequent action by taxpayers.**

   Where, in an action by citizens and taxpayers of a county against the board of commissioners and the sheriff of the county, the complaint alleges that a preceding board had ascertained that the sheriff was in default in a large sum and had accepted his note in a certain amount secured by a mortgage on his lands to cover the default and that upon proceedings to foreclose the mortgage according to its terms the sheriff obtained a restraining order upon allegations that a smaller amount was due, and the matter was referred to a referee to ascertain the correct amount, and that the defendant commissioners since elected and qualified, without the concurrence of their own attorneys, but upon the advice of the sheriff's attorneys, had caused a consent judgment to be entered in the injunctive proceedings relieving the sheriff of all liability except cost, with further allegations of fraud, etc., *Held:* a demurrer upon the ground that the consent judgment operated as an estoppel is bad. The question of whether the clerk had authority to enter the consent judgment is not decided.

4. **Fraud C b—All facts and elements constituting fraud must be properly pleaded.**

   A demurrer to a pleading admits all allegations of fact properly set out therein, but if fraud is relied on all material facts and elements constituting the fraud must affirmatively appear from the pleadings.

CIVIL ACTION, before *Warlick, J.* From ASHE.

The plaintiffs are certain taxpayers of Ashe County, and the defendants are the former sheriff of the county and the board of commissioners of said county.

Plaintiffs alleged that the defendant, J. W. Hampton, was duly elected sheriff of Ashe County and served from 1920 to 1928 inclusive, and

as such sheriff was charged with the duty of collecting the taxes for the years 1921, 1922, 1923, 1924, 1925, and 1926, and that from 4 December, 1926, until December, 1928, said Hampton was the duly constituted and acting treasurer of the county. It was further alleged that the county authorities procured an audit of the accounts of defendant Hampton from 17 September, 1921, to 30 April, 1923, and that such audit was examined by said defendant and approved, and that said audit showed that said defendant was in arrears and in default in his accounts in the sum of $9,148.05, and that it was further shown by said audit that said defendant as sheriff was indebted to the county on account of uncollected taxes in the sum of $78,950.44. That thereafter an audit was duly made covering a period from 1 May, 1923, to 30 November, 1927, and that said audit was duly filed with the board of county commissioners on 9 January, 1928, which said audit was duly and officially approved by said board, and that the defendant Hampton was served with copy of said audit and resolution approving same, accompanied with a demand upon him to make settlement. It was further alleged that said audit showed that on 30 November, 1927, the said defendant Hampton was in arrears on his accounts of receipts and disbursements as sheriff, tax collector and treasurer in the aggregate amount of $40,474.24, and was further in default and arrears on account of uncollected taxes for the years of 1921 to 1926 in the sum of $25,171.84, and that after making certain corrections, the said defendant Hampton was indebted to the county in the sum of $70,372.86. It was further alleged that prior to 18 September, 1926, unsuccessful attempts were made between the then board of commissioners of the county and the defendant Hampton to effect a settlement, and that while negotiations were pending the said Hampton and his wife executed and delivered a deed of trust to W. B. Austin and Ira T. Johnston, trustees, to secure certain notes or bonds aggregating the sum of $50,000, said notes or bonds being payable to the board of county commissioners of Ashe County, and as security for the payment thereof the said defendant and his wife conveyed to said trustees by said deed of trust eleven tracts of land owned by the defendant Hampton. The said deed of trust contained the usual power of sale, and it was alleged that upon the expiration of the time for settlement the board of county commissioners directed the trustees in said deed of trust to foreclose the same, and that thereupon the defendant Hampton instituted an action entitled J. W. Hampton v. Board of County Commissioners of Ashe County *et al.*, seeking to restrain the said trustees from selling said land, alleging that a controversy existed between him and the county as to the correctness of the amount due. The board of county commissioners

filed a reply setting up the indebtedness due by said Hampton to the county, and thereupon the cause was duly referred to Honorable J. H. Burke as referee to take and state the account between said Hampton and the board of county commissioners; that said referee subsequently entered upon the hearing of the cause and after hearing evidence for a number of days the county rested its case and the attorneys for said Hampton requested a continuance in order that they might have an opportunity to examine various exhibits introduced in evidence in order to intelligently cross-examine the witnesses. It was further alleged that on 1 December, 1930, and while said action was pending before the referee the defendants, Kilby, Eller and Hartsog, were duly inducted into the office of county commissioner of Ashe County. It was further alleged that said commissioners on 3 December, 1930, gave their assent to a consent judgment signed by the clerk of the Superior Court of Ashe County, which said consent judgment provided as follows: "It is, therefore, by consent, considered and adjudged, that J. W. Hampton recover nothing of the county on account of his complaint, and that the defendant, the county of Ashe, recover nothing of the plaintiff, J. W. Hampton, on account of its counterclaim alleged in its answer. That J. W. Hampton pay his own witnesses, his own auditors, one-half of the referee's allowance and one-half of the court cost; and that the county of Ashe pay its own witnesses, its auditors, one-half of the referee's allowance and one-half of the court cost to be taxed by the clerk." It was further ordered that the deed of trust given by Hampton and wife to secure certain bonds payable to the county should be canceled on the record.

Plaintiffs alleged that this consent judgment was approved by the board of county commissioners "without conferring with any of the attorneys theretofore representing the county and without any advice from said attorneys and without making any effort to acquaint themselves with the facts involved, but that said county commissioners in flagrant disregard of and in utter violation of their official duties," and in gross abuse of their official positions and authority, fraudulently, unlawfully and wrongfully entered into a purported consent judgment between themselves as commissioners aforesaid, and the said defendant Hampton, whereby it was provided that the county take nothing on account of its claim, and pay one-half of the costs and that said defendant be released from all claims of said county." It was further alleged that said county commissioners, in approving said consent judgment, acted upon the advice of counsel of defendant Hampton. It was further alleged that said commissioners approved said consent judgment "corruptly and fraudulently with the purpose of wrongfully relieving the former sheriff and treasurer of the amount justly due by him."

The plaintiffs further alleged that more than sixty days prior to the institution of this action they filed with the board of commissioners, the defendants herein, a statement demanding that said commissioners bring suit or take such action to obtain the relief prayed for, but that said commissioners failed and refused, and now fail and refuse to institute a suit or to take any steps whatever to recover the money due said county.

The defendants demurred to the complaint upon the ground that the consent judgment alleged in the complaint constituted a bar to the action, and that it further appeared from the face of the complaint that said consent judgment constituted a full settlement between the parties. Attached to the demurrer was the resolution passed by the board of county commissioners on the first Monday in December, 1930, setting out in substance "that serious controversy existed between Hampton and the county; that the litigation was expensive, and the cost thereof steadily mounting, and that more than one hundred of the leading citizens of the county had filed petition with the board requesting said board to compromise, settle and adjust this unfortunate, expensive and uncertain litigation." And further that said board "upon its own initiative and without the advice of counsel representing the county in this litigation, approached the said J. W. Hampton in person and not through his counsel with the view of settling this cause because of respect this board had for the petition of the taxpayers and leading citizens of this county," etc. Whereupon, it was resolved "that the proposition of settlement agreed upon by parties to this suit be accepted by the county of Ashe, and that a judgment be signed embodying this agreement, and that this resolution and the judgment be published in the *Ashe County Journal,* a newspaper published in the county of Ashe," etc.

The trial judge overruled the demurrer filed by the defendants, and they appealed to the Supreme Court.

W. R. Bauguess, U. S. G. Bauguess, R. H. McNeill, W. R. Lovill, and Jno. E. Brown for plaintiffs.

R. A. Doughton, Ira T. Johnson, J. B. Councill, and T. C. Bowie for defendant.

BROGDEN, J. This action is brought under authority prescribed in C. S., 3206. The statute was discussed in *Waddill v. Masten,* 172 N. C., 582, 90 S. E., 694, in which case it was written: "Suits in protection of the rights and interests of the county, on the part of citizens and taxpayers, have been frequently entertained by the courts in this State, and, while they have usually been of an inhibitive character, as in re-

straint of incurring an unlawful indebtedness of levying unlawful taxes, etc., the same principles, in proper cases, will uphold recoveries for money wrongfully disposed of or withheld from the counties, on averment that the proper officials have corruptly or negligently refused to perform their duties in the matter." See *Tyrrell County v. Holloway,* 182 N. C., 64, 108 S. E., 337. The defendants, however, assert that even if it be conceded that the plaintiffs as taxpayers are authorized to institute the action that it appears upon the face of the complaint that all questions in controversy were settled by the consent judgment referred to in the complaint, and that such consent judgment constitutes an estoppel and perpetual bar to the maintenance of the suit.

It is settled beyond controversy in this State that a consent judgment is the contract of the parties spread upon the records with the approval and sanction of a court of competent jurisdiction, and that such contract cannot be modified or vacated without the consent of all parties thereto except for fraud or mistake, and that in order to vacate such judgment, an independent action must be instituted. *Morris v. Patterson,* 180 N. C., 484, 105 S. E., 25; *Board of Education v. Commissioners,* 192 N. C., 274, 134 S. E., 852.

Omitting any discussion of the power of the clerk to enter a consent judgment in a cause duly pending before a referee, the inquiry is narrowed to the bare question as to whether fraud was sufficiently alleged. It is now a truism that a demurrer admits all facts properly alleged. Moreover, the law requires that if fraud be relied upon, all essential facts and elements constituting the fraud must affirmatively appear from the pleadings. *Hoggard v. Brown,* 192 N. C., 494, 135 S. E., 331; *Hawkins v. Carter,* 196 N. C., 538, 146 S. E., 231.

The complaint paints substantially the following picture: The sheriff of the county is in arrears and defaults in a large sum of money, aggregating approximately $70,000. Demand is made upon him by the proper authorities for a settlement. In recognition of the demand, he executes notes for $50,000 payable to the county, and secures the same by a deed of trust upon eleven parcels of land owned by him. Nothing more is done or said until the notes fall due, when for the first time the official alleged to be in default, institutes an action to restrain the sale of the property, asserting that the claims of the county are incorrect. In this action a referee is duly appointed to hear the matter, to find the facts and state the account. The referee enters upon the discharge of his duties and the county offers its evidence and rests its case. Thereupon the defendant requests a continuance. In the meantime a new board of commissioners come into power and after remaining in office two days, and without consulting counsel or seeking to acquire any facts or to

otherwise inform themselves of the status of the matter, they approach the defaulting official with a proposition to cancel the deed of trust, to surrender the claim, and to pay one-half the cost and expense.

Such a picture may be lurid and may be stamped to pieces by evidence offered at the trial, but upon demurrer this Court must assume that the picture is correctly painted. Consequently the Court is of the opinion that the trial judge correctly overruled the demurrer.

Affirmed.

T. O. TEAGUE, TRADING AS MARION VENEER AND PANEL COMPANY, IN BEHALF OF HIMSELF AND ALL OTHER CREDITORS AND STOCKHOLDERS OF THE TEAGUE FURNITURE COMPANY, v. TEAGUE FURNITURE COMPANY (A CORPORATION).

(Filed 16 December, 1931.)

1. **Corporations G d—Property of corporation is held as trust fund first for benefit of creditors and second for benefit of stockholders.**

   The directors and officers of a corporation hold its assets in trust first for its creditors and second for its stockholders, and its president and secretary, knowing the corporation to be insolvent may not divert the moneys of the corporation in the bank to the payment of a debt due him individually by the corporation as against the rights of creditors of the corporation later represented by a receiver appointed by the court.

2. **Corporations H e—Creditors of president who are assignees of his rights against corporation have no priority over creditors of corporation.**

   Where the president and secretary of an insolvent corporation to whom the corporation was largely indebted, has diverted the moneys of the corporation to pay his individual indebtedness just before the appointment of a receiver for the corporation by the court, and thereafter the president executes a deed in trust for the benefit of his individual creditors and includes in the trust estate as a credit the amount due him by the corporation, *Held:* the receiver acquires title to all property and rights of the corporation of whatever kind, and the equitable rights of the creditors of the corporation are superior to the rights of the personal creditors of the president, and the doctrine of equality of equities does not apply, and the receiver of the corporation should withhold from the trustee in the deed in trust upon the assigned claim against the corporation by its president the amount wrongfully diverted by the president immediately before the receivership. C. S., 1210.

3. **Assignments C a — Trustee in assignment for benefit of creditors acquires no better title than that of assignor.**

   Where the president and secretary of a corporation gives his deed in trust for the benefit of his personal creditors, and includes in the trust estate his claim against the corporation for money due, the trustee in the

deed in trust can acquire no better title than the assignor had, and the trustee takes the claim against the corporation subject to equities existing in favor of the corporation against the assignor.

APPEAL by J. E. Neal, trustee, from *Schenck, J.*, at February Term, 1931, of MCDOWELL.

The plaintiff alleges:

1. That the defendant authorized and issued two classes of stock, (a) common stock in the par value of $77,000, and (b) 8 per cent cumulative preferred stock in the par value of $77,000.

2. That in the issuance and sale of the said preferred stock, the plaintiff, T. O. Teague, became the personal guarantor of both principal and dividends thereon, and by reason thereof, the defendant is indebted to the plaintiff in the sum of $77,000 plus a further sum of $3,000, dividends advanced, which the defendant was unable to pay.

3. That the defendant is indebted to the plaintiff in the further sum of $21,708.17 for moneys advanced to the defendant to enable it to carry on its business.

4. That the defendant is indebted to the plaintiff, T. O. Teague, trading as Marion Veneer and Panel Company, in the sum of $11,950.38 for veneer material and built up stock.

5. That by reason of the matters and things alleged in the last three preceding paragraphs, the defendant is indebted to the plaintiff in the sum of $113,658.55, over and above all offsets, credits and counterclaims.

6. That the indebtedness due by the defendant to the plaintiff, T. O. Teague, and T. O. Teague, trading as the Marion Veneer and Panel Company, is past due and unpaid and in addition thereto the defendant is indebted to various other creditors in the amount of approximately $110,000, that is, a total of more than $200,000.

7. That, during the year 1921, the furniture plant of the defendant in the town of Marion, N. C., was operated at an operating loss of approximately $52,866.71, and by reason thereof, the defendant is insolvent and unable to pay its creditors, all of whom are making demands upon it and are threatening to bring suits in various places in North Carolina.

8. That the defendant is in imminent danger of having its property dissipated; that its business operations have practically been suspended, owing to its financial condition and inability to procure funds with which to operate, and its assets are gradually depreciating and are being gradually consumed, and if it is permitted to continue operation, great and serious loss will result to the creditors and stockholders.

On 20 January, 1930, Judge Harding appointed R. S. Crisp temporary receiver of the Teague Furniture Company and on 31 January Judge Schenck made the appointment permanent.

The receiver made a report setting forth a transaction between T. O. Teague, the president of the Teague Furniture Company and J. W. Crawford, the secretary of the company, which is more specifically stated in the order of the court; and the receiver was authorized to institute an action against the above named parties for the recovery of the sum of $2,500 referred to in the report and in the order. Thereupon he brought suit against J. W. Crawford, the plaintiff being a party.

The cause came on for hearing at the February Term of the Superior Court and Judge Schenck from the evidence offered found certain facts among which are the following:

1. On 18 January, 1930, T. O. Teague was the president and treasurer of the Teague Furniture Company, a corporation doing business in the town of Marion, and J. W. Crawford was secretary and bookkeeper of the said corporation on the said date.

2. On 18 January, 1930, the Teague Furniture Company owed large sums of money and was insolvent, which fact was known to the said T. O. Teague, and on application of T. O. Teague, individually and trading as the Marion Veneer and Panel Company, on 20 January, 1930, R. S. Crisp was appointed temporary receiver, and on notice to show cause being heard on 31 January, 1930, the said R. S. Crisp was named permanent receiver of said Teague Furniture Company, and executed and delivered the bond required and took possession of all of the assets of the said Teague Furniture Company.

3. Prior to 18 January, 1930, the Teague Furniture Company became indebted to and was on that date indebted to T. O. Teague, its president and treasurer, in a large sum of money, and prior to said date and on said date the said T. O. Teague was indebted to the said J. W. Crawford, secretary and bookkeeper, as aforesaid.

4. On 18 January, 1930, the sum of $2,500 was withdrawn from the treasury of the Teague Furniture Company on two checks aggregating that sum, each payable to the order of T. O. Teague, as an attempted credit on the amount due by the Teague Furniture Company to the said T. O. Teague, and at the same time the said Teague endorsed the said checks and delivered the same to the said J. W. Crawford in settlement of the indebtedness then existing and due by T. O. Teague to the said Crawford.

5. On 8 February, 1930, T. O. Teague, being indebted to various parties, with the joinder of his wife, executed and delivered to J. E. Neal, trustee, a deed of trust, which is recorded, conveying the property therein described, including the claim of the said T. O. Teague, individually and trading as Marion Veneer and Panel Company, against the

Teague Furniture Company, for the benefit of his creditors, reference being here made to the said trust deed for its terms, which are a part of these findings.

6. Pursuant to the authority given in a deed of trust described in the last preceding paragraph, J. E. Neal, trustee, filed with R. S. Crisp, receiver of the Teague Furniture Company, claim for the amount of indebtedness due by the said Furniture Company to T. O. Teague, less the amount of $2,500 withdrawn from the treasury of the Teague Furniture Company on 18 January, 1930, as above stated.

Upon the foregoing facts the court was of opinion that T. O. Teague, as president of the defendant company, was charged with the duty of preserving and properly distributing its assets, and that his withdrawal of $2,500 was a breach of his duty; that he should return this sum with interest; that when Teague executed his deed for the benefit of his creditors to J. E. Neal, the property of the defendant company was in *custodia legis* and that with reference to the debt due him by the defendant company he could convey no greater rights than he had; that the receiver has a right to withhold a sufficient amount of the claim filed with him by the trustee to refund the $2,500 with interest; and that the trustee is entitled to file a corrected claim with the receiver so as to eliminate the credit of $2,500 as of 18 January, 1930, and increase the amount of the claim to that extent, so that he may participate in the distribution of the assets of the defendant company in proportion to the correct amount due him.

It was thereupon adjudged that the trustee be authorized to file a corrected claim with the receiver, and that out of the first dividend or dividends a sum sufficient to refund the sum of $2,500 to the treasury of the defendant company, with interest from 18 January, 1930, be withheld by the receiver and distributed as assets of the corporation under the order of the court.

The trustee excepted and appealed.

W. R. Chambers for trustee.
Winborne & Proctor for receiver.

ADAMS, J. The appellant's only assignment of error relates to that part of the judgment which directs the receiver to withhold payment of $2,500 on the claim filed with him by J. E. Neal, trustee, to whom T. O. Teague had conveyed certain property for the benefit of his creditors.

T. O. Teague and J. W. Crawford were not only directors in the defendant company but they occupied responsible official positions—the former those of president and treasurer and the latter those of

secretary and bookkeeper. On 18 January, 1930, when the defendant was insolvent and indebted to its president in excess of $100,000, Crawford drew two checks on its treasury aggregating $2,500 payable to the order of T. O. Teague, the president, who in turn endorsed them to Crawford in payment of stock issued to Crawford by the defendant and purchased by Teague. Two days afterwards Crisp was appointed receiver of the defendant at the instance of Teague, and on 8 February Teague conveyed his property to a trustee for the benefit of his creditors.

In our jurisprudence the principle is firmly entrenched that the capital stock and property of a corporation constitute a trust fund which, in case of insolvency, should be administered first for the satisfaction of its creditors and then for the stockholders, the object being to give its creditors a right to priority of payment in preference to the claims of those who hold stock in the corporation. It is likewise an accepted principle that the directors of a corporate body and others who have the direct control of its affairs and the management of its business occupy in reference to the corporation a fiduciary capacity which imposes the peril of personal liability if they use their knowledge of its financial condition for their own benefit. *Hill v. Lumber Co.*, 113 N. C., 178. If this principle did not obtain it would be possible for the directors and shareholders of a corporation to dispose of practically all the assets of the corporation to their own advantage without incurring liability for their act. *McIver v. Hardware Co.*, 144 N. C., 478; *Bassett v. Cooperage Co.*, 188 N. C., 511.

The appellant concedes the principle but denies its application, contending that an issue is drawn between the creditors of the corporation and the creditors of Teague; that the legal title to Teague's claim against the defendant passed to the trustee upon the execution of the deed of trust and the equitable or beneficial title to Teague's creditors; that the equities of the creditors are equal; and that the judgment should be reversed.

All the real and personal property of the defendant company and all its franchises, privileges and effects, upon the appointment of the receiver forthwith vested in him and the title of the corporation was thereby divested. C. S., 1210; *Hardware Co. v. Garage Co.*, 184 N. C., 125. The entire assets were then in *custodia legis*. *Bank v. Bank*, 127 N. C., 432.

This was the situation when Teague's assignment was executed. Teague could convey no greater right than he had and his trustee, who succeeded to his rights, took the property subject to all equities enforceable against Teague, the assignor. *Southerland v. Fremont*, 107 N. C., 565; *Wallace v. Cohen*, 111 N. C., 103; *Sykes v. Everett*, 167 N. C., 600, 607.

The trustee holds the legal title to Teague's property; he took it after the receiver had been appointed and with at least constructive notice. The receiver is seeking to enforce an equity against Teague; and upon the findings of fact set out in the judgment he has established an equity superior to that of the trustee. The equities, therefore, are not equal, as insisted by the appellant, and in our opinion the judgment should be affirmed.

Affirmed.

BEULAH B. GOODMAN v. L. VICTOR GOODMAN.

(Filed 16 December, 1931.)

Appeal and Error J b—Action of trial court in setting aside verdict in his discretion is not reviewable on appeal.

Where, in a wife's action for reasonable subsistence and counsel fees without divorce under the provisions of C. S., 1667, the trial court sets aside the verdict in the husband's favor in his discretion as being contrary to the weight of the evidence his action is not reviewable on appeal in the absence of abuse of discretion, and in this case the appeal is dismissed, there being no evidence of such abuse, C. S., 591. The distinction between actions under this section and actions under C. S., 1666, where the trial court must find the facts, is pointed out.

APPEAL by defendant from *Stack, J.*, at July Term, 1931, of BUNCOMBE.

Application for alimony without divorce.

Upon issues joined, the jury returned the following verdict:

"Did the defendant abandon the plaintiff as alleged? Answer: No."

Upon the coming in of the verdict the court, in its discretion, ordered that the verdict be set aside and the cause retained on the docket. Exception.

The defendant tendered judgment on the verdict, which the court refused to sign, as he had already set the verdict aside in the exercise of his discretion. Exception.

Defendant appeals, assigning errors.

Ellis C. Jones and Zeb F. Curtis for plaintiff.
Wells, Blackstock & Taylor for defendant.

STACY, C. J. This is an action instituted in the Superior Court of Buncombe County, the county in which the cause of action arose, to have a reasonable subsistence and counsel fees allotted and paid or secured to the plaintiff out of the estate or earnings of her husband

under authority of C. S., 1667, as amended by chapter 123, Public Laws 1921, and chapter 52, Public Laws 1923.

It is provided by the statute, as amended, that if any husband (1) shall separate himself from his wife and fail to provide her and the children of the marriage with necessary subsistence according to his means and condition in life, or (2) shall be a drunkard or spendthrift, or (3) shall be guilty of any conduct or acts which would be or constitute cause for divorce, either *a vinculo* or *a mensa et thoro,* his wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband: *Provided,* it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony; and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony or for her support, but only her reasonable counsel fees.

The plaintiff alleges at least two causes of action for divorce—one that the defendant has abandoned his family, and the other, that he has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome. C. S., 1660.

It should be observed that the action is not for divorce and alimony *pendente lite* under C. S., 1666, but it is an application for alimony without divorce under C. S., 1667. The two statutes are dissimilar in several respects. There is no specific requirement in the latter section (*Allen v. Allen,* 180 N. C., 465, 105 S. E., 11), as there is in the former (*Easeley v. Easeley,* 173 N. C., 530, 92 S. E., 353), that the judge shall find the facts as a basis for his judgment, except, when put in issue, which is not done here, the fact of the wife's alleged adultery is required to be found against her, when she otherwise would be entitled to the relief sought, and the application is denied on this ground. *Price v. Price,* 188 N. C., 640, 125 S. E., 264; *Black v. Black,* 198 N. C., 809, 150 S. E., 925.

There was ample evidence to support the allegations of the complaint, with none to the contrary. The defendant was not present at the trial, and no evidence was offered in his behalf. The court properly directed that the verdict be set aside, as it was contrary to all the evidence, and his action in this respect, remitted by the law to his sound discretion, is not reviewable. *Bird v. Bradburn,* 131 N. C., 488, 42 S. E., 936; *S. v. Hancock,* 151 N. C., 699, 66 S. E., 137; *S. v. Rose,* 129 N. C., 575, 40 S. E., 83.

In *Edwards v. Phifer,* 120 N. C., 405, 27 S. E., 79, it was said: "No principle is more fully settled than that this Court will not interfere with the discretion of the trial judge in setting aside a verdict as being

against the weight of the evidence," citing as authority for the position: *Armstrong v. Wright,* 8 N. C., 93; *Alley v. Hampton,* 13 N. C., 11; *Long v. Gantley,* 20 N. C., 457; *Brown v. Morris,* 20 N. C., 565; *MacRae v. Lilly,* 23 N. C., 118; *Boykin v. Perry,* 49 N. C., 325; *Vest v. Cooper,* 68 N. C., 131; *Watts v. Bell,* 71 N. C., 405; *Thomas v. Myers,* 87 N. C., 31; *Goodson v. Mullen,* 92 N. C., 211; *Ferrall v. Broadway,* 95 N. C., 551; *Redmond v. Stepp,* 100 N. C., 212; *Davenport v. Terrell,* 103 N. C., 53; *Whitehurst v. Pettipher,* 105 N. C., 40; *Jordan v. Farthing,* 117 N. C., 181; *Spruill v. Ins. Co.,* 120 N. C., 141.

Speaking to the subject in *Brink v. Black,* 74 N. C., 329, *Reade, J.,* delivering the opinion of the Court, said: "The defendant had a verdict, and the judge set it aside and granted a new trial, because in his opinion it was against the weight of the evidence. The defendant appealed, and the only question is, can we review his Honor's order? We have so often said that we cannot that it is a matter of some surprise that he should have the question presented again. When a judge presiding at a trial below grants or refuses to grant a new trial because of some question of 'law or legal inference' which he decides, and either party is dissatisfied with his decision of that matter of law or legal inference, his decision may be appealed from, and we may review it. But when he is of the opinion that, considering the number of witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior on the examination, and all the circumstances on both sides, the weight of the evidence is clearly on one side, how is it practicable that we can review it, unless we had the same advantages? And even if we had, we cannot try facts."

Rulings of the Superior Court on matters addressed to the court's discretion, *e. g.,* granting or refusing a continuance (C. S., 560), allowing or disallowing removal or change of venue, for convenience of witnesses (C. S., 470), or to secure a fair trial (C. S., 471), permitting or denying amendment to pleadings (C. S., 547), granting or refusing request to file pleadings after time for filing has expired (*Washington v. Hodges,* 200 N. C., 364, 156 S. E., 912), passing upon motion for mistrial on account of the misconduct of parties or counsel (*Lane v. Paschall,* 199 N. C., 364, 154 S. E., 626), or to prevent an alleged miscarriage of justice (*S. v. Guice, ante,* 761, *S. v. Bass,* 82 N. C., 570), determination of motion at trial term to set aside verdict as contrary to the weight of the evidence (*In re Beal,* 200 N. C., 754), adjudication of application for new trial on ground of newly discovered evidence (*S. v. Casey, ante,* 620), and the like, which involve no question of law or legal inference, are not subject to review on appeal. *Hoke v. Whisnant,* 174 N. C., 658, 94 S. E., 446; *Billings v. Observer,* 150 N. C.,

540, 64 S. E., 435; *Jarrett v. Trunk Co.,* 142 N. C., 466, 55 S. E., 338; *Abernethy v. Yount,* 138 N. C., 337, 50 S. E., 696; *Benton v. Collins,* 125 N. C., 83, 34 S. E., 242; *Jones v. Parker,* 97 N. C., 33, 2 S. E., 370; *Braid v. Lukins,* 95 N. C., 123; *Carson v. Dellinger,* 90 N. C., 226; *Moore v. Edmiston,* 70 N. C., 471.

Expressions may be found in a number of cases to the effect that so far as the direct supervision of verdicts is concerned, the discretionary authority of the Superior Court is final. *Harvey v. R. R.,* 153 N. C., 567, 69 S. E., 627; *Boney v. R. R.,* 145 N. C., 248, 58 S. E., 1082; *Slocumb v. Construction Co.,* 142 N. C., 349, 55 S. E., 196; *Brown v. Power Co.,* 140 N. C., 333, 52 S. E., 954; *Norton v. R. R.,* 122 N. C., 910, 29 S. E., 886. Where the jury has committed a palpable error, it is the duty of the trial judge to act so as to prevent a miscarriage of justice. *Hussey v. R. R.,* 183 N. C., 7, 110 S. E., 599.

But in *Settee v. Electric Ry.,* 170 N. C., 365, 86 S. E., 1050, it was said: "The discretion of the judge to set aside a verdict is not an arbitrary one, to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of preventing what may seem to him an inequitable result." And speaking to the same question in *Cates v. Tel. Co.,* 151 N. C., 497, 66 S. E., 592, *Walker, J.,* observed: "It rests in his sound discretion, which should be exercised always, not arbitrarily, but with a view to a correct administration of justice according to law."

It is upon these last quoted expressions and the provisions of C. S., 591, that the defendant bases his appeal in the instant case, but the record discloses no abuse of discretion, or arbitrary or capricious exercise of authority on the part of the trial court. *Bailey v. Mineral Co.,* 183 N. C., 525, 112 S. E., 29. Hence, the appeal is without substance, and will be dismissed. *Bird v. Bradburn, supra.*

Appeal dismissed.

ANNICE AYERS AND KATE ROBINSON v. T. D. BANKS AND HIS WIFE, BERTHA BANKS.

(Filed 16 December, 1931.)

Judgments K a—Where guardian admits allegations in action against wards but acts in good faith without personal interest the judgment is valid.

Where the consideration of a deed is the support of the grantors during the remainder of their lives, and an action is later brought by them to set aside the deed for failure to perform the consideration, and in the

action the grantees, who were minors, are represented by a guardian *ad litem*, duly appointed, who, knowing the facts alleged to be true, answers and admits the allegations of the complaint, and judgment setting aside the deed is accordingly rendered, *Held:* in a later action by the grantees to set aside the judgment, the defendant's motion as of nonsuit is properly allowed, it appearing that the guardian *ad litem* had acted in good faith without any personal interest and, there being nothing to impeach the validity of the judgment, it completely concludes the grantees in the second action.

APPEAL by plaintiffs from *Harwood, Special Judge,* at August Term, 1931, of YANCEY. Affirmed.

This is an action to recover of defendants the tract of land described in the complaint.

From judgment dismissing the action as of nonsuit, at the close of their evidence, plaintiffs appealed to the Supreme Court.

R. W. Wilson and Max C. Wilson for plaintiffs.
Charles Hutchins and Watson & Fouts for defendants.

CONNOR, J. On 15 October, 1921, J. G. Allen and his wife, by their deed which was duly executed and recorded, conveyed the land described in the complaint to their daughter, Mirah Green, wife of John S. Green, for her life, and at her death, to the plaintiffs in this action, who are the daughters of John S. Green and Mirah Green. The consideration for said deed was the agreement of John S. Green and Mirah Green to care for and support the grantors so long as they or either of them should live. It was not a voluntary deed with respect to either Mirah Green or to the plaintiffs, who are the granddaughters of the grantors, but was executed in consideration of the agreement of the father and mother of the plaintiffs to care for and support the grantors.

After the execution and delivery of the deed, John S. Green and Mirah Green failed and refused to perform their agreement with the grantors to care for and support them. On 15 May, 1922, J. H. Allen and his wife, the grantors in said deed, brought an action in the Superior Court of Yancey County for its cancellation and for judgment that they were the owners of the land described therein, and that the grantees had no right, title or interest in said land. The plaintiffs in this action, together with their father and mother, John S. Green and Mirah Green, were defendants in said action. Upon application to the court, John S. Green was appointed guardian *ad litem* of the plaintiffs, and filed an answer to the complaint in their behalf. In this answer, which was duly verified, he admitted all the allegations of the complaint. Mirah Green filed no answer in said action. Judgment was rendered

that the deed under which plaintiffs in this action claim the land described in the complaint be and the same was canceled. It was further ordered, considered and adjudged that plaintiffs in that action, to wit: J. G. Allen and his wife, N. L. Allen, were the owners of the land described in the deed, and that the defendants, to wit: John S. Green, Mirah Green, Annice Green (now Ayers) and Kate Green (now Robinson) had no interest therein.

After the rendition of said judgment, J. G. Allen and his wife conveyed the land described in the complaint to the defendants. Both J. G. Allen and his wife, N. L. Allen, died prior to the commencement of this action. Mirah Green, the mother of the plaintiffs, is now living.

There was no evidence tending to show that the action in which the deed under which plaintiffs claim the land described in the complaint was canceled, was brought or prosecuted otherwise than in good faith; nor was there evidence tending to show that the application for the appointment of John S. Green as guardian *ad litem* of plaintiffs in said action was fraudulent, or that the answer filed by him as guardian *ad litem* of the plaintiffs was false or fraudulent. It does not appear that John S. Green, father of the plaintiffs, had any interest in the action which was hostile or antagonistic to the interests of the plaintiffs.

In the absence of evidence tending to impeach the judgment rendered by the Superior Court of Yancey County in the action entitled Allen v. Green, the said judgment is conclusive that plaintiffs in this action have no right, title or interest in or to the land described in the complaint. *Holt v. Ziglar,* 159 N. C., 272, 74 S. E., 813, is not applicable in the instant case. In that case it appeared from the record that the guardian *ad litem* had an interest adverse to the interest of the minors, and that the judgment to which he consented deprived his wards of any interest under the will, and was altogether in his personal interest. Not so in the action brought by J. G. Allen and his wife for the cancellation of the deed under which plaintiffs claim. The guardian *ad litem* had no interest in the land, described in the deed. The facts alleged in the complaint were necessarily known to him, and he could not have done otherwise than admit them in the answer filed by him as guardian *ad litem.* Upon these admissions, the court rendered the judgment, canceling the deed under which plaintiffs claim. There was no error in the judgment. It is

Affirmed.

HUGH LABARBE ET AL. v. F. B. INGLE.

(Filed 16 December, 1931.)

Judgments F a—Judgment may be entered at subsequent term where verdict has been returned and record is complete except for judgment.

A judgment *nunc pro tunc* may be entered at a subsequent term of the court to complete the record in a case wherein a verdict has been returned by the jury and the record complete except for the judgment, the judgment relating back to the beginning of the term at which the cause was actually tried as between the parties, and as to third persons the judgment lien attaching as of the first day of the term at which the judgment was entered.

APPEAL by defendant from *Harding, J.,* at June Term, 1931, of BUNCOMBE.

Motion for judgment on verdict rendered at prior term.

Civil action to recover on two promissory notes, tried at the May Term, 1930, Buncombe Superior Court, which resulted in a verdict for the plaintiffs. Through inadvertence, omission or error, no formal judgment was signed by the judge, or if signed, such judgment has been lost or destroyed.

At the June Term, 1931, after due notice to the defendant, the plaintiffs moved for judgment *nunc pro tunc* on the verdict. The motion was allowed, and from this ruling the defendant appeals.

Harkins, Van Winkle & Walton for plaintiffs.
Welch Galloway for defendant.

PER CURIAM. Affirmed on authority of *McDonald v. Howe,* 178 N. C., 257, 100 S. E., 427, *Pfeifer v. Drug Co.,* 171 N. C., 214, 88 S. E., 343, *Knowles v. Savage,* 140 N. C., 372, 52 S. E., 930, *Thompson v. Peebles,* 85 N. C., 418.

Speaking to a similar situation in *Ferrell v. Hales,* 119 N. C., 199, 25 S. E., 821, *Clark, J.,* observed: "The judge could not set aside the verdict rendered at the previous term; and if he could not enter judgment upon the facts found by the jury by their recorded verdict, the matter would have been forever suspended, like Mahomet's coffin.

'In Aladdin's tower
Some unfinished window unfinished must remain.'

"Not so in legal proceedings which deal with matters of fact, not fancy. The judge, at the next term, seeing the record complete up to and including the verdict, properly rendered judgment *nunc pro tunc.* This

was practical common sense and is justified by precedent. *Bright v. Sugg,* 15 N. C., 492; *Long v. Long,* 85 N. C., 415; *Smith v. State,* 1 Tex. App., 408. As to difficulties suggested, it may be observed that, while the judgment as between the parties is entered as of the former term, *nunc pro tunc,* as to third parties it can only be a lien from the docketing, which by The Code, sec. 433, has effect from the first day of the term at which it was actually entered." There is no question here as to the rights of third persons.

Affirmed.

LAKE ROLAND v. RAILWAY EXPRESS AGENCY AND BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 16 December, 1931.)

Principal and Agent C d—Action against principal will be dismissed where there is no evidence that he authorized or ratified act of agent.

Where a principal is sued for damages for false arrest as a result of a warrant procured by his agent, the action will be dismissed in the absence of evidence that the principal authorized the act of the agent or ratified his act in procuring the warrant.

APPEAL by plaintiff from *Harwood, Special Judge,* at August Term, 1931, of YANCEY. Affirmed.

This is an action to recover damages for the false arrest and malicious prosecution of plaintiff upon a criminal warrant procured by an agent of the defendants, charging the plaintiff with larceny.

From judgment dismissing the action as upon nonsuit at the close of his evidence, the plaintiff appealed to the Supreme Court.

C. D. Bailey and C. R. Hamrick for plaintiff.
Charles Hutchins and Pless & Pless for defendants.

PER CURIAM. In the absence of any evidence tending to show that their agent was authorized by defendants to procure the warrant on which plaintiff was arrested and prosecuted, or that defendants ratified the action of their agent in procuring the warrant and prosecuting the plaintiff, this action was properly dismissed. *Lamm v. Charles Stores Co., ante,* 134, 159 S. E., 444. The judgment is

Affirmed.

WOODY BROTHERS BAKERY v. GREENSBORO LIFE INSURANCE COMPANY.

(Filed 23 December, 1931.)

Appeal and Error F a—Only exceptions entered in Superior Court upon appeal from county court will be considered on appeal to Supreme Court.

Under the provisions of our Constitution Art. IV, sec. 8, the Supreme Court on appeal may review only matters of law or legal inference, and it can exercise this jurisdiction only where the decision of the lower court is presented by assignments of error based upon exceptions duly taken, and where the appeal is taken solely to the judgment of the Superior Court affirming the judgment of the general county court the judgment will be affirmed where there is no error therein, and the Supreme Court will not consider assignments of error taken in the county court where the action of the Superior Court upon such assignments are not presented by exceptions duly entered in the Superior Court.

APPEAL by defendant from *Harding, J.*, at June Term, 1931, of BUNCOMBE. Affirmed.

This is an action to recover on a policy of life insurance issued by the defendant, without a medical examination of the insured. C. S., 6460. By the terms of the policy, defendant promised to pay to the plaintiff, upon the death of the insured, the sum of $2,500. The policy was issued on 15 May, 1930; the insured died on 28 July, 1930.

The defendant denied liability on the policy and refused to pay the amount thereof, on the ground that the issuance of the policy was procured by false and fraudulent representations made by the insured in his written application therefor.

The action was begun and tried in the General County Court of Buncombe County. The issues submitted to the jury were answered as follows:

"1. Was the policy sued on in this action procured by the fraud of the deceased? Answer: No.

2. What amount, if any, is the plaintiff entitled to recover of the defendant on the policy sued on in this action? Answer: $2,500, with interest from 28 July, 1930."

From judgment on the verdict, the defendant appealed to the Superior Court of Buncombe County. N. C. Code, 1931, sec. 1608(cc). On this appeal defendant assigned as errors in the trial in the general county court the refusal of the court (1) to submit issues tendered by defendant; and (2) to allow its motion for judgment as of nonsuit at the close of all the evidence. On the hearing of this appeal in the Superior Court, defendant's assignments of error were not sustained.

From judgment of the Superior Court affirming the judgment of the general county court, defendant appealed to the Supreme Court. On this appeal, defendant assigned as error the judgment of the Superior Court. This was the only assignment of error.

W. H. Hipps, Irwin Monk and Kitchin & Kitchin for plaintiff.
Sullivan & McRae for defendant.

PER CURIAM. The only assignment of error on defendant's appeal to this Court is based upon its exception to the judgment of the Superior Court. The defendant does not assign as errors the decisions of the judge of the Superior Court of the questions of law presented to said court by its assignments of error on its appeal from the judgment of the general county court. These assignments of error were not sustained by the Superior Court. They are discussed in the brief filed in this Court by counsel for defendant. They cannot be considered, however, on this appeal. *Smith v. Texas Co.,* 200 N. C., 39, 156 S. E., 160; *Davis v. Wallace,* 190 N. C., 543, 130 S. E., 176; *Smith v. Winston-Salem,* 189 N. C., 178, 126 S. E., 514. This Court will consider and pass upon only exceptions duly noted by the appellant to decisions of the court below on matters of law or legal inference. Its jurisdiction as an appellate court is conferred by the Constitution, Art. IV, sec. 8. It has no jurisdiction except to review, upon appeal, decisions of the court below on matters of law or legal inference. It can exercise this jurisdiction only when the decisions of the court below are properly presented by assignments of error based upon exceptions duly taken. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175. There is no error in the judgment of the Superior Court. It is

Affirmed.

CORRIE LAZARUS v. BLUE RIDGE GROCERY COMPANY.

(Filed 23 December, 1931.)

Master and Servant D b—Evidence in this action against employer for damages caused by employee's negligent driving of truck held sufficient for jury.

Where, in an action against an employer, the plaintiff's evidence tends to show that he was injured by the negligent driving of the defendant's truck used exclusively in the defendant's business, and that the truck was driven by an employee of the defendant who was regularly employed for that purpose and who had taken the truck from defendant's place of

business under the defendant's express orders, *Held:* the evidence is sufficient to make out a prima facie case and should be submitted to the jury, and defendant's evidence that the driver had deviated from his route and was returning thereto at the time of the injury is insufficient to bar a recovery as a matter of law.

APPEAL by defendant from *Stack, J.*, at August Term, 1931, of BUNCOMBE. Affirmed.

This is an action to recover damages for personal injuries resulting from a collision on a street in the city of Asheville, between an automobile in which plaintiff was riding as a guest of the owner who was driving the automobile, and a truck owned by the defendant and driven by one of its employees. The collision was caused by the negligence of the driver of the truck.

Defendant denied liability on the ground that its employee, the driver of the truck, was not acting within the scope of his employment at the time of the collision. It alleged that the driver had deviated from the route over which it was his duty as an employee of defendant to drive the truck, and was engaged in his own business and not that of defendant, at the time of the collision which resulted in the injuries to the plaintiff.

The action was begun and tried in the General County Court of Buncombe County. At the trial, there was judgment dismissing the action, at the close of the evidence, as upon nonsuit. From this judgment, plaintiff appealed to the Superior Court of Buncombe County, assigning as error the action of the court in allowing defendant's motion for judgment as of nonsuit.

At the hearing of the appeal in the Superior Court, plaintiff's assignment of error was sustained. From judgment setting aside and vacating the judgment of the general county court, and remanding the action to said court for a new trial, defendant appealed to the Supreme Court.

Bourne, Parker, Arledge & DuBose for plaintiff.
Merrimon, Adams & Adams for defendant.

PER CURIAM. There is no error in the judgment of the Superior Court in this action, reversing the judgment of the general county court, by which the action was dismissed, at the close of the evidence, as of nonsuit.

There was evidence at the trial in the general county court tending to show that plaintiff was injured by the negligent operation of a truck on a street in the city of Asheville; that the truck was owned by the defendant and used exclusively for business purposes; that at the time

plaintiff was injured, the truck was driven by a regular employee of defendant, employed for that purpose; and that this employee had taken the truck from defendant's place of business pursuant to the express orders of defendant. This was sufficient to make a prima facie case for the plaintiff. *Jeffrey v. Mfg. Co.*, 197 N. C., 724, 150 S. E., 503. The evidence should, therefore, have been submitted to the jury. *Parrish v. Armour & Co.*, 200 N. C., 654, 158 S. E., 188; *Duncan v. Overton*, 182 N. C., 80, 108 S. E., 387. The evidence offered by defendant did not show such a deviation by the driver of the truck from defendant's business as relieved defendant from liability to plaintiff, as a matter of law, on the principle of *respondeat superior*. The driver of the truck, although he had deviated from the route over which he was directed by defendant to drive the truck, was returning to this route at the time he injured the plaintiff by his negligence. This case is distinguishable from *Martin v. Bus Lines*, 197 N. C., 720, 150 S. E., 501; *Wilkie v. Stancil*, 196 N. C., 794, 147 S. E., 296, and *Cotton v. Transportation Co.*, 197 N. C., 709, 150 S. E., 505.

The action was properly remanded to the general county court for a new trial. The judgment is

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF W. L. HICKS, GUARDIAN OF GLENN HAWKINS, JOSEPH HAWKINS, AND HAZEL HAWKINS, INFANTS, v. CORPORATION COMMISSION OF NORTH CAROLINA, JOHN D. BIGGS, LIQUIDATING AGENT OF FARMERS BANK AND TRUST COMPANY OF FOREST CITY, N. C., AND T. B. LOVELACE, B. B. DOGGETT AND J. A. DENNIS.

(Filed 23 December, 1931.)

Banks and Banking H d—Where bank commingles funds in its hands as guardian the ward's estate is not entitled to preference.

Where a bank acting as guardian commingles moneys belonging to its ward's estate with its own assets, and becomes insolvent, a preference in favor of the ward or the sureties on the guardian's bond will not be allowed, but the guardian's bond is liable for the loss occasioned the ward's estate thereby.

APPEAL by defendants, Corporation Commission and John D. Biggs, liquidating agent, from *MacRae, Special Judge*, at March Special Term, 1931, of RUTHERFORD. Modified and affirmed.

This is an action on a guardian's bond, executed by the Farmers Bank and Trust Company, guardian of Glenn Hawkins, Joseph Haw-

kins and Hazel Hawkins, infants, as principal, and by the defendants, T. B. Lovelace, B. B. Doggett and J. A. Dennis, as sureties. The bond is dated 5 July, 1929.

On 4 February, 1930, the Farmers Bank and Trust Company was duly declared insolvent. The Corporation Commission of North Carolina, under the provisions of statutes then in force, took possession of the assets of the said insolvent bank, for the purpose of liquidating its affairs. The said commission appointed the defendant, John D. Biggs, as liquidating agent of said bank, and the said defendant is now engaged in the performance of his duties as such agent.

On 29 April, 1930, the relator, W. L. Hicks, was appointed by the clerk of the Superior Court of Rutherford County as guardian of Glenn Hawkins, Joseph Hawkins and Hazel Hawkins. He has duly qualified as such guardian. At the date of its insolvency and of its removal by the clerk as guardian of said infants, the Farmers Bank and Trust Company had in its hands the sum of $3,000, belonging to the estate of its said wards. The said Bank and Trust Company had received said sum from a former guardian and had failed to invest same as required by law. It had commingled said sum with its funds.

On the foregoing facts, admitted in the pleadings, it was adjudged that plaintiffs recover of the defendants the sum of $3,000, with interest from 5 July, 1929, and the costs of the action. It was further ordered and adjudged that plaintiffs have a preferred claim against the assets of the Farmers Bank and Trust Company of Forest City, now in the hands of the defendants, Corporation Commission of North Carolina (or its successor, the Commissioner of Banks of North Carolina) and John D. Biggs, liquidating agent.

From this judgment, the defendants, Corporation Commission and John D. Biggs, liquidating agent, appealed to the Supreme Court.

No counsel for appellees.
B. T. Jones, Jr., for appellants.

PER CURIAM. There is no error in the judgment in this action that the relator, W. L. Hicks, guardian of Glenn Hawkins, Joseph Hawkins and Hazel Hawkins, infants, recover of the defendants the sum of $3,000, with interest and costs.

There is error, however, in so much of the judgment as orders and adjudges that the relator has a preferred claim on the assets of the Farmers Bank and Trust Company, now in the hands of the Corporation Commission or its successor, the Commissioner of Banks of North Carolina, or of the defendant, John D. Biggs, liquidating agent. See *Bank v. Corp. Com., ante,* 382, 160 S. E., 360. *Roebuck v. Surety*

Company, 200 N. C., 196, 156 S. E., 531. Neither the relator nor the sureties on the bond of the Farmers Bank and Trust Company as guardian are entitled to preference in the distribution of its assets among the creditors of the insolvent bank. The judgment as modified in accordance with this opinion is affirmed.

Modified and affirmed.

J. S. JORDAN v. MRS. LYDIA McKENZIE.

(Filed 23 December, 1931.)

Appeal and Error A f—Appeal by administrator upon whom summons has not been served will be dismissed, the administrator not being a party.

Where judgment by default for want of an answer has been rendered against a defendant, who has later died and her administrator appointed and ordered to be made a party, the administrator does not become a party until service of summons on him, and has no standing in court, but after service of summons he may appear and challenge the validity of the proceedings.

APPEAL by D. A. McKenzie, administrator of Mrs. Lydia McKenzie, from *Schenck, J.,* at May Term, 1931, of MOORE. Appeal dismissed.

This action was begun on 22 March, 1928. On Monday, 30 April, 1928, judgment by default for want of an answer was rendered in favor of the plaintiff and against the defendant. Since the rendition of the judgment, the defendant, Mrs. Lydia McKenzie, has died.

On 22 March, 1930, D. A. McKenzie, administrator of Mrs. Lydia McKenzie, after notice to plaintiff, moved in the action that the judgment be set aside and vacated, on the ground that the summons was not served on the defendant, notwithstanding the return endorsed thereon by the sheriff to the contrary. This motion was heard by Judge Cowper at March Term, 1931 (see *Jordan v. McKenzie,* 199 N. C., 750, 155 S. E., 868). At the hearing Judge Cowper found as a fact that the summons was not served on the defendant, Mrs. Lydia McKenzie, and on this finding ordered that the judgment be set aside and vacated. It was ordered that the action be continued.

At May Term, 1931, on motion of the plaintiff, it was ordered that summons be issued in the action for D. A. McKenzie, administrator of Mrs. Lydia McKenzie, and that the complaint heretofore filed be adopted as the complaint against the said D. A. McKenzie, administrator. From this order, D. A. McKenzie, administrator, appealed to the Supreme Court.

L. B. Clegg for plaintiff.
H. F. Seawell, Jr., for defendant.

PER CURIAM. It does not appear in the record that summons has been issued for D. A. McKenzie, administrator. He cannot challenge the validity of the order made by Judge Schenck, until the summons has been issued and served on him. He will then be a party to the action, and may present for decision the questions of law discussed in the brief filed in his behalf in this Court. This appeal must be and is

Dismissed.

J. W. MERRIMON, MRS. J. W. MERRIMON, AND J. B. MERRIMON v. COUNTY OF BUNCOMBE, CENTRAL BANK AND TRUST COMPANY, AND G. N. HENSON, LIQUIDATING AGENT.

(Filed 27 June, 1931.)

CIVIL ACTION, before *McElroy, J.*, at March Term, 1931, of BUNCOMBE.

Plaintiffs alleged that the Central Bank and Trust Company was indebted to them in the sum of $1,800, evidenced by certain certificates of deposit issued by said bank. It was further alleged that the bank was closed and its assets placed in the hands of defendant, Henson, as liquidating agent for the Corporation Commission. It was further alleged that the defendant, county of Buncombe, had on deposit in said bank at the time it was closed the sum of $3,600,000, and that the bank had turned over to said county as security for said deposit, certain collateral consisting of notes, bonds, stocks, and other assets, aggregating $6,000,000. It was further alleged that the hypothecation of its assets by the bank to secure certain depositors was wrongful and unlawful and enabled the defendant to receive an unlawful preference.

The defendants demurred to the complaint and the demurrer was sustained by the trial judge.

From the judgment so rendered the plaintiffs appealed.

Robt. R. Mullikin for plaintiffs.
C. K. Hughes and Jones & Ward for Buncombe County.
Johnson, Smathers & Rollins for liquidating agent.

PER CURIAM. This case is a companion case to *Merrimon v. Asheville et al., ante,* 181, and the judgment sustaining the demurrer is

Affirmed.

ERVIN F. ASHE v. SOUTHERN RAILWAY COMPANY, JOE DAUGHERTY AND W. H. MICHAEL.

(Filed 27 May, 1931.)

APPEAL by plaintiff from *MacRae, Special Judge,* at October Term, 1930, of JACKSON. Affirmed.

Doyle D. Alley, A. Hall Johnston and Alley & Alley for plaintiff.
C. K. Hughes and Jones & Ward for defendants.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the negligence of the defendants in the operation of a train of the Southern Railway Company. At the close of the plaintiff's evidence the action was dismissed as in case of nonsuit. After careful examination of the evidence and of the briefs filed on behalf of plaintiff and defendant, we are convinced that the plaintiff is not entitled to the recovery of damages. The judgment dismissing the action is therefore

Affirmed.

HUNTER MANUFACTURING AND COMMISSION COMPANY v. LEAK MANUFACTURING COMPANY.

(Filed 2 July, 1931.)

Appeal and Error J d—Where Supreme Court is evenly divided the judgment of the lower court will be affirmed.

Where the Supreme Court is evenly divided in opinion, one *Justice* not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Stack, J.,* at Chambers, by agreement, 24 September, 1930. From RICHMOND.

Civil action to recover commissions or balance alleged to be due on selling agent's agreement.

The case was made to turn on whether the plaintiff was entitled to commissions of 5% on sales of defendant's goods, as it alleged, or only 4%, as the defendant contended.

By consent, a reference was ordered and the matter heard by Hon. A. A. F. Seawell, who found the facts and reported the same, together with his conclusions of law, to the court.

The referee found for the plaintiff, but on exceptions duly filed to his report, the judge of the Superior Court reversed the findings and conclusions of the referee and entered judgment for the defendant. The plaintiff appeals, assigning errors.

Frank P. Hobgood, Ozmer L. Henry and C. J. Weber for plaintiff.
F. W. Bynum and Varser, Lawrence & McIntyre for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Adams, J.*, not sitting, the judgment of the Superior Court is affirmed and stands as the decision in this particular case, without becoming a precedent for the future. *Lawrence v. Bank,* 193 N. C., 841, 137 S. E., 427; *Miller v. Bank,* 176 N. C., 152, 96 S. E., 977; *Durham v. R. R.,* 113 N. C., 240, 18 S. E., 208.

This accords with the uniform practice of appellate courts in cases of equal division of opinion. *Jenkins v. Lumber Co.,* 187 N. C., 864, 123 S. E., 82.

Affirmed.

STATE v. DONALD ARNOLD AND HENRY ARNOLD.

(Filed 30 September, 1931.)

APPEAL by defendants from *Devin, J.*, at June Term, 1931, of CRAVEN.

Criminal prosecution tried upon an indictment charging the defendants, and two others, with the murder of one Claude Coward.

Verdict: Guilty of murder in the second degree as to Donald Arnold; and guilty of manslaughter as to Henry Arnold.

Judgment: Imprisonment in the State's prison, 5 years for Donald Arnold and 2 years for Henry Arnold.

Defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.
Ernest M. Green and D. L. Ward, Jr., for defendants.

PER CURIAM. On the hearing the trial narrowed itself largely to issues of fact, which the jury resolved in favor of the State and against the contentions of the defendants. A different verdict might have been returned, but it was not.

The record discloses no exceptive assignment of error upon which this Court, in the exercise of its appellate jurisdiction, could award the defendants a new trial. The verdict and judgment will be upheld.

No error.

ROBERT A. WALL, BY HIS GUARDIAN, CHLOE J. WALL, v. UNITED BANK AND TRUST COMPANY AND ELLIOTT S. POOLE.

(Filed 30 September, 1931.)

APPEAL by plaintiff from *Sinclair, J.*, at April Term, 1931, of JOHNSTON. Affirmed.

Hugh A. Page and E. J. Wellons for plaintiff.
J. C. Pittman and Abell & Shepard for defendants.

PER CURIAM. On 23 September, 1930, the plaintiff and the defendant Poole executed and delivered to the United Bank and Trust Company their promissory note in the sum of $3,000, payable 22 November, 1930; and to secure payment thereof the plaintiff delivered to the payee thirty shares of stock in the Enterprise Mill of Pittsboro. After maturity of the note the plaintiff brought suit to enjoin a sale of the stock and to have the note declared void as to him by reason of his alleged mental incapacity. Judge Sinclair denied the plaintiff's motion to continue the restraining order to the hearing and retained the cause for trial by jury upon the issues. He evidently found the facts against the plaintiff. Besides, there is no evidence that the bank is insolvent or that it had knowledge of the plaintiff's alleged disability. *West v. R. R.*, 151 N. C., 231; *Yount v. Setzer*, 155 N. C., 213; *Davenport v. Board of Education*, 183 N. C., 574. Judgment

Affirmed.

JAMES W. SMITH v. THE NASH MOTOR COMPANY.

(Filed 7 October, 1931.)

APPEAL by plaintiff from *Devin, J.*, at February Term, 1931, of PITT. Affirmed.

Julius Brown and P. R. Hines for plaintiff.
F. G. James & Son for defendant.

PER CURIAM. This is an action for actionable negligence brought by plaintiff against defendant, alleging that defendant manufactured and sold to him a Nash automobile, which was unsafe, with unsafe and defective brakes and which became uncontrollable while plaintiff was driving, which condition caused a wreck and caused the injuries and damages to the plaintiff as set out and specified.

The defendant in the answer says: "That, as this defendant is advised, the plaintiff did, during the fall of 1928, purchase a Nash automobile from the Turnage Motor Company of Ayden, N. C. That said sale was made by said Turnage Motor Company and not this defendant. That the plaintiff took said automobile out to his home—a distance of about fifteen (15) miles from the town of Ayden, for his wife to see and try it out with him. That the automobile was tried out thoroughly on the trip and also around the town of Ayden, and, after a thorough trial and demonstration on the part of the plaintiff, the car being demonstrated by the Turnage Motor Company by one of it's salesmen, the plaintiff purchased said Nash car."

The defendant denied it sold plaintiff the car, and also denied any negligence and set up the plea of contributory negligence. At the close of plaintiff's evidence, upon motion of defendant for judgment as in case of nonsuit, the court below sustained the motion. The plaintiff excepted, assigned error and appealed to this Court.

Upon a careful review of the evidence, which it is unnecessary to set forth, we think the judgment of the court below correct.

Affirmed.

A. D. HARRELL v. B. G. WILLIS, TRADING AS ALBEMARLE NAVIGATION COMPANY.

(Filed 7 October, 1931.)

CIVIL ACTION, before *Cranmer, J.*, at April Term, 1931, of HERTFORD.

The evidence tended to show that on 4 February, 1929, the defendant entered into an agreement with the Atlantic Coast Line Railroad Company to the effect that said defendant would pay one-half of the salary of the station agent and other station forces maintained by said railroad at Tunis, North Carolina. It was further provided that the agreement could be terminated by either party on ninety days written notice. The plaintiff was employed by the railroad company as agent at Tunis, North Carolina. At the trial it was agreed that the trial judge could find the facts and in pursuance of such agreement, the court found that the

contract was terminated on 20 March, 1930, and thereupon adjudged that the plaintiff was entitled to recover the salary from 1 April, 1930, to 18 June, 1930, it appearing that the plaintiff had been paid to 1 April, 1930.

From the foregoing judgment the defendant appealed.

C. Wallace Jones for plaintiff.
W. D. Pruden for defendant.

PER CURIAM. A careful examination of the record and briefs of the parties leads to the conclusion that the ruling of the trial judge was correct.

Affirmed.

J. S. AYERS AND JESSE KEEL, TRADING AS J. S. AYERS AND COMPANY, v. L. S. CURTIS AND WIFE, MINNIE CURTIS.

(Filed 7 October, 1931.)

APPEAL by plaintiffs from *Moore, Special Judge,* at June Special Term, 1931, of MARTIN.

Civil action to recover for goods sold and delivered during the years 1928 and 1929.

Judgment in favor of the plaintiffs was rendered against L. S. Curtis, but the court directed a nonsuit as to Mrs. Minnie Curtis, from which the plaintiffs appeal, assigning error.

Jos. W. Bailey for plaintiffs.
B. A. Critcher, J. C. Smith and A. R. Dunning for defendants.

PER CURIAM. The plaintiffs, having failed to make out a case against Mrs. Minnie Curtis, were properly nonsuited as to her.

Affirmed.

J. M. TEMPLETON, JR., v. TOWN OF CARY.

(Filed 14 October, 1931.)

APPEAL by plaintiff from *Moore, Special Judge,* at Second March Term, 1931, of WAKE.

Civil action to redeem land sold under consent judgment and mortgage.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. Demurrer sustained. Plaintiff appeals.

W. T. Shaw and R. B. Templeton for plaintiff.
Clyde A. Douglass for defendant.

PER CURIAM. The judgment is correct.
Affirmed.

TOWN OF CARY v. J. M. TEMPLETON, JR.

(Filed 14 October, 1931.)

MOTION and petition to vacate *lis pendens* and to enjoin the defendant from further contesting matters settled by consent judgment filed herein, *Town of Cary v. Templeton,* 198 N. C., 604, 152 S. E., 797. Motion allowed. Defendant appeals.

Clyde A. Douglass for plaintiff.
W. T. Shaw and R. B. Templeton for defendant.

PER CURIAM. There is no valid exceptive assignment of error appearing on the record.
Affirmed.

MRS. J. G. COX v. A. L. HYATT ET AL.

(Filed 14 October, 1931.)

APPEAL by defendants from *Grady, J.,* at February Term, 1931, of LENOIR. No error.

This is an action for trespass, involving title to a certain lot or parcel of land situate in the city of Kinston, N. C., and described in the complaint.

Plaintiff alleges that she is the owner and is in the possession of said lot or parcel of land, and that defendants have wrongfully and unlawfully trespassed on said land. This allegation is denied by the defendants, who allege in their further answer to the complaint that they are the owners and in the possession of a portion of the land described in the complaint, and that plaintiff has wrongfully and unlawfully trespassed thereon.

The issues submitted to the jury were answered in accordance with the contentions of the plaintiff.

From judgment that plaintiff is the owner and is entitled to the possession of the land described in the complaint, and that she recover of the defendants the amount assessed by the jury as her damages, resulting from the trespass on said land by the defendants, the defendants appealed to the Supreme Court.

Rouse & Rouse, and Wallace & White for plaintiff.
Shaw & Jones for defendants.

PER CURIAM. This action arose out of a controversy between the parties as to the location of the land described in certain deeds under which plaintiff claims title to the land described in the complaint. The evidence offered by plaintiff tended to show that the land described in the complaint is the identical land described in the deeds. The evidence offered by defendants tended to show the contrary. This conflicting evidence was submitted to the jury under a charge which was free from error. Defendants' assignments of error on their appeal to this Court cannot be sustained.

The evidence offered by plaintiff and admitted subject to defendants' exceptions tended to identify the land described in the deeds under which plaintiff claims title as the land described in the complaint. This evidence was competent and was properly admitted.

Defendants' motion for a new trial, made in this Court, on the ground of newly discovered evidence, has been duly considered. The motion is denied. The newly discovered evidence, if competent, is merely cumulative. The judgment is affirmed.

No error.

J. S. AYERS AND JESSE KEEL, TRADING AS J. S. AYERS AND COMPANY, v. LAWRENCE BOWEN AND MILLIE J. BOWEN.

(Filed 21 October, 1931.)

CIVIL ACTION, before *Harris, J.*, at March Term, 1931, of MARTIN.

This action was instituted by the plaintiff as a claim and delivery action for certain personal property. The defendant pleaded a general denial and counterclaim. The pleadings filed by the parties resulted in an action for accounting. Issues were submitted to the jury and answered in favor of defendant. There was judgment for defendant upon the counterclaim and the plaintiff appealed.

Jos. W. Bailey for plaintiff.
B. A. Critcher for defendant.

PER CURIAM. The evidence is conflicting and uncertain, and while the testimony of the defendant is susceptible of more than one interpretation, the jury accepted the defendant's version of the controversy, and the verdict and judgment thereon is determinative of the rights of the parties.

Affirmed.

NORFOLK NATIONAL BANK OF COMMERCE v. F. M. SIMMONS.

(Filed 21 October, 1931.)

APPEAL by plaintiff from *Devin, J.*, at January-February Term, 1931, of CRAVEN.

Civil action to recover on promissory note alleged to have been executed by the defendant to the First National Bank of New Bern, duly transferred and endorsed to the plaintiff for a valuable consideration before maturity and without notice of any defect or equity, constituting the plaintiff a holder thereof in due course.

Upon denial of liability to plaintiff and equities set up against the receiver of the First National Bank of New Bern, the defendant asked that said receiver be made a party to this action. Motion allowed. Plaintiff appeals.

W. H. Lee for plaintiff.
Warren & Warren and R. E. Whitehurst for defendant.

PER CURIAM. Dismissed on authority of *Trust Co. v. Whitehurst, ante,* 504.

Appeal dismissed.

STATE v. LATHINGHOUSE.

(Filed 21 October, 1931.)

APPEAL by defendant from *Devin, J.*, at June Term, 1931, of CARTERET. No error.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.
W. B. R. Guion for defendant.

PER CURIAM. The defendant was convicted of involuntary manslaughter. The State's evidence tended to show that he unintentionally caused the death of Glennie Lewis by operating an automobile on a public highway with culpable negligence. The defendant's evidence tended to show that the injury resulted from unavoidable accident. The contentions of the parties were clearly presented to the jury, and the charge of the court explained the law as declared in *S. v. Rountree,* 181 N. C., 535, and the cases therein cited. We find

No error.

W. H. H. JONES, ADMINISTRATOR OF RUSSELL JONES, DECEASED, v. W. L. BAGWELL.

(Filed 21 October, 1931.)

APPEAL by plaintiff from *Cowper, Special Judge,* at April Term, 1931, of WAKE. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, caused, as alleged in the complaint, by the negligence of the defendant.

Plaintiff's intestate, 37 years of age, undertook, in the night time, to cross Hillsboro Street, at or near its intersection with West Street, in the city of Raleigh. He left the curb on the south side of Hillsboro Street, and before he reached the curb on the north side of said street, he was struck and fatally injured by an automobile owned and driven by defendant in a westerly direction on Hillsboro Street. He died within a few hours after he was injured, his death resulting from his injuries.

It is alleged in the complaint that at the time plaintiff's intestate was struck and injured, defendant was driving his automobile at an unlawful rate of speed, and in a careless and negligent manner. This allegation is denied in the answer. Defendant alleges that the death of plaintiff's intestate was caused by an unavoidable accident.

At the close of the evidence for the plaintiff, defendant moved for judgment as of nonsuit. This motion was allowed and plaintiff excepted.

From judgment dismissing the action, plaintiff appealed to the Supreme Court.

Pou & Pou and J. L. Emanuel for plaintiff.

Clyde A. Douglass and R. N. Simms for defendant.

PER CURIAM. There was no direct evidence at the trial of this action tending to sustain the allegations of the complaint with respect to the rate of speed at which, or in the manner in which defendant was driving his automobile at the time plaintiff's intestate was struck and fatally injured. Plaintiff contends on his appeal to this Court that the evidence tends to show facts and circumstances from which the jury could have reasonably inferred that defendant was negligent as alleged in the complaint. A careful consideration of all the evidence fails to sustain this contention. All the evidence shows that the unfortunate death of plaintiff's intestate was the result of an unavoidable accident, for which defendant was not responsible. There was no error in the judgment dismissing the action. It is

Affirmed.

FEDERAL RESERVE BANK OF RICHMOND v. E. H. MEADOWS AND G. S. ATTMORE.

(Filed 21 October, 1931.)

APPEAL by plaintiff from *Devin, J.*, at January-February Term, 1931, of CRAVEN.

Civil action to recover on a 60-day, negotiable, promissory note for $3,500, alleged to have been executed by E. H. Meadows to the First National Bank of New Bern, endorsed by G. S. Attmore, duly transferred and endorsed to the plaintiff for a valuable consideration before maturity and without notice of any defect or equity, constituting the plaintiff a holder thereof in due course.

The defendants answered, alleging that the plaintiff is not the real party in interest, but is acting for the receiver of the First National Bank of New Bern in undertaking to enforce payment of said note; that the defendants have a counterclaim against said receiver for more than the amount of the note; whereupon they ask that the receiver of the payee bank be made a party. Motion allowed. Plaintiff appeals.

M. G. Wallace and W. H. Lee for plaintiff.
W. B. R. Guion for defendants.

PER CURIAM. Dismissed on authority of *Trust Co. v. Whitehurst, ante,* 504.

Appeal dismissed.

J. G. CHAMBERS v. WILLIAM BASS.

(Filed 28 October, 1931.)

APPEAL by plaintiff from *Devin, J.*, at April Term, 1931, of PERSON.

Civil action to enforce agricultural lien in the sum of $149.74 for supplies sold and delivered. The defendant pleaded payment in full and overpayment to the amount of $4.15, for which counterclaim was set up.

Verdict and judgment for the defendant for the amount of his counterclaim, from which the plaintiff appeals, assigning errors.

B. I. Satterfield for plaintiff.
Nathan Lunsford for defendant.

PER CURIAM. There is no valid exceptive assignment of error appearing on the record. The verdict and judgment will be upheld.

No error.

C. E. POINDEXTER v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 28 October, 1931.)

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

The burden of showing error on appeal is on the appellant, it being presumed that the judgment of the lower court is correct, and where the appellant fails to overcome this presumption the judgment will be affirmed.

APPEAL by plaintiff from *Cranmer, J.*, at July Term, 1931, of LEE.

Civil action to recover damages for an alleged negligent burning of about 35 acres of plaintiff's plantation and timber land.

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

H. M. Jackson for plaintiff.
Robinson, Downing & Downing for defendant.

PER CURIAM. The plaintiff on his appeal to this Court has failed to overcome the presumption against error. The testimony of his witnesses falls short of the desired result on appeal, because of its indefiniteness and uncertainty as to the origin of the fire.

The burden is on appellant to show error. It is not presumed. *Jackson v. Bell, ante,* 336; *Bailey v. McKay,* 198 N. C., 638, 152 S. E., 893.

Affirmed.

WILMINGTON CAPE FEAR CORPORATION v. CAPE FEAR HOTEL COMPANY, INCORPORATED, W. R. BARRINGER AND L. S. BARRINGER.

(Filed 28 October, 1931.)

Appeal and Error J d—Where Supreme Court is divided the judgment of the lower court will be affirmed.

Upon an even division of opinion of the Supreme Court on appeal, one *Justice* not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants from *Midyette, J.*, at May Term, 1931, of NEW HANOVER. Affirmed.

K. O. Burgwin and Carr, Poisson & James for plaintiff.
Rose & Lyon for defendants.

PER CURIAM. *Justice Clarkson* not sitting and the other *Justices* being evenly divided in opinion, the judgment of the Superior Court is affirmed without becoming a precedent.

Affirmed.

MARGIE BALDWIN, ADMINISTRATRIX OF DANIEL BALDWIN, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 October, 1931.)

APPEAL by plaintiff from *Daniels, J.*, and a jury, at May Term, 1931, of CUMBERLAND. No error.

This is an action for actionable negligence, brought by plaintiff against defendant. The defendant denied negligence and set up the plea of contributory negligence. Margie Baldwin was duly appointed administratrix of Daniel Baldwin. Her intestate was killed by defendant Railroad Company in a collision about ten o'clock at night in Fayetteville, N. C., 2 May, 1930. Plaintiff's intestate was killed by defendant's freight train moving northwardly on the east main line along the middle of Winslow Street at the intersection with Franklin.

The issues submitted to the jury were as follows:

"1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: No.

2. Did the plaintiff's intestate by his own negligence contribute to his death, as alleged in the answer? Answer: .....

3. What damages, if any, is the plaintiff's intestate entitled to recover of the defendant? Answer: ....."

The jury answered the first issue "No." The court below rendered judgment on the verdict for defendant. The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Dye & Clark for plaintiff.
Rose & Lyon for defendant.

PER CURIAM. We have read the record and briefs of the litigants with care. We have heard the able attorneys argue the case before us. We have gone over the exceptions and assignments of error made by plaintiff and read the charge of the court below. We think the charge correct, and we see no new or novel proposition of law presented on the record. The controversy between the litigants was mainly questions of fact. The jury has decided with the defendant and we see no legal reason to disturb the judgment.

No error.

CITY OF WINSTON-SALEM v. W. S. SHEPHERD, SR., ET AL.

(Filed 4 November, 1931.)

APPEAL by plaintiff from *Warlick, J.*, at June Term, 1931, of FORSYTH. Affirmed.

Parrish & Deal for plaintiff.
J. M. Wells, Jr., for W. S. Shepherd and wife.
Manley, Hendren & Womble for receiver.

PER CURIAM. This is an action to foreclose a tax sales certificate. When the case came on for hearing a trial by jury was waived and the court found certain facts and rendered judgment thereon in behalf of defendants. This judgment was given in deference to the case of *Rexford v. Phillips,* 159 N. C., 213; *Stone v. Phillips,* 176 N. C., 457; and *Phillips v. Kerr,* 198 N. C., 252. The plaintiff admits that these cases are controlling unless there are local statutes which justify a judgment for the plaintiff. The statutes referred to are Public-Local Laws 1923, chap. 502, and Private Laws 1915, chap. 180. We are of opinion that an analysis of these statutes does not take the present case out of the principle laid down in the cases above cited with respect to the listing of property for taxation. The judgment is therefore

Affirmed.

DEPENDENTS OF W. W. CANTER, DECEASED, v. SURRY COUNTY BOARD OF EDUCATION AND MARYLAND CASUALTY COMPANY.

(Filed 4 November, 1931.)

Master and Servant F b—Where there is no causal relation between the employment and the injury compensation is correctly denied.

Where the evidence in a proceeding for compensation under the Workmen's Compensation Act fails to disclose any causal relation between the accident and the employment, compensation is correctly denied, it being necessary that the injury should arise out of the employment to entitle the injured employee to compensation.

APPEAL by dependents of plaintiff from *Shaw, J.*, at July Term, 1931, of SURRY. Affirmed.

The hearing commissioner found the facts and the conclusion of law was to the effect that W. W. Canter's dependents could not recover. Upon appeal to the full Commission, the findings of fact and conclusion of law before the hearing Commissioner were affirmed, denying compensation. Appeal was taken to the Superior Court, and the judgment of the court below is as follows: "It is ordered and adjudged and decreed that the judgment of the Industrial Commission is hereby in all things confirmed and the petitioners in this cause are denied any compensation in this action; and that the defendants, the board of education and the Maryland Casualty Company, go without day." The dependents of W. W. Canter, deceased, excepted, assigned error to the judgment as signed, and appealed to the Supreme Court.

Folger & Folger for dependents.
McMichael & McMichael for defendants.

PER CURIAM. The only material exception and assignment of error is to the testimony of Dr. M. S. Martin. We do not think it necessary to pass upon the competency of this evidence.

Public Laws 1929, chap. 120, sec. 2(f), (Workmen's Compensation Act) is as follows: "'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 where it results naturally and unavoidably from the accident." See, also, sec. 4.

On all the evidence appearing in the record, we think the death of W. W. Canter, the employee of defendant Surry County Board of Education, was not the result of an "injury by accident arising out of and in the course of the employment." There was no causal relation between the accident and the employment. The judgment below is

Affirmed.

SECURITY FINANCE COMPANY, INCORPORATED, v. M. E. ROBINSON AND T. R. ROBINSON, TRADING AS M. E. ROBINSON AND BROTHER.

(Filed 10 November, 1931.)

CIVIL ACTION, before *Sinclair, J.*, at May-June Term, 1931, of WAYNE.

The plaintiff instituted an action against the defendants upon certain promissory notes given for the purchase price of radios and radio equipment. The notes were payable to the Brenard Manufacturing Company, and it was alleged that they were duly endorsed to the plaintiff and that the plaintiff was a holder thereof in due course. The defendant offered evidence to the effect that the property was worthless. Issues were submitted to the jury and answered in favor of the defendant.

From judgment upon the verdict the plaintiff appealed.

O. N. Lovelace for plaintiff.

Dickinson & Freeman and W. S. O'B. Robinson for defendant.

PER CURIAM. The trial judge instructed the jury correctly upon all phases of the law involved in the controversy. Indeed there is no exception to the charge as given. Consequently, the trial of the cause was narrowed to the determination of issues of fact, and hence the verdict determines the merits of the action.

No error.

JOHN FRIES BLAIR, RECEIVER OF L. LEFKOWITZ, TRADING AS SOUTHERN LOAN OFFICE v. PATRIOTIC INSURANCE COMPANY OF AMERICA, (NOS. 1812 AND 1887), AND JOHN FRIES BLAIR, RECEIVER OF L. LEFKOWITZ, TRADING AS SOUTHERN LOAN OFFICE v. SOUTHERN HOME INSURANCE COMPANY OF THE CAROLINAS (NO. 1818).

(Filed 10 November, 1931.)

APPEAL by plaintiff from *Oglesby, J.*, at September Term, 1931, of FORSYTH.

Civil actions instituted in the Forsyth County Court to recover on three fire insurance policies, consolidated for the purpose of trial and heard together.

The defenses interposed were that the policies in suit were void, because of the failure on the part of the assured to comply with "the iron safe clause" contained in each policy.

From a judgment of nonsuit entered at the close of plaintiff's evidence, an appeal was taken to the Superior Court of Forsyth County, where the judgment of the County Court was affirmed, and the plaintiff again appeals, assigning error.

Benet Polikoff and Ratcliff, Hudson & Ferrell for plaintiff.
John M. Robinson and Fred S. Hutchins for defendants.

PER CURIAM. Affirmed on authority of *Coggins v. Ins. Co.*, 144 N. C., 7, 56 S. E., 506, which is essentially on all-fours with the case at bar.

The cases of *Arnold v. Ins. Co.*, 152 N. C., 232, 67 S. E., 574, and *Mortt v. Ins. Co.*, 192 N. C., 8, 133 S. E., 337, cited and relied upon by plaintiff, are readily distinguishable.

Affirmed.

EDNA ELLIOTT v. BOARD OF COMMISSIONERS OF LEXINGTON.

(Filed 10 November, 1931.)

APPEAL by defendant from *Sink, J.*, at April Term, 1931, of DAVIDSON. No error.

Spruill & Olive for plaintiff.
Raper & Raper for defendant.

PER CURIAM. This is a civil action prosecuted by the plaintiff to recover damages for personal injury alleged to have been caused by the negligence of the defendant in allowing the ground wire on a power pole to become charged with electricity. The Lexington Moving Picture Company was made a party defendant, but at the close of the plaintiff's evidence its motion for nonsuit was granted.

The plaintiff lived on a lot contiguous to Second Avenue and Marble Alley. For a number of years the defendant has maintained a line of poles and wires to and in the alley. On one of the poles there was a ground wire which was not insulated. The plaintiff and her husband lived with her father and mother on the lot in question. The plaintiff's mother, Mrs. Harris, undertook to lead a cow from the barn into the alley by means of a chain connected with a leather halter which was fastened to the cow's head. Without fault on the part of Mrs. Harris the chain came in contact with the ground wire which was charged with

electricity and the current was transmitted to the chain. The plaintiff seeing that her mother had been shocked and incapacitated by the current sought to rescue her and in doing so was herself electrified and seriously injured. For this injury she brought suit and the jury answered the two issues of negligence and damages in her favor. Judgment was rendered for the plaintiff and the defendant excepted and appealed.

Upon an inspection of the appellant's assignments of error we find no satisfactory reason for granting a new trial. The principles applicable to the controversy are discussed in *Small v. Utilities Co.*, 200 N. C., 719, *Ramsey v. Power Co.*, 195 N. C., 788, and *McAllister v. Pryor*, 187 N. C., 832.

No error.

CHARLIE BELL, ADMINISTRATOR OF ALONZO BELL, v. GREAT ATLANTIC AND PACIFIC TEA COMPANY, N. J. WHITE, AND HORTON MOTOR LINES, INCORPORATED.

(Filed 10 November, 1931.)

APPEAL by plaintiff from *Warlick, J.*, at September Term, 1931, of DAVIDSON. Affirmed.

Walser & Walser for appellant.
Raper & Raper for appellee.

PER CURIAM. The plaintiff brought suit to recover damages for the wrongful death of his intestate Alonzo Bell. He moved for judgment by default and inquiry against the Great Atlantic and Pacific Tea Company for want of an answer. This defendant resisted the plaintiff's motion and moved for an extension of time for filing the answer. The clerk denied the defendant's motion for want of power to extend the time, gave judgment by default and inquiry, and retained the case upon the docket of the Superior Court for the assessment of damages. The defendant excepted and appealed. Judge Warlick found certain facts and in the exercise of his discretion granted the defendant's motion for the extension of time at which to file its answer.

The judgment is affirmed upon the authority of *McNair v. Yarboro*, 186 N. C., 111, and *Howard v. Hinson*, 191 N. C., 366.

Affirmed.

BERTHA NEBEL v. WILLIAM NEBEL.

(Filed 25 November, 1931.)

Appeal and Error J d—Where Supreme Court is divided the judgment of the lower court will be affirmed.

Upon an even division of opinion of the Supreme Court on appeal, one *Justice* not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Harding, J.*, at June Term, 1931, of MECKLENBURG. Affirmed.

This is an action brought by plaintiff against the defendant (1) for alimony without divorce (2) application for an allowance for subsistence *pendente lite*. 3 C. S., 1667.

T. L. Kirkpatrick and H. L. Taylor for plaintiff.
E. A. Hilker and B. G. Watkins for defendant.

PER CURIAM. The Court being evenly divided in opinion, one of the members, the *Chief Justice*, not sitting, the judgment of the Superior Court is affirmed and stands as the decision of this action, without becoming a precedent. *Gooch v. Western Union Tel. Co.*, 196 N. C., 823; *Tarboro v. Johnson*, 196 N. C., 824; *Parsons v. Board of Education*, 200 N. C., 88; *Durham v. Lloyd*, 200 N. C., 803.

Affirmed.

CITIZENS SAVINGS AND LOAN COMPANY v. J. C. WARREN, TRADING AS WARREN TRANSFER COMPANY.

(Filed 2 December, 1931.)

APPEAL by defendant from *Shaw, Emergency Judge*, at May Term, 1931, of MECKLENBURG. No error.

H. C. Jones and Brock Barkley for appellant.
A. B. Justice for appellee.

PER CURIAM. The plaintiff brought suit to recover the amount of premiums alleged to be due on several policies of insurance which it had procured for the benefit of and had delivered to the defendant. The exceptions relate entirely to instructions given the jury which in our opinion are free from error.

No error.

S. B. LACY v. J. B. HORTON.

(Filed 9 December, 1931.)

APPEAL by plaintiff from *Clement, J.*, at July Term, 1931, of AVERY. Affirmed.

Charles Hughes and W. C. Newland for plaintiff.
J. W. Ragland and Burke & Burke for defendant.

PER CURIAM. This is an action to recover damages for personal injury. The plaintiff, who was a deputy sheriff, served a *capias ad testificandum* on the defendant. The defendant requested the plaintiff to permit him to go to the county seat of Avery in his own car. He was unable to start the engine and requested the plaintiff to use the crank, and when the plaintiff undertook to do so the motor "back-fired" and caused the crank to strike and injure the plaintiff's hand and arm. At the close of the evidence the court dismissed the action as in case of nonsuit, and the plaintiff excepted and appealed.

Upon an inspection of the entire record we are of opinion that the judgment should be affirmed.

Affirmed.

J. J. WOOTTON v. R. D. MCGINNIS AND H. H. CANNON.

(Filed 9 December, 1931.)

APPEAL by defendant, H. H. Cannon, from *Harding, J.*, at January Term, 1931, of GASTON. No error.

This is an action to recover damages resulting from collisions between an automobile owned and driven by the plaintiff, and automobiles owned and driven by the defendants. The collisions occurred on the Wilkinson Boulevard, a State Highway, between the cities of Gastonia and Charlotte.

Plaintiff's automobile, while traveling along Wilkinson Boulevard, from Gastonia to Charlotte, was first struck and injured by the automobile owned and driven by the defendant, R. D. McGinnis. This defendant drove his automobile from a side road into Wilkinson Boulevard, while plaintiff's automobile was passing the intersection of the side road with the Boulevard. The jury found that the collision between plaintiff's automobile and the automobile owned and driven by the defendant, R. D. McGinnis, was caused by the negligence of said

defendant, and that plaintiff did not contribute to the injuries to his automobile by his negligence. Plaintiff's damages resulting from this collision were assessed at $75.00.

As the result of the collision between plaintiff's automobile and the automobile owned and driven by the defendant, R. D. McGinnis, plaintiff lost control of his automobile, which, however, proceeded along the Boulevard in the direction of the city of Charlotte. It was then struck and injured by the automobile owned and driven by the defendant, H. H. Cannon, which was approaching plaintiff's automobile on the Boulevard, from the direction of Charlotte. As the result of this collision, plaintiff sustained injuries to his person. The jury found that the collision between plaintiff's automobile and the automobile owned and driven by the defendant, H. H. Cannon, was caused by the negligence of said defendant and that plaintiff did not contribute to his injuries by his negligence. Plaintiff's damages resulting from this collision were assessed at $1,100.

From judgment that plaintiff recover of the defendant, R. D. McGinnis, the sum of $75.00, and from the defendant, H. H. Cannon, the sum of $1,100, the defendant, H. H. Cannon, appealed to the Supreme Court.

P. W. Garland for plaintiff.

J. Laurence Jones, J. L. DeLaney and Henry E. Fisher for defendant.

PER CURIAM. Assignments of error relied upon by defendant, H. H. Cannon, on his appeal to this Court, cannot be sustained. There was evidence sufficient to sustain the allegations of the complaint. This evidence was submitted to the jury by the court in a charge which is free from error. We do not deem it necessary to write an opinion in this appeal. The judgment is therefore affirmed without an opinion. C. S., 1416.

No error.

STATE v. WILL ELMORE.

(Filed 23 December, 1931.)

APPEAL by defendant from *Harding, J.*, at August-September Term, 1931, of MACON.

Criminal prosecution tried upon an indictment charging the defendant, and another, (1) with breaking and entering a garage, (2) with the larceny of "one Model T, 1927, Ford automobile," valued at $200, the property of E. O. Rickman, and (3) with receiving said automobile

knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

The case was submitted to the jury on the presumption that: "When goods are stolen, one found in possession so soon thereafter that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief." *S. v. Graves,* 72 N. C., 482; *S. v. McRae,* 120 N. C., 608, 27 S. E., 78.

Verdict: "Guilty on the third count in the bill of indictment."

Judgment: Eight months on the roads.

Defendant appeals, assigning errors.

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

George B. Patton and Edwards & Leatherwood for defendant.

PER CURIAM. The case is controlled by the decision in *S. v. Best,* 202 N. C., 9, and *S. v. Adams,* 133 N. C., 667, 45 S. E., 553.

New trial.

L. DALE THRASH v. C. B. ROBERTS AND REX S. SMATHERS, AND C. B. ROBERTS v. L. DALE THRASH AND REX S. SMATHERS.

(Filed 23 December, 1931.)

APPEAL by C. B. Roberts from *Harding, J.,* at June Term, 1931, of BUNCOMBE. Affirmed.

The above entitled actions were consolidated by consent and tried in the General County Court of Buncombe County. From judgment rendered by said court, C. B. Roberts appealed to the Superior Court of Buncombe County. The assignments of error on said appeal were not sustained.

From judgment affirming the judgment of the general county court, C. B. Roberts appealed to the Supreme Court.

Wells, Blackstock & Taylor for L. Dale Thrash, appellee.

Lincoln L. Kellogg for C. B. Roberts, appellant.

PER CURIAM. The assignments of error on this appeal are not sustained. There is no error in the judgment of the Superior Court.

We do not deem it necessary to file a written opinion in this appeal and therefore affirm the judgment without an opinion. C. S., 1416.

Affirmed.

W. P. ROSE ET AL. v. KITCHEN LUMBER COMPANY.

(Filed 23 December, 1931.)

APPEAL by plaintiffs from *Harwood, Special Judge,* at June Term, 1931, of GRAHAM.

Civil action for trespass.

From an adverse verdict and judgment thereon, the plaintiffs appeal.

T. M. Jenkins for plaintiffs.

Moody & Moody for defendant.

PER CURIAM. The record contains no exceptive assignment of error which can be sustained. The verdict and judgment, therefore, will be upheld.

No error.

STATE v. VAN SHOEMAKER, BEN BREWER AND WILL McLAIN.

(Filed 23 December, 1931.)

APPEAL by defendants from *Moore, J.,* at May Term, 1931, of IREDELL. No error.

Defendants were tried on an indictment for violations of the prohibition law of this State. N. C. Code of 1931, sec. 3411. There was a verdict of guilty as to each of the defendants.

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

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

P. P. Dulin and Lewis & Lewis for defendants.

PER CURIAM. Defendants' assignments of error on this appeal cannot be sustained. There was evidence tending to show that defendants are guilty as the State contended, at the trial. This evidence was submitted to the jury under a charge which is free from error. The judgment is affirmed.

No error.

CLYDE F. FLEMMING v. THE HOMESTEAD FIRE INSURANCE COMPANY OF BALTIMORE, MARYLAND.

(Filed 23 December, 1931.)

APPEAL by plaintiff from a judgment of *Stack, J.*, reversing a judgment of the general county court. From BUNCOMBE. Affirmed.

Edward H. McMahan for plaintiff.
R. R. Williams for defendant.

PER CURIAM. This is an action to recover an amount alleged to be due the plaintiff on a policy of insurance issued by the defendant on 3 August, 1929, indemnifying the assured against loss of an automobile by theft, robbery, pilferage, or fire. The Peoples Fire Insurance Company was permitted to intervene but it did not appeal from the judgment of the Superior Court.

In the general county court the defendant made the usual motions for nonsuit, which were denied. Issues were submitted to the jury and upon the verdict judgment against the defendant was given, as appears of record. The Superior Court adjudged that the action should have been dismissed as in case of nonsuit and remanded the cause for further proceedings. No rider was attached to the policy. The plaintiff excepted and appealed.

The policy contains the following provisions:

1. "This policy is made and accepted subject to the provisions, exclusions, conditions and warranties set forth herein or endorsed hereon, and upon acceptance of this policy, the assured agrees that its terms embody all agreements then existing between himself and this company or any of its agents relating to the insurance described herein, and no officer, agent or other representative of this company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached. This policy shall be void in event of violation by the assured of any agreement condition or warranty contained herein, or in any rider now or hereafter attached thereto."

2. "No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such insurance be valid and or collectible or not, covering such loss, which would attach if this insurance had not been affected."

3. "Unless otherwise provided by agreement in writing added hereto, and except as to any lien, mortgage or other encumbrance specifically set forth and described in paragraph D of this policy, this company shall not be liable for loss or damage to any property insured hereunder while subject to any lien, mortgage, or other encumbrance."

4. "No suit or action on this policy or for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the foregoing requirements."

An examination of the record leads us to the conclusion that the plaintiff is precluded from recovering by the terms of the policy both as to additional insurance and as to an encumbrance on the property unless there was a waiver by the defendant, and that there is not sufficient evidence of such waiver to support the answer to the fourth issue submitted to the county court:

Did the defendant, Homestead Fire Insurance Company, waive the breach, if any, by the plaintiff of conditions in the policy?

We are therefore of opinion that there was no error in the judgment of the Superior Court and that it should be affirmed. *Johnson v. Insurance Co., ante,* 362; *Greene v. Insurance Co.,* 196 N. C., 335; *Welch v. Insurance Co., ibid.,* 547; *Smith v. Insurance Co.,* 193 N. C., 446; *Roper v. Insurance Co.,* 161 N. C., 151; *Watson v. Insurance Co.,* 159 N. C., 639. Judgment

Affirmed.

GREEN RIVER MANUFACTURING COMPANY v. J. O. BELL ET AL.

(Filed 23 December, 1931.)

APPEAL by defendants from *Stack, J.,* at May Term, 1931, of HENDERSON.

Civil action to determine the rights of the parties under a consent judgment, tried upon the following issue:

"Is the plaintiff the owner of an easement or privilege in the water line, ditch, flume or conduit described in the complaint and entitled to get water from the reservoir on the lands of J. O. Bell, Jr., by virtue of the consent judgment rendered at the May-June Term, 1928, in the various cases then determined between Green River Manufacturing Company, F. D. Bell, J. O. Bell, and J. O. Bell, Sr., as alleged in the complaint? Answer: Yes."

Judgment on the verdict for plaintiff, from which the defendants appeal.

Ewbank, Whitmire & Weeks for plaintiff.
Shipman & Arledge for defendants.

PER CURIAM. No error has been shown in the trial court's interpretation of the consent judgment. This is all the case presents. The principles applicable were discussed in *Blankenship v. Dowtin*, 191 N. C., 790, 133 S. E., 199.

No error.

ALVIN BERRY v. DREXEL FURNITURE COMPANY AND GEORGIA CASUALTY COMPANY.

(Filed 23 December, 1931.)

APPEAL by defendants from *Sink, J.*, at July Term, 1931, of McDOWELL. Affirmed.

This is a proceeding begun before the North Carolina Industrial Commission for compensation under the provisions of the Workmen's Compensation Act of this State. Chapter 120, Public Laws, 1929; chapter 133A, N. C. Code of 1931.

Claimant was injured on 17 December, 1929, while engaged in work as a carpenter, constructing a dry-kiln for the Drexel Furniture Company at Morganton, N. C. He was employed to do said work by Everett Mull, who had undertaken to construct the dry-kiln under a contract with the Drexel Furniture Company. It was admitted that claimant's injuries were the result of an accident, and that they arose out of and in the course of his employment.

Claimant contended that Everett Mull, by virtue of his contract with the Drexel Furniture Company, was an employee or agent of said company, and employed him to do the work in which he was engaged at the time he was injured as such agent; and that for this reason he was an employee of the Drexel Furniture Company, and entitled to compensation under the provisions of the North Carolina Workmen's Compensation Act from the defendants, Drexel Furniture Company, and its insurance carrier, Georgia Casualty Company.

Defendants contended that Everett Mull by whom claimant was employed at the time he was injured, was an independent contractor with respect to the work in which claimant was engaged when he was injured; and that for this reason claimant was the employee of Everett Mull, and not of the defendant, Drexel Furniture Company, and is, therefore, not entitled to compensation from the defendants.

The proceeding was heard by Commissioner Dorsett, at Morganton, N. C., on 24 July, 1930. At this hearing the Commissioner found as a

fact, that "Everett Mull, at the time of the accident suffered by the claimant, was an employee of the Drexel Furniture Company and not an independent contractor." Upon this and other findings of fact to which there were no exceptions, and upon his conclusions of law, Commissioner Dorsett made an award directing the defendants to pay to the claimant the sums of money as therein set out. Upon defendants' appeal from this award to the full Commission, the findings of fact and conclusions of law of Commissioner Dorsett were reviewed and approved. The award made by him was affirmed.

Defendants' appeal from the award of the full Commission was heard by Judge Sink. At this hearing the findings of fact, conclusions of law and award of the full Commission were approved and affirmed. Defendants appealed to the Supreme Court.

S. J. Ervin and S. J. Ervin, Jr., for claimant.
Winborne & Procter for defendants.

PER CURIAM. The only question of law presented by this appeal is whether there was evidence at the hearing before Commissioner Dorsett, sufficient to support his finding of fact that Everett Mull was an employee and not an independent contractor of the defendant, Drexel Furniture Company, with respect to the construction of the dry-kiln on which claimant was at work at the time he was injured. We are of the opinion that this question must be answered in the affirmative. *Gadsden v. Craft,* 173 N. C., 418, 92 S. E., 174. Claimant was, therefore, an employee of the defendant, and is entitled to compensation from the defendant and its insurance carrier, Georgia Casualty Company.

The judgment of the Superior Court affirming the award of the Industrial Commission is

Affirmed.

JAMES STEPP v. R. P. ROBINSON.

(Filed 23 December, 1931.)

APPEAL by defendant from *Schenck, J.,* at April-May Term, 1931, of HENDERSON.

Civil action for damages, tried upon the following issues:

"1. Did the defendant, R. P. Robinson, prevent the plaintiff, James F. Stepp, from reading the deed, Exhibit C, by means of fraud, as alleged in the complaint? Answer: Yes.

"2. If so, what amount of damage is the plaintiff, James F. Stepp, entitled to recover of the defendant, R. P. Robinson? Answer: $2,500."

From a judgment on the verdict, the defendant appeals, assigning errors.

W. R. Sheppard and O. V. F. Blythe for plaintiff.
R. S. Eaves and Stover P. Dunnagan for defendant.

PER CURIAM. The record contains no exceptive assignment of error which can be sustained. On the trial, the case resolved itself into a contest over disputed facts. The verdict speaks for itself.

In the absence of demonstrated error, the verdict and judgment will be upheld.

No error.

C. F. LEWIS, JR., BY HIS NEXT FRIEND, C. F. LEWIS, v. BASKETERIA STORES, INCORPORATED.

(Filed 23 December, 1931.)

CIVIL ACTION, before *Clement, J.*, at April Term, 1931, of FORSYTH.

The plaintiff, a boy nine years of age, instituted by his next friend, an action against the defendant for damages for personal injury sustained by collision with a truck owned by the defendant and operated by one of its agents. The action was instituted in the county court and three issues were submitted to the jury, as follows:

1. "Was Norman Casper operating the truck of the defendant within the scope of and in the execution of his authority?"

2. "If so, was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?"

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

The issues were answered by the jury in favor of plaintiff and damages assessed in the sum of $400. Thereupon the defendant appealed to the Superior Court. The Superior Court judge overruled the exceptions filed by the defendant and affirmed the judgment of the county court, and the defendant appealed to this Court.

John D. Slawter for plaintiff.
Parrish & Deal for defendant.

PER CURIAM. The evidence tended to show that the plaintiff was struck while standing on the sidewalk by a truck belonging to the de-

fendant. The truck was used for delivering groceries in the due course of business. The driver of the truck left it to deliver a package of groceries and thereupon another employee of the defendant, who accompanied the driver in order to point out the homes of customers, undertook to turn the truck around in the street, and in so doing, ran it upon the sidewalk and into the plaintiff.

These facts invoke the principle of law declared in *Jeffrey v. Mfg. Co.*, 197 N. C., 724, 150 S. E., 503, which is decisive of the merits of this case.

Affirmed.

C. E. HOLLOWAY v. AMERICAN COTTON MILLS, INCORPORATED, AND L. F. SCURRY.

(Filed 23 December, 1931.)

APPEAL by plaintiff from *Harding, J.*, and a jury, at May Term, 1931, of GASTON. No error.

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

"1. Did the defendant Scurry unlawfully assault the plaintiff, as alleged in the complaint? Answer: No.

2. Did the defendant American Cotton Mills, Incorporated, through their agent, unlawfully assault the plaintiff as alleged in their complaint? Answer: .....

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

Upon the verdict the court below rendered judgment for the defendants. Plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

S. R. Cleary and J. E. Hamme for plaintiff.
Stonewall Jackson Durham for defendants.

PER CURIAM. This was a civil action for damages growing out of the alleged wilful, wanton and malicious assault committed, upon the plaintiff by one of the defendants, L. F. Scurry, individually and as agent of the codefendant American Cotton Mills, Incorporated. The alleged assault having been committed by the defendant Scurry, while in the discharge of his duties as overseer of the defendant American Cotton Mills, Incorporated, during his regular hours of employment and on the premises of the American Cotton Mills, Incorporated, allegedly

in an effort to expel the plaintiff from the premises, in which plaintiff sustained serious bodily injuries.

The defendant Scurry in answer, admitted that he was an overseer of the American Cotton Mills, Incorporated, but denied that any part of his duties authorized him to assault the plaintiff, and as a defense to the action alleged that he did nothing more than defend himself against a murderous assault of the plaintiff made on him without cause with a knife.

The defendant American Cotton Mills, Incorporated, in answer says that "It is true that the defendant Scurry was employed as an overseer of the American Cotton Mills, Incorporated, and at the time set forth in the complaint was in charge of the American Cotton Mills Department, but it is denied that the said Scurry was authorized by this defendant to assault the plaintiff or that the said Scurry did in fact assault the plaintiff; and if in fact the said Scurry did assault the plaintiff he was acting wholly apart from any duty that was his by reason of his employment by this defendant."

From the evidence in the court below, the jury was fully justified in rendering the verdict they did. Upon careful review of the entire record and reading the briefs of the parties to the controversy, we can see no prejudicial or reversible error in the conduct of the trial of the action in the court below.

No error.

DISPOSITION OF APPEALS FROM SUPREME COURT OF NORTH CAROLINA IN SUPREME COURT OF THE UNITED STATES

Southern Railway Company v. Hamilton and Seaboard Air Line Railroad Company v. Hamilton (200 N. C., 543). Petitions for writs of *certiorari* denied.

ADDRESS

BY A. D. MACLEAN

ON

PRESENTATION OF THE PORTRAIT

OF

STEPHEN CAMBRELENG BRAGAW

TO THE

SUPREME COURT OF NORTH CAROLINA

ON TUESDAY, 1 SEPTEMBER, 1931

The presentation to this Court of the portrait of a departed friend and former law partner is attended with sentiments both of satisfaction and of sorrow.

Stephen Cambreleng Bragaw, the second of a family of eight children, was born in the town of Washington, Beaufort County, North Carolina, 22 February, 1868, and died there in his sixty-second year, 8 January, 1930. His father was John Goldsmith Bragaw, a native of Long Island, New York, who came to North Carolina in 1859, and in the War Between the States cast his fortune with his adopted State. In 1864, he married Ann Cambreleng Hoyt, of Washington, descendant of Ann Caldon, a native of Scotland, who married Colonel John Patten, also of Beaufort County and an officer in the Revolutionary War. From this marriage of Ann Caldon and John Patten was descended Churchill Caldon Cambreleng, who removed to New York, became a member of Congress from New York City, was Chairman of the Ways and Means Committee and of the Committee on Foreign Affairs, and in 1840 was appointed Minister Plenipotentiary to Russia. His brother, Stephen Cambreleng, was the maternal uncle for whom Stephen Cambreleng Bragaw was named, and was a distinguished lawyer and jurist of New York City.

The Bragaw family traces its origin in America to Bourgon Bracard, a French Huguenot, who settled on Long Island in 1726, where some of his descendants have since lived in the home built by him. They also were active partisans in the Cause of Independence and attained prominence in the campaigns conducted in that section during the Revolution.

This sketch of Stephen Bragaw's honorable, and even distinguished, ancestry is not out of place here, because it was part of the man himself. Always he took a proper pride in it, and his daily walk and conversation, his contact with his fellow man and the friction inevitable to the

practice of his profession were tempered by the consciousness of a background and of the blood of gentle folk in his veins. Your Honors, before whose Forum all men are equal in respect of their legal rights, will not take it amiss, therefore, that I have called attention to his gentility, which in his case was both a quality and an ornament. This quality was emphasized also in the place and in the period of his upbringing, but it implies nothing of ease or of wealth, nor any lack of diligence or necessity, as may be understood at once upon recollection of the fact that he was born and lived in a small town, which but a short time before had been nearly destroyed by the besom of war and its well-to-do citizens reduced almost to penury. His parents were economical, industrious people, and, while as a boy he may not always have found working in the garden, caring for the poultry and milking the cows congenial tasks, he certainly was not above them, and to perform them thoroughly was part of his valuable training.

It may be of special interest to those whose acquaintance was limited to his later years to know that as a youth he was unusually strong and virile, fond of all out-of-door sports, particularly baseball and football, and that he was made Captain of the first team at the University of North Carolina to play intercollegiate football. But he was more than an athlete, and early in life developed a love of literature, which was fostered by his home environment, and the private schools of his home town, with a year at Trinity School, Chocowinity, qualified him as an alternate to pass the examinations at Annapolis, although upon failure of the regular appointee his mother objected to a naval career, and consequently he returned to his home and worked in a store, studying at night, until he was able to enter the University, where he remained for three years, but did not graduate because of the necessity of going to work again. At the University, besides going in for athletics, he was a leader in the intellectual and social life of the student body, joined the D. K. E. Fraternity and was one of its outstanding members. At the end of his third year there, he taught school at Pollocksville, Jones County, was a teacher in the New Bern Collegiate Institute from 1889 until the summer of 1891, when in two months and ten days at Chapel Hill he completed the full law course then required and was licensed by this Court to practice law in September, 1891. With twenty-five dollars saved up, he at once began the practice of law in New Bern, and in 1893 was elected its City Attorney. In the same year he was married to Miss Maude Haywood Amyette, of New Bern, then and since one of the State's best known and most charming women, and with her as his helpmeet moved in 1894 to St. Louis, Missouri, as President of the Gilbert Elliott Collection Company, a position tendered

him as the result of some excellent legal work in New Bern, but which he had to give up because the climate there and overwork had impaired his health, inducing his return to Washington, North Carolina, in 1895, where he located and thereafter continued to reside.

He was not without honor in his own country, serving as Mayor in 1897-8, as City Attorney from 1900 to 1906, inclusive, as County Superintendent of Schools in 1902-3, and as State Senator from the Second Senatorial District in 1904. He was a member of the Episcopal Church and of the Masonic Fraternity, a Democrat in politics and a Trustee of the University. In 1912, Governor W. W. Kitchin appointed him Judge of the Superior Court from the First Judicial District, upon the resignation of Judge George W. Ward, and he was thereafter elected for the full term, but resigned in 1914 on account of his health, and resumed the practice of law in his home town. At different times he had as partners Collin H. Harding and Hallett S. Ward, and upon his resignation from the bench became a member of the firm of Small & McLean, discontinuing that connection several years prior to his death in order that he might devote himself more to associate and consultative employment with other attorneys than to the general practice, as also to conserve his health, which necessitated the closest attention and care by himself and his devoted wife.

So much in outline of Judge Bragaw's life, which little exceeded three score years and was cut off in the fullness of his mental powers, before the light of his glowing intelligence had been dimmed by physical infirmity. He was a student of the law—with him it was always a fresh subject—and he could cite the cases decided by this Court with a greater facility than any lawyer in his District. Thorough preparation was perhaps his outstanding characteristic, so much so that a former partner has said that he was fortunate in having a reasonably slow mind, but Judge Bragaw was much more than a mental plodder and routine practitioner. Not only learned in the law, he was a fine examiner and a brilliant advocate and in the full tide of argument before court and jury he was a master of diction and of eloquence studded with gems of classical allusion and apt quotation, with now and then a humorous sally. Even more, he knew not only what the Court had decided and where to find it, but why and whether it had rightly decided because he was deeply versed in the philosophy of the law, in its origin and development, and its proper application to a given state of facts. It followed, therefore, that in his later years he became a lawyer's lawyer and was frequently consulted or retained with other lawyers in doubtful cases. But any estimate of him as a lawyer is incomplete without reference to his constant courtesy to the court, to his associates and to his

adversaries, including parties and witnesses, and this courtesy, be it said, was not put on and off like a garment, but was an enduring quality of the man, part of his nature and inheritance, and he never discarded it himself nor failed to esteem it in others. From what has already been said, his fitness for judicial position also becomes apparent, and equipped as he was with smooth, easy manners, broad sympathy for those in distress and an extensive acquaintance with human nature, his term on the bench of the Superior Court was an honor to him and to the profession, and a satisfaction to his family and friends, in which he and they took a just pride, and the incidents of which he liked to recall in after years. While his term was short, it was long enough to justify the impression that he was one of the best balanced and best equipped men who have sat on that bench, and the distinction and experience it added to his learning and capacity led some of his friends to propose that his connection with the University Law School would be helpful to that institution, but this never happened, and he continued in active practice for the remainder of his life.

As a man Judge Bragaw was likable, kindhearted, fond of the amenities, of social contact and intercourse with his friends, devoted, I need hardly say, to his father, who survived his mother by many years, and to his brothers and sister, and reluctant always to leave his own fireside. His marriage was not blessed with children, but to the day of his death he and his wife, who had supplied and tended his wants and whims, were lovers, and this High Court, chiefly occupied with practical concerns, with prosaic cases and often with human nature at its worst, will not fail to understand the relationship that made him "Laddie" to her, nor misjudge the devotion to each other that they often expressed in poetry of tender sentiment. Living by the river which they loved to watch in the evening of their years, she awaits the summons to cross over and join him on the other side, and that due respect may be paid to his memory, she has asked me to present to Your Honors this portrait of an outstanding member of our profession, a learned and well poised judge, a true gentleman.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF THE LATE STEPHEN CAMBRELENG BRAGAW, IN THE SUPREME COURT ROOM, 1 SEPTEMBER, 1931

Stephen C. Bragaw was a "knight without fear and without reproach." No lawyer fought more valiantly than he, and none excelled him in the cultivation of the gentler virtues. Indeed, it may be said of him:

> "His life was gentle, and the elements
> So mix'd in him, that Nature might stand up
> And say to all the world, 'This was a man!' "

"No profession," says Mr. Robbins in his American Advocacy, "not even that of the doctor or preacher, is as intimate in its relationship with people as that of the lawyer. To the doctor the patient discloses his physical ailments and symptoms, to the preacher the communicant broaches as a general rule only those things that commend him in the eye of heaven, or those sins of his own for which he is in fear of eternal punishment, but to his lawyer he unburdens his whole life, his business secrets and difficulties, his family relationships and quarrels and the skeletons in his closet. To him he often commits the duty of saving his life, of protecting his good name, of safeguarding his property, or regaining for him his liberty. Under such solemn and sacred responsibilities, the profession feels that it owes to the people who thus extend to its members such unparalleled confidence the duty of maintaining the honor and integrity of that profession on a moral plane higher than that of the merchant, trader or mechanic." Similar thoughts were often expressed by Judge Bragaw.

We are fortunate in having this excellent portrait of the distinguished lawyer and judge who so worthily exemplified the ideals of the legal profession. The Marshal will hang it in its appropriate place among his peers as a worthy tribute to one who served well and ably his State and its people.

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ALIENS.

A Rights and Disabilities.

a Right to Sue in Courts of this State

1. A receiver appointed by a foreign nation for the estate of a friendly alien may be permitted by our courts to sue herein under the spirit of comity when there is nothing involved in the action that may be construed as against our public policy or the rights of our citizens, although a receiver appointed in a foreign jurisdiction has no extra territorial right to maintain an action in the courts of this State. *Van Kempen v. Latham*, 505.

2. Where the foreign receiver of a friendly alien has had turned over to him or in his possession under an order of court negotiable notes, properly endorsed, he may sue thereon in the spirit of comity in the courts of our State without special permission from our court therefor. *Ibid.*

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d Premature Appeals

1. Where one claiming as a holder in due course of a negotiable instrument by endorsement before maturity from the payee brings action on the note against the payer who claims that the plaintiff was not a holder in due course, and that he had made payment on the note to the payee which had not been credited, *Held:* an appeal will not lie from an order of the court before trial making the payee a party, it appearing that no harm had come to the plaintiff, and the appeal so taken will be dismissed as premature. *Trust Co. v. Whitehurst*, 504; *Bank v. Simmons*, 830; *Bank v. Meadows*, 832.

e Moot Questions

1. Where appeal presents only moot question it will be dismissed. *Finley v. Finley*, 1.

2. Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only a moot question, and will be dismissed. *Rousseau v. Bullis*, 12.

3. Appellate courts will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor give advisory opinions on constitutional questions. *Blackmore v. Duplin County*, 243; *McPherson v. Motor Sales Corp.*, 303.

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1. Where judgment by default for want of an answer has been rendered against a defendant, who has later died and her administrator

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appointed and ordered to be made a party, the administrator does not become a party until service of summons on him, and has no standing in court, but after service of summons he may appear and challenge the validity of the proceedings. *Jordan v. McKenzie*, 821.

D Effect of Appeal.

a Powers and Proceedings in Lower Court After Appeal

1. Where the trial court sets aside a verdict in his discretion as being against the weight of the evidence and the defendant excepts and notes an appeal, and later during the same term the case is again called for trial, *Held:* the defendant's prayer that further proceedings be stayed until the appeal previously taken could be determined is properly refused, the trial court having the right to set aside a verdict in his discretion at any time during the term while the matter is *in fieri*, and is justified in disregarding the attempted appeal from his order setting the verdict aside. *Goodman v. Goodman*, 794.

E Record.

c Form and Requisites of Transcript

1. Where the record purports to contain a case on appeal, but the same is not signed, and it does not appear that it has been served, and there is no judgment signed by the judge, although it appears that he signed the "entries of appeal," and the record evidence is conflicting as to material dates, the appeal will be dismissed. *Trust Co. v. Woltz*, 179.

2. Where no summons appears in the record in the case on appeal and there is nothing to show that the term of court was regularly held or that the cause was properly constituted in court the case will be dismissed under Rule 19. *Sanders v. Sanders*, 350.

b Matters Not Set Out in Record Deemed Correct

1. Where the charge of the trial court is not set out in the record it is presumed that the court correctly charged the law applicable to the facts. *Hunt v. Meyers Co.*, 636; *Carter v. Mullinax*, 783.

2. Where record does not set out evidence upon which court directed a verdict his ruling will not be held for error. *Reams v. Hight*, 797.

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1. Where there is no statement of case on appeal the Supreme Court is limited to correctness of judgment excepted to. *Boyd v. Walters*, 378.

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1. An exception only to the judgment signed is without merit on appeal when the verdict supports the judgment. *Sanders v. Sanders*, 350.

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2. Where the record contains no statement of case on appeal the Supreme Court is limited to the consideration of the judgment, the appeal being regarded as an exception thereto. *Boyd v. Walters*, 378.

3. An appeal to the Supreme Court is itself an exception to the judgment and to any other matters appearing upon the face of the record. *Dixon v. Osborne*, 489.

4. An unpointed or broadside exception to the charge of the trial court will not be considered on appeal. *S. v. Moore*, 618.

c Form and Requisites of Assignments of Error

1. Under the requirements of Rule 19 of Practice in the Supreme Court only exceptive assignments of error properly appearing of record are considered, and where no assignments of error appear in the statement of the case on appeal, but only purported assignments are added, after the case has been filed in the Supreme Court, alleging errors appearing on the face of the statement of case on appeal, the case will be dismissed for noncompliance with the rule. *Sanders v. Sanders*, 350.

2. Where there are no exceptions stated in the case on appeal, appearing of record, to support assignments of error, the assignments of error will not be considered on appeal. *Dixon v. Osborne*, 489.

3. Under the provisions of our Constitution, Art. IV, sec. 8, the Supreme Court on appeal may review only matters of law or legal inference, and it can exercise this jurisdiction only where the decision of the lower court is presented by assignments of error based upon exceptions duly taken, and where the appeal is taken solely to the judgment of the Superior Court affirming the judgment of the general county court the judgment will be affirmed where there is no error therein, and the Supreme Court will not consider assignments of error taken in the county court where the action of the Superior Court upon such assignments are not presented by exceptions duly entered in the Superior Court. *Bakery v. Ins. Co.*, 816.

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1. Where neither party has filed a brief the appeal will be dismissed. *Daniel v. Power Co.*, 681.

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a Of Interlocutory Orders and Injunctions

1. While the Supreme Court may review the evidence and findings of fact by the court below upon appeal in injunction proceedings, the presumption is that the judgment of the lower court is correct, with the burden of showing error on the appellant, and where the court does not find the facts and there is no request therefor, it is presumed that he found the proper and necessary facts to support the judgment. *Talking Pictures Corp. v. Electrical Research Products, Inc.*, 143.

APPEAL AND ERROR J—*Continued.*

b Of Matters in Discretion of Lower Court

1. Where in the trial of an action the court has refused the defendant's motion as of nonsuit, and after verdict and judgment has set aside the judgment as a matter of law for insufficiency of evidence, and upon appeal therefrom the Supreme Court remands the judgment for the further proceedings, and thereafter the defendant makes motion before another judge to set aside the verdict as a matter of discretion, which motion is refused, *Held:* the refusal to set aside the verdict as a matter of discretion is final. *Price v. Ins. Co.*, 376.

2. Where, in a wife's action for reasonable subsistence and counsel fees without divorce under the provisions of C. S., 1667, the trial court sets aside the verdict in the husband's favor in his discretion as being contrary to the weight of the evidence his action is not reviewable on appeal in the absence of abuse of discretion, and in this case the appeal is dismissed, there being no evidence of such abuse. The distinction between actions under this section and actions under C. S., 1666, where the trial court must find the facts, is pointed out. *Goodman v. Goodman*, 808.

3. Where the court exercises its discretion under erroneous belief that it was without jurisdiction the case will be remanded. *S. v. Casey*, 620.

4. In an action to recover damages for injuries sustained in an automobile accident the plaintiff's counsel asked the defendant on cross-examination "Did the finance people or the insurance company take your automobile?" The question was stricken out upon objection and defendant moved for a mistrial, the court refused the motion and the defendant appealed. *Held:* the trial court's ruling will not be reviewed on appeal or a new trial granted in the absence of evidence that the defendant was prejudiced by the asking of the question. *Butner v. Whitlow*, 749.

c Of Findings of Fact

1. Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the Superior Court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal. *Bigham v. Foor*, 14.

d Presumptions and Burden of Showing Error

1. Error will not be presumed and the burden is on the appellant to show not only that error was committed in the trial below, but that the error was material and prejudicial. *Walker v. Walker*, 183.

2. Burden is on appellant to overcome presumption that judgment of lower court is correct. *Jackson v. Bell*, 336; *Poindexter v. R. R.*, 833.

3. Where an action has been referred to a referee and the parties agree that the trial judge may give a directed verdict on the evidence

APPEAL AND ERROR J d—*Continued.*

taken before the referee, the instructions accordingly given will not be held for error when the evidence upon which this ruling is based does not appear of record, the presumption being as to the correctness of the instructions. *Reams v. Hight*, 797.

4. Where the Supreme Court is evenly divided in opinion, one *Justice* not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Mfg. Co. v. Mfg. Co.*, 823; *Cape Fear Corp. v. Hotel Co.*, 834; *Nebel v. Nebel*, 840.

e Harmless Error

1. Where the trial court refuses a defendant's motion as of nonsuit, but later directs a verdict in his favor, the defendant's rights are not prejudiced. *Markham v. Improvement Co.*, 117.

2. Appellant must show that alleged error was prejudicial. *Walker v. Walker*, 183; *Bank v. McCullers*, 440.

3. Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial or reversible error. C. S., 564. *S. v. Gant*, 211.

4. Where the verdict establishes the fact that the intervener has a written registered chattel mortgage on the defendant's property and that the debt secured thereby is greater than the value of the property, a directed verdict on a subsequent issue against the plaintiff claiming a verbal mortgage on the same property, if error, is harmless. *Bowers v. Beatty*, 352.

5. Although it is error for the trial court to require a physician to disclose confidential information acquired in the course of treating a patient without a finding that the testimony was necessary to a proper administration of justice, C. S., 1798, where there is no such finding of record, but other witnesses have testified to the identical information elicited from the physician, the admission of his testimony cannot be held for reversible error. *Sawyer v. Weskitt*, 500.

6. Where a party objects to the ruling out of certain evidence and later during the trial evidence of the same import is admitted of which he gets the benefit, the error, if any, committed in ruling out the evidence is harmless. *Guano Co. v. Ball*, 534; *In re Will of Badgett*, 565; *Hunt v. Meyers Co.*, 636.

7. Upon an assignment of error to the exclusion of certain testimony tendered, the record must disclose what the testimony rejected would have been or the assignment of error will not be considered on appeal. *Guano Co. v. Ball*, 534; *In re Will of Badgett*, 565; *Campbell v. R. R.*, 102.

8. A new trial will not be granted on appeal unless there is some prospect that the result of the trial would be different, and where the appellant's rights are not prejudiced the judgment will be affirmed. *Lowder v. Smith*, 642; *Daniel v. Power Co.*, 680.

9. An objection to the charge of the court on the last clear chance on the ground that the evidence was not sufficient to sustain it, will not be

APPEAL AND ERROR J e—*Continued.*

held for reversible error where, upon the record, the rights of the appellant could not be prejudiced thereby. *Sanders v. R. R.*, 672.

10. Where, in an action by a customer to recover damages sustained from slipping and falling on the oiled floor of a grocery store, the trial court excludes evidence offered by the defendant that there were three hundred other customers in the store on the same day and none of them were injured, but the evidence excluded is argued to the jury without objection, *Held:* if the evidence was competent and was erroneously excluded, it was not error to defendant's prejudice who received the full benefit in the argument of the case before the jury. *Parker v. Tea Co.*, 691.

g Questions Presented for Determination

1. Where, in an action for damages for the taking of land by a power company for its transmission lines, the jury has answered the issue as to wrongful entry in the affirmative, but has failed to answer to issue as to damages therefor, and has assessed permanent damages for the land taken: *Held*, all objections and exceptions upon the trial relating to the wrongful entry by the defendant become immaterial. *Crisp v. Light Co.*, 46.

2. Where the verdict of the jury upon one issue determines the rights of the parties it is not necessary to consider exceptions relating to another issue. *Cotton Growers Association v. Tillery*, 531.

K Determination and Disposition of Cause.

g Force and Effect of Decision of Supreme Court

1. A *per curiam* opinion of the Supreme Court stands upon the same footing as those containing a more extended discussion or more numerous citations of authority. *Bigham v. Foor*, 14.

L Proceedings After Remand.

c Subsequent Appeals

1. Where, upon an appeal by the plaintiff from a judgment sustaining a demurrer on the ground that the plaintiff was estopped from bringing the action, the Supreme Court reverses the judgment, and upon the defendant's request, also passes upon the sufficiency of the evidence to sustain the cause of action, and holds the evidence sufficient, upon a subsequent appeal by the defendant the Court will not again consider the question of the sufficiency of the evidence, the question having been decided upon the former appeal. *Fuquay v. R. R.*, 575.

APPEARANCE.

A General Appearance.

a Acts Constituting General Appearance and Effect Thereof

1. By demurring to the sufficiency of the complaint a defendant makes a general appearance constituting a waiver of his objection that he is a nonresident and that the court has no jurisdiction over his person. *Shaffer v. Bank*, 415.

2. Appearance held to waive objection that plaintiffs instituted summary proceeding on clerk's bond. *S. v. Gant*, 211.

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E Award as Bar to Subsequent Action.

b Effect and Conclusiveness of Award

1. In a special proceeding to establish the true dividing line between adjoining lands under the provisions of C. S., 361, *et seq.*, the defendant introduced in evidence an undisputed agreement between the defendant and the plaintiff's predecessor in title, under which a surveyor established and plainly marked the line in question in the presence of the interested parties who had by the terms of the agreement obligated themselves to faithfully keep and observe it as its true location, and which was thereafter observed by the parties for several years, *Held:* the plaintiff was estopped in the pending proceeding from denying the line so established, and further, it was not error for the court to order the same surveyor and his assistants to run the line by the existing marked corners and courses they had theretofore made and established. *Lowder v. Smith*, 642.

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1. With certain exceptions, a chose in action is now usually assignable, and the assignee may bring an action thereon in his own name, C. S., 446, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable, and the assignee may bring action thereon to recover the loss sustained by the assignor by reason of the insufficiency of the assets, and may recover against the obligor and sureties on the bond within the penalty stated, subject to any offset or defense which the latter may have as against the assignor. *Trust Co. v. Williams*, 464.

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C Operation and Effect.

a Title and Possession of Trustee

1. Where the president and secretary of a corporation gives his deed in trust for the benefit of his personal creditors, and includes in the trust estate his claim against the corporation for money due, the trustee in the deed in trust can acquire no better title than the assignor had, and the trustee takes the claim against the corporation subject to equities existing in favor of the corporation against the assignor. *Teague v. Furniture Co.*, 203.

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BANKS AND BANKING.

H Insolvency and Receivership.

a Statutory Liability of Stockholders

1. Where the owner of shares of stock in a bank transfers some of his stock to his sons in trust for his grandchildren, the stock and the increment therefrom to be held for their education, but there is nothing on the books of the bank to indicate for whom the trust was created, and the transfer is regularly made in good faith when the bank was solvent, *Held:* upon the bank becoming insolvent some two years after the transfer, the transferer is not liable for the statutory assessment against the stock. C. S., 219(a), 219(c). *Corporation Commission v. Latham*, 342.

c Management, Control and Recovery of Assets

1. In order for individual depositors to maintain an action to recover the bank's assets hypothecated with a city to secure its deposit upon the theory that the officials of the bank were without authority to hypothecate its assets and that the city was given an unlawful preference, the individual depositors must allege and show the failure of the liquidating agent to make demand for the return of the assets or follow the appropriate remedy for their recovery, and in the absence of such allegation in the complaint a demurrer thereto is properly sustained. *Merrimon v. Asheville*, 181; *Merrimon v. Buncombe County*, 822.

d Claims, Priorities and Distribution

1. Where a bank, authorized by its charter to act as guardian, intermingles funds coming into its hands as guardian with funds received by it in its regular banking business, and it is impossible to separate any of the trust funds from the other funds on deposit and placed in the bank's vault, *Held:* upon the bank becoming insolvent its successor as guardian has no lien on its assets and is not entitled to a preference for the amount of the guardianship funds in an action against the liquidating agent, but is only a general creditor of the bank and entitled only to pro rate with other creditors, the guardianship funds being also protected by the bond required by statute; the mingling of guardianship and personal funds by an individual guardian depositing the funds in a bank is distinguished. *Bank v. Corporation Commission*, 331.

2. Where a bank acting under authority of its charter as guardian for certain minors is the payee of two certain notes which it endorses without recourse, one to itself as guardian for one group of minors and the other to itself as guardian for a second group of minors, and thereafter the bank becomes insolvent, *Held:* its successor as guardian for some of the second group of minors has no right, title or interest in the note endorsed for the benefit of the first group of minors, and is not entitled to recover the second note from the liquidating agent, it being only a tenant in common along

BANKS AND BANKING H d—*Continued.*

with the other minors for whose benefit the note was endorsed, and the second note should be collected by the liquidating agent and the proceeds applied according to the respective rights of the parties. *Ibid.*

3. Where a bank acting as guardian commingles moneys belonging to its ward's estate with its own assets, and becomes insolvent, a preference in favor of the ward or the sureties on the guardian's bond will not be allowed, but the guardian's bond is liable for the loss occasioned the ward's estate thereby. *Hicks v. Corporation Commission*, 819.

I Criminal Responsibility of Officers.

a False Entries on Books

1. A specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of section 224(e) N. C. Code of 1927, it being sufficient if the defendant wilfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent, section 83 of chapter 4, Public Laws of 1921, having been struck out and superseded by section 16 of chapter 47, Public Laws of 1927, and an instruction to the jury that the issue before them was whether the defendant "knowingly made false entries on the books of the bank" is in accord with the provisions of the statute and is not erroneous. *S. v. Lattimore*, 32.

2. In a prosecution under section 224(e), N. C. Code of 1927, for wilfully making false entries on the books of a bank an instruction to the jury that they should find whether the alleged false entries were made for the purpose of "deceiving and preventing the directors and others from knowing the correct status of the books," will not be held for error, when it appears that the instruction, when taken in connection with the other parts of the charge, was intended to stress and in effect did stress the necessity of proving that the false entries were wilfully and not inadvertently made. *Ibid.*

BILLS AND NOTES.

B Negotiability and Transfer.

b By Endorsement

1. The words qualifying an endorsement of a negotiable instrument, such as "without recourse" and words of like effect, may either precede or follow the signature of the transferer of title. C. S., 3019, 3047. *Medlin v. Miles*, 683.

c Instruments Negotiable

1. A bond indemnifying a bank from any loss which it might sustain by reason of its taking over the assets and discharging the liabilities of another bank, the bond being payable to the liquidating bank and not to its order, is not a negotiable instrument within the meaning of C. S., 2982, and its transfer by endorsement to another is an assignment of a chose in action, and the assignee is not a holder

BILLS AND NOTES B c—*Continued.*

in due course, C. S., 3033, and the obligors may set up such defenses against the assignee as they might have had against the liquidating bank. *Trust Co. v. Williams*, 464.

C Rights and Liabilities upon Transfer.

b Transfer After Maturity

1. Where the payee of a note under seal made by a husband and wife has knowledge that the wife signed in the capacity of surety and transfers the same by endorsement after maturity, the transferee thus becomes the holder subject to the equities existing between the original parties, and in his action against the wife she may show by parol that she was only a surety on the note. *Barnes v. Crawford*, 434.

c Transfer by Qualified Endorsement

1. A negotiable instrument transferred by an endorsement reading "for value received I hereby sell, transfer and assign all my right, title and interest to within note to M." assigns title to the instrument by qualified endorsement, exempting the transferer from all liability as a general endorser, except that he is still chargeable with implied warranties as a seller. C. S., 3019, 3047. *Medlin v. Miles*, 683.

d Bona Fide Purchasers

1. Where the payee of a note secured by a chattel mortgage transfers the note for value before maturity by endorsement to another, the endorsee is a holder in due course and may recover on the note although the payee has sold the property mortgage and has failed to apply the proceeds to the payment of the note, the holder in due course not being affected by the subsequent change in the relationship of the parties, and an endorser before delivery to the payee may not claim that as to him the note was discharged. *Supply Co. v. Prescott*, 456.

D Construction and Operation.

b Liabilities of Parties in General (Limitation of actions against, see Limitation of Actions A b 1)

1. Since the enactment of the Negotiable Instruments Law, a person who places his name on a note otherwise than as maker, drawer, or acceptor is deemed to be an endorser unless he clearly indicates his intention to be bound in some other capacity, C. S., 3044, and as against the holder he may not show a different liability by parol, and the rule, theretofore existing, to the effect that the parties to a negotiable instrument may prove as between themselves whether they have affixed their signatures as joint promisors, endorsers, guarantors, or accommodation endorsers, is changed. *Corporation Commission v. Wilkinson*, 344.

2. Where a wife signs a note under seal upon its face with her husband for money borrowed by him, and joins with him in giving a mortgage upon his lands in order to pass her dower interests therein as security for his debt, she is in effect a surety upon his note, and the payee with knowledge of the facts is presumed to know the law, and takes the note subject to her rights as surety. *Barnes v. Crawford*, 434.

BILLS AND NOTES D—*Continued.*

c Extension of Time for Payment

1. Where the maker of a negotiable instrument, with accommodation endorsers before delivery, negotiates the note to a bank and thereafter the bank becomes insolvent and is placed in the hands of the liquidating agent of the Corporation Commission, and the liquidating agent agrees with the maker after maturity for an extension of time for payment to a definite date without retaining recourse upon the endorsers and without their consent, and there is a statement upon the face of the note that the "subscribers" agree to remain bound notwithstanding any extension of time given the maker for payment, *Held:* the word "subscribers" does not include the endorsers whose names appear upon the back of the instrument, and the agreement made between the liquidating agent and the maker discharges them from liability, there being no waiver of their rights under the wording of the instrument or otherwise. C. S., 3102(6), 3092. *Corporation Commission v. Wilkinson*, 344.

2. In order to bind the endorsers of a negotiable instrument to an agreement appearing upon its face, that the parties should remain bound in the event that an extension of time for payment be given the maker, it is necessary that the agreement refer specifically to the endorsers or otherwise clearly include them within its terms, and where the agreement is that the "subscribers" should remain bound it is insufficient to include the endorsers. This appeal does not present the question of the waiver by the endorsers of dishonor under Art. 8 of the Negotiable Instruments Act, or the effect of an indicated credit upon the instrument, it appearing that the agreement with the maker for an extension of time for payment was made more than a year after the credit entered on the note. *Ibid.*

G Payment and Discharge.

c Payment to Collecting Agent

1. Evidence held sufficient to raise issue as to whether one of defendants was collecting agent of the plaintiff. *Credit Co. v. Greenhill*, 609.

BONDS—see Taxation, bonds of public officers see Principal and Surety, to prevent receivership see Receivers A c, A d; assignability of, see Assignments A a 1, negotiability of, see Bills and Notes B c 1.

BOUNDARIES see Deeds and Conveyances D.

BROKERS (Fraud in concealing price purchaser would pay for stock see Trusts A b 2).

E Actions for Commissions.

c Burden of Proof

1. Where upon the evidence and admissions of record the defendant may show by parol evidence that plaintiff's commissions as selling agent were to be confined to payment out of notes given the principal as a part of the purchase price of the lands sold, the burden of proof is upon the defendant, and his motion as of nonsuit on the plaintiff's evidence should be denied. (See *S. c.*, 198 N. C., 148.) *Stockton v. Lenoir*, 88.

BURDEN OF PROOF see Evidence C.

BUSES see Carriers, Highways B.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

A Right of Action and Defenses.

e Failure of Consideration

1. Where the plaintiff seeks to have a contract for the purchase of land rescinded on the ground of total failure of consideration, there being no allegation of fraud, and sets up agreements to assist him in the erection of a building on the land purchased and to erect a building on adjoining land, and alleges that the agreements were material inducements to the purchase of the land, and that the agreements were not performed, and it appears that a building on the adjoining land has been completed by another substantially as promised the plaintiff and that the plaintiff has suffered no damage by failure to perform, and it does not appear that the plaintiff has ever been in a position to insist upon performance of the agreement to assist in financing a building on his land, or, if so, that he suffered injury for the nonperformance: *Held*, the plaintiff's suit for rescission is properly dismissed, the evidence failing to show want of consideration entitling him to the relief sought. *Lykes v. Grove*, 254.

CARRIERS.

B Carriage of Goods.

a Shipping Facilities and Notice of Required Service

1. A contract to furnish a specified number of iced cars on a specified date for shipment of peaches in interstate commerce falls within the provisions of the Federal Interstate Commerce Act which requires only due diligence of the carrier to furnish the empty cars after notice, and a demurrer to the shipper's complaint in an action to recover damages based upon the contract alone is properly sustained. C. S., 3522. *Peach Co. v. R. R.*, 176.

D Carriage of Passengers.

c Baggage

1. The Corporation Commission in accordance with authority given it by statute, chapter 136, Public Laws of 1927, has passed certain regulations in regard to the carriage of baggage by bus companies, and its Rule 65, limiting the number of pieces of hand baggage, the weight and the value thereof that shall be checked and carried free of charge, is within the delegated power of the Commission, and the rule that a common carrier in intrastate shipments may not make a valid contract limiting liability for negligent loss of baggage, is thereby made inapplicable to bus companies, and a provision on a ticket of a bus company limiting liability for loss of baggage to fifty dollars unless a higher valuation is declared and an extra charge paid, in accordance with the rules of the Corporation Commission, is valid, and a passenger may not recover a greater sum than that fixed by the rule. *Knight v. Coach Co.*, 261.

CHATTEL MORTGAGES (Crop liens see Agriculture D b).

B Lien and Priority.

a As Against Other Liens or Claims

1. The validity of the intervener's mortgage, duly executed and registered, as against the plaintiffs' subsequent attachment of the property and proceedings in claim and delivery is upheld upon authority of *Hornthal v. Burwell*, 109 N. C., 10. *Bowers v. Beatty*, 352.

b Indexing and Cross-indexing

1. The indexing and cross-indexing of chattel mortgages is an essential part of their registration, and where separate indexes for real estate mortgages and chattel mortgages are kept by the register of deeds of a county, a duly recorded chattel mortgage which is indexed and cross-indexed in the general chattel mortgage index has priority over a mortgage covering the same personal property and also certain real estate which is previously executed and recorded and indexed in the general real estate mortgage index but subsequently indexed and cross-indexed in the general chattel mortgage index. C. S., 3560, 3561, as amended by chapter 327, Public Laws of 1929. *Pruitt v. Parker*, 696.

c Recitations and Provisions in Instrument

1. The priority of a chattel mortgage which is properly recorded and indexed is not affected by the fact that its warranty excluded "encumbrances of record" when the alleged prior encumbrance is not indexed and cross-indexed as required by the statute. *Pruitt v. Parker*, 696.

CHECKS—Employer's liability for prosecution on by employee see Master and Servant D b.

CLAIMS—Against the State see States E b.

CLAIM AND DELIVERY see Replevin.

CLERKS OF COURT (Liabilities on bonds of, see Principal and Surety B c 1 to 8).

C Jurisdiction.

a In General

1. The jurisdiction of clerks of the Superior Courts is statutory, and they have only such jurisdiction as is conferred by statute. *Ins. Co. v. Buckner*, 78.

COMMERCE see Pilots, Carriers.

CONFESSIONS see Criminal Law G 1.

CONFESSION OF JUDGMENT see Judgments C.

CONSOLIDATED STATUTES AND N. C. CODE (Michie) (For convenience in annotating; Statutes see Statutes).

SEC.

15, 20. Where no one qualified by statute has applied for letters after six months clerk may appoint administrator, there being no public administrator in the county. *Brooks v. Clement Co.*, 768.

CONSOLIDATED STATUTES—*Continued.*

SEC.

76, 1. Administrator may not charge estate with liability for matters transpiring entirely after death of intestate, nor may clerk approve of his action. *Insurance Co. v. Buckner*, 78.

160. Section gives right to maintain action only where injured party, if he had survived, could have done so, and does not give guardian of minor child right to bring action against its parents. *Goldsmith v. Samet*, 574. Testimony that deceased provided for his family, had a comfortable home, etc., held competent on question of damages. *Hicks v. Love*, 773.

203. Counsel may not read dissenting opinion in argument to jury over objection of adverse party. *Conn v. R. R.*, 157.

219(a), (c). Defendant held not liable for statutory assessment of stock in this case. *Corporation Commission v. Latham*, 342.

224(c). Specific intent to deceive or defraud is not necessary to crime of making false entries on bank books. *S. v. Lattimore*, 32.

356, 353, 354, 355. Right of surety to object to proceedings under section 356 held waived, and ruling defendants into immediate trial did not violate section 557. *S. v. Gant*, 211.

357. Interest recoverable on amounts embezzled by public officers. *S. v. Gant*, 211.

361. Executed agreement to arbitrate disputed boundary held to estop plaintiff from bringing proceeding under this section. *Lowder v. Smith*, 642.

415. Voluntary nonsuit is abandonment of action by plaintiff, after which another action may be brought within one year, but if the action is in the nature of *quo warranto* permission to sue and bond are again necessary. *Cooper v. Crisco*, 739. Action brought within one year from voluntary nonsuit is regarded as continuation of first action. *Van Kempen v. Latham*, 505.

428. Judgment lien is not affected by adverse possession against judgment debtor. *Moses v. Major*, 613.

430, 426. Deed held properly admitted in evidence to show extent of boundaries claimed by plaintiff. *Hodgin v. Liberty*, 658.

432. Where claimant fails to show that possession was adverse it is presumed that he held under other party. *Hayes v. Cotton*, 369.

441. Applies to sureties on note under seal, 437 not applying to them. *Barnes v. Crawford*, 434.

441(1), 415. Action instituted within one year from voluntary nonsuit is not barred if the prior action was not barred. *Van Kempen v. Latham*, 505.

441(9). Action on bond of clerk held not barred, default not being discovered by due diligence. *Pasquotank County v. Surety Co.*, 325. Where defendant does not commit fraud or participate therein this section does not apply as to him. *Cotton Co. v. Sprunt*, 419. Statute held sufficiently pleaded. *S. v. Gant*, 211.

CONSOLIDATED STATUTES—*Continued.*

SEC.

446. Only personal representative of deceased employee may litigate claim under Compensation Act where employee leaves no dependents. *Hunt v. State*, 37. Assignee of indemnity bond could maintain action thereon. *Trust Co. v. Williams*, 464.

456, 457, 460. Before allotting dower to widow the heirs at law of deceased husband should be made parties. *Holt v. Lynch*, 404.

456, 829, 840. Refusal of trial court to require interpleader bond held not error. *Bank v. Lewis*, 148.

464. Action against sheriff of one county and clerk of another held not separable and removal as to clerk was error. *Kellis v. Welch*, 39.

470. Improper venue may not be taken advantage of by demurrer but by motion in the cause. *Shaffer v. Bank*, 415.

507. Plaintiff may not unite two inconsistent causes in complaint. *Lykes v. Grove*, 254. But may unite causes arising from the same transaction or transactions connected with same subject of action. *Shaffer v. Bank*, 415. Multifariousness is to be determined according to rules of equity pleading. *Craven County v. Investment Co.*, 523.

511, 512. Demurrers may be pleaded only for causes specified in statute. *Shaffer v. Bank*, 415.

511(4), (5). Demurrer for misjoinder of parties and causes held properly sustained in this case. *Grady v. Warren*, 693.

512. Demurrer *ore tenus* must specifically specify the grounds of objection. *Oldham v. McPheeters*, 35.

517, 518. Failure to make motion to consolidate or to plead pendency of action held to waive objections. *S. v. Gant*, 211.

518. Want of jurisdiction or failure of complaint to state a cause of action may be taken advantage of at any time. *Finley v. Finley*, 1.

535. Upon demurrer the pleadings are to be construed in light favorable to pleader. *Joyner v. Woodard*, 315.

543, 580. *Held:* no issues of fact were raised by pleadings which required determination of jury. *Lowder v. Smith*, 642.

564. Peremptory instructions as to amount recoverable held not error. *S. v. Gant*, 211. Instruction in this case held not to have impinged on this section. *S. v. Durham*, 724.

567. Mere scintilla of evidence is insufficient to be submitted to jury. *Shuford v. Brown*, 17; *Shuford v. Scruggs*, 685; *Ferguson v. Glenn*, 128; *Broughton v. Oil Co.*, 282. Upon motion of nonsuit only evidence favorable to plaintiff will be considered. *Moore v. R. R.*, 26. Evidence will be considered in light most favorable to plaintiff. *Hunt v. Meyers Co.*, 636; *Broadway v. Ins. Co.*, 639; *Sanders v. R. R.* 672; *Holton v. Oil Co.*, 744. Motion must be renewed at close of all evidence to present question on appeal. *Debnam v. Bank*, 459.

591. Action of trial court in setting aside verdict in his discretion is not reviewable on appeal. *Goodman v. Goodman*, 808.

CONSOLIDATED STATUTES—*Continued.*

SEC.

600. Finding that neglect was excusable upheld. *Meece v. Commercial Credit Co.*, 139; *Colt v. Martin*, 354.

610, 836. Correct form of judgment for plaintiff in action in claim and delivery where defendant replevies property. *Boyd v. Walters*, 378.

614. Judgment is lien on all land of judgment debtor at time of docketing and the lien is not affected by his transfer of title, nor by adverse possession against him. *Moses v. Major*, 613. Judgment creditor has only lien on land of judgment debtor but no estate or interest therein. *Byrd v. Insurance Co.*, 407.

624. Judgment by confession must show with particularity the items and facts upon which it is entered. *Bank v. McCullers*, 440.

655. Court may disregard attempted appeal from order setting aside verdict in discretion and proceed with second trial. *Goodman v. Goodman*, 794.

668, 614. Leave of court is not now necessary to execution on judgment after three years from date of docketing. *Moses v. Major*, 613.

860, 861. Refusal to allow defendant to file bond to prevent receivership held error. Agreement in mortgage for receivership could not affect rights under the statute. *Woodall v. Bank*, 428.

869, 871. Where relator takes voluntary nonsuit he must again obtain permission to sue before bringing another action. *Cooper v. Crisco*, 739.

912. Suit to reform deed of trust is not sufficient notice of motion to set aside judgment. *Bank v. Alexander*, 453.

927. Bond of clerk is liable for embezzlement of funds coming into his hands for Confederate veterans. *S. v. Gant*, 211. Surety held estopped from setting up statutory limitation on amount of bond of clerk. *S. v. Gant*, 211.

1210. Creditors of president of corporation who are assignees of his rights against corporation have no priority over creditors of corporation. *Teague v. Furniture Co.*, 803.

1236, 214. State is liable for costs in a proceeding for disbarment where judgment is rendered in respondent's favor. *Committee on Grievances of Bar Association v. Strickland*, 619.

1287, 1284. Court held to have committed error in failing to find facts in regard to costs on motion to retax the costs. *S. v. Kirby*, 789.

1410. Where complaint presents issue of fact and no important question of law the Supreme Court will not exercise recommendatory jurisdiction. *Cohoon v. State*, 312.

1414. Personal representative may not come in and be made a party in the Supreme Court where proceedings are a nullity because brought in name of deceased employee. *Hunt v. State*, 37.

1416. Judgment affirmed without opinion. *Wootton v. McGinnis*, 841; *Thrash v. Roberts*, 843.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1654. Where son acquires land from father by purchase and dies before father, son's heirs take exclusively. *Ex Parte Barefoot*, 393.

1664. Court has authority to enter judgment respecting custody of minor children on motion heard out of term and county upon agreement of parties. *Pate v. Pate*, 402.

1706. Power of eminent domain is given public-service corporations, but statutory procedure should be followed. *Crisp v. Light Co.*, 46.

1795. Testimony in this case held incompetent as being of transaction with deceased by party interested in event. *Dill-Cramer-Truitt Corp. v. Downs*, 478.

1798. Error in requiring physician to testify as to confidential communication held harmless. *Sawyer v. Weskitt*, 500.

1799. Where defendant testifies in his own behalf he is subject to cross-examination as other witnesses. *S. v. Griffin*, 541.

1802. Wife is not competent witness against husband in prosecution for abandonment of minor children. *S. v. Brigman*, 793.

2161. Recovery may be had against surety on guardian's bond without first determining liability on other bonds covering default. *Phipps v. Indemnity Co.*, 561.

2435. Person ordering repairs was not owner or legal possessor of car and mechanic's lien did not attach. *Willis v. Taylor*, 467.

2480. Crop lien under this section is superior to prior registered chattel mortgage on crops for antecedent debt. *Cotton Oil Co. v. Powell*, 350.

2517, 454. Husband may sue wife for tort committed prior to marriage. *Shirley v. Ayers*, 51.

2583. Statutory provision for substitution of trustees in deeds of trust held valid. *Bateman v. Sterrett*, 59.

2621(46). Evidence held properly submitted to jury on question of defendant's exceeding speed limit under circumstances. *Godfrey v. Coach Co.*, 264.

2621(51), 2616, 2623(55). Evidence of criminal negligence in driving automobile held sufficient. *S. v. Durham*, 724.

2621(53). Driver may assume that another driver will take right side of road in passing, there being no indication of disability. *Shirley v. Ayers*, 51.

2880(189). World War veteran held not entitled to recover amount of tax on property purchased with money received from Federal Government. *Martin v. Guilford County*, 63.

2982, 3033. Bond indemnifying liquidating bank for loss is not negotiable and assignee is not a holder in due course. *Trust Co. v. Williams*, 464.

3019, 3047. Words qualifying endorsement may either precede or follow signature, and transfer in this case was by qualified endorsement. *Medlin v. Miles*, 683.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3044. Liabilities of parties on note is fixed by Negotiable Instruments law and different liability may not be shown by parol. *Corporation Commission v. Wilkinson*, 344.

3102(6), 3092. Person writing name on back of note is not subscriber and is not bound by agreement on face of note that "subscribers" should be bound regardless of extension of time given to maker. *Corporation Commission v. Wilkinson*, 344.

3206. Where commissioners corruptly refuse to bring action against sheriff the qualified taxpayers may maintain the action. *Weaver v. Hampton*, 798.

3411(a). It may be shown in evidence that liquors other than those enumerated in statute are intoxicating in fact. *S. v. Fields*, 110.

3467. In action under the statute against logging road contributory negligence is not a complete bar to recovery. *Byers v. Hardwood Co.*, 75.

3522. Demurrer to complaint in action for breach of contract to furnish cars on specified date held properly sustained. *Peach Co. v. R. R.*, 176.

3560, 3561. Chattel mortgage first indexed and cross-indexed in chattel mortgage index has priority over mortgage covering chattels registered in real mortgage index. *Pruitt v. Parker*, 696.

3836. Petition in Superior Court for way of necessity held properly dismissed, the statutory remedy being exclusive. *White v. Coghill*, 421.

4102. Although dower interest can be conveyed by wife in conformity to statutory procedure, dower need not be sold if husband's estate is solvent. *Holt v. Lynch*, 404.

4339. Promise of marriage must be absolute for conviction. *S. v. Shatley*, 83.

4347. Evidence of general reputation and boisterous conversation of inmates held competent in prosecution for disorderly house, and testimony of occurrence therein more than two years prior held competent as corroborative evidence. *S. v. Hildebran*, 780.

4364. In order to constitute perjury the false swearing must be wilfully done. *S. v. Dowd*, 714.

4447. Abandonment of minor children is continuing offense and prosecution therefor is not barred by conviction for prior time. *S. v. Jones*, 424. In prosecution for abandonment of minor children the wife is not a competent witness against the husband. *S. v. Brigman*, 793.

4515. Deed of wife not conforming to statute is void. *Bank v. McCullers*, 440.

4622. Where two offenses could be united under the statute trial court's refusal to require State to elect between them was not error. *S. v. Smith*, 494.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4623, 4625. Failure of indictment to specify day held not fatal in view of instructions. *S. v. Jones*, 424.

4640. Failure to instruct on lesser degrees of crime is not error when there is no evidence to support conviction of less degree. *S. v. Cox*, 357; *S. v. Smith*, 494; *S. v. Spain*, 571.

4643. Upon motion of nonsuit all evidence is to be considered in light most favorable to the State. *S. v. Durham*, 724.

4644, 1412, 4654, 4663. After affirmance of judgment by Supreme Court the Superior Court has jurisdiction to hear motions for new trial for newly discovered evidence. *S. v. Casey*, 620.

4654. Appeal stays all proceedings in lower court and motions thereafter made are *coram non judice*. *S. v. Casey*, 185. But appeal does not vacate judgment, and motion for new trial may be made after affirmance of judgment on appeal. *S. v. Casey*, 620.

5410, 5428, 5489. Action cannot be maintained against board of education for negligence in transporting pupil, and it is not estopped from setting up this defense. *Benton v. Board of Education*, 653.

5490(1). Title to certain school property not used for school purposes by enlarged district held to remain in county board. *Mitchell v. Board of Education*, 55.

6437. Provisions for forfeiture in standard form of fire insurance are valid. *Johnson v. Insurance Co.*, 362.

6618, 6683. Board of Medical Examiners may revoke license for unprofessional conduct in violating narcotic act. *Board of Medical Examiners v. Gardner*, 123.

6955. Barge held liable for State pilotage. *Craig v. Towing Co.*, 250.

7692, 1334(53), 1334(46), 1334(50). Sheriff collecting taxes on fixed salary is entitled to monthly payments thereon from beginning of fiscal year to end of his term. *Martin v. Swain County*, 68.

8180. Findings of fact necessary to support award for hernia. *Ussery v. Cotton Mills*, 688.

CONSPIRACY.

A Civil Actions.

b Evidence

1. In an action against the directors of a corporation for conspiracy in procuring the purchase of stock by the plaintiff by false and fraudulent representations, evidence that a man entered the office of the secretary and demanded the right to inspect the books of the corporation, and that the secretary, not knowing the man's identity, "talked short" to him and refused the request, and that thereafter, at a discussion of the happening at the directors' meeting, a motion was made and passed to have the question of auditing the books submitted to the corporation's attorney: *Held*, the passage of the motion was not evidence of conspiracy of a director as to a pur-

CONSPIRACY A b—*Continued.*

chase of stock by the plaintiff prior to the meeting, and the fact that the secretary refused the stranger's request to inspect the books is not evidence that the director was attempting to conceal the financial condition of the company. *Edwards v. Ashcraft*, 246.

2. Where the directors of a corporation enter into an agreement that certain directors be permitted to buy a share of preferred stock for ten dollars and receive as a bonus eighty shares of common stock for each share of preferred, provided they bought the preferred stock in blocks aggregating the sum of five thousand dollars, such stock to be held by a trustee until the whole purchase price was paid, and that thereafter stock was sold to the plaintiff for ten dollars a share for preferred stock and two dollars and a half for common stock, and there is no evidence of the actual value of the stock: *Held*, the agreement is not evidence of a conspiracy to defraud the plaintiff by inducing him to purchase stock upon false representations, and in an action against a director, where there is no evidence that he was present, or knew of false representation made by the corporation's salesman in inducing the purchase of the stock, it is insufficient to be submitted to the jury on the issue of conspiracy to defraud, and the defendant's motion as of nonsuit should have been allowed. *Ibid.*

3. While conspiracy may be proved by circumstantial evidence, the evidence must be sufficient to create more than a suspicion or conjecture in order to justify the submission of the issue to the jury. *Ibid.*

CONSTITUTION (For convenience in annotating).

ART.

I, sec. 17. Provisions prohibiting impairment of obligations of contract include all means for enforcement. *Bateman v. Sterrett*, 59.

IV, sec. 1. Legal and equitable remedies are determined in one action. *Woodall v. Bank*, 428.

IV, sec. 8. Supreme Court is limited to matters of law or legal inference on appeal in civil or criminal actions. *Debnam v. Rouse*, 459; *Carter v. Mullinax*, 783; *S. v. Casey*, 185; *Bakery v. Insurance Co.*, 816.

IV, sec. 9. Jurisdiction under this section may not be enlarged by statute, and the Supreme Court will not exercise it where only a question of fact is presented. *Cohoon v. State*, 312.

V, sec. 6. County may not levy taxes in excess of fifteen cents on the hundred-dollar valuation for general fund, and the limitation applies to funding debts incurred for this purpose. *Glenn v. Commissioners of Durham*, 233.

VII, sec. 7. Where tax is not for necessary expense the approval of voters is necessary whether for special purpose or not. *Glenn v. Commissioners of Durham*, 233.

XIV, sec. 7. County commissioners and notaries public are public officers and one person may not hold both offices. *Harris v. Watson*, 661.

CONSTITUTIONAL LAW (See Eminent Domain, Extradition, Taxation A; person may not hold two State offices see Public Officers B c; city police power see Municipal Corporations H; retroactive statutes see Statutes A c).

E Obligations of Contract.

b What Constitutes Impairment of Obligations of Contract

1. The constitutional provisions against the impairment of the obligations of a contract include all means and assurances available for the enforcement of the contract at the time of its execution, and any unreasonable alteration of the remedies available which enlarges, abridges, or in any manner changes the intention of the parties is prohibited, but a statute that merely facilitates the intention of the parties does not come within the constitutional prohibition. State Constitution, Art. I, sec. 17, Federal Constitution, Art. 1, sec. 10. *Bateman v. Sterrett*, 59.

2. Where a deed of trust is executed after the effective date of C. S., 2583, providing for the removal and substitution of trustees in deeds of trust, the provisions of the statute enter into and become a part of the contract, and a later statute providing a more economical and expeditious procedure for such substitution, so long as the rights of the parties, especially those of the *cestui que trust*, are not injuriously affected, does not violate the constitutional provisions, and in this case a substitution under the provisions of the act is upheld. *Ibid.*

F Right of Accused Not to Be Compelled to Testify Against Self.

b Waiver of Right

1. Where a defendant in a criminal prosecution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses, C. S., 1799, and on a prosecution for murder it is competent to ask the defendant on cross-examination whether he did not kill another with the same pistol with which he shot the deceased, it being admitted that the same pistol was found in room after the second shooting. *S. v. Griffin*, 541.

CONTINUING OFFENSE see Parent and Child A b.

CONTRACTS (Particular contracts see Vendor and Purchaser, Sales, Indemnity, Insurance; particular remedies see Election of Remedies, Injunctions D b 1, Cancellation and Rescission of Instruments, Reformation of Instruments; impairment of obligation of, see Constitutional Law E; limiting tort liability by, see Carriers D c 1).

B Construction and Operation.

a General Rules of Construction

1. The general laws of the State in force at the time of the execution of a contract enter into and become a part thereof. *Bateman v. Sterrett*, 59.

CONTRACTS B a—*Continued.*

2. The parties to a contract will be presumed to know its intent and meaning better than strangers thereto, and where they have practically interpreted the contract the courts will ordinarily give it that construction which they themselves have given it. *Markham v. Improvement Co.*, 117.

CONVERSION see Money Received.

CORPORATIONS.

D Stock (Unpaid stock and purchase of its stock by corporation see hereunder H f).

f License to Sell Stock; "Blue Sky Law"

1. Where those soliciting subscriptions for shares of stock in a domestic corporation to be formed are not paid any compensation, commissions or remuneration for or in connection with the sale or disposition of the stock, a sale by them does not fall within the provisions of section 8, chapter 190 of the "Capital Issues Law" of North Carolina, nor is this result affected by the fact that the corporation after its formation paid a certain sum of money to a special and distinct agency for its services in making an investigation of the desirability of forming such a corporation. Section 4, sub-sec. 8, ch. 190, Public Laws of 1925. *Hotel Corp. v. Overman*, 337.

h Fraud in Procuring Purchase of or Subscription to Stock (Conspiracy for fraudulent selling see Conspiracy A b 1, 2).

1. Where, in an action to enforce a written agreement for the subscription of stock in a corporation to be formed, the defendant sets up the defense that his signature to the agreement was procured by false and fraudulent representations, evidence tending only to show that the representations were all promissory in their nature is insufficient to support his defense. *Hotel Corp. v. Overman*, 337.

2. Sellers of stock could recover of one negotiating sale and the purchaser for misrepresentation as to price purchaser would pay. *Abbitt v. Gregory*, 577.

G Corporate Powers and Liabilities.

c Representation of Corporation by Officers and Agents

1. Where the transactions of an officer of a corporation acting within the scope of his duties causes a loss which must fall either on the corporation or a third party, both being innocent, the corporation who selected its own officer, must suffer the loss. *Shuford v. Brown*, 17.

d Property and Conveyances

1. The directors and officers of a corporation hold its assets in trust first for its creditors and second for its stockholders, and its president and secretary, knowing the corporation to be insolvent may not divert the moneys of the corporation in the bank to the payment of a debt due him individually by the corporation as against the rights of creditors of the corporation later represented by a receiver appointed by the court. *Teague v. Furniture Co.*, 803.

CORPORATIONS G—*Continued.*

i Liability for Torts

1. A corporation may be held liable for the negligent or malicious torts of its employees, servants or agents when committed by them in the course of their employment and within its scope, precisely as a natural person. *Dickerson v. Refining Co.*, 90.

H Insolvency (Insolvent banking corporation see Banks and Banking H).

e Liens. Claims and Priorities

1. Where the president and secretary of an insolvent corporation to whom the corporation was largely indebted, has diverted the moneys of the corporation to pay his individual indebtedness just before the appointment of a receiver for the corporation by the court, and thereafter the president executes a deed in trust for the benefit of his individual creditors and includes in the trust estate as a credit the amount due him by the corporation, *Held:* the receiver acquires title to all property and rights of the corporation of whatever kind, and the equitable rights of the creditors of the corporation are superior to the rights of the personal creditors of the president, and the doctrine of equality of equities does not apply, and the receiver of the corporation should withhold from the trustee in the deed in trust upon the assigned claim against the corporation by its president the amount wrongfully diverted by the president immediately before the receivership. *Teague v. Furniture Co.*, 803.

f Unpaid Stock, Fraudulent Transfers and Purchases

1. In this action by the receiver of an insolvent corporation to recover the purchase price of stock alleged to have been sold by the defendant to the corporation when the corporation was insolvent, the evidence tended to show that the defendant sold the stock to the president of the corporation in his individual capacity and accepted the president's personal notes in payment, that the notes were collected by the defendant through a bank, and were paid by the president by check on corporate funds, that the president had a personal account with the corporation and it not appearing that he did not have the right to issue the checks thereon, that the corporation had continuously paid dividends on the stock and that the defendant was ignorant of its insolvency, and that the stock book of the corporation recorded the transfer as a personal transaction of its president, *Held:* the evidence was insufficient to show that the corporation had purchased the stock, and defendant's motion as of nonsuit should have been granted. *Shuford v. Brown*, 17; *Shuford v. Scruggs*, 685.

2. The fact that a president and treasurer of a corporation paid for shares of the corporation's stock he had purchased by check on corporate funds on his personal account with the corporation is not alone sufficient evidence to take the case to the jury upon the question of fraud and collusion between the officer, the purchaser of the stock, and the corporation, under the allegation that it was a device whereby the corporation purchased its own stock to the detriment of its creditors at a time when it was insolvent. *Shuford v. Brown*, 17.

CORPORATIONS H f—*Continued.*

3. The principle that an insolvent corporation may not purchase its own stock is not applicable to the facts of this case, the evidence tending to show that the stock in question was purchased by the president of the corporation in his individual capacity and not by the corporation. *Ibid.*

COSTS.

B Persons and Property Liable.

a Actions ex rel. the State

1. Where the proceedings for disbarment of an attorney has not been sustained the costs are taxable against the State under the provisions of C. S., 1236, 214, and an order erroneously taxing them against the county in which the matter was tried will be vacated. *Committee on Grievances of Bar Association v. Strickland*, 619.

d Extent and Amount Recoverable

1. Where a defendant tenders to the plaintiff the correct amount the latter can recover in his action, the cost and interest are recoverable against the defendant only to the time he made the tender. *Reinhardt v. Ins. Co.*, 785.

COUNTIES (Taxation by, see Taxation; county schools see Schools and School Districts; county commissioner is public officer see Public Officers A b 1).

F Actions (On bonds of clerk of court and sheriff see Principal and Surety B c).

a Parties and Process

1. Under the provisions of C. S., 3206, citizens and taxpayers of a county may maintain an action against the commissioners of the county and its defaulting sheriff to enforce collection of the amount of the default upon allegations that the county commissioners have corruptly refused to perform their duties in this respect. *Weaver v. Hampton*, 798.

COURTS (Supreme Court see Appeal and Error, States E b).

A Superior Courts (Judges see Judges; appeals from Industrial Commission see Master and Servant F i; Removal of Causes see Removal of Causes).

a Original Jurisdiction in General (Venue see Venue; forms between legal and equitable remedies see Actions B a)

1. Where in an action against the clerk of the Superior Court of one county and the sheriff of another county the clerk makes motion for removal of the cause as to him to the county of his office under C. S., 464, the motion raises a question of venue and not of jurisdiction. *Kellis v. Welch*, 39.

c Jurisdiction on Appeals from Clerk

1. Where upon appeal from the clerk the judge of the Superior Court dismisses the appeal he is without further jurisdiction to consider the matter, and after dismissal it is error for him to affirm the order appealed from, and upon appeal to the Supreme Court the action will be remanded. *Dixon v. Osborne*, 489.

CRIMINAL LAW (Particular crimes see Homicide, Intoxicating Liquor, Disorderly House, etc., false entries see Banks and Banking I a).

E Arraingment and Pleas.

d Nolle Prosequi

1. The statement of the solicitor at the trial of an indictment for burglary in the first and second degrees that he would not ask for a conviction on the count charging the higher degree of the crime has the effect of a *nolle prosequi* with leave on that count, and withdraws it from the case, leaving only the question of guilt of the lesser degree of the crime. *S. v. Spain*, 571.

2. Upon the trial of the husband for the abandonment and nonsupport of his wife and minor children, the announcement by the solicitor, made before entering upon the trial, that he would not prosecute the defendant for the abandonment and nonsupport of the wife is tantamount to a *nolle prosequi* or acquittal on this charge. *S. v. Brigman*, 793.

F Former Jeopardy or Conviction.

d Same Offense

1. Failure to support children is continuing offense and prosecution therefor is not barred by conviction for prior time. *S. v. Jones*, 424.

G Evidence (Right of accused not to be compelled to testify against self see Constitutional Law F; evidence in particular prosecutions see Titles of Particular Crimes).

e Hearsay Evidence

1. Testimony of confession of third party held inadmissible as hearsay evidence. *S. v. English*, 295.

h Flight as Evidence of Guilt

1. Fact that motorist sped on without stopping after hitting pedestrian is competent circumstance in prosecution for manslaughter. *S. v. Durham*, 724.

i Expert and Opinion Evidence

1. Where it is shown that witnesses have sufficient knowledge and experience to enable them to form an opinion as to whether liquor found in the possession of the defendant or manufactured by him was intoxicating, their testimony that from its odor and looks upon examination, the liquor was intoxicating, their testimony is competent without further qualification as experts. *S. v. Fields*, 110.

2. Where there is evidence in a prosecution for murder that the defendant shot the deceased twice with a pistol, poured gasoline on his body and his car and set fire thereto, that the defendant then returned to the house where he was boarding, and bathed and changed his shirt, which had blood on it, and that a pistol was found in the room of the house where he had been, and that two bullets had been fired therefrom, and the pistol is identified as the one which was in defendant's possession: *Held*, testimony of witnesses, one of whom had run paper through the barrel in the presence of the others, that the pistol had been recently fired is competent, when taken in connection with other evidence in the

CRIMINAL LAW G i—*Continued.*

case, as a circumstance to be considered by the jury, the probative force being for their determination. *S. v. Casey*, 185.

3. The president of a bank may testify as to false entries made by the secretary and treasurer thereof when the testimony is to matters within the knowledge of the witness or subject to his inspection. *S. v. Lattimore*, 32.

j Testimony of Convicts, Accomplices, etc.

1. In this case there was no evidence that the State's witness accompanying the defendant at the time of the commission of the crime was an accomplice, and no request for instructions was made in regard to his testimony, but the unsupported evidence of an accomplice, if believed by the jury, is sufficient to convict. *S. v. Casey*, 185.

2. The testimony of an accomplice if believed by the jury is sufficient for a conviction, and it is within the sound discretion of the trial judge to charge that the testimony of an accomplice should be scrutinized carefully and cautiously. *S. v. Herring*, 543.

l Confessions

1. Testimony of a voluntary confession of a third party that he committed the crime is held properly excluded by the trial court in the trial of the defendant for the murder of his wife, it being established by a long line of decisions that such evidence is incompetent as hearsay. *S. v. English*, 295.

p Evidence of Identity (See, also, Homicide G a 2)

1. Where a witness testifies that he measured foot prints at the scene of the crime soon after its commission, and testifies in detail as to the measurements taken by him at the time, and testifies that the measurements of one of the tracks checked with the measurements of the shoes of one of the defendants, and further testifies as to the measurements of the defendant's shoes, the measurements being identical, *Held:* error, if any, in the admission of the testimony that the measurements checked with the measurements of the defendant's shoe was harmless in view of the detailed testimony of the measurements of the tracks and shoes of the defendant. *S. v. Cox*, 357.

q Privileged Communications and Testimony of Husband or Wife

1. The wife is not competent to testify against her husband in a criminal action, C. S., 1802, unless the action comes within the exceptions enumerated in the statute, and upon the trial of the husband for wilfully abandoning and failing to support his minor children, the admission of the wife's testimony against him is reversible error. C. S., 4447. *S. v. Brigman*, 783.

r Impeaching, Contradicting or Corroborating Witness

1. Where on the trial of a husband for the murder of his wife the wife's father testifies in the husband's behalf, exception to testimony tending to show that the father had attempted to bribe another to implicate others will not be sustained. *S. v. English*, 295.

CRIMINAL LAW G r—*Continued.*

2. Evidence held competent on credibility of witness. *S. v. Cox*, 357.

3. Where the defendant testifies in his own defense he is subject to cross-examination as other witnesses. *S. v. Griffin*, 541.

I Trial (Of particular crimes see Particular Titles of Crime).

c Course and Conduct of Trial

1. In this case *held:* evidence was competent and objection that it unduly excited sympathy of jury is not sustained. *S. v. Cox*, 357.

f Consolidation and Separation and Election Between Counts

1. A motion, made before the introduction of any evidence, to require the State to elect between two separate counts in the bill of indictment, one charging burglary in the first degree and the other rape, is properly denied, the court not being able to intelligently pass upon the motion before knowing what the evidence would be, and the two offenses being of the same class, which under our statute, C. S., 4622, may be joined in one indictment in separate counts, it being within the sound discretion of the trial court as to whether he should compel an election between the counts and, if so, at what stage of the trial. *S. v. Smith*, 494.

g Instructions (On lesser degrees of crime charged see hereunder I l)

1. Where the charge of the court fully states the contentions of the defendant that he was not at the scene of the crime at the time of its commission, and that he was not guilty of the offense charged, the instructions will not be held for prejudicial error on the defendant's exception because of the failure to use the specific word "alibi" in regard thereto. *S. v. Casey*, 185.

2. Where upon the trial for a homicide the judge has fully and sufficiently charged the jury that the State must satisfy them of the guilt of the defendant beyond a reasonable doubt, the failure to instruct them as to the legal presumption of the defendant's innocence is not sufficient to warrant the granting of a new trial, this presumption not being considered as evidence in the case. *S. v. Herring*, 543.

3. The failure of the trial judge to define the term "beyond a reasonable doubt" in his charge to the jury will be considered as a failure to charge upon subordinate elaboration and will not be held for reversible error. *Ibid.*

4. Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions in a trial for unintentional manslaughter, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of C. S., 564, in expressing his opinion upon the weight and credibility of the evidence, is untenable. *S. v. Durham*, 724.

5. *Held:* on this trial for involuntary manslaughter, construing the charge contextually as a whole the judge correctly charged upon the evidence respecting the identity of the defendant as the driver

CRIMINAL LAW I g—*Continued.*

of the automobile at the time of the injury, the law applicable to the offense, and proximate cause, and the burden and quantum of proof necessary for conviction. *Ibid.*

6. Where the trial judge clearly and substantially charges the law arising from the evidence when the instructions are viewed contextually as a whole, the elaboration of any particular phase of the case should be presented by prayers for special instructions, and the judge is not required to instruct the jury on academic propositions of law which have no substantial relation to the case. *Ibid.*

h Province of Court and Jury in General

1. The competency, admissibility and sufficiency of the evidence is for the court to determine, and the weight and credibility is for the jury. *S. v. Casey*, 185.

j Nonsuit

1. Upon a motion to dismiss a criminal action only the evidence favorable to the State will be considered, and the motion is properly denied if there is any sufficient evidence upon the whole record of the defendant's guilt. *S. v. Casey*, 185.

2. On a motion to dismiss as of nonsuit in a criminal action the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. *S. v. Durham*, 724.

l Lesser Degrees of Crime Charged

1. Where all the evidence in a criminal prosecution tends to show that the crime was committed as alleged in the bill of indictment, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the trial court to refuse to instruct the jury that they might find the defendants guilty of a lesser degree of the crime charged. C. S., 4640. *S. v. Cox*, 357; *S. v. Smith*, 494.

2. Where there is no evidence of manslaughter the failure to charge the jury in regard thereto is not error. *S. v. Casey*, 185.

3. The principle upon which a defendant may be convicted upon a less degree of the same crime charged in the bill of indictment applies only where there is evidence of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the count charging the first degree of the crime is withdrawn, and the evidence shows that the dwelling-house was occupied at the time the alleged crime was committed, the evidence does not support the charge of second degree burglary, and the defendant's motion for the judgment as of nonsuit on that count should be allowed, C. S., 4643, *Semble:* under the provisions of C. S., 4640, the case could have been submitted to the jury on a charge of breaking into or entering a dwelling-house other than burglariously with intent to commit a felony or other infamous crime therein, contrary to the provisions of C. S., 4235. *S. v. Spain*, 571.

CRIMINAL LAW—*Continued.*

J Arrest of Judgment, New Trial, and Motions.

c Jurisdiction of Trial Court to Hear Motions for New Trial

1. The effect of an appeal is to stay all proceedings in the lower court pending the disposition of the appeal, and where, after appeal bond has been given, the defendant makes motions before the Superior Court judge for a mistrial for prejudice of jurors and for a new trial for newly discovered evidence, the motions are *coram non judice.* C. S., 4654. *S. v. Casey,* 185.

2. Where the Supreme Court has affirmed the judgment on an appeal in a criminal case and the judgment has been certified to the clerk of the Superior Court, C. S., 1412, the case is in the latter court for the purpose of the execution of the sentence, and a motion for a new trial may be there entertained for disqualification of jurors and for newly discovered evidence, C. S., 4644, and the motion is made in apt time if made at the next succeeding term after the case is certified down. *S. v. Casey,* 620.

3. An appeal in a criminal case does not vacate the judgment of the Superior Court, C. S., 4654, and although C. S., 4663 as amended by chapter 55, Public Laws of 1925, provides that the clerk of the Supreme Court shall notify the warden of the penitentiary of the affirmance of the judgment in a capital case for execution of the sentence, yet the judgment to be executed is the judgment of the Superior Court, and it will not be held that the law intended to be less mindful of the rights of one condemned to die than of those convicted of less offenses, and under the provisions of the Federal Constitution, Art. XIV, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws" it is *Held,* a motion for a new trial for newly discovered evidence and for disqualification of jurors may be made in a capital case in the trial court at the next succeeding term of court after the affirmance of the judgment by the Supreme Court. C. S., 4644. *Ibid.*

4. In misdemeanors and felonies not capital the trial court may withdraw a juror and order a mistrial in his discretion, before verdict, and without finding the facts upon which his action is based, and in capital felonies he may do so upon finding the facts which are subject to review on appeal, and in this case his judgment ordering a mistrial over the defendant's objection after refusing defendant's motion for judgment as of nonsuit, is affirmed, there being no evidence of abuse of discretion. *S. v. Guice,* 761.

L Appeals in Criminal Cases.

a Prosecution of Appeals Under Rules of Court

1. Where in a capital case the defendant's appeal in *forma pauperis* is not prosecuted according to the Rules of Court, and his motion for *certiorari* is not resisted, but return thereto is not made for about four months, when, as the only possible return, the clerk of the Superior Court sends up defendant's statement of case on appeal, which had not been served on the solicitor because of the expiration of time therefor: *Held,* although the statement of case on appeal is subject to the plea of "*nul tiel* record," the Supreme

CRIMINAL LAW L a—*Continued.*

Court will examine it, and upon the absence of reversible error appearing therein or on the face of the record proper, the judgment will be affirmed and the appeal dismissed. *S. v. Goldston*, 89.

2. Where the defendant convicted of a capital offense gives notice of appeal, but nothing is done toward perfecting the same, the State's motion to docket and dismiss the appeal will be allowed, no error appearing upon the face of the record proper. *S. v. Rives*, 343.

3. Where an appeal in a capital case *in forma pauperis* is not prosecuted according to the Rules of Court, and after the expiration of time for filing the statement of case on appeal, an *ex parte* statement is filed, and later, upon suggestion of the Attorney-General, the record of the case as agreed to by the solicitor and counsel for defendant is certified up by the clerk of the Superior Court, but is not signed by either and contains no assignments of error, the Supreme Court, not withstanding the insufficiency of the papers to constitute a proper statement of the case, will examine the *ex parte* statement and the "record of the case," and upon no error appearing upon either or on the face of the record proper, the judgment will be affirmed and the appeal dismissed. *S. v. Moore*, 618.

c *Effect of Appeal and Proceedings in Lower Court after Appeal*

1. Appeal to the Supreme Court stays all proceedings in lower court and motions before it thereafter are *coram non judice*. *S. v. Casey*, 185.

e *Review*

1. Where the president of a bank in testifying as to the making of false entries on the bank's books by another officer of the bank, under indictment therefor, inadvertently refers to an irrelevant account and has corrected the error after discovering it, whereupon the judge has ordered this testimony stricken from the record and instructed the jury not to consider it, an exception theretofore taken becomes immaterial. *S. v. Lattimore*, 32.

2. Defendant's motion for a new trial on appeal in a criminal action must be based on injustice arising from error on the trial, and his motion therefor will be denied when it appears that the granting of a new trial would carry no prospect of ultimate benefit to the defendant, and where on the trial of a clerk of a municipal court for embezzlement, the trial court excludes testimony of the auditor, who had audited the accounts, as to transactions not included in the counts in the indictment, tending to show that the clerk had turned over money for which no record of fines, etc., could be found, and it appears that evidence of the same substance was fully brought out on cross-examination, error, if any in the exclusion of the testimony will not be held prejudicial, and a new trial will not be awarded therefor. *S. v. Caudle*, 85.

3. Upon appeal in a criminal case the Supreme Court has jurisdiction to review only matters of law or legal inference. Article IV, section 8. *S. v. Casey*, 185.

CRIMINAL LAW L e—*Continued.*

4. Where the bill of indictment charges the defendant with burglary in the first degree and rape under separate counts, and the jury renders a verdict of guilty as charged, on both counts, it is immaterial whether the trial court committed error in failing to charge upon the lesser degree of the crime of burglary, the verdict of guilty of rape being sufficient to support the judgment. *S. v. Smith*, 494.

5. Where a motion for a new trial for disqualification of jurors and for newly discovered evidence has been denied by the trial court under the erroneous belief that it lacked jurisdiction to hear the motion, and denied also in the exercise of the discretion, the case is appealable, and as the court's erroneous belief as to its jurisdiction might have affected the exercise of the discretionary powers, the case will be remanded on appeal. *S. v. Casey*, 621.

f Disposition of Cause

1. Upon refusing defendant's motion to retax the costs in a criminal action the judge should find the material facts upon which his ruling is based so that the Supreme Court may determine the correctness of his ruling, and where this has not been done the case will be remanded; in this case it not appearing whether the State had tendered its witnesses for cross-examination or whether the trial judge made any order with respect to the fees of any witnesses, or whether certificates were given them by the solicitor, C. S., 1287, or whether the witnesses whose fees were taxed were duly under subpœnas, C. S., 1284, and upon remand the costs of the appeal will be taxed against the State. *S. v. Kirby*, 789.

CROP LIENS see Agriculture D b.

DAMAGES.

F Measure of Damages (In action for wrongful death see Death B b).

a Injuries to the Person

1. Where the plaintiff in a negligent injury action does not offer evidence of any expense he was put to as the result of the injury, and instruction upon the measure of damages recoverable that the plaintiff has the burden of proof and may recover, if at all, only an amount which would compensate him for past, present and future suffering and the condition of his person, excluding any expense he may have incurred otherwise on account of the injury received, is not erroneous, and an exception by the defendant to another portion of the charge consistent and not in conflict therewith will not be sustained. *Campbell v. R. R.*, 102.

c Injuries to Property

1. In an action to recover damages to the plaintiff's car resulting from a collision of two automobiles on the public highway, testimony of a properly qualified witness as to the value of the injured car before and after the accident is competent and the admission of the testimony will not be held for error on the defendant's objection that the witness failed to specify that the values as given were the market value when it appears that such was intended and understood by the jury. *Hicks v. Love*, 773.

DAMAGES—*Continued.*

E Punitive Damages.

a Grounds Therefor

1. Punitive damages for the wrongful seizure of the plaintiff's car are not recoverable when the evidence tends to show that the car was seized with the consent of the plaintiff, and where the jury awards punitive damages on such evidence in addition to compensatory damages for the wrongful seizure, the judgment rendered on the verdict will be modified by striking out the answer to the issue relating to the punitive damages. *Somers v. Credit Co.*, 601.

DEATH.

B Actions for Wrongful Death (Right of minor's administrator to maintain action for wrongful death against its parents see Parent and Child B a 1).

b Expectancy of Life and Damages

1. The rule for damages recoverable for a wrongful death was correctly given in the instructions in this case. *Byers v. Hardwood Co.*, 75.

2. In an action for wrongful death the jury may consider evidence of the plaintiff's intestate's age, habits, industry skill, means and business, C. S., 160, and the admission of testimony in this case that the deceased had a 200-acre farm, a comfortable home, and a plenty for his family to eat and wear, was not error. *Hicks v. Love*, 773.

3. Where damages are sought in an action for the negligent killing of the plaintiff's intestate and the liability of the defendant has been established by the answer of the jury upon the other issues, it is not necessary that the plaintiff introduce evidence of the earning capacity of the deceased in order to recover more than nominal damages, there being other evidence as to the financial worth and industry of the deceased. *Ibid.*

DECLARATORY JUDGMENT ACT see Actions A a 2.

DEEDS AND CONVEYANCES (Contracts to convey see Vendor and Purchaser).

A Requisites and Validity (Deeds fraudulent as to creditors see Fraudulent Conveyances).

f Acknowledgment and Probate

1. The failure of the certificate of a deed to lands from a wife to her husband to state that the conveyance was "not unreasonable or injurios to her" renders the instrument void. C. S., 2515. *Bank v. McCullers*, 440.

2. Probate in this case held defective and deed of trust was null and void as notice to purchasers and creditors. *Barber v. Brunson*, 779.

D Boundaries (Arbitration as bar to action to establish, see Arbitration and Award E b 1).

d Declarations

1. Where the dividing line is in dispute in an action involving title to lands and trespass, testimony of declarations against his interest by the plaintiff's predecessor in title is competent against the plain-

DEEDS AND CONVEYANCES D d—*Continued.*

tiff when the declarations are relevant to the issue and a circumstance tending to prove the correct location of the boundary. *Dill-Cramer-Truitt Corp. v. Downs*, 478.

DEMURRER see Pleading D.

DENTISTS see Physicians and Surgeons C b 6.

DESCENT AND DISTRIBUTION.

A Nature and Course in General.

a Determination of Whether Estate is Taken by Descent or Purchase

1. A deed to lands from a father to his son reciting a consideration of natural love and affection and a further consideration of one hundred and sixty dollars, reserving a life estate with warranty and covenants of title excepting an existing judgment against the land of one hundred and sixty dollars, *Held:* the words of the consideration "natural love and affection" do not qualify the estate, and in the absence of words to the contrary the express consideration of one hundred and sixty dollars, the amount of the outstanding judgment against the land, is a valuable consideration and sufficient to support the deed and create the son a new propositus, and at his death intestate, the lands will descend to his heirs-at-law and not to those of the grantor, his father, the estate acquired by the son not being by descent, devise, gift or settlement. *Ex Parte Barefoot*, 393.

2. A consideration expressed in a deed is not contractual and the actual amount paid may be shown by parol evidence, but nothing else appearing, it will be presumed that the recited consideration is correct and where a deed from a father to a son is supported by a valuable consideration and another deed is introduced as a correction thereof showing a larger amount, the later deed, if taken as correct, recites a valuable consideration under which the son would also take by purchase. *Ibid.*

B Persons Entitled Thereto and Their Respective Shares.

f Relations of the Half and Whole Blood

1. The fourth canon of descent, providing that upon the death of the ancestor intestate and without lineal descendants the inheritance in land shall descend to the next collateral relation of the person last seized, capable of inheriting, of the blood of the ancestor, is construed in connection with the sixth canon, providing that the collateral relations of the half-blood shall inherit equally with those of the whole blood, with an exception where the inheritance is transmitted to the person last seized by devise, gift or settlement, but the exception does not apply where the estate is acquired by purchase, and where a son acquires land by deed from his father and pays a valuable consideration therefor, and dies without lineal descendants prior to his father's death intestate, *Held:* the land descends to the collateral relations of the son whether of the whole or half-blood, and the inheritance is not limited to the collateral relations of the son who are also of the blood of the father, the grantor. C. S., 1654. *Ex Parte Barefoot*, 393.

DISORDERLY HOUSE.

B Prosecution and Punishment.

c Evidence

1. In a prosecution for keeping a disorderly house evidence tending to show the lewd and boisterous conversation of the inmates and frequenters of the house, and evidence of the general reputation or character of the house is competent. C. S., 4347. *S. v. Hildebran*, 780.

2. In a prosecution for keeping a disorderly house evidence of occurrences happening more than two years prior to the indictment is competent as corroborative of evidence of such occurrences happening within the two years. *Ibid.*

DIVORCE.

A Grounds for Divorce.

a Adultery

1. In this case *held:* testimony on the issue of adultery was competent and sufficient to be submitted to the jury in the plaintiff's action for divorce, the defendant introducing no evidence in rebuttal. *Walker v. Walker*, 183.

DOCTORS see Physicians and Surgeons.

DOWER.

A Nature, Rights and Incidents in General.

b Lands and Interests to Which Dower Attaches

1. Dower is the life estate to which a married woman is entitled upon the death of her husband intestate or in case of her dissent from his will, and is one-third in value of all lands, tenements, and hereditaments, legal and equitable, of which the husband was beneficially seized at any time during coverture, and which her issue might inherit as heir to the husband, and upon the husband's death the right of dower is consummate. *Holt v. Lynch*, 404.

C Dower Consummate.

a Rights of Widow and Creditors of Husband's Estate

1. During the term of her life the widow's dower right is not ordinarily subject to the payment of debts of her husband's estate, and while the widow may subject her dower to the payment of the debts of her husband's estate by joining in his mortgage deed or conveyance in conformity to the statutory requirements, C. S., 4102, yet if his estate is solvent the dower need not be sold, and in the event that it is insolvent the estate must be administered according to the established rules. *Holt v. Lynch*, 404.

b Allotment of Dower

1. Where a wife has signed her husband's mortgage deed, observing the statutory requirements, and he has died intestate, the mortgagee is not entitled to have the lands sold and the value of the widow's dower paid to her out of the proceeds, but if there are no unsecured creditors of the husband's estate he should first take his claim out of the personal estate of the husband, but if the estate is insolvent, the widow's dower in the land should be laid out, and the remain-

DOWER C b—*Continued.*

ing two-thirds of the lands sold and applied to the mortgage debt before sharing in the personal estate ratably with other creditors, and if this is not sufficient to pay the mortgage debt he is entitled to have the dower interests sold and applied thereto, the widow having assigned her right as security for the debt. *Holt v. Lynch*, 404.

2. Before allotment of dower is made in the lands of a deceased husband dying intestate his heirs at law should be made parties plaintiff or defendant. C. S., 456, 457, 460. *Ibid.*

EASEMENTS.

A Creation.

c Easements by Necessity

1. Where a petition for a "way of necessity" over the lands of another is filed in the Superior Court, and the petition alleges that the petitioner was devised a tract of land without any way of egress to a public road except over the land of another devisee of the testator, and there is no allegation that such a way over the land of the other devisee had theretofore existed in favor of the land devised to the petitioner, and there is no stipulation in the devise for a way of ingress and egress to a given point, *Held:* the petitioner's exclusive remedy is under the provisions of C. S., 3835, 3836, by way of petition before the road-governing body of the county, and the proceedings in the Superior Court is properly nonsuited. *White v. Coghill*, 421.

B Operation and Effect.

b Subsequent Purchasers

1. A registered grant of a right-of-way to a telephone company for its transmission lines for a sufficient consideration passes the title as against a later registered conveyance of the land to another, and, the allegations of the one acquiring the land under the later registered conveyance not being sufficient to establish fraud, his action against the telephone company is properly dismissed. *Bender v. Tel. Co.*, 355.

C Termination.

a By Acts of the Parties

1. The lower proprietor of lands must show a right of easement in the drainage ditches on the land of the upper proprietor by written grant or prescription, but an abandonment may be shown under verbal agreement evidenced by acts of the parties showing an unequivocal intent to that effect, and testimony in this case was sufficient to be submitted to the jury to the effect that the upper proprietor stopped up certain drainage ditches on his land several times whereupon the lower proprietor as often cleared them out, the action being brought by the latter to restrain the former from continuing to obstruct the flow of water therein. *Semble:* by reference to answers to certain issues the right of easement was by prescription in this case. *Combs v. Brickhouse*, 366.

EDUCATION see Schools and School Districts.

EJECTMENT.

C Pleadings and Evidence.

b Evidence and Burden of Proof

1. Where in an action in ejectment the plaintiff establishes his title to the *locus in quo* and the defendants allege adverse possession of a tract of land under color of title but described in their deed differently from the description of the land in the plaintiff's complaint, and the defendants claim that the two tracts are the same but fail to make it so appear and introduce no evidence of adverse possession, C. S., 432, *Held:* the granting of the defendant's motion as of nonsuit was error. *Hayes v. Cotton*, 369.

2. In an action in ejectment the plaintiff has the burden of proving his own title to the *locus in quo*, and it is not sufficient for him to show that the defendant does not have title, but where the plaintiff has established his title and the defendant relies upon adverse possession as a defense, the defendant must establish such affirmative defense by the greater weight of the evidence. *Ibid.*

ELECTION OF REMEDIES.

A When Election Must be Made.

a In General

1. Where two inconsistent causes of action are joined in the same complaint the plaintiff will be required to adopt one and abandon the other, or to reform the complaint to make it square with the rules of good pleading. The distinction is noted between inconsistent remedies and inconsistent defenses allowed by statute. C. S., 522. *Lykes v. Grove*, 254.

b Between Rescission of Contract and Action for Breach

1. The plaintiff is put to his election between bringing a suit for the rescission of a contract *ab initio*, where fraud is not alleged, and bringing an action for damages for the breach thereof, as he will not be permitted to deny and affirm the contract at the same time, but where special damages have been sustained, notwithstanding the rescission, rescission will not bar a recovery of such special damages. *Lykes v. Grove*, 254.

c Between Actions Ex Contractu or in Tort

1. Generally under our reformed procedure several causes of action may be united if they arise out of the same transaction or a transaction connected with the same subject-matter of the action, whether legal or equitable or in contract or tort, and in this action: *Held*, the elements of contract and tort are so closely related that defendant's motion calling for the election of the plaintiff to sue either in contract or tort was properly denied. *Craven County v. Investment Co.*, 523.

ELECTIONS.

J Recall of Elected Officers.

a Procedure and Requisites

1. Mandamus is only available to enforce a clear legal right, and where the writ is sought to compel a city clerk to certify to the sufficiency of a petition for the recall of an elected officer of the city under the

ELECTIONS J a—*Continued.*

provisions of the city charter, and it appears that the original petition, after the elimination of duplicates, contained five less names than the number required for the recall, and the record fails to show that an amended petition thereafter filed, purporting to contain the names of fifty-eight additional electors, was ever acted upon by the clerk or that it did contain the names of as many as five additional qualified electors, the plaintiff has failed to show a clear legal right and the writ of mandamus is properly denied, and the question of whether the clerk had the authority to remove the names of electors from the petition upon their written application is not presented for decision. *Barham v. Sawyer*, 498.

ELECTRICITY.

A Duties and Liabilities of Power Companies.

e Right of Action Against and Defenses

1. Every person specially injured by the breach of duty of an electric company can maintain an action for his individual compensation, and where a complaint in an action against an electric company for damages caused by the negligent installation of electric wiring, refers throughout to the house damaged as the plaintiff's "house" or "home" it is a sufficient allegation of ownership upon which to deny a motion of nonsuit entered upon the ground of failure to allege ownership. *Wooten v. Power Co.*, 560.

EMBEZZLEMENT—Liability on clerk's bond for, see Principal and Surety B c 1 to 8.

EMINENT DOMAIN.

B Delegation of Power.

b Public Utilities Corporations

1. A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines under the provisions of our statute, C. S., 1706, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedure. *Crisp v. Light Co.*, 46.

C Compensation.

a Necessity and Sufficiency of Compensation and Acts Constituting Taking of Property

1. In assessing damages to be awarded the private owner of lands for its taking for a permanent use by a power company for the maintenance of transmission line, its erection upon a right of way of another public service corporation is a superimposed burden upon the title of the owner, for which compensation should be awarded. *Crisp v. Light Co.*, 46.

2. Where the owner of a development has constructed a water system therein and deeded the lands in the development to others, upon an appropriation of the water system by a city extending its limits to include the development, the city may not maintain that the owner had no interest in the water system or nothing of value for which compensation should be paid upon such appropriation. *Stephens Co. v. Charlotte*, 258.

EMINENT DOMAIN C a—*Continued.*

3. Where a city, with statutory authority, makes a contract with a railroad company whereby the city agrees to build certain underpasses across certain of its streets and to close certain other streets where they cross the railroad tracks at grade in the city limits, and in pursuance of the contract the city closes a street at a grade crossing, *Held:* an owner of a lot abutting the street closed under the agreement, whose property is thus placed in a *cul de sac* and cut off from the use of the street as a means of travel to and from the business section of the city and made less valuable by reason of the stopping of traffic along the street from one direction, is entitled to compensation for the damage to his property by reason thereof, less any special benefits, he having suffered special damage not common to the public generally. *Hyatt v. Greensboro*, 515.

c Right to Compensation for Injury to Contiguous Lands

1. In assessing damages for the taking of the land of a private owner by a public service corporation for the erection of transmission lines, entire and full compensation for its permanent use should be awarded, and witnesses acquainted with the facts are properly allowed to testify as to the use to which the lands contiguous to that taken could have been put, except for the taking, within reasonable bounds, not including those that are imaginative or merely speculative, and such evidence is competent on the question of damages, and the fact that the transmission line was to carry a highly dangerous voltage of electricity is a competent circumstance to be considered by the jury. *Crisp v. Light Co.*, 46.

D Proceeding to Take Land and Assess Compensation or to Recover Damages.

a Requisites, Pleadings and Jurisdiction

1. Charter provision requiring notice does not apply to taking of property for public use. *Stephens Co. v. Charlotte*, 158.

c Appeal from and Review of Appraisals

1. The remedy provided by statute for the assessment of damages to the property of a private owner taken by a city for a public use must be observed, and where an owner fails to appeal from the reports of the appraisers or fails to perfect an appeal therefrom he may not bring a separate action in the courts to have his damages assessed. *Harwood v. Concord*, 781.

EMPLOYER AND EMPLOYEE see Master and Servant.

EQUITY (Forms of action abolished see Actions B a; specific equitable rights and remedies see Injunctions, Reformation of Instruments, Trusts, etc.).

A Principles and Maxims of Equity.

1. Where an action for the wrongful death of a child is brought by his administrator against his mother, the complaint alleging that the death was caused by the negligent driving of the mother's car by her agent, the father, a recovery if permitted under the facts of this case would pass under the law of descent and distribution to the parents, C. S., 137(6), and the policy of the law would not permit them to benefit by their own tort. *Goldsmith v. Samet*, 574.

ESTATES—Created by will see Wills E; estate by entireties see Husband and Wife G a.

ESTOPPEL see Judgments L.

EVIDENCE (In criminal cases see Criminal Law G; in particular actions see Malicious Prosecution B c, Negligence D b, Ejectment C b, Conspiracy A b, Trespass to Try Title A f, etc.).

C Burden of Proof (See, also, Adverse Possession C a, Ejectment C b, Brokers E c).

b Defenses

1. Where an affirmative defense is set up in an action such defense must be established by the greater weight of the evidence. *Hayes v. Cotton*, 369.

D Relevancy, Materiality and Competency in General.

b Transactions or Communications with Decedents

1. The interest of one who temporarily held the title to the lands in dispute prior to the defendant is a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. C. S., 1795. *Dill-Cramer-Truitt Corp. v. Downs*, 478.

G Declarations.

b By Decedents Against their Interests

1. Testimony of declaration against interest by plaintiff's predecessor in title held competent. *Dill-Cramer-Truitt Corp. v. Downs*, 478.

I Documentary Evidence (In criminal cases see Criminal Law G s).

b Accounts, Ledgers, Records, and Private Writings

1. Explanatory entries upon the stock book of a corporation made in the regular course of business in relation to transfers and purchases of its shares is not, in proper instances and in connection with other evidence, objectionable as hearsay evidence. *Shuford v. Brown*, 17.

J Parol Evidence.

a Admissibility in General

1. Parol evidence is not admissible in action for construction of will. *Reynolds v. Trust Co.*, 267.

2. Where an agreement for the subscription of stock in a corporation to be formed is in writing and expressly provides that the entire contract is expressed in the writing, parol evidence of promissory representations theretofore made is incompetent as tending to vary the terms of the written instrument, all prior or contemporaneous oral agreements being merged in the written contract. *Hotel Corp. v. Overman*, 337.

3. Liability of parties on note is fixed by Negotiable Instrument Act and different liability may not be shown by parol. *Corporation Commission v. Wilkinson*, 344.

4. Parol evidence of consideration for deed held competent. *Bank v. Lewis*, 148; *Ex Parte Barefoot*, 393; *Bank v. McCullers*, 412.

EVIDENCE J a—*Continued.*

5. Where a receipt is an acknowledgment of the payment of money or the delivery of goods it is but prima facie evidence of the amount stated thereon and may be contradicted by parol, and *Held:* in this case, the action of the trial judge in ruling out the evidence of the plaintiff, a substitute employee of the United States Postoffice, that though she had signed a government receipt for the amount of her salary at the government rate of a fixed sum per hour, that she had actually received a less amount in monthly payments from the local postmaster is reversible error in her action against the postmaster for the money had and received by him to her use, and this rule is particularly insistent where there is evidence of fraud and mistake. *Jenkins v. Wood*, 460.

6. Where a written instrument is so expressed as to leave its meaning doubtful parol evidence is ordinarily admissible to show and make certain what the actual agreement between the parties really was. *Robinson v. Benton*, 712.

d In Actions for Reformation of Instrument

1. In an action to reform a deed of trust or mortgage on real property, parol evidence is competent to sustain the allegations of the complaint that an additional tract of land was included in the description of the land in the instrument by the mutual mistake of the parties, this being an exception to the ordinary rule that evidence of this character is not admissible to vary the terms of a written instrument. *Alexander v. Bank*, 449.

K Expert Testimony and Opinion Evidence.

b Subjects of Expert or Opinion Testimony

1. A man of usual intelligence may testify without previous qualification as to the speed of an automobile moving upon the public highway from his own observation, when material to the inquiry, and while it is the better practice for the party offering him to show by examining him his qualifications, his testimony without such qualification will be given such weight and credibility as the jury considers it entitled to. *Hicks v. Love*, 773.

2. Where, in an action to recover damages caused by a collision between two automobiles on a public highway, the plaintiff's witnesses testify to the speed at which the defendant's car was traveling immediately before the accident, an objection to their testimony on the ground that the defendant's car was not sufficiently identified by them will not be sustained when the testimony of all the witnesses sufficiently identifies the car referred to as that of the defendant by descriptions of its make, color and number of occupants, etc., and the defendant's car was the only car under the circumstances that could have fitted the descriptions. *Ibid.*

N Weight and Sufficiency.

a Prima Facie Case

1. Where a prima facie case has been made out it is sufficient to carry the case to the jury and to warrant a recovery, but it neither insures nor compels a recovery, the question of whether the necessary facts have been established being for the jury. *Dickerson v. Refining Co.*, 90.

EVIDENCE N—*Continued.*

b Sufficiency in General

1. Where there is any evidence tending to sustain the plaintiff's cause of action, even though conflicting in material parts, it should be submitted to the jury, but where there is no such evidence the defendant's exceptions to the refusal of the trial court to grant his motion of nonsuit or his request for a directed verdict will be sustained on appeal. *Ferguson v. Glenn*, 128.

2. Evidence must be sufficient to raise more than a conjecture or suspicion of the fact to be proved in order to be sufficient to be submitted to the jury. *Shuford v. Brown*, 17; *Broughton v. Oil Co.*, 282; *Shuford v. Scruggs*, 685.

EXECUTION.

C Issuance, Form and Requisites.

a Leave of Court After Three Years from Docketing

1. C. S., 668, providing that after the lapse of three years from the entry of judgment execution could be issued only by leave of court, was repealed by the act of 1927, and leave of court is not necessary for execution upon a judgment after the lapse of three years where the execution is issued after the effective date of the act of 1927 and within ten years from the date of the docketing of the judgment. C. S., 614. *Moses v. Major*, 613.

EXECUTORS AND ADMINISTRATORS (Venue of action against, on final accounting see Pleadings D a 1).

A Appointment, Qualification and Tenure.

a Persons Entitled to Appointment

1. Where a resident dies in a county in which no public administrator has been appointed, C. S., 20, the clerk of the court has jurisdiction to appoint an administrator for his estate after the lapse of six months where no other person qualified under the statute has applied for letters of administration, C. S., 15, and where the clerk has appointed an administrator under the statute a debtor of the estate cannot maintain the position that the appointment of a public administrator was necessary to receive payment of the debt, in this case compensation recoverable under the provisions of the Workmen's Compensation Act. *Brooks v. Clement Co.*, 768.

C Control and Management of Estate.

c Contracts and Debts and Encumbrances Created by Executor or Administrator

1. Although a conveyance by the heirs-at-law within two years from the qualification of the administrator of the estate is voidable as to creditors of the estate, C. S., 76, an administrator does not have the power to charge the estate with liability created by him on matters wholly occurring after the death of the testator, and, upon a sale of lands of the estate to make assets for the payment of debts, he may not exchange land with the purchaser and assume, as administrator, a mortgage debt on the lands conveyed to him by the purchaser, nor may the clerk approve such an exchange. C. S., ch. 1, and where the mortgagee of the purchaser from the adminis-

EXECUTORS AND ADMINISTRATORS C c—*Continued.*

trator seeks to set aside a conveyance to the heirs-at-law by the administrator on other lands received in the exchange and conveyed to the heirs-at-law and conveyed by them to a third person, a judgment sustaining a demurrer to the complaint is affirmed. *Ins. Co. v. Buckner*, 78.

d Suits to Recover Debts Due Estate

1. Where a father in his individual capacity brings an action against his daughter to recover certain money alleged to have been owned by and in possession of his wife at the time of her death, a demurrer is properly sustained, the cause of action for the recovery of such sum being vested in the personal representatives of the wife alone. *Penland v. Wells*, 173.

D Allowance and Payment of Claims (Respective rights of widow and creditors see Dower C a).

a Claims for Services Rendered Decedent

1. In an action to recover for services rendered a decedent upon a *quantum meruit*, testimony as to the reputed wealth of the decedent is incompetent, the question at issue being the value of the services rendered and not the value of the estate of the decedent. *Sawyer v. Weskett*, 500.

EXPERT TESTIMONY see Evidence K, Criminal Law G i.

EXPLOSIONS see Negligence A c 5.

EX POST FACTO see Statutes A c.

EXTRADITION.

A Proceedings and Formal Requisites for Extradition.

a Nature of Remedy in General

1. While there is no express grant to Congress by Art. IV, sec. 2, of the Constitution of the United States relating to extradition between the states of fugitives from justice, the duty devolves upon the legislative branch of providing by law for regulations necessary to carry the constitutional provisions into execution, in pursuance of which Congress enacted U. S. C. A., sec. 662, under which the executive of the demanding state issues extradition papers to the executive of the asylum state. *In re Hubbard*, 472.

B Grounds Therefor and Defenses.

a Charge of Crime and Fugitive from Justice

1. Under the provisions of the Constitution of the United States, Art. IV, sec. 2, relating to extradition of fugitives from justice, the right to demand implies the correlative obligation to deliver the fugitive without regard to the nature of the crime or the policy of the law of the demanding state. *In re Hubbard*, 472.

2. Where extradition papers have been issued by the executive of another state to the executive of this State for the delivery of one having violated the criminal laws of the demanding state, it is necessary for the papers upon which the requisition is issued to show at least that a crime has been committed by the person

EXTRADITION B a—*Continued.*

against the laws of the demanding state, and where the requisition papers, construed liberally, fail to charge substantially that a crime has been committed against the laws of the demanding state the person arrested will be discharged upon the hearing of the writ of *habeas corpus* in our courts. *Ibid.*

3. Where the offense charged in the extradition papers is the drawing of checks upon a bank which have been returned by the bank with notice of insufficient funds, and the statute of the demanding state makes the drawer's fraudulent intent and knowledge of the insufficiency of the funds an essential element of the crime, the failure of the extradition papers to charge these essential elements is fatal, and, upon the hearing of a writ of *habeas corpus* by our courts, the prisoner will be discharged from custody. *Ibid.*

c Procedure to Test Validity of Extradition Papers

1. Where the executive authority of one state demands any person, as a fugitive from justice, of the executive authority of another state, the requisition may be challenged by a writ of *habeas corpus* issuing from a state court, Congress having failed to invest the judicial tribunals of the United States with exclusive jurisdiction in respect thereto. *In re Hubbard*, 472.

FALSE IMPRISONMENT—Liability of master for servant's false arrest of third person see Master and Servant D b 4, 5.

FEDERAL COURTS—Removal of causes to, see Removal of Causes.

FEDERAL EMPLOYERS' LIABILITY ACT see Master and Servant E.

FIDUCIARIES.

A Fiduciary Relationships.

a In General

1. It is difficult to define legally the exact extent of the meaning of the term "fiduciary" to include every relationship of that character, but the relationship exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and in due regard to the one reposing the confidence. *Abbitt v. Gregory*, 577.

FILLING STATIONS—Explosions at see Negligence A c 5; zoning ordinances see Municipal Corporations H b; as nuisances see Nuisances A b.

FOOT TRACKS see Criminal Law G p.

FRAUD (In procuring release see Torts C b; in concealing price purchaser would pay for stock see Trusts A b 2; fraudulent conspiracy to sell stock see Conspiracy A b 1, 2).

C Actions.

b Pleadings

1. A demurrer to a pleading admits all allegations of fact properly set out therein, but if fraud is relied on all material facts and elements constituting the fraud must affirmatively appear from the pleadings. *Weaver v. Hampton*, 798.

FRAUDS, STATUTE OF—Parol termination of easement see Easements C a.

FRAUDULENT CONVEYANCES (Suit for reconveyance of property conveyed to defeat creditors see Trusts A b 1).

A Transfers Invalid.

b Consideration

1. A deed from a husband to his wife in consideration of love and affection is founded upon a good consideration, and is valid as to the parties, and where there is evidence that funds received by her from her family were used in the purchase the evidence is admissible to show a valuable consideration, although the deed recites a consideration of one dollar and love and affection, and although the relationship raises a presumption of fraud as to creditors, the presumption is rebuttable, and the deed is valid as to all parties if the consideration was a fair price for the land conveyed. *Bank v. Lewis*, 148.

2. Where, in an action to set aside a deed from a mother to her daughter as being voluntary and fraudulent as to creditors, the daughter attempts to show that the deed was given in consideration of personal services rendered the mother by her, upon a promise to pay therefor, it is error for the trial court to confine her evidence to services rendered within three years next preceding the commencement of the action or the death of the grantor, the action not being to recover for such services and no plea of the statute of limitations being entered. *Bank v. McCullers*, 412.

3. In an action to set aside a deed from a mother to her daughter as being voluntary and fraudulent as to creditors, the daughter is entitled to show, if she can, that the consideration for the deed was personal services rendered by her to her mother, the presumption of gratuity arising out of the relationship being rebuttable by proof of an agreement to pay, or that payment was intended on the one hand and expected on the other, and although the deed, if voluntary, is void as to creditors, it is otherwise if the defendant can show a valuable consideration therefor. *Ibid.*

d Insolvency and Intent of Grantor

1. Where, in an action to set aside a deed from a husband to his wife as being fraudulent as to his creditors, the trial court admits testimony by her to the effect that money received by her from her family was used in payment of the purchase price, and instructs the jury to consider the testimony only on the aspect of fraudulent intent of the husband in executing the deed, the admission of the evidence will not be held for error on the plaintiff's exception. *Bank v. Lewis*, 148.

2. In an action against a husband and wife to set aside a deed from him to her as being voluntary and fraudulent as to creditors, an instruction that if the husband, taking into consideration his financial condition at the time of the execution of the deed and the fact that he had signed a guaranty for a company in which he was interested, and the financial condition of the company and the other signers of the guaranty, if he had retained property sufficient to pay his then existing debts that the conveyance would be valid, is not error. *Ibid.*

FRAUDULENT CONVEYANCES A d—*Continued.*

3. In an action against a husband and wife to set aside a deed from him to her as being voluntary and fraudulent as to creditors, an instruction that the jury might consider the financial condition of the husband in determining the question of his fraudulent intent is not error. *Ibid.*

GOLF.

A Duties and Liabilities of Players.

a Observance of Safety Rules, Negligence, etc.

1. A player upon a golf course must exercise ordinary care commensurate upon the surrounding circumstances at the time, particularly in driving the ball, and where there is evidence that the defendant, playing in a threesome behind a twosome in which the plaintiff was playing, failed to give any warning by shouting "fore" or otherwise, and that he drove the ball while the plaintiff was shortly in front of him on the fairway in violation of a rule of the club that a player should be allowed two drives before following players should proceed, with evidence in contradiction and evidence that the twosome and threesome had merged into one game, *Held:* the conflicting evidence was properly submitted to the jury upon the issue of the defendant's negligence. *Everett v. Goodwin*, 734.

B Duties and Liabilities of Golf Clubs or Owners of Courses.

a Promulgation and Enforcement of Safety Rules

1. The owners of golf courses for hire are obligated by law to promulgate reasonable rules for the protection of persons who are rightfully on the course, and to exercise due care for the enforcement of the rules, and where a golf club has adopted, for the safety of players, rules regulating the distance to be observed between successive players upon the course, and has supplied "rangers" to enforce the rules, and there is evidence that the rules were continuously violated by a player in playing a threesome behind a twosome in which the plaintiff was playing, and that the "rangers" made no attempt to enforce the rules, if they saw their violation, and that the plaintiff was injured as a result of the violation of the rules, *Held:* in an action against the golf club the evidence was properly submitted to the jury on the question of the club's negligent failure to enforce the rules. *Everett v. Goodman*, 734.

GUARDIAN AND WARD (Ward has no priority in insolvent bank's assets for mingling guardianship funds see Banks and Banking H d 1, 2; setting aside judgment obtained upon admission by guardian see Judgments K a 2).

H Liabilities on Bonds.

a In General

1. Where an assistant clerk of the Superior Court has been appointed guardian of the estate of a minor by the clerk and has given bond and has defaulted, causing loss to the estate of the minor, upon the minor's coming of age he and the new guardian appointed may sue upon the guardianship bond (C. S., 2161) and where he sues upon the guardianship bond neither the clerk of the Superior Court

GUARDIAN AND WARD H a—*Continued.*

nor his sureties on his bond is a necessary party, so far as his action is concerned, and the refusal of a motion to make them parties is not error. *Phipps v. Indemnity Co.*, 561.

2. The surety on a guardianship bond is estopped to deny the validity of the appointment of a guardian when the bond signed by the surety recites that the guardian had been duly appointed. *Ibid.*

HABEAS CORPUS see Extradition B c.

HIGHWAYS.

B Use of Highway and Law of the Road.

a Right Side of Road and Law in Passing Cars

1. A driver of an automobile upon a public highway has a right to assume that another driver coming towards him will observe the rule in passing, and will turn to the right to avoid a collision when there are no indications that he is under any physical disability, and under the evidence in this case an instruction is held correct that if the defendant was running to the right of the center of the highway and met the plaintiff's car, it was not the duty of the defendant to turn further to his right even though he could have done so, he having the right to assume that the other driver would take his rightful position in passing. N. C., Code of 1927 (Michie), sec. 2621(53). *Shirley v. Ayers*, 51.

c Speed on Highways

1. The evidence in this case tended to show that the car in which the plaintiff's intestate was riding as a guest was thrown across the highway by skidding when the driver thereof put on brakes to attempt to regain his position behind another car upon seeing the defendant's bus approaching around a curve, that the bus was traveling at a greater rate of speed than fifteen miles per hour around the curve and that the driver's view was obstructed by the grade within a distance of two hundred feet; that the defendant's bus collided with the car in which plaintiff's intestate was riding, causing the intestate's death: *Held*, the evidence was properly submitted to the jury on the question of the defendant's negligence in exceeding the speed limit in such circumstances, C. S., 2621(46), N. C. Code, 1927, and the question of whether such negligence, if established, was the proximate cause or one of the proximate causes of the injury. *Godfrey v. Coach Co.*, 264.

h Ordinary Care in Driving, Attention to Road, etc.

1. While the skidding of an automobile upon a highway is not sufficient to apply the doctrine of *res ipsa loquitur*, where there is evidence in an action to recover damages for an injury resulting from the alleged negligence of the driver, that the driver was inattentive to the road and talking to a companion on the seat with him or looking within the automobile instead of on the road ahead, and that the skidding was caused by a sudden turn of the wheel when he found himself on the edge of the hard surface, it is sufficient to be submitted to the jury on the issue of negligence. *Butner v. Whitlow*, 749.

HIGHWAYS B—*Continued.*

k Guests and Passengers

1. Upon evidence tending to show only that the plaintiff was an invitee of the owner and driver of an automobile, and had no management or control over the driver, any contributory negligence attributable to the driver will not ordinarily be imputed to the plaintiff. *Campbell v. R. R.*, 102; *Sanders v. R. R.*, 672.

2. The administrator of an intestate, killed in a collision between a bus and a car in which the intestate was riding as a guest, may not recover against the bus company if the negligence of the driver of the car was the sole proximate cause of the injury, but he may recover if the negligence of the bus company was the proximate cause or one of the proximate causes of the intestate's death. *Godfrey v. Coach Co.*, 264.

3. Where negligence of driver is sole proximate cause of accident a guest therein may not recover of third person. *Holt v. R. R.*, 638.

4. Where an injury is sustained by the plaintiff while riding in an automobile driven by her brother-in-law on a trip to take the plaintiff's niece, the driver's daughter, to a sanatorium at which the plaintiff was to pay her expenses, the driver may not escape liability for his negligent act causing injury to the plaintiff on the ground that at the time of the injury they were engaged in a common enterprise, when the evidence discloses that the plaintiff had no control or authority over the driver in the operation of the car, and that he was not her agent in its operation. *Butner v. Whitlow*, 749.

HOMESTEAD.

A Nature, Acquisition and Extent.

d Laying off Homestead, Appraisal, Designation and Extent

1. Where a judgment debtor is present when his homestead in his lands is laid off to him by the appraisers and designates the land he desires for the purpose, he may not successfully contend thereafter that other lands should have been included, it not being contended that the value of the homestead as allotted was less than one thousand dollars. *Bank v. Robinson*, 796.

HOMICIDE.

B Murder.

a Murder in the First Degree

1. Where in a prosecution for murder there is evidence that the defendant was engaged in cutting and hauling lumber on the land of another, and that the company for which the deceased worked stopped payment of a check given the defendant for certain lumber on account of a dispute as to the ownership of the timber, that the defendant had been told that the deceased was responsible therefor, and that the defendant had shot the deceased and taken a sum of money from his person and then put the body in the deceased's car and burned them: *Held*, testimony of threats made by the defendant to the effect that he was going to get his money one way or another, is competent under the evidence in this case as tending to show motive, malice, premeditation and deliberation, although the threats were not directed specifically against the deceased. *S. v. Casey*, 185.

HOMICIDE—*Continued.*

C Manslaughter.

a Negligence or Culpability of the Defendant

1. Evidence tending to show that the defendant was driving his automobile upon a straight and unobstructed road at a speed in excess of that allowed by the law, that he attempted to pass a pedestrian without giving the required warning, and that he struck the pedestrian while driving on the wrong side of the road, inflicting injuries resulting in death and that he sped on without stopping, is sufficient evidence that the defendant was driving unlawfully in several respects in violation of our statutes and killed the deceased while driving in a reckless manner in disregard of the safety of others who might then be upon the highway, and is properly submitted to the jury in a prosecution for manslaughter, the burden of proof being upon the State to establish guilt beyond a reasonable doubt. Code (Michie), 2621(51), (54), 2623(55), 2616. *S. v. Durham*, 724.

2. The degree of negligence necessary to be shown on an indictment for manslaughter where an unintentional killing is established is such recklessness or carelessness as is incompatible with a proper regard for human life, and it is sufficient to carry the case to the jury where it reasonably appears that death or great bodily harm was likely to occur from the acts of the defendant. *Ibid.*

3. The statutes prescribing rules for the driving of automobiles upon the highway were enacted in the interest of public safety, and disregard of them by one driving an automobile upon the highway is negligence, and when amounting to a wanton disregard for the safety of others it is sufficient to be submitted to the jury in a prosecution for manslaughter, but such negligence must be the proximate cause of death in order to constitute the crime. *Ibid.*

4. Evidence that a driver of an automobile upon a public highway struck and killed a pedestrian thereon and went on his way without stopping may be considered with other revelant evidence upon the trial by the jury upon the issue of defendant's guilt in a prosecution for manslaughter. *Ibid.*

E Justifiable or Excusable Homicide.

a Self-defense

1. Where, in a prosecution for murder, there is evidence that both the defendant and the deceased were hunting each other with shotguns and met and fired at each other at about the same time, an instruction of the court that no man has a right to shoot another because the latter has shot at him, though technically correct, is held to constitute reversible error when applied to the setting and circumstances of this case. *S. v. Rhodes*, 86.

G Evidence.

a Weight and Sufficiency

1. Where there is evidence that the defendant in a prosecution for murder held a grudge on account of the stopping of payment on a check given him in payment of certain lumber, that he had been informed that the deceased was responsible therefor; that he was seen near the place of the crime at or about the time of its com-

HOMICIDE G a—*Continued.*

mission; that a pistol in his possession had been recently fired, with testimony of an eye witness that the defendant had shot the deceased and then taken a sum of money from his person and burned his body, and that a key belonging to the defendant had been found at the scene of the crime, together with tracks of a tire similar to those upon the defendant's truck, with other incriminating evidence, is *held:* sufficient to be submitted to the jury and to sustain a verdict of murder in the first degree. *S. v. Casey*, 185.

2. Where in a prosecution for murder there is evidence that the defendant hired a car and drove his wife to the woods where he cut her throat with a razor, that the defendant and his wife were constantly bickering, that the defendant on various recent occasions had assaulted his wife and threatened her with great bodily harm or death, that he had borrowed the razor and had made careful preparations for the trip, is held sufficient evidence of premeditation and deliberation to carry the case to the jury on the capital felony of murder in the first degree. *S. v. Goss*, 373.

3. Where in a prosecution for murder there is evidence tending to show that the defendant and three others went to the home of the deceased in a borrowed car to get some whiskey, that, instead of paying for the whiskey, the defendant told the deceased to "get to the bushes" and shot him twice, inflicting injuries resulting in death, that after shooting the deceased the defendant, in answer to a question from one of his companions as to why he had done so, said "S. O. B. ought to be dead, he didn't have any liquor," with further evidence that the gun with which the murder was committed had been bought by one of the "gang" for use in "highjacking and taking folks' liquor," is *Held:* sufficient evidence of premeditation and deliberation to take the case to the jury on the capital felony of murder in the first degree. *S. v. Griffin*, 541.

4. Upon a prosecution for involuntary manslaughter, evidence tending to show that the defendant was driving his car in the vicinity of the crime shortly prior thereto and that an automobile of the same kind and make of that of the defendant was seen at the time and place of the crime, and that there were no other cars at the time in the vicinity, that the front of the car striking the deceased was damaged by the impact, that a radiator cap of the same peculiar shape as that on the defendant's car was found after the accident, and that the defendant took his car to a garage for repair and gave conflicting statements as to the way in which the car was injured, and as to why the radiator cap was missing, is *Held:* sufficient evidence of the identity of the defendant as the one driving the car at the time of the accident to be submitted to the jury. *S. v. Durham*, 724.

d Competency and Admissibility in General

1. Where there is strong evidence that the defendant actually committed the murder of his wife for which he was tried, proof of motive is not necessary to convict, but evidence that he was infatuated with another woman at the time is properly admitted as a circumstance tending to show motive under the facts of this case. *S. v. English*, 295.

HOMICIDE G d—*Continued.*

2. In a prosecution of a defendant for the murder of his wife evidence tending to show that the defendant and his wife were constantly bickering and quarreling prior to her being killed is held competent on authority of *S. v. Wilkins*, 158 N. C., 603. *S. v. Goss*, 373.

H Trial.

c Instructions

1. Where there is sufficient evidence in a prosecution for murder to justify a charge on the aspect of manslaughter it is error for the trial court to fail to do so, but in this case the record failed to disclose any evidence of manslaughter and the failure of the trial court to instruct the jury in regard thereto was not error. *S. v. Casey*, 185.

HOSPITALS.

C Private Hospitals.

a Liability to Patients

1. A hospital operated for profit is held to the duty of exercising ordinary care in the treatment and care of its patients, and is responsible for injuries resulting from failure to perform such duty. *Bowditch v. French Broad Hospital*, 169.

2. Where a patient in a hospital operated for profit selects his own physician the hospital owes no duty to the patient to obtain his discharge by the physician, and where there is evidence that the patient requested a nurse furnished by the hospital to find out from his physician whether he could go home, and if the discharge was obtained to bring him his bill, and that the nurse shortly thereafter had the bill presented to him, whereupon he went home, causing permanent injury by his premature discharge: *Held*, the acts of the nurse relating to obtaining the discharge were beyond the scope of her employment and the hospital is not liable therefor. *Ibid.*

HUSBAND AND WIFE (Testimony by one against the other see Criminal Law G q).

B Rights, Duties and Liabilities (Wife's liability on husband's note signed by her see Bills and Notes D b 2; dower see Dower).

d Right to Maintain Actions Against Each Other

1. Where prior to their marriage the wife incurs liability for a negligent injury to the husband: *Held*, the subsequent marriage does not affect her liability, and the question of law relating to the right of a husband to sue his wife in tort is not presented, and a motion as of nonsuit based upon the marriage relationship is improvidently granted. C. S., 2517, 454. *Shirley v. Ayers*, 51.

G Property and Conveyances (Acknowledgment and private examination of wife see Deeds and Conveyances A f; conveyances between as fraudulent see Fraudulent Conveyances A b 1).

a Estates by Entireties (Right of husband to mortgage see Mortgages A d)

1. A deed to a husband and wife, unless requiring them to hold by another character of tenancy, conveys to them the common-law estate by entirety under which each holds the entire estate as one person,

HUSBAND AND WIFE G a—*Continued.*

with the common-law right of the husband to the use thereof and the rents and profits therefrom, and with the right of survivorship which may not be defeated by a conveyance by either of them to a stranger, our constitutional provisions relating to married women and the statutes enacted in pursuance thereto making no change in this common-law estate. *Bank v. Hall,* 788.

INDEMNITY CONTRACTS (Surety bonds see Principal and Surety; assignability of indemnity bond see Assignments A a 1).

A Contracts to Indemnify in General.

c Acts and Responsibility of Third Parties

1. Where a development company is granted a permit to construct a basement under a sidewalk in a city under an agreement that the development company should relieve the city of any liability by reason of such construction, and thereafter the development company leases the property to a third person under a contract requiring the lessee to keep the premises in repair: *Held,* as between the city and the development company the lease contract in no way affects the contract of indemnity, and a judgment providing that if the city is required to pay any part of a recovery obtained by a person injured by the dangerous condition of the sidewalk, that the city is entitled to be reimbursed by the development company, is not error. *Markham v. Improvement Co.,* 117.

INDICTMENT—Election between counts see Criminal Law I f; lesser degrees of crime charged see Criminal Law I l.

INDUSTRIAL COMMISSION see Master and Servant F.

INJUNCTIONS (Appeal in injunctive proceedings see Appeal and Error J a; right to enjoin foreclosure see Mortgages H b).

D Preliminary and Interlocutory Injunctions.

b Continuing, Modifying or Dissolving

1. The seller of motion picture apparatus sought to enjoin the installation of the apparatus of another firm in a theatre upon the ground that the owner thereof had made a previous contract with him for such installation, and alleged irreparable damage, insolvency, etc.: *Held,* the evidence warranted a finding that there was no valid contract between the plaintiff and the owner, and the order dissolving a temporary order theretofore issued is affirmed. *Talking Pictures Corp. v. Electrical Research Products, Inc.,* 143.

INSOLVENCY see Fraudulent Conveyances A d 2.

INSURANCE (Surety bonds see Principal and Surety).

D Insurable Interest.

a In General

1. Where a judgment creditor does not insure his interest in the lands of the judgment debtor and there is no loss payable clause in his favor attached to a policy of fire insurance taken out by the judgment debtor, the question of whether the judgment creditor has an insurable interest in the property does not arise in an action on the policy taken out by the judgment debtor. *Byrd v. Ins. Co.,* 407.

INSURANCE—*Continued.*

E The Contract in General.

b Construction and Operation

1. Where a standard, statutory fire insurance policy provides that the policy should be void if the insured procures other contemporaneous insurance on the same property during the term covered, unless the insurer agrees thereto and a writing to that effect is attached to the policy contract, the provision is valid and binding, C. S., 6437. *Johnson v. Ins. Co.*, 362.

2. A policy of fire insurance is to be interpreted to effectuate the lawful intent of the parties as to forfeitures and waiver as other contracts. *Ibid.*

3. Provision that no benefits should be paid if insured should be killed by intentional act of another is valid. *Epps v. Ins. Co.*, 695.

4. Provision that insurer should not be liable if insured should die within two years from chronic kidney trouble is valid. *Reinhardt v. Ins. Co.*, 785.

d Reinstatement of Policies

1. There is a material difference between an application for a policy of life insurance and an application for the reinstatement of a policy which has lapsed for nonpayment of premiums, the terms of the policy for reinstatement being in the nature of an agreement to revive the original policy after forfeiture upon certain conditions, and the insurer may not act upon an application for reinstatement arbitrarily or disregard it by failure to act thereon within a reasonable time. *Trust Co. v. Ins. Co.*, 552.

2. Although the insurer must act upon an application for reinstatement of a policy of life insurance within a reasonable time, where all the evidence tends to show that the insurer, upon receipt of the application, acted with the diligence required, and that the insured came to his last illness before a conclusion could thus be reached, an instruction that the jury should return a verdict for the insurer if they found the facts to be as testified by all the witnesses is not error. *Ibid.*

J Forfeiture of Policy for Breach of Covenants or Conditions.

a Violation of Stipulations and Covenants in General

1. Where a policy of insurance is ambiguous it will be construed in favor of the insured, and forfeitures are not favored by the law, and the policy should be construed with reference to the purpose for which the insurer knew the property was to be used, and *held:* where a policy of fire insurance on a boat provides for forfeiture in case gasoline is kept thereon, but attached thereto is a writing permitting the use of oil for fuel, and the evidence discloses that a small quantity of gasoline necessary for the starting of the crude oil engine was kept on the boat, and that the loss was not caused by the gasoline catching fire, the evidence should be submitted to the jury, and the granting of defendant's motion as of nonsuit is error. *Baum v. Ins. Co.*, 445.

2. Where a policy of life insurance provides that for a period of two years from its issuance the company should be liable only for the

INSURANCE J a—*Continued.*

return of the premium if the insured should have been attended by a physician for any serious disease or should have had any chronic disease of the kidneys before the date of its issuance, and the uncontradicted evidence discloses that the insured was being treated for chronic Bright's disease at the time of the issuance of the policy and that in her application therefor she represented that she had no disease of the kidneys and had not been treated by a physician within two years, the provision of the policy is valid and binding and an instruction that the jury should answer the issue against the insured is correct. *Reinhardt v. Ins. Co.*, 785.

b Nonpayment of Premiums

1. Where, in an application for insurance attached to and made a part of the policy contract, the insured elects to leave his dividends, as declared, with the company at interest unless otherwise ordered, and thereafter, upon notification that a premium was due, he fails to pay the premium and allows the policy to lapse, and informs the company's agent that he would take the dividend then due in cash, and gives the company no further notification, *Held:* it was the duty of the insurer to abide by the election of the insured as to the application of dividends, and upon the insured's death during a period in which the dividend, if applied to paid-up insurance, would have kept the policy alive, the beneficiary cannot maintain that the insurer should have so applied the dividend, and she is entitled to recover only the dividend left with the company with interest. *Gardner v. Ins. Co.*, 716.

2. Where a policy of accident insurance provides for renewal from year to year upon prepayment of the stipulated annual premium to the local agent in cash, and that the local agent should have no authority to modify or change the conditions of the policy, an extension of credit given solely by the local agent for the payment of a premium for a renewal period, done without knowledge of the company, will not bind the latter, and evidence of a course of dealing between the local agent and the insured tending to establish such extension of credit by the local agent is insufficient to resist the insurer's motion as of nonsuit, there being no evidence of ratification by the insurer by acceptance of the premium after the due date, or otherwise. *Burch v. Ins. Co.*, 720.

c Encumbrancing Property or Taking Out Additional Insurance

1. Where two policies of fire insurance are issued on certain property, the policies providing that they should be void if the insured procured other contemporaneous insurance thereon, and thereafter a loss payable clause permitting other insurance is attached to one of the policies, but later, upon payment of the mortgage and the execution of another, a substitute loss payable clause in favor of the second mortgagee is attached thereto revoking the first loss payable clause and containing no provision as to other contemporaneous insurance, *Held:* the provision in the first loss payable clause permitting other insurance is revoked by the second loss payable clause, and upon the insured's procuring other insurance during the term of the first policies they are forfeited and he may not recover thereon for damage by fire occurring during the term of the policies. *Johnson v. Ins. Co.*, 362.

INSURANCE J e—*Continued.*

2. Incomplete negotiations by the insured for the sale of property covered by a policy of fire insurance does not violate the condition of the policy that the insured must be the sole owner, the transaction not having been consummated at the time of the loss covered by the policy, and where there is evidence to this effect the granting of a judgment as of nonsuit is erroneous. *Baum v. Ins. Co.*, 445.

f Death of Insured by Intentional Act of Self or Another

1. Where a policy of life insurance provides that no recovery should be had thereon if the death of the insured is caused by the intentional act of another, the provision is valid, and upon evidence tending to show that the insured was intentionally shot by a police officer to prevent the insured from shooting another officer, and that the insured died as a result thereof, an instruction that if the jury believed the evidence to answer the issue in the insurer's favor is not error, for although the officer did not intend to kill the deceased the injury resulting in death was intentionally inflicted. *Epps v. Ins. Co.*, 695.

K Estoppel, Waiver, or Agreements Relating to Right to Avoid or Forfeit Policy.

a Knowledge of Violation of Conditions or Covenants or Agreements Relating Thereto

1. Where an insurance company has issued and delivered through its local agent a policy of fire insurance and the policy has become a contract binding the parties, subsequent knowledge or agreement by the local agent of a breach of condition that would avoid the policy cannot be construed as a waiver of such condition by the company. *Johnson v. Ins. Co.*, 362; *Fleming v. Ins. Co.*, 845.

2. There is a distinction between agreements relating to a modification of the terms of a policy made by the local agent at the inception of the policy and such agreements made by him after the policy has been in force in regard to whether the insurer is bound thereby. *Burch v. Ins. Co.*, 720.

e Agreements or Acts After Claim or Suit

1. In this action upon a policy of accident insurance, *Held:* the right of the insurer to maintain the position that the beneficiary had not conformed to the provisions of the policy as to the time of bringing action and notice and proof of loss was waived by an agreement upon the trial that the court give judgment against it in a certain amount if the jury answered the issue fixing it with liability in the affirmative. *McKerley v. Ins. Co.*, 502.

N Persons Entitled to Proceeds.

e Lienors, Creditors, etc., Under Fire Insurance Policy

1. A judgment creditor or his assignee, having only a lien on the lands of the judgment debtor, is not entitled to the proceeds of a policy of fire insurance taken out on the property by the judgment debtor or his transferee in the absence of a contract between the judgment creditor or his assignee and the insurer. *Byrd v. Ins. Co.*, 407.

2. The assignee of a tax sale certificate has no title to or estate in the land described in the certificate and, upon destruction of the property by fire, he is not entitled to the proceeds of a policy of fire

INSURANCE N e—*Continued.*

insurance covering the premises, and his motion for an order restraining the insured from collecting on the policy and for a receiver to collect the proceeds for payment of the amount of the certificate is properly denied. *Street v. Oil Co.*, 410.

P Actions on Policies.

b Evidence and Nonsuit

1. In an action on an insurance policy a nonsuit is correctly entered in the court below when the policy contract is not offered in evidence and it is not made to appear that it was in force at the time in question. *Watkins v. Ins. Co.*, 681.

R Accident and Health Insurance.

a Accidental Injuries to Insured

1. In an action to recover upon an accident insurance policy the defense of the insurer that the death of the insured was not caused from the effect of bodily injury sustained solely through external, violent or accidental means, as the policy provided, is answered against the insurer by the verdict of the jury under the facts of this case. *McKerley v. Ins. Co.*, 502.

INTERPLEADERS see Parties B c.

INTOXICATING LIQUORS.

A Validity and Construction of Prohibition Statute.

c What Liquors are Intoxicating and Prohibited (Opinion evidence as to whether certain liquor is intoxicating see Criminal Law G i 1)

1. It may be shown in evidence as a fact that other beverages than those defined by our statute, N. C. Code, 1927, sec. 3411(a) as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute, and while courts will not take judicial notice that home brew is intoxicating, where officers experienced in such matters testify that the liquor in question was home brew, and the defendant admits it to have been root beer, and the officers testify that from its smell and appearance when it was seized by them that the beverage was intoxicating, it is sufficient to take the case to the jury on this question under proper instructions from the court and to resist defendant's motion as of nonsuit. C. S., 4643. *S. v. Fields*, 110.

JUDGES.

A Jurisdiction and Powers (Power to render judgment out of term and county see Judgments G b).

a Jurisdiction and Powers of Regular Superior Court Judges

1. As a rule one judge may not review the action of another judge of coördinate jurisdiction on the same facts. *Price v. Ins. Co.*, 376.

JUDGMENTS (Execution on see Execution; judgments in replevin see Replevin F e).

C Judgments by Confession or Consent.

a Jurisdiction to Enter

1. A judgment by confession may be entered in conformity with the statutory requirements in term by the judge, or out of term by the

JUDGMENT C a—*Continued.*

clerk, for money due or to become due, or to secure against a contingent liability, or for both such debt and liability. C. S., 623. *Bank v. McCullers*, 440.

b Form and Requisites

1. The judgment by confession in this case is held not necessarily void as matter of law, it appearing that the confession and entry on their face conform to statutory requirements. *Bank v. McCullers*, 412.

2. A judgment confessed becomes a lien on the lands of the party confessing it from time of its docketing as in case of other judgments, but in order to protect the rights of other creditors it is necessary that the essential requirements of the statute be followed, and the statute requires that the statement upon which the judgment is based, if for money due or to become due, should show with particularity the facts out of which it arose and the items constituting the claim and that the amount confessed is justly due, and when for a contingent liability, the facts constituting such liability and that the amount confessed does not exceed it. C. S., 624. *Bank v. McCullers*, 440.

3. Where a judgment confessed by a wife in favor of her husband shows only that it was based upon a sum alleged to be due on account of money advanced by the husband from time to time to take care of obligations due at the banks by the wife, and fails to state the items constituting the claim, when advanced and to whom, and that the advancements were not gifts to the wife, the judgment is insufficient to meet the requirements of the statute, and is void. *Ibid.*

c Operation and Effect

1. A consent judgment is one entered by the agreement of the parties to the action with the consent and approval of a court of competent jurisdiction but may be vacated in an independent action upon allegations and proof of fraud. *Weaver v. Hampton*, 798.

G Entry, Recording and Docketing.

a Lien and Priorities

1. A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, the lien exists against a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. C. S., 614. *Byrd v. Ins. Co.*, 407.

2. Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of ten years from the time of its docketing, C. S., 614, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. *Moses v. Major*, 613.

3. Adverse possession against the judgment debtor for a period of seven years under color of title does not affect the lien of the judgment creditor, the judgment creditor having no right of entry or

JUDGMENT G a—*Continued.*

cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. C. S., 428. *Ibid.*

b Time and Place of Rendition

1. Where an absolute divorce has been decreed in an action and a motion is made respecting the custody of a minor child, and the parties agree that the judge should render judgment on the motion out of term and outside the county of trial, the judgment rendered under the terms of the agreement is valid, the judge having authority to render such judgment. C. S., 1664. *Pate v. Pate*, 402.

2. A judgment *nunc pro tunc* may be entered at a subsequent term of the court to complete the record in a case wherein a verdict has been returned by the jury and the record complete except for the judgment, the judgment relating back to the beginning of the term at which the cause was actually tried as between the parties, and as to third persons the judgment lien attaching as of the first day of the term at which the judgment was entered. *LaBarbe v. Ingle*, 814.

K Attack and Setting Aside.

a Consent Judgments and Judgments Uncontested by Guardians, etc.

1. Consent judgment may be set aside for fraud. *Weaver v. Hampton*, 798.

2. Where the consideration of a deed is the support of the grantors during the remainder of their lives, and an action is later brought by them to set aside the deed for failure to perform the consideration, and in the action the grantees, who were minors, are represented by a guardian *ad litem*, duly appointed, who, knowing the facts alleged to be true, answers and admits the allegations of the complaint, and judgment setting aside the deed is accordingly rendered, *Held:* in a later action by the grantees to set aside the judgment, the defendant's motion as of nonsuit is properly allowed, it appearing that the guardian *ad litem* had acted in good faith without any personal interest and, there being nothing to impeach the validity of the judgment, it completely concludes the grantees in the second action. *Ayers v. Banks*, 811.

b For Surprise, Excusable Neglect, etc.

1. Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the State, to defend an action brought in another county, and has put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the case has been calendared and called for trial without notice to the defendant or his attorney: *Held*, upon a judgment being obtained by default against the defendant, the defendant may, upon his motion aptly made, have the judgment set aside for surprise, excusable neglect, etc., upon a showing of a meritorious defense, the negligence of the attorney if any, not being imputed to the client, and the latter being without fault. C. S., 600. *Meece v. Commercial Credit Co.*, 139.

JUDGMENT K b—*Continued.*

2. In this case held: upon the facts found by the Superior Court judge on appeal from the clerk upon a motion to set aside a judgment for surprise and excusable neglect under C. S., 600, judgment that the neglect of the defendant was excusable is not error. *Colt Co. v. Martin*, 354.

f Procedure

1. Notice of a motion to set aside a judgment must ordinarily be given as required by C. S., 912, and the pleadings in an action to reform a deed of trust upon allegations of mutual mistake are insufficient as notice of a motion to set aside the decree of foreclosure for irregularity and surprise, etc., the pleadings in the suit for reformation containing no allegations of irregularities in the foreclosure or of surprise. The distinction between treating an independent action to set aside a judgment as a motion in the original cause is pointed out. *Bank v. Alexander*, 453.

L Operation of Judgments as Bar to Subsequent Action.

b Matters Concluded or Embraced in Pleadings

1. Where a court of competent jurisdiction renders judgment in a case properly before it, such judgment estops the parties and their privies as to all issuable matter contained in the pleadings, including all material and relevant matters within the scope of the pleadings which the parties in the exercise of reasonable diligence could and should have brought forward. *Garrett v. Kendrick*, 388.

2. Where surgeons have recovered judgment against their patient for services rendered in the treatment of broken bones, lacerations, etc., a later action brought by the patient against them for alleged malpractice in such treatment is barred by the former judgment, since the allegations of malpractice should have been set up as a defense in the surgeons' action against him, which he defended, the matter being within the scope of the prior action. *Ibid.*

3. Where in an action to foreclose a deed of trust the description in the complaint and in the prayer for relief is ambiguous, the decree of foreclosure will not estop the trustor or mortgagor as a matter of law from bringing an action to reform the description in the deed of trust on the ground that through the mutual mistake of the parties more land was included within the description than had been intended or agreed upon, and in this case it further appears that the trustee was not made a party to the suit for foreclosure. *Alexander v. Bank*, 449.

d Irregular, Erroneous, and Fraudulent Judgments and Collateral Attack

1. Where, in an action by citizens and taxpayers of a county against the board of commissioners and the sheriff of the county the complaint alleges that a preceding board had ascertained that the sheriff was in default in a large sum and had accepted his note in a certain amount secured by a mortgage on his lands to cover the default and that upon proceedings to foreclose the mortgage according to its terms the sheriff obtained a restraining order upon allegations that a smaller amount was due, and the matter was referred to a referee to ascertain the correct amount, and that the

JUDGMENT L d—*Continued.*

defendant commissioners since elected and qualified, without the concurrence of their own attorneys, but upon the advice of the sheriff's attorneys, had caused a consent judgment to be entered in the injunctive proceedings relieving the sheriff of all liability except cost, with further allegations of fraud, etc., *Held:* a demurrer upon the ground that the consent judgment operated as an estoppel is bad. The question of whether the clerk had authority to enter the consent judgment is not decided. *Weaver v. Hampton*, 798.

e Parties and Their Privies

1. Where a surgeon who has rendered services in the treatment of a patient recovers judgment against the patient for such services, and thereafter the patient brings action against the surgeon and his partner, who had coöperated and assisted in the treatment, to recover for alleged malpractice in such treatment, the prior action operates as a bar not only in favor of the surgeon recovering judgment therein, but also in favor of the assisting surgeon, he being regarded as a privy in the same cause. *Garrett v. Kendrick*, 388.

LANDLORD AND TENANT—Liabilities for condition and use of land and buildings see Negligence A c; crop liens see Agriculture D b.

LIBEL AND SLANDER.

D Actions for Libel or Slander.

c Trial

1. In an action against a mercantile corporation to recover damages for words spoken of and concerning the plaintiff by its manager, *Held:* the words spoken in the presence of others in the store, charging the plaintiff with being a rogue, thief and shoplifter are sufficient upon the question of slander to be submitted to the jury and sustain a judgment for damages. *Satterfield v. Eckerd's, Inc.*, 599.

LIENS see Mortgages, Chattel Mortgages, Agriculture D b, Mechanic's Liens, Judgments.

LIFE ESTATES see Wills E h 2.

LIMITATION OF ACTIONS.

A Limitations on Particular Actions (Against city see Municipal Corporations J b).

b Three-Year Statute: Contracts, etc.

1. C. S., 441, applies to sureties on a note under seal, and as to the sureties the right of action on the note is barred after the lapse of three years, and the ten-year statute, C. S., 437, by excluding the word "surety" applies only to the principals on the note. *Barnes v. Crawford*, 434.

B Computation of Period of Limitation.

b Demand, Notice, Fraud, or Ignorance or Concealment of Cause of Action

1. Where a clerk of the Superior Court forges the names of Confederate pensioners to warrants issued by the State Auditor, and embezzles the proceeds, and such fraud is not discovered until about 90 days prior to the institution of proceedings against the clerk

LIMITATION OF ACTIONS B b—*Continued.*

and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, C. S., 441(9) applies, and the cause of action on the bonds will not be held to have accrued until the discovery of the fraud, and C. S., 439, providing that actions on bonds of public officers must be brought within six years, will not operate to bar an action to recover the sums embezzled. *S. v. Gant*, 211.

2. The clerk of the Superior Court is required by statute to give bond for the faithful discharge of his duties as clerk, C. S., 927, and upon orders made according to our statute, C. S., 956, and Rule of Practice in the Superior Court number 13, to keep proper records and to account for all moneys coming into his hands by virtue or color of his office, and where there is evidence tending to show that a clerk had kept accurate records of various funds coming into his hands, but had secreted in his safe a list of securities he had received in making investments which were not discovered until after his death by audit made of his books, and the referee finds as a fact, approved by the trial court, that the concealment could not have been discovered by the exercise of due diligence, the evidence supports the finding and the statute of limitations applicable to the surety on the clerk's bond is C. S., 441(9) which provides that the action will not be barred until three years from the discovery of the fraud, and the six-year statute, C. S., 439, does not apply. *Pasquotank County v. Surety Co.*, 325.

3. Where an action is brought against the purchaser of cotton to recover for money received, upon allegations that the cotton was impressed with a crop lien in favor of the plaintiff, it being alleged that the grower sold the crop to the purchaser and that the grower fraudulently concealed from the plaintiff the fact of sale and the whereabouts of the cotton, *Held:* there is no allegation or proof that the purchaser fraudulently concealed the fact of sale or participated in any fraud in connection therewith, and as to him the action is barred by the lapse of three years, C. S., 441(9) not applying as to the action against the purchaser. *Cotton Co. v. Sprunt*, 419.

g Institution of Action

1. Where a foreign receiver, under the mistake that special permission was necessary for him to sue in the courts of our State, has taken a voluntary nonsuit, and obtains permission to sue in our courts, and brings the identical action again within one year from the nonsuit, the permission obtained to sue will be regarded as surplusage, and if the former action has not been barred by a statute of limitations applicable (441(1), the second action is in time if brought within one year from the time of the voluntary nonsuit, C. S., 415. *Van Kempen v. Latham*, 505.

2. Where a plaintiff elects to abandon his action for any cause, except the ruling of the court against him, it is a voluntary nonsuit and he may commence another action within one year, and it will be considered a continuation of the first action, and will not be held barred by a statute of limitations if the first action nonsuited was not so barred. C. S., 415. *Van Kempen v. Latham*, 505; *Cooper v. Crisco*, 739.

LIMITATION OF ACTIONS B g—*Continued.*

3. *Semble:* where a counterclaim setting up a separate and distinct cause of action is alleged in an amended answer the statute of limitations runs until the filing of the amended answer containing such new matter. *Cotton Growers Association v. Tillery*, 531.

4. After voluntary nonsuit in *quo warranto* proceedings permission to sue must again be obtained before bringing second action. *Cooper v. Crisco*, 739.

E Pleadings, Evidence and Trial.

c Pleadings

1. Where, in a proceeding against a clerk of the Superior Court and the surety on his bonds to recover for moneys embezzled by the clerk, the surety pleads the statute of limitations, and the reply fully sets forth the facts in regard to the concealment of the fraud by the clerk, and the trial court fully and correctly instructs the jury that the cause of action would not accrue until the discovery of the fraud or until the fraud should have been discovered by due diligence, and the issues submitted specifically present the question to the jury: *Held*, the surety was not prejudiced by the failure of the reply to specifically refer to the statute, C. S., 441(9), and its contention that the plaintiffs had not pleaded the statute will not be sustained. *S. v. Gant*, 211.

LOGGING see Master and Servant C g 1.

MALICIOUS PROSECUTION (Liability of master or principal for prosecution by servant or agent see Master and Servant D b, Principal and Agent C d).

A Right of Action and Defenses.

a Elements Essential in General

1. To make out a case of malicious prosecution, the plaintiff is required to allege and prove that the defendant instituted or participated in a proceeding against him maliciously, without probable cause, which ended in failure. *Dickerson v. Refining Co.*, 90.

c Probable Cause

1. Want of probable cause may be inferred from the facts and circumstances, and it does not depend upon the guilt or innocence of the accused, but upon whether the apparent facts are such as to lead a discreet and prudent man to believe that a crime has been committed by the person charged. *Dickerson v. Refining Co.*, 90.

2. Evidence that the chief aim of a prosecution was to accomplish some collateral purpose, as the collection of a debt or the obtaining of possession of property, is competent to show want of probable cause, and is sufficient to establish it prima facie. *Ibid.*

d Termination of Prosecution

1. A *nolle prosequi* with leave is sufficient termination of a criminal prosecution to support an action for malicious prosecution based thereon. *Dickerson v. Refining Co.*, 90.

e Malice

1. In actions for malicious prosecution malice may be inferred from want of probable cause. *Dickerson v. Refining Co.*, 90.

MALICIOUS PROSECUTION—*Continued.*

B Pleadings, Evidence and Trial.

c Sufficiency of Evidence

1. Where in a civil action to recover damages for malicious prosecution there is evidence that one of the defendants swore out a warrant for the arrest of the plaintiff for issuing an alleged worthless check, and that he did so at the instance of the other defendant, who sought to have the cashier of the bank place "an insufficient funds tag" on it, and who afterwards told the plaintiff that they had made a mistake and wanted to have the warrant withdrawn, and that thereafter the check was paid upon presentation, and the action *not prossed* without the plaintiff's knowledge or consent, is *held:* sufficient to establish a prima facie case against the defendant swearing out the warrant, and to permit the inference that the defendants were acting in concert, and should have been submitted to the jury under correct instructions from the court. *Dickerson v. Refining Co.*, 90.

MANDAMUS.

A Nature and Grounds of Remedy.

b Enforcement of Clear Legal Right

1. Mandamus lies only to enforce a clear legal right, and the writ will be denied when the application therefor fails to show this right on the part of the plaintiff demanding it. *Braddy v. Winston-Salem*, 301; *Barham v. Sawyer*, 498.

MANSLAUGHTER see Homicide C.

MASTER AND SERVANT.

C Master's Liability for Injury to Servant (Under Compensation Act see hereunder, F).

b Tools, Machinery and Appliances and Safe Place to Work

1. The principle requiring an employer to provide his employees a reasonably safe place to work extends to providing them reasonably safe ingress and egress to and from their work, but does not extend to providing such ingress and egress over the lands of a third party over which the employer has no supervision or control. *Atkinson v. Mills Co.*, 5.

2. Evidence that a railroad company had a right of way for a spur track into the defendant's mill, that the right of way was under the exclusive use and control of the railroad company, and that the injury in suit occurred off the defendant's premises when the plaintiff stepped upon soft dirt on the railroad company's right of way as she was leaving her work in the defendant's mill, is held, insufficient to take the case to the jury upon the issue of defendant's negligence, and its motion as of nonsuit should have been sustained. *Ibid.*

3. The lineman of a telegraph company in pursuance of his duty had climbed to the top of a pole to fix the wires, and the pole fell causing personal injuries to him. His evidence tended to show that he was subject to the order of the defendant's maintenance foreman whose duty it was to have inspected the pole, that the pole was

MASTER AND SERVANT C b—*Continued.*

rotten under the ground which could not have been discovered by the plaintiff in the exercise of ordinary care and which should have been discovered by the maintenance foreman in the exercise of his duty of inspection. The defendant pleaded contributory negligence and its evidence tended to show that the plaintiff was in charge of the work and was under duty to inspect the pole and should have discovered and avoided the danger. *Held:* the conflicting evidence was properly submitted to the jury on the question of the defendant's failure to exercise due care to provide the plaintiff with a reasonably safe place to work. *Kennedy v. Tel. Co.*, 756.

c Methods of Work, Rules and Orders

1. Where there is a rule for the protection of the employees of a logging road requiring them to apply the brakes on the rear of the car to prevent their being run over and injured by the car in the event they are thrown therefrom, and a violation of this rule proximately causes an injury, the employer is not liable, but where there is evidence that the rule had been openly, constantly and habitually violated for so long a time that the employer in the exercise of ordinary care and diligence knew or should have known thereof, it should be submitted to the jury on the question of whether the rule had been waived or abrogated. *Byers v. Hardwood Co.*, 75.

f Assumption of Risk

1. The doctrine of assumption of risk is applicable only where the relation of master and servant exists between the parties. *Broughton v. Oil Co.*, 282.

g Contributory Negligence

1. The contributory negligence of an employee of a steam logging road will not completely bar a recovery when the negligence of the defendant is a proximate cause of the injury. C. S., 3467. *Byers v. Hardwood Co.*, 75.

D Master's Liability for Injuries to Third Parties.

b Scope of Employment

1. Master or principal is liable for acts of servant or agent in scope of his duties. *Dickerson v. Refining Co.*, 90.

2. Whether act is within scope of duties of agent or servant depends upon whether he was then engaged in service of employer. *Ibid.*

3. Whether prosecution for issuing worthless check was within scope of authority held for jury. *Ibid.*

4. Where the evidence in behalf of the plaintiff, in an action for false imprisonment, malicious prosecution and libel, tends to show that the general manager of one of the defendant's stores had a warrant issued against her for obtaining goods by means of a worthless check, that she did not give the check in question, that the general manager was authorized to cash checks only on his own responsibility, and that he had personally paid the defendant the amount of the check, that he wrote a letter to the plaintiff's father on the firm stationery threatening criminal prosecution, and the undisputed evidence is to the effect that the defendant did only a cash

MASTER AND SERVANT D b—*Continued.*

business, and there is no evidence that the general manager had ever collected accounts for the defendant: *Held,* upon defendant's motion of nonsuit the plaintiff's view must be adopted, and upon this theory the general manager of the defendant's store swore out the warrant without justification and without the sanction of any business transaction, and such action was outside the scope of his duties, and was without authorization or ratification of the defendant corporation, and its motion as of nonsuit was properly granted. *Lamm v. Charles Stores Co.*, 134.

5. Where an agent, of his own motion, institutes a criminal action against another to avenge an imagined wrong done his employer, the employer is not liable therefor unless the action is authorized or ratified by him, and it is immaterial whether the agent or employee intended to secure a benefit for the employer, the employer's liability depending upon whether act is done by the employee in the line of duty and within the scope of the employment while attempting to accomplish what he was employed to do. *Ibid.*

6. Where, in an action against an employer, the plaintiff's evidence tends to show that he was injured by the negligent driving of the defendant's truck used exclusively in the defendant's business, and that the truck was driven by an employee of the defendant who was regularly employed for that purpose and who had taken the truck from defendant's place of business under the defendant's express orders, *Held:* the evidence is sufficient to make out a prima facie case and should be submitted to the jury, and defendant's evidence that the driver has deviated from his route and was returning thereto at the time of the injury is insufficient to bar a recovery as a matter of law. *Lazarus v. Grocery Co.*, 817.

7. Evidence that servant was acting within scope of employment when he injured plaintiff by negligent driving of defendant's truck held sufficient to go to the jury. *Lewis v. Basketeria Stores, Inc.*, 849.

E Federal Employers' Liability Act.

b Nature and Extent of Liability Thereunder

1. Upon the question of whether an injury received by a brakeman while making a flying switch on a freight car in interstate commerce was caused by a defective brake, for which injury the carrier would be liable under the provisions of the Federal Safety Appliance Act, the insufficiency of the brake may be shown by the failure of the brake to function properly when operated with due care by an experienced brakeman in the normal, natural and usual manner, and where there is evidence of this character, defendant's motion as of nonsuit should be overruled and the case submitted to the jury. *Spencer v. R. R.*, 537.

F North Carolina Workmen's Compensation Act.

a Nature, Construction and Application

1. The Workmen's Compensation Act provides that its provisions shall be presumed to be accepted by all employers and employees, with certain exceptions, and that the remedies therein provided shall exclude all other remedies, and where an employee coming within

MASTER AND SERVANT F a—*Continued.*

the provisions of the act brings an independent action and alleges negligence and that his application for compensation was refused by the Industrial Commission on the grounds that his injuries did not result from an accident arising out of and in the course of his employment, from which no appeal was taken, the employer's demurrer thereto is properly sustained, and the employee's contention of a distinction between an injury by accident and an injury from negligence cannot avail him, the act eliminating the question of negligence in determining the employer's liability. *Pilley v. Cotton Mills*, 426.

2. The scope of the term "employee" as used in the Workmen's Compensation Act is to be determined in the light of the entire act, giving significance to its provision for compensation based upon a per centum of the average weekly wage and its title and theory to award compensation to workmen and their dependents, and *Held:* executives, while engaged in their duties directing or relating to the policy of the business are not employees within the intent and meaning of the act, the test being the nature and quality of the act at the time of the injury. *Hodges v. Mortgage Co.*, 701.

3. Upon evidence tending to show that an injury made the basis for a claim under the Workmen's Compensation Act was received by the vice-president of a mortgage company whose remuneration was fixed upon a commission on the loans he secured for the company, and that the accident occurred while he was on his way to catch a train to meet the treasurer of the company to negotiate certain trust contracts: *Held*, the injury was not compensable under the Workmen's Compensation Act, the vice-president not being an employee at the time within the intent and meaning of its provisions. *Ibid.*

4. Evidence held sufficient to support finding that claimant was employee and not an independent contractor. *Stepp v. Robinson*, 848.

b Injuries Compensable

1. Under the provisions of section 13 of the Workmen's Compensation Act the finding of fact by the Industrial Commission supported by evidence that the employee's death resulted from his wilful intention to injure or kill his fellow employee is sufficient to uphold the ruling of the Commission denying the application for compensation. *Harris v. Cafe*, 458.

2. In order for an injury to be compensable under the Workmen's Compensation Act it must not only arise in the course of the employment but also arise out of the employment with a causal connection between the accident and the employment, and where an employee of the State Highway Commission, while engaged in his employment, is accidentally shot by a hunter, the injury does not arise out of the employment and is not compensable even under a liberal interpretation of the statute. *Whitley v. Highway Commission*, 539.

3. Where there is evidence tending to show that the deceased received the injury that caused his death while on duty as a night watchman in defendant's manufacturing plant, and that he had been

MASTER AND SERVANT F b—*Continued.*

robbed by his assailant when the injury was inflicted, is sufficient to sustain a finding by the Industrial Commission that the injury was received in the course of, and arising out of the employment and the award for compensation by the Industrial Commission will be sustained. *West v. Fertilizer Co.*, 556.

4. In order to award compensation to an employee for an accident resulting in hernia there must be evidence that the hernia immediately followed the accident, was accompanied by pain, and that the applicant did not have hernia prior thereto, and it is sufficient for the Commission to find these facts and award compensation if the pain immediately followed the accident although the hernia was not discovered until diagnosis by a physician some days thereafter, ten days in this case. N. C. Code (Michie), 8180. *Ussery v. Cotton Mills*, 688.

5. Where the evidence in a proceeding for compensation under the Workmen's Compensation Act fails to disclose any causal relation between the accident and the employment, compensation is correctly denied, it being necessary that the injury should arise out of the employment to entitle the injured employee to compensation. *Carter v. Board of Education*, 836.

6. The terms "out of" and "in the course of the employment" as used in the Workmen's Compensation Act are not synonymous; the words "in the course of" refer to the time, place, and circumstances under which the accident occurs, and the words "out of" to its origin, it being necessary that the risk be incidental to the employment. *Hunt v. State*, 707.

7. Whether an accident arises out of the employment is usually a mixed question of fact and law, but if the facts are admitted and the case does not depend upon inferences of fact to be drawn therefrom, the question is one of law. *Ibid.*

8. A member of the North Carolina National Guard acting under the order of his superior officer, as he was required to do, attempted to go into encampment at a certain place some distance from his home by means of an automobile furnished at his own expense, and while his pay for the military district camp began when he began his journey, there was no agreement either express or implied that the government would furnish the transportation. *Held:* an injury resulting in death received in an accident occurring en route did not arise out of his employment by the State Government and is not compensable under the provisions of the Workmen's Compensation Act. *Ibid.*

d Parties and Proceedings

1. It is required by C. S., 446, that an action be prosecuted in the name of the real party in interest, and where a statute names a person to receive funds and authorizes him to sue therefor, only the person named may litigate the matter, and section 40 of the Workmen's Compensation Act provides that in case the deceased employee leaves no dependents, the employer shall pay the amount recoverable thereunder to the personal representative of the deceased, and *held:* where a claim under the act is litigated in the name of the

MASTER AND SERVANT F d—*Continued.*

deceased the proceeding is a nullity and will be dismissed on appeal to the Supreme Court, nor may the personal representative come in and make himself a party under the provisions of C. S., 1414. *Hunt v. State*, 37.

g Persons Entitled to Payment

1. Where the death of an employee is compensable under the Workmen's Compensation Act, and it appears that the deceased employee left no dependents, a recovery may be had under the terms of the statute by the administrator of the deceased employee for distribution to his next of kin. *McPherson v. Motor Sales Corp.*, 303; *Brooks v. Clement Co.*, 768.

h Amount Recoverable Thereunder

1. While there is no commuted amount provided by section 38 of the Workmen's Compensation Act for payment to the personal representative of a deceased employee for death from an injury compensable thereunder, the act provides the method by which such amount can be commuted, and in this case the amount of the award by the Industrial Commission is upheld. *Brooks v. Clement Co.*, 768.

i Appeal and Review of Proceedings

1. Where an award allowed by a member of the Industrial Commission is adopted by the full Commission on appeal to it, and the employer does not appeal therefrom, the matter is at an end so far as the employer is concerned and he has no standing either in the Superior or Supreme Court on the insurer's appeal. *McPherson v. Motor Sales Corp.*, 303.

2. Where an insurer appeals upon specified grounds from an award made by the Industrial Commission it may not contend in the Superior Court that certain sections of the Workmen's Compensation Act as applied by the Commission in the case were unconstitutional when the question is not embraced in the specified exceptions it has filed as the foundation of its appeal. *Ibid.*

3. The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the full Commission on appeal, are conclusive upon the courts when supported by any sufficient competent evidence. *West v. Fertilizer Co.*, 556; *Brooks v. Clement Co.*, 768.

4. An appeal from the award of a single member of the Industrial Commission in a hearing before him will not lie directly to the Superior Court, the Workmen's Compensation Act not providing that the findings of fact of a single commissioner should be conclusive or for the judge of the Superior Court to find the facts, but the act provides for review by the full Commission upon application, and for the right of appeal from the award of the full Commission to the Superior Court upon questions of law, and where an appeal has been taken from the award of a single commissioner directly to the Superior Court the case will be remanded with leave to the respondent to appeal to the full Commission. *Hollowell v. Department of Conservation and Development*, 616; *Moore v. Pipe Co.*, 617.

MASTER AND SERVANT F i—*Continued.*

5. In order for the Industrial Commission to award compensation to an employee suffering from hernia as a result of an accident arising out of and in the course of his employment it required that the Commission find the necessary facts upon the evidence, and in the absence of such findings, where the evidence is sufficient, on appeal to the Supreme Court the case will be remanded to the Superior Court for the latter court to remand it to the Industrial Commission, the last named being the only jurisdiction in which the evidence may be considered and passed upon. *Ussery v. Cotton Mills*, 688.

MECHANICS' LIENS.

A Nature and Extent of Lien.

c Ownership and Legal Possession of One Having Repairs Made

1. Where the purchaser of an automobile gives the seller a title-retaining contract to secure the balance of the purchase price, and thereafter gives a second lien on the car to another, and later the second lienor takes possession from the purchaser without legal process and has the car repaired, *Held:* the second lienor was not the owner or legal possessor of the car within the intent and meaning of C. S., 2435, and the one making the repairs obtains no lien therefor under the statute and is not entitled to possession as against the first lienor. *Willis v. Taylor*, 467.

MONEY RECEIVED.

B Pleadings, Parties and Trial.

a Pleadings

1. Where the complaint alleges that the plaintiff gave a sum of money to his daughter to give to his wife and that the daughter converted it to her own use, it alleges a good cause of action for the recovery of the sum and a demurrer is properly overruled. *Penland v. Wells*, 173.

2. Where a complaint alleges that a certain sum of money belonging to the plaintiff with interest was paid to the defendant and wrongfully converted by him to his own use it is broad enough, when liberally construed, to support an action for money had and received, and the objection that the complaint failed to sufficiently allege fraud is untenable. *Jenkins v. Wood*, 460.

MOOT QUESTIONS see Actions A a, Appeal and Error A e.

MORTGAGES.

A Requisites and Validity.

c Probate

1. The certificate of a notary public to a deed in trust on lands leaving out the name of the grantor and his wife is defective and its registration thereon is defective, and it is null and void as notice to purchasers and creditors. *Barber v. Brunson*, 779.

d Right of Mortgagor to Mortgage or Convey Title

1. Where the husband and wife hold an estate by entirety the husband may execute a valid mortgage without the joinder of the

MORTGAGES A d—*Continued.*

wife only for his incidental common-law rights in the estate, and upon his prior death the mortgage is extinguished and the title goes to the surviving wife free from the mortgage lien, and where after his death the wife has executed a mortgage on the lands, her mortgagee may permanently restrain the foreclosure of the mortgage executed by the husband without her joinder. *Bank v. Hall*, 787.

C Construction and Operation.

c Conditions and Covenants

1. The appointment of a receiver is an equitable remedy and our statutory provisions (C. S., 860, 861), enacted before the giving of a deed of trust upon lands may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions so as to prevent our courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts. *Woodall v. Bank*, 428.

f Appointment and Tenure of Trustees

1. Statutory provision for substitution of trustees in deeds of trust is constitutional and valid. *Bateman v. Sterrett*, 59.

H Foreclosure.

b Right to Foreclose and Defenses

1. The creditors of an estate are not entitled to have an order temporarily restraining the execution of the power of sale in a deed of trust continued to the final hearing where it appears that the decedent executed the mortgage and notes secured thereby in consideration of money loaned and that the notes were past due and unpaid and that the trustee was authorized to sell the lands under the terms of the deed of trust, there being no allegations or evidence of fraud or mistake in the execution of the instrument or of other elements that would justify the intervention of a court of equity. *Bank v. Purvis*, 753.

e Parties

1. The legal title to lands conveyed by mortgage or deed of trust remains in the mortgagee or trustee until the lands have been sold and conveyed by him under power of sale or under a decree of court, and in an action to foreclose a mortgage or deed of trust the mortgagee or trustee is an indispensable party. *Alexander v. Bank*, 449.

g Decree of Foreclosure and Proceedings Thereunder

1. A decree of foreclosure is an exercise of the equitable jurisdiction of the Superior Court, and the confirmation of the sale under the decree involves the exercise of judicial discretion, and it would seem that the clerk of the Superior Court does not have jurisdiction to order the confirmation of a sale under such decree although the decree specifies that the commissioners appointed by the court should report to the clerk, the clerk having only such jurisdiction

MORTGAGES H g—*Continued.*

as is given him by statute, but in this case the question is not presented, there being no exception appearing of record in regard thereto. *Dixon v. Osborne*, 489.

m Title and Rights of Purchaser at Sale

1. Where a deed of trust is given on lands used as a nursery for the cultivation of ornamental shrubbery and fruit trees, requiring several years growth to be ready for marketing, upon the execution of the power of sale according to the terms of the instrument, the purchaser is entitled to the trees and shrubbery upon the land at the time of the sale, and the devisee and legatee of the deceased mortgagor may not claim the right thereto as personalty, and is not entitled to an order allowing her a reasonable time for their removal after the sale. *Bank v. Purvis*, 753.

MUNICIPAL CORPORATIONS.

E Torts of Municipal Corporations.

c Defects or Obstructions in Streets or Other Public Places

1. A city is liable in damages to one who sustains a personal injury proximately caused by a dangerous condition of its sidewalk of which the city has actual or implied notice. *Markham v. Improvement Co.*, 117.

2. Where a dangerous place in the sidewalk of a city has existed for a sufficient length of time to have been known by the city in the exercise of due care in inspection, the city will be held to have implied knowledge thereof, and where there is evidence that a dangerous condition had existed for a week or more in the sidewalk, while it was in constant use by the public, it is sufficient to bar a motion as of nonsuit, and in this case there was evidence that the city manager had knowledge of the defect. *Ibid.*

f Injuries to Lands by Sewer System

1. Where, in an action to recover damages to lands caused by the defendant's sewerage system, the trial court instructs the jury that it should restrict its award to the acreage owned by the plaintiff, an exception to the introduction in evidence of testimony of the value of contiguous lands will not be held for reversible error when such evidence relates to the value of the lands in controversy, nor will the instruction be held erroneous as implying that a recovery could be had for damages to such contiguous lands although the jury might have considered the testimony in arriving at the value of the land owned by the plaintiff. *Hodgin v. Liberty*, 658.

2. Where in an action to recover damages resulting to lands from the defendant's sewerage system the trial court correctly defines a nuisance as anything which works hurt, inconvenience, or harm, or which essentially interferes with the enjoyment of life or property, and correctly applies the principles of law to the evidence in the case, the charge is correct and the defendant's exception thereto will not be sustained. *Ibid.*

3. Where, in an action to recover damages to land resulting from the defendant's sewerage system, the charge, containing a concise statement of the rule for assessing permanent damages, will not be held

MUNICIPAL CORPORATIONS E c—*Continued.*

for reversible error because stating the rule in general terms, it being incumbent on the defendant to request special instructions if a more specific explanation was desired. *Ibid.*

H Police Powers and Regulations.

b Zoning Ordinances and Building Permits

1. A municipal corporation, in the interest of the public welfare, may establish areas within its limits and prescribe regulations as to the use of property within each area under its inherent police power, and this power is not static but expands to meet the changing conditions of progress, and although it may cause inconvenience or hardship in particular cases, the exercise of the zoning power is valid if the classifications are reasonable and fair and if the restrictions apply to all property within the district without unjust discrimination. *Elizabeth City v. Aydlett*, 602.

2. Where a city in the exercise of its inherent police power and under legislative authority enacts a reasonable and valid zoning ordinance which divides the city into certain districts and regulates the use of property in each by a uniform rule, but provides that the operation of lawful businesses already established at the time of the passage of the ordinance might be continued although not in conformity with the zoning provisions, and provides further that gasoline filling stations should not be erected in districts of specified classifications: *Held*, the city may enjoin an owner of property in the prohibited district from completing the erection of a filling station therein, and the ordinance will not be declared void as being discriminatory in that it permitted the continued operation of filling stations erected in the district prior to the passage of the ordinance. The distinction between zoning ordinances and ordinances regulating the erection of gasoline filling stations only is pointed out by ADAMS, J. *Ibid.*

3. The test of the validity of a zoning ordinance of a municipal corporation is whether the classifications therein set out are fair and the scheme of development is sound, and the ordinance will not be declared invalid as being confiscatory because resulting in financial loss in a particular instance to an owner by restricting the use of his property in a district of a specified classification. *Ibid.*

I Rights in and Regulation of Public Places.

a Streets

1. While the public has, ordinarily, only the right to the use of public streets for travel so long as the streets are maintained for that purpose by public authority, an abutting owner has an easement in the street to have it kept open as a means of egress and ingress to and from his property, and he may not be deprived of his right without just compensation. *Hiatt v. Greensboro*, 515.

J Actions.

b Limitation of Time for Bringing Action Against City, Notice and Requisites

1. Where a complaint alleges that the defendant city took and appropriated a water system constructed by the plaintiff on his own lands

MUNICIPAL CORPORATIONS J b—*Continued.*

in a development later taken into the city, and that by reason of such taking the city became indebted to the plaintiff in the amount of the value of the water system upon an implied promise to pay: *Held*, a provision in the city charter that no action against it should be maintained, unless notice of injury to person or property should have been given it within six months of the date of such injury, does not apply to an action for compensation for the taking of private property for public use. The distinction between an action sounding in tort is pointed out. *Stephens Co. v. Charlotte*, 258.

MURDER see Homicide.

NAVIGATION see Pilots.

NEGLIGENCE (Of persons in particular relationships see Master and Servant C, Physicians and Surgeons C b, of persons in particular circumstances see Highways B, Railroads D, Hospitals, Electricity, liability of particular persons for, see Municipal Corporations E, Master and Servant D, Principal and Agent C d, criminal negligence see Homicide C).

A Acts and Omissions Constituting Negligence.

a In General

1. The violation of a statute intended and designed to prevent injury to persons or property is negligence *per se*, and where such violation is admitted or established the question of proximate cause is ordinarily for the determination of the jury. *Godfrey v. Coach Co.*, 264.

2. Actionable negligence is the want of due care under the existing circumstances and is conveniently defined to be "the failure to observe for the protection of the interest of another that degree of care, precaution or vigilance which the circumstances justly demand, when some other person suffers injury." *Broughton v. Oil Co.*, 282.

c Condition and Use of Lands and Buildings and Liability of Owner and Lessee

1. The owner of a hotel is not liable in damages for the alleged negligence of its lessee causing injury to the latter's employee arising solely in the management of the leased premises. *McInturff v. Trust Co.*, 16.

2. In an action against a lessee and others for an injury resulting from a dangerous condition of the leased premises, the admissions of the manager of the lessee that he knew of the existence of the defect are properly admitted in evidence. *Markham v. Improvement Co.*, 117.

3. Where under a lease contract the lessee covenants to keep the premises "in good repair except the roof and floor of said storebuilding" and to "make all repairs which might be necessary during said term," and the lessee in possession of the premises has repaired defects in the sidewalk over the basement thereof as occasion required: *Held*, conceding that the contract in respect to repairing the sidewalk was ambiguous, the parties have practically interpreted their contract, and, in an action by a person injured

NEGLIGENCE A c—*Continued.*

by the dangerous condition of the sidewalk, the evidence of the lessee's duty to keep it in repair is sufficient to bar the lessee's motion as of nonsuit. *Ibid.*

4. The general rule is that a tenant in possession is liable for injury caused by a defective condition of the leased premises, and where under the lease contract the lessee is under duty to keep the sidewalk in repair, and has negligently failed to do so, the tenant is liable to a third person injured by the defective condition, and, in an action against the lessor, the lessee and the city, a judgment that the plaintiff recover against the lessee and the city, and that as between the defendants the liability of the lessee was primary and that of the city secondary, and that the city, if required to pay any part thereof, would be entitled to reimbursement from the lessor on a contract of indemnity entered into by them, is held not to contain error entitling either defendant to a new trial. *Ibid.*

5. The plaintiff's intestate brought action against the defendant oil company, alleging that it was negligent in respect to gasoline tanks owned and installed by it at a filling station. The evidence tended to show that the defendant, under contract with the owner of the station, installed its own tanks, pumps and appliances, and inspected them at intervals to see that they were in good condition and properly operated; that on Wednesday prior to the explosion early Saturday morning there was found in the basement of the station a quantity of gasoline floating on water collecting there from heavy rains; that the fluids were drained, but that there remained a very perceptible odor of gasoline about the station, that the intestate was employed as a helper at the station; that prior to the explosion, the intestate, while intoxicated, went to sleep in the station in violation of the orders of the lessee; that the manager of the station, while searching for a key dropped by a customer, struck a match igniting the gasoline fumes causing the explosion: *Held*, in the absence of notice that gasoline had been found in the basement the oil company cannot be held negligent in failing to inspect between that time and the time of the explosion, and there being no evidence tending to show that the tank had leaked during the preceding year, and no evidence that the oil company was under duty to repair, and the evidence raising only a conjecture as to whether the gasoline had leaked from the tank or whether it got there from improper use of the appliances by the employees, it is insufficient to establish negligence on the part of the defendant, and its motion as of nonsuit should have been allowed. *Broughton v. Oil Co.*, 282.

6. Evidence that the plaintiff, a customer in defendant's store, stumbled over a stool left in the aisle of the store, and that the room was poorly lighted so that the plaintiff did not see the stool, is *held* sufficient under the circumstances of this case to be submitted to the jury on the question of the defendant's negligence. *Hunt v. Meyers Co.*, 636.

7. Where in an action by a customer to recover damages for an injury sustained by slipping and falling on the oiled floor of a grocery store there is evidence that the injury occurred on Monday after

NEGLIGENCE A c—*Continued.*

the floor had been oiled on the preceding Saturday night and that the oil had accumulated in streaks and that the customer slipped and fell where there was an unusual accumulation of oil at a place where customers were invited to inspect merchandise displayed, is *Held:* sufficient evidence that the oil had been negligently applied to take the case to the jury upon the issue of the defendant's negligence. *Parker v. Tea Co.*, 691.

c Res Ipsa Loquitur

1. The doctrine of *res ipsa loquitur* does not apply where more than one inference can be drawn from the evidence as to the cause of the injury, or where the existence of negligence is not the more reasonable probability and the matter is left in mere conjecture, or where the injury results from an accident as defined and contemplated in law. *Smith v. McClung*, 648.

2. 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. *Parker v. Tea Co.*, 691.

3. The doctrine does not apply to mere fact of skidding of automobile. *Butner v. Whitlow*, 749.

B Proximate Cause.

a In General

1. Where the evidence is insufficient to establish the negligence of the defendant, the question of proximate cause need not be considered, but in this case there was evidence that the independent act of a third person was the sole proximate cause of the injury. *Broughton v. Oil Co.*, 282.

c Intervening Negligence

1. Railroad is not liable where negligence of third person is sole proximate cause of accident at crossing. *Holt v. R. R.*, 638.

d Concurring Negligence

1. In a case involving defendant's negligence, any degree of causal negligence, however small, on defendant's part, will entitle the plaintiff to recover if he is free from contributory negligence. *Campbell v. R. R.*, 102.

2. Where an injury is the result of the concurrent negligence of the defendant and another, the injured person may recover against the defendant if any amount of the causal negligence is attributable to him and if the injured person is not guilty of contributory negligence. *Sanders v. R. R.*, 672.

e Proximate Cause as Question of Law or Fact

1. Violation of safety statute is negligence *per se* and question of proximate cause is ordinarily for jury. *Godfrey v. Coach Co.*, 264.

C Contributory Negligence.

a Of Persons Injured in General

1. The negligent act of a night employee at a hotel in opening an elevator gate left slightly ajar, and, assuming that the elevator

NEGLIGENCE C a—*Continued.*

was in place, without looking, stepping into the open shaft to his injury, is held negligence on the part of the employee barring his right to recover against the owner of the building. *McInturff v. Trust Co.*, 16.

2. In moment of peril the plaintiff will not be held to degree of care for own safety required under ordinary circumstances. *Moore v. R. R.*, 26.

3. Where, in an action by the administrator of an employee of a filling station to recover for his death caused in an explosion thereat, the evidence tends to show that the intestate had knowledge of the presence of gasoline fumes about the station, and the fact that a few days prior to the explosion gasoline was found in the basement of the station, and that the intestate, while intoxicated, in violation of the orders of the lessee operator of the station, went to sleep in the station, that others in the station at the time of the explosion escaped without serious injury, but that the intestate failed to escape because he was asleep at the time: *Held*, the evidence discloses contributory negligence of the intestate barring the administrator's right to recover against the oil company owning, installing and inspecting the tanks upon allegations of negligence on its part in respect thereto. *Broughton v. Oil Co.*, 282.

c Imputed Negligence see Highways B k.

D Actions.

b Evidence

1. The fact that a defendant procures a doctor and takes an injured person to a hospital is not an implied admission of liability to the injured person. *Brown v. Wood*, 309.

NEW TRIAL see Criminal Law J c; appeal from refusal to grant, see Appeal and Error J b; for conflicting verdict see Trial G b.

NEWLY DISCOVERED EVIDENCE see Criminal Law J c.

NONSUIT see Trial D a.

NORTH CAROLINA—Officers see Public Officers; Board of Assessment see Taxation C e; Workmen's Compensation Act see Master and Servant F.

NOTARIES PUBLIC see Public Officers A b 2.

NOTICE.

A Sufficiency and Effect of Notice (Of motion to set aside judgment see Judgments K f).

b Operation and Effect of Notice

1. A party having notice must exercise ordinary care to ascertain the facts and is chargeable with all that a reasonable inquiry would disclose. *Austin v. George*, 380.

NUISANCE.

A Conditions Constituting Nuisances.

b Condition and Use of Buildings

1. A properly constructed gasoline filling station, built under permit from the proper municipal authorities, and operated in the usual

NUISANCE A b—*Continued.*

manner is not a nuisance *per se* and may not be abated because of the usual escape of gasoline odors into the atmosphere, causing mere occasional inconvenience to the plaintiff in the enjoyment of his home on adjacent property. *Holton v. Oil Co.*, 744.

2. Disorderly conduct at a filling station within the limits and police control of an incorporated town may be controlled by the proper municipal authorities and the filling station will not be abated as a private nuisance on the complaint of an owner of adjacent property. *Ibid.*

3. A properly constructed and operated gasoline filling station which also sells soft drinks from an ice-box kept therein may not be abated as a private nuisance because of the natural flow of water upon the lower lands of the plaintiff, the lower lands being obliged to receive the natural flow of surface water, and the owner thereof being required, if necessary, to collect the water in a ditch and carry it off to a proper outlet. *Ibid.*

OFFICERS see Public Officers.

OPINION EVIDENCE see Evidence K, Criminal Law G i.

PARENT AND Child (Deed to child as being fraudulent as to creditors see Fraudulent Conveyances A b 2, 3).

A Rights and Liabilities of Parent.

b Abandonment of and Failure to Support Minor Children

1. Where, in a prosecution for the violation of C. S., 4447, making it a misdemeanor for a husband to abandon his wife and minor children without providing for their support, and providing that the abandonment shall be a continuing offense and not barred by any statute of limitations until the youngest living child shall obtain the age of eighteen years, *Held:* a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto. *S. v. Jones*, 424.

2. Where the father has been convicted of abandonment of his minor children without providing for their support, and the judgment has been suspended upon his payment into court of a sum of money for their support, an objection in a later prosecution under the statute that he was in charge of the county court when the crime for which he is now prosecuted was alleged to have been committed is met by the charge of the court in the instant case that the jury should consider only such evidence as tended to show his failure to provide for their support since the final disposition of the former case. C. S., 4623, 4625. *Ibid.*

B Actions.

a Right of Child to Maintain Action Against Parents

1. An unemancipated child living with his parents may not maintain an action in tort against them, nor can the administrator of the child recover damages against them for the child's wrongful death,

PARENT AND CHILD B a—*Continued.*

as the statute, C. S., 160, gives a right of action for wrongful death only where the injured party, if he had lived, could have maintained such action. *Goldsmith v. Samet*, 574.

PARTIES (Trustee is necessary party to foreclosure see Mortgages H e; parties who may appeal see Appeal and Error A f).

A Parties Plaintiff.

a Who May or Must Sue (In proceedings for compensation see Master and Servant F d; right of particular persons to maintain action see Receivers F a, Counties F a, Husband and Wife B d, Parent and Child B a)

1. Only personal representative may sue for funds of deceased converted by third person. *Penland v. Wells*, 173.

2. Individual may not bring action to recover bank's assets hypothecated where liquidating agent has not refused to do so. *Merrimon v. Asheville*, 181.

B Parties Defendant.

b Parties Who May be Joined

1. Where there is but one subject-matter of the suit or action in which several parties have divergent interests, and they may all be united in one suit without undue increase of cost or inconvenience to the parties, a motion to dismiss for multifariousness and misjoinder of parties is properly denied. *Craven County v. Investment Co.*, 523.

c Interpleaders

1. Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife is a necessary party, C. S., 456, and has a right to set up her claim to the property attached, C. S., 829, 840, and the refusal of the trial court to require the wife to give an interpleader bond is not error. *Bank v. Lewis*, 148.

PARTNERSHIP.

D Rights and Liabilities as to Third Persons.

a Representation of Firm by Partner and Liability of Firm Therefor

1. Where a member of a partnership violates a partnership agreement not to buy on credit, and there is evidence that his copartner had informed the seller's agent of the agreement prior to the sale, but the undisputed evidence is to the effect that the partnership received the benefit of the transaction, *Held:* the partnership is liable for the purchase price, and an instruction upon the undisputed evidence that if the jury found it to be true to answer the issue for the plaintiff is not error, and the fact that the partnership was later placed in a receiver's hands and that one of the partners was indicted is not relevant to the issue. *Guano Co. v. Ball*, 534.

d Retiring Partners

1. Where a store is rented to one of two partners who pays rent thereon for a time and thereafter tells the lessor that he is no longer connected with the partnership, and the other partner continues to

PARTNERSHIP D d—*Continued.*

pay rent until a later date, *Held:* in an action to recover rent accruing thereafter, notice given by the retiring partner was at least sufficient to put the lessor upon reasonable inquiry and charge him with all that such inquiry would disclose, and the holding of the trial court that it was not sufficient to relieve the retiring partner of liability is error, and a new trial will be awarded. *Austin v. George*, 380.

PAYMENT—To collecting agent see Bills and Notes G c.

PENDING ACTION see Abatement and Revival B b.

PERJURY.

A Elements and Essentials of the Crime.

a Wilfulness and Corruptness

1. Where the complaint in a civil action has been verified the answer must also be verified, and where the defendant swears to it before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of C. S., 4364, it must be shown that he "wilfully and corruptly" committed the offense, and where there is evidence in his behalf that he was reasonably mistaken as to the import of his allegations an instruction to the effect that if the jury believed all the evidence to find him guilty is reversible error. The distinction is made as to perjury under the common-law definition. *S. v. Dowd*, 714.

PHYSICIANS AND SURGEONS.

A Licensing and Supervision.

d Revocation of Licenses

1. Where the State Board of Medical Examiners has revoked the license of a physician on the ground that he had been guilty of unprofessional conduct in that he had violated the Harrison Narcotic Act, a Federal statute: *Held*, while the board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, C. S., 6618, and while C. S., 6683, does not empower the board to revoke a license on the ground of its violation, its provision for the revocation of licenses upon its violation being a part of the punishment prescribed therein, the board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the act. *Board of Medical Examiners v. Gardner*, 123.

e Procedure for Revocation, Appeal and Trial

1. Where upon appeal from the order of the board of medical examiners revoking the license of a physician upon the ground that he had been guilty of unprofessional conduct in that he had violated the Harrison Narcotic Act, the physician denies that he had been guilty of unprofessional conduct and denies that he had violated the statute: *Held*, he is entitled to trial *de novo* by jury of the controverted facts, upon the question of his guilt or innocence of the offense

PHYSICIANS AND SURGEONS A c—*Continued.*

charged, and the submission of the sole issue as to whether he had been convicted in the Federal Court of violating the act is error entitling him to a new trial. C. S., 6618. *Board of Medical Examiners v. Gardner*, 123.

C Rights, Duties and Liabilities.

b Malpractice or Negligence (Negligence of hospitals see Hospitals C a)

1. The law applicable to the care and treatment a physician must give his patient applies only when the relationship of physician and patient has been established, it being the privilege of a physician to accept or reject an injured man as a patient, whether he misconceived the cause of the proposed patient's condition or otherwise under the provisions of the law relating to contracts. *Childers v. Fryc*, 42.

2. Where in an action against a physician for alleged neglect of a patient the evidence tends to show that the proposed patient was brought to the hospital in an unconscious condition, that the person who brought him stated to the physician or nurse that the proposed patient had been injured in an automobile accident, that the physician, after looking over the injured man and discovering that he had been drinking, told the injured man's companion to take him home: *Held*, the evidence shows a refusal by the physician to accept the injured man as a patient, and is insufficient to establish the relationship of physician and patient, and the action was properly nonsuited. *Ibid.*

3. In order to hold a physician liable in damages for neglect of his patient the plaintiff must show by his evidence that the alleged neglect caused the injury in suit, and the evidence in this case to the effect that the intestate died from an injury after having been first refused as a patient by the defendant, but that the intestate was thereafter treated by other well qualified physicians, is *held:* insufficient to take the case to the jury. *Ibid.*

4. Where a duly licensed physician and surgeon is sued for damages arising from alleged unskillful treatment of the plaintiff's broken leg, and all the evidence tends to show that the physician possessed the skill and used the treatment which was usual for injuries like the plaintiff's, and which was used in like circumstances by physicians and surgeons of standing in their profession, without evidence to the contrary, the defendant's motion as of nonsuit thereon or his prayer for instructions to like effect, aptly tendered, should have been allowed. *Ferguson v. Glenn*, 128.

5. The standard of duty which a physician owes his patient is prescribed by law and arises out of the relationship, which is voluntary and contractual, and the law requires that a physician shall have such knowledge and skill as are ordinarily possessed by those similarly situated, and that he use his best skill in the treatment of a patient, but the physician is not an insurer of his patient's recovery, and the burden of proving that a physician licensed by the State Board of Examiners lacks the skill and character required of him by the law is upon the person alleging to the contrary. *Ibid.*

PHYSICIANS AND SURGEONS C b—*Continued.*

6. A dentist is not held as a warrantor in the exercise of his professional duties, and the doctrine of *res ipsa loquitur* only applies when from the result there is more than an inference of improper treatment, and where a dentist extracts a tooth from the mouth of a patient on Sunday at the patient's request, and the point of a hypodermic needle used in the operation breaks off in the gum of the patient, and the dentist, without informing the patient of the fact, leaves the broken point in the gum, and tells the patient to return the following day, at which time he tells patient the facts and offers to extract the broken point without pain, and thereafter again requests to be allowed to do so, but the patient refuses to allow him or anyone else to attempt to extract it, *Held:* the doctrine of *res ipsa loquitur* does not apply to the facts of the case, and in the absence of evidence of some unskillfulness of the dentist or of improper work, or improper or defective instruments to perform it, the case should have been dismissed on motion as of nonsuit. *Smith v. McClung*, 648.

PILOTS.

B Employment of Pilots.

a When State Pilotage is Compulsory

1. A barge dependent entirely upon motive power furnished by a tug or other towing vessel is not a vessel "propelled in whole or part by steam" within the meaning of U. S. C. A., Title 46, section 361, and does not come within the provisions of section 215, which provides that no State shall require of such vessels a state or other license in addition to that issued by the United States, and a barge of over sixty gross tons having a United States licensed pilot on board is subject to pilotage, tender and refusal under C. S., 6955, upon entering North Carolina waters, and where State pilotage has been refused, is under the same liability as to performance. C. S., 6991. *Craig v. Towing Co.*, 250.

PLEADINGS (In particular actions see Fraud C b, Money Received B a, Limitation of Actions E c).

A Complaint.

a Contents, Form, and Requisites

1. Plaintiff may not unite two inconsistent causes of action in complaint. *Lykes v. Grove*, 254.

2. The plaintiff may unite in one complaint several causes of action if they all arise out of the same transaction or a transaction connected with the same subject of action, C. S., 507, and *held* in this case that there was not such misjoinder of parties and causes as to require a dismissal upon defendant's demurrer. *Shaffer v. Bank*, 415.

3. While at common law the object was to confine the litigation to one issue, in equity the object was to end all disputed matters between the parties having an interest therein in one suit, and under our code procedure in which both actions at law and suits in equity are tried in one forum, and under the provisions of C. S., 507, permitting the plaintiff in certain instances to unite several causes

PLEADINGS A a—*Continued.*

of action in the same complaint, *Held:* a demurrer to the complaint for misjoinder was properly overruled. *Craven County v. Investment Co.*, 523.

4. Where the receiver of an insolvent banking corporation brings action against its directors, alleging mismanagement resulting in insolvency, and against another banking corporation with which the insolvent corporation was later merged, alleging breach of a contract with the directors of the insolvent corporation in regard to liquidation, resulting in loss, there is a misjoinder of parties and causes of action and the action will be dismissed upon the defendant's demurrer, there being no allegation in the complaint of a conspiracy or of a general or continued course of dealing or systematic policy or wrongdoing participated in by all the defendants. C. S., 511(4), (5), C. S., 456, as amended by chapter 344, Public Laws of 1931, applying only when the plaintiff is in doubt as to the persons from whom he is entitled to relief. *Grady v. Warren*, 693.

B Answer.

f Pleading of Matters in Abatement

1. Where an action against a clerk of the Superior Court and the surety on his official bonds is instituted by the State, the State Auditor, and the State Treasurer, and thereafter another action against the clerk is instituted by his successor in office to recover funds belonging to the office, and neither the clerk's successor in office, nor the defendant clerk, nor the surety makes motion for consolidation of the actions, and the surety does not plead by way of answer the pendency of the second suit: *Held*, the surety has waived any rights it had in this respect, and the refusal of the trial court to dismiss the action or order it to be consolidated with the subsequent action is not error. C. S., 511(3), 517, 518. *S. v. Gant*, 211.

D Demurrer.

a Cause of Action and Jurisdiction of Court

1. A demurrer to the complaint on the grounds that the action was an attack on the final accounting of an administrator and was not brought in the county where the letters of administration were issued, is bad, venue not being jurisdictional and being available to the objecting party not by demurrer, but by motion in the cause. C. S., 470, it further appearing in this case that the plaintiff might have the right to bring the action in the county of his residence under C. S., 465. *Shaffer v. Bank*, 415.

b Misjoinder of Parties and Causes

1. Where the plaintiff in his action to recover damages for an alleged negligent injury anticipates the defense of release and sufficiently attacks the release as procured by fraud, the action of the trial court in treating the plaintiff's allegation in regard thereto as surplusage and ordering it stricken out, and denying defendant's motion of nonsuit based upon the ground of inconsistent pleading and misjoinder of causes of action, will not be held for error: no harm resulting from the judgment as entered. *Joyner v. Woodard*, 315.

PLEADINGS D b—*Continued.*

2. *Held:* demurrer for misjoinder of parties and causes should have been overruled. *Shaffer v. Bank*, 415; *Craven County v. Investment Co.*, 523.

3. Demurrer for misjoinder of parties and causes held properly sustained in this case. *Grady v. Warren*, 693.

4. In interpreting our statute with regard to multifariousness and misjoinder of parties our courts will take into consideration the principles of the old practice formerly existing exclusively in suits in equity. C. S., 507. *Craven County v. Investment Co.*, 523.

5. Where one under contract with the county board of education to drive a school bus operated in a district is sued for a negligent injury to a pupil being thus transported, and in the same action the sureties on a bond given by him to the board for the faithful performance of the contract are joined with him as defendants, the sureties are not liable to the plaintiff on the bond, and upon a demurrer for misjoinder of parties and causes an order of the trial court separating the actions and permitting the action against the driver to be proceeded with is proper. *Benton v. Board of Education*, 653.

c *Statement of Grounds, Facts Appearing Upon Face of Complaint, and Speaking Demurrers*

1. A demurrer *ore tenus* to the complaint for insufficiency to state a cause of action must state the legal grounds upon which it is based or it will be disregarded. C. S., 512. *Oldham v. McPhecters*, 35.

2. Under our practice all demurrers are special and may be pleaded only for causes specified in the statute. C. S., 511, 512. *Shaffer v. Bank*, 415.

3. Where the grounds for demurrer invoke matters not appearing upon the face of the complaint or ignore specific allegations therein that the plaintiff's assignment of his interests was procured by fraud the demurrer should be overruled. *Ibid.*

d *When Demurrer May be Pleaded*

1. A demurrer *ore tenus* to the complaint on the grounds that it fails to allege a cause of action or that the court does not have jurisdiction may be made at any time, even after answer has been filed, or even in the Supreme Court on appeal. C. S., 518. *Finley v. Finley*, 1.

e *Effect of Demurrer*

1. Upon a demurrer the complaint is to be liberally construed and, contrary to the common law practice, every reasonable intendment is to be made in favor of the pleader. C. S., 535. *Joyner v. Woodard*, 315.

2. Upon a demurrer the allegations of the complaint are taken as true and they will be construed liberally, and if when so construed it sets out sufficient facts, or sufficient facts can fairly be gathered therefrom to state a cause of action, the pleading will stand. *Shaffer v. Bank*, 415.

PLEADINGS—*Continued.*

G Issues, Proof and Variance.

b Necessity of Allegations to Support Evidence or Contention

1. In order to avail himself of the defense of the effect of the plaintiff's conduct after knowledge that the defendant had obtained more money for her than she had received, it is necessary that the defense be set up in the answer. *Jenkins v. Wood*, 460.

H Filing and Service.

a Time for Filing

1. An order of the trial court allowing the defendant to file answer after the expiration of the statutory time is upheld upon authority of *Howard v. Hinson*, 191 N. C., 366. *Watkins v. Ins. Co.*, 681; *Bell v. Tea Co.*, 839.

PREMEDITATION see Homicide B a.

PRIMA FACIE CASE see Evidence N a.

PRINCIPAL AND AGENT (Corporate agents see Corporations G e).

A The Relation.

a Creation, Existence and Proof of the Relation

1. Where a guest in an automobile upon the highway is injured by the negligence of the driver of another automobile, and the owner of the car causing the injury visits the injured person at the hospital and promises to pay the doctor's bill and provide some money for the injured person's education, and pays him a sum of money and promises to see that "everything was all right," *Held:* although the language might be only an assumption of hospital care and treatment, it is susceptible of a broader interpretation, and is sufficient to be submitted to the jury on the question of an implied admission of agency. *Brown v. Wood*, 310.

2. Where there is evidence that an automobile dealer had repeatedly collected notes sold by it to a credit company, and that a purchaser from the dealer, a defendant in an action by the credit company for possession of the car, had paid the dealer the purchase price of the car, and that the credit company had looked to the dealer for payment of the note endorsed to it, and that payment had not been made to the credit company because of a dispute between the credit company and the dealer as to the amount due: *Held*, the evidence is sufficient to raise an issue as to whether the dealer was authorized by the credit company to collect the notes, and a directed verdict in favor of the credit company for possession of the automobile is error. *Credit Co. v. Greenhill*, 609.

C Rights and Liabilities as to Third Persons.

d Wrongful Acts of Agent

1. Where an agent or servant causes injury to a third person while acting in the line of duty and exercising the functions of his employment, the principal or master is liable therefor, without reference to whether the intent of the agent or servant was good or bad. *Dickerson v. Refining Co.*, 90.

PRINCIPAL AND AGENT C d—*Continued.*

2. Whether an act causing injury to a third party is within the scope of an agent's or servant's employment depends upon whether the agent or servant at the time is engaged in the performance of the duties he is employed to perform, and not upon intent to benefit the employer or protect his property. *Ibid.*

3. While the criminal prosecution of an offender is not ordinarily within the scope of an agent's or servant's authority, a distinction is to be made where the prosecution could have no effect other than the punishment of the offender and those cases where it is instituted to recover the employer's property or protect his business, and where the evidence tends to show that the agents or employees of a refining corporation were acting within the scope of their authority in making a sale of gasoline and in accepting a check payable to the corporation in payment of gasoline sold, and in presenting the check for payment: *Held*, in an action for malicious prosecution, the question of whether the refining corporation is responsible for their act in swearing out a warrant for the arrest of the purchaser of the gasoline for giving an alleged worthless check, either upon the theory of authorization or ratification, is for the determination of the jury, and a directed verdict in favor of the defendant is error. *Ibid.*

4. Evidence held insufficient to show that prosecution for worthless check was within scope of duties. *Lamm v. Charles Stores Co.*, 134.

5. Whether act is within scope of duties of agent or servant depends upon whether he was then engaged in service of employer. *Ibid.*

6. Where the family-purpose doctrine does not apply, proof of ownership of an automobile does not constitute a prima facie case of liability against the owner for an injury inflicted by another while driving the car, it being necessary that the injured person establish by his evidence the fact of agency and that the agent at the time of the injury was acting within the scope of his employment. *Brown v. Wood*, 309.

7. Where the purchaser of an automobile executes a note and title retaining contract under an agreement that the seller should negotiate the note to a credit company, and thereafter, while the note is in the hands of the credit company pending its acceptance thereof, the purchaser, with knowledge of the facts, signs another note and title retaining contract in blank, and the seller fills in the blanks in the name of an automobile dealer, who, without knowledge of the first note, negotiates the second note as payee to another credit company and pays the proceeds to the seller as a matter of accommodation, and the seller collects and retains the proceeds of the first note also, *Held:* the dealer, having paid the note negotiated in its name, may recover from the purchaser of the automobile the amount thereof on the principle that as between two innocent parties the one first reposing confidence in a third person must suffer the loss occasioned by his wrongful act, and the question of whether the dealer was the payee of holder in due course of the second note does not affect his right to recover against the purchaser of the automobile. *Brown v. Payne*, 398.

PRINCIPAL AND AGENT C d—*Continued.*

8. Where a principal is sued for damages for false arrest as a result of a warrant procured by his agent, the action will be dismissed in the absence of evidence that the principal authorized the act of the agent or ratified his act in procuring the warrant. *Roland v. Express Agency*, 815.

PRINCIPAL AND SURETY.

B Nature and Extent of Liability on Surety Bonds.

c *Bonds of Public Officers or Agents* (Limitation of actions thereon see Limitation of Actions B b)

1. In this proceeding by the State, the State Auditor and the State Treasurer against a clerk of the Superior Court and the surety on his bond to recover sums embezzled by the clerk by forging the names of Confederate pensioners to warrants issued by the Auditor and paid by the Treasurer, and converting the funds to his own use: *Held*, the plaintiffs had the right to pursue the summary remedy under C. S., 356, upon their motion after due notice, and demand upon the clerk was not necessary, or the plaintiffs could have brought a civil suit under C. S., 475, in their option. *S. v. Gant*, 211.

2. Where a summary proceeding under C. S., 356, has been instituted against a clerk of the Superior Court and the surety on his bonds to recover sums embezzled by the clerk, and the surety has entered a general appearance and filed answer, demanding a jury trial, requested special instructions and argued the case to the jury: *Held*, the surety has waived its rights, if any it had, under C. S., 353, 354, 355, to object that the plaintiffs could not maintain a summary proceeding under C. S., 356. *Ibid.*

3. Where a clerk of the Superior Court has forged the signatures of Confederate pensioners to warrants issued by the State Auditor and sent to him for payment to the persons entitled, and has witnessed such signatures, cashed the warrants, and converted the funds to his own use, such sums are received by him by virtue of and under color of his office, and come within the terms of his bonds given under the provisions of C. S., 927, and the surety thereon is liable within the penalty of the bonds for the amount so embezzled. N. C. Code, 1927 (Michie), secs. 5168 n, o, q, r, s. *Ibid.*

4. Where a defaulting clerk of the Superior Court gives successive bonds for succeeding terms of office with the same surety, and continues his defalcations, the surety is liable only to the amount of the bond for each term, but where the court so instructs the jury and specifically charges them as to the limitations of the bonds, the refusal of the surety's motion to dismiss because the plaintiff undertakes to recover on the successive bonds in one cause of action, is not error. *Ibid.*

5. Where a summary proceeding against a clerk of the Superior Court and the surety on his bonds is instituted under C. S., 356, the ruling of the defendants into trial immediately after issues joined does not deny the defendants any legal right under C. S., 557. *Ibid.*

PRINCIPAL AND SURETY B c—*Continued.*

6. Under the provisions of C. S., 357, the plaintiff in an action to recover for moneys unlawfully detained by a public officer is entitled to recover, besides the amounts detained, damages at the rate of 12 per cent from the time of wrongful detention until payment, within the penalty of the bond, and where, in an action against a clerk of the Superior Court and the surety on his bonds to recover sums embezzled by the clerk, the State waives the interest from the date of the actual defalcations, but does demand the 12 per cent from the date of the expiration of each term of office: *Held*, judgment awarding damages at 12 per cent on the sums defaulted from the expiration of each term is not error, the amount being within the penalty of the bond. *Ibid.*

7. Although C. S., 927, is directory and prescribes the penalty on the bond of a clerk of the Superior Court of not less than $10,000, and not more than $15,000, both the clerk and his surety are presumed to know the provisions of the statute, and where the clerk has voluntarily executed a bond in the penal sum of $25,000, and the surety has accepted premiums based on a bond in this amount, the surety is estopped to deny the validity of the bond, and the plaintiff may recover of the surety, upon a proper showing, to the full amount of the penalty of the bond. *Ibid.*

8. The surety on the bond of a public officer is an insurer, and its liability is to be measured by the liability of the principal on the bond. *Ibid.*

9. A clerk of the Superior Court is an insurer of funds coming into his hands by virtue or under color of his office, and where the clerk has made investments of such funds and the total cash value of such investments is not equal to the amount for which the clerk is liable, whether because of defaults and misapplications or because of the failure of the investments, the surety on his bond is liable within the penal amount of the bond to the extent that the investments and cash fail to cover the total amount of the clerk's liability. *Pasquotank County v. Surety Co.*, 325.

10. Where the final judgment against the surety on the bond of a deceased clerk of the Superior Court provides that the surety, after payment of the penal sum of the bond, is entitled to recover of the clerk's administrator the amount of its ultimate liability, and should be subrogated to the county's rights in any assets remaining in the hands of the receivers after the county's rights therein have been fully satisfied, subsequent orders by judges of the Superior Court directing that the receivers pay over to the succeeding clerk such moneys as they might have realized on the deceased clerk's official investments, which payments should operate as a credit on the surety's liability, are temporary instructions by the court to its officers and do not operate as *res judicata*, the matter being *in fieri* and the rights of the surety are not prejudiced thereby. *Ibid.*

11. Where one under contract to transport teachers and pupils to and from a public school as authorized by C. S., 5489, has given bond with sureties payable to the board of education conditioned upon

PRINCIPAL AND SURETY B c—*Continued.*

the faithful performance of the services required under the contract. *Held:* in an action by the administrator of a pupil to recover damages for a negligent injury resulting in death while the pupil was being thus transported, the plaintiff's intestate was not a party or privy to the contract or a beneficiary thereof, and the plaintiff's action against the sureties thereon will not lie. *Benton v. Board of Education*, 653.

PRIVATE ROADS see Easements A c.

PROCESS.

B Service of Process (Waiver of service by appearance see Appearance A a).

c Service on Nonresident Auto Owners

1. Our statute, chapter 75 Public Laws of 1929, relating to service on nonresident automobile owners in civil actions, is constitutional and valid. *Bigham v. Foor*, 14.

D Abuse of Process.

a Right of Action and Defenses

1. Where a criminal action for false pretense has been nonsuited, but the evidence shows that it was regularly and orderly prosecuted according to the procedure therefor, and there is no evidence to the contrary, it will not sustain an action by the defendant therein for malicious abuse of process, and a motion as of nonsuit on the evidence in the civil action will be sustained on appeal. *Martin v. Motor Co.*, 641.

PROHIBITION see Intoxicating Liquors.

PUBLIC OFFICERS (Venue of actions against, see Venue A b; sheriffs see Sheriffs, superintendents see Schools and School Districts D c; actions on bonds of, see Principal and Surety B c).

A Nature of Public Offices.

b Who are Public Officers

1. The provisions of our Constitution, Art. XIV, sec. 7, that "no person who shall hold an office or place of trust . . . under this State . . . shall hold or exercise any other office or place of trust or profit under the authority of this State" applies to the position of county commissioner, a county commissioner being a public officer of the State within the meaning of the section. *Harris v. Watson*, 661.

2. A notary public exercises a judicial or *quasi*-judicial function under the government of this State, C. S., 3175, and holds a public office within the contemplation of Art. XIV, sec. 7, of our Constitution although there is no supervisory power given him and he may not be compelled to act in any given case, and to some extent holds his office at the will of the Governor. *S. v. Knight*, 169 N. C., 335, cited and applied. The instance of a special commissioner appointed for a special purpose is distinguished. *Ibid.*

PUBLIC OFFICERS—*Continued.*

B Qualifications, Appointment and Tenure.

c Person May Not Hold Two Offices Under the State

1. Where one holding an office as county commissioner accepts a commission from the Governor as a notary public he may not hold both offices, Art. XIV, sec. 7, and his right of election is exercised by his acceptance of the second office, and his position as county commissioner is *eo instanti* vacated, and where he continues to exercise the duties of county commissioner he may be removed therefrom in an action in the nature of a *quo warranto*. *Harris v. Watson*, 662.

PUBLIC SERVICE CORPORATIONS see Eminent Domain B b.

QUO WARRANTO.

B Proceedings.

a Bond and Permission to Sue

1. Common-law procedure by *quo warranto* and proceedings by information in the nature thereof have been abolished, and the remedy in such matters is under the provisions of our statute, C. S., 869, 871, requiring that permission of the Attorney-General be first obtained and bond filed to save the State harmless from costs, and where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject-matter against the same respondent, but fails to obtain permission to bring the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the statute be again complied with before the bringing of the second action. *Cooper v. Crisco*, 739.

2. In proceedings under the statute to try title to a public office the interest of the public is involved and is paramount to the rights of the relator, and the consent of the Attorney-General, the filing of the bond, etc., as required by the statute, is a prerequisite to the right of the relator to maintain the action. *Ibid.*

RAILROADS (As carriers see Carriers; liability to employees see Master and Servant E).

D Operation of Railroads.

b Accidents at Crossings

1. Where in an action against a railroad company to recover damages resulting from a collision at a public grade crossing the evidence tends to show that the driver of the truck stopped within about sixty feet of the track and he and an occupant therein looked and listened, and again stopped when from seven to fourteen feet of the track, and, failing to see or hear an approaching train, drove upon the track without further precaution, that the truck stalled upon the track and was hit by defendant's train within twelve or fourteen seconds, that there were two mounds between the highway and the crossing between eight to fifteen feet from the tracks, one mound being from ten to twelve feet high and preventing a clear view of the track, that the driver could see up the track in

RAILROADS D b—*Continued.*

the direction from which the train came for one-third of a mile, and that at the crossing there were boards projecting two or three inches above the rails, is *Held:* insufficient to establish contributory negligence on the part of the driver as a matter of law, the issue being for the jury, and defendant's motion as of nonsuit was properly denied. *Moore v. R. R.*, 26.

2. Where in a few seconds of peril caused by the unexplained stopping of the engine of the plaintiff's truck on defendant's railroad track, with evidence tending to show that the defendant was negligent in causing a collision at a grade crossing, the mere fact that the driver of the automobile unsuccessfully endeavored to start his engine instead of seeking safety by jumping therefrom, is not held to bar recovery on the issue of contributory negligence upon which the defendant based his motion as of nonsuit. *Ibid.*

3. One who drives across a railroad track at a public crossing and the employees on the defendant's train are mutually held to the degree of care required under the rule of the ordinarily prudent man under the circumstances to avoid receiving or inflicting injury. *Ibid.*

4. It is the duty of a railroad company to keep its right of way at a public crossing in a reasonably safe condition and one using a crossing without previous knowledge of its condition may assume that the railroad company had performed this duty. *Ibid.*

5. Where a city ordinance requires a railroad company, among other things, to keep its grade crossing in the city in a safe condition at all times by paving same with wood, brick, cement, etc., for the full width of the street, and makes the failure to do so a misdemeanor, evidence that the wheels of the automobile in which the plaintiff was riding as a guest became caught between the exposed cross-tie on one side of the crossing where the driver was forced to go by other passing automobiles, and that this part of the crossing was in an unsafe condition, and that the car was struck by defendant's train approaching the crossing without giving any warning, is held sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit. *Campbell v. R. R.*, 102.

6. Where the owner of an automobile is driving his own car and his invitee or guest, who has no control over the running or operation of the car, is injured in a collision with a train at a grade crossing, and the railroad company is negligent, the negligence of the driver of the automobile, if any, will not bar plaintiff's right to recover against the railroad company unless it is the sole proximate cause of the injury in suit. *Campbell v. R. R.*, 102; *Sanders v. R. R.*, 672.

7. Where the collision between an automobile and a train at a grade crossing is caused solely by the negligence of the driver of the automobile, an occupant of the automobile injured in the collision may not recover damages against the railroad company. *Holt v. R. R.*, 638.

8. Where there is evidence that the defendant railroad company's through train approached a grade crossing in a city without giving warning by blowing its whistle or ringing its bell as required by an

RAILROADS D b—*Continued.*

ordinance of the city, and that it was running at a rate of speed greatly in excess of that allowed by the ordinance, and that such negligence was a proximate cause of a collision at the crossing, the evidence is sufficient to be submitted to the jury in an action for damages by one injured in the collision, the violation of the ordinance being negligence *per se*, and the question of negligence and proximate cause being for the jury. *Sanders v. R. R.*, 672.

9. Where a city ordinance provides that no railroad company or engineer in charge of a train passing through the city shall exceed the speed limit therein stipulated, and imposes a fine on any engineer who violates the ordinance, *Held:* although the fixed penalty applies solely to the engineer, by a correct interpretation of the ordinance its violation is also negligence on the part of the railroad company for which damages may be recovered in a civil action if the proximate cause of injury. *Ibid.*

RECEIVERS.

A Nature and Grounds for Receivership.

c Right to File Bond to Prevent Appointment of Receiver

1. The appointment of a receiver is a harsh and extraordinary remedy in equity intended to prevent the possibility of loss of the rents or profits from the property of the debtor, and it should not be granted ordinarily where, by following the statutory provisions allowing the debtor to give bond, the rights of the creditors can be fully protected, and in this case the appointment of a permanent receiver for the owners of a five-hundred-acre farm in a high state of cultivation and the refusal to allow the owners to give the statutory bond and retain possession is held for error under the facts and circumstances, C. S., 860, 861, it appearing that loss would not likely result to the creditors. *Woodall v. Bank*, 428.

d Liabilities on Bonds Filed to Prevent Receivership

1. Where an order is given requiring a bond with sureties for a specified crop year as a condition for permitting the mortgagor to retain possession, otherwise a receiver to be appointed, and the order stipulates that if the case is not tried within a year that another bond should be given to prevent the appointment of a receiver, the order and the bond given in pursuance thereof will be construed together to determine the liabilities of the obligors thereon, and where the case is not tried within a year and no further bond is given, but a receiver is appointed who fails to take possession of the property, the bond covers a period of one year only, and a judgment against the sureties thereon for a three-year period to the extent of the penalty of the bond is error. *Cavenaugh v. Thompson*, 469.

F Actions.

a Right to Sue, Parties and Process

1. Distinctions between actions at law and suits in equity are not regarded under our practice, and a receiver may bring action to realize upon the assets entrusted to him in his own name without special permission of court, under the presumption that he is invested with the full power to maintain the action in his own name. *Van Kempen v. Latham*, 505.

REFERENCE.

D Trial in Superior Court Upon Exceptions.

c Review and Rulings of Trial Court Upon Exceptions in General

1. While the trial court must consider and rule upon each exception to the referee's report upon a hearing before him on the exceptions, where, for the purpose of rendering judgment, the trial court restates in his own language the findings of fact deemed by him pertinent to the judgment, and affirms the findings of the referee, and the statement of the facts by the court and the findings of fact by the referee are substantially the same, his order overruling all exceptions to the findings of fact which do not conform to his statement of the facts is not subject to the objection that the court failed to pass on each exception, it appearing that the court had carefully considered the referee's report and the exceptions thereto before rendering judgment. *Abbitt v. Gregory*, 577.

REFORMATION OF INSTRUMENTS (Foreclosure is not bar to action for reformation of mortgage see Judgments L b 3).

C Actions (Admissibility of parol evidence see Evidence J d).

d Evidence and Nonsuit

1. In an action upon a note given by the owner of a newspaper there was in evidence a bill of sale made by him to another who was made a party defendant in the present action. A controversy arose between the defendants as to whether by inadvertence or mutual mistake an agreement was omitted from the writing in the bill of sale that the purchaser would assume liability upon the note in suit. Before the vendor would sign the bill of sale an exception from the covenant and warranty of title was inserted, excepting "a certain suit pending in the Superior Court" of the county (the present action): *Held*, it was error for the trial court to withdraw from the jury the relevant issues as to these matters, there being sufficient evidence thereon; and, *Held further:* the wording of the exception was ambiguous admitting parol evidence in explanation. *Robinson v. Benton*, 712.

RELEASE see Torts C.

REPLEVIN.

F Trial.

e Judgment

1. Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its detention, and against the surety on the bond for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff, or, if the return of the property cannot be had, upon payment of the value of the property at the time of its detention with interest thereon as damages, and costs, the recovery against the surety in no event to exceed the penalty of the bond. C. S., 610, 836. *Boyd v. Walters*, 378.

RES IPSA LOQUITUR see Negligence A e.

RETROACTIVE STATUTES see Statutes A c.

ROBBERY.

B Prosecution and Punishment (Failure to instruct on lesser degree of the crime see Criminal Law I 1 1).

c Evidence

1. In a prosecution for robbery it is competent for the prosecuting witness to tesify that the money stolen from her had been saved by her over a long period of years and had been accumulated by hard work and thrift, the testimony being competent as tending to explain why the prosecutrix had so large a sum on her person and as affecting her credibility as a witness, and an objection to the admission of such evidence on the ground that it tended to unduly enlist the sympathy of the jury cannot be sustained, the State having the right to introduce all competent and material evidence tending to convict, and there being nothing to show that there was any appeal made to the jury based upon sympathy for the prosecutrix. *S. v. Cox*, 357.

d Sufficiency of Evidence and Nonsuit

1. Evidence in this case is held sufficient to show that both defendants were guilty of robbery as charged in the bill of indictment, and the defendants' motions as of nonsuit were properly overruled. *S. v. Cox*, 357.

REMOVAL OF CAUSES.

C Citizenship of Parties.

b Separable Controversy and Fraudulent Joinder

1. Where a petition and bond are filed by a nonresident defendant to remove a cause from the State to the Federal Court on the ground of alleged fraudulent joinder of the resident defendant to defeat the jurisdiction of the Federal Court, the allegations of the complaint of a breach of duty by each of the defendants to the plaintiff proximately causing the injury is sufficient to retain the cause in the State court. *Wright v. Lumber Co.*, 184.

2. Where a nonresident defendant files petition and bond for the removal of a cause from the State to the Federal Court upon diversity of citizenship and pending of the same action in the Federal Court, and the amount is jurisdictional in the latter court, for the purpose of the motion the statement contained in the petition is taken as true, the plaintiff having the right to answer, join issue with the petition or move to remand from the District to the State Court, and the defendant's petition to remove the cause as prayed, should be allowed. *Stubbs v. Lumber Co.*, 336.

SALES.

H Remedies of Buyer.

d Actions for Breach of Contract or Warranty

1. Where the contract for the sale of machinery provides that in case any part is defective the seller should replace it with other suitable parts, and that the acceptance by the buyer of any part should

SALES H d—*Continued.*

be a waiver of damages due to delay and that the seller should be liable only for the rental value of other parts, and in the buyer's action thereon the seller's evidence is to the effect that the buyer, although aware of the defects of the machinery and that it did not come up to specifications, failed to demand replacements and accepted the machinery and paid the purchase price, and the buyer's evidence discloses that the agents of the seller sent by it to adjust the matter, promised that "everything would be adjusted satisfactorily," *Held:* the representations of the agents of the seller inducing the payment of the purchase price amounts to a waiver of the stipulations as to replacement of defective parts and as to the acceptance of the machinery, and the buyer may recover his damages under the rules for assessment of damages in such cases, and a verdict in the buyer's favor in accordance therewith will be upheld. *Ferry Co. v. Fairbanks-Morse and Co.*, 485.

SCHOOLS AND SCHOOL DISTRICTS.

D Government and Officers.

c Title to Property

1. Where under the provisions of N. C. Code of 1927 (Michie), sec. 5490(1), several school districts have been included in an enlarged district, and certain property in the former districts is not necessary to be used for school purposes in the enlarged district because of new consolidated schools therein, and the trustees of the enlarged district have not assumed any debt on such property: *Held,* under the express provisions of the statute the title to such property remains in the county board of education, the statute providing that the county board should execute a deed to the trustees of the district for all school property in the district "except property maintained by the county for other district purposes, the debt for which property has not been assumed by the new district," and the provisions of the exception, being clear and unambiguous, must be given effect. *Mitchell v. Board of Education*, 55.

e Compensation of County Superintendent

1. When the salary of a county superintendent of public instruction is to be determined under the provisions of our statute the amount fixed as to population under the provisions of section 19, chapter 245, Public Laws of 1929, are not a full restriction of the amount of the entire salary the superintendent shall receive, but only a portion thereof when a larger salary has been allowed in accordance with section 15 thereof, the former being intended as a basis of the county's participation in the equalization fund. *Board of Education v. Commissioners of Swain*, 81.

H Liabilities of School Districts or Boards and Actions Against.

b Actions in Tort

1. A county board of education is a political subdivision or agency of the State authorized by statute in specific instances to provide transportation of teachers and pupils from the county school fund for their attendance at the public schools of the county, and an action for damages for negligent injury by those thus transported

SCHOOLS AND SCHOOL DISTRICTS H b—*Continued.*

may not be maintained against such board, there being no permissive statute to that effect, and where so brought a demurrer to the sufficiency of the complaint to state a cause of action will be sustained. C. S., 5410, 5428, 5489. *Benton v. Board of Education*, 653.

2. The doctrine of estoppel does not apply where a private person brings an unauthorized action against a county board of education founded upon the alleged negligent act of one under contract with the board to transport teachers and pupils to and from public schools of the county as authorized by C. S., 5489. *Ibid.*

3. One injured by negligence of school bus driver may not sue on bond given by him to board of education. *Ibid.*

SEDUCTION.

A Nature and Elements of the Crime.

b Promise of Marriage

1. In order for conviction of the offense of seduction of an innocent and virtuous woman under promise of marriage, C. S., 4339, the promise of marriage must be absolute and unconditional, and a promise at the time to marry the woman in the event "anything should happen to her," is insufficient for a conviction under the statute. *S. v. Shatley*, 83.

SERVICE OF PROCESS see Process B.

SHERIFFS.

B Compensation.

b For Collection of Taxes on Salary Basis

1. Where a sheriff is paid a fixed amount a year for the collection of taxes, the amount payable in equal monthly installments, and he receives the tax books in October, and fails to succeed himself and goes out of office the following December, the tax books being turned over to his successor under court order: *Held*, he is entitled to receive payment of the "monthly installments" of the salary for so much of the fiscal year as intervened between its beginning on 1 July and the date he went out of office. N. C. Code, 1927 (Michie), secs. 7692, 1334(53), 1334(46), 1334(50). *Martin v. Swain County*, 68.

SIGNATURES.

B Form and Sufficiency of Signatures.

a Place of Affixing Signature

1. Where a statute requires that a writing be signed to bind a party to its terms it is not necessary that the signature appear at any particular place on the writing, but where the statute requires that the signature be subscribed it must be signed below and after the writing. *Corporation Commission v. Wilkinson*, 344.

STATE—Board of Assessments see Taxation C e; Industrial Commission see Master and Servant F; officers see Public Officers; liability for costs in disbarment proceedings see Costs B a.

STATES.

E Claims Against the State (Against municipal corporations see Municipal Corporations E, against school districts see Schools and School Districts H b).

a Right of Action Against in General

1. No action sounding in tort can be maintained against the State, or, ordinarily, against any political subdivision or agency thereof exercising a governmental function in performing duties required of it by statute. *Benton v. Board of Education*, 653.

b Nature and Grounds of Jurisdiction of Supreme Court

1. The original recommendatory jurisdiction of the Supreme Court to hear claims against the State is confined to the powers given by Art. IV, sec. 9, of our Constitution, and is not enlarged by the rules of procedure prescribed by C. S., 1410, to include any claim which may be presented for consideration, and where the complaint presents only an issue of fact and raises no important question of law the proceeding will be dismissed. *Cohoon v. State*, 312.

STATUTE OF LIMITATIONS see Limitation of Actions.

STATUTES.

A Requisites and Validity.

c Retroactive, Curative and Ex Post Facto Statutes

1. Neither the State nor the Federal Constitution prohibits the passage of retrospective or retroactive laws, as distinguished from those that are *ex post facto*, unless they impair the obligations of contracts or disturb vested rights, and no person has any vested right in procedure. *Bateman v. Sterrett*, 59.

B Construction and Operation.

a General Rules of Construction

1. Where an act of the General Assembly is susceptible of two interpretations, one constitutional and the other not, the courts will adopt that interpretation which would be constitutional and reject the other, the presumption being in favor of the validity of the act. *Glenn v. Commissioners of Durham*, 233; *S. v. Casey*, 621.

C Repeal and Revival.

b Repeal by Implication and Construction

1. Where a special law relating to a particular locality such as cities or towns in a certain county is passed as to interests, etc., allowed the purchaser at a tax sale of lands, and a general law of State-wide application is later passed upon the same subject-matter, the general law will not modify or repeal the special one unless such modification or repeal is provided for by express words or arises from necessary implication, but where the two statutes can be reconciled by reasonable construction the rule of repeal by implication does not apply. *Kirkman v. Stoker*, 9.

SUMMARY PROCEEDINGS see Principal and Surety B c 1.

SUMMONS see Process.

TAXATION.

A Validity of Levy and Constitutional Requirements and Restrictions.

a Necessity of Approval of Voters to Issuance of County Bonds

1. Taxes levied for a special purpose by a county with special legislative approval and for necessary county expenses are valid without a vote of the people, but whether purpose is special or general is a question for the courts. *Glenn v. Commissioners of Durham*, 233.

2. For purposes other than necessary expenses, whether special or not, taxes may not be levied by a county either within or in excess of the limitation fixed by our Constitution, Article V, section 6, except by a vote of the people under special legislative authority. Article VII, section 7. *Ibid.*

b Constitutional Limitations on Tax Rate

1. Within the limitations of our Constitution, Article V, section 6, providing that the total State and county tax on property shall not exceed fifteen cents on the one hundred-dollar valuation, the county commissioners of the respective counties may levy a tax for necessary expenses without a vote of the people or special legislative authority. *Glenn v. Commissioners of Durham*, 233.

2. The issuance of bonds by a county to refund a debt arising from a deficiency in the general fund for general county expenses may not be declared to be for a special purpose within the meaning of the Constitution, but where the original debt was incurred for a special purpose for a necessary expense its funding may be declared to be for a special, necessary expense because of its original character. Special purposes within the constitutional provisions discussed by STACY, C. J. *Ibid.*

3. Our statute permitting a county to refund its indebtedness incurred prior to 1 July, 1931, provides that "nothing herein contained shall be construed as authorizing an unlimited tax for the payment of bonds not issued for a special purpose," and the statute is declaratory of the law as construed by our courts, and confines the refunding of debts to those not requiring a tax rate in excess of the constitutional limitation for general county expenses or those created for a special, necessary purpose with the special approval of the General Assembly. *Ibid.*

4. The General Assembly is without power to suspend the constitutional provision limiting the tax rate for general county expenses by declaring the issuance of bonds to refund debts incurred for general county expenses to be for a special purpose by reason of financial depression, and to the extent a statute attempts to violate the constitutional provision it is void. *Ibid.*

5. Where a statute authorizes the issuance of bonds by a county for funding indebtedness now outstanding or incurred before 1 July, 1931, and declares that taxation for the payment of such funding bonds shall constitute a special purpose, it will be interpreted in the light of the Constitution, and it authorizes the funding of debts incurred for purposes properly denominated special which are also necessary expenses of the county, but it does not authorize the funding of debts incurred to meet a deficiency in the general county

TAXATION A b—*Continued.*

fund when it would be necessary to exceed the constitutional limitation on the tax rate for their payment. Article V, section 6. *Ibid.*

6. Whether a tax levy authorized by statute is for a special purpose is a question including both law and fact, and is for judicial and not for legislative determination. *Ibid.*

f Form, Requisites, Amount of Issue, and Procedure for Issuance of Bonds

1. A county proceeding under the County Finance Act to refund its indebtedness must act strictly according to the procedure prescribed by the statute, and section 17 of the act provides that after hearing the governing body may pass an order in the form of its introduction or in an amended form, but that the amount of the issue shall not be increased nor the purpose of the issuance substantially changed by the amendment unless due notice and opportunity of hearing as required by the act shall be given, and where the governing body of a county substantially changes the purpose of the proposed issue by amendment without notice and an opportunity of hearing as prescribed by the act it is sufficient to invalidate the proposed bonds. *Blackmore v. Duplin County*, 243.

B Liability of Persons and Property.

d Property Exempt from Taxation

1. Where a veteran of the World War has received money as a benefit under the Federal statute, and has invested it in property in this State subject to taxation, it does not fall within the intent and meaning of the Federal statute excepting the benefit from State or Federal taxation (Title 38, U. S. C. A.), and the question does not arise as to whether Congress has the power to exempt the benefit from taxation by the State, the statute not including within its intent property acquired by investment of the money so received as a benefit, and the veteran having paid his taxes under protest is not entitled to recover it in his action under N. C. Code, 1927 (Michie), 7880(189). *Martin v. Guilford County*, 63; *Lambert v. Guilford County*, 67.

C Levy and Assessment.

d Appeals from Assessments of Valuation to Boards of Equalization and Review

1. The board of commissioners of a county when sitting as the statutory board of equalization and review of the county must observe certain statutory rules in reviewing the valuations placed upon property by the local assessors, and it is required that they shall raise the valuation on such property as in their opinion has been returned below its true value and reduce the valuation of such property as in their opinion has been returned above its true value, and an order by such board of equalization and review making a horizontal reduction in all the valuations returned by the local assessors is erroneous. *Power Co. v. Burke County*, 318.

2. Where the board of county commissioners while sitting as the statutory board of equalization and review of the county makes an order

TAXATION C d—*Continued.*

for the horizontal reduction in the valuations placed on property in the county by the local assessors, such order is erroneous, but it is not void, the board having jurisdiction of the subject-matter and the parties interested therein, and having the power to accomplish the result of the order upon its finding that it would place each tract of land on the tax books at its true value in money, but such order is subject to review by the State Board of Assessment upon complaint of any taxpayer of the county. *Ibid.*

c Appeals to State Board of Assessment

1. Upon appeal to the State Board of Assessment from the valuation placed on the plaintiff's property the State Board has the authority to interfere with an order of the county board of equalization and review making a horizontal reduction in the valuations placed upon property by the local assessors, but where the State Board reduces the valuation placed on the plaintiff's property and erroneously holds that it cannot interfere with the order for such horizontal reduction, the holding of the State Board is binding on the plaintiff and all other taxpayers until set aside by a court of competent jurisdiction in a hearing upon a writ of *certiorari*. *Power Co. v. Burke County*, 318.

E Collection of Taxes and Remedies for Wrongful Collection or Levy.

c Action to Recover Taxes Paid

1. An order of the board of equalization and review of a county for a horizontal reduction in the valuations placed on property in the county by the local assessors, although erroneous, is not void, and it may not be collaterally attacked in an action to recover a part of the taxes paid by the plaintiff under protest. *Power Co. v. Burke County*, 318.

H Tax Sales and Foreclosures.

a Tax Sales and Certificates

1. Holder of tax sale certificate is not entitled to proceeds of policy of fire insurance covering premises. *Street v. Oil Co.*, 410.

d Interest, Costs and Attorney's Fees

1. Under the provisions of a special act relating to the method for collection of taxes by a city, remedy was given in the nature of an action for debt to foreclose tax liens on lands in any court of competent jurisdiction, the act making no reference to payment of interest, costs, or attorney's fee, the only reference being the provision that 25 per cent should be paid by the owner if he should redeem the land within a year, and such provision being inapplicable to the facts in the present case; the general law regulating the sale of land for taxes provided that the purchaser of a tax sale certificate should be entitled to certain interest, costs, commissions and attorney's fee upon the foreclosure of the tax sale certificate, *Held:* the general and special acts are not in conflict as to the allowance of interest, costs, and attorney's fee, and the rate of interest should be determined by the statute in force at the time of the sale. *Kirkman v. Stoker*, 9.

TORTS (Election of remedies see Election of Remedies A c; particular torts see Negligence, Malicious Prosecution, etc., liability of particular persons see Corporations G i, Municipal Corporations E, Master and Servant D; limiting liability for, by contract see Carriers D c 1).

C Releases from Liability.

a Operation and Effect of Release

1. A release from liability for a personal injury, signed by the injured party for consideration, is a bar to an action for damages in the absence of fraud or mistake. *McInturff v. Trust Co.*, 16.

b Fraud in Procuring Release

1. Evidence in this case is held sufficient to sustain the allegations of fraud in procuring a release in settlement of a claim against an insurance company; courts of equity will not attempt to define the meaning of the term "fraud." *Broadway v. Ins. Co.*, 639.

TRESPASS TO TRY TITLE.

A Actions.

f Evidence

1. Where, for the purpose of establishing title, the plaintiff offers a deed in evidence, an objection to its admission on the ground that it did not convey title is properly overruled where the probate is not defective, the relevancy and legal effect of the deed being reserved until a subsequent stage of the trial. *Hodgin v. Liberty*, 658.

TRIAL (Of criminal cases see Criminal Law I).

A Time of Trial, Notice and Preliminary Proceedings.

b Continuance

1. In this summary proceeding against the clerk of the Superior Court and the surety on his official bonds under C. S., 356, there was no abuse of discretion on the part of the trial court in ruling the defendants into trial immediately after issues joined under the facts and circumstances then existing. *S. v. Gant*, 211.

C Conduct and Course of Trial.

a Arguments of Counsel

1. It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto, and the fact that the trial court, upon objection, made a general observation to the effect that the jury would take the law from the court and not from counsel is insufficient, it being his duty, upon objection duly made, either to direct counsel not to read the dissenting opinion or to plainly and unequivocally instruct that the dissenting opinion had not legal bearing upon the case. C. S., 203. Limitations on counsel in their argument to the jury discussed by BROGDEN, J. *Conn v. R. R.*, 157.

c Consolidation of Actions

1. Where several actions against the same defendant have been referred to a referee and heard by him at the same time by consent of the

TRIAL A c—*Continued.*

parties, and his findings of fact and conclusions of law are substantially the same in each action, upon the hearing of exceptions to his reports an order of the trial judge consolidating the actions on his own motion is not error. *Abbitt v. Gregory*, 577.

D Taking Case or Question from Jury.

a Nonsuit (As affecting limitations see Limitation of Actions B g)

1. A mere scintilla of evidence, raising only a suspicion, conjecture, guess, or speculation as to the issue to be proven is insufficient to take the case to the jury. C. S., 567. *Shuford v. Brown*, 17; *Broughton v. Oil Co.*, 282; *Shuford v. Scruggs*, 685.

2. Upon a motion of nonsuit the evidence favorable to the plaintiff will be taken as if established to the satisfaction of the jury, and conflicting or contradictory evidence offered by the plaintiff will not be considered in passing upon the sufficiency of the evidence. C. S., 567. *Moore v. R. R.*, 26.

3. Judgment as of nonsuit in favor of party upon whom was the burden of proof held error. *Stockton v. Lenoir*, 88.

4. Upon a motion as of nonsuit all the evidence, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Campbell v. R. R.*, 102; *Hunt v. Myers Co.*, 636; *Broadway v. Ins. Co.*, 639; *Sanders v. R. R.*, 672; *Holton v. Oil Co.*, 744.

5. Where a city and a development company are sued for an injury resulting from a dangerous condition of a sidewalk constructed by the development company under an agreement with the city that the development company should assume all responsibility for injuries resulting therefrom, the refusal of the motion of the development company for nonsuit is not error when the legal relationship between the city and the development company had not been determined. *Markham v. Improvement Co.*, 117.

6. Failure of the defendant to renew his motion as of nonsuit at the close of all the evidence introduced on the trial of a civil action is a waiver by him of his motion theretofore made at the close of the plaintiff's evidence. C. S., 567. *Debnam v. Rouse*, 459.

7. Ordinarily when the plaintiff submits to a voluntary nonsuit in a civil action he is unable to prove his case, or refuses or neglects to proceed to the trial of the cause at issue, or leaves the matter undetermined. *Cooper v. Crisco*, 739.

8. Apparent contradictions or inconsistencies in the evidence of a plaintiff testifying in his own behalf in a civil action will not entitle the defendant to a judgment as in case of nonsuit or to a directed verdict, when he has also testified to matters tending to sustain his action, such contradictions going only to his credibility as a witness. *Kennedy v. Tel. Co.*, 756.

TRIAL D—*Continued.*

b Directed Verdict

1. Where the evidence relating to an issue is conflicting the refusal of the trial court to direct a verdict thereon is not error. *Brown v. Payne*, 398.

2. An instruction for the jury to answer the issue in the negative if they should find the facts to be as testified by all the witnesses is not a peremptory charge, and the verdict thus returned is not directed, the credibility of the evidence being passed upon by the jury. *Trust Co. v. Insurance Co.*, 552.

3. In an action to recover damages for a negligent injury, an instruction requested by defendant that upon the evidence, the plaintiff could not recover is properly refused when the plaintiff denies contributory negligence and was not guilty of it according to his testimony. *Hicks v. Love*, 773.

4. While ordinarily a verdict directed in favor of a party having the burden of proof may not be correctly given by the trial court, the rule will not apply when all the evidence and admissions and reasonable inferences therefrom are in his favor. *Reinhardt v. Insurance Co.*, 785.

c Issues of Fact

1. Where in proceedings to establish the disputed boundaries between adjoining lands, C. S., 361, a binding executed agreement between the parties has been established by uncontradicted evidence, no issue of fact is raised which requires the determination of the jury, C. S., 543, 580, and there is no error in the court's holding that the completed agreement of arbitration operated as an estoppel as a matter of law. *Lowder v. Smith*, 642.

d Questions of Law and of Fact (Proximate cause see Negligence B c)

1. Where a city and a development company are sued for an injury resulting from a dangerous condition of a sidewalk in the city, and in its answer the city alleges that it granted a permit to the development company to construct a basement under the sidewalk under an agreement that the development company should relieve the city of all liability that might result from such construction, and this is not denied by the development company, the question as to the liability of the development company to the city under the contract of indemnity involves a matter of law arising upon undisputed facts, and its submission to the jury is not necessary. *Markham v. Improvement Co.*, 117.

2. The competency, admissibility and sufficiency of the evidence is for the court to determine, the weight, effect and credibility is for the jury. *Shuford v. Scruggs*, 685.

E Instructions.

b Expression of Opinion by Court

1. Where the trial court charges the jury that if they should find the facts to be as contended by the defendant, that the plaintiff could not recover, and in the next succeeding paragraph states the converse of the proposition, an exception by the defendant to the latter

TRIAL E b—*Continued.*

portion of the charge will not be held for error as an expression of opinion by the court on the weight and credibility of the evidence, the charge being correct when construed contextually as a whole. *Kennedy v. Tel. Co.*, 756.

2. Where the driver of an automobile attempts to turn out on the highway and the injury in suit was received by his car being struck by a car following, and the question as to whether the driver of the forward car gave the required signal with his hand is material to the controversy, an instruction to the jury giving the plaintiff's contention that he had made the proper signal, but fully and clearly stating the law applicable to the evidence in the case and the burden of proof, is not objectionable as an expression of opinion by the court as to the weight and credibility of the evidence, nor will a charge that the jury should determine the weight of the evidence from the estimate they placed upon the credibility of the witnesses and not the number of witnesses or the volume of their testimony be held for reversible error. *Hicks v. Love*, 773.

c Requests for Instructions

1. Where the instructions of the court to the jury are generally sufficient under the evidence, the objecting party must offer prayers for instructions in more detail if he desires them or his exception is untenable. *Campbell v. R. R.*, 102; *Hodgin v. Liberty*, 658; *Kennedy v. Tel. Co.*, 756.

2. The refusal of the trial court to give special instructions requested will not be held for error if the requested instructions are substantially covered in the charge. *Campbell v. R. R.*, 102; *Kennedy v. Tel. Co.*, 756.

f Objections and Exceptions

1. An incorrect statement in the charge of the trial judge to the jury as to the contentions of a party will not be held for error unless the complaining party has called the matter to the attention of the judge in time to afford him an opportunity to correct the misstatement. *Kennedy v. Tel. Co.*, 756.

g Construction of Instructions and General Rules Upon Review

1. Where the charge of the trial court to the jury taken in its related parts and construed contextually as a whole is free from error an exception thereto will not be sustained on appeal. *Campbell v. R. R.*, 102; *Kennedy v. Tel. Co.*, 756.

h Additional Instructions and Redeliberation

1. Where verdict is not inconsistent and is sufficient to support judgment the trial court may not require jury to reconsider. *Allen v. Yarborough*, 568.

F Issues.

a Form and Sufficiency in General

1. Where the issues submitted to the jury afford the parties opportunity to introduce all pertinent evidence and apply it fairly, an exception thereto by a party tendering other issues will not be sustained. *Bank v. Lewis*, 148.

TRIAL F a—*Continued.*

2. A plea in bar to the right of plaintiff to recover in his action must be supported by evidence sufficient in law for an affirmative finding by the jury or the question will not be submitted for its determination. *McKerley v. Insurance Co.*, 502.

3. The correct form of the one issue of *devisavit vel non* is sufficient to present all issuable matters to the jury. *In re Will of Badgett*, 565.

G Verdict.

a Impeaching or Setting Aside Verdict

1. After verdict jurors will not be heard to impeach it by their individual testimony, though the power of the trial court to perfect a verdict or to correct an inadvertence or mistake does not fall within the rule, and *held:* on this appeal an exception and assignment of error for that the trial court refused to hear testimony of jurors that the verdict was a quotient verdict is not sustained. *Campbell v. R. R.*, 102.

b Form and Sufficiency of Answers to Issues

1. In an action on a note given for the purchase price of an engine the defendant pleaded a counterclaim, with supporting evidence, as to fraudulent representations inducing the purchase, the jury answered the issue as to fraudulent representations in the negative, but in another issue assessed damages against the plaintiff for such fraudulent representations: *Held*, the verdict is conflicting, and the instructions failing to point out the connection between the issues, and it being apparent that the jury was confused, a new trial is awarded on appeal. *Frick Co. v. Shelton*, 71.

2. In a personal injury case involving upon the trial the issues of negligence, contributory negligence, and the last clear chance, the failure of the jury to answer the last issue will not entitle the defendant to a new trial on appeal when it appears that the jury's answer to the first two issues completely and properly dispose of the case. *Campbell v. R. R.*, 102.

3. The verdict of the jury upon disputed questions of fact arising upon the evidence must be sufficient to enable the court to proceed to judgment, and where the recovery of usury is sought in the action a verdict establishing the amount of the interest charged is insufficient without a finding that usury was exacted, or, if so, that it was knowingly done, and where the insufficiency cannot be determined by proper reference to the pleadings the evidence and admissions of the parties and the charge of the court, a new trial will be ordered on appeal. *Newbern v. Gordon*, 317.

4. Where in an action involving the issues of negligence, contributory negligence and damages, a verdict answering the first and second issues in the affirmative and awarding damages under the third is not essentially inconsistent, the answer to the second issue eliminating the award of damages as a matter of law, and it is error for the trial judge to return this verdict to the jury for further consideration with the explanation that the answers to the issues

TRIAL G b—*Continued.*

were inconsistent, nor is the error cured by the intimation of a single juror that they had not understood the charge, and where, upon redeliberation, the jury has answered the second issue in the negative, a new trial will be awarded. *Allen v. Yarborough*, 568.

5. Verdict in this case held conflicting and ambiguous, entitling appellant from judgment entered thereon to a new trial. *In re Will of Henderson*, 759.

c Acceptance of Verdict by the Court

1. The power of the trial court to accept or reject a verdict is restricted to the exercise of a limited legal discretion and he may instruct the jury to reconsider their verdict only when it is imperfect, informal, insensible, repugnant, or not responsive to the issues. *Allen v. Yarborough*, 568.

TROVER AND CONVERSION see Money Received, punitive damages for conversion of car see Damages E a 1.

TRUSTS.

A Creation and Validity.

b Resulting and Constructive Trusts

1. Where the complaint in an action by a father against his daughter alleges that he conveyed certain property to her by absolute conveyance to be held in trust for him for the purpose of defeating certain threatened litigation which he alleges was without merit, and prays for a reconveyance of the property: *Held*, a demurrer thereto was properly sustained, it appearing that the plaintiff was attempting to defeat the due administration of the law and the equitable doctrine of "clean hands" applying, and the law condemning, in proper cases, the tying of a parol trust for the benefit of the grantor to an absolute conveyance. *Penland v. Wells*, 173.

2. Where, upon sufficient evidence, a referee finds that the general manager of a corporation was authorized by certain other officers and stockholders to negotiate for the sale of their controlling shares to another corporation, that the general manager was a close business and personal friend of the selling shareholders and that they had a right to, and did rely on his business judgment and integrity, and that he represented to the selling shareholders that the purchasing corporation would pay only $106.00 a share whereas in fact, under a secret agreement between the general manager and the purchasing corporation, the purchasing corporation paid him about $158.00 a share, and that he retained the difference for his personal use, with the knowledge and connivance of the purchasing corporation, *Held:* the selling shareholders are entitled to recover of the general manager negotiating the sale and the purchasing corporation, jointly and severally, the difference wrongfully retained by the general manager, there being a fiduciary relationship between the general manager and the selling shareholders and the purchasing corporation knowing the facts constituting such relationship, and the judgment of the lower court confirming the findings of fact and conclusions of law to this effect will be affirmed on appeal. *Abbitt v. Gregory*, 577.

VENDOR AND PURCHASER (Cancellation of contract for failure of consideration see Cancellation and Rescission of Instruments A c 1).

B Construction of Contract.

b Whether Contract is for Sale in Gross or by Acre

1. Where an area comprising a number of acres of land is conveyed by metes and bounds in a deed and sold at a fixed price per acre under a contract to convey, the bargain and sale is not in gross and where the vendee has paid the purchase price for a greater number of acres than the number conveyed he may recover the value of the shortage at the fixed price per acre. *Patrick v. Worthington*, 483.

VENUE.

A Nature and Subject of Action.

b Actions Against Public Officers

1. Where the clerk of the Superior Court of one county issues an execution to the sheriff of another county who seizes the plaintiff's property in the latter county, and the plaintiff brings action against the clerk and the sheriff in the county wherein the goods were seized, alleging that the seizure was wrongful: *Held*, the causes relate to substantially one transaction and are not separable in the sense of being mutually independent, and the motion of the clerk for removal as to him to the county of his office should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of the statute, C. S., 464, relating to venue of actions against public officers, being effected in such instances by trial of the whole controversy in the county where the goods were seized. *Kellis v. Welch*, 39.

D Objections to Venue.

a Procedure to Raise Question

1. Improper venue may not be taken advantage of by demurrer, but by motion in the cause. *Shaffer v. Bank*, 415.

VERDICT see Trial G.

WATER AND WATER COURSES see Municipal Corporations E f, Nuisances A b 3.

WILLS.

D Probate and Caveat.

j Issues

1. Where upon the trial of a caveat to a will two issues, one of mental capacity and the other of undue influence, are raised for the determination of the jury with conflicting evidence as to each, and the judge has fully charged the jury upon the evidence and there is but one issue submitted to the jury, a verdict for the propounders will be construed as an answer both as to mental capacity and undue influence, and no reversible error will be found on appeal. *In re Will of Badgett*, 565.

WILLS D—*Continued.*

k Verdict

1. Where on the trial of a caveat of a will the first issue submitted to the jury is whether the paper-writing and every part thereof was the last will and testament of the deceased, and the third issue submitted was whether the testator had sufficient mental capacity to execute the instrument, and the jury answers the first issue "Yes" and the third issue "No," the verdict is conflicting in its result, and is so uncertain and ambiguous that on appeal from judgment entered thereon a new trial will be granted. *In re Will of Henderson*, 759.

E Construction and Operation.

a General Rules of Construction

1. The intent of the testator in the disposition of his property is to be construed by the courts from the entire instrument with regard to its relevant parts. *Reynolds v. Trust Co.*, 267.

g Conditions and Restrictions

1. A devise of land to certain named beneficiaries in fee but the land not to be sold under fifty years from the testator's death gives the devisees the immediate right of alienation, the absolute restraint on alienation being annexed to a fee is void. *Williams v. Scaly*, 372.

h Estates in Trust and With Power of Disposition

1. Where a will provides for the payment of a certain amount annually to the testator's children from a trust fund therein set up, and in another item provides "to encourage habits of industry, thrift and economy in my children, . . . I direct my trustee, upon any of my children presenting to it a statement showing to its satisfaction that he or she has made by individual effort, in any legitimate business or investment, or has saved from money, stocks or bonds owned by him or her, any money over and above all living expenses, to pay to such child . . . two dollars for every one dollar so made or saved," except money made in buying or selling stocks on margin: *Held*, the provisions as to money saved from money, stocks or bonds owned by the legatees does not include bequests from the estate of the testator or any other estate or gifts without consideration from any persons, such sums not being saved or earned by the legatees from money or stocks owned by them, and such items are properly excluded from the statement of a legatee in calculating the amount due such legatee under the provisions. *Reynolds v. Trust Co.*, 267.

2. A testator left an estate including lands with timber growing thereon and devised to his wife all of his property of every kind and description for life with remainder over to his nephew and his nephew's children, the testator having no children, and by later provision of the will empowered his wife to dispose of the standing timber as she might think best. The wife sold the timber and deposited the proceeds in the bank. *Held:* by interpretation of the will it appears that the intent of the testator was to provide for his wife more particularly than his nephew and his nephew's children, and that title to the timber was severed from the fee

WILLS E h—*Continued.*

and did not pass with the land, and the wife had the right under the terms of the will to the proceeds of the timber as her own money which she could dispose of by her will, there being no trust in favor of the remaindermen coupled with the wife's power of disposition. *Fletcher v. Bray*, 763.

i Actions to Construe Wills

1. The Court will not construe the provisions of a will in an action brought by an executor unless for the purpose of aiding him in the administration of the estate, and where suit is brought by an executor to settle a dispute among the devisees as to the quality of the estate devised, and the lands have already been sold and the proceeds are in the hands of the executor for distribution, the action and the appeal from the judgment of the lower court will be dismissed. *Finley v. Finley*, 1.

2. A will signed by the testator and witnessed as required by statute and clearly unambiguously expressed as to the testator's intent in the disposition of his estate, and sufficient in law as his last will and testament, will be given effect as written, and parol evidence to show a different intent as to the meaning of its terms upon which the designated beneficiary is to receive his portion, is incompetent when the issue of fraud or undue influence does not arise. *Reynolds v. Trust Co.*, 267.

WITNESSES—Impeaching see Criminal Law G r; right of accused not to be compelled to testify against self see Criminal Law F; testimony of wife against husband see Criminal Law G q; privileged communications see Evidence D b, D e.

WORKMEN'S COMPENSATION ACT see Master and Servant F.

WORLD WAR VETERANS—Property subject to taxation see Taxation B d 1.

WRONGFUL DEATH see Death B.

ZONING ORDINANCES see Municipal Corporations H b.