NORTH CAROLINA REPORTS

VOLUME 202

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NORTH CAROLINA REPORTS
VOL. 202

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1931
SPRING TERM, 1932

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1932

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" Eq.	"	45	"
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2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
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6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
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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

FALL TERM, 1931.
SPRING TERM, 1932.

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:

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CLERK OF THE SUPREME COURT:

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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.
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W. A. DEVIN	Tenth	Oxford.

SPECIAL JUDGES

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WESTERN DIVISION

JOHN H. CLEMENT	Eleventh	Winston-Salem.
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MICHAEL SCHENCK	Eighteenth	Hendersonville.
P. A. MCELROY	Nineteenth	Marshall.
WALTER E. MOORE	Twentieth	Sylva.

SPECIAL JUDGE

CAMERON F. MACRAE	Asheville.

EMERGENCY JUDGE

THOS. J. SHAW	Greensboro.

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EASTERN DIVISION

Name	*District*	*Address*
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R. H. PARKER	Third	Henderson.
CLAWSON L. WILLIAMS	Fourth	Sanford.
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T. A. MCNEILL	Ninth	Lumberton.
W. B. UMSTEAD	Tenth	Durham.

WESTERN DIVISION

CARLYLE HIGGINS	Eleventh	Sparta.
H. L. KOONTZ	Twelfth	Greensboro.
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JOHN M. QUEEN	Twentieth	Waynesville.

LICENSED ATTORNEYS

SPRING TERM, 1932.

List of applicants to whom license to practice law in North Carolina was granted by Supreme Court at Spring Term, 1932:

BALL, DAVID GRAHAM.....Raleigh.
BANZET, FRANK BROADHURST.....Ridgeway.
BLOOM, ELI.....Greenville.
BRAMLETT, WILLIAM ARTHUR.....Asheville.
BROWN, TRAVIS TAYLOR.....Charlotte.
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BUTLER, WILLIAM EARLE.....Glen Alpine.
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KLUTZ, HOWARD MARTIN.....Blowing Rock.
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MAYO, JOHN AUGUSTUS.....Washington.
METTREY, WILLIAM WEBBIE.....Elizabeth City.
MILLER, SAMUEL WESLEY.....Asheboro.
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PEARSON, CONRAD ODELLE.....Durham.
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POWELL, JUNIUS KENNETH.....Raleigh.
RANDOLPH, CORNELIUS POSEY.....Green Mountain.
SANDERS, GEORGE WASHINGTON.....Asheville.
SESSOMS, DAVID COLUMBUS.....Pinetops.
SMITH, LEON DUDLEY.....Kelly.
STEVENS, CHARLES WALTER.....Morehead City.
THOMPSON, VICTOR WORTH.....Lumberton.
UPCHURCH, MISS GERTRUDE MCGEE.....Raleigh.
WAYNICK, ROBERT PARKER.....High Point.
WEAVER, ZEBULON, JR.....Asheville.
WELLS, ROBERT CARROLL.....Kenansville.
WHITE, HENRY EUGENE.....Middleburg.
WILLIAMS, JOHN BLANEY, JR.....Clinton.

COMITY APPLICANTS.

BURCH, ALEXANDER AUSTIN.....Georgia.
ROALFE, WILLIAM ROBERT.....California.
SOMMERS, GOODLOE GOOCH.....Virginia.

SUPERIOR COURTS, FALL 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

Fall Term, 1932—Judge Midyette.

Beaufort—July 25‡; Oct. 3† (2); Nov. 21; Dec. 19†.
Gates—Aug. 1; Dec. 12.
Currituck—Sept. 5.
Chowan—Sept. 12; Dec. 5.
Pasquotank—Sept. 19†; Oct. 10† (A) (2); Nov. 7 (2).
Camden—Sept. 26.
Hyde—Oct. 17.
Dare—Oct. 24.
Perquimans—Oct. 31.
Tyrrell—Dec. 19 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1932—Judge Daniels.

Washington—July 11; Oct. 24†.
Nash—Aug. 22*; Oct. 10†; Nov. 28*; Dec. 5†.
Wilson—Sept. 5; Oct. 3†; Oct. 31† (2); Dec. 19.
Edgecombe—Sept. 12; Oct. 17†; Nov. 14† (2).
Martin—Sept. 19 (2); Nov. 21† (A) (2); Dec. 12.

THIRD JUDICIAL DISTRICT

Fall Term, 1932—Judge Frizzelle.

Hertford—July 25*; Oct. 17*; Oct. 24†; Nov. 28† (A).
Northampton—Aug. 1; Sept. 5†; Oct. 31 (2).
Halifax—Aug. 15 (2); Oct. 3† (A) (2); Oct. 24* (A); Nov. 28 (2).
Bertie—Aug. 29; Nov. 14 (2).
Warren—Sept. 19 (2).
Vance—Oct. 3*; Oct. 10†.

FOURTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Grady.

Lee—July 18 (2); Oct. 31; Nov. 7†.
Chatham—Aug. 1† (2); Oct. 24.
Johnston—Aug. 15*; Sept. 26† (2); Dec. 12 (2).
Wayne—Aug. 22; Aug. 29†; Oct. 10† (2); Nov. 28 (2).
Harnett—Sept. 5*; Sept. 19† (A); Oct. 3† (A) (2); Nov. 14* (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Harris.

Pitt—Aug. 22†; Aug. 29; Sept. 12†; Sept. 26†; Oct. 24†; Oct. 31; Nov. 21† (A).
Craven—Sept. 5*; Oct. 3† (2); Nov. 21† (2).
Jones—Sept. 19.
Carteret—Oct. 17; Dec. 5†.
Pamlico—Nov. 7 (2).
Greene—Dec. 12 (2).

SIXTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Cranmer.

Duplin—July 11*; Aug. 29† (2); Oct. 3*; Dec. 5; Dec. 12†.
Onslow—July 18‡; Oct. 10; Oct. 31†; Nov. 21† (2).
Sampson—Aug. 8 (2); Sept. 12† (2); Oct. 24*; Dec. 5† (A).
Lenoir—Aug. 22*; Sept. 26†; Oct. 17; Nov. 7† (2); Dec. 12* (A).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Sinclair.

Wake—July 11*; Sept. 12*; Sept. 19 (2); Oct. 3†; Oct. 10*; Oct. 24† (2); Nov. 7*; Nov. 28† (2); Dec. 12* (2).
Franklin—Aug. 29† (2); Oct. 17*; Nov. 14† (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Devin.

New Hanover—July 25*; Sept. 12*; Sept. 19†; Oct. 17† (2); Nov. 14*; Dec. 5† (2).
Columbus—Aug. 22 (2); Nov. 21† (2).
Brunswick—Sept. 5†; Oct. 3.
Pender—Sept. 26; Oct. 31† (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Small.

Robeson—July 11†; Aug. 15; Sept. 5† (2); Oct. 10*; Oct. 17†; Nov. 7*; Dec. 5† (2); Dec. 19*.
Bladen—Aug. 8†; Sept. 19*.
Hoke—Aug. 22; Nov. 14.
Cumberland—Aug. 29*; Sept. 26† (2); Oct. 24† (2); Nov. 21*.

TENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Barnhill.

Durham—July 18*; Sept. 5* (A); Sept. 12† (2); Oct. 10*; Oct. 24† (A); Oct. 31† (2); Dec. 5*.
Granville—July 25; Oct. 24†; Nov. 14 (2).
Alamance—Aug. 1†; Aug. 15*; Sept. 5† (2); Nov. 14† (A) (2); Nov. 28*.
Person—Aug. 8; Oct. 17.
Orange—Aug. 22; Aug. 29; Oct. 3†; Dec. 12.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Stack.

Ashe—July 11† (2); Oct. 17*.
Surry—July 11 (A) (2); Oct. 24 (2).
Forsyth—July 25* (2); Sept. 12† (2); Oct. 3 (2); Nov. 7* (2); Nov. 21† (A) (2); Dec. 5* (A); Dec. 12*.
Rockingham—Aug. 8* (2); Nov. 21† (2).
Alleghany—Sept. 26.
Caswell—Aug. 22; Oct. 17† (A); Dec. 5.

TWELFTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Harding.

Stokes—July 4*; July 11†; Oct. 17*; Oct. 24†.
Guilford—July 11* (A); Aug. 1*; Aug. 8† (2); Aug. 29† (2); Sept. 19* (2); Oct. 3† (2); Oct. 24* (A); Oct. 31† (2); Nov. 14*; Nov. 21† A) (2); Dec. 5† (2); Dec. 19*.
Davidson—July 18† (2); Aug. 22*; Sept. 12†; Oct. 3† (A) (2); Nov. 21 (2).

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Oglesby.

Stanly—July 11; Oct. 10†; Nov. 21.
Richmond—July 18†; July 25*; Sept. 5†; Oct. 3*; Nov. 21† (A).
Union—Aug. 1*; Aug. 22† (2); Oct. 17; Oct. 24†.
Moore—Aug. 15*; Sept. 19†; Sept. 26† (A); Dec. 12†.
Anson—Sept. 12†; Sept. 26*; Nov. 14†.
Scotland—Oct. 31†; Nov. 28 (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Warlick.

Mecklenburg—July 11* (2); Aug. 29*; Sept. 5† (2); Oct. 3*; Oct. 10† (2); Oct. 31† (2); Nov. 14*; Nov. 21† (2).
Gaston—July 25*; Aug. 1† (2); Sept. 12* (A); Sept. 19† (2); Oct. 24*; Nov. 28* (A); Dec. 5† (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Finley.

Montgomery—July 11; Sept. 26†; Oct. 3; Oct. 31†.
Randolph—July 18† (2); Sept. 5*; Dec. 5 (2).
Iredell—Aug. 1 (2); Nov. 7 (2).
Cabarrus—Aug. 15 (3); Oct. 17 (2).
Rowan—Sept. 12 (2); Oct. 10†; Nov. 21 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Schenck.

Catawba—July 4 (2); Sept. 5† (2); Nov. 14*; Dec. 5† (A).
Lincoln—July 18; Oct. 17; Oct. 24†.
Cleveland—July 25 (2); Sept. 19† (A); Oct. 31 (2).
Burke—Aug. 8 (2); Sept. 26† (3); Dec. 12 (2).
Caldwell—Aug. 22 (2); Nov. 28 (2).
Watauga—Sept. 19.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge McElroy.

Avery—July 4† (3); Oct. 17*; Oct. 24†.
Mitchell—July 25†; Oct. 31 (2).
Wilkes—Aug. 8 (2); Oct. 3† (2).
Yadkin—Aug. 22*; Dec. 12† (2).
Davie—Aug. 29; Dec. 5†.
Alexander—Sept. 19 (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Moore.

McDowell—July 11† (3); Sept. 12 (2).
Transylvania—Aug. 1 (2); Dec. 5 (2).
Yancey—Aug. 15† (2); Oct. 24 (2).
Rutherford—Aug. 29† (2); Nov. 7 (2).
Polk—Sept. 26 (2).
Henderson—Oct. 10 (2); Nov. 21† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1932—Judge Clement.

Buncombe—July 11† (2); July 25; Aug. 1† (2); Aug. 15; Aug. 29; Sept. 5† (2); Sept. 19; Oct. 3† (2); Oct. 17; Oct. 31; Nov. 7† (2); Nov. 21; Dec. 5† (2); Dec. 19.
Madison—Aug. 22; Sept. 26; Oct. 24; Nov. 28.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1932—Judge Sink.

Haywood—July 11 (2); Sept. 19† (2); Nov. 28 (2).
Swain—July 25 (2); Oct. 24 (2).
Cherokee—Aug. 8 (2); Nov. 7 (2).
Macon—Aug. 22 (2); Nov. 21; Nov. 28 (A).
Graham—Sept. 5 (2).
Clay—Sept. 26 (A); Oct. 3.
Jackson—Oct. 10 (2).

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

Fayetteville, third Monday in March and 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

FALL TERM, 1931

W. J. GODWIN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 23 December, 1931.)

Railroads D b—In this action for damages suffered in accident at crossing the evidence is held insufficient to be submitted to the jury.

In an action for damages resulting in a collision at a grade crossing the evidence tended to show that two tracks of the defendant crossed the road, that the plaintiff was thoroughly familiar with the crossing, and that before attempting to cross he stopped 45 or 50 feet therefrom where his vision was obstructed by trees growing off the right of way, and looked and listened without discovering defendant's approaching train, that he did not again stop although at fifteen feet from the crossing his vision was unobstructed in the direction from which the train was coming for two hundred yards, that he saw the train when his front wheels were upon the first track and went on across although the train was coming upon the second track, *Held:* the evidence was insufficient to be submitted to the jury and the railroad company's motion as of nonsuit was properly allowed. The evidence as to rough places in the crossing is immaterial as nothing indicated that such was a cause of the injury in suit.

CIVIL ACTION, before *Moore, Special Judge,* at April Term, 1930, of HARNETT.

On the morning of 26 April, 1930, the plaintiff was going to his farm which was situated west of the defendant railroad. The car was driven by plaintiff's son, but under the direction and control of plaintiff. The road upon which plaintiff was traveling crossed the tracks of defendant

at grade at a point known as Gainey's crossing. There was a North Carolina stop sign near the crossing. Plaintiff's narrative of the collision and injury is substantially as follows: "I stopped about forty-five or fifty feet from the first rail. From the point where I stopped I could not see down the railroad track for a bunch of willow trees. . . . I stopped behind the willow trees. The willow trees reached up to the right of way. . . . We looked both ways for a train and didn't see the right of way. . . . We looked both ways for a train and didn't see one or hear the whistle blow or the bell ring. After thinking that our way was clear, we went on and just as the wheels of our car got on the first track the train tooted once and we drove on trying to get off the track, and the car was struck by the train. The car was within twenty-five or thirty yards of us when it tooted one time. . . . The first track was right smart lower than the next track, about fifteen or twenty inches lower, and the crossing was narrow. The road bed where the crossing is was just wide enough for one car to go across. I have crossed the railroad at this point a great many times before. In crossing the first track there is a sudden rise across the next track. That track is elevated some fifteen or twenty inches. The surface of the crossing was rough. . . . I was born within three miles of Dunn and used this crossing on an average of two or three times a day for twenty years. I was perfectly familiar with the crossing. The railroad . . . runs through an open field and runs north and south. The road on which I was traveling runs about east and west."

The plaintiff also offered evidence tending to show that the view of a traveler approaching the crossing was obstructed. The testimony with respect to such obstructions is substantially as follows: "There is a cut about two hundred yards south of the crossing. There are certain willow trees which are about seventy-five yards south of the crossing. These trees were twelve or fifteen feet high. However, the evidence tended to show that these willow trees were not on the right of way. One of the witnesses for the plaintiff testified that the willow trees were on the land of a man named Jim Woods. There was a persimmon tree about seventy-five yards below the willow trees. This would place the persimmon tree about one hundred and fifty yards south of the crossing. The persimmon tree was not on the right of way. There was an embankment two hundred yards or more south of the crossing. Plaintiff testified: "I would have to get something like ten or fifteen feet of the track before I could see south beyond the embankment or cut; that is to say, that within ten or fifteen feet of the first track a traveler could see toward the south more than two hundred yards." The train which

struck plaintiff's car was a fast passenger train, traveling northward, and the plaintiff was traveling westward. There was evidence that the train was running at a very rapid rate of speed. There was no evidence of any obstruction whatever on the north side of the crossing. The evidence showed that the train was traveling on the second track.

At the conclusion of plaintiff's evidence the trial judge sustained the motion of nonsuit and the plaintiffs appealed.

C. L. Guy and Young & Young for plaintiff.
Rose & Lyon and Clifford & Williams for defendant.

BROGDEN, J. The evidence offered by plaintiff presents substantially the following situation: A traveler in an automobile approaches a grade crossing in the day time with which he is thoroughly familiar. He stops about forty-five or fifty feet from the first track and looks and listens, and neither hears nor sees the train. His vision is obstructed by willow trees at the point where the stop is made. Thereupon he proceeds toward the first track, apparently without stopping, looking or listening until the wheels of his car were on the first track. He then hears the whistle of a train and looks up and discovers a rapidly moving passenger train bearing down upon him, twenty-five or thirty yards away. The train is on the second track and the traveler in his own words "drove on trying to get off the track, and the car was struck by the train."

There was evidence that the crossing was rough and that the rails of the second track were fifteen or twenty inches higher than the rails of the first track, but no evidence is offered tending to show that the car of the traveler became engaged with the rails or that the rough condition of the crossing contributed to the injury. Within ten or fifteen feet of the first track the traveler had an unobstructed vision of two hundred yards to the south of the crossing, and the train was approaching from the south, traveling northward.

The Court is of the opinion that the facts classify this case in that line of decisions represented by *Trull v. R. R.*, 151 N. C., 545, 66 S. E., 586; *Coleman v. R. R.*, 153 N. C., 322, 69 S. E., 129; *Bailey v. R. R.*, 196 N. C., 515, 146 S. E., 209; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800.

Affirmed.

S. T. HOOKER ET AL. V. PITT COUNTY ET AL.

(Filed 23 December, 1931.)

Taxation E b—Held: plaintiff was not entitled to injunctive relief from collection of taxes in this case.

Where, in a suit by a taxpayer to restrain the collection of taxes on his land by a county, it appears that the commissioners sitting as a Board of Equalization and Review pursuant to statute passed upon plaintiff's petition for a reduction of valuation assessed on his lands along with others and found the value fixed a proper one, and the values of the property were equalized and upon appeal to the State Board of Assessments the valuation was upheld, and later the value thus assessed was reduced with that of other property in the county by 10 per cent, the tax so levied being within the constitutional limitation, *Held:* the plaintiff had no equitable right that would entitle him to an injunction. The remedy suggested in *Power Co. v. Burke County*, 201 N. C., 318, was not followed in this case.

APPEAL by plaintiffs from *Frizzelle, J.*, at Chambers, 17 October, 1931. From PITT.

Civil action to restrain the defendants from proceeding with the collection of taxes in Pitt County for the year, 1931, upon the alleged ground (1) that the assessed value of all the properties therein, and especially those owned by the plaintiffs, is in excess of their "true value in money" (Const., Art. V, sec. 3), and (2) that the rate levied for general county purposes is in excess of "fifteen cents on the one hundred dollars value of property" (Const., Art. V, sec. 6).

The pertinent facts upon which the judgment of the Superior Court was entered, and the reasons assigned therefor, may be briefly summarized as follows:

1. That the board of commissioners of Pitt County, sitting as a board of equalization and review pursuant to the Machinery Act, chap. 428, Public Laws 1931, duly heard the petition filed and presented by the plaintiff in this cause, along with others, and the values set out in the complaint were fixed by said board which the court finds were proper and equalized values.

2. That the plaintiffs appealed to the State Board of Assessment, which board found "that the values fixed by the board of commissioners of Pitt County, sitting as a board of equalization and review, are proper and equalized values, and the values are hereby approved and sustained," 16 October, 1931.

3. That among the properties listed in the name of the plaintiff is a tobacco warehouse valued at $38,500, which is now renting for $8,000 a year.

4. That on 7 September, 1931, the board of commissioners of Pitt County duly levied a tax of 14½ cents on the one hundred dollars value of property as a general county tax for ordinary county purposes; and a special tax, with the special approval of the General Assembly, of 4¾ cents for the county home and poor; and a special tax, with the special approval of the General Assembly, of 2¼ cents for the health department, all of which taxes were for necessary expenses of the county. *Glenn v. Comrs. of Durham,* 201 N. C., 233.

5. That the property in Pitt County was valued, equalized and adjusted for 1931, in accordance with the provisions of chapter 428, Public Laws 1931, and as a result of which, the taxable values of real estate therein were reduced between nine and ten per cent, aggregating more than three millions of dollars. "Such equalization shall not affect the total values of real property in said county to a greater extent than ten per cent of the values of real property in said county for one thousand nine hundred and thirty." Section 523, subsec. f.

6. That a revaluation of property for taxation was had in Pitt County in 1929, as authorized by a Special Act, chapter 383, Public-Local Laws 1929, applicable only to said county, which values were in effect for 1930.

7. That upon the first cause of action, wherein it is alleged the property in Pitt County has been illegally assessed, the court finds that plaintiffs have failed to allege or show facts sufficient to invoke the aid of a court of equity, for an adequate remedy exists at law if plaintiffs' property has been assessed in excess of its true value in money. *Ragan v. Doughton,* 192 N. C., 500, 135 S. E., 328.

8. That on the second cause of action, no facts have been alleged, or shown, which would entitle the plaintiffs to equitable relief, *R. R. v. Lenoir County,* 200 N. C., 494, 157 S. E., 610.

From a judgment dismissing the action, plaintiffs appeal, assigning errors.

F. M. Wooten for plaintiffs.

F. G. James & Son for defendants.

STACY, C. J. Plaintiffs having profited from a reduction in the valuation of their properties, rather than suffered from any increase therein, and the rate levied for general county purposes being within the limit fixed by the Constitution, both causes of action were properly dismissed as wanting in any basis for equitable relief. *Glenn v. Comrs. of Durham,* 201 N. C., 233; *Wilson v. Green,* 135 N. C., 343, 47 S. E., 469.

Speaking to a situation similar to that disclosed by plaintiffs' alleged first cause of action, in *R. R. v. Commissioners,* 82 N. C., 260, *Smith, C. J.,* delivering the opinion of the Court, observed: "In this connection it may be remarked that, when the law-making power directs an act to be done in a specific time and manner, the judicial authority should be reluctant to interpose and obstruct the execution of the expressed legislative will, on the ground that the end to be accomplished by the use of the prescribed means is unwarranted by the Constitution, until some substantial right of the complaining party is to be injuriously affected; since, if the alleged repugnancy exists, no harm can come from noninterference, and if it does not the process of the court will have been used to defeat a valid act of legislation."

Plaintiffs did not pursue the remedy suggested in *Power Co. v. Burke County,* 201 N. C., 318, and followed in *Caldwell County v. Doughton,* 195 N. C., 62, 141 S. E., 289.

Furthermore, it is provided by chapter 427, Public Laws 1931, section 510, that the collection of any tax imposed by the Revenue Act of 1931 shall not be prevented by injunction. The plaintiffs, having failed to make out a case calling for the aid of a court of equity, are in no position to challenge the constitutionality or applicability of this provision. *Barber v. Benson,* 200 N. C., 683; *Ragan v. Doughton, supra.* The action was properly dismissed.

Affirmed.

IN RE WILL OF W. R. STALLCUP.

(Filed 23 December, 1931.)

Wills D i—Instruction in this caveat proceeding held erroneous as placing burden of proof on the issue on both parties at the same time.

In a caveat proceeding the trial court instructed the jury that if they should find by the greater weight of the evidence that the testator had sufficient mental capacity at the time of executing the paper-writing to understand the nature and character of the property disposed of, who were the objects of his bounty, etc., they should answer the issue in the affirmative, but if they found from the greater weight of the evidence that the contrary was true that they should answer the issue in the negative, *Held:* the instruction placed the burden of proof on the one issue on both parties simultaneously, and a new trial is ordered. The advisability of separating the issues when undue influence and mental incapacity are alleged is pointed out.

APPEAL by propounder from *Oglesby, J.,* at April Term, 1931, of MACON.

IN RE WILL OF STALLCUP.

Issue of *devisavit vel non,* raised by a caveat to the will of W. R. Stallcup.

The following excerpt from the charge constitutes one of propounder's exceptive assignments of error:

"The court further instructs you if you find from the evidence and by its greater weight that W. R. Stallcup at the time he executed the paper-writing had sufficient mental capacity to understand the nature and character of the property disposed of, who were the objects of his bounty and how he was disposing of the property among the objects of his bounty, then he was capable of making a valid disposition of his property by will, and you would answer the issue, Yes. But, if you find at the time he executed the paper-writing, he didn't know what he was doing and didn't understand what property he had and didn't know and understand the nature and effect of his acts, and if you find the facts so to be by the greater weight of the evidence, then you will find he didn't have sufficient mental capacity to make a will and you would answer the issue, No."

The jury returned the following verdict:

"Is the paper-writing offered by the propounder, and every part thereof, the last will and testament of W. R. Stallcup? Answer: No."

From a judgment on the verdict declaring the paper-writing null and void, the propounder appeals, assigning errors.

Felix E. Alley, J. N. Moody and T. J. Johnston for propounder.
Jones & Jones, George Patton and Jones & Ward for caveators.

STACY, C. J. There is error in the instruction, duly excepted to, which places the burden of proof simultaneously on propounder and caveators. *Boone v. Collins, post* 12. The burden of proving the affirmative of a single issue cannot rest on both parties at the same time. *Speas v. Bank*, 188 N. C., 524, 125 S. E., 398.

Nor can the instruction be upheld under what was said in *In re Rawlings' Will*, 170 N. C., 58, 86 S. E., 794, for there, the execution of the will, the burden of which was on the propounder, and the alleged mental incapacity of the testator, the burden of which was on the caveators, were submitted under separate issues. The wisdom of dividing the issues when alleged undue influence and mental incapacity are set up as grounds for the caveat, rather than try the whole matter on the one issue of *devisavit vel non*, was pointed out in that case, and is illustrated by this one. See, also, *In re Will of Brown*, 200 N. C., 440.

New trial.

SANFORD DOTSON, BY HIS NEXT FRIEND, C. W. DOTSON, v. FREDERICK EARLY.

(Filed 23 December, 1931.)

Highways B g—In this case held: the question of contributory negligence should have been submitted to the jury under the evidence.

Where the evidence discloses that the plaintiff, a fourteen-year-old boy, was attacked by a dog while attempting to cross a hard-surfaced highway, and that the boy, while kicking at the dog, retreated towards the middle of the highway, which was straight for more than a hundred yards, and that the boy did not see the defendant's automobile approaching and was struck by it while in the middle of the highway, *Held:* the question of contributory negligence should be submitted to the jury, and the granting of the defendant's motion as of nonsuit is error, and *held further,* the evidence is sufficient to warrant the submission of the issue of the last clear chance.

CIVIL ACTION, before *Stack, J.,* at September Term, 1931, of BUNCOMBE.

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

Anderson & Howell for plaintiff.
Fortune & Fortune for defendant.

BROGDEN, J. The plaintiff's evidence paints the following picture: A fourteen-year-old boy in broad daylight sets out to the spring to get a bucket of milk for his mother. The spring is on the opposite side of an improved hard-surfaced highway. Procuring the milk, he starts back across the road. The road is straight for more than one hundred yards. Just as he reaches the shoulder of the road a feist, accompanied by another dog, makes an attack upon the barefoot boy. The other dog apparently takes no part in the unlawful assault but stands by giving aid and comfort to the feist. The boy retreats toward the center of the road, kicking at the pursuing feist. As the boy reaches the center of the road, the defendant, driving an automobile, traveling at the rate of twenty-five miles an hour, struck the boy in the back or side, knocking him to the pavement and inflicting injury. The boy did not see the automobile until after the injury. An eye witness said: "I noticed that Mr. Early did not make much effort to drive around him and the car struck the boy and knocked him down."

Ordinarily a scrap between a fourteen-year-old weaponless boy and a feist would be a fair fight, and while a much used highway is a dangerous place to stage the encounter, nevertheless it is the province of a jury to say whether or not under all the circumstances the boy

was guilty of contributory negligence. Moreover, if a jury shall find that the negligence of the boy contributed to his injury, there is sufficient evidence in the record to warrant an issue of last clear chance. *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829; *Goss v. Williams*, 196 N. C., 213, 145 S. E., 169.

Reversed.

STATE v. MARY BEST, HAZEL McMAHAN AND LEE ELLEN HARBIN.

(Filed 23 December, 1931.)

Receiving Stolen Goods D b—Recent possession of stolen property, without more, is insufficient to raise presumption of guilt of receiving.

Recent possession of stolen property, without more, is insufficient to raise a presumption that those in whose possession the property was found immediately after the larceny were guilty of receiving stolen property knowing at the time of the receiving that it was stolen, and where, in a prosecution for larceny and receiving, the judge charges that the State contended that such recent possession ought to satisfy the jury that the defendants either stole the goods or received them knowing them to have been stolen, whereupon the jury brings in a verdict of guilty on the second count only, a new trial will be awarded. C. S., 4250.

APPEAL by defendants from *Harding, J.*, at August Term, 1931, of CHEROKEE.

Criminal prosecution tried upon an indictment charging the defendants (1) with the larceny of shoes, dresses, hats, caps, cigarettes, etc., valued at $100, the property of R. L. Anderson, and (2) with receiving said goods and chattels knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

The record discloses that the property in question was found in the possession of the defendants on the day after it had been stolen from the store of R. L. Anderson.

After the jury had been out for some time, they returned for further instructions:

Juror: We can agree on the first count, but we cannot agree on the second.

By the court: I'll take the verdict on the first count.

Juror: We cannot agree on the evidence or circumstantial evidence that they knew they were stolen goods.

By the court: The State contends that these goods were stolen from Anderson's store, 7 January, 1930; that they were found in the possession of the defendants on the following day; that there is no evidence that would explain their possession; that that possession, under the rule

of law laid down to you by the court, ought to satisfy you beyond a reasonable doubt that they either stole the goods themselves or that they received them into their possession from the person that did steal them, knowing that they were stolen. Exception.

Verdict: "Not guilty of the first count. Guilty of receiving stolen goods into their possession knowing them to have been stolen."

Judgment: Imprisonment in the State's prison: Lee Ellen Harbin 3 years; Hazel McMahan 2½ years; and Mary Best 2 years.

Defendants appeal, assigning errors.

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

Hill & Gray and Moody & Moody for defendants.

STACY, C. J. Conceding that the recent possession of the stolen property was a circumstance tending to show the larceny thereof by the defendants (*S. v. Hullen*, 133 N. C., 656, 45 S. E., 513), or that it raised a presumption of fact (*S. v. Anderson*, 162 N. C., 571, 77 S. E., 238), or a presumption of law (*S. v. Graves*, 72 N. C., 482), of such guilt, nevertheless, it is the holding with us that the inference or presumption arising from the recent possession of stolen property, without more, does not extend to the statutory charge (C. S., 4250) of receiving said property knowing it to have been feloniously stolen or taken. *S. v. Adams*, 133 N. C., 667, 45 S. E., 553. The two offenses, larceny and receiving, are separate and distinct, and the one is not necessarily included in the other.

Speaking to an instruction similar to the one given in the instant case, *Connor, J.*, delivering the opinion of the Court, in the case last cited, observed: "The charge of his Honor, assuming that the stolen property was found in the possession of the defendant, says to the jury that the law presumes that he is *guilty*. The question arises, guilty of what? The law says, of the theft. The jury says he is not guilty of the theft, but is guilty of receiving, etc. Under the general charge of his Honor, the jury may well have applied the language to the second count and found him guilty 'by presumption of law,' as was the view of Mr. Saddletrees in the case of Scott's unfortunate heroine, Effie Deans. Presumptions of law are useful to courts and juries in seeking to ascertain the truth, but the criminal records of all ages and people have shown that great and often irreparable wrongs have been done when they are pressed too far."

On the record as presented, the defendants are entitled to a new trial. It is so ordered.

New trial.

LORETTA FRAZIER, ADMINISTRATRIX, v. PIEDMONT AND NORTHERN RAILWAY COMPANY ET AL.

(Filed 23 December, 1931.)

1. **Appeal and Error J d—The burden is on the appellant to show error.**

On appeal from an order granting a motion for removal from the State to the Federal Court for diversity of citizenship and fraudulent joinder where the requisite jurisdictional amount is shown, the burden is on the appellant to overcome the presumption against error.

2. **Appeal and Error E a—Appeal in this case is dismissed for insufficiency of record.**

Where the record on appeal fails to set out the summons or to indicate that the resident defendant had been served, and fails to show organization of court and that the court was properly held at the place and time prescribed by law, the appeal will be dismissed.

APPEAL by plaintiff from *Cowper, Special Judge,* at October Special Term, 1931, of MECKLENBURG (as shown on face of judgment).

Civil action to recover damages for an alleged wrongful death, brought against Piedmont and Northern Railway Company, a corporation chartered under the laws of the State of South Carolina, and F. E. Williams, citizen and resident of Mecklenburg County, N. C.

Motion by nonresident, corporate defendant to remove cause to the District Court of the United States for the Western District of North Carolina for trial. Motion allowed, and plaintiff appeals.

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

W. S. O'B. Robinson, Jr., for defendant, Piedmont and Northern Railway Company.

STACY, C. J. The petition for removal, besides showing the presence of the requisite jurisdictional amount, asserts a right of removal on the grounds of diverse citizenship, and alleges that the resident defendant has been fraudulently joined to prevent such removal.

The trial court held that the case was controlled by the line of decisions of which *Cox v. Lumber Co.,* 193 N. C., 28, 136 S. E., 254, *Johnson v. Lumber Co.,* 189 N. C., 81, 126 S. E., 165, and *Rea v. Mirror Co.,* 158 N. C., 24, 73 S. E., 116, may be cited as fairly illustrative; while the appellant contends that the principles announced in *Givens v. Mfg. Co.,* 196 N. C., 377, 145 S. E., 681, and *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238, are more nearly applicable.

Without "threshing over old straw," suffice it to say, appellant has not overcome the presumption against error. *Bailey v. McKay,* 198 N. C.,

638, 152 S. E., 893. To prevail on appeal, he who alleges error must successfully handle the laboring oar. *Poindexter v. R. P.*, 201 N. C., 833, 160 S. E., 767; *Jackson v. Bell*, 201 N. C., 336, 159 S. E., 926.

But for another reason the appeal must be dismissed. There is no summons in the record or anything to indicate that the resident defendant has been served, and the transcript fails to show organization of court (*S. v. May*, 118 N. C., 1204, 24 S. E., 118), or that "court was held by a judge authorized to hold it, and at the place and time prescribed by law" (*S. v. Butts*, 91 N. C., 524). *Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

G. M. BOONE v. BELLE F. COLLINS.

(Filed 23 December, 1931.)

Evidence C a—Where the burden of proof is placed on both parties at the same time a new trial will be awarded.

In a special proceeding to establish the dividing line between adjoining landowners the burden of proving the true boundary is on the plaintiff, and where the trial judge inadvertently places the burden of the proof on both parties at the same time a new trial will be awarded, the rule as to the burden of proof constituting a substantial right.

APPEAL by defendant from *Harwood, Special Judge*, at May Term, 1931, of HAYWOOD.

Special proceeding to establish dividing line between adjoining lands of plaintiff and defendant, designated, by common consent, as "the M. P. Francis line."

It was agreed that the true location of the boundary line between plaintiff's and defendant's lands was either the "Solid Line" or the "Dash Line," as shown on map made by court surveyor, the plaintiff contending that it was the former and the defendant that it was the latter.

The court instructed the jury as follows:

"If the plaintiff has satisfied you by the greater weight of the evidence that the solid line is the true location as indicated on the map of the M. P. Francis line you will write 'Solid Line'; and if the defendant has satisfied you by the greater weight of the evidence that the dash line is the true location, then you will write 'Dash Line.'" Exception.

The jury returned the following verdict: "What is the true location of the M. P. Francis line? Answer: Solid Line."

From a judgment on the verdict for plaintiff, the defendant appeals, assigning errors.

Grover C. Davis for plaintiff.

Joe. E. Johnson, Morgan, Stamey & Ward and Johnson, Smathers & Rollins for defendant.

STACY, C. J. This is a special proceeding to establish the dividing line between adjoining landowners. The plaintiff says the line is at one place, the "Solid Line" shown on the map, and the defendant says it is at another, the "Dash Line" shown thereon.

The burden of establishing the true location of the boundary line was on the plaintiff. *Hill v. Dalton*, 140 N. C., 9, 52 S. E., 273. But this was inadvertently placed on both parties at the same time. *Power Co. v. Taylor*, 194 N. C., 231, 139 S. E., 381. Similar instructions were held for error in *Garris v. Harrington*, 167 N. C., 86, 83 S. E., 253, and *Tillotson v. Pulp*, 172 N. C., 499, 90 S. E., 500. The burden of proving the affirmative of a single issue cannot rest on both sides at the same time. *Carr v. Bizzell*, 192 N. C., 212, 134 S. E., 462; *Speas v. Bank*, 188 N. C., 524, 125 S. E., 398.

The rule as to the burden of proof constitutes a substantial right, and its erroneous placing is reversible error. *Hosiery Co. v. Express Co.*, 184 N. C., 478, 114 S. E., 823.

New trial.

LON POWERS v. COMMERCIAL SERVICE COMPANY, INCORPORATED, ET AL.

(Filed 23 December, 1931.)

Evidence D d—Testimony of contents of telephone conversation held incompetent under the facts of this case.

Where a witness is allowed to testify over objection to the substance of an alleged telephone conversation with an unknown person for the purpose of showing the contents of the conversation which alone gave it pertinency and rendered it hurtful, the testimony is incompetent as hearsay, and its admission constitutes reversible error.

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

Civil action for damages, tried in the General County Court of Buncombe, which resulted in a verdict and judgment for plaintiff. On appeal to the Superior Court, four exceptions "upon which the defendants have assigned error as appears by the record" were sustained, and the cause remanded for another hearing. From this order, plaintiff appeals, contending that no reversible error appears on the record.

Johnson, Smathers & Rollins for plaintiff.
Zeb. V. Nettles and Carter & Carter for defendants.

STACY, C. J. Putting aside the doubt as to whether it "appears by the record" that the four assignments of error, sustained by the Superior Court in the exercise of its appellate jurisdiction, are based on exceptions duly taken and entered (*Sanders v. Sanders*, 201 N. C., 350), which otherwise might call for a dismissal of the appeal, the ruling on the first assignment of error seems to be well supported by the authorities.

The trial court permitted a witness for the plaintiff, over objection of defendants, to give in evidence the substance of an alleged telephone conversation which he had with some unknown person. This was hearsay, and as it was offered for the purpose of showing the contents of said conversation, which alone gave it pertinency and rendered it hurtful in effect, the ruling of admission was erroneous. The Superior Court, therefore, properly sustained the assignment of error based on this exception. Occasion was presented in each of the following cases to deal with the competency of conversations had over the telephone: *Lumber Co. v. Askew*, 185 N. C., 87, 116 S. E., 93, *Sanders v. Griffin*, 191 N. C., 447, 132 S. E., 157, *Mfg. Co. v. Bray*, 193 N. C., 350, 137 S. E., 151, *S. v. Burleson*, 198 N. C., 61, 150 S. E., 628, *Harvester Co. v. Caldwell*, 198 N. C., 751, 153 S. E., 325.

The remaining exceptions are not considered, as it is unnecessary to pass upon them now.

Affirmed.

W. L. PEARSON v. STANDARD GARAGE AND SALES COMPANY, INCORPORATED; EUGENE CARLAND AND MRS. LUCY J. CARLAND.

(Filed 23 December, 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 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. Negligence A c—Evidence held properly submitted to jury in action against lessee for injury caused by falling through trap door.

A building formerly leased to a laundry had been equipped with a trap door on one of its floors, and the evidence tended to show that the present lessee, the defendant, had contracted with the plaintiff to remove from the building the waste lumber, trash, etc., upon consideration of the plaintiff's having it for doing the work of its removal, and that the de-

fendant's *alter ego* showed the plaintiff through the building and failed to warn him of the hole in one of the floors left open by the removal of the trap door, and that the defendant knew or, in the exercise of ordinary care, should have known of the dangerous condition, and that the hole was covered by waste lumber and trash so that the plaintiff could not have discovered it in the exercise of reasonable care, and that the personal injury in suit was caused by his stepping upon the top of the trash which gave way with him and precipitated him to the concrete floor below, *Held:* the evidence was sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. The question of whether the plaintiff was an independent contractor or an employee is immaterial, the plaintiff being rightfully on the premises as an invitee or licensee.

3. Same—Liability of lessee for injury to licensee or invitee injured by dangerous condition of premises.

The lessee of a building being repaired for his use is liable in damages for injuries caused to another whom he has employed to remove the debris from one of the floors where the latter is injured by falling through an opening left in the floor which ordinary care on his part would not have discovered and of which the lessee gave no notice or warning and of which the lessee is charged with express or implied notice in the exercise of ordinary care.

4. Negligence B a—Negligence must be proximate cause of injury to entitle injured person to damages.

Where one who is rightfully upon a leased premises and is injured by a concealed menace without contributory negligence on his part, but of which the lessee knew or, in the exercise of ordinary care, should have known, and gave no timely warning, the negligence of the lessee in this respect will not entitle the licensee or invitee upon the premises to recover damages unless such damages were proximately caused by such negligence. The charge of the court upon the evidence in this case is approved.

APPEAL from *Stack, J.*, and a jury, at August Term, 1931, of BUNCOMBE. NO ERROR.

The evidence on the part of plaintiff was to the effect that Lucy J. Carland owned a certain building, 52 and 56 Broadway Street, Asheville, N. C. That Eugene Carland was her husband. That the building consists of three separate floors, size of each being 75 by 100 feet. That it had been used by a Ford agency and thereafter occupied and used for a laundry business. At the time it was used as a laundry, a hole about four feet square was cut in the second floor as a laundry chute, to send the laundry down stairs from the second to the first floor. The defendant, Standard Garage and Sales Company, Incorporated, was handling Studebaker cars and had rented the building from 1 March, 1930. Preparatory thereto, the building was being renovated and put into shape for occupancy by said defendant, Standard Garage and Sales Company, Incorporated, by 1 March, 1930.

In his complaint the plaintiff alleges that the defendant "Standard Garage and Sales Company, Incorporated, through its duly authorized representative, general manager, and president, S. A. Isenhour, did on the morning of 27 February, 1930, employ the plaintiff to haul and carry away the remainder of the waste paper, scrap lumber, rubbish and refuse from said building, the consideration for said employment being that the plaintiff could have said materials for the hauling of same. That on the morning of 27 February, 1930, while the plaintiff was carrying out his duties under said employment on said premises, he did go to the second floor of said building to assist in the loading of one of his trucks; that while so doing he stepped upon a place in said floor filled and covered and concealed with trash, consisting mostly of waste paper which suddenly and without warning gave way with his weight, causing him to fall through said floor on down broad-side upon the concrete surface of the floor fourteen feet below, thereby seriously and in all probability permanently injuring him. . . . That the Standard Garage and Sales Company, Incorporated, had knowledge or with the exercise of reasonable care and diligence would have known of the existence of said defect, dangerous condition and nuisance, but that despite said knowledge did negligently allow same to continue without repairing or abating it and without placing any safeguards or warnings around same, and that while said portion of said premises were in said condition, did employ, invite, license and direct the plaintiff to go in, about and over the very place where said defect, dangerous condition and nuisance existed without warning him of same, with the full realization that he would in all probability be injured, as he was."

The defendant, Standard Garage and Sales Company, Incorporated, (1) denied negligence; (2) set up plea of contributory negligence; (3) action subject and bound by the provisions of North Carolina Workmen's Compensation Act; (4) that plaintiff was an independent contractor. "That they selected their own means of doing the work and this answering defendant retained no control over them whatsoever with respect to the manner in which the work was to be done and performed, and was interested only in the final result to be accomplished, to wit: the removal of the lumber, trash, debris and other waste material from the floors of said building." (5) Assumption of risk.

The evidence of plaintiff fully sustained the allegations of the plaintiff. The plaintiff testified, in part: "On my arrival at the building, I drove up the ramp from the first floor to the second floor and parked my truck up there about the trash pile. I went from there to where my trucks were on the third floor. One of my trucks was on the third floor, and one on the second floor. I went up the ramp and backed

my truck back to the trash pile. I walked down to the first floor and met Mr. Isenhour, and asked him if the verbal contract he made with my brother-in-law (Frank J. Gasperson) the day before was okeh. He said it was, and I went back to the second floor then and started to load my truck. I went back by myself and when I got back George Conley (an employee of plaintiff) was standing at the back of the truck that I drove up there. I told George that we will just go ahead and load the truck—fill it up—and so then we went ahead. There was trash on the floor, paper and laths, and rubbish, etc. About two truck loads. From the head of the ramp, I imagine, and piled up there. Piled there in a pile about two feet high. It was a round pile, two big truck-loads of it, it covered a space on the floor of twenty feet square, I imagine. I went to the pile, I took up an armful from the pile and carried it over to the truck. I went back to the pile to get another armful, taking it off the top in order to get it loaded and when I went to get it and got on the top of the pile of rubbish on the floor or whatever it was, trash, etc., it suddenly gave away with me and I went to the concrete floor below—about fourteen feet approximately. I landed on the concrete floor on my wrist, on my right side and shoulder and hip. I couldn't get up. I just laid there and about that time one of my employees got to me. I asked him to please do something for me. . . . Prior to the time that place gave away with me and I fell through the floor I could not look at the place and tell whether there was anything wrong with it. Court: Had you any knowledge or information that there was a place there? A. I hadn't been advised, your Honor. Mr. Brown: Anything to put you on notice in any way? A. No, sir. Q. How long after you went back upstairs from the time you came down to see Mr. Isenhour to confirm the agreement was it before you fell? A. Well, I had time to walk back to the second floor, and put one armful into the truck, and go back on top of the pile. Walked up to the second floor, and carried one armful of rubbish to the truck, I imagine about a period of four or five minutes." A trap-door of about four or five feet square of plank was made to cover the hole.

After plaintiff had fallen through the opening in the floor, George Conley, a witness for plaintiff, testified, in part: "After they had left, Mr. Isenhour and the carpenter went by the room over in front of me. Mr. Isenhour was fussing with him and said, 'I told you to fix that floor. Get busy and fix it.' Q. When did he say he told him? A. He didn't say when he had told him. . . . Mr. Pearson had just left when he was telling him and he went up right away to fix the floor and that was when I heard Mr. Isenhour make the statement to the carpenter. Q. What statement did he make? A. He said, 'I told you to fix that floor. Get busy and fix it.' Q. That was after the thing hap-

pened he told him that. Court: That wouldn't tend to show knowledge. He got knowledge of it when he fell. Mr. Brown: Q. How long had Mr. Pearson been gone? A. They just pulled out of the building with the truck. Mr. Isenhour went up the ramp in front of me, and he got up there and looked at the hole. . . . I did not see any door around there; I didn't notice the place prior to the time that Mr. Pearson fell. I couldn't tell it was there. I hadn't done anything before Mr. Pearson came up. The height from the concrete floor was about 14 feet. . . . As to the condition of the floor I couldn't tell anything wrong where the trash was. There was some scattered. Most of it was in this pile and the other part of the floor was clean. The hole must have been under the trash. He put one armful of papers in the truck. I was shoveling mine in there. I didn't see no hole until Mr. Pearson fell through it. There were laths and papers in the pile, not much lumber at all; wooden laths. Where the truck was, it was clean. There is a great big floor, you could drive all over the floor."

It was in evidence that the trash pile consisted of quite a lot of paper and scrap lumber, about 18 or 19 feet square, and covered the laundry chute. It was in evidence that about 20 or 25 minutes after plaintiff's injury a witness went to the second floor and the door to the chute was sitting against the wall.

Frank J. Gasperson, a witness for plaintiff, testified, in part: "When I was talking to Mr. Isenhour I agreed to clean up the place for the lumber. That was the only contract with him and he told me to go to it, and he had nothing to do with the manner in which I performed the work. He told me he wanted the first floor cleaned up first. He had men doing work on each floor, the first, second and third. Outside of cleaning the first floor first, we actually started doing the work and did it in any way we wanted to, but Mr. Isenhour didn't tell me how to do the work, except that he wanted the first floor cleaned first. It had to be swept with the broom and I cleaned up some with the broom. Mr. Isenhour took me on the first, the second and the third floor on the afternoon of the 26th and showed me the stuff that had to be moved and pointed out the stuff he didn't want moved, but he told me no particular manner in which to do the work. In the afternoon Mr. Isenhour showed me the stuff on the second floor a good deal of the trash was in this pile, a little bit was scattered, but the floor was pretty clean except this one pile. I made the contract with Mr. Isenhour for the Transfer Company and reported it that afternoon to Mr. Pearson and to my father and they approved what I had done and I didn't go on the second floor that morning until after the accident. I was on the third floor."

Oscar Fore, a witness for plaintiff, testified, in part: "After we had taken him to the office (speaking of plaintiff), I came back and went upstairs and looked at the hole. It was an old hole and looked like it had been a laundry chute. There was a lot of paper and things about it where he fell through. Some paper and stuff had went down in the hole and lodged in there where he had stepped through on the paper and stuff. I didn't discover the hole the afternoon before. Mr. Isenhour carried us over the building and over the three floors. He never said anything about the condition of the building."

The evidence on the part of defendant, Standard Garage and Sales Company, Incorporated, was a denial of the material evidence introduced by plaintiff. The jury rendered a verdict for plaintiff.

The judgment of the court below was as follows: "The above entitled cause coming on for hearing and having been heard by his Honor, A. M. Stack, judge presiding over the August, 1931, regular civil term of the Superior Court of Buncombe County, North Carolina, and a jury and it appearing that the jury for its verdict in said cause answered the issues submitted to it in same in favor of the plaintiff and against the defendant, Standard Garage and Sales Company, Incorporated. This action as against the defendant, Eugene Carland and Lucy J. Carland, having been nonsuited on the motion of said defendants, during the course of the trial. The issues and answers thereto submitted to the jury being as follows: (1) Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes. (2) If so, what damages, if any, is the plaintiff entitled to recover by reason thereof? Answer: $946.00. Now, therefore, it is upon motion of Sanford W. Brown, attorney for the plaintiff, hereby considered, ordered and adjudged, that the plaintiff have and recover of the defendants, Standard Garage and Sales Company, Incorporated, judgment in the sum of $946.00 and that said defendant pay the costs of this action to be taxed by the clerk."

The defendant, Standard Garage and Sales Company, Incorporated, made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Sanford W. Brown for plaintiff.

Joseph W. Little for defendant, Standard Garage and Sales Company, Incorporated.

CLARKSON, J. At the close of plaintiff's evidence the defendants made motions for judgment as in case of nonsuit. The motion of the Carland defendants was granted. The defendant Standard Garage and Sales Company, Incorporated, introduced evidence and at the close of all the

evidence made a motion for judgment as in case of nonsuit. C. S., 567. This motion was 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 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.

We see no evidence on the record as to contributory negligence or assumption of risk. There are no facts of record to indicate that the provisions of the North Carolina Workmen's Compensation Act is applicable (1) to casual employment (2) nor to any private corporation that has regularly in service less than five employees in the same business within the State. Public Laws 1929, chap. 120, sections 2(b), 14(b).

We do not think the issues tendered by defendant were the proper ones, and therefore the refusal to submit same by the court below was not error. In regard to the evidence admitted over defendant's objection, if error, it was not prejudicial. We agree with defendant that "It was a contract for the removal of rubbish"; it is immaterial on the facts in this case what the relationship is termed—independent contractor, master and servant, inviter and invitee, etc. The defendant, Standard Garage and Sale Company, Incorporated, owed a duty to plaintiff, that its *alter ego*, Isenhour, under the contract with plaintiff, should not without warning to him of the hidden danger, allow and permit him to remove the trash. It is in evidence, on the part of plaintiff, that the *alter ego* of defendant knew, or in the exercise of due care ought to have known, of the laundry chute hole, a dangerous pitfall, that it was concealed by the trash being thrown over it, and plaintiff was ignorant of its existence, and in the exercise of due care could not discover it.

In Bailey Personal Injuries, 2d ed. Vol. 1, part sec. 121, p. 307, the law is stated as follows: "It is a principle universally recognized that the care required of a master is such as is commensurate with the danger. Trap-doors, as the designation implies, are at best dangerous traps. Thus, it was held, where a trap-door is maintained in the hall of a building, it is the duty of the master when it is open to provide barriers, or give warning to employees who have occasion to pass in the hall."

Under negligence—circumstances implying liability—English Ruling Cases, Vol. 19, p. 64, is the case of *Indenmaur v. Dames*, L. R., 2 C. P., 311. In that case it was held: "Upon the premises of the defendant, a sugar-refiner, was a hole or chute on a level with the floor, used for

raising and lowering sugar to and from the different stories of the building, and usual, necessary, and proper in the way of the defendant's business. Whilst in use it was necessary and proper that this hole should be unfenced. While not in use, it was sometimes necessary, for the purpose of ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might at such time, without injury to the business, have been fenced by a rail. Whether or not it was usual to fence similar places when not in use, did not appear. The plaintiff, a journeyman gas-fitter in the employ of a patentee who had fixed a patent gas-regulator upon the defendant's premises, for which he was to be paid provided it effected a certain amount of saving in the consumption of gas, went upon the premises with his employer's agent for the purpose of examining the several burners, so as to test the new apparatus. Whilst thus engaged upon an upper floor of the building, the plaintiff, under circumstances as to which the evidence was conflicting, but accidentally, and, as the jury found, without any fault or negligence on his part, fell through the hole, and was injured: *Held*, that, inasmuch as the plaintiff was upon the premises on lawful business in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole or chute was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced."

Shirley's Leading Cases in the Common Law, 3d ed. p. 275. In Shirley, *supra*, the interesting case of *Bird v. Holbrook*, 4 Bing., 628, is digested as follows: "The defendant, having had some valuable flowers and roots stolen from his garden, which was at some distance from his house, had set a spring-gun. The plaintiff, a young fellow of nineteen, climbed a wall, during the daytime, in pursuit of the stray fowl of a friend, and got shot. In spite of the plaintiff being thus a trespasser, it was held that the defendant was liable in damages. 'There is no act,' said *Best, C. J.*, 'which Christianity forbids, that the law will not reach; if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England. I am, therefore, clearly of the opinion that he who sets spring-guns, without giving notice, is guilty of an unhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer.' "

In the annotation of *Warner v. Synnes* (114 Org., 451), 44 A. L. R., at p. 982-3, we find the following under general discussion: "The ratio *decidendi* in numerous cases is a doctrine which may be formulated thus: Where the premises on which the stipulated work is executed remain under the control of the principal employer while the contract

is in course of performance, a servant of the contractor is in the position of an invitee, and as such entitled to recover for any injury which he may sustain by reason of the abnormally dangerous condition of the premises or plant thereof, if the evidence shows that the principal employer was, and the servant was not, chargeable with knowledge, actual or constructive, of the existence of that condition."

In setting out the duty of employer to employee, we find the same well stated in 18 R. C. L., p. 591-2: "A question that has often been under judicial consideration is whether an employer owes to his employees any duty to box, fence, or guard the appliances and machinery in the vicinity of which the work is done. The rule formerly was generally recognized, and is supported by some recent decisions, that the employer, is, in the absence of statute, under no obligation to his employees to affix guards to gearing, shafting and other dangerous moving parts of machinery. No doubt the guarding of some appliances is unnecessary and impracticable, the danger being obvious and avoidable by employees; but public policy in respect of such matters has in recent times undergone a very decided change, and the tendency is to hold the employer negligent in failing to guard all dangerous appliances, especially is this noticeable in the rulings of the late cases. And, of course, if it can be shown that an injured employee was not informed of or did not appreciate the danger of the unguarded appliance, it is not to be supposed that a recovery will be denied in any jurisdiction." *Boswell v. Hosiery Mills,* 191 N. C., at p. 556-7.

The duty of the owner of premises to those who come on them is fully and well stated in *Brigman v. Construction Co.,* 192 N. C., 791, by *Brogden, J.; Hughes v. Lassiter,* 193 N. C., 651.

In *Jones v. R. R.,* 199 N. C., at p. 4, is the following: "After setting forth in an excerpt from *Sweeney v. R. R.,* 10 Allen, 368, 87 Anno. Dec., 544, the usually applied principle that a licensee who enters on premises by permission only, without enticement, allurement, or inducement held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls, the Court pertinently said: 'Nor does the application of this principle protect from liability the owner of a lot or a railroad company who, with knowledge of the user of his property as a pathway across or along it, places without warning to those likely to use the pathway, a new and dangerous pitfall or obstruction."

We can see no error in the charge of the court below. We think the charge covered the law applicable to the facts. Part of the charge given, which covers the law in the case, is as follows: "Now the action is based on alleged negligence. Negligence is the failure to do or not to do what an ordinarily prudent person would do or would not do under the circumstances in the case. In other words, negligence is a failure to do

as a prudent person would do under those particular circumstances or his failure to do what a prudent person would do under those circumstances. Negligence alone, however, would not be sufficient to entitle this plaintiff to recover. If he has only shown negligence on the part of the defendant alone that would not entitle him to recover. Before the plaintiff can recover of the defendant he must prove to your satisfaction, by the greater weight of the evidence, two propositions: First: That he was injured by the negligence of the defendant, as alleged in the complaint, and secondly, that that particular negligence of the defendant was the proximate cause of his injury or damage. Proximate cause is the real cause of the damage and the cause without which it would not have occurred. . . . Now, the duty of the defendant to the plaintiff was, under the circumstances of the evidence, to furnish him a reasonably safe place in which to do his work. That is, not absolutely to furnish him, but to exercise ordinary care in furnishing him with a reasonably safe place to work. If the defendant owed him that duty, and failed to perform that duty it would be guilty of negligence; but, if it performed its duty, it would not. That is to say, if the defendant knew that the hole was there and saw it covered up by the paper and rubbish and did not inform the plaintiff of the condition, why that would be negligence. Or, if the defendant, by the exercise of ordinary prudence and care would have known of the dangerous condition; that the hole was there, and no door over it, but simply papers and trash and rubbish, in that event it would be guilty of negligence. But if the defendant did not know that the hole was there, or by the exercise of ordinary diligence and care it could not have learned it was there, or if the last time he saw it, just before the plaintiff fell through the hole it was covered with a door, then there would be no negligence on his part and would find in favor of the defendant." In the judgment of the court below, we find,

No error.

R. B. KILLIAN v. MAIDEN CHAIR COMPANY.

(Filed 23 December, 1931.)

1. Judgments F a—Judgment may be rendered out of term and out of district upon consent of parties.

Ordinarily a judgment cannot be entered by a Superior Court judge out of term and out of the district wherein the cause is pending when not falling within certain exceptions where the judgment may be entered *nunc pro tunc*, but this rule does not apply when the parties to the action appear at the time of the rendition of the judgment and consent that the judge consider the matter and enter the judgment.

2. Appeal and Error J c — Judge's finding that parties consented to rendition of judgment out of term and county is conclusive.

While it is the better practice for the consent that judgment be rendered out of term or out of the county in which the action was pending to be put in writing, it is not essential that this be done, and where the judgment excepted to states as a fact that such consent was in fact given, it is conclusive upon the parties in the absence of collusion or fraud.

3. Appeal and Error J b—Held: court's refusal, in his discretion, to allow plaintiff to file exceptions or set up plea is not reviewable.

Where the receiver of a corporation has paid under the order of the court certain sums to one of the creditors without objection by the plaintiff, the refusal of the trial court in his discretion to permit the plaintiff to later file exceptions to the orders under which the payments were made or let him set up a plea attacking the validity of the contract under which the claim was filed, is conclusive and not reviewable on appeal. The principle upon which a party may not take a voluntary nonsuit where a counterclaim has been filed does not arise under the facts of this case.

4. Judgments F c—Judgment in this case held not objectionable as being conditional.

Where a party to an action consents to the abandonment of a right he has therein set up, and this is done and the judgment accordingly rendered, the judgment is not objectionable as being a conditional judgment when it is final and requires no future act to be done or condition to be performed by any of the parties.

CIVIL ACTION, before *Clement, J.*, at Chambers, Mocksville, N. C., 1 September, 1931. From CATAWBA.

On or about 17 July, 1929, the plaintiff, a stockholder of defendant, instituted an action against the defendant alleging that it was in imminent danger of insolvency. The complaint alleged that the indebtedness amounted to approximately $385,500. It was further alleged that the defendant had notes receivable worth about $200,000, "on which the Merchants Transfer and Storage Company of Washington, D. C., has a lien to the amount of about $186,000," etc. There was a prayer for the appointment of a receiver. On 22 July, 1929, C. R. Brady was duly appointed receiver of defendant and directed in his discretion "to run and operate the factory plant owned by defendant company and to employ all such assistants, superintendents, clerks and laborers, as may be necessary to properly operate said furniture plant until further orders of this court." The record discloses that the order appointing a permanent receiver was consented to by attorneys for the plaintiff and the defendant. On 14 November, 1929, the receiver filed a petition in the cause stating "that on or about 25 February, 1927, the Maiden Chair Company executed an assignment to the Merchants Transfer and Storage Company, a Delaware corporation, of Washington, D. C., agreeing to

assign to and did assign to the Merchants Transfer and Storage Company from time to time its accounts receivable for value, . . . and that there was about $211,000 of these accounts held by the Merchants Transfer and Storage Company as aforesaid. . . . That by the terms of said contract between the Maiden Chair Company and the Merchants Transfer and Storage Company the Maiden Chair Company was to collect the accounts from its debtors from time to time and remit the full collection to the Merchants Transfer and Storage Company; . . . that up to this time he has collected approximately $70,605.82, and your receiver has paid to the Merchants Transfer and Storage Company from said collections the sum of $28,298.04, and that your receiver still has on hand in a bank in New York and the Citizens Bank at Conover, N. C., the sum of $42,307.78, and he is still collecting on said accounts from time to time. That some question has arisen as to whether or not your receiver should have paid the amount aforesaid to the Merchants Transfer and Storage Company, as set out, and pay the amount now on hand to it, and pay the amounts as collected from time to time, until the said Merchants Transfer and Storage Company is paid in full, without an order of the court." On the same day, to wit, 14 November, 1929, Judge Harding considered the petition and entered an order approving the action of the receiver in paying to the Merchants Transfer and Storage Company the said sum of $28,298.04, and further directed the receiver to pay the balance in his hands then due said Merchants Transfer and Storage Company under and by virtue of the terms of the contract referred to in the petition of the receiver.

The receiver made reports from time to time and these reports were approved by the court and certain allowances were made by orders duly entered. On 1 December, 1930, the Merchants Transfer and Storage Company filed a petition after notice setting out the contract existing between it and the defendant, and alleging that the receiver had in his hands the sum of $2,656.64, which had been demanded by the petitioner, but that the receiver had declined to pay the same and requesting an order directing the receiver to pay said sum to the petitioner. The receiver filed an answer to the petition of the Merchants Transfer and Storage Company, setting out that he had incurred certain expense in collecting accounts for the Merchants Transfer and Storage Company and suggesting that these expenses should be paid out of said fund.

In the meantime a creditors' committee of defendant filed an answer to the petition of the Merchants Transfer and Storage Company, alleging that as the receiver had spent most of his time and energy in collecting accounts for said petitioner that the result was that the creditors who had received nothing on their claims were bearing the financial burden

of collections for the benefit of petitioner. The creditors' committee thereupon asked that the court appoint a referee to take and state an account between all the parties. The cause was heard by Judge Clement in January, 1931, and after considering the merits of the question presented, appointed a referee. The creditors' committee thereafter filed an amendment to the petition of the Merchants Transfer and Storage Company attacking the contract between the defendant company and the petitioner Storage Company, and alleging that the Storage Company was securing a preference which was unlawful, and praying that the court direct a receiver "to proceed forthwith by whatever process he may be advised and recover from the petitioner, Merchants Transfer and Storage Company, said amount to be ascertained before the referee and constituting the entire amount paid by the receiver to said petitioner."

Thereupon on 8 July, 1931, the plaintiff Killian filed a supplemental petition alleging that the receiver had no right to pay any funds to the Storage Company, and that the action of the receiver in paying money under order of court to the Storage Company was wrongful and unlawful. It was further alleged that the Storage Company had charged more than six per cent, and that the transactions between the Storage Company and the defendant, Chair Company, were usurious. Whereupon, the plaintiff prayed an order directing the receiver to file an itemized statement of his accounts and of all sums disbursed to the Storage Company, and to set aside the orders made from time to time by the judge of the Superior Court directing and approving payments theretofore made to the Storage Company. On 16 July, 1931, the attorney for the Storage Company served notice on the attorneys for the receiver and of the creditors' committee and of plaintiff Killian that he would file a motion for permission to withdraw the petition theretofore filed by the Storage Company, such motion to be heard before his Honor, Judge Clement, at Chambers, in Bakersville on 28 July, 1931. On 18 July, 1931, the plaintiff filed certain exceptions denying that he had consented to the appointment of a receiver or that he had authorized any one to act in his behalf, and also attacking the motion made by the receiver and excepting to all orders made by the court.

The cause came on for hearing before Clement, J., at Wilkesboro, on 12 August, 1931. The pertinent portions of the judgment rendered are as follows: "This cause coming on to be heard, by consent of the parties, at Chambers, in the courthouse in Wilkesboro, N. C., on 12 August, 1931, . . . upon the motion heretofore filed in this cause by the Merchants Transfer and Storage Company, a corporation, for an order requiring the receiver of the defendant to pay to it certain money in the sum of $2,821.35. . . . And upon the motion of the said Mer-

chants Transfer and Storage Company to be allowed to withdraw its said motion and to strike out its appearance in this cause. . . . And coming on, further, to be heard upon the motion herein filed by a committee of creditors of the Maiden Chair Company, and upon the motion of plaintiff, R. B. Killian, to be allowed to file exceptions to orders and reports of the receiver, . . . and further, to file a plea of usury on behalf of said plaintiffs against the said Merchants Transfer and Storage Company. . . . After hearing the argument of counsel, the court finds that the plaintiff, R. B. Killian, is and was, at all times, the plaintiff in this action, and that he instituted this action on 20 July, 1929, and that the said plaintiff consented to the judgment and order of Harding, J., entered by consent on 2 July, 1929, . . . and that at a hearing on 12 August, 1931, at Wilkesboro, N. C., the said plaintiff, R. B. Killian, appeared through his counsel and made the foregoing motions as above recited. . . . After hearing the same the court announced that it was of the opinion that the plaintiff, R. B. Killian, was a party and approved all the proceedings in this cause, and having knowledge of the same, that the court was without power now to allow him to except to said orders, and that said plaintiff had, in fact, consented to the order and judgment appointing C. R. Brady receiver of defendant, and the court declined in its discretion to grant the motion made on behalf of plaintiff, R. B. Killian. The court is further of the opinion that the creditors had not been diligent and had not presented their objections prior to the disbursement of funds by the receiver pursuant to orders hereinbefore entered, and that such creditors were not entitled, in their own right, to set up a plea of usury. . . . The court is further of the opinion upon the conditional offer made by counsel for the Merchants Transfer and Storage Company to waive its claim to the said fund in the sum of $2,821.35 in case it is allowed to withdraw its motion and strike out its appearance herein, and the said motions having been allowed, that the said fund in the sum of $2,821.35 in the hands of said receiver and collected from said accounts shall be hereafter distributed as such to creditors, in the distribution of which the Merchants Transfer and Storage Company is not to participate. . . . This order is entered at Mocksville, N. C., at Chambers, on 1 September, 1931, all parties having agreed that the court should enter its final order on said motions at said time and place."

From the foregoing judgment the plaintiff, Killian, appealed.

W. H. Childs and W. H. Dennis for plaintiff.

W. A. Self for receiver.

M. H. Yount, Osmer L. Henry and Varser, Lawrence & McIntyre for Transfer and Storage Company.

BROGDEN, J. The questions of law presented by the appeal are:

1. Has a Superior Court judge power to make an order in receivership proceedings outside of the county of the judicial district in which the cause is pending?

2. Has a Superior Court judge power to permit a party to withdraw a petition in a receivership proceeding?

The plaintiff contends that the order made in this cause on 1 September, 1931, was invalid by reason of the fact that the judge entered the order out of the judicial district in which the action was pending and out of the county in which the suit had originally been instituted. This contention, however, must be interpreted in the light of the facts found by the judge at the time the order was entered. He finds as a fact that the motions and exceptions were submitted to him in Wilkesboro on 12 August, 1931, "by consent of the parties." He further finds as a fact that the judgment rendered at Mocksville on 1 September, 1931, was upon the agreement of all parties "that the court should enter its final order on said motions at said time and place." Ordinarily a judgment cannot be entered out of term and out of the district unless such judgment falls within that class of decrees which may be made *nunc pro tunc*. However, this principle does not apply where the parties are present in court either in person or by attorney and consent that a hearing may be had and a judgment rendered. This idea was thus expressed in *Hemphill v. Moore,* 104 N. C., 379, 10 S. E., 313: "It is in case of motions and proceedings in an action out of term-time that a special notice to the adverse party must generally be given. But, in such cases, if the opposing party should appear, by himself or his counsel, he would, ordinarily, have been deemed to have taken actual notice and to have waived formal notice." Indeed, in *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1, express sanction was given to a judgment signed by an emergency judge out of term and out of district when it appeared that all the parties had fully consented to such procedure. In order to avoid misunderstanding between counsel for opposing parties, it is perhaps advisable that such consent should be given in writing. Nevertheless, a writing is not essential to the validity of the judgment or order in the absence of a denial that consent was given. Moreover, when the judge finds as a fact that consent was actually given, whether in writing or not, and this finding is set out in the judgment, it is binding upon the parties in the absence of fraud or collusion. *Westhall v. Hoyle,* 141 N. C., 337, 53 S. E., 863; *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130.

The second question of law becomes immaterial upon the facts found by the judge and set forth in the order for the reason that the judge

in his discretion declined to permit the plaintiff to file exceptions or to set up a plea attacking the validity of the contract between the defendant and the Storage Company. Hence there was nothing before the court in the nature of a counterclaim or equity, which the plaintiff had a right to have determined in the action. The judge found as a fact that the plaintiff had full notice of all the orders in the receivership proceedings and had fully consented to such orders, and that the larger portion of the fund which was the subject of the controversy, had been disbursed by the receiver under proper order of the court. A party is not permitted to withdraw or take a nonsuit or bow himself out of court when his adversary has set up a counterclaim or claim of an equitable nature involving rights which have attached and which he is entitled to have determined in the action. But this principle is not applicable to the facts appearing in the record. *R. R. v. R. R.*, 148 N. C., 59, 61 S. E., 683.

A further contention is made to the effect that when the judge permitted the Storage Company to withdraw its petition upon the understanding that said Storage Company would abandon any and all claim to the sum of $2,821.35 in the hands of the receiver that such judgment was a conditional judgment and prohibited by law. McIntosh on North Carolina Practice and Procedure, page 731, writes: "A conditional judgment is one whose force depends upon the performance or nonperformance of certain acts to be done in the future by one of the parties, as where a judgment was given for the plaintiff, to be stricken out if the defendant filed a bond within a certain time, and this was held to be void. But where the judgment is definite and certain, and a condition is added which may operate to carry the judgment into effect, it is not conditional; as in a judgment for foreclosure the property is to be sold if the judgment is not paid within a certain time, or that the judgment may be satisfied by giving secured notes by a certain time. Where the parties agree that a certain judgment may be entered upon failure to comply with a certain condition, and it is so entered after failure, it is not a conditional judgment." The judgment in the case at bar contemplated no future act to be performed by any of the parties. It waived its claim to the fund in open court and was thereupon permitted to withdraw, leaving the fund to the exclusive control of the court.

Affirmed.

MRS. ROSA H. NASH, ADMINISTRATRIX OF LOUISE NASH, v. SEABOARD AIR LINE RAILWAY COMPANY AND SAM HOWIE.

(Filed 8 January, 1932.)

1. **Highways B k—Where guest has no control over driver and is not engaged in joint enterprise, negligence of driver will not be imputed to him.**

Where a gratuitous passenger or guest in an automobile has no ownership or control over the car and is not engaged in a joint enterprise with the driver or other occupants, negligence of the driver of the car will not be imputed to the guest, and he may recover against a third person for a negligent injury if the negligence of the driver is not the sole proximate cause of the injury.

2. **Negligence C a—Person will not be held to same degree of care for own safety where placed in imminent peril.**

The driver of an automobile, in an effort to avoid an accident at a railroad crossing, turned the car and drove it down the tracks in front of an approaching train, and a guest in the car jumped therefrom and was killed by being hit by the engine: *Held*, the act of the guest in jumping from the car under the circumstances will not bar the right of her administrator to recover damages against the railroad company for its negligence which proximately caused the injury, although the driver and other passengers in the car who remained therein escaped injury.

3. **Railroads D b—Evidence of negligence of railroad company proximately causing injury in collision at crossing held sufficient.**

The plaintiff's intestate was killed in an accident at a grade crossing of a railroad company while the intestate was riding as a guest in an automobile owned and operated by another. In an action by her administratrix against the railroad company the evidence tended to show that the intestate had no control over the driver of the car, and was not engaged in a joint enterprise at the time of the accident, that no signal was given by the approaching train, that the view at the crossing was partially obstructed by a loading platform and trees upon the right-of-way, and by other cars parked near the tracks, that the crossing was in an incorporated town and was much used, that the accident occurred at five o'clock in the afternoon when traffic was heaviest, and that the railroad company kept no watchman or signaling device at the crossing, *Held:* the evidence was sufficient to be submitted to the jury, and the defendant's motion as of nonsuit was properly denied.

CIVIL ACTION, before *Finley, J.*, at July Term, 1931, of RICHMOND.

Raleigh Street, in the town of Hamlet, runs approximately north and south. Seven tracks of the defendant cross the street at grade. This street, including the railroad crossing, is paved with concrete and divides the town into two parts. Business houses and residences are situated on both the north and south sides of said crossing. The crossing is constantly used by pedestrians and vehicles at all hours of the day, and

particularly in the afternoon. The depot of defendant is near the crossing and the tracks are in constant use by passenger trains, freight trains and shifting engines. On the west side of the crossing and about 91 feet therefrom is situated a building known as the Ford plant. There is also on the west side and near the crossing a loading platform for freight, the height of which was variously estimated from five to seven feet. There are two large trees on the right of way of defendant. The nearest tree is 150 or 160 feet from the crossing and the next tree thereto about 200 feet from the crossing. There is an iron-clad building referred to as a warehouse or factory situated 300 feet west of the crossing. The space between the Ford plant and the crossing is open, and the evidence tended to show that this space was used for parking automobiles. On 27 August, 1930, Sarah Adams, a girl about sixteen years of age, was driving her father's Pontiac sedan. On the front seat with the driver was Miss Louise Nash. The rear seat was occupied by three girls, Misses Sullivan, Meacham and Kirkland. It was about five o'clock in the afternoon. The driver of the car said: "There were cars passing all the time, going in every direction. It was five o'clock in the afternoon. As we approached this crossing I looked and listened. I first saw the train when I was just almost on the crossing. It was just at the edge of the street. I don't know how far we were from the rail upon which the train was traveling. It seems as far as from here to the bannister over there. I did not hear any bell or any whistle. I did not see the approach of the train. When I saw the train it was moving east. I was on the right side of the street at that time. When I saw the train Louise Nash screamed and said 'Sarah.' I saw the train as she screamed and then started turning east. I ran down the track I don't know how far. As I went off the track she went out of the car door. I next saw her at my home. I did not see her on the track. The train struck the back bumper of the car." Another girl riding in the car at the time said: "When Louise screamed the young lady who was driving the car turned to the left and started down the track in front of the train. . . . Miss Adams finally got the car off of the railroad track proper and turned it back toward Raleigh Street. I don't know whether it was clear of the railroad track before Miss Nash got out, I don't know when she got out. I never did see or notice to see what damage it did to the car. The engine hit on the left side as we turned completely off the track. The four of us that stayed in the car were not hurt. We all got out after the car stopped." The testimony disclosed that a long freight train was approaching the Raleigh Street crossing from the west, traveling eastward to the depot. The engine was a large passenger engine pulling a freight train. The height was

variously estimated from fourteen to sixteen feet and the length approximately 90 feet. The engine was driven toward the crossing and was pulling a train of forty-eight box cars, and running at a speed variously estimated at eight to fifteen miles per hour. There was also testimony to the effect that the car in which the young ladies were riding was traveling at a slow rate of speed as it approached the crossing. The evidence further tended to show that the automobile traveled down the track in front of the engine a distance of approximately 45 feet, and that just as the car turned off the track Miss Louise Nash either jumped out of the car or was thrown out immediately in front of the engine and her body cut in two by the train.

The engineer testified that he did not see the car as it approached from the opposite side of the engine. The fireman testified he saw the car approaching, but thought it had passed the front of the engine, and that he had called out to the engineer to know if the car had passed on his side. There was evidence that the engine was stopped within a space of twenty feet after the brakes were applied. Neither the engineer nor the fireman knew that Miss Nash had been killed.

There was evidence that the engine gave no signal as it approached the crossing, either by whistle or bell. There was much evidence by disinterested witnesses to the contrary. One witness testified that by reason of the obstructions aforesaid "you would have to be almost on the track before you could see. You could not see over ten feet." Another witness said: "Approaching the track on the north side you would have to be fifteen or twenty feet of the track to see a train coming there." Much evidence was offered by the plaintiff to the effect that the crossing was a populous and much used crossing, and that the defendant had maintained no watchman, gate or other signal device for the protection of the public.

At the conclusion of all the evidence the plaintiff took a nonsuit as to defendant, Howie, the engineer.

Issues of negligence, contributory negligence, last clear chance and damages were submitted to the jury. The jury answered the issue of negligence in favor of plaintiff and awarded damages in the sum of $20,000.

From judgment upon the verdict the defendant, Railway Company, appealed.

Clyde A. Douglass, J. C. Sedberry and L. H. Gibbons for plaintiff.

Ozmer L. Henry, Fred W. Bynum and Varser, Lawrence & McIntyre for defendant.

BROGDEN, J. Louise Nash was a gratuitous passenger or guest in the automobile driven by Sarah Adams. She was not the owner of the car and had no control of it; neither is there evidence that the deceased was engaged in a joint enterprise with the driver or other occupants of the car. Consequently, any negligence on the part of the driver would not be imputed to the deceased. In the light of the facts and circumstances disclosed by the present record, the rule of law, therefore, applicable to the facts was stated in *Earwood v. R. R.*, 192 N. C., 27, as follows: "Therefore, 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. Of course, if the negligence of the driver is the sole, only, proximate cause of the injury, the injured party could not recover. This rule is not based upon the idea of contributory negligence on the part of the injured party but rather upon the idea that the party causing the injury was not guilty of any negligence, which was the proximate cause thereof." All occupants of the car who remained therein, escaped without injury, and undoubtedly the deceased would also have escaped if she had not either jumped or been thrown from the car immediately in front of the engine. This act, however, does not bar recovery. Discussing a similar situation in *Odom v. R. R.*, 193 N. C., 442, 137 S. E., 313, the Court said: "The mere fact that a person jumps from a vehicle in which he is traveling, where there is imminent danger of its coming in collision with an approaching train at a crossing, does not bar recovery against the railroad corporation, although it appears that he made a mistake and would have escaped injury had he remained quiet."

Hence the determining question of law is whether there is evidence of negligence on the part of defendant. There is evidence that no signal was given by the approaching train. There is evidence that the crossing was obstructed by a loading platform and trees upon the right of way. There is evidence that in the open space adjacent to the right of way automobiles were parked. There is evidence that the vision of an approaching traveler was thereby obscured until within ten or twenty feet of the track. Of course, the engine and box cars were higher than the parked automobiles or the loading platform near the crossing, and consequently the top of the engine and box cars was visible. Manifestly, however, there was partial obstruction or interference with vision.

The evidence of plaintiff and the inferences which such evidence warrants, classify this case in the line of decisions represented by *Moseley v. R. R.*, 197 N. C., 628, 150 S. E., 184; *Thurston v. R. R.*, 199 N. C., 496, 154 S. E., 836, and *Butner v. R. R.*, 199 N. C., 695, 155 S. E., 601. Particularly in view of the fact that the deceased was a guest in the car at the time of the collision.

There are many other exceptions in the record which have been carefully examined, but the court is of the opinion that there was sufficient evidence of negligence to be submitted to the jury and that the issue has been tried in accordance with the rules of liability heretofore established.

No error.

HARRY J. BOST, EXECUTOR OF ED S. ERWIN, v. MINNIE E. MORRIS ET AL.

(Filed 8 January, 1932.)

1. Wills F a—Distinction between specific and general legacies.

A general legacy is one which is chargeable generally upon the testator's personal estate and which does not amount to a bequest of any specific part of the estate, while a specific legacy is a bequest of a particular thing or money specified and distinguished from all of the same kind, it being necessary to a specific bequest that the testator described the property as belonging to him.

2. Same—Legacy in this case held specific and legatee was entitled to dividends from stocks bequeathed from time of testator's death.

The will of the testator bequeathed to a named legatee "ten thousand dollars in stocks in an incorporated company or companies to be selected by her, at its then par value" and a later item referred to the "rest and residue of my estate" etc., *Held:* construing the will as a whole the testator unequivocally indicated his ownership of all the property, and manifested his intention that the stock should be selected out of those owned by him and not to be purchased on the open market "at their market value," and upon the exercise of the power of selection of the stock by the legatee the bequest was rendered specific and the legatee was entitled to all dividends declared thereon from the date of the testator's death, and *held further*, the amount of the dividends in the executor's hands being in excess of the inheritance tax, his assent to the legacy need not be postponed until the tax is paid by the legatee.

APPEAL by the plaintiff and by the defendants, other than Minnie E. Morris, residuary legatees, from *McElroy, J.*, at October Term, 1931, of CABARRUS. *No error.*

Ed S. Erwin died 13 November, 1927, leaving the following will which was duly admitted to probate:

"North Carolina—Cabarrus County.

I, Ed S. Erwin, of Cabarrus County, State of North Carolina, do make this my last will and testament, as follows:

Item 1. I give and devise to my beloved wife, Jennie Erwin, the tract of land on which I live, containing about 200 acres, for and during the term of her natural life.

Item 2. I give and bequeath to my sister, Minnie E. Morris, if she survives me, ten thousand dollars in stocks in an incorporated company or companies to be selected by her, at its then par value.

Item 3. I give and bequeath to my beloved wife, Jennie Erwin, the sum of $10,000; and to my uncle, John V. Bost, the sum of $1,000.

Item 4. I give to Rocky River Church in Cabarrus County, N. C., the sum of $10,000, to be used by the proper officers of said church for any purposes they may think best.

Item 5. I give and bequeath to my aunt, Mrs. Tinslow L. Bost, the sum of $500, to be paid to her by my executor.

Item 6. All the rest and residue of my estate, both real, personal and mixed of whatever nature or kind, I give and devise absolutely and in fee simple to my nephews Ed Bost and the children of T. L. Bost, who may be living at my death.

Item 7. I hereby constitute and appoint Harry J. Bost, executor of this my last will and testament, and instruct him to employ my friend J. L. Crowell as his attorney in the management of my estate.

In witness whereof, I, the said Ed S. Erwin, have hereunto set my hand and seal, on this 3 April, 1923.

Witnesses: Ed S. Erwin. (Seal.)

A. F. Goodman, C. L. Propst."

"North Carolina—Cabarrus County.

I, Ed S. Erwin, do make this codicil to my foregoing will, dated 3 April, 1923, which I reaffirm, except as herein modified:

Out of the property and estate which I have given my wife, is to be deducted a note and interest which I hold against her for $1,500 dated 26 January, 1920.

This 7 April, 1923. Ed S. Erwin. (Seal.)

A. F. Goodman and C. L. Propst, witnesses."

The executor qualified and on 14 December, 1927, delivered to Minnie E. Morris, the legatee in item two, a list of the stocks found in the lock box of the deceased with their appraised value as fixed by the Commissioner of Revenue. On 17 December, 1927, the widow filed her dissent, and this changed the status of the estate. Owing to a change in values the stocks were worth perhaps $30,000 less at the death of the testator than at the time the will was executed. A dividend was declared on 1 January, 1928, for the previous six months and was paid to the executor. On the stocks selected by Minnie E. Morris the dividends amounted to $431. Within one year from the death of the testator other dividends were paid her.

The plaintiff brought suit to have the will construed and upon the pleadings only one issue was submitted to the jury: "On what date did Minnie E. Morris deliver the list of stocks selected by her to the executor, Harry J. Bost, or his attorney, J. Lee Crowell, Sr.?" The answer was, "26 January, 1928."

It was adjudged upon the verdict that Minnie E. Morris is entitled to all the dividends paid after 13 November, 1927, on the stocks which she selected on 26 January, 1928—the dividends not to be paid her until she pays the executor $395.76, the amount of the inheritance tax assessed against her legacy by the Commissioner of Revenue and paid by the executor out of the assets of the estate. It was adjudged that the costs be paid out of the estate.

The par value of each of the shares selected was $100; their market value was appraised by the Commissioner at $12,962, and a tax of $408 was assessed on which a discount of 3 per cent was allowed, leaving $395.76.

Hartsell & Hartsell and J. Lee Crowell, Sr., for plaintiff.
J. L. Crowell, Jr., for residuary legatees.
Armfield, Sherrin & Barnhardt for Minnie E. Morris, appellee.

ADAMS, J. When the plaintiff brought suit for a construction of the will it was found that the second item is the substantial ground of the controversy, the others being material only as they serve to reveal the testator's intent. It was necessary to submit to the jury a single issue, the answer to which fixed the time when the appellee delivered to the plaintiff the list of stocks which she had selected. The date was 26 January, 1928; and after this finding the court adjudged that the legatee named in the second item is entitled to all the dividends on the selected stocks since the testator's death, which occurred on 13 November, 1927. The appellants say that this part of the judgment is erroneous; that the appellee is not entitled to any dividend within one year from the day the testator died; and that the accrued dividends are a part of the residuary estate. This position is controverted by the appellee.

The answer to the question at issue is dependent upon the nature of the bequest. It is contended by the appellants that the legacy in item two is general, and by the appellee that it is specific and includes all dividends accruing after the testator's death. If the bequest is specific the appellee's conclusion is correct and she is entitled to all dividends declared after 13 November, 1927. *Turnage v. Turnage*, 42 N. C., 127; *Beasley v. Knox*, 58 N. C., 1; *Harrell v. Davenport, ibid.*, 4.

A general legacy is one which is chargeable generally upon the testator's personal estate and is not so given as to be distinguishable from

other parts of the estate; or, when it is so given as not to amount to a bequest of a specific part of the testator's personal estate. A specific legacy is the bequest of a particular thing or money specified and distinguished from all of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor. *Shepard v. Bryan,* 195 N. C., 822; *Smith v. Smith,* 192 N. C., 687. A bequest of money "in notes to be taken out of my notes by my executor and paid over to (the legatee) as soon after my death as it can conveniently be done," is specific. *Perry v. Maxwell.* 17 N. C., 488, 496, 502. So is a bequest of "one carriage, one yoke of oxen—her choice," the last two words making the preceding description specific. *Everitt v. Lane,* 37 N. C., 548. In the present case the exercise of the power of selection rendered the bequest specific when the selection was made. 28 R. C. L., sec. 267.

To create a specific bequest the property must be described as belonging to the testator, and it is customary to express ownership by the use of such words as "my," "in my possession," etc. *Smith v. Smith, supra.* It is suggested by the appellants that the will contains no words which identify the stocks. So it was in several items of the will construed in the case last cited, but this Court took into consideration the whole will and not merely the clauses containing the gift of stocks.

Considered according to these principles, the legacy in the second item is specific. In the sixth item the testator disposed of "all the rest and residue of my estate, both real, personal, and mixed"; instructed his executor to employ counsel in the management of *my* estate; and in the codicil he referred to the property and estate which he had given. This was unequivocal indication of his ownership of all the property.

We do not accede to the contention that the words "at its then par value" negative the testator's intent to bequeath the dividends, or that the bequest is susceptible of the construction that stocks not owned by the testator should be purchased in the open market for the benefit of the legatee. Why adopt this interpretation when the testator, owning stocks in a score of corporations obviously intended to dispose of all his property, and not to hazard the interests of the legatees by pursuing the suggested policy?

The appellants insist that the executor should not be required to assent to the legacy in question until the legatee has paid the inheritance tax. The executor is protected; he has the dividends which, according to the record, are in excess of the tax. The judgment as to the costs is correct. We find

No error.

W. A. NICHOLS v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 8 January, 1932.)

Taxation B c—Plaintiff in this case held not required to give proof of ability to pay damages before obtaining license for car for hire.

A person engaged in the operation of an automobile for the transportation of persons for hire within the State comes within general provisions of chapter 116, Public Laws of 1931, and he may not be required to offer evidence of ability to respond in damages for future accidents before granting him a license when he has tendered the correct fee therefor, and has never had a judgment docketed against him for negligence in the operation of such motor vehicle, and the provisions of the last paragraph of section three of the act, requiring proof of ability to respond in damages before the issuance of a license to owners of passenger vehicles operated for hire who are not embraced in the provision of the "present law," are not applicable to him, he being embraced in the provisions of the "present law" as set forth in section one of the act.

APPEAL by plaintiff from *Harris, J.*, at Chambers in Raleigh, on 12 September, 1931. Reversed.

This is an action for judgment, in the nature of a mandamus, ordering and directing the defendant, Commissioner of Revenue of North Carolina, to issue to plaintiff, a citizen of this State, a license to operate on the highways of this State an automobile for the transportation of passengers for hire.

Plaintiff has tendered to defendant the fees prescribed by statute for such license, and has otherwise complied, as he alleges, with all the lawful requirements of the defendant. He has been engaged in the business of operating an automobile for the transportation of passengers for hire in this State for more than nine years. No judgment has ever been rendered against the plaintiff for the recovery of damages resulting from injuries to the person or property of another caused by the negligence of the plaintiff in the operation of an automobile on the highways of this State.

It is the duty of the defendant, Commissioner of Revenue, to collect from each applicant for license to operate an automobile on the highways of this State the fees prescribed by statute, and upon compliance by such applicant with all lawful requirements of the defendant to issue to such applicant the license applied for by him. Such requirements are prescribed or authorized by statute.

The defendant has refused to issue to the plaintiff the license applied for by him, for the sole reason that plaintiff has failed and refused to furnish to defendant as proof of his ability to respond in damages result-

ing from injuries to the person or property of another that may be caused by his negligence in the operation of his automobile on the highways of this State, a bond or insurance policy in accordance with the provisions of chapter 116, Public Laws 1931, as construed by the defendant in the performance of his official duties. In accordance with his construction of certain provisions of the statute, the defendant has required of the plaintiff, and of all other applicants for license to operate on the highways of this State automobiles for the transportation of passengers for hire, a bond or insurance policy, conditioned as required by said statute. This requirement was made by defendant pursuant to his construction of the last paragraph of section 3, chapter 116, Public Laws 1931.

The action was heard after notice to defendant to show cause why judgment should not be rendered in this action as prayed for by plaintiff. On the facts found by the court from the verified pleadings, it was considered, ordered and adjudged that plaintiff is not entitled to the relief prayed for in his complaint, and that the action be dismissed.

From judgment dismissing the action, plaintiff appealed to the Supreme Court.

R. L. McMillan, J. S. Griffin, W. T. Hatch and George Pennell for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Seawell for defendant.

John W. Hester, amicus curiæ.

CONNOR, J. Chapter 116, Public Laws 1931, is entitled, "An act to promote safe driving on the highways, and to enforce the collection of judgments against irresponsible drivers of motor vehicles." The statute includes within its provisions every person, firm or corporation against whom a judgment has been recovered for damages for injuries to the person or property of another, resulting from the negligence of such person, firm or corporation, in the use or operation of a motor vehicle on the highways of this State, and who has failed to satisfy such judgment within thirty days after same was rendered by the trial court, or affirmed on appeal by a Court of final jurisdiction. It provides that upon the failure of such person, firm or corporation to so satisfy said judgment, the license of the operator of the motor vehicle, and all the registration certificates of its owner, shall be suspended by the Commissioner of Revenue, and that neither the license nor the registration certificates shall be renewed until the judgment has been satisfied, or until the person, firm or corporation against whom the judgment

was recovered shall first give proof to the Commissioner of Revenue of ability to respond in damages for future accidents, which may be caused by the negligence of such person, firm or corporation. It provides that proof of such ability may be established by the filing with the Commissioner of Revenue of a bond or insurance policy executed in accordance with the provisions of the statute.

There are no provisions of the statute which are applicable to the plaintiff, as the owner and operator of an automobile, against whom no judgment has been recovered for damages resulting from his ownership or operation of an automobile on the highways of this State, unless plaintiff is included within the provisions of the last paragraph of section 3 of the statute. This paragraph is as follows:

"The Commissioner of Revenue shall require proof of ability to respond in damages, within the limits herein specified, from and after the effective date of this bill, of all taxi-cab, jitney and for-hire operators not covered or embraced within the provisions of the present law or such laws as may be enacted at this session of the General Assembly affecting other motor vehicle operators transporting passengers or property upon the highways for compensation."

It is manifest, we think, that the foregoing paragraph was not included in the bill, which was enacted as chapter 116, Public Laws 1931, as the same was originally drawn. The internal evidence shows that the paragraph was an amendment to the bill, and was offered and adopted after the bill was introduced, and while it was on its passage by the General Assembly. It was evidently prepared without careful consideration of its language. Hence the difficulty presented to the Commissioner of Revenue and to the courts, when called upon to construe the language of the paragraph in order to ascertain the legislative intent.

We are of the opinion that the plaintiff is not included within the provisions of the paragraph, and that they are not, therefore, applicable to him or to others who shall apply to the Commissioner of Revenue for license to operate automobiles on the highways of this State, for the transportation of passengers for hire, with respect to whom the facts are identical. Plaintiff is embraced within the provisions of section 1 of the act. It cannot be held that he is not covered or embraced within the provisions of the "present law," which we construe to mean chapter 116, Public Laws 1931. No other statute was enacted by the General Assembly at its session in 1931, affecting operators of motor vehicles used for the transportation of passengers or property for hire on the highways of this State.

Upon his payment of the fees prescribed by statute for the license applied for by the plaintiff, and upon his compliance with other lawful requirements of the defendant, plaintiff is entitled to his license. There was error in the opinion of the trial judge that it was the duty of defendant to require as a condition precedent for the issuance of the license proof of plaintiff's ability to respond in damages for injuries to the person or property of another, caused by his negligence. The judgment is

Reversed.

J. E. KIRK v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 8 January, 1932.)

(For digest see *Nichols v. Maxwell, ante*, 38.)

APPEAL by plaintiff from *Harris, J.*, at Chambers in Raleigh, on 12 September, 1931. Reversed.

This is an action for judgment enjoining the defendant, Commissioner of Revenue of North Carolina, from revoking and canceling the license heretofore issued to and now held by the plaintiff, a citizen of this State, to operate on the highways of this State, an automobile for the transportation of passengers for hire.

The plaintiff now holds a license heretofore issued to him by the Commissioner of Revenue of North Carolina to operate on the highways of this State an automobile for the transportation of passengers for hire. He has been engaged in the business of operating an automobile for the transportation of passengers for hire in this State for more than twelve years. No judgment has been rendered by any court against the plaintiff for the recovery of damages for injuries to the person or property of another caused by his negligence in the operation of an automobile.

Subsequent to the enactment of chapter 116, Public Laws 1931, the defendant, Commissioner of Revenue of North Carolina, notified the plaintiff that unless plaintiff furnished to the said Commissioner proof of his ability to respond in damages for injuries to the person or property of another, by filing with said Commissioner a bond or policy of insurance in accordance with the provisions of said act, the said commissioner would revoke and cancel the license now held by the plaintiff.

The defendant, Commissioner of Revenue, relied upon the provisions of the last paragraph of section 3 of chapter 116, Public Laws 1931, for his power to revoke and cancel the license of the plaintiff, upon

plaintiff's failure to furnish proof of his ability to respond in damages in accordance with the provisions of said act. The plaintiff contended that the provisions of said paragraph are not applicable to him, and denied that the defendant under said provisions has the power to revoke and cancel his license.

The action was heard after notice to the defendant to show cause why the temporary restraining order issued therein should not be continued to the final hearing. There was judgment that the temporary restraining order be dissolved and that the action be dismissed.

From judgment dismissing the action, plaintiff appealed to the Supreme Court.

R. L. McMillan, J. S. Griffin, W. T. Hatch and George Pennell for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Seawell for defendant.

John W. Hester, amicus curiæ.

CONNOR, J. We are of opinion that plaintiff is not included within the provisions of the last paragraph of section 3 of chapter 116, Public Laws 1931, and that for this reason there was error in the judgment dismissing this action. See *Nichols v. Maxwell, ante,* 38. Plaintiff is covered and embraced within the provisions of section 1 of the act, and cannot be required by the Commissioner of Revenue to furnish proof of his ability to respond in damages in accordance with the provisions of the act, until he has failed to satisfy a judgment rendered against him for damages for injuries to person or property caused by his negligence in the operation of an automobile on the highways of this State. On the facts found by the court from the pleadings, plaintiff is entitled to judgment in accordance with the prayer of his complaint. The judgment dismissing the action is

Reversed.

W. M. SEARCY v. W. T. HAMMETT, H. H. CARSON, J. W. JACK, J. C. DENTON AND J. D. CARPENTER, THE LAST NAMED BEING REPRESENTED BY HIS GENERAL GUARDIAN, S. J. CARPENTER.

(Filed 8 January, 1932.)

1. Bills and Notes A e—Endorsement of note without consideration is not binding when endorser does not have sufficient mental capacity.

Where, at the time of the endorsement, an endorser does not have sufficient mental capacity to endorse the note, and the endorsement is

without consideration to the endorser, the endorser is not liable thereon although the payee of the note is without notice of such mental incapacity, but the endorser is liable if he received consideration.

2. Bills and Notes A a—Endorsement of note in this case held supported by legal consideration.

Where the creditor of a corporation accepts its notes endorsed by its stockholders and directors in settlement of the debt he extends the maturity of the debt and gives up his right to reduce the debt to judgment until after the maturity of the notes, and the endorsement of such notes by a stockholder and president of the corporation is supported by a legal consideration, and he is liable thereon although at the time of the endorsement he did not have sufficient mental capacity to make the endorsement, the payee having no notice of such mental incapacity.

APPEAL by plaintiff from *Shaw, Emergency Judge*, at June Special Term, 1931, of POLK. New trial.

This is an action to recover of the defendants the amounts due on seven notes payable to the order of the plaintiff, and executed by the Citizens Planing Mill Company, Incorporated, as maker, and the defendants, as endorsers.

One of the notes sued on is dated 23 July, 1928, and is for the sum of $2,000. This note has been credited with a payment of $80.00. The other six notes are dated 1 January, 1930, and are for the sum of $250, each. The consideration for said notes was lumber sold and delivered by plaintiff to the Citizens Planing Mill Company, Incorporated. The accounts for said lumber were due and payable prior to the dates of said notes. All of said notes are now due and unpaid.

The Citizens Planing Mill, Incorporated, is insolvent. The defendants were stockholders and directors of said corporation at the date of said notes. They offered to endorse and did endorse said notes upon plaintiff's agreement to extend the maturity of the indebtedness due him by the Citizens Planing Mill Company, Incorporated, on account of the lumber sold and delivered by the plaintiff to said corporation.

This action was begun in the Superior Court of Polk County on 21 April, 1930. It was tried at June Special Term, 1931, of said court. There was a judgment by default final, for want of an answer, against all of the defendants except the defendant, J. D. Carpenter. This judgment is for the full amount of all said notes.

After the commencement of the action, to wit, on 7 May, 1930, an inquisition of lunacy was begun before the clerk of the Superior Court of Polk County, in which, upon the verdict of a jury, it was adjudged that the defendant, J. D. Carpenter, was incapable, from want of understanding, to manage his affairs. Pursuant to said adjudications,

Miss Sallie J. Carpenter, his sister, was duly appointed general guardian of the defendant, J. D. Carpenter. She filed an answer in his behalf to the complaint in this action on 21 May, 1930.

At the trial issues were submitted to and answered by the jury, as follows:

"1. Did the defendant, J. D. Carpenter, at the time he endorsed the note dated 23 July, 1928, have sufficient mental capacity to endorse said note? Answer: Yes.

2. If not, did the plaintiff, W. M. Searcy, have notice of such want of mental capacity? Answer: .....

3. Did the defendant, J. D. Carpenter, at the time he endorsed the notes dated 1 January, 1930, have sufficient mental capacity to endorse said notes? Answer: No.

4. If not, did the plaintiff, W. M. Searcy, have notice of such want of mental capacity? Answer: No.

5. Were said notes without adequate consideration as alleged in the answer? Answer: Yes, as to the six notes for $250 each, dated 1 January, 1930. No, as to the $2,000 note dated 23 July, 1928.

6. What amount, if any, is the defendant, J. D. Carpenter, indebted to the plaintiff, W. M. Searcy? Answer: $1,980 with interest from 23 July, 1929."

Plaintiff excepted to the refusal of the court to render judgment in his favor and against the defendant, J. D. Carpenter, not only for $1,980, but also for $1,500, with interest from 1 January, 1930.

From judgment that plaintiff recover of the defendant, J. D. Carpenter, the sum of $1,980 with interest from 23 January, 1929, plaintiff appealed to the Supreme Court.

E. B. Cloud and S. P. Dunnagan for plaintiff.
Shipman & Arledge for defendant.
J. Lee Lavendar for J. D. Carpenter.

CONNOR, J. At the trial of this action in the Superior Court, the judge instructed the jury not to consider or answer the 5th or the 6th issue. This instruction was given to the jury because the judge was of opinion that these issues involve matters of law only and that the answers of the jury to the 1st, 2d, 3d and 4th issues would determine the answers to these issues. The jury having answered the 1st, 2d, 3d and 4th issues as shown in the record, the judge answered the 5th and 6th issues, and upon these answers, notwithstanding the answer of the jury to the 4th issue, refused to render judgment in accordance with plaintiff's

motion that he recover of the defendant not only the sum of $1,980 on the note dated 23 July, 1928, but also the sum of $1,500 on the notes dated 1 January, 1930.

Plaintiff excepted and on his appeal to this Court assigns as error the action of the judge in answering the 5th and 6th issues, in refusing his motion for judgment, and also in rendering the judgment shown in the record. The question of law presented by these assignments of error is whether upon all the evidence the endorsement by the defendant, J. D. Carpenter, of the notes dated 1 January, 1930, was without consideration. The jury having found that on 1 January, 1930, J. D. Carpenter did not have sufficient mental capacity to endorse the notes of that date, the said J. D. Carpenter is not liable to plaintiff on said notes by reason of his endorsement, if such endorsement was without consideration, notwithstanding plaintiff had no notice of such want of mental capacity. *Wadford v. Gillette,* 193 N. C., 413, 137 S. E., 314.

On 1 January, 1930, J. D. Carpenter was a stockholder of the Citizens Planing Mill Company, Incorporated; he was also the president of said corporation at said date. The Citizens Planing Mill Company, Incorporated, was indebted to the plaintiff on 1 January, 1930, for lumber sold and delivered to said corporation by plaintiff. The account was due, and plaintiff had demanded payment. At the request of the Citizens Planing Mill Company, Incorporated, and of its stockholders and officers, plaintiff agreed to accept the notes of the corporation endorsed by the defendants in this action, its stockholders and officers, in settlement of his account. The notes sued on in this action, dated 1 January, 1930, were executed by the corporation as maker and endorsed by the defendants, its stockholders and officers, in settlement of plaintiff's account. By his acceptance of the notes, plaintiff extended the maturity of his debt and thereby surrendered his right to reduce the same to judgment until the maturity of the notes. The endorsement of said notes by the defendants, including the defendant, J. D. Carpenter, was supported by a legal consideration. *Exum v. Lynch,* 188 N. C., 392, 125 S. E., 15. To hold otherwise would deprive his codefendants of their right to contribution from the defendant, J. D. Carpenter. *Lancaster v. Stanfield,* 191 N. C., 340, 132 S. E., 21. Plaintiff's assignments of error are sustained. He is entitled to a

New trial.

MRS. NETTIE M. ABERNETHY v. STATE PLANTERS BANK AND TRUST COMPANY, AND DAVID B. HARRIS AND TRISTAM T. HYDE, TRUSTEES.

(Filed 8 January, 1932.)

1. **Trial A b: Appeal and Error J b — Upon proper, uncontradicted affidavits and certificates the trial court may grant continuance for illness.**

Where a party files an affidavit and certificates of physicians stating that he is too ill to attend court, and there is no evidence in contradiction thereof, the trial court may well grant his motion for a continuance upon such terms as the court deems just to the parties, and upon appeal to the Supreme Court from his refusal to grant the motion a new trial may be granted when it appears that the moving party has been deprived of his right to be present at the trial or to have witnesses whose testimony is essential to his cause present. In this case the question is not decided, a new trial being awarded upon another ground.

2. **Trial E b — In this case the court expressed an opinion as to an essential fact in issue, and a new trial is awarded.**

Where, in an action by a married woman to set aside a deed of trust on the ground that her private examination had not been taken to the deed, the trial court instructs the jury that the statute requiring her private examination "should be abolished, because it is not necessary now. A woman would not do anything she did not want to do": *Held*, the instruction contains such an expression of opinion by the court as to an essential fact involved as to be condemned by C. S., 564, and a new trial will be granted.

APPEAL by plaintiff from *Clement, J.*, at May Term, 1931, of CATAWBA. New trial.

This is an action to have a deed of trust under which the defendants, David B. Harris and Tristam T. Hyde, trustees, have advertised for sale the lot of land described therein, adjudged void and ordered canceled.

The deed of trust purports to have been executed by plaintiff and her husband, R. O. Abernethy, to secure certain notes recited therein, now held by the defendant, State Planters Bank and Trust Company of Richmond, Va. The lot of land described in the deed of trust is located in the city of Hickory, N. C.; it is owned by the plaintiff, and is occupied by her as her home.

Plaintiff alleges in her complaint that she was induced to execute said deed of trust by false and fraudulent representations made to her by an agent of the defendants and by her husband, with respect to the land described therein; that said agent and her husband falsely and fraudulently represented to plaintiff at the time she signed the said deed

of trust that the land described therein was property in the city of Hickory other than her home place.

Plaintiff further alleges in her complaint that her private examination touching her voluntary execution of said deed of trust was not taken as required by law; that the defendants at the date of the delivery to them of said deed of trust knew that her private examination had not been taken as required by law, and had full notice of the false and fraudulent representations by which plaintiff was induced by the agent and by her husband to execute the same.

These allegations were denied by the defendants in their answer.

The issues submitted to the jury were answered as follows:

"1. Was the execution and delivery of the deed of trust of date 15 November, 1926, and of registration on pages 152 and 153 in Book 197 of the Record of Mortgages and Deeds of Trust of Catawba County, procured by means of the fraudulent representations of defendants and plaintiff's husband as alleged in the complaint? Answer: No.

2. Was the deed of trust delivered without the execution thereof being privately and voluntarily acknowledged by the plaintiff? Answer: No.

3. In what amount, if any, is plaintiff indebted to the defendant, State Planters Bank and Trust Company? Answer: $6,437.17, with interest from 4 May, 1931."

From judgment in accordance with the verdict, authorizing and directing the foreclosure of the deed of trust by the exercise of the power of sale contained therein, plaintiff appealed to the Supreme Court.

Louis A. Whitener for plaintiff.

Self, Bagby, Councill, Aiken & Patrick for defendants.

CONNOR, J. This action was begun in the Superior Court of Catawba County on or about 22 October, 1930. It was on the calendar for trial at May Term, 1931, of said court. During said term and prior to the call of the action for trial, counsel for plaintiff moved that the action be continued for the term because of the illness of the plaintiff, and of her inability for that reason to attend the court and to testify as a witness in her own behalf at a trial during said term. In support of the motion, plaintiff's counsel offered her affidavit and the certificates of two physicians, who were admitted to be men of high standing in their profession. It appeared from the affidavit of the plaintiff and from the certificates of the physicians that plaintiff was ill, and for that reason was unable to leave her home, which is about eleven miles from the courthouse, to attend court. Plaintiff's illness was due to the

fact that about ten days before the court convened, she had had all her teeth extracted, and in consequence thereof was nervous and subject to fainting spells. The court found that the condition of plaintiff, physical or otherwise, was not such as to entitle her to a continuance of the action. All the evidence appearing in the record on this appeal is to the contrary. We think that in the absence of any evidence tending to contradict the affidavit of the plaintiff and the certificates of the physician, the court should have found that plaintiff was ill and for that reason unable to attend court during the May Term, 1931, of the court. On this finding, in accordance with the practice in the courts of this State, the action might well have been continued, upon such terms as the court deemed just to the parties. In *Moore v. Dickson,* 74 N. C., 423, this Court said: "We will not say that there may not be a case in which the refusal of a continuance would not be a ground for granting a new trial by this Court, under its general power to supervise and control the proceedings of the inferior courts. But, undoubtedly, the granting or refusing a continuance is in the discretion of the judge below, and it would require circumstances proving beyond a doubt hardship and injustice to induce this Court to review his exercise of it, if in any case it has the power to do so." We do not doubt that in a proper case, this Court has the power, and therefore the duty, to grant a new trial, when it appears that as the result of the refusal by the trial court to allow a motion for continuance, the moving party to the action has been deprived of his right to be present at the trial, or to have witnesses whose testimony is essential to his cause present. In the instant case, the plaintiff is entitled to a new trial for error in the charge of the court to the jury. It is therefore not necessary for us to grant a new trial upon the ground that there was prejudicial error in the refusal of the trial court to allow the motion for continuance.

The second issue submitted to the jury was as follows: "Was the deed of trust delivered without the execution thereof being privately and voluntarily acknowledged by the plaintiff?" This issue was raised by the pleadings and was properly submitted to the jury. The court charged the jury as follows:

"Under our law the statute requires if a married woman executes a deed that she shall be privately examined separate and apart from her husband; that she shall be asked whether she executed this paper-writing, or contract, or deed, voluntarily; whether she did it without fear or compulsion of her husband, or fear or compulsion of anybody, and whether it was her own free act. That ought to be abolished, because it is not necessary now. A woman would not do anything she did not want to do."

Plaintiff's exception to this instruction was well taken. Her assignment of error based on this exception must be sustained. C. S., 564. This was such an expression of an opinion by the judge as to an essential fact involved in the issue as is condemned by the statute. For this reason plaintiff is entitled to a

New trial.

SARAH MYERS v. R. A. BARNHARDT ET AL.

(Filed 8 January, 1932.)

1. **Criminal Law K b—Suspended judgments and executions are permissible under our practice.**

   The practice of suspending judgments or staying executions in criminal prosecutions upon terms that are reasonable and just is established as a part of our permissible procedure, and while the court may direct that the defendant be released from custody upon the condition that the defendant execute a bond securing the payment of a certain sum to the prosecutrix injured by his criminal negligence, the payment of the sum specified may not be enforced by the execution of the prison sentence on account of the constitutional provision against imprisonment for debt, but the judgment is not void, it not being alternative or conditional.

2. **Same—Held: nonsuit was improperly entered in civil suit on bond filed under the provisions of a judgment suspending execution.**

   Where in a criminal prosecution judgment is entered sentencing the prisoner to jail for a specified period with the provision that he be released from custody upon condition that he file a bond securing the payment of a certain sum in monthly installments to the prosecutrix injured by his criminal negligence, with a further understanding that the prosecutrix should take a nonsuit in a civil action for damages then pending: *Held,* in a civil action by the prosecutrix on the bond, the granting of the defendant's motion as of nonsuit is error, the bond being founded upon a valid judgment, and is binding if the condition is lawful and the consideration is proper, but it should be determined whether the bond was given as a ransom for the defendant's freedom, in which case it could not be enforced. Art. I, sec. 35.

APPEAL by plaintiff from *Warlick, J.,* at June Term, 1931, of FORSYTH.

Civil action to recover on a bond given to the plaintiff by the defendants.

At the June Term, 1927, Forsyth Superior Court, R. A. Barnhardt was convicted of an assault with a deadly weapon upon the plaintiff. The following is the pertinent part of the judgment entered therein:

"It is ordered and adjudged that the defendant pay a fine of $250 and the cost in this case, and the cost in Nos. 523 and 558, and be confined

in the county jail for a term of two years, to be assigned to work on the public roads of Forsyth County.

"It appearing to the court that Mrs. Sarah Myers, State's witness, was seriously injured, to the extent that she is now unable to support herself and make provision for her own necessity, because of the fact that she was run over by the defendant and injured, it is further ordered that upon the payment of the cost in the three cases above set out, and the fine imposed in this case, and the payment into court of the sum of $50.00 for the benefit of Mrs. Myers, he may be released from custody conditioned upon the defendant filing a bond to be approved by the clerk of this court in the sum of $2,500, that he will on the first day of July, and on the first day of every month thereafter until the full sum of $2,500 has been paid, pay the sum of $50 into the office of the clerk of this court for the benefit of Mrs. Sarah Myers or her legal representative and that he will not operate an automobile for a term of two years from the first day of this term. Upon the defendant's failure to file the bond as above set out not later than 27 June, 1927, the clerk is ordered instanter to issue *capias* for the arrest of the defendant that this judgment be carried out."

Pursuant to the judgment entered as above indicated, a bond was executed by the defendants to "Sarah Myers of Forsyth County, her heirs and assigns, for the payment to her of the sum of $2,500," conditioned as follows:

"Now, therefore, if the said R. A. Barnhardt shall well and truly pay into the clerk's office of Forsyth County for the benefit of Sarah Myers or her legal representatives the sum of $2,500, the same due and payable as follows: $50.00 on 1 July, 1927, and $50.00 on the 1st of each and every month thereafter until the entire sum, together with the $50.00 this day paid, shall amount to $2,500, then this bond shall be null and void, otherwise to remain in full force and effect."

The defendant Barnhardt made payments to the clerk for plaintiff's benefit, to the amount of $1,350, leaving a balance of $1,150 now due and unpaid, for the collection of which this suit is brought.

There was evidence on behalf of the plaintiff tending to show that the judgment in the criminal action was entered with the consent of counsel for the defendant therein and counsel appearing with the solicitor for the private prosecution, with the further understanding that Sarah Myers should take a nonsuit in the civil action for damages then pending in the county court, which was done.

From a judgment of nonsuit, the plaintiff appeals.

Parrish & Deal for plaintiff.

Self, Bagby, Councill, Aiken & Patrick for defendants.

STACY, C. J. The practice of suspending judgments in criminal prosecutions, upon terms that are reasonable and just, or staying executions therein for a time, with the consent of the defendant, has so long prevailed in our courts of general jurisdiction that it may now be considered established, both by custom and judicial decision, as a part of the permissible procedure in such cases. *S. v. Edwards,* 192 N. C., 321, 135 S. E., 37; *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011.

It has been held that a court "may suspend judgment upon the understanding that a defendant will compensate an injured party by the payment of money, but it adds no force to such a condition to make it a matter of record. The collection of such damages cannot be enforced by imprisonment without coming in conflict with the constitutional inhibition against imprisonment for debt." *S. v. Whitt,* 117 N. C., 804, 23 S. E., 452. In such case, "the only redress open to the State is in the enforcement of the securities taken, so far as they can be made available." *S. v. Warren,* 92 N. C., 825.

So, in the instant case, while the condition of payment to the plaintiff upon which the defendant, R. A. Barnhardt, was "released from custody," may not, upon breach of said condition, be enforced by execution of the prison sentence entered in the criminal action, nevertheless, if the condition be lawful and the consideration proper, any bond, or security, taken for its performance, or assurance, may be made available to those in whose behalf it was given. *Johnson v. Pittman,* 194 N. C., 298, 139 S. E., 440.

"The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests"—*Mr. Justice Butler* in *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U. S., 353, 75 L. Ed., 1112.

There is nothing in the case which perforce savors of stifling a criminal prosecution. *Aycock v. Gill,* 183 N. C., 271, 111 S. E., 342. Everything that was done had the sanction and approval of the court. Anson on Contract, 301; *Maloney v. Nelson,* 42 N. Y. Supp., 418, affirmed on appeal, 158 N. Y., 351, 53 N. E., 31.

Nor is the bond in suit founded upon a judgment void for alternativeness. *S. v. Schlichter,* 194 N. C., 277, 139 S. E., 448, and cases there cited. Though the decision in *S. v. Bennett,* 20 N. C., 170, might lend color to this view. It is conceded that an alternative or conditional judgment is void, whether rendered in a criminal prosecution or a civil action. *Flinchum v. Doughton,* 200 N. C., 770; *S. v. Jaynes,* 198 N. C., 728, 153 S. E., 410; *Lloyd v. Lumber Co.,* 167 N. C., 97, 83 S. E., 248;

Strickland v. Cox, 102 N. C., 411, 9 S. E., 414. The form of the judgment was not debated in *Cavenaugh v. Thompson,* 201 N. C., 469.

If it should be determined, however, that the bond in question was given as a ransom for the defendant's freedom, it could not be enforced under the principles announced in *Johnson v. Pittman, supra; Aycock v. Gill, supra; Corbett v. Clute,* 137 N. C., 546, 50 S. E., 216, and *Comrs. v. March,* 89 N. C., 268. Const., Art. I, sec. 35. "Neither the good intentions of the prosecutor and defendant, nor the approval of the judge, can avail if, in fact, the consideration for the agreement was illegal"—*Stirling, J.,* in *Windhill Local Board v. Vint,* 45 Ch. D. (C. A.), 351.

On the other hand, it would seem that the defendants are in no position to complain at the civil liability voluntarily assumed under the bond, if, by executing it, they thereby induced the plaintiff to forego her rights in the civil action for damages then pending. *Keir v. Leeman,* 6 Q. B. (Eng.), 321; Anson on Contract, 301.

New trial.

VERNON TART, BY HIS NEXT FRIEND EDWARD TART, v. SOUTHERN RAILWAY COMPANY AND NORTH CAROLINA RAILROAD COMPANY.

(Filed 8 January, 1932.)

1. Appeal and Error J g—Where judgment overruling motion of nonsuit is reversed, other alleged errors in trial become immaterial.

Where the Supreme Court on appeal reverses the judgment of the lower court overruling the defendant's motion as of nonsuit, other alleged errors in the trial of the action become immaterial and will not be considered on appeal.

2. Railoads D b—Evidence of plaintiff's contributory negligence held to bar recovery as a matter of law.

Where in an action by an eleven-year-old boy, brought by his next friend, to recover for an injury received by the plaintiff in an accident at a railroad crossing, the plaintiff introduces some evidence of the defendant's negligence in failing to give the proper signals and warnings of its approaching train, etc., but considering only the evidence most favorable to the plaintiff, it tends to show that he attempted to walk across the defendant's tracks at a grade crossing, that there was an open space of about twenty feet between a track on which some box cars were standing and the track on which the train was approaching, that the track was straight for some distance and that the defendant's train could have been seen and heard, that the plaintiff failed to see the train until it was almost upon him, when he started to run, fell, and was struck and injured, but that he was normally alert and intelligent for his age: *Held,*

the evidence discloses contributory negligence barring recovery as a matter of law, and the defendant's motion as of nonsuit should have been allowed, the law not extending its protection to those who can see and hear and will not do so.

3. Negligence C a—Degree of care law requires to be exercised by eleven-year-old boy for his own safety.

While an eleven-year-old boy is not chargeable with the exercise of that degree of caution before crossing a railroad track as a person of mature years, he is required to exercise that degree of care as is reasonably within his capacity and which the evidence shows that he should have exercised for his own safety.

APPEAL by plaintiff from *Warlick, J.*, at September Term, 1931, of GUILFORD. Affirmed.

This is an action to recover damages for personal injury alleged to have been suffered by the plaintiff through the negligence of the Southern Railway Company. The case was tried in the Municipal Court of the city of High Point. The defendants' motion for nonsuit was denied, the usual issues were submitted to the jury and answered in favor of the plaintiff, and judgment was given awarding damages. The defendants appealed to the Superior Court, and the judgment of the municipal court refusing the motion for nonsuit was reversed.

Gold, York & McAnally for plaintiff.
Roberson, Haworth & Reece and Richard C. Kelly for defendants.

ADAMS, J. Whether other error prejudicial to the defendants was committed during the trial in the municipal court is a matter with which we need have no concern if the Superior Court was correct in dismissing the action, and this question we must determine by giving to the evidence such construction as is most favorable to the plaintiff. Given this interpretation the evidence tends to establish the following facts:

The plaintiff was injured at the Taylor Street crossing in the city of High Point. At this place the defendants have five tracks extending northeast and southwest: a sidetrack, a passing track, the southbound main line, the northbound main line, and another sidetrack. Broad Street runs parallel with the tracks on the north side and Taylor Street intersecting with Broad Street crosses the tracks and intersects with Millis Street on the south. Midway between the outside tracks the crossing was about ten feet in width—wide enough for one automobile to pass another; at other places it was much wider. It was smooth in the center but on each side the rails were two or three inches above the ground. There was an arc light fourteen steps from the outside rail on the west side of the railroad. A watchman's house, six by eight feet,

stood near the intersection of Broad and Taylor streets, but at the time of the injury no watchman was on duty.

On the evening of 4 April, 1930, at about half-past seven o'clock the plaintiff and Gilchrist Newell passed from the south side over the Taylor Street crossing, went to a drug store for ice cream, and started back to the home of the plaintiff's aunt. They passed the watchman's house and again went on the crossing. On their right-hand, that is, fourteen steps from the southern side of the crossing there were box cars on the sidetrack and the passing track nearest Broad Street. Between the second track from Broad Street (the passing track) and the northbound track on which the injury occurred lies the southbound track. The distance between the passing track and the southbound is about ten feet, and ten feet between the southbound and the northbound, making an open space of about twenty feet between the passing track and the northbound track. On the latter a long freight train came from the south or southwest.

The plaintiff was eleven years and seven months old. He and his companion were walking. He testified that no signal was given of the approaching train—that he heard neither bell nor whistle. He then portrayed the accident.

He said that he looked before going on the tracks but could not see the train on account of the box cars; that he looked again at the watchman's house; that he looked the last time when he was in front of the cars; and that he did not know how many tracks he crossed or the track on which the train was running. When asked whether he looked after he had passed the cars he answered, "The train was right on me when I looked; . . . that was after I had passed the end of the box cars. . . . It was right on me and I started to run and fell . . . I fell on my hands and the train hit me as I was getting up. I didn't see the train before I started to run across. I never saw the train until it was right over me. I saw the train before I stumbled; I was not running when I stumbled; I started to run and fell. I was in the middle of the track, right at it. I was right on one of the tracks when I first saw the train, on the track the train was on. After that is when I stumbled and fell. I stumbled on a rail, the rail the train was on. I didn't fall over the one I was standing on; I fell over the next one. . . . The front part of the train hit me, the cowcatcher. I was in the middle of the track and that was the first time I saw the train . . . I looked after I went by the end of the cars. The train was right on me. I got hit before I saw it."

The plaintiff's evidence tended to show that the tracks were straight for at least three-quarters of a mile, although the plaintiff testified

that at one place there was a curve. His father said the accident happened sixty-one steps from the crossing, and there, on the north side, the plaintiff was found with a crushed leg and a cut on his back. Other witnesses testified in corroboration.

Giving the plaintiff the benefit of every reasonable inference and granting the engineer's negligent failure to signal the approach of the train and the railway's negligent failure to observe the ordinance, we cannot escape the conviction that the plaintiff's negligence was the proximate cause of his injury. After going over the two tracks on which the box cars were standing he entered a zone twenty feet in width in which according to all the evidence he offered the range of his vision was unobstructed, and deliberately walked directly in front of the oncoming train. To say that he did not see or hear it is a challenge to universal experience. The courts give slight heed to the testimony of a witness who is willing to say that he cannot see or hear when there is nothing to keep him from seeing and hearing: "The law is not able to protect one who has eyes and will not see—ears and will not hear." *Harrison v. R. R.*, 194 N. C., 656. The plaintiff first saw the train when it was "right on" or "right over" him; he did not say that he could not have seen it, merely that he did not. His testimony manifests his negligence. *Eller v. R. R.*, 200 N. C., 527; *Bailey v. R. R.*, 196 N. C., 515.

Upon the facts disclosed his age does not bar the defense of contributory negligence. The doctrine is settled that a child is not chargeable with the same degree of care as an experienced adult and that the standard of conduct varies with his age, capacity and experience; but he must exercise care and prudence equal to his capacity. *Alexander v. Statesville*, 165 N. C., 527. The law with reference to the employment of minors in the operation of machinery has no application. *Rolin v. Tobacco Co.*, 141 N. C., 300; *Hauser v. Furniture Co.*, 174 N. C., 463. In traversing a public crossing the plaintiff was required as a matter of self-protection simply to make use of his eyesight and his hearing. He was an "average boy, had been in several schools," and was fully competent to perform this duty. *McCulloch v. R. R.*, 188 N. C., 797; *Foard v. Power Co.*, 170 N. C., 48; *Murray v. R. R.*, 93 N. C., 92.

In the foregoing discussion we have not considered any part of the defendants' evidence which is repugnant to or inconsistent with that of the plaintiff. It may be noted, however, that four of their witnesses testified to a statement of Gilchrist Newell, who was with the plaintiff, to the effect that he "hopped the train and Vernon was to catch it right behind him": that he jumped off, sought the plaintiff, and found him

injured. The plaintiff's evasive answers to questions asked him on cross-examination in regard to these circumstances are not characterized by commendable frankness. However this may be, the proximate cause of the deplorable injury must be assigned to the plaintiff's negligence. Judgment

Affirmed.

FARM SUPPLY COMPANY, A CORPORATION, v. E. D. DAVIS AND WIFE, MAGGIE DAVIS.

(Filed 8 January, 1932.)

1. **Election of Remedies A d—Where note is given in payment of open account creditor must elect between action on note and action on debt.**

   Where in an action against a husband and wife the plaintiff elects to sue on a note given by the husband for the wife's debt due on open account with the plaintiff, the plaintiff is estopped by its election to maintain the action against the wife on the open account, it not being in a position upon judgment on the note to put the parties in *statu quo*, and its evidence that in taking the husband's note it did not intend to release the wife from her obligation is properly excluded, and a judgment as of nonsuit in favor of the wife is properly allowed.

2. **Payment C a—Note given for open account is conditional payment and where it is not paid creditor may sue on either note or account.**

   The effect of taking a promissory note from the husband for the separate obligation of the wife due on open account is to postpone the maturity of the wife's debt to the due date of the note, but if the note is not paid at maturity the rights of the creditor on the open account are revived and he may sue either on the note or the account.

APPEAL by plaintiff from *Sink, J.*, and a jury, at July Term, 1931, of MCDOWELL. No error.

This is an action brought by plaintiff against the defendants. There was evidence on the part of plaintiff to the effect that the defendants are husband and wife. That Maggie Davis ran a dairy near Marion, N. C., and owed the plaintiff $551.69, and E. D. Davis owed plaintiff $42.85. C. M. Pool, secretary, treasurer and manager of the plaintiff corporation, testified: "I took E. D. Davis' note for $551.69, that is all we are suing on in this case. At that time Maggie Davis was indebted to Farm Supply Company in the sum of $551.69. . . . I am suing on the note."

The court below charged the jury: "If you believe the evidence you will answer the first issue, 'What amount, if any, is the plaintiff entitled

to recover of the defendants?' $551.69 as to the defendant, Mr. Davis; nothing as to Mrs. Davis." Judgment was rendered on the verdict. Plaintiff excepted, assigned error and appealed to the Supreme Court.

W. R. Chambers for plaintiff.
C. C. Lisenbee for defendants.

CLARKSON, J. At the close of plaintiff's evidence the defendants made motions for judgment as in case of nonsuit. Motion overruled as to the defendant E. D. Davis and allowed as to Maggie Davis. The plaintiff contends that the court below was in error in excluding the following: "Q. Mr. Pool, when you had this note executed and accepted it, did you mean to release Maggie Davis of any indebtedness she owed you? (If witness had been allowed to answer, he would have answered: 'No, sir, I didn't.')" We cannot so hold on this record.

On the other hand, the defendant Maggie Davis contends that the entire evidence on the record discloses that plaintiff elected to sue on the note given by E. D. Davis for his wife's (her) indebtedness to plaintiff, and relies on the following in *Buggy Co. v. Dukes,* 140 N. C., at p. 395-6: "It is true, as contended by defendant, that the acceptance of a negotiable security for an open account, suspends the right of action until the maturity of the note and then if the plaintiff will resort to his original cause of action, he must surrender the security. The acceptance of the promissory note, unless expressly so agreed upon, will not discharge the original cause of action. The law is well stated in Clark on Contracts, 435 (2d ed.): 'In such a case the position of the parties is that the payee, having certain rights against the other party, under a contract, has agreed to take the instrument from him instead of immediate payment of what is due him, or immediate enforcement of his right of action, and the other party, in giving the instrument, has thus far satisfied the payee's claim, but, if the instrument is not paid at maturity, the consideration of the payer's promise fails and his original rights are restored to him. The effect of receiving a negotiable instrument conditionally, is merely to suspend the right to sue on the original contract until the instrument matures, and when it matures, and is not paid, to give the right to sue either on it or on the original contract.' Norton, Bills and Notes (3d ed.), 20; *Gordon v. Price,* 32 N. C., 385."

She further contends that the election made by plaintiff to sue on the note, made by her husband, E. D. Davis, indicated an express agreement and tantamount to the discharge of the original cause of action against her, and plaintiff now has a judgment against her husband for the in-

debtedness. The plaintiff, although he brought an action against E. D. Davis and wife, Maggie Davis, having elected to sue on the note and take judgment against E. D. Davis the husband, is, on the record and under the pleadings, in no position to put the parties in *statu quo*. He therefore is estopped to maintain this action against the wife, Maggie Davis.

No error.

N. T. PENLAND v. R. J. REYNOLDS TOBACCO COMPANY.

(Filed 8 January, 1932.)

Appeal and Error E a—Appeal in this case dismissed for insufficiency of the record.

Where on appeal to the Supreme Court the only exceptions and assignments of error are to the judgment of the Superior Court overruling the plaintiff's exceptions and assignments of error relating to a part of the charge of the judge of the general county court on the issue of negligence, and the issues and answers thereto and the judgment of the county court do not appear of record, the appeal will be dismissed, the Supreme Court being unable to determine from the record whether the answer of the jury to the issue of contributory negligence rendered the alleged error immaterial.

STACY, C. J., not sitting.

APPEAL by plaintiff from *Harding, J.*, at June Term, 1931, of BUNCOMBE. Appeal dismissed.

This is a civil action for actionable negligence tried before Guy Weaver, judge, and a jury, February Term, 1930, General County Court of Buncombe County.

The plaintiff, on 16 November, 1929, bought a plug of Reynolds' Suncured Chewing Tobacco from Young Brothers store, at Woodfin, N. C., which was manufactured by defendant R. J. Reynolds Tobacco Company. Later in the evening, in the presence of several men, plaintiff attempted to take a chew from the tobacco, felt something hard which he thought was a stem, attempted to bite through it, cracking one tooth and injuring another. He found a nail embedded in the tobacco. Plaintiff testified as to his suffering from the injury; was treated at least fourteen times by the dentist, incurring a bill of $75.00.

The defendant denied the material allegations of the complaint and denied that it was guilty of any negligence, and set up the plea of contributory negligence. As further defense and answer defendant alleges: "That the defendant is a corporation engaged in the manufacture

of chewing and smoking tobacco, and of selling the same to the general wholesale trade throughout the United States, and that in the manufacture of said products the defendant uses the most up-to-date methods which are approved and in general use, and this defendant also avers that in the manufacture of its products the most up-to-date, approved and efficient machinery is used for the purpose of removing any impurities or foreign substances from the tobacco, and that the said machinery is operated by employees in the exercise of reasonable and ordinary care, and this defendant again avers that if any foreign substance or deleterious matter such as a nail was found in a plug of tobacco manufactured by this defendant, which is again expressly denied, that the presence of the said foreign substance or deleterious matter was not due to any negligence on the part of this defendant but due instead to a pure accident."

J. W. Pless for plaintiff.
Johnson, Smathers & Rollins for defendant.

CLARKSON, J. From the pleadings in this cause the usual issues are as follows: (1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? (3) What amount of damage, if any, is plaintiff entitled to recover?

The action was commenced in the General County Court of Buncombe County. From the charge of the judge in the general county court, it appears that the above issues were submitted to the jury, but the issues and answers thereto and judgment of the general county court, do not appear in the record. The material exceptions and assignments of error made by plaintiff in the general county court relate to certain evidence and the charge on the first issue as to negligence. From the record we do not know how the issues were answered.

We have frequently called to the attention of the profession the importance of care being taken in making up appeals to this Court. We have spent considerable time in examining the record and briefs in this action, so that an opinion could be written as to an interesting question of law presented, on the judge's charge in the General County Court of Buncombe County, to which plaintiff excepted and assigned error. On appeal to the Superior Court the plaintiff's exceptions and assignments of error were overruled by the Superior Court and plaintiff then appealed to the Supreme Court, relying alone on the exception and assignment of error in reference to certain parts of the charge of the judge in the General County Court of Buncombe County relating

to the issue of negligence. No issues and answers thereto or judgment in the general county court, from which plaintiff appealed to the Superior Court, making exceptions and assignments of error, appear in the record. The only exception and assignment of error on appeal to this Court by plaintiff applies to the alleged error on the issue of negligence, *non constat* the second issue of contributory negligence may have been decided against plaintiff and the alleged error on the first issue, of which plaintiff complains of the charge of the judge in the General County Court of Buncombe County, even if valid, would be immaterial and not prejudicial. We just do not know how this is.

The appeal of plaintiff is dismissed. *Pruitt v. Wood*, 199 N. C., 788. Dismissed.

STACY, C. J., not sitting.

STATE v. JAMES W. MORRISON.

(Filed 8 January, 1932.)

Arson C a—Indictment under C. S., 4245, need not specify any particular fraudulent purpose for burning of dwelling-house.

Where in a prosecution under C. S., 4245 the indictment charges that the defendant burned his dwelling-house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged "for a fraudulent purpose, and the State alleges that the fraudulent purpose" was to collect the insurance money, *Held:* it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal, and the judgment will be upheld, refined technicalities of procedure having been almost entirely abolished. C. S., 4610, 4625.

CRIMINAL ACTION, before *Moore, J.*, at April Term, 1931, of CABARRUS.

The defendant was indicted upon a bill charging in substance that on 6 December, 1929, "he did unlawfully, wilfully and feloniously, while being bona fide owner thereof, living in and occupying the said house and residence which he was then and there using as a dwelling-house, burn the same for the fraudulent purpose of collecting $3,500 of insurance which the defendant was carrying on said building and the contents thereof." There was sufficient evidence of the commission of the crime charged to be submitted to the jury, the jury having convicted the defendant, he was sentenced to serve a term of not less than five nor more than seven years in the State's prison.

From judgment upon the verdict the defendant appealed.

Armfield, Sherrin & Barnhardt for defendant.

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

BROGDEN, J. The indictment was founded upon C. S., 4245. The bill of indictment alleged that the defendant set fire to his residence for the fraudulent purpose of collecting fire insurance on the building and the contents thereof.

The trial judge charged the jury as follows: "Now, gentlemen, if you find beyond a reasonable doubt, as I have defined reasonable doubt to you, that this defendant either by himself or by the procurement of others, wilfully and wantonly set fire to that house and burned it, for a fraudulent purpose, and the State alleges that fraudulent purpose was the intent to burn that building and destroy it that he might collect the insurance money—if you find that he did that, or procured it to be done by another who aided and assisted him, then it would be your duty to find him guilty, if you so find beyond a reasonable doubt. If not, it would be your duty to give him the benefit of the doubt and acquit him." The defendant attacks the correctness of the charge upon the ground that as the bill of indictment specified the particular fraudulent purpose moving the defendant to burn the house that the State was limited to proof of the particular purpose specified in the bill of indictment. Hence it was contended that when the trial judge instructed the jury that if the defendant wilfully and wantonly burned the house for a fraudulent purpose that the defendant was prejudiced by such charge in that the proof of guilt was not limited to the fraudulent purpose of procuring fire insurance money.

Manifestly, it was not necessary that the bill specify any particular fraudulent purpose. *S. v. Hedgecock,* 185 N. C., 714, 117 S. E., 47; *S. v. Maslin,* 195 N. C., 537, 143 S. E., 3. Consequently, an unnecessary allegation in the bill would not, necessarily, be fatal. Indeed, in *S. v. Anderson,* 193 N. C., 253, 136 S. E., 723, the defendant was indicted and convicted upon a bill of indictment based upon C. S., 4245, which charged a fraudulent purpose in general terms, and the judgment was upheld upon appeal. "Moreover, the courts now disregard these refinements, so as not to permit the defendant to avoid answering a bill of indictment because there are merely technical and formal errors in the bill of indictment. The refined technicalities of the procedure at common law in both civil and criminal cases have almost entirely, if not quite, been abolished by our statute, C. S., 4610 to 4625." *S. v. Hawley,* 186 N. C., 433, 119 S. E., 888.

No error.

FLORA PATRICK, BY HER NEXT FRIEND, J. WESTON MICHAL, v. A. M. BRYAN AND HASSON, ANDERSON AND TROBAUGH COMPANY.

(Filed 8 January, 1932.)

1. Negligence D b—The giving of first aid to injured person is not evidence of admission of negligence.

One driving an automobile upon the highway who hits and injures a pedestrian thereon does not impliedly admit his liability by stopping and rendering aid in procuring a physician for the injured person and arranging for his immediate necessary attention at a hospital, and doing such other acts as are dictated by humanity under the circumstances.

2. Judgments K c—Held: court should have found further facts before setting aside judgment based on compromise with minor plaintiff's father.

Where the father of a minor child injured in an automobile accident reaches a compromise agreement with the attorney of the insurance company carrying indemnity insurance on the car causing the accident, and to effectuate the compromise agreement, the attorney for the insurance company has a next friend appointed for the minor and brings a friendly action, reducing the compromise agreement to judgment, and thereafter the father and mother of the minor have another next friend appointed and seek to have the judgment set aside as being contrary to the course and practice of the courts and for fraud: *Held*, before ordering the judgment set aside the trial court should find whether the driver of the car was negligent, which was denied by the defendant, whether the plaintiff was guilty of contributory negligence, and should find whether the compromise judgment was just and fair and whether the rights of the minor were prejudiced, and where the court has failed to find these necessary facts the case will be remanded.

3. Parent and Child A c—Father of minor child is its natural guardian.

The father of a minor child is its natural guardian, and his rights of control over the child is superior to that of the mother.

4. Judgments K g—Order setting aside judgment should provide for accounting of moneys paid out under the judgment.

Where the defendants have paid a judgment rendered against them in an action involving the question of their actionable negligence in injuring another, and later this judgment is set aside for fraud or as being contrary to the course and practice of the courts, the order vacating the judgment should provide for an accounting of the moneys paid by the defendant under the judgment so vacated.

5. Appeal and Error J c—Findings of fact by trial court are conclusive only when supported by any competent legal evidence.

The findings of fact by the trial court are conclusive on appeal when supported by any competent evidence, but where the record does not contain evidence in support of a finding it will not be sustained on appeal.

ADAMS and CONNOR, J.J., concur on the ground that the rights of the plaintiff under her motion are not finally determined by the court's opinion.

PATRICK *v.* BRYAN.

APPEAL by defendants from *Stack, J.*, at September Term, 1931, of BUNCOMBE. Error and remanded.

Application for the appointment of next friend to Flora Patrick was regularly made before the clerk of the Superior Court of Buncombe County, 11 March, 1930. On the same day an order was made appointing J. Weston Michal "after making due inquiry as to the fitness" and "it is found by the court to be a fact that the said J. Weston Michal is a reputable and disinterested citizen and a fit and suitable person to act as next friend to the said minor in said action," etc.

The summons in the action was instituted the same day. Complaint was filed alleging actionable negligence by plaintiff against defendant A. M. Bryan and his employers, the other defendants in this action. It is alleged in the complaint "That due to said reckless, negligent and wrongful conduct of the defendant, A. M. Bryan, and of the defendant, Hasson, Anderson and Trobaugh Company, by and through its agent and employee, A. M. Bryan, the plaintiff, Flora Patrick, was forced to incur numerous and large debts, to wit, as follows: Mission Hospital, $299.66; Dr. Arthur Reeves, $250.00; Dr. W. A. Sams, $95.00; extras at Mission Hospital, anæsthetic, $20.00, dentist, $5.00, special nurse, $24.75; taxi bill due to J. R. Henderson, $30.00. That the plaintiff's father, John Patrick, has been put to great expense in taking care of his injured daughter, Flora Patrick, plaintiff in this action, and has incurred numerous expenses on account of the injuries of his said daughter, all for her benefit and welfare in the sum of $255.00. That the defendant, A. M. Bryan, at the time of said injury, advanced to John Patrick, father of the plaintiff, $20.00 to cover immediate expenses incurred by him, and that the said A. M. Bryan advanced to Dr. W. A. Sams $25.00, to be applied by him on his bill for services rendered, and that the said A. M. Bryan further advanced the sum of $25.00 to Dr. Sams, to be paid as entrance fee to the Mission Hospital, and that said last mentioned sum of $25.00 entrance fee was paid by the said Dr. W. A. Sams to the said Mission Hospital and credited by it upon its bill for expenses incurred for the care and treatment of this plaintiff." Prayer for $2,000 damages. This complaint was filed by R. Hilliard Greenwood, attorney for plaintiff, and the allegations fully protect the rights of Flora Patrick.

The defendants denied any negligence and set up the plea of contributory negligence and alleged "In response to the allegations of the complaint, these defendants say that it is admitted that the highway at the point referred to was straight and that the day was clear, but that all the other allegations contained in said paragraph are untrue and therefore denied, and the defendants specifically deny that the de-

fendant, A. M. Bryan, was driving at a reckless, negligent and unlawful rate of speed, but on the contrary state that he was driving at a careful, prudent and safe rate of speed, and that he saw the plaintiff, Flora Patrick, standing on the right-hand side of the road, and drew his car over to the left-hand side of the road, so that he might not even drive near her, but as he approached she suddenly, without warning, darted out in front of him, and though he drove his car clear out of the road, on the left-hand side, to avoid striking her, he could not do so, and that he was in no wise to blame for said accident." This answer was signed by Bourne, Parker & Jones, attorneys for defendants.

The record discloses that the following issues were submitted to the jury at March Term, 1930, of the Superior Court of Buncombe County:

"1. Did the defendant, A. M. Bryan, negligently injure the plaintiff, Flora Patrick, as alleged in the complaint? Answer: Yes.

2. In what amount, if any, are the defendants indebted to the plainiff? Answer: $1,049.41."

The following judgment was rendered: "This cause coming on to be heard, and being heard, before his Honor, Michael Schenck, judge presiding over the courts of the 19th Judicial District, and a jury, and the issues hereinafter set out having been submitted to the jury, and having been answered by the jury as follows: (see issues above). And his Honor finding from the pleadings and the evidence that the plaintiff has incurred certain expenses for care and medical treatment, and that the plaintiff is desirous of having said sums paid, and that same should be paid, it is now therefore, ordered, adjudged and decreed, that the plaintiff have and recover of the defendants, and of each of them, the sum of $1,049.41, and the costs of this action incurred, and it is further ordered, adjudged and decreed, and the clerk of the court is hereby directed to pay out of said sum the following amounts to the persons hereinafter indicated: to the Mission Hospital $349.41; to Dr. Arthur Reeves $250.00; to Dr. W. A. Sams $95.00; to J. R. Henderson $30.00; to John Patrick $255.00. And it appearing to the court from the pleadings and the evidence, that at the time of said injury defendant A. M. Bryan advanced the sum of $70.00 cash for the care and treatment of the plaintiff, it is now, therefore, further ordered and adjudged that the clerk pay to the said A. M. Bryan out of the amount of the judgment, hereinbefore set out, the sum of $70.00. This 12 March, 1930.

MICHAEL SCHENCK, *Judge Presiding.*"

W. T. Davis ("signed in the presence of James E. Rector") made application to the clerk of the Superior Court of Madison County, knowing that a next friend for Flora Patrick had been appointed in

Buncombe County, setting forth certain facts: "That the father and mother of the said infant, Flora Patrick, who is about 8 years of age, have requested the undersigned to apply for appointment as next friend of the said infant to prosecute her claim for damages as aforesaid, . . . Wherefore, the undersigned makes application that he be appointed as next friend of the said infant, Flora Patrick, to the end that he may institute and conduct an action for damages in her behalf on account of the personal injuries she has sustained as above set forth. This 10 September, 1930."

The clerk of the Superior Court of Madison County, after finding that he is a reputable and disinterested citizen and is a fit and suitable person, appointed W. T. Davis, next friend to Flora Patrick. The acceptance of the appointment was on 10 September, 1930, and was witnessed by James E. Rector, who as attorney made the certificate upon which the order was granted to sue in *forma pauperis,* that Flora Patrick "has a good and meritorious cause of action in fact and law."

On 4 August, 1931, nearly a year and a half after the judgment was rendered by Schenck, J., a motion was made in this cause in Buncombe County Superior Court. "The plaintiff, through her counsel, James E. Rector, Esq., enters a special appearance, and moves the court for an order striking out and vacating a judgment, or pretended judgment, entered in a cause entitled as above," etc. That the judgment is irregular and void: "The said alleged judgment was procured by the defendants by their own improper use of court process and procedure and the means employed and used by the defendants, in obtaining said judgment, were contrary to the course and practice of our courts and amounts to a fraud upon the court and the infant plaintiff." Alleging in detail the facts on which the motion is made and that the whole proceeding was *ex parte;* that the pleadings and conduct of the case was directed by the defendants' attorneys and the proceeding was not adversary. The motion was verified on 4 August, 1931, by W. T. Davis. Motion was made by Bourne, Parker & Jones, attorneys for defendants, "especially appearing for the purpose, and only for the purpose of moving to dismiss the pretended motion herein filed. . . . (1) For that the purported proceeding or motion is in fact an attempt to attack a judgment of the Superior Court of Buncombe County regularly entered and regular upon its face, upon a pretended allegation of fraud practiced against the infant plaintiff, Flora Patrick. These movants respectfully show to the court that it is necessary to the procedure and rules of practice in the State of North Carolina to attack a judgment for fraud in such manner, and therefore movants having entered their

appearance for such purpose, move the court that said motion be dismissed. (2) For the reason that the infant plaintiff, Flora Patrick, in this motion is not represented by any person appointed for that purpose."

An answer to the motion of James E. Rector, attorney, and sworn to by Davis; Bourne, Parker & Jones, attorneys, denied all the material allegations of fact set forth in the motion and concluded the answer as follows: "By further answer to the motion and the allegations of fraud contained therein, these respondents say and aver that the settlement of the said case was conducted and had in the utmost good faith, and without any thought whatever to overreach, or take advantage of the plaintiff or any party connected with said action; that the settlement was made at the earnest solicitation of the father of the injured child, the facts surrounding said injury, as counsel verily believes, not being sufficient to justify the admission of any negligence on the part of defendants, and in fact it appearing that the accident by which the child was injured was unavoidable, or the result of an accident for which the plaintiff could not recover in law; that the said settlement was made upon the very terms demanded and requested by the father of the said injured child, and with the full belief, upon the part of the defendants, that they were acting to the very best interest of said injured child, and in presenting the matter to the court every effort to save expense to the child and her father was employed, in order that the benefits of the funds paid by the defendants might inure to said injured child. That the father of said injured child has never, to the knowledge of these respondents made any complaint whatever on account of said settlement, but, in the opinion of these respondents, this action is brought through the intermeddling of certain parties, moved by the hope of profit to themselves." This answer was sworn to on 20 August, 1931, by John DuBose, who swears: "That he is a practicing attorney and at the time of the institution of the action and entering of judgment in the above entitled cause was connected, by employment, with the law firm of Bourne, Parker & Jones, and made the investigations, knows the facts in connection therewith, has read the foregoing answer and knows the contents thereof," etc., to be true.

The court below found the facts and set aside the judgment rendered by Schenck, J. The defendants made numerous exceptions and assignments of error, the material ones and necessary additional facts will be considered in the opinion.

James E. Rector for plaintiff.

A. Y. Arledge for defendants.

CLARKSON, J. The record in this action discloses that Flora Patrick, on 19 December, 1929, was a child about eight years of age, living with her parents, John and Lillie Patrick. She was injured by having her leg broken, in front of her home in Madison County, about five o'clock in the afternoon, on the State Highway which leads from Waynesville to Hot Springs, by an automobile driven by A. M. Bryan, a traveling salesman for Hasson, Anderson and Trobaugh Company, a wholesale firm of Morristown, Tenn., all being defendants to this action. A. M. Bryan contended that the little girl was "standing on the right-hand side of the road and he drew his car over to the left-hand side of the road, so that he might not even drive near her, but as he approached she suddenly, without warning, darted out in front of him, and though he drove his car clear out of the road, on the left-hand side, to avoid striking her, he could not do so, and that he was in no wise to blame for said accident."

Immediately after the injury to the child, A. M. Bryan went to where the father of Flora Patrick (John Patrick) was working, some 8 miles away, and in the language of John Patrick notified him "of what had happened." And "the said A. M. Bryan carried this affiant (John Patrick) in his automobile to his home and then the said Bryan called Dr. Sams of Marshall, who called to see Flora Patrick at about 9 o'clock on the same night; that on the following day the said Flora Patrick was removed under the direction of Dr. Sams, to Mission Hospital, at Asheville, the said A. M. Bryan having made necessary arrangements to that end." It seems that the defendant A. M. Bryan did everything after the injury to the child that could be expected of a humane being. In fact, fully carried out the letter and spirit of the "hit and run" statute. Code, 1931 (Michie), sec 2621(71); 2621(103); Pub. Laws 1927, chap. 148, sec. 29(a); sec. 61. *S. v. Durham,* 201 N. C., 724.

In the affidavit of John Patrick, sworn to on August 10, 1931, long after the judgment in this action was rendered at March Term, 1930, and tried before Schenck, J., John Patrick alleges that Bryan "notified this affiant of what had happened." Bryan said it was not his fault and the implication is that he so told the father, John Patrick. The conduct of Bryan was highly commendable.

In *Barber v. R. R.,* 193 N. C., at p. 696, the law is thus stated: "The defendant, not knowing whether it was liable or not, had the humanity to take 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 court should hold in any respect was an implied admission or circumstance tending to admit liability. If a court should so hold, it would tend to stop, instead of encourage, one injuring another from giving

aid to the sufferer. It would be a brutal holding, contrary to all sense of justice and humanity." *Norman v. Porter,* 197 N. C., 222.

In *Brown v. Wood,* 201 N. C., at p. 312, the matter is further stated: "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." In the *Brown case, supra,* there was some evidence to indicate an admission of liability and the matter was on that aspect left to the jury.

The defendants had casualty insurance, and under the terms of the policy gave notice to the Insurance Company of the injury to Flora Patrick. The firm of Bourne, Parker & Jones were attorneys for the Casualty Company. An attorney in the office of Bourne, Parker & Jones, took up the matter of compromise settlement with John Patrick, the father of Flora Patrick, and after negotiation between them wrote the following letter embracing the terms which were accepted by John Patrick:

"6 March, 1930.

Mr. John Patrick, Hot Springs, N. C.

Dear Mr. Patrick:

Yesterday I received the following wire from the Insurance Company: 'Authorize ten hundred fifty Patrick case for immediate settlement. Wire result negotiations.' I tried to call you last night and again this morning over long distance, but the operator told me that you lived 15 miles in the country and that she could not get word to you. I later got in communication with Dr. Sams over long distance and he told me that you had authorized him to accept that amount in settlement. I have therefore wired the Insurance Company that you have accepted their offer. As I explained to Dr. Sams, it will be necessary to have a friendly lawsuit in order to settle this claim because your daughter, Flora Patrick, is under 21 years of age. This expense will be borne by the Insurance Company and we will prepare all the papers and take care of the details. It will be necessary to appoint a next friend to bring suit and a guardian to receive the settlement and at that time the court will direct the payment of all just bills. As I know you are anxious to get

this money as soon as possible, I suggest that we bring the action in Buncombe County, as we have a court in session now and there is no court at present in Madison County. As this case will not be contested, we can try it in a very few minutes before a jury, and if you will come to our office tomorrow or next day, we will try to dispose of this matter. I have advised Dr. Sams that I am writing you about this and suggested that he might care to come with you, but it will not be necessary for him to do so. We can get the judgment in a few days and then be prepared to give you the money as soon as we receive the check from the Insurance Company. Yours truly, John DuBose."

"I accept the above offer and confirm Dr. Sams' action 3-8-30.
Witness: C. A. P. Moore. (Signed.) John Patrick."

C. A. P. Moore, who witnessed the acceptance, testified that he "Was asked to witness the signature of one John Patrick; that said affiant saw the said John Patrick sign his name to the acceptance of the offer contained in a carbon copy of a letter addressed to John Patrick, Hot Springs, N. C., dated 6 March, 1930; that said letter and his acceptance thereof was read to the said John Patrick before he signed same; that the copy of said letter and acceptance hereto attached is a true copy of the paper-writing signed by the said John Patrick. That affiant has no interest in this matter whatever except to tell the truth."

In *Armstrong v. Polakavetz,* 191 N. C., at p. 735, the following observation is made: "The law encourages and looks with favor on litigants adjusting differences—compromises like the present one have been held binding from time whence 'the memory of man runneth not to the contrary.' It is constantly done between litigants to their credit and good judgment. The finest exhibition of a generous settlement was made when there was a strife between the herdsmen of Abram's cattle and Lot's cattle. The patriarch Abram said: 'For we be brethren' Gen., chap. 13, part verse 8." *Tise v. Hicks,* 191 N. C., 609. *Eggleston v. Crump,* 143 S. E. (Va.), at p. 689.

The court below (part of findings of fact 9) finds: "That the defendants claim that a compromise settlement had been made by the defendants with the father of Flora Patrick and the suit was simply carrying out the compromise, but the father emphatically denies this, so does the mother." The defendants excepted and assigned error to the above finding of fact.

The mother of Flora Patrick states in her affidavit that she did not authorize any suit to be brought. She does not deny that a compromise settlement had been agreed upon. The father, John Patrick, is the

guardian by nature of the child. He nowhere denies that the compromise settlement had been agreed upon. In fact, he could read and write and deliberately stated "I accept the above offer and confirm Dr. Sams' action." In Peck, Domestic Relations, 3d ed. (1930), chap. 18, p. 371, sec. 30, it is said: "The father has at common law an unquestioned right of custody and control over his minor children as against the mother, and still more clearly as against any third person."

In matters of this kind, the findings of fact by the court below are not subject to review on appeal if they are supported by any competent evidence. All the findings of the court below are not supported by the record. This exception and assignment of error on the part of the defendants, goes to the very heart of the controversy, and we think well taken.

Another material matter is entirely left out of the findings of fact by the court below. Bryan alleges that he was guilty of no negligence, and on the entire record it is not denied, and it is set up by Bryan as a defense, that Flora Patrick was guilty of contributory negligence, and this is not denied. This matter should have been fully investigated by the court below and findings of fact on this aspect.

In *Hoggard v. R. R.*, 194 N. C., at p. 259-260, it is stated: "In the present case the boy was 9 years of age. The question of contributory negligence is one for the jury. While a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in an action to recover damages therefor, whether under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care. *Fry v. Utilities Co.*, 183 N. C., 281." *Brown v. R. R.*, 195 N. C., at p. 701.

The court below in its judgment says: "That facts necessary for a fair, just and legal determination of the rights of the infant, Flora Patrick, were withheld to such extent as to amount to an imposition upon the court, whose judgment entered under such conditions and circumstances ought, therefore, to be set aside and vacated and the whole proceedings should be vacated and annulled as being contrary to the course and practice of the court. It is now, therefore, considered, ordered and adjudged and decreed by the court that the judgment signed by his Honor, Michael Schenck, on 12 March, 1930, in a cause entitled 'Flora Patrick, by her next friend, J. Weston Michal, *v.* A. M. Bryan and Hasson, Anderson and Trobaugh Company,' and appearing of record in the office of the clerk of the Superior Court of Buncombe County

in judgment docket No. 70, at page 107, be and the same is hereby set aside and vacated and declared to be of no validity, force or effect, and the entire proceeding leading up to said judgment is hereby declared invalid and absolutely void."

Practically all of the $1,049.91, except $255.00 paid to John Patrick, the father and natural guardian of the child, was hospital and doctors' bills. In setting aside the judgment the court below made no provision for an accounting for these payments if W. T. Davis, the new next of friend of Flora Patrick appointed in Madison County, should recover in a new action for these same necessary hospital and doctors' bills. *Bunch v. Lumber Co.*, 174 N. C., 8.

In *Cole v. Wagner*, 197 N. C., at p. 698-9, we find: "It is well settled in this jurisdiction that in an action for injuries, if the plaintiff 'be entitled to recover at all, he is entitled to recover as damages one compensation—in a lump sum—for all injuries, past and prospective, in consequence of the defendant's wrongful and negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity, to earn money,' etc. *Ledford v. Lumber Co.*, 183 N. C., at p. 616; *Shipp v. Stage Lines*, 192 N. C., 475. The money recovered by defendant guardian in the damage suit, which it is alleged was a material and substantial consideration of the judgment, was for necessary expenses of the defendant. To allow the defendant infant to recover upon this theory and then deny the plaintiff in the present action the right to recover on the same theory of necessary expenses, would be blowing hot and cold in the same breath." The above was an action by the trustees of a hospital against a minor and his guardian, it is alleged that the hospital gave the infant medical attention, necessary to save his life and usefulness after his injury in an accident, and that the guardian of the infant had recovered judgment for the negligent injury, and that hospital and medical attention was a substantial part of the consideration of the judgment recovered by the guardian of the infant.

The principle is well settled in this State and we adhere to what is said in *Moore v. Gidney, Admr.*, 75 N. C., at p. 40-1: "But it is denied that the counsel of the plaintiff acted as the defendant's counsel, farther than in drawing up her answer; *and we are satisfied that no improper influence was intended.* Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general, will not permit a judgment or decree so affected to stand, if made the subject of exception *in due time by the*

parties injured thereby. The presumption, in such cases, is that the party was unduly influenced by that relation, and the opposite party cannot take the benefit of it. It does not appear affirmatively in this case that Mrs. Moore the defendant, was not influenced to her prejudice and thrown off her guard thereby. The purity and fairness of all judicial proceedings should so appear when drawn in question." (Italics ours.) *Johnson v. Johnson,* 141 N. C., 91; *Rector v. Logging Co.,* 179 N. C., 59; *Keller v. Furniture Co.,* 199 N. C., 413. Court proceedings, like Cæsar's wife, "ought to be free from suspicion."

In the present case, we have the rights of a minor involved. Her natural guardian, her father, John Patrick, agreed to a compromise settlement and the money was disbursed under this agreement through a court action, that it is contended was not regularly conducted according to the practice and procedure in such cases and therefore invalid. The father, her own blood, agreed to this compromise settlement and $1,049.91 was paid out under this judgment. The new next of friend appointed in Madison County for the minor, is now in effect attempting to repudiate the compromise settlement that the minor's father agreed to. Before finally passing on this matter, and other serious legal questions involved in this controversy, this real fact should be found: Was the compromise settlement made by the father of the minor, for the minor; and the insurance company for the defendants, a just and righteous one? Has the minor suffered no substantial injustice?

In *Syme v. Trice,* 96 N. C., at p. 246, citing numerous authorities, the following observation is made: "While the Court will always be careful of the rights of infants, it will not, in all cases, set aside irregular judgments against them as of course; it will not do so where it appears from the record, or otherwise, that the infant suffered no substantial injustice, especially it will not when the rights of third parties without notice have supervened." *Harris v. Brown,* 123 N. C., 419; *Flowers v. King,* 145 N. C., 234; *Land Co. v. Wooten,* 177 N. C., 248; *Montague v. Lumpkin,* 178 N. C., 270; *Battle v. Mercer,* 187 N. C., 437.

The matter is remanded to the Superior Court so that this and other necessary facts may be ascertained. Why set aside a compromise settlement made by the father of the minor, if it is just and righteous and not prejudicial to the interest of the minor. On the present record we cannot determine how this is. It may be said, though perhaps it is unnecessary, that we see nothing improper or unethical done in this matter by Bourne, Parker & Jones, attorneys for defendants. The matter of adjustment was left to a young attorney in their office, who conducted the negotiations that led to the compromise settlement and appeared in the

case for defendants before Schenck, J. We cannot sustain the finding of the court below as the record does not justify it, viz.: "That facts necessary for a fair, just and legal determination of the rights of the infant, Flora Patrick, were withheld to such extent as to amount to an imposition upon the court." If the judgment before Schenck, J., was irregular and contrary to the course and practice of the court, it was merely an error of judgment on the part of the attorney.

Error and remanded.

ADAMS and CONNOR, J.J., concur on the ground that the rights of the plaintiff under her motion are not finally determined by the Court's opinion.

HORNE-WILSON, INCORPORATED, v. NATIONAL SURETY COMPANY.

(Filed 8 January, 1932.)

1. **Principal and Surety B b—Provision in bond for public construction that action thereon should be brought within reasonable time is valid.**

   While the provisions of C. S., 2445, requiring a bond to be executed by a contractor for work on public buildings for the benefit of laborers and materialmen, are as binding as if written into the bond, and the express requirements of the statute may not be varied, the statute does not forbid an agreement to be written into the bond requiring that any action thereon be brought within a reasonable time, and in this case *Held:* it appearing from the complaint that the bond stipulated that any action thereon must be brought within twelve months from the date the last installment was due the contractor and that the action was not begun within the time prescribed, the demurrer of the surety on the contractor's bond should have been sustained.

2. **Same—Materialmen are bound by valid condition in bond that actions thereon be brought within a reasonable, stated time.**

   The laborers and materialmen for a public school building take their rights under the contractor's indemnity bond as it is written, and are bound by a valid provision therein that any action thereon should be brought within a stated, reasonable time.

APPEAL by defendant from *Harwood, Special Judge,* at July Term, 1931, of DAVIDSON.

Civil action to recover for materials furnished by plaintiff and used by the contractor in the installation of plumbing and heating systems in two public school buildings.

The record shows:

1. That on 24 April, 1928, the Salisbury Plumbing and Heating Company, contractor, entered into a contract with the city of Lexington, through its school commissioners, to install heating systems in two public schools, stipulating "to furnish all labor and materials and do all work" necessary, etc., and on 26 April, 1928, for a valuable consideration, the school commissioners of Lexington took from the contractor, as principal, and the National Surety Company, as surety, a bond in the sum of $4,475 for the faithful performance of said contract; and further: "This bond is subject to the provisions of C. S., 2445 and amendments thereto. *Provided, however,* that no suit, action or proceeding by reason of any default whatever shall be brought on this bond after twelve months from the date on which the final payment under the contract falls due."

2. That final payment under the contract fell due on 16 November, 1928.

3. That summons was issued in this action 3 July, 1930.

Demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that it appears on the face of the complaint that suit was not instituted on said bond until after twelve months from the date on which the final payment under the contract fell due.

From a judgment overruling the demurrer on the ground "that since C. S., 2445 provides that every bond given thereunder 'shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statutes or not, and this statute shall be conclusively presumed to have been written into every bond so given,' and since the statute does not authorize any contractual limitation in such bond, and particularly since the plaintiff was not a party to the said bond and did not agree to the limitation of one year therein contained, the provision in the bond undertaking to limit the time for the institution of suits thereon to one year is contrary to the said statute and void," the defendant appeals, assigning error.

C. H. Gover and R. P. Jamison for plaintiff.

Pharr, Bell & Pharr for defendant.

STACY, C. J. The provisions of C. S., 2445 are presumed to have been written into the bond in suit, and any stipulation incorporated therein at variance with the terms of the statute would be void. *Ingold v. Hickory,* 178 N. C., 614, 101 S. E., 525. But there is nothing in the statute which prohibits the parties from agreeing upon a reasonable

time for the bringing of suits, and barring any thereafter instituted. *Brick Co. v. Gentry*, 191 N. C., 636, 132 S. E., 800.

The fact that the plaintiff is not a party to the bond places it in no superior position, for with respect to the valid provisions of the bond, including its statutory enlargement, if any, the beneficiaries thereunder take it as they find it. The demurrer should have been sustained.

Reversed.

STATE v. HAZEL ASHE AND WINNIE ASHE.

(Filed 8 January, 1932.)

Municipal Corporations H c — Municipal ordinance in this case held invalid.

A municipal ordinance which makes it a misdemeanor for any lewd woman, regardless of her purpose, to appear upon the public streets of the city, or in any public buildings, store, shop, or any other place of business, imposing a punishment for its violation, is an unlawful use of the police power and a discrimination which is unreasonable in contravention of common right, and will be held invalid.

APPEAL by defendants from *Harding, J.*, at August Term, 1931, of CHEROKEE.

Criminal prosecution tried upon a warrant charging the defendants with violating the provisions of the following ordinance of the town of Murphy:

"1. That the presence of any lewd woman upon the public streets, or within any public building, store, shop or any other place or places of business within the corporate limits of the town of Murphy is hereby declared to be a public nuisance; and any lewd woman who shall be found loitering upon the public streets, or who shall be found loitering at or within any public building, stores, shop, or any other place or places of business within the corporate limits of the town of Murphy; or who shall be found in company with any male person, whether on foot or in an automobile, vehicle or other conveyances upon the streets, or in or at any public building, store, shop or any other place or places of business within the corporate limits of the town of Murphy, shall be guilty of a misdemeanor.

"2. And any male person who shall be found in company with any lewd woman at any of the places enumerated in section 1 hereof shall be guilty of a misdemeanor.

"3. Any person violating any of the provisions of this ordinance shall, upon conviction, pay a fine of $50.00."

The evidence tends to show that the defendants are lewd women residing on the "Hanging Dog Road" about two miles from the town of Murphy; that during the month of April, 1931, they were seen upon the public streets of the town of Murphy; that they entered some of the public buildings, stores, shops, and other places of business therein, and that they conversed with men upon the streets thereof.

Motion by defendants for judgment as in case of nonsuit; overruled; exception.

Verdict: Guilty.

Judgment: 30 days in jail.

The defendants appeal, assigning errors.

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

Moody & Moody for defendants.

STACY, C. J. Is a municipal ordinance valid which makes it unlawful for any lewd woman, regardless of her purpose, to appear upon the public streets, or in any public building, store, shop, or other place of business, within the town of Murphy? We think not.

The ordinance is unduly restrictive of the rights and liberties of the defendants. *S. v. Webber,* 107 N. C., 962, 12 S. E., 598. However much they may have offended against the decencies of society, or run counter to the prevailing code of morals, or rendered themselves *non grata persona* to the community, still they are human beings, citizens of a great Commonwealth, and entitled to the equal protection of the laws.

To deny to anyone, not lawfully imprisoned, the right to travel the highways, to buy goods, to eat bread, to attend Divine Worship, and the like, simply because he or she happens, for the time being, to belong to an unfortunate class, is an unwarranted use of the police power. 19 R. C. L., 845. Such an attempt at discrimination is unreasonable and in contravention of common right. *Milliken v. City Council,* 54 Tex., 388, 38 Am. Rep., 629.

Furthermore, the class intended to be outlawed by the ordinance is not altogether definite and certain. It is somewhat elastically described. *Snow v. Witcher,* 31 N. C., 346.

We need not pause to debate whether the clause against "loitering" might be upheld, as the conviction is based on the general provisions of the ordinance. *Peoples v. Bergen,* 169 N. Y. S., 319.

The motion of defendants for judgment as in case of nonsuit will be sustained as provided by C. S., 4643.

Reversed.

CORPORATION COMMISSION OF NORTH CAROLINA v. ALEXANDER McLEAN AND MARGARET GRACE McLEAN, AND J. A. SINCLAIR AND CANIE N. BROWN.

(Filed 8 January, 1932.)

1. **Banks and Banking H a—Owner of stock in insolvent bank is subject to statutory liability, and books of bank prima facie establish ownership.**

The books of a bank establish, prima facie, who are stockholders therein, and those whose names appear thereon as stockholders are ordinarily liable, upon the bank's becoming insolvent, for the statutory liability imposed upon them, C. S., 219(a), and it is only when a person whose name appears on the books as a stockholder can show that he was not in fact the owner of the stock that he can escape the assessment on his stock made according to law.

2. **Same—Procedure for enforcement of statutory liability on stock in insolvent bank is governed by statute.**

The procedure for the enforcement of the statutory liability of stockholders in an insolvent bank is provided by statute, C. S., 218(c), subsec. 13, and where an appeal to the Superior Court is taken from an assessment made according to the statutory provisions, ordinarily the only issues of fact which may be raised in the Superior Court are whether the appellant was in fact a stockholder, and if so, the number of shares owned by him.

3. **Same—Appeal to Superior Court from assessment of bank stock is properly dismissed where issue of fact of ownership is not raised.**

Where upon appeal to the Superior Court from an assessment made according to law on stock in an insolvent bank, the appellants alleged that the stock was sold to them by two directors of the bank, made parties to the action by order of court, and that they were induced to buy the stock upon false and fraudulent representations made by the directors as to the financial condition of the bank, and pray that the sale of the stock be rescinded for the alleged fraud and that the sellers be assessed for the statutory liability, *Held:* judgment vacating the order making the directors, the sellers of the stock, parties, and dismissing the appeal of the owners of the stock is not error, it appearing that the stock had been owned by the appellants for more than a year and that they had received the dividends thereon, and no question of fact as to the ownership of the stock at the date of the assessment being raised by the pleadings. The remedy of the appellants for the alleged fraud being by independent action against the directors.

APPEAL by defendants, Alexander McLean and Margaret Grace McLean, from *Stack, J.*, at July Term, 1931, of BUNCOMBE. Affirmed.

The Central Bank and Trust Company is a corporation, organized, and prior to 19 November, 1930, engaged in the banking business in the city of Asheville, under and pursuant to the laws of this State.

On 19 November, 1930, the Corporation Commission of North Carolina took possession of the business and property of the said Bank and Trust Company, because it had become and was on said day insolvent. C. S., 218(b). After taking possession of the business and property of the said insolvent banking corporation, the Corporation Commission proceeded to liquidate its assets for distribution among its creditors and depositors, as provided by statute, C. S., 218(c). On 14 February, 1931, under the provisions of subsection 13 of C. S., 218(c) an assessment was levied by the Corporation Commission upon the stockholders of the Central Bank and Trust Company and on 16 February, 1931, a certified copy of said assessment was filed in the office of the clerk of the Superior Court of Buncombe County. Among the persons assessed as stockholders of the Central Bank and Trust Company by the Corporation Commission are Alexander McLean and Margaret Grace McLean. The sum of $15,000 was assessed against them as owners of 150 shares of the capital stock of said Bank and Trust Company of the par value of $100 per share.

On 25 February, 1931, the said Alexander McLean and Margaret Grace McLean gave notice of their appeal from said assessment to the Superior Court of Buncombe County. After said appeal had been docketed in said court, it was placed on the civil issue docket for trial. On motion of the appellants, it was ordered by the court that J. A. Sinclair and Canie N. Brown be made parties to the cause, and that summons be issued therein for that purpose. Summons was thereupon issued and duly served on the said J. A. Sinclair and Canie N. Brown.

Thereafter, the appellants, Alexander McLean and Margaret Grace McLean, filed in the cause a verified pleading, described as their answer and cross-bill.

It appears from said pleading that on 24 September, 1928, J. A. Sinclair sold to the appellants 90 shares of the capital stock of the Central Bank and Trust Company, of the par value of $100 per share. Appellants paid to the said Sinclair for said shares of stock $275 per share. On 24 October, 1928, a certificate for 90 shares of its capital stock was issued to the said Alexander McLean and Margaret Grace McLean by the Central Bank and Trust Company. The shares of stock represented by this certificate are the identical shares sold to the appellants by J. A. Sinclair.

It further appears from said pleading that on 28 February, 1929, Canie N. Brown sold to the appellants 60 shares of the capital stock of the Central Bank and Trust Company, of the par value of $100 per share. Appellants paid to the said Brown for said shares of stock $275 per share. On 28 February, 1929, certificates for 60 shares of its capital

stock were issued to the said Alexander McLean and Margaret Grace McLean by the Central Bank and Trust Company. The shares of stock represented by these certificates are the identical shares sold to the appellants by Canie N. Brown.

It further appears from said pleading that the certificates for 90 shares and for 60 shares of the capital stock of the Central Bank and Trust Company, issued to the said Alexander McLean and Margaret Grace McLean, by said Bank and Trust Company, on 24 October, 1928, and on 28 February, 1929, were outstanding on 19 November, 1930, when the Corporation Commission took into its possession the business and property of said Bank and Trust Company, because of its insolvency. Dividends declared on said stock since the dates of said certificates have been paid to and received by the said Alexander McLean and Margaret Grace McLean, as the owners of said stock. The amount of these dividends has been tendered to the Corporation Commission or its successor, the Commissioner of Banks, by the appellants since the insolvency of the Central Bank and Trust Company.

It is alleged in said pleading that the appellants were induced by false and fraudulent representations as to the financial condition of the Central Bank and Trust Company and as to the value of its stock, made to them by J. A. Sinclair and Canie N. Brown, to purchase the shares of stock for which the certificates were issued to them by the Central Bank and Trust Company; that both the said J. A. Sinclair and the said Canie N. Brown were directors of the Central Bank and Trust Company at the time the false and fraudulent representations were made by them to the appellants; and that the president of said Bank and Trust Company joined with the said J. A. Sinclair and the said Canie N. Brown in making the false and fraudulent representations by which appellants were induced to purchase said shares of stock, and take the certificates therefor.

Upon the facts alleged in their answer and cross-bill, the defendants, Alexander McLean and Margaret Grace McLean, pray judgment:

1. That the purchase of stock by them from the said J. A. Sinclair and the said Canie N. Brown be canceled and rescinded; that the assessment levied against them as stockholders of the Central Bank and Trust Company be vacated and set aside; that the amount assessed against them be assessed against J. A. Sinclair and Canie N. Brown, as the owners of the 150 shares of stock standing in the name of the defendants; and that they recover of the said J. A. Sinclair and Canie N. Brown the amounts paid to them for said shares of stock.

2. That if defendants are not entitled to judgment as prayed for above, they recover of the defendant, J. A. Sinclair, the sum of $33,750, and

of the defendant, Canie N. Brown, the sum of $22,500, as damages sustained by the defendants by reason of their false and fraudulent representations.

After summons had been served on them, J. A. Sinclair and Canie N. Brown appeared in court and moved that the order entered in the cause that they be made parties thereto be vacated and set aside. This motion was heard at July Term, 1931, and allowed.

It was also ordered and adjudged that the appeal of the defendants, Alexander McLean and Margaret Grace McLean, from the assessment made against them as stockholders of the Central Bank and Trust Company be and the same was dismissed.

From judgment vacating the order that J. A. Sinclair and Canie N. Brown be made parties to the cause, and that their appeal be dismissed, the defendants, Alexander McLean and Margaret Grace McLean appealed to the Supreme Court.

Johnson, Smathers & Rollins for Commissioner of Banks, successor of the Corporation Commission.

I. H. Sample and Braxton Miller for defendants, Alexander McLean and Margaret Grace McLean.

Merrimon, Adams & Adams for J. A. Sinclair.

V. L. Gudger and Harkins, Van Winkle & Walton for Canie N. Brown.

CONNOR, J. The individual liability of stockholders of a banking corporation organized under the laws of this State, by reason of their ownership of shares of the capital stock of such corporation, is statutory. C. S., 219(a).

It is provided by the statute that such stockholders shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the par value of the shares of stock owned by them. This liability is imposed by law upon such stockholders for the protection and benefit of depositors and other creditors of the corporation. The purpose of the law is to make available, upon the insolvency of the corporation, for the payment of its debts, a fund in addition to its capital stock. All persons whose names appear on the books of the corporation as stockholders are, ordinarily, subject to the statutory liability. *American Trust Company v. Jenkins,* 193 N. C., 761, 138 S. E., 139. It is only when it is shown that a person whose name appears on the books of the corporation as a stockholder, is not in fact an owner of stock, that such person is not subject to the statutory liability. *Corp. Com. v. Harris,* 197

N. C., 202, 148 S. E., 174; *Darden v. Coward,* 197 N. C., 35, 147 S. E., 671. The books of the corporation show, prima facie, at least, who are its stockholders, and who are liable to assessment in accordance with statutory provisions.

The procedure for the enforcement of the statutory liability of a stockholder of a banking corporation, organized under the laws of this State, upon the insolvency of such corporation, is also statutory. C. S., 218(c), subsection 13.

It is provided by the statute that after the expiration of thirty days from the date of the notice that the State Commissioner of Banks, (formerly the Corporation Commission) has taken possession of the business and property of a banking corporation, because of its insolvency, the Commissioner of Banks may levy an assessment equal to the stock liability of each stockholder of the corporation, and shall file a copy of such levy in the office of the clerk of the Superior Court of the county in which the corporation has its office or principal place of business. The provision of the statute that the assessment when levied and filed as provided therein shall have the force and effect of a judgment of the Superior Court, which may be enforced by execution, has been upheld by this Court. *Corp. Com. v. Murphy,* 197 N. C., 42, 147 S. E., 667. The statute further provides, however, that any person who shall be assessed as a stockholder of an insolvent banking corporation, may appeal from such assessment to the Superior Court; the issue or issues raised by such appeal shall be determined as in other actions in the Superior Court.

The only issues of fact which may be raised by such appeal and determined in the Superior Court, ordinarily, are:

(1) Was the appellant a stockholder of the insolvent banking corporation at the date of his assessment?

(2) If so, how many shares of the capital stock of said corporation did appellant own at said date?

The answers of the jury to these issues will be sufficient, ordinarily, to support a judgment of the Superior Court, disposing of the appeal. Only in rare cases, if any, can matters not involved in these or similar issues, be injected into the trial in the Superior Court of an appeal from an assessment made as provided by statute to enforce the individual liability of a stockholder of an insolvent banking corporation.

In the instant case there was no error in the judgment vacating and setting aside the order made in the cause that J. A. Sinclair and Canie N. Brown be made parties to this proceeding. Neither J. A. Sinclair nor Canie N. Brown upon the facts appearing from defendants' pleading are proper parties to the proceeding. If the defendants have a

cause of action against them or against either of them, they may prosecute an action to recover damages on such cause of action; they cannot have relief in this proceeding. To hold otherwise, would defeat the purpose of the statute, which is to provide an expeditious proceeding for the enforcement of the statutory liability of all persons who are stockholders of an insolvent banking corporation, at the date of its insolvency, and at the same time provide for a trial in the Superior Court of issues of law or fact involving the liability of any person who may be assessed, and who denies such liability.

On the facts alleged in their answer and cross-bill, the defendants were stockholders of the Central Bank and Trust Company, at the date of their assessment. No issue of law or fact is raised by their pleading, involving their liability as stockholders under the statute. Their names appeared on the books of the corporation as stockholders; they had held certificates for 150 shares of the capital stock of the corporation, for more than a year. During this time they had received the dividends declared on the shares of stock owned by them, and represented by their certificates. Having received all the benefits arising from the ownership of stock in the Central Bank and Trust Company, it is not unjust that they should now bear their share of the burden imposed by law upon them by reason of their ownership of said stock. The judgment is

Affirmed.

W. A. BROWN v. BURLINGTON HOTEL CORPORATION AND J. F. SOMERS.

(Filed 8 January, 1932.)

1. **Sales I b—Where conditional sale contract has not been registered a subsequent purchaser acquires title free from its lien.**

Where, in an action against a hotel corporation to recover the balance due on a refrigerating plant or to recover possession thereof, the evidence discloses that the plant was sold to the hotel corporation's lessee under a title-retaining contract, and that the hotel corporation had purchased it from its lessee, giving a certain number of shares of its capital stock in payment, and that at the time of the purchase by the hotel corporation from its lessee the conditional sales contract had not been registered, C. S., 3312, *Held:* no notice however full and formal can supply notice by registration, and evidence of knowledge of the hotel corporation that the full purchase price had not been paid is immaterial, and the hotel corporation acquired the title to the property by its purchase from its lessee free from the lien of the conditional sales contract, and its motion as of nonsuit should have been allowed.

2. Laborers' and Materialmen's Liens C b—Notice to owner before payment by him is necessary to claim of lien for material furnished contractor.

Where the lessee of a hotel corporation purchases a refrigerating plant and installs it in the hotel building, and sells it to the hotel corporation, the lessee's vendor may not claim a lien against the hotel building for the balance of the purchase price where he has not given the hotel corporation notice of the balance due him before the hotel corporation has paid the full purchase price to the lessee. C. S., 2438.

APPEAL by defendant, Burlington Hotel Corporation, from *Stack, J.*, at November Term, 1930, of ROWAN. Reversed.

This is an action to recover of the defendants the sum of $4,000, balance due on the purchase price of a refrigerating plant sold and delivered by the plaintiff to the defendant, J. F. Somers, and at his request installed by the plaintiff in a hotel building in the city of Burlington, owned by the defendant, Burlington Hotel Corporation, and leased by said corporation to its codefendant, J. F. Somers; and for the possession of said refrigerating plant by virtue of the terms of the contract between plaintiff and the defendant, J. F. Somers, providing that the title to said refrigerating plant was retained by and should remain in the plaintiff until the purchase price thereof had been paid in full.

On 11 March, 1925, plaintiff entered into a contract in writing with the defendant, J. F. Somers, by which plaintiff sold to said defendant a refrigerating plant to be delivered to him in the city of Burlington, and there installed by the plaintiff in a hotel building owned by the defendant, Burlington Hotel Corporation. The agreed purchase price of said refrigerating plant was $7,500, to be paid as follows: $3,500—30 days after the date of shipment; $2,000—6 months after the date of shipment, and $2,000—9 months after the date of shipment. The said refrigerating plant was shipped and installed by the plaintiff in accordance with the terms of his contract. The defendant, J. F. Somers, has paid on the purchase price of said refrigerating plant the sum of $3,500. On 1 July, 1925, he executed and delivered to plaintiff two notes, each for $2,000, due and payable six and nine months after date, respectively. These notes were executed by said defendant, and accepted by the plaintiff in accordance with the terms of their contract. Neither of said notes has been paid. The defendant, J. F. Somers, has been duly adjudged a bankrupt in a proceeding begun and pending in the District Court of the United States for the Western District of North Carolina. He was discharged of his indebtedness in June, 1927, as provided by the act of Congress. It is admitted that said discharge is a bar to plaintiff's recovery of the said defendant in this action.

On 3 March, 1924, the defendant, Burlington Hotel Corporation, entered into a contract in writing with its codefendant, J. F. Somers, by which the said corporation leased to the said J. F. Somers, for a term of twenty years, its hotel building in the city of Burlington. By the terms of said contract, the said J. F. Somers agreed to install at his own expense in said hotel building the kitchen equipment and storage or refrigerating plant, provided for in the specifications for said hotel building. It was agreed that upon the installation in said hotel building of said kitchen equipment and storage plant, by the said J. F. Somers, the Burlington Hotel Corporation should issue to him shares of its capital stock of the par value of $10,000. It was further agreed that upon the issuance of said shares of stock to the said J. F. Somers, the said kitchen equipment and storage plant should be the property of the Burlington Hotel Corporation.

In September, 1925, after the refrigerating plant sold to the defendant J. F. Somers by the plaintiff had been installed in its hotel building, the Burlington Hotel Corporation issued to the defendant, J. F. Somers, certificates for shares of its capital stock of the par value of $10,000. At the date of the issuance of these certificates, the president of the Burlington Hotel Corporation was informed by him that the notes for $4,000, executed by J. F. Somers and payable to the order of the plaintiff, were outstanding and had not been paid.

The contract between the plaintiff and the defendant, J. F. Somers, contains the following clause:

"It is mutually understood and agreed by and between the parties hereto that the title to the above property shall be and remain in the party of the first part, W. A. Brown, until the full amount of the purchase price, expenses and all charges as set out herein, with interest on the same at the rate of 6 per cent per annum, payable semiannually, shall have been paid in full."

At the date of the execution of the contract between plaintiff and the defendant, J. F. Somers, they were both residents of Rowan County, North Carolina. The contract was recorded in the office of the register of deeds of Rowan County on 9 August, 1926. It had been previously recorded in the office of the register of deeds of Alamance County on 15 June, 1926. The city of Burlington is in Alamance County.

The contract between the defendant, Burlington Hotel Corporation, and the defendant, J. F. Somers, by which the said corporation leased its hotel building in the city of Burlington, to the said J. F. Somers, upon the terms fully set out therein, was recorded in the office of the register of deeds of Alamance County on 1 December, 1924.

The foregoing are the material facts shown by the evidence offered at the trial by the plaintiff. At the conclusion of this evidence, the defendant, Burlington Hotel Corporation, moved for judgment as of nonsuit. This motion was denied, and defendant excepted.

The defendant then tendered an issue as follows:

"1. Was the plaintiff's conditional sale agreement registered at the time the Burlington Hotel Corporation paid J. F. Somers for the refrigerating plant?"

The court refused to submit this issue, and defendant excepted to such refusal.

The issues submitted to and answered by the jury were as follows:

"1. Did the defendant, Burlington Hotel Corporation, contract with J. F. Somers to have installed in its hotel building a refrigerating plant as alleged in the complaint? Answer: Yes.

2. If so, did the defendant, J. F. Somers, contract with the plaintiff, W. A. Brown, to furnish the material and install the refrigerating plant in said hotel building for $7,500, as alleged in the complaint? Answer: Yes.

3. If so, what amount is now due the plaintiff as a balance on said contract? Answer: $4,000, with interest from 1 July, 1925.

4. Did the defendant, Burlington Hotel Corporation, through its officer and president, know of the contract between W. A. Brown and J. F. Somers, and, if so, did said corporation through its president see the work as it progressed and see the material as it went into its hotel building? Answer: Yes.

5. In what amount, if any, is the Burlington Hotel Corporation indebted to the plaintiff, W. A. Brown? Answer: $4,000, with interest from 1 July, 1925."

In apt time, the defendant objected to the submission of each of the foregoing issues. To the refusal of the court to sustain said objections, defendant excepted.

From judgment that plaintiff recover of the defendant, Burlington Hotel Corporation, the sum of $4,000, with interest from 1 July, 1925, and the costs of the action, the defendant appealed to the Supreme Court.

Hudson & Hudson and Woodson & Woodson for plaintiff.

W. S. Coulter and Hayden Clement for defendant.

CONNOR, J. On the cause of action alleged in his complaint, the only relief to which plaintiff is entitled in this action as against the defendant, Burlington Hotel Corporation, is a judgment for the possession of the refrigerating plant which the plaintiff sold to the defendant, J. F.

Somers, and which he installed in the hotel building owned by the defendant corporation. He alleges that in the contract by which he sold said refrigerating plant, he retained the title thereto until the purchase price had been paid in full; that the purchase price has not been paid in full; and that the defendant, Burlington Hotel Corporation, is not an innocent purchaser of said refrigerating plant, for that it purchased and paid for the same, with knowledge that the purchase price had not been paid in full by his vendee, J. F. Somers. The evidence offered by the plaintiff at the trial shows, however, that at the time the defendant, Burlington Hotel Corporation, paid for the said plant, by the issuance of shares of its capital stock to the defendant, J. F. Somers, in accordance with its contract with him, the conditional sale agreement under which plaintiff claims title to the said plant, had not been registered either in Rowan County where both the plaintiff and J. F. Somers resided at the date of their contract, or in Alamance County, where the plant was located at the commencement of this action. There was evidence tending to show that the president of the Burlington Hotel Corporation knew when he delivered the certificates for the capital stock of said corporation to J. F. Somers, that the said J. F. Somers had not paid the said purchase price in full; there was no evidence, however, tending to show that said president knew that in the contract between plaintiff and the said J. F. Somers, the title to the plant had been retained by the plaintiff. This, however, is immaterial, for in the absence of the registration of the conditional sale agreement in the proper county, no notice of its contents or terms, however full and ample, can affect the title acquired by the Burlington Hotel Corporation by its purchase of the refrigerating plant from J. F. Somers. C. S., 3312. For this reason there was error in the refusal by the trial court of defendant's motion for judgment as of nonsuit, at the close of the evidence offered by the plaintiff. There was no evidence offered by the defendant. The action should have been dismissed as of nonsuit. C. S., 567.

Conceding that by a liberal construction of the allegations of the complaint, a cause of action is alleged therein on which plaintiff is entitled to judgment that he has a lien on the hotel building owned by the defendant, Burlington Hotel Corporation, for the sum of $4,000, and interest, under the provisions of C. S., 2438, plaintiff cannot recover on this cause of action for the reason that there was no evidence at the trial tending to show that plaintiff gave notice of his claim, as a subcontractor, to the defendant, Burlington Hotel Corporation, as owner of the hotel building, before the payment by said corporation to J. F. Somers of the amount due him. *Rose v. Davis*, 188 N. C., 355, 124 S. E., 567.

There was error in the refusal of the court to allow defendant's motion made at the close of the evidence. The action should have been dismissed by judgment as of nonsuit. For this reason it is not necessary to consider the assignments of error based upon the exceptions with respect to the issues. The judgment is

Reversed.

F. A. CULP v. THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, E. J. LATTIMORE, W. L. ABERNETHY AND DR. J. RUSH SHULL.

(Filed 8 January, 1932.)

Removal of Causes C b—Petition for removal of cause to Federal Court should have been allowed in this case.

A life insurance company had several local physicians acceptable to it to make medical examinations of applicants for insurance taken through the soliciting agent, and the applicant in the present case was injured by trying to sit in a defective chair in the physician's office, and brings action for damages against the insurer, a nonresident corporation, its soliciting agent and the local medical examiner whom the insurer paid only a fee for each examination, *Held:* the case should have been removed from the State to the Federal Court upon proper motion of the nonresident insurer for fraudulent joinder of the resident defendants for the purpose of defeating the jurisdiction of the latter court.

APPEAL by defendant, the Lincoln National Life Insurance Company, from *Oglesby, J.*, at June Special Term, 1931, of MECKLENBURG. Reversed.

This action was heard in the Superior Court of Mecklenburg County on plaintiff's appeal from the order of the clerk of said court, removing the action from said Superior Court to the District Court of the United States for the Western District of North Carolina for trial, upon the petition of the defendant, the Lincoln National Life Insurance Company.

From judgment reversing the order of the clerk, and denying its petition for the removal of the action, the defendant, the Lincoln National Life Insurance Company, appealed to the Supreme Court.

T. L. Kirkpatrick and Shore & Townsend for plaintiff.
Cansler & Cansler and M. C. Moysey for defendant.

CONNOR, J. This action was begun in the Superior Court of Mecklenburg County, North Carolina. On the facts alleged in the complaint as

his cause of action, the plaintiff, a citizen of the State of North Carolina, demands judgment that he recover of the defendants the sum of $25,000. The defendant, the Lincoln National Life Insurance Company, is a corporation, organized and doing business under the laws of the State of Indiana, with its principal office in said state. It is not a citizen of the State of North Carolina. The other defendants are residents and citizens of this State.

In apt time, the defendant, the Lincoln National Life Insurance Company, filed its petition, accompanied by bond as required by law, with the clerk of the Superior Court of Mecklenburg County, for the removal of the action from said court to the District Court of the United States for the Western District of North Carolina, for trial. The petitioner alleged in its petition that the cause of action set out in the complaint against the petitioner as one of the defendants in this action, is separable from the cause of action set out therein against the other defendants. It also alleged that its joinder by the plaintiff with the other defendants in this action was with the fraudulent purpose of depriving the petitioner of its right under the laws of the United States to have the action removed from the State court to the United States Court, for trial.

The facts alleged in the complaint as constituting plaintiff's cause of action against the defendants in this action, are substantially as follows:

On or about 20 March, 1931, the defendant, W. L. Abernethy, acting under the authority of the defendant, E. J. Lattimore, the general agent in this State of the defendant, the Lincoln National Life Insurance Company, solicited the plaintiff for an application to the defendant, the Lincoln National Life Insurance Company, for a policy of insurance on his life. Plaintiff, upon such solicitation, applied to the defendant Insurance Company for a policy of insurance on his life in the sum of $3,000. He was advised by the said W. L. Abernethy that before said application would be considered by the defendant, the Lincoln National Life Insurance Company, a medical examination of the plaintiff was required. Pursuant to this advice, and under the instructions of the defendants, W. L. Abernethy and E. J. Lattimore, plaintiff went to the office of the defendant, Dr. J. Rush Shull in the city of Charlotte, for the medical examination required by the defendant, the Lincoln National Life Insurance Company. After the plaintiff had entered the said office, he sat down in a chair which he found there. Under plaintiff's weight, because of defects in said chair, which plaintiff did not observe and which he could not have discovered before sitting down but which were known to the defendant, Dr. J. Rush Shull, the chair gave way, causing

plaintiff to fall to the floor. As the result of the fall, plaintiff sustained personal injuries from which he has suffered damages in the sum of $25,000.

It is alleged in the complaint that "all the injuries which said plaintiff was caused to sustain and suffer were the direct and proximate result of the wilful, wanton and negligent acts, deeds and conduct of the said W. L. Abernethy, and his codefendant, E. J. Lattimore, the Lincoln National Life Insurance Company, and Dr. J. Rush Shull, and each of them, severally and jointly as *tort-feasors*, in that:

(a) Each of said defendants wilfully, wantonly and negligently failed, refused and neglected to provide said plaintiff with reasonably safe and suitable agencies, appliances, equipment and office in which to be examined;

(b) Each of said defendants wilfully, wantonly and negligently failed, refused and neglected to provide said plaintiff with a reasonably safe chair, equipment, and appliances and place in which to sit after plaintiff was invited into the office aforesaid;

(c) Said defendants and each of them, as joint *tort-feasors*, failed, refused and neglected to inspect and cause the aforesaid chair, equipment and appliances to be inspected before ordering and directing said plaintiff to occupy and sit in said chair;

(d) Said defendants and each of them, as joint *tort-feasors*, failed refused and neglected to warn or cause said plaintiff to be warned of the dangerous condition of said chair as aforesaid, although each of said defendants knew, or by the exercise of ordinary care and prudence on their part could have known, and they did know of the dangerous condition of said chair, before permitting the said plaintiff to occupy and sit in said chair."

In support of its petition for the removal of the action from the State Court to the United States Court, for trial, the petitioner, the Lincoln National Life Insurance Company, alleged in its petition:

"4. That the defendant, E. J. Lattimore, is and was at the times mentioned in the complaint, a so-called 'general agent' of the petitioner within the State of North Carolina, and authorized and licensed by the Insurance Commissioner of said State, through himself and his subagents, to solicit and obtain written applications from various citizens of North Carolina for policies of life insurance to be issued by the petitioner, and when such applications are obtained, to forward the same, together with the report of the medical examination attached thereto, to the home office of the petitioner at Fort Wayne, Indiana, for acceptance or rejection, and if accepted and policies issued thereon, to deliver such policies, when sent to the said Lattimore by the petitioner,

to the persons purported to be insured thereunder, and at or before said delivery, to collect the initial premium thereon, and forward the same to the petitioner, less the regular commissions paid by the petitioner to the said Lattimore for his services in either directly or indirectly soliciting and obtaining applications as aforesaid, forwarding the policies to said applicants and collecting the initial premiums thereon as aforesaid, the said Lattimore having no other powers, duties or authority conferred upon him by the petitioner in the premises.

5. That the defendant, W. L. Abernethy, is and was at the times mentioned in the complaint, either a general or soliciting agent of the Massachusetts Mutual Life Insurance Company, an insurance corporation existing, as the petitioner is informed and believes, under and by virtue of the laws of the State of Massachusetts, with like powers, duties and authority from said Massachusetts Mutual Life Insurance Company, as those conferred by the petitioner upon the defendant, E. J. Lattimore, as hereinbefore in paragraph 4 specifically set forth, and as such agent of said Massachusetts Mutual Life Insurance Company the said W. L. Abernethy solicited and obtained from the plaintiff an application for $3,000 of insurance upon his life, to be issued, if approved by the said Massachusetts Mutual Life Insurance Company, said policy to be sent to the said W. L. Abernethy to be delivered to the plaintiff upon the payment of the initial premium thereon. That when the said application was so forwarded by the said W. L. Abernethy to the said Massachusetts Mutual Life Insurance Company, the same was rejected. That when the said W. L. Abernethy notified the plaintiff of said rejection, it was agreed by and between the plaintiff and the said Abernethy that the latter should attempt to broker said insurance through the defendant, E. J. Lattimore, with the petitioner. That thereupon the said Abernethy obtained from the said Lattimore a blank application, etc., for the purpose aforesaid, filled out the same pursuant to the consent and authority of the plaintiff, who thereupon signed the said application. That said W. L. Abernethy then requested the plaintiff to present said application to the defendant, Dr. J. Rush Shull, one of the medical examiners of the petitioner, in order that plaintiff might be examined for a policy of life insurance applied for in said application.

6. That the defendant, Dr. J. Rush Shull, is and was at the times mentioned in the complaint, one of the medical examiners for the defendant company of applicants for policies of life insurance, the said Shull having and maintaining offices for the practice of his profession in the Professional Building in the city of Charlotte. That when applicants for insurance in the defendant company were directed by the agent or agents soliciting applications to be medically examined by the

said Shull, and pursuant to said directions, presented themselves to him in his offices, the said Shull subjected said applicants to such examination by not only physically examining said applicants, but by propounding to them various questions in accordance with the printed form attached to said application for insurance, and writing the applicant's answers to each question and returning same to the home office of the petitioner, for which services in each instance, the said Shull charged and was paid a specified fee by the petitioner, the said Shull having no specific contract of employment as a medical examiner of the petitioner, who had simply designated him as being one of several medical examiners whose examination of applicants for insurance would be accepted and acted upon by the executive officers of the petitioner at its home office in Fort Wayne, Indiana, there being no contractual obligation whatever upon the petitioner to employ the said Shull as a medical examiner for any specific length of time, or to direct all or any applicants for life insurance to the said Shull for examination, and no contractual obligation on the part of the said Shull to examine any applicant for life insurance in the defendant company so directed to him by one of its soliciting agents.

7. That pursuant to the request of the defendant, W. L. Abernethy, hereinbefore referred to, the plaintiff, on 20 March, 1931, as the petitioner is informed and believes, went to the office of the defendant Shull, for the purpose of being medically examined by him, pursuant to the conditions and requirements of the application aforesaid. That finding that said Shull was temporarily absent from his office, the plaintiff, voluntarily and without suggestion from anybody, selected one of four or five chairs in the office to which the plaintiff went, which chair as the petitioner is now informed and believes, had been pushed under the desk of the defendant Shull for the purpose of having same repaired, and when plaintiff undertook to sit upon said chair, the same, as the petitioner is informed and believes, gave way, causing the plaintiff to fall or slide therefrom onto the floor, after which time the defendant Shull came to his office, proceeded to examine the plaintiff in accordance with the terms of the application and printed form of medical examination attached thereto, and after plaintiff was examined and the application forwarded to the petitioner's home office, a policy of insurance in the sum of $3,000 was issued upon the plaintiff's life and returned to the defendant Lattimore, for delivery either directly or indirectly to the plaintiff. That thereafter the said policy was delivered to the plaintiff and he paid the premium thereon."

Although the cause of action alleged in the complaint in this action against the defendant, the Lincoln National Life Insurance Company,

may not be separable from the cause of action alleged therein against its codefendants, we are of the opinion that the facts appearing on the record, taking the facts alleged in the petition for removal as true, lead unerringly to the conclusion that the joinder of the nonresident defendant with its codefendants, was with the purpose of depriving the nonresident defendant of its right, under the act of Congress, to have the action, begun in the State court, removed from said court to the United States Court for trial. The joinder was, therefore, fraudulent in law, and for this reason there was error in the judgment reversing the order of the clerk and denying the petition for removal. *Crisp v. Fibre Co.*, 193 N. C., 77, 136 S. E., 233. The judgment is

Reversed.

JOE W. STEVENSON AND MRS. O. B. HOLBRUNER v. WACHOVIA BANK AND TRUST COMPANY, ADMINISTRATOR C. T. A., OF A. L. STEVENSON, ET AL.

(Filed 8 January, 1932.)

1. Wills F h—Legacy in this case held to have lapsed by reason of the death of the legatee prior to the death of the testator.

Where a testator leaves all his property real and personal to his wife for life, and directs that after her death that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among his brothers and sisters and the brothers and sisters of his wife, if living, and if not living, to their legal representatives, *Held:* where one of the brothers and the wife of such brother die prior to the death of the testator, and leave no children them surviving, the legacy as to them lapses they having acquired no interest under the will.

2. Wills E f—Held: lapsed legacy under the will in this case was thrown into residuary clause for distribution to designated class.

Whether a clause is a residuary clause is not dependent upon any particular form of expression but upon the intention of the testator, and where a will provides that after the termination of a life estate that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among a specific class, *Held:* where the legacy of one of the class lapses by the death of the legatee prior to the testator's death, the amount of such legacy is thrown into the fund for distribution among the class named, and it does not go to the next of kin of the legatee. C. S., 4166.

3. Death A a—Presumption of death after seven years absence raises no presumption of death at any particular time.

The presumption of death after seven years absence without being heard from by those who might be expected to hear from the absent

person if he were living does not raise any presumption of death at any particular time, but that the absent person is dead after the expiration of seven years where there is no other evidence.

4. Wills E f—Held: construing will as a whole the meaning of the words "legal representatives" is "children" or "issue."

Where a testator provides that after the termination of a life estate that the whole estate be reduced to cash and, after the payment of certain specific legacies, divided among his brothers and sisters and the brothers and sisters of his wife, if living, and if not living to their legal representatives, *Held:* construing the context of the entire instrument, the meaning of the words "legal representatives" is "children" or "issue," and where one of the class is presumed to be dead after absence of seven years, and leaves no children, the legacy to her lapses, and the amount thereof is thrown into the fund for distribution among the members of the class specified.

APPEAL by plaintiffs from *Clement, J.*, at June Term, 1931, of FORSYTH. Affirmed.

A. L. Stevenson died on 17 February, 1917 (not 1925, as reported in a former appeal) leaving a last will and testament, two items of which were under consideration in *Trust Co. v. Stevenson,* 196 N. C., 29. He appointed his wife, Emma A. Stevenson, his executrix. She died 29 August, 1925.

The testator devised to his wife his real and personal property, "to have and use the same during her natural lifetime, with full power to dispose of such real estate and personal property or money as might be necessary for her comfortable maintenance and support," excepting certain dispositions which were otherwise made. He directed that his property should be converted into cash after the death of his wife and the proceeds, less the amount of two legacies, applied as follows: "To my brothers and sisters, if living, if not living, to their legal representatives; to the brothers and sisters of my wife if living, or if not living to their legal representatives." He left no children.

After the death of the executrix the Wachovia Bank and Trust Company qualified as administrator *d. b. n. c. t. a.* of the testator's estate and instituted an action in the Superior Court for the purpose of determining and identifying the beneficiaries named in the clause heretofore set out. The Superior Court held that the proceeds should be distributed per capita among the living brothers and sisters of the testator and of his deceased wife and *per stirpes* among the legal representatives of the deceased brothers and sisters of the testator and of his deceased wife, and found as a fact that those who took under the fifth item were the following: (1) Joe W. Stevenson, a brother of the testator; (2) Mrs. J. C. Salley, a sister; (3) Mary Stevenson, a sister, "if living";

(4) A. P. Stevenson, a brother, whose death occurred after that of the testator, leaving a son who conveyed his interest in the estate to T. W. Terry; (5) Amanda Stevenson, a sister, who died leaving a son, J. P. Stevenson; (6) Sandy Stevenson, a brother, who died prior to the death of the testator without lineal descendants, leaving a widow who died during the lifetime of the testator; (7) R. C. Rights (Wrights), a brother of Mrs. Emma A. Stevenson; (8) Will Rights (Wrights), a brother who conveyed his interest to R. J. Lineback; (9) Mrs. R. C. Jenkins, a sister; (10) Mrs. G. W. Booe, a sister, who died leaving a daughter Mrs. J. J. Mock. This Court on appeal affirmed the judgment of the Superior Court. *Trust Co. v. Stevenson, supra.* The opinion was certified to the Superior Court and at a subsequent term it was adjudged that the cause go off the civil issue docket.

Upon a difference of opinion as to the designation of those entitled to share in the proceeds under the fifth item of the will, a petition was filed in the Superior Court on 23 March, 1929, entitled as in the original proceeding, for advice. No new process was issued, but all the parties to this litigation were duly made parties to the original proceeding. On the same day the court made an order which is not in the record, and pursuant thereto the administrator divided the proceeds into eight equal parts, giving no share to Sandy Stevenson—he and his widow having died without issue, or to Mary Stevenson, who had not been heard from for many years.

In its answer the administrator alleges that under appropriate orders of the Superior Court it has paid all sums due the legatees and has filed its final account, which has been duly approved.

In May, 1930, the petitioners instituted the present proceeding before the clerk to annul the order made at the March Term, 1929, of the Superior Court, and to recover one-half of the two shares referred to as the shares of Mary Stevenson and Sandy Stevenson, "approximately $7,200." The respondents filed answers and the clerk transferred the cause to the civil issue docket. It came on for hearing at the June Term, 1931, and at the close of the petitioners' evidence Judge Clement dismissed the proceeding and taxed the cost against the petitioners, who excepted and appealed.

John M. Greenfield, Roy L. Deal and Fred H. Morris for appellants.
DuBose & Weaver for administrator, appellee.

ADAMS, J. This is a proceeding brought before the clerk of the Superior Court to require the Wachovia Bank and Trust Company, as administrator with the will annexed of the estate of A. L. Stevenson, to pay to the petitioner O. B. Holbruner, as assignee of her father Joe W.

Stevenson, copetitioner, the interest her father claimed in the estate as a legal representative of Mary Stevenson and Sandy Stevenson, a deceased sister and a deceased brother of the testator. The pleadings raised issues of fact, and the cause was transferred to the civil issue docket, and at the trial it was dismissed as in case of nonsuit.

According to the findings of fact set out in the judgment rendered in the Superior Court at the November Term of 1927 the brothers and sisters of the testator and of his wife were ten in number. It is with the interest of Mary Stevenson and Sandy Stevenson that the present controversy is chiefly concerned. Sandy died prior to the death of the testator, leaving no children but a widow whose death, also, preceded that of the testator. There is no definite evidence of Mary's death, but there is testimony that she was last heard from by the family in the early part of the year 1912. The argument of the appellants is based, at least in part, on the presumption of her death. They contend that Joe W. Stevenson and Mrs. J. C. Salley are the two nearest of kin of Mary and Sandy and that the appellants are entitled to one-half of these two shares. Mrs. Salley, one of the defendants, admits the principal allegations of the petition and apparently espouses the cause of the plaintiffs.

The position of the appellants rests primarily on their interpretation of the judgment rendered by Judge Stack and affirmed on appeal to this Court. *Trust Co. v. Stevenson, supra.* This judgment, they contend, awarded one share of the testator's estate to the legal representatives of Sandy Stevenson, and to Mary Stevenson one share, if living, and if not living to her legal representatives; that the legal representatives of these two are those on whom the descent would be cast by the statute of distributions; and that the petitioners and Mrs. Salley are entitled to the whole of the two contested shares. They admit that the only point in dispute regarding the effect of the former judgment is the meaning of the term "legal representatives."

We are unable to concur in the appellants' interpretation. When the will in controversy was brought to this Court on the former appeal we construed the fifth item as expressing the testator's intention to distribute the funds arising from the sale per capita among such of his own brothers and sisters and those of his wife as were living at the termination of the life estate, and *per stirpes* among the legal representatives of such as were deceased at that time. *Trust Co. v. Stevenson, supra.* It is perfectly obvious from the facts heretofore stated that neither Sandy Stevenson nor his wife acquired any interest under the will. They predeceased the testator, leaving no children, and the legacy lapsed.

In the absence of a residuary clause a lapsed legacy will ordinarily go to the heirs or the next of kin as in case of intestacy, but the disposition is ultimately controlled by the intent of the testator. *Reid v. Neal*, 182 N. C., 192, 199. If there is a residuary clause such a legacy falls into the residue. C. S., 4166; *McCorkle v. Sherrill*, 41 N. C., 173; *Coley v. Ballance*, 60 N. C., 634. Whether a clause is residuary is not dependent upon any particular form of expression but upon "the intention to include." *Allison v. Allison*, 56 N. C., 236; *Faison v. Middleton*, 171 N. C., 170.

With respect to the fifth item of the will what was the testator's intention? This clause is the last by which he disposed of his property. He directed that his entire estate, real and personal, should be converted into cash and distributed, after the payment of legacies, among certain brothers and sisters and their legal representatives. He gave them legacies, not nominatim, but as a class, intending that the described class should take the whole fund. *Johnson v. Johnson*, 38 N. C., 426, 430. After the "entire estate" is disposed of no other property remained, and among those designated as a class "all the funds arising from the sale must be distributed." In these circumstances the lapsed legacy of Sandy Stevenson did not go to those who are described technically as the next of kin; it was a part of the general fund set apart by the testator for distribution among the entire class named in the fifth item as the objects of his bounty. We see no error in the court's disposition of this interest.

The devise or bequest to Mary Stevenson invites consideration of another question. The absence of a person from his domicile without being heard from by those who would reasonably be expected to hear from him if living raises a presumption that at the end of seven years he is dead, but not that he died at any particular time during this period. *Beard v. Sovereign Lodge*, 184 N. C., 154. If Mary Stevenson was living in January, 1912, as the evidence tends to show, there is no presumption that she was dead on 17 February, 1917, the date of the testator's demise; but without other evidence there is a presumption that she was dead on 29 August, 1929, when the life estate ended and the roll of the class was to be called.

Let us concede, as contended, that she died during the intervening period. Are the appellants in that event entitled to one-half of her share? This question raises another: What is the meaning of the term "legal representatives," as used in item five? The appellants say the term includes only those who would take from the same ancestor under the rules of descent and distribution; the appellee insists that it signifies children or "issue of the body."

Its meaning is to be determined by the context and the entire will. For this reason we need consume no time in reviewing the numerous cases in which the words have been variously construed. That Judge Stack understood their meaning to be "children" or "issue" is manifest from his judgment, and his construction was approved by this Court on appeal. Since the disbursement of the fund was made by the administrator in accordance with this judgment it is immaterial whether all the parties had notice of the order signed by Judge Clement in March, 1929. The judgment is

Affirmed.

G. W. ALMOND v. OCEOLA MILLS, INCORPORATED.

(Filed 8 January, 1932.)

1. **Trial D a—On motion of nonsuit all the evidence is to be considered 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 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. **Master and Servant C b—Evidence held sufficient to go to jury in action by employee to recover damages against employer.**

Where, in an action against an employer to recover damages caused by his alleged negligence in failing to exercise proper care to furnish the plaintiff a reasonably safe place to work and reasonably safe and suitable tools therefor, the evidence tends to show that the employee had to operate a comb in a cotton mill while the machinery was running, and that the comb fell on his hand causing the injury in suit, that, if the comb had been properly fixed, its own weight would have held it back and prevented its so falling, that the comb under unchanged circumstances had thereafter fallen while other operatives were at work at the machine, and that it was not the employee's duty to repair machinery, but the duty of a superintendent, *Held:* the evidence is sufficient to take the case to the jury on the issue of the employer's negligence, and the granting of its motion as of nonsuit was error.

3. **Evidence D h—Evidence of similar occurrences held competent under the facts of this case.**

Where an employee is injured by the falling of a comb in a cotton mill machine, alleged to have fallen because of a defect therein, evidence that the comb had so fallen while the machinery was being operated by other employees immediately thereafter is competent where there is evidence that no change had taken place, the probative force of the evidence being for the jury.

ALMOND *v.* OCEOLA MILLS, INC.

APPEAL by plaintiff from *Harwood, Special Judge*, at March-April Term, 1931, of CHEROKEE. Reversed.

This is an action brought for actionable negligence by plaintiff, an employee of defendant, against defendant for damages. The plaintiff alleged that in the machinery used in manufacturing cotton into thread, on the night of 22 August, 1929, the middle finger of his right hand "was caught between the teeth of said comb and said nipper" and was cut off. The allegations of negligence that was the proximate cause of the injury: (1) in requiring plaintiff to operate more combers than could be done by one man; (2) that the machine comber and comb was in a defective and dangerous condition, in that it worked loose at each end, where same was fastened, so that the vibration in the operation of the machinery caused the comb to drop and fall on plaintiff's finger and cut the nail of same off.

The defendant denied the material allegations of the complaint—that plaintiff's injury was caused by any negligence on the part of defendant, and alleged that the injury was slight and plaintiff "continued to work for a great many days at the same work." That the machine was in "perfect working order."

The defendant set up the plea of contributory negligence and alleged: "If the plaintiff was injured at all that he was injured through no negligence or carelessness on the part of this defendant but through his own negligence and carelessness in negligently and carelessly sticking his hand into the machine where he had no business and where he knew better or in striking some portion of the machine, and that such negligence on his part is expressly pleaded in bar of any recovery in this cause."

Moody & Moody for plaintiff.
Johnston & Horner for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The motion was sustained and in this we think there is 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 evidence of plaintiff was in part: "I was running combers. Whiting combers. These combers were used to comb the cotton and take all the stuff out of the cotton that was necessary for them to take out to make the thread. To prepare the cotton to make thread. The combs are ten or twelve inches, and they come down this way (indicating) and when they come down where the cotton goes through there are two steel rollers and two hooks that you have to take up, and this is what we call the nippers that come up, and you have to lift that comb back and lay it back and lift up these two hooks and take the roller out and take the rope off, and then you have to put back the roller and put the hooks back and then start our cotton through, and when I done that this comb fell on my hand. The comb is up over the rollers and comes right down like that (indicating with book), comes over like that right down on this cotton, and when you lay it back you turn it right back like that. There are two rollers under this comb and the half laps that the teeth was on. The comb has teeth on it, on the bottom, and the cotton goes through the rollers. There is no teeth on the rollers. These nippers are things that come up through there that keep time, I suppose to carry the cotton, that goes up and down, the nippers work all the time. The nippers cuts the cotton. They are made out of steel. . . . When I started to comb the comb was laying back there (indicating) and it just fell over and caught my hand and took the finger nail off right there. . . . I couldn't tell you what degree the angle would be. If the comb was properly fixed its own weight would hold it back. If the comb was in proper shape I expect it would stay back, but it did not do it, it fell, that is all I can tell you about it. I don't know what was wrong with the shape of the comb, I aint a comb fixer. Yes, sir, the reason I say the comb was not in proper shape was because it fell. Yes, it works on a hinge and its own weight holds it back *if it is kept tight, if it wouldn't work loose and drop down.* It is fastened down on the bars that would hold it down. I never did work on a comb, all I done to the comb was to just run the comb, I never did try to repair a comb. No, I didn't know that there was anything wrong with the comb, more than the comb come loose and fell; I don't know why. . . . The cotton had not got through when the comb fell. I had a paddle made out of wood that they gave me and I used it to poke it through between the steel rollers. They gave me the paddle and told me to poke the cotton through the rollers. *The machine was running. It had to run before the cotton would go through.* . . . My immediate foreman was Mr. Welch, Cary Welch. He had a section hand in there and a superintendent and he helped overhaul all

combs himself, Mr. Welch did. *It wasn't my duty to repair machinery. it was my duty to run it.*"

We think the evidence of similar occurrences that were excluded by the court below competent, the probative force is for the jury. It was in evidence that no change had occurred.

In *Perry v. Bottling Co.*, 196 N. C., at p. 691, we find: "'Evidence of similar occurrences is admitted where it appears that all the essential physical conditions on the two occasions were indentical; for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to a matter which cannot reasonably be expected to have affected the result.' 22 C. J., 751, sec. 840; *Pritchett v. R. R.*, 157 N. C., 88; *Leathers v. Tobacco Co.*, 144 N. C., 330; *Dorsett v. Mfg. Co.*, 131 N. C., 254." *Shaw v. Handle Co.*, 188 N. C., at p. 235; *McCord v. Harrison-Wright Co.*, 198 N. C., 742.

In *Shaw v. Handle Co., supra*, at p. 236, quoting from *Blevins v. Cotton Mills*, 150 N. C., 498, is the following: "It may be well to note that the doctrine we are now discussing refers to the objective conditions, where, from the facts and circumstances, it is reasonably probable that no change has occurred, and must not be confused with the position which obtains with us, that voluntary changes made by any employer after an injury to an employee, and imputed to the employer's negligence, are not, as a rule, relevant on the trial of an issue between them."

In *Ammons v. Mfg. Co.*, 165 N. C., at p. 452: "It is established by repeated adjudications in this State that an employer of labor, in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements, and appliances safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision," citing numerous authorities. *Ainsley v. Lumber Co.*, 165 N. C., 122; *Riggs v. Mfg. Co.*, 190 N. C., at p. 258.

It was in evidence that in doing the work required of plaintiff, the machine "had to run"; "if the comb was properly fixed its own weight would hold it back, . . . if it is kept tight (if) it wouldn't work loose and drop down." Shortly after plaintiff was injured, some three days, one Earl Crisp took his place at the same machine, the same comb fell while he was operating it. Later one Frank Birchfield took Crisp's place and worked at the same machine. He testified, in part: "Q. State, Mr. Birchfield, while you worked with that comb, whether it fell at times? A. Yes, sir. Q. While you were working with it, it fell? A. Yes, sir. Q. About how many times did it fall while you were working

with it? A. I think it fell three or four times when I was working with it, I know it did. By the court: How long was that, Mr. Birchfield, after Mr. Almond was injured? A. Well, it must have been something near thirty days."

We think the evidence of plaintiff sufficient to be submitted to a jury. For the reasons given, the judgment of the court below is

Reversed.

STATE v. J. MACK RHODES.

(Filed 8 January, 1932.)

1. **Appeal and Error J b—Motion for continuance is addressed to discretion of trial court and his refusal is not ordinarily reviewable.**

The granting or refusing of a motion of a party for a continuance of a cause rests in the sound discretion of the trial judge before whom it is heard, and the exercise thereof is not reviewable on appeal in the absence of gross abuse, and where it appears that the judge acted after a careful and unbiased investigation of the circumstances, his refusal to grant the motion will not be disturbed.

2. **Criminal Law G s—Books of bank held sufficiently identified and properly admitted in evidence in prosecution for embezzlement, etc.**

Where the president and former cashier of a closed bank is tried for embezzlement, misappropriation of the bank's funds, false entries on its books and records, the testimony of an expert accountant employed to make an examination thereof that he found the books and records in the bank's vault upon opening it with keys furnished by the bank's cashier and bookkeeper, is sufficient evidence of their identification as the books and records of the bank, and they are properly admitted in evidence.

3. **Same—It is presumed that entries on bank's books were made by accredited agents and employees.**

A bank operating under authority of a State statute is subject to public supervision, and its rights, powers and privileges are prescribed by law, and in the exercise thereof it is presumed to keep a correct record of its transactions, and proof of the identity of the books raises the presumption that the records and entries they contain were made by accredited clerks or agents of the corporation, and in a prosecution for embezzlement, etc., it is not required of the State to produce all the employees as witnesses to the entries thereon, the entries covering a long period of time.

4. **Same—Parol expert testimony in explanation of bank books properly introduced in evidence is competent.**

The entries on the books and records of a banking corporation when the books are relevant to the inquiry on the trial of one of its officers for embezzlement, etc., are not self-explanatory, and parol evidence is admissible in explanation thereof by witnesses introduced at the trial who are competent to testify, subject to direct and cross-examination.

STATE *v.* RHODES.

APPEAL by defendant from *Sink, J.*, at March Term, 1931, of HENDERSON.

The First Bank and Trust Company was a corporation organized under the laws of North Carolina and was engaged in the business of banking in Hendersonville. It had been in business a number of years prior to 19 November, 1930, when its doors were closed. For a year immediately previous to this date the defendant was president of the institution and for the preceding fifteen years he had been its cashier. T. R. Grubbs, a certified public accountant, began an examination of the bank on 21 November, 1930, and on 19 December, 1930, H. G. Kramer took charge as liquidating agent.

Thereafter the defendant was indicted for embezzlement, abstraction, and misapplication of the funds of the bank and for making and causing to be made a false entry in the bank's records. He was tried and convicted on each of the five counts, and was sentenced on the first, charging embezzlement, and on the fourth, charging the false entry. On the second, third, and fifth counts the prayer for judgment was continued. The defendant excepted and appealed, assigning error.

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

R. L. Whitmire and Shipman & Ardledge for defendant.

ADAMS, J. The court convened on the second day of March, 1931, and on the fifth the defendant moved for a continuance on the ground that he was not physically able to go to trial. He produced two certificates, each signed by a reputable physician, indicating the defendant's "highly nervous state" and the probability of a nervous collapse or breakdown. The motion was denied and the case was set for trial on the following Monday. It was not called at that time, but the trial judge of his own motion requested a physician from Asheville to examine the defendant and to determine whether he could be brought to trial without detriment to his health and whether he would likely be more able to stand the trial in October. The physician found no organic disease, referred the defendant's condition to large doses of hypnotic drugs, and expressed the opinion that under certain conditions he would soon "be able to undergo the court proceedings." The case was finally called on the eleventh day of March, when the defendant's motion for a continuance was again overruled. The denial of the motion is the subject of the first three exceptions.

It is now a familiar axiom that granting or refusing the continuance of a cause is a matter which rests in the discretion of the trial court

and in the absence of gross abuse is not subject to review on appeal. *S. v. Sauls,* 190 N. C., 810; *S. v. Riley,* 188 N. C., 72; *Hensley v. Furniture Co.,* 164 N. C., 149; *Armstrong v. Wright,* 8 N. C., 93. Instead of abusing his discretion, the presiding judge made a careful and patient investigation of the circumstances pending the several motions of the defendant and refused a continuance after sufficient opportunity for reflection. These exceptions are overruled.

The principal assault is made upon the admission in evidence of certain books, entries, and exhibits, and the testimony of witnesses in reference to their significance and to their bearing on the question of the defendant's guilt. The books, referred to as exhibits, include the record of certificates of deposit issued, a transfer binder of the sheets making up the daily cash journal binder, a loose leaf ledger, and a certificate of deposit account. The reason assigned for challenging the admissibility of these records is the absence of evidence tending to show the defendant's admission that they were the books of the bank or that they were properly identified. That there is evidence of identity is not open to debate. Grubbs, the public accountant, who began his examination of the bank's affairs on the twenty-first of November, testified that these books were in the vault and together with the keys were turned over to him by J. Allen Rhodes, the cashier, and Cecil Rhodes, the bookkeeper. Kramer, the liquidating agent, said the Corporation Commission gave him the keys to the vault where he found the books about which he testified. The defendant admitted that he had made a false entry on the certificate of deposit account to offset debit entries extending over a long period, and that he had used the cash for his personal benefit. The sums thus applied amounted to about $20,000 and no doubt comprised the fund, or a part of the fund, charged in the first count of the indictment to have been embezzled. So far as the record reveals, although the defendant was not questioned as to all the exhibits, at no time did he suggest the nonidentity of those about which he was examined; and, as all the records were found in the vault, this also was a circumstance for the consideration of the jury.

It is contended, however, that the evidence does not show by whom the entries in the books were made or authorized, and that the testimony of the accountant and the liquidating agent in explanation of the entries should have been excluded. The supporting argument proceeds on the theory that the records and books of a corporation may not be received in evidence for any purpose unless it is shown or admitted that the entries were made by an authorized servant or agent of the corporation. It is not doubted that cases apparently of such tenor may be cited, but the question of their application to given cases must be solved by refer-

ence to the matters in controversy—the object and scope of the litigation and the particular facts admitted or established.

The First Bank and Trust Company was created by statute; it was subject to public supervision; its rights, powers, and privileges were prescribed by law. It was presumed in the exercise of its powers to have appropriate books and to keep a correct record of its transactions. That it had such books is not denied. Proof of their identity as the property of the bank raised the additional presumption that the entries and records which they contain were made by an accredited clerk or agent of the corporation. *Glenn v. Orr*, 96 N. C., 413; *Turnpike v. McCarson*, 18 N. C., 306.

It was upon this principle that the exhibits were admitted in evidence. But they were not self-explanatory; negation as well as affirmation was a prominent feature of the prosecution. If explanation of the entries was essential, so likewise of the omissions, which must be proved by oral testimony. To elucidate the controversy and to establish its theory the State examined T. R. Grubbs and H. G. Kramer as two of its witnesses. The defendant objected, but we think the competency of their testimony cannot reasonably be questioned.

They examined the books, made tabulations and calculations, and testified as to the results of their investigation. This mode of exemplifying the records of an insolvent bank has received the approval of this Court in *S. v. Hightower*, 187 N. C., 300. It is founded on considerations of policy and convenience, if not of necessity, and commendably results in relaxation of the rigid rule which would require the production of all the employees, who through an indefinite period had made entries in books of the corporation. Where a fact can be ascertained only by the inspection of a large number of documents made up of many detailed statements it would be practically out of the question to require the entire mass of documents and entries to be read by or in the presence of the jury. As such examination cannot conveniently be made in court the results may be shown by the person who made the examination. Wigmore on Evidence (2 ed.), sec. 1234; Chamberlayne on Evidence, sec. 2317. The production of the documents and the privilege of cross-examination and of the introduction of evidence afford ample protection of the defendant's rights.

We find no error in the charge. Evidence as to the defendant's good character, brought out on the cross-examination, was favorable to himself. The remaining exception is without merit.

No error.

H. O. CHARNOCK v. REUSING LIGHT AND REFRIGERATING COMPANY AND W. J. REUSING.

(Filed 8 January, 1932.)

1. **Master and Servant F a—Superior Court may determine whether plaintiff was employee when employment is set up as defense to action.**

   Where, in an action instituted in the Superior Court to recover damages for a negligent injury, the defendant sets up the defense that the plaintiff was an employee and that his exclusive remedy was under the Workmen's Compensation Act, *Held:* the issue may be determined in the Superior Court, its jurisdiction not being ousted by the Compensation Act, and upon conflicting evidence it is properly submitted to the jury.

2. **Highways B k—In order for negligence of driver to be imputed to guest the guest must have such control as to be in joint possession.**

   Where the doctrine of being engaged in a joint enterprise is relied on by the defendant sued for negligently inflicting a personal injury in the driving of an automobile wherein the plaintiff was an invitee, it must be shown by the defendant that he and the plaintiff had such control over the car as to be substantially in joint possession of it.

APPEAL by defendants from *McElroy, J.*, at May Term, 1931, of BUNCOMBE. No error.

Joseph W. Little for plaintiff.
Heazel, Shuford & Hartshorn for defendants.

PER CURIAM. This is a civil action which was tried in the Superior Court for the recovery of damages for personal injury alleged to have been caused by the negligence of the defendants. The corporate defendant owned an automobile which W. J. Reusing was driving as its president and agent in the prosecution of its business. The plaintiff alleged that he was riding as a guest at the invitation of Reusing on the highway between Asheville and Spartanburg; that others were in the car; that the brakes and tires were defective; that Reusing, though repeatedly warned to desist, operated the car in a heedless and reckless manner and at an excessive rate of speed, 50 or 60 miles an hour, until it left the highway, "jumped" a ditch, turned over, and injured the plaintiff. The defendants denied negligence, set up the usual defenses, and alleged that the plaintiff at the time of the injury was an employee of the defendant and that any compensation to which he might be entitled should be awarded by the Industrial Commission. Issues involving all these questions were submitted to the jury and answered in favor of the plaintiff and his damages were assessed.

Under the Workmen's Compensation Act every employer and employee, except as therein stated, shall be presumed to have accepted the provisions of the act; but there is no presumption that every person who is injured by a corporation or an individual is an employee of either. That is a matter of proof, which in this case the jury resolved against the defendants. To hold, as the appellants intimate, that the Industrial Commission has "exclusive jurisdiction" to determine the relationship of the parties and that the Superior Court is ousted of its jurisdiction would be at least an anomaly in judicial procedure.

We have examined the several exceptions and find that an elaborate review of them would result only in a repetition of familiar principles. There is no error in the instruction relating to the burden of proof on the first issue. Nor is there sufficient evidence that the plaintiff and the defendants were engaged in a joint enterprise. A common enterprise in riding is not enough; the circumstances must be such as to show that the plaintiff and the driver had such control over the car as to be substantially in the joint possession of it. *Albritton v. Hill,* 190 N. C., 429. There is no evidence of the technical assumption of risk, and the ordinary risks of travel by automobile, which are pleaded by the defendants, were presented by the court in the instructions given the jury on the issues submitted.

Testimony as to the speed of the car, similar to that under the circumstance referred to, was considered and approved in *Hicks v. Love,* 201 N. C., 773. The remaining exceptions are formal.

The charge to the jury very clearly set out the several contentions of the parties so far as they were reasonably justified by the evidence and applied the law as contemplated by C. S., 564.

It is unnecessary to consider the formal exceptions. We find

No error.

J. FRANK SMITH, WALTER L. SMITH AND C. W. SMITH v. WALTER J. BARNHARDT AND B. W. BLACKWELDER, COMMISSIONER.

(Filed 8 January, 1932.)

Injunctions B b—Held: plaintiff could not enjoin sale of land under order of court, his remedy being by motion in the original cause.

Where land embraced in a deed of trust has been ordered sold by final judgment the fact that it was under lease will not prevent the dissolution of a restraining order, the sale being subject to confirmance by the court, the remedy of the plaintiffs, if they are entitled to any, being by order in the original cause.

SMITH *v.* BARNHARDT.

APPEAL by plaintiffs from *Oglesby, J.*, at Chambers in Concord, 21 February, 1931. Affirmed.

This is an action to restrain the defendant, B. W. Blackwelder, commissioner, from selling the lands described in the complaint, under a judgment and decree of the Superior Court of Cabarrus County, rendered at February Term, 1929, in an action between the plaintiffs and the defendant, Walter J. Barnhardt.

This action was begun on 31 January, 1931, and was heard pursuant to an order to show cause why a temporary restraining order dated 2 February, 1931, should not be continued to the final hearing.

From judgment dissolving the temporary restraining order, plaintiffs appealed to the Supreme Court.

Armfield, Sherrin & Barnhardt for plaintiffs.
H. S. Williams and J. Lee Crowell for defendants.

PER CURIAM. In an action pending in the Superior Court of Cabarrus County, at February Term, 1929, between the plaintiffs in this action and the defendant, Walter J. Barnhardt, there was a final judgment, and a decree that the lands described in a deed of trust executed by plaintiffs to secure their note held by the defendant, Walter J. Barnhardt, be sold and that the proceeds of said sale be applied as therein directed. B. W. Blackwelder was appointed in said decree as commissioner to sell said lands. In accordance with certain provisions of said decree, the said B. W. Blackwelder, commissioner, on 1 January, 1931, advertised said lands for sale on 2 February, 1931. This action was begun on 31 January, 1931, to restrain the said commissioner from selling said lands in accordance with the decree rendered at February Term, 1929, of the Superior Court of Cabarrus County.

A temporary restraining order signed on 2 February, 1931, was dissolved at the hearing on 2 February, 1931. Plaintiffs excepted to the judgment dissolving the temporary restraining order and appealed to this Court.

We find no error in the judgment dissolving the temporary restraining order. The fact that the defendant, W. J. Barnhardt is in possession of the lands described in the deed of trust, under a lease executed by the plaintiffs, is immaterial. No sale of said lands will be consummated until same has been confirmed by the Superior Court.

If plaintiffs are entitled to any relief on the facts alleged in their complaint, such relief may be had by an order in the action in which the decree for the sale of their lands was rendered. It cannot be had in this action. The judgment is

Affirmed.

STATE v. C. J. GIBSON.

(Filed 8 January, 1932.)

Husband and Wife A c—Misrepresentation of wife before marriage that she was pregnant is no defense in prosecution for wilful abandonment.

The false representations of the prosecutrix that she was pregnant before the marriage is no defense in a criminal action against the husband for wilful abandonment.

APPEAL by defendant from *McElroy, J.*, at May Term, 1931, of BUNCOMBE. No error.

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

Thomas A. Curry for defendant.

PER CURIAM. The defendant was indicted for wilful abandonment of his wife. On appeal the chief contention was that the defendant's consent to the marriage was procured by the false representation of the prosecutrix before the marriage that she was pregnant. It has been held that this is not a sufficient cause for the annulment of the marriage (*Bryant v. Bryant*, 171 N. C., 746), and if not, it is obviously not a sufficient cause for collaterally assailing the validity of the marriage in a distinct proceeding. We have examined all the exceptions and find no error.

No error.

E. A. SECHRIEST, E. T. EVERHART, H. T. MANUEL, J. E. LOFTIN, LINDSAY LOFTIN, J. D. MORGAN, W. E. STINSON, MRS. J. A. LINTHICUM, C. R. THOMAS, D. J. HUNDLEY, JOHN MANUEL, N. F. JORDAN, FLOYD SLACK, JOHN T. FOWLER, J. H. HARRISON, ROY H. GRUBB, FRANK HAGER, E. G. BARLOW, THEODORE RIDGE, LEE TYSINGER, NUMA (JOHN) HINKLE, MRS. C. T. EVERHART, FRANK LANIER, M. K. HAMPTON, SINK & OWENS, AND T. H. SHIRLEY, v. THE CITY OF THOMASVILLE.

(Filed 27 January, 1932.)

1. Municipal Corporation G b—Assessment for widening street beyond width of regular highway without petition of owners held invalid.

Where, in constructing a highway through a city, the State Highway Commission contracts with the city to construct the highway through the city with a width of five feet on each side in excess of the width

of the highway beyond the city limits, the town to pay the cost of the extra five feet on each side, and the city levies a special assessment against the abutting owners to pay for the additional five-foot strip without a petition of the owners: *Held*, the statute under which the contract was made, sec. 3846(ff) N. C. Code of 1931 (Michie), applies only where the width of the street and the regular highway are the same, and the assessment is invalid, the provisions of C. S., 2707, requiring a petition of the majority of the abutting owners to be filed, not having been complied with.

2. Statutes B a—Statutes giving authority to take land or burden it with assessments should be strictly construed.

The statute giving the State and municipal authorities the right and authority to take private lands or burden it for public purposes should be strictly construed.

APPEAL by defendant from *Harwood, Special Judge,* at July Term, 1931, of DAVIDSON. Affirmed.

This is a civil action, upon an appeal of the defendant. There was created a special assessment district and an assessment was levied against plaintiffs' property pursuant to a contract entered into with the State Highway Commission by virtue of section 3846(ff), N. C. Code, 1931 (Michie). From the judgment of the court below, declaring the creation of said assessment district, and the levying of an assessment upon the lands of the plaintiffs, to be invalid and unenforceable, the defendant appealed.

The contract is as follows:

"This agreement, made and entered into this 30 April, 1928, by and between the North Carolina State Highway Commission, on the one part, and the town of Thomasville, in Davidson County, on the other part:

Witnesseth, that whereas, State Highway No. 10 passes through the town of Thomasville, and it has been found necessary to connect the State Highway System with the improved streets of said town; and whereas, the town of Thomasville desires that that portion of said State Highway within the town of Thomasville, from College Street north to the city limits be widened, straightened and improved, in accordance with plans prepared by and on file with the North Carolina State Highway Commission;

Now, therefore, it is agreed that if the State Highway Commission will cause to be constructed along the said street a pavement thirty feet in width, then the town of Thomasville, at its own expense, will cause to be laid, on either side of the said thirty foot strip of pavement, such additional pavement, including curb and gutter, with provisions for surface drainage, as will make the total paved width of said street,

from curb to curb, 40 feet. Such additional pavement to be of the same kind and character as that provided by the State Highway Commission.

It is understood and agreed that the town of Thomasville shall cause to be laid, under said pavement, all necessary water, sewer, gas and other pipe lines, or conduits, together with all necessary house or lot connections, to the curb line of said street, and that no part of the cost thereof shall be chargeable to or against the State Highway Commission and, as a further inducement to the State Highway Commission to enter into this contract, the town of Thomasville agrees and binds itself to save the State Highway Commission harmless from all costs that it may incur by reason of the right of way of said Route 10, through the town of Thomasville, and to provide for the prompt removal of any telephone or electric line poles or other obstructions that may be necessary for carrying out the said improvement.

Provided, however, that, if the town of Thomasville shall be unable, prior to the time of the commencement of construction on this project, to give the State Highway Commission satisfactory assurance of a right of way for that portion of the project between station 42 and the end of the project at College Street, where the plan proposed shows an encroachment upon the right of way claimed by the Southern Railway Company, then, in that event, the State Highway Commission reserves the right to eliminate from this project all that portion of the pavement south of station 42.

It is further understood and agreed that if, prior to the commencement of the construction of said work within the limits of the town of Thomasville, by the State Highway Commission, the town of Thomasville shall deposit with the State Highway Commission a sum of money which, in the opinion of the chairman of the State Highway Commission, shall be sufficient to pay for that portion of the entire pavement of the street of a total width of 40 feet, which, under the terms of this agreement, is chargeable to the town of Thomasville, then and in that event, the State Highway Commission will assume the supervision of and cause to be laid the entire pavement as hereinbefore provided.

That, in view of the contents of this agreement and, in order to provide the means for carrying the same into execution, the State Highway Commission, by virtue of section 16 of the State Highway Act, hereby orders the town of Thomasville to cause that portion of the streets of said town covered and embraced by State Highway No. 10, from College Street north to the town limits of Thomasville, in accordance with the plan of improvement hereinbefore referred to, to be paved in accordance with this agreement, and the said street is hereby declared to be an as-

sessment district, in accordance with the provisions of section 16, of the State Highway Act.

In witness whereof, the State Highway Commission has caused this agreement to be signed by its chairman, attested by its assistant secretary, and its corporate seal affixed, and the town of Thomasville has caused this agreement to be executed in its name, by its mayor, attested by its town clerk, and its corporate seal affixed. Executed in triplicate the day and year first above written."

The following judgment was rendered by the court below: "This cause coming on to be heard at the regular July Term, 1931, of the Superior Court of Davidson County before his Honor, John H. Harwood, judge presiding, and a jury, and the parties having expressly waived a jury trial and agreed upon the following as a statement of facts to be found by the court, and having agreed that his Honor could render judgment upon the admissions in the pleadings and the following agreed statement of facts, to wit:

1. That the contract, copy of which has been introduced in evidence, was executed between the State Highway Commission and the city of Thomasville.

2. That the street improvement described in this contract was done by the State Highway Commission, and the additional pavement, ten feet in width, inside of the city of Thomasville, was paid for by the city of Thomasville.

3. That the city of Thomasville did not procure the right of way from the North Carolina Railroad Company on East Main Street and that this street was eliminated from the contract.

4. That no petition of abutting property owners was filed, asking for assessment district to be made; but the city of Thomasville, relying upon the contract and order of the State Highway Commission, declared assessment district and made advertisement thereof and assessment for the cost of said pavement against the plaintiffs in this action, in accordance with their respective frontages, upon the said improvement, all as set out in the pleadings.

5. It is admitted that no condemnation proceedings was instituted by the town for the purpose of acquiring title to the lands upon which the said street improvement was made.

6. It is admitted that the pavement of the State Highway outside of the city limits is only thirty feet, exclusive of dirt shoulders, and that the pavement of that portion inside the city limits involved in this controversy is 40 feet.

7. That the condition of said streets is correctly shown on blue print introduced in evidence.

8. That chapter 301, section 49, Private Laws 1915, is in full force and effect as a part of charter of city of Thomasville.

9. That said assessment and improvement is made under and by virtue of section 3846(ff) of N. C. Code (Michie).

10. That the city of Thomasville is and was at the time herein referred to in the pleadings a city of more than 3,000 inhabitants.

11. That the State Highway No. 10 had previously been constructed by the State Highway Commission from the city of High Point to College Street in the city of Thomasville a total width of thirty feet and eighteen feet thereof had been paved with concrete.

12. That State Highway No. 10 follows Main Street from College Street westward and that there existed on this street a pavement varying in width from twenty-four to forty-six feet to the westward city limits, and that the State Highway No. 10 then continued in the direction of Lexington over a thirty-foot road, eighteen feet of which had been paved.

13. That simultaneous with the building of the street in controversy in this action the State Highway No. 10 from the city limits of Thomasville to the city limits of High Point was widened by the State Highway Commission to a pavement of thirty feet, with a five-foot dirt shoulder on either side, and that part of No. 10 extending from the eastern corporate limits of the city of Thomasville to the intersection of East Main Street was paved by the State Highway Commission under the terms of the contract between the State Highway Commission and the city of Thomasville, introduced in evidence, to a width of forty feet, and the city of Thomasville thereupon paid to the State Highway Commission the cost of ten feet of this pavement, five feet additional on each side of the forty-foot strip constituting the assessment district involved in this action.

Now, therefore, his Honor being of the opinion that upon the admissions in the pleadings and the foregoing statement of facts the assessment levied by the city of Thomasville, is invalid, the same is set aside, and declared null and void, and said city of Thomasville is perpetually enjoined and restrained from collecting said assessment. The cost of this action to be taxed against the city of Thomasville."

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

Walser & Walser for plaintiffs.
Chas. Ross and H. R. Kyser for defendant.

CLARKSON, J. The sole question involved in this action: Is an assessment by a city against the abutting property owners on each side of the

street widened, improved or surfaced to extent of five feet extra under a contract with the State Highway Commission, by virtue of N. C. Code, 1931 (Michie), sec. 3846(ff), invalid on account of the five feet on each side of such street widened, improved or surfaced, within the corporate limits, not being uniform in width with the improved or surfaced portion of the State Highway outside of the corporate limits; no petition for the extra five feet to be improved or surfaced having been obtained from the majority in number of the abutting property owners, in accordance with C. S., chap. 56, Art. 9, sec. 2707? Under the facts of this case, we think the assessment invalid.

Section 3846(ff), *supra,* is as follows: "When any portion of the State Highway System shall run through any city or town and it shall be found necessary to connect the State Highway System with improved streets of such city or town as may be designated as part of such system, *the State Highway Commission shall build such connecting links, the same to be uniform in dimensions and materials with such State highway: Provided, however,* that whenever any city or town may desire to widen its streets which may be traversed by the State Highway, *the State Highway Commission may make such arrangements with said city or town in connection with the construction of said road as, in its discretion, may seem wise and just* under all the facts and circumstances in connection therewith: *Provided further,* that such city or town shall save the State Highway Commission harmless from any claims for damage arising from the construction of said road through such city or town and including claims for right of way, change of grade line, and interference with public-service structures. And the State Highway Commission may require such city or town to cause to be laid out water, sewer, gas or other pipe lines or conduits together with all necessary house or lot connections or services to the curb line of such road or street to be constructed: *Provided further,* that whenever by agreement with the road-governing body of any city or town *any street designated as a part of the State Highway System shall be surfaced by order of the State Highway Commission at the expense, in whole or in part, of a city or town it shall be lawful for the governing body of such city or town to declare an assessment district as to the street to be improved, without petition by the owners of property abutting thereon,* and the cost thereof, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways whose tracks are laid in said street which shall be assessed under their franchise, shall be specially assessed upon the lots or parcels of lands abutting directly on the improvements, according to the extent of their respective frontage thereon by an equal rate per foot of such frontage." (Italics ours.)

In *Shute v. Monroe*, 187 N. C., at p. 686, we said: "We think C. S., 56, Art. 9, and the State Highway Act are *in pari materia*, and are to be construed together."

In analyzing the statute: We think it means that the street which is the connecting link through the city or town, that is to be improved or surfaced, shall be uniform in dimensions and materials with the paved portion of the highway outside of the city or town. That if the city or town desires to widen the street, that is the highway link, running through the city or town, the State Highway Commission and the city or town can agree as to the construction, in its discretion, as what may seem wise and just. It can be readily seen that it would be for the best interest of both city or town and the State Highway Commission, that when it is improving or surfacing the connecting link, of uniform dimensions and materials, that it should do the entire construction, the additional five feet on each side, as was done in the present case. That the link or street to be so improved or surfaced, the governing body of the city or town can declare it an assessment district without petition by the owners of the property abutting thereon, but this applies only to the width of the improved or surfaced portion of the State highway going through the city or town of the same width as the State highway, outside of the corporate limits. The extra feet, as in this case, five feet on each side of the highway through the city or town to be improved or surfaced, would require a petition from the majority in number of the abutting owners in accordance with C. S., chap. 56, Art. 9, sec. 2707.

The State Highway Act, chap. 2, Public Laws 1921, sec. 16, was fully considered in *Shute v. Monroe, supra*. The question presented in this case, was not presented in that one. The above section 16 was changed—Public Laws 1923, chap. 160, sec. 4: "That section sixteen be amended by striking out all of said section and inserting in lieu thereof the following." The new section is the same as that quoted in this opinion, *supra*, 3846(ff).

Plaintiffs, in contesting this matter, pursued the statutory remedy. *Jones v. Durham*, 197 N. C., at p. 133.

In *Charlotte v. Brown*, 165 N. C., 435, it is held: Where a municipality levies a special tax for street improvements upon the land of an abutting owner in excess of that allowed by a statute applicable, the excess is a nullity and may be enjoined; and where the limitation prescribed is a certain per cent of the taxable value of the property, that valuation must control, whether the property lies upon one or several streets. *Winston-Salem v. Coble*, 192 N. C., 776; *Winston-Salem v. Ashby*, 194 N. C., 388; *Flowers v. Charlotte*, 195 N. C., 599. In the

above cases the matter was jurisdictional and the proceeding void and the remedy by injunction permissible. *Jones v. Durham, supra,* at p. 132.

N. C. Code, 1931 (Michie), sec. 3671, is as follows: "The highways in any county, township, or road district constructed or improved under this article shall have a right of way of not less than forty feet, except where the road authorities or State Highway Commission deem it impracticable to acquire such width, and in such cases the width shall be as determined by said authorities. The alignment of the road shall be as straight as practicable and with no grade over four and one-half per cent, except as such grade is considered impracticable." See *Highway Commission v. Young,* 200 N. C., 603.

We do not think this section cited by defendant applicable to this case. We are not concerned with the width of the street, forty feet, but with the payment for the improvement and surfacing of the extra five feet on each side of the thirty feet improved or surfaced highway, through defendant city, that is uniform in width and material with the improved or surfaced portion of the highway outside of the corporate limits. There is no trouble about the State Highway Commission's right to condemn the land. N. C. Code, 1931 (Michie), 3846(bb); *Long v. Randleman,* 199 N. C., 344.

It is not a question that "North Carolina Main Street" No. 10, of 500 miles, from Beaufort to Murphy, and the Tennessee line, cannot be widened to forty feet, within the corporate limits of any city or town the highway traverses. See *Highway Commission v. Young, supra.* This can be done, and the statute gives the authority, but who shall pay for the hardsurfacing of same is the controlling question. In the present case it was paved the entire forty feet, but without statutory authority as to the extra five feet on either side—therefore, the paving of the extra five feet, on either side, is invalid, null and void. The statutes giving the road-governing bodies and others the right and authority to take private land, or burden it for public purpose, should be carefully followed. Such acts are strictly construed.

"Remove not the ancient landmark, which thy fathers have set." Prov. 22:28.

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

Affirmed.

F. B. INGLE v. GAY GREEN.

(Filed 27 January, 1932.)

1. **Appeal and Error K c—Decision of Court on former appeal is the law of the case upon subsequent trial and appeal.**

Where upon a former appeal to the Supreme Court it is decided that the plaintiff's cause of action is not barred by a judgment as of nonsuit, formerly rendered in an action between the same parties, because the allegations and evidence in the second action were not substantially identical, upon a subsequent trial and appeal the decision of the court that the plaintiff was not barred by the judgment as of nonsuit is the law of the case, and the question will not again be considered.

2. **Brokers E d—Evidence held competent on question of arbitrariness of refusal to sell in action by broker to recover commissions.**

In an action on a contract providing for a division of profits from the sale of land owned by the defendant if the plaintiff should procure a purchaser at a satisfactory price within a certain time, testimony of proposed purchasers procured by the plaintiff that they were ready, able and willing to perform their offer of purchase within the time specified is competent upon the question of the defendant's arbitrariness in refusing to sell.

3. **Trial F a—Where issues present all issuable matters to the jury they are sufficient.**

Error will not be found on appeal to issues submitted to the jury by the trial court when they present to the jury proper inquiries as to all the essential or determinative matters in dispute, and where a party contends that the issues submitted were improper he should tender other issues for the consideration of the trial court.

4. **Contracts B a—Contract will be construed as a whole to effectuate the intent of the parties.**

The entire written contract will be construed as to its related terms and expressions so as to effectuate the intent of the parties.

5. **Appeal and Error J e—Admission of evidence will not be held for error where substantially same evidence is admitted without objection.**

A party to an action who objects to the admission of certain evidence may not maintain his exception on appeal when evidence substantially the same has later been introduced on the trial without objection.

6. **Brokers E d—Testimony of value of land held competent on question of arbitrariness in refusal to sell upon broker's obtaining purchaser.**

Where it is material upon the trial as to whether a purchaser of lands procured by the plaintiff under his contract with the defendant, offered a reasonable price for the *locus in quo*, it is competent for a witness having experience and observation to testify to the value of the land at the time of the offer to buy, the probative force of the testimony being for the jury.

7. Brokers D b—Where owner arbitrarily refuses reasonable offer obtained by broker under contract, the broker may recover his commissions.

Where the plaintiff and defendant have entered into a written contract for the division of profits from the sale of land owned by the defendant if the plaintiff should procure a purchaser at a reasonable price, the reasonableness of the price is not one to be arbitrarily determined by the defendant, and where there is evidence tending to show that the plaintiff had procured a purchaser ready, able and willing to pay a reasonable price, the reasonableness of the price offered is to be determined by the jury under proper instructions from the court, and the plaintiff may recover his commissions if the defendant arbitrarily refused to accept the offers procured.

CONNOR, J., dissents.

APPEAL by defendant from *Harding, J.*, and a jury, at June Term, 1931, of BUNCOMBE. No error.

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

"1. Did the plaintiff and defendant enter into the contract as alleged in the complaint? Answer: Yes.

2. Did the plaintiff procure a purchaser for the whole of said tract of land during the period of one year from the date of said contract, who was ready, able and willing to purchase said lands at the price and under the terms of said contract, as alleged? Answer: Yes.

3. Did the defendant fraudulently or arbitrarily refuse to accept said offer of sale and thereby breach said contract, as alleged in the complaint? Answer: Yes.

4. What damages, if any, is plaintiff entitled to recover? Answer: $10,000."

Judgment was rendered in the court below on the verdict. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Ellis C. Jones and A. Y. Arledge for plaintiff.
Alfred S. Barnard for defendant.

CLARKSON, J. This action grows out of the following contract between plaintiff and defendant: "Asheville, N. C., 14 April, 1925. This form of contract by and between Gay Green, party of the first part, and F. B. Ingle, party of the second part. The party of the first part purchased the T. L. Johnson farm containing 150 acres for $16,000, through the party of the second part with the understanding that both parties hereto are to share all profits equally above the purchase price of $16,000, and each party is to bear equally in all expenses of handling

and selling said farm. Provided a satisfactory sale can be made within twelve months from date. Gay Green, F. B. Ingle."

In *Ingle v. Green*, 196 N. C., at p. 382, after setting forth the above contract, we find: "The proviso, or last sentence, in this contract was inserted by the defendant in his own handwriting. It is conceded that no sale was made within the life of the contract, though plaintiff alleges he produced purchasers ready, able and willing to buy before the expiration of the twelve months' period. But none of the offers was satisfactory to the defendant. There is no allegation that defendant acted fraudulently or arbitrarily in refusing to sell. . . . The record fails to disclose any ground upon which plaintiff is entitled to recover against the defendant in the present action."

In *Ingle v. Green*, 199 N. C., 149, it is held: Where an action upon a contract for the sale of defendant's lands by the plaintiff and the division of the profits therefrom, is nonsuited because the evidence of fraud or arbitrariness on the part of the defendant, in accordance with the contract, were not supported by allegations the judgment of nonsuit will not operate as a bar to a subsequent action brought within the statutory period on the same cause of action where the allegations are not substantially identical with those of the first, but the deficiency in the allegations of the first action are supplied therein and evidence introduced to support them; the doctrine of *res judicata* does not apply.

The case was tried in the court below before a jury, with the result of a verdict for plaintiff. This appeal is from that verdict.

One of the questions presented by defendant was: "Did the court err in overruling defendant's motion for a judgment of nonsuit made at the close of the plaintiff's evidence, and renewed at the close of all the evidence (C. S. 567), upon the ground that there was not sufficient evidence to be submitted to the jury, and upon the further ground that the judgment rendered by the Superior Court of Henderson County in a suit between the same parties on the same contract was a bar to the prosecution of this action?" We think the motions above, for judgment in case of nonsuit, properly overruled. There was sufficient evidence to be submitted to the jury and the plea of *res judicata* not applicable.

In this case, 199 N. C., at p. 152, the defendant pleaded *res judicata*. This Court said, at p. 153; "The defendant set up the plea of *res judicata*. We think the nonsuit should not have been granted by the court below, and there was sufficient evidence to be submitted to the jury, and the principle of *res judicata* is not applicable."

This matter is again "boldly asserted and plausibly maintained" by defendant's able counsel. The argument is persuasive, but not convincing. We see no injustice done. Our former opinion must stand. This

Court does not make contracts, we construe them. The defendant entered into the contract with plaintiff, and, by the finding of the jury, fraudulently or arbitrarily, breached it. We think there was plenary evidence to sustain the jury's finding—a part is hereafter set forth.

We again repeat: "A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Harrington v. Rawls,* 136 N. C., 65; *Strunks v. R. R.,* 188 N. C., at p. 568; *Moses v. Morganton,* 195 N. C., at p. 101; *Ingle v. Green,* 199 N. C., at p. 154; *Jessup v. Nixon,* 199 N. C., 125-6; *Fuquay v. R. R.,* 201 N. C., 575.

The defendant tendered no issues, but contends that the issues submitted by the court below were not such as were raised by the pleadings and sufficient to settle the rights of the parties. We cannot so hold. It has been long settled in this jurisdiction that "issues are sufficient when they present to the jury proper inquiries as to all the essential matters or determinative facts in dispute." *Mann v. Archbell,* 186 N. C., at p. 74. "If the defendant did not consider the issues submitted to the court proper and relevant, it was his duty to tender other issues and having failed to do so he cannot now complain." *Greene v. Bechtel,* 193 N. C., at p. 99.

In construing a contract "The intent of the parties is arrived at by taking into consideration all the paper-writings relating to the controversy," etc. *Peeler v. Peeler, post,* 123.

We think the contract signed 14 March, 1925, "purchasing 189 acres of land more or less," signed by J. R. Reid, T. L. Johnson and M. E. Johnson, and assigned by J. R. Reid, competent and material to the controversy. The assignment is as follows: "I hereby transfer all my right, title and interest to Gay Green and F. B. Ingle." Some of the evidence bearing on the controversy, is as follows:

George M. Burns, testified, in part: "know Mr. Ingle and also know Gay Green. I visited the Tom Johnson farm in 1925. Mr. Ingle carried me there in view of buying it. I looked at it. I made an offer on it. . . . The second was $300 an acre. The terms of that were that the payments were to be made one-third cash, balance 1, 2 and 3 years secured by deed of trust on the property. . . . Q. At that time state whether or not you were ready, able and willing to comply with the terms of your offer, if it had been accepted? A. At that time I was ready, able and willing to comply with the terms of my offer, if it had been accepted."

This and similar evidence from the plaintiff's witnesses, Revis and Outlaw, was objected to and assigned as error. We think the evidence competent. One of the elements essential to the plaintiff's right of

recovery, was that he had found and submitted purchasers who were ready, able and willing to buy at the prices and upon the terms shown in evidence, which were alleged to have been satisfactory in fact. In order to show the ability, willingness and readiness to buy, these witnesses were asked specific questions to that end, all of whom testified that they were, at the time they made their offers, ready, able and willing to buy. These parties actually made the offers, there is nothing imaginative, conjectural or speculative about the evidence. There is no better way to prove one's readiness, ability and willingness to carry out a transaction than to put the party on the witness stand who offered to do it, and let him testify in regard to the matter.

The witness, George M. Burns, further testified: "To the best of my recollection that was between the 5th and 15th of July, when I talked to Mr. Ingle about it, in the year 1925. I saw Mr. Green after that and had a conversation with him. I met Mr. Green one night in the old Langren Hotel. We had a conversation in regard to the piece of property. I met him there and made the same offer there that I had made to Mr. Ingle and he wouldn't accept it at all, wouldn't consider it. He didn't come out and say specifically why, but intimated in (witness stopped by objection of defendant). I don't remember the conversation just as it took place at that time, but he refused the offer I made him on the terms and also the price and said it was a very valuable piece of property and he could realize more out of it in the future."

We do not think the authorities cited by defendant applicable under the facts and circumstances of this case. This kind of evidence was later unobjected to by defendant, as shown by the evidence of Mary W. T. Connally, who testified, in part: "I know F. B. Ingle, have known him ten years, since 1919. Know the property in Henderson County known as the T. L. Johnson farm, on Mills River, very well. Mr. Ingle took me out there to look at it when I was thinking of buying land. He first took me in the early summer 1925, to look at this land; I was interested in purchasing land in that community; I did own other land in that community; I should say Mr. Ingle took me three or four times to this property; I considered purchasing it and made Mr. Ingle an offer for the land. My offer was for the purchase of the entire Johnson farm. I made him an offer of $300 an acre, one-third cash and the balance in one and two years. In reply to my offer Mr. Ingle said that Mr. Green would not accept it. . . . I most certainly was ready, able and willing to have complied with the terms of my offer, if it had been accepted by Mr. Green. You might ask the Central Bank what I was worth financially at that time. Certainly more than enough to have bought not only Mr. Green's one piece of property but several others.

I made this offer for the land through Mr. Ingle in the early summer of 1925. I subsequently bought other farm lands in Mills River section and Black Mountain."

In *Ledford v. Lumber Co.*, 183 N. C., at p. 616, the following is stated to be the law: "To like effect are the decisions in *Smith v. Moore*, 149 N. C., 185, and *Blake v. Broughton*, 107 N. C., 220, where it was held that the admission of improper evidence was harmless when it appeared that the fact thereby sought to be shown was otherwise fully and properly established." *Tyler v. Howell*, 192 N. C., at p. 437.

W. Frank Cathey, testified in part: "It was in May or June, sometime, in 1925, that was the year he bought it. Mr. Green said that he didn't care to sell it right then, for a year or two, might want to build on it a little later. He was talking to Mr. Johnson, Tom Johnson. Mr. Johnson was talking about wanting to buy a little tract back to build a home on it was how I come to hear the conversation."

Thos. L. Johnson, testified in part: "Mr. Green made a statement to me about building on it, said he was very fond of his mother, which most people ought to be, he said, 'She is very much impressed with this place up here and likes it, and I want to build her a fine house, brick veneer. I want to give her a good place and everything I can as long as she lives.' That was his idea. That was in May, I sold in April, 1925, this was in May that Mr. Green said that. It was the same year he bought the land 25 May, 1925."

S. D. Hall, testified in part: "Q. What is your opinion as to the reasonable market value of the Tom Johnson farm in the year from 14 April, 1925, to 14 April, 1926? A. I think around $200 an acre would be the fair value of it." Defendant objected and assigned error to the above question. It was competent under the contract and on the issues submitted. It was some evidence, the probative force was for the jury.

The defendant denied the material evidence of plaintiff. On cross-examination, he testified, in part: "Q. You were expecting to make a good profit? A. Yes, I wanted some, at least more than I gave for it. Q. And you would have been satisfied with any reasonable profit? A. Yes. Q. If he had brought a valid offer for $40,000 for the farm, or $300 an acre, you would have thought that a very satisfactory profit? A. Yes. Q. That was what you intended when you wrote in the contract 'provided a satisfactory sale can be made within 12 months from date?' A. Yes."

Plaintiff testified in part, unobjected to: "Yes, Mr. Green and I discussed it as to why it was being bought. I told him that we could get the option for $1,500. The land cost $15,000 and he said he would pay $16,000 and I would pay $500. Mr. Green said 'We will buy it at

that price and make some money on it.' That was the purpose of buying it, to resell again and make some money on it. I was to resell it. He said, 'I will pay in $16,000 and you pay $500 and we will go fifty-fifty over and above $16,000 and half the expense of selling and operating it will be deducted, and you go ahead and work on it and find purchasers to buy it, and we will sell it for a profit.' "

The court below charged the jury as follows: "He did not have the legal title but his right was based upon his procuring a purchaser who was ready, able and willing to buy, and would buy, at a price that was satisfactory to himself and the defendant, and it was the duty of the defendant under that contract when within a year the plaintiff produced such purchaser who was ready, able and willing to buy and would buy, if the defendant would accept the proposition and make a deed if the price was satisfactory—it was the duty of the defendant under his contract to accept and make conveyance and when expenses and purchase price of $16,000 was deducted, if there was any profit, to divide it equally between plaintiff and defendant, whatever that was. He has the right to refuse to do so, however, that is he had the right to fix a satisfactory price in his own mind provided he did so honestly with the bona fide intent to carry out the contract. If he formed and fixed in his mind when this contract was signed that he would not accept any price however satisfactory it might be otherwise for the reason that if he just refused to accept anything that was offered until the year expired, then he could come out and take up the proposition he made, or any other proposition that he could receive, whether it was more or less, and retain all the profits himself—if he refused to accept for that purpose the court charges you that would be a dishonest purpose, that would be a fraudulent purpose, it would be an arbitrary purpose."

The defendant duly excepted and assigned error to the above portions of the charge. We think the charge correct, under the facts of this case.

In *Crowell v. Parker,* 171 N. C., at p. 396, the law is thus stated: "But it must be borne in mind that if an agent, who is employed to sell real estate, finds a purchaser who is ready, able and willing to purchase it on the authorized terms, his right to commissions will not be impaired by the default of his principal in refusing to consummate the sale. The seller cannot complain if he is made to pay commissions because, by his own fault, he has lost a bargain upon his own terms. *Parker v. Walker,* 86 Tenn., at p. 569, where it is said: 'To procure a purchaser of real estate not only implies that the purchaser shall be one able to comply, but the further idea, that the seller and the purchaser must be bound to each other in a valid contract. To this we must agree. An oral agreement upon the part of the purchaser would

not be a valid agreement; and if he refused to complete the sale after such oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions. If, on the other hand, the purchaser was not only able, but willing, to complete the sale, and the vendor then refused to sell, or is unable to fulfil the terms upon his part or make a good title, or the trade falls through for any other default, upon the part of the seller, the commissions are nevertheless earned,' " citing numerous authorities.

By the former appeal, it has been established as the law in this action that if the plaintiff acted "fraudulently or arbitrarily" in refusing to sell upon tender to him by the plaintiff of a sale that in fact was "satisfactory," then the plaintiff is entitled to recover.

The jury has found, on competent evidence, the issues against defendant, this is for them to determine and not us. We have heard the argument of counsel, read the record and briefs and examined the exceptions and assignments of error made by defendant in this action with care, and can find no prejudicial or reversible error.

No error.

CONNOR, J., dissents.

CORA MAY PEELER v. B. M. PEELER AND CORA MAY PEELER, FOR THE USE AND BENEFIT OF HER TWO CHILDREN, BURTON PEELER, JR., AND GRADY LEE PEELER, v. B. M. PEELER AND P. A. D. PEELER.

(Filed 27 January, 1932.)

1. **Husband and Wife C c—Rules for construction of bonds given to insure faithful performance of deeds of separation.**

In construing a bond given to insure the faithful performance of a deed of separation, executed in accordance with a judgment of the court, the intent of the parties must be arrived at by taking into consideration all the paper-writings relating to the controversy, the condition of the parties and the purpose of the bond, the family relationships and the circumstances existing at the time of its execution.

2. **Same—Surety on bond for faithful performance of deed of separation could not be discharged by paying penal amount into court.**

Where in an action by a wife against her husband a judgment has been entered requiring the defendant to pay the plaintiff a certain sum each month for a stated period, and in accordance with the judgment a deed of separation is executed to carry into effect the provisions of the judgment, the deed of separation providing that a bond should be executed which should be responsible "for each and every payment until the conditions of the judgment have been fully complied with," and a bond in accordance therewith is executed in a certain penal sum, and

is conditioned upon the principal's performance of the provisions of the judgment: *Held*, by interpretation of all the relative papers the penalty of the bond is not the limit of liability thereon, it being collateral to the purpose of the bond and inserted merely for security, and a judgment that the surety should be discharged upon payment into court of the penal sum of the bond is erroneous.

APPEAL by plaintiff from *Moore, J.*, at May Term, 1931, of ROWAN. Reversed.

This is an action primarily, to recover for certain periodical amounts, due under a deed of separation, etc., judgment of the Superior Court of Rowan County, for the support of two minor children of Cora May Peeler and B. M. Peeler. The defendant P. A. D. Peeler, the grandfather, being on the bond. The amounts claimed are from 1 August, 1930.

The court consolidated the two actions mentioned above. The judgment of the court below, in part, is as follows: "The court is of the opinion that the bond or instrument executed by the defendant, B. M. Peeler, and his surety, P. A. D. Peeler, is a penal bond, and that no greater sum than $300 can be recovered on it against the surety, and that if he pays, or causes to be paid, into court for the use and benefit of the plaintiff, the sum of $300 to cover all back installments up to 1 June, 1931, he shall then be released and discharged of future or further liability by reason of the execution of said instrument by him, even though B. M. Peeler should default in the future," etc. Plaintiff moved to strike from said judgment that part which holds that P. A. D. Peeler is not liable for any greater sum than $300, and also excepted to the judgment as signed. On the exceptions plaintiff assigned error and appealed to the Supreme Court.

The necessary facts will be set forth in the opinion.

Charles Price and R. Lee Wright for plaintiff.
L. A. Swicegood for defendants.

CLARKSON, J. The principal question involved on this appeal is whether P. A. D. Peeler is released by paying into court the sum of $300. We think not.

The intent of the parties is arrived at by taking into consideration all the paper-writings relating to the controversy, the condition of the parties and the purpose for which they were entered into. The setting surrounding the parties when the paper-writings were signed, the family relationship, the purpose of the entire paper-writings on the subject, must all be considered in arriving at the intent. *In re Westfeldt*, 188

N. C., 711; *Brown v. Brown,* 195 N. C., 315; *Ellington v. Trust Co.,* 196 N. C., 755; *Myers v. Barnhardt, ante,* 49. Unfortunately, the plaintiff, Cora May Peeler, and the defendant, B. M. Peeler, who were man and wife, could not get along together. Born of the wedlock were two children, Burton Peeler, Jr., and Grady Lee Peeler. On 23 November, 1929, the said Cora May Peeler and B. M. Peeler executed, according to law, a deed of separation between them. *Archbell v. Archbell,* 158 N. C., 408.

In *Taylor v. Taylor,* 197 N. C., at p. 201, speaking to the subject: "On the ground of public policy, deeds of separation are not favored by the law, but under certain circumstances they are recognized by certain statutes, when signed in conformity thereto. C. S., 2515, 2516, 2529."

In the Superior Court of Rowan County, at November Term, 1929, a judgment was rendered in the action for Cora May Peeler against B. M. Peeler, requiring the defendant B. M. Peeler to pay plaintiff a certain sum each month for a stated period, to support and maintain her two children. The deed of separation between the parties, executed 23 November, 1929, in part, is as follows: "It is the purpose of this deed of separation to carry into effect all the provisions and stipulations set forth in the judgment of the court, and the defendant to pay to the clerk of the court of Rowan County the sum of $30.00 per month for the use and benefit of the two minor children until the oldest one becomes 18 years of age, and then thereafter the sum of $15.00 per month until the youngest child becomes 18 years of age, and when both children become 18 years of age, then the monthly allowance shall cease, but until the oldest one becomes 18 years of age, he shall pay $30.00 per month, and then thereafter $15.00 per month, which said amounts shall be paid to the clerk of the Superior Court of Rowan County on the first of each and every month during said period, the first payment to be made on 1 December, 1929, and then on the first of each and every month thereafter, according to the judgment of the court. . . . And it further having been agreed that B. M. Peeler execute a good and sufficient bond in the sum of $300, payable to Cora May Peeler for the use and benefit of her two children, for the faithful performance of the monthly allowance as set forth in the judgment of that court, and said bond having been executed and accepted. . . . That Cora May Peeler have the absolute control, custody and supervision of her two children: Burton Peeler, Jr., and Grady Lee Peeler, and that B. M. Peeler pay to the clerk of the Superior Court of Rowan County the sum of $30.00 per month, payable on the first of each and every month thereafter until Burton Peeler, Jr., becomes 18 years of age, and then

thereafter the sum of $15.00 per month until Grady Lee Peeler becomes 18 years of age, as provided by the judgment of the court; *and the said bond shall be responsible for each and every payment until the conditions of the judgment of the court have been fully complied with.*"

The bond of defendants, D. M. and P. A. D. Peeler, recites "Whereas B. M. Peeler was adjudged to perform certain conditions as set forth in a judgment rendered at November Term, 1929," etc. . . . "Whereas, the undersigned principal and surety bind themselves, their heirs, executors, administrators and assigns firmly by these presents to make said payments and to execute a bond in the sum of three hundred ($300) dollars, *to guarantee the faithful performance of the same;* Now, therefore, we, B. M. Peeler, as principal, and P. A. D. Peeler, as surety, acknowledge ourselves justly indebted to Cora May Peeler in the sum of $300, lawful money of the United States. *The condition of the above obligation is such* that if B. M. Peeler shall pay to the clerk of Rowan County, to be delivered by him to the plaintiff, Cora May Peeler, *the sum of $30.00 per month for the use and benefit of her two children, Burton Peeler, Jr., and Grady Lee Peeler, children of B. M. Peeler and Cora May Peeler,* that is $15.00 each per month until Burton Peeler, Jr., becomes 18 years of age, and after Burton Peeler, Jr., becomes 18 years old, $15.00 per month until Grady Lee Peeler becomes 18 years old, Grady Lee Peeler now being 6 years old, and shall make said payments on the first of each and every month as set forth in the judgment of the court, the first on 1 December, 1929, *and fully carry out the provisions of said judgment, then this obligation shall be void and of no effect; otherwise to remain in full force and effect.*"

In *S. v. Bell,* 184 N. C., 701, it is held: Within the intent and meaning of C. S., 4447, the wilful abandonment by the father of his children of the marriage, until the youngest living child shall arrive at the age of 18 years, is made a separate offense of like degree with that of his wilful abandonment of his wife; and his duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. *S. v. Faulkner,* 185 N. C., 635; *S. v. Hooker,* 186 N. C., 761; *Jeffreys v. Hocutt,* 195 N. C., at p. 343-4.

Defendant B. M. Peeler was bound under the facts of record to support his two children or was guilty of a misdemeanor. C. S., 4447.

The judgment of Cora May Peeler *v.* B. M. Peeler, rendered at November Term, 1929, in part, is as follows: "The court finds as a fact upon the complaint and affidavits of the plaintiff that the defendant wilfully failed to provide the plaintiff and the two children by the marriage

with necessary or adequate subsistence according to his means and station in life. . . . That a deed of separation be executed between plaintiff and the defendant, which shall not affect or impair the obligations of the defendant as stated above; . . . and the court finding as a fact that the foregoing agreement of the defendant is fair and reasonable under the circumstances, and that the same should become a part of the judgment of this court based upon the facts found by the court. . . . That plaintiff have the custody, control and supervision of the two children: Burton Peeler, Jr., age about 12, and Grady Lee Peeler, age 6. That the defendant pay to the clerk of the court and by him to the plaintiff for the use and benefit of said children, the sum of $30.00 per month, until Burton Peeler, Jr., becomes 18 years of age, and thereafter $15.00 per month until the youngest child becomes 18 years of age, as now provided by law; and that the payments be made monthly, the first on 1 December, 1929, and then on the first of each and every month thereafter."

The deed of separation, which is made a part of the judgment, provides that the above monthly sums be paid, and further: "That B. M. Peeler execute a good and sufficient bond in the sum of $300, payable to Cora May Peeler *for the use and benefit of her two children, for the faithful performance of the monthly allowance as set forth in the judgment of the court.*"

B. M. Peeler was bound to pay each month the amounts above set forth to support his children, and was required to give $300 bond "for the faithful performance of the monthly allowance, as set forth in the judgment of the court." The bond was given and the father and P. A. D. Peeler, the grandfather, signed the same as above set forth, and the condition of the obligation is that B. M. Peeler shall pay the amounts agreed upon before mentioned, each month beginning 1 December, 1929, *"and fully carry out the provisions of said judgment then this obligation shall be void and of no effect, otherwise to remain in full force and effect."* B. M. Peeler, the father, and P. A. D. Peeler the grandfather, are liable for the payment on the first of each month, commencing 1 December, 1929, of the amounts agreed upon until each child becomes 18 years of age.

The record indicates that payments have been made from 1 December, 1929, to 1 August, 1930. The judgment, deed of separation, and bond, are all inter-related and must be construed together.

We have a decision, fully supported by authorities in this State, to sustain the position that the bond of P. A. D. Peeler by the payment of $300, as held by the court below, is not released. In *Rhyne v. Rhyne*, 151 N. C., 400, the material part of the bond necessary to be construed,

is as follows: "I, Wm. H. Rhyne, am held and firmly bound unto James R. Rhyne in the sum of $1,000," etc. The condition was that said Wm. H. Rhyne "shall and will, at his and their own proper costs and charges, maintain and keep the said James R. Rhyne for and during his natural life, with good and sufficient meat, drink, apparel, washing and lodging," etc. James R. Rhyne was an imbecile. In this action for a breach of the bond, the jury awarded $775, on appeal to this Court no error was found. The case came to this Court again, *Rhyne v. Rhyne*, 160 N. C., 559. In this latter case the jury awarded $400 for the breach of the bond, and the court below rendered judgment for $225, the judgment in the two cases amounting to $1,000, the sum set forth in the bond. This Court found error. At p. 562, it is said: "Both the actions brought by plaintiff are upon the contract to secure the performance of which the bond was given, and the plaintiff is not limited in his recoveries to the penalty named in the instrument. Let judgment be entered in the Superior Court for the sum of $400, the sum assessed by the jury." And at p. 560: "The sum of $1,000, inserted in the bond to secure the performance by defendant of his agreement, was intended neither as a penalty nor as liquidated damages. It is generally held that where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages or as a penalty beyond which recovery cannot be had. *Robinson v. Cathcart*, 2 Cr. C. C., 590; *Richards v. Edick*, 17 Barb. N. Y., 260; 1 Sedgewick on Damages, sec. 410, and cases cited."

In *Wilkes v. Bierne*, 68 W. Va., at p. 85 (69 S. E., 366), we find the following: "The sum stipulated is one collateral to the object of the contract. That object is support and maintenance. Most evidently the sum was inserted simply as security for performance. There is nothing so peculiar in the case as to make us view it otherwise. 'Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages.' 1 Sedg. Dam., sec. 410."

In *City of Helena v. Fitzpatrick*, 36 Ark., 583, it is held: A bond in which the obligors acknowledge themselves to be indebted to the obligee "in the sum of seventy dollars and eighty-three cents (monthly rent), upon condition that, whereas, the obligors have leased from the obligee certain described premises, for the period of twelve months, for the sum of seventy dollars and eighty-three cents (monthly rent), to be paid in monthly installments of seventy dollars and eighty-three cents," and then providing that if the obligors should pay said sums as they become due, the bond should become void, binds the obligors for the

amount named for each successive month, and not merely for the penalty of the bond.

In *Meinert v. Bottcher, et al.*, 62 N. W., 276 (60 Minn., 204), it is held: Where a bond contains a contract for the performance of certain things, and the obligor binds himself in a penalty for the performance of the contract, the penalty is not the limit of recovery on the instrument. In an action for the breach of the contract, the obligee may recover damages as often as the breach arises, even beyond the penalty.

Said *Lord Mansfield,* in *Lowe v. Peers,* 4 Burrows, 2228: "There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty (after which recovery he cannot resort to the covenant, because the penalty is to be a satisfaction of the whole), or, if he does not choose to go to the penalty, he may proceed upon the covenant, and recover more or less than the penalty—*toties quoties.*" *Meinert v. Bottcher, supra;* 9 C. J., sec. 243, pp. 131-2.

This is not such a bond that the penalty is the limit of liability. The judgment, deed of separation and bond are all inter-related. This bond was security for the performance of a contract, that required on the 1st of each month designated payments for the support and maintenance of two children until they arrived at the age of 18 years. The father and grandfather (the bondsman) must both fulfil their obligations solemnly undertaken.

In *S. v. Jones,* 201 N. C., at p. 425-6, is the following: "The object of the statute (C. S., 1447) 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."

The defendant, B. M. Peeler, if he should wilfully fail or neglect to pay the sums agreed upon for the support and maintenance of the children could be indicted under C. S., 4447. See *West v. West,* 199 N. C., 12.

Then, again, the entire paper-writings indicate a continuing guarantee. *Lewis v. Dwight,* 10 Conn. Rep. (2d Series), p. 95; *Novelty Co. v. Andrews,* 188 N. C., 59. For the reasons given, the judgment below is

Reversed.

A. A. DAVIS *v.* J. S. ALEXANDER.

(Filed 27 January, 1932.)

1. **Highways A b—Where public highway is abandoned by Highway Commission abutting owners still have easement thereover.**

Where there is evidence that the road in controversy had been used by the public for about fifty years as a main highway between two cities, that it had been worked and kept up for that period and had been macadamized for about nine years, all at public expense, and that thereafter the State Highway Commission discontinued such road as a part of the State highway system under the plenary power given to it by statute, and built a permanent hard-surfaced road in close proximity thereto in order to straighten and improve the highway: *Held*, the abutting owners along the abandoned road have an easement therein for ingress and egress although the original owner may still retain the fee subject to the easement, and the road abandoned as a part of the highway system may not be closed by the owner of the land through which it lies to such abutting owners without their consent.

2. **Same—Injunction will lie against owner of fee to prevent his closing public highway after its abandonment by Highway Commission.**

Where a highway has been used by the public for over fifty years and has been kept up and macadamized at public expense, and thereafter this section of the road is abandoned by the State Highway Commission as a part of the highway system of the State: *Held*, an abutting owner is entitled to a permanent injunction restraining the owner of the fee in the land through which the section of abandoned road lies from taking possession of the abandoned road and closing it to the destruction of the abutting owner's right of easement thereover, and where the road has been closed by the owner of the fee a mandatory injunction may be issued commanding that the road be reopened.

APPEAL by plaintiff from *Cowper, Special Judge*, at March Term, 1931, of MECKLENBURG. Reversed.

This is a civil action brought by plaintiff against defendant in which a mandatory injunction is prayed for. The plaintiff and defendant owned adjoining land on the old Charlotte-Statesville road, leading from Charlotte to Statesville, about 11 miles north from Charlotte. This road was taken over by the State Highway Commission under Public Laws of 1921, chap. 2. See map made a part of the bill showing this road, etc., section 7 of the act. In 1924 the State Highway Commission caused a new survey to be made of said Charlotte-Statesville highway, and subsequently paved said road in accordance with said new survey which resulted in the *locus in quo* being abandoned by the State Highway Commission as part of the State System of Roads and Highways.

The plaintiff had a residence facing on the old Charlotte-Statesville road, and in going to Charlotte on the old Charlotte-Statesville road

from plaintiff's land, he had to go along the road which crossed defendant's land some 905 feet. The defendant, when the State Highway Commission caused the new road to be located, took possession of the old road through his land and closed it.

The affidavit of J. M. Knox, is as follows: "That he is 68 years old and has resided in Mecklenburg County for 68 years and has lived within five miles of the tracts of land of the defendant and the plaintiff, and that he is familiar with the roadway in controversy and as shown on the blue print attached to the complaint; that to his own knowledge said roadway as above described has been used continuously and adversely by the neighbors living on the adjoining land to the defendant and plaintiff and by the public generally for about 50 years; that said roadway has been used by the public as the main highway from the city of Charlotte to the town of Huntersville, Davidson, and other towns and cities north of Charlotte for a period of at least 50 years. That said roadway was used as a government post road or mail route. That for a period of at least 50 years said roadway has been worked or kept up by the public at public expense; said roadway having been macadamized by the public at public expense at least 19 years ago. That said public has used said roadway for said period of years without interference and as a matter of right and adversely to all persons whatsoever up and until recently, when the defendant closed said road."

Similar affidavits were made by John C. Garrison, W. J. Hutchison, J. R. Cochran and M. W. VanPelt. The map attached shows the *locus in quo.*

Scarborough & Boyd for plaintiff.
J. F. Newell and Geo. W. Wilson for defendant.

CLARKSON, J. The court below "ordered, adjudged and decreed: That the temporary restraining order heretofore issued in this action against the defendant be, and the same is hereby vacated and a permanent restraining order against the defendant be and the same is hereby denied." From the above judgment, the plaintiff excepted, assigned error and appealed to the Supreme Court. We think the judgment in the court below must be reversed and the prayer of plaintiff for mandatory injunction allowed.

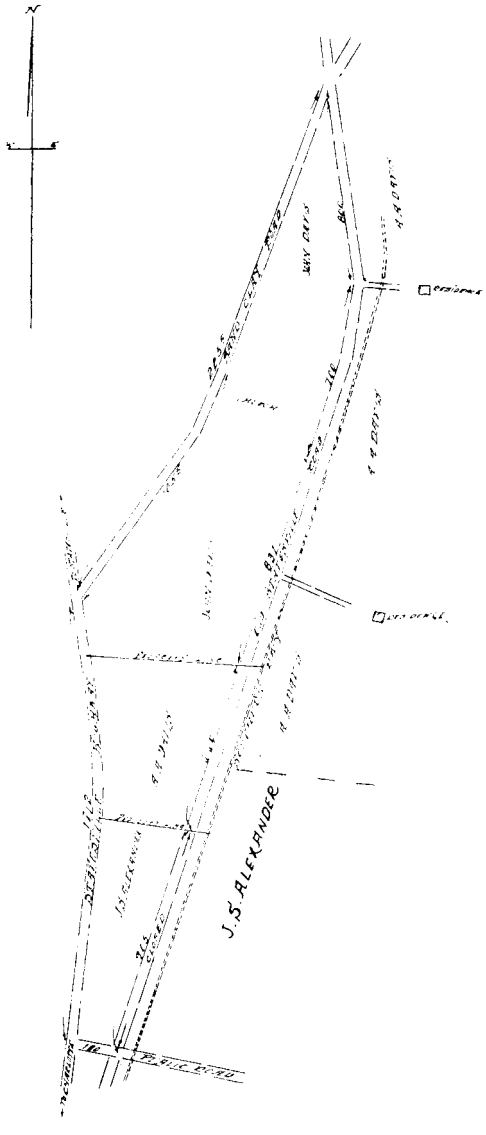
The law applicable to this action is well stated in 2 Elliott, Roads and Streets (4th ed.), part sec. 1172, at p. 1668: " 'Once a highway always a highway,' is an old maxim of the common law to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith in-

vested money or obtained property interests in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the legislature can take away such rights without compensation. Such, at least, is the rule which seems to us to be supported by the better reason and the weight of authority, although there is much apparent conflict as to the doctrine when applied to the vacation of highways." *Moose v. Carson,* 104 N. C., 431; *Colvin v. Power Co.,* 199 N. C., 353; *Crowell v. Power Co.,* 200 N. C., 208; *Combs v. Brickhouse,* 201 N. C., 366; *Hiatt v. Greensboro,* 201 N. C., 515.

In *Hiatt v. Greensboro, supra, Connor, J.* (petition to rehear denied), wrote an able opinion for the Court. It was there held: "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." See *White v. Coghill,* 201 N. C., 421.

The General Assembly of North Carolina, Public Laws of 1921, chap. 2, passed "An act to provide for the construction and maintenance of a State system of hard-surfaced and other dependable roads connecting by the most practicable routes the various county seats and other principal towns of every county in the State for the development of agriculture, commercial and industrial interests of the State, and to secure benefits of Federal aid therefor, and for other purposes." Section 7, in part, is as follows: "A map showing the proposed roads to constitute the State highway system is hereto attached to this bill and made a part hereof. The roads so shown can be changed, altered, added to or discontinued by the State Highway Commission: *Provided,* no roads shall be changed, altered or discontinued so as to disconnect county seats, principal towns, State or National parks or forest reserves, principal State institutions, and highway systems of other states." Section 10(b), is in part: "To take over and assume exclusive control for the benefit of the State of any existing county or township roads, and to locate and acquire rights of way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change, or alter the grade or location thereof; to change or relocate any existing roads that the State Highway Commission may now own or may acquire," etc.

It is a matter of common knowledge that in carrying out the mandate of the General Assembly, the State Highway Commission found it necessary for engineering and financial reasons to change grades, to make shorter routes from county seat to county seat and principal towns,



SHEWING LOCATION
OF SECTION OF
NEW AND OLD STATESVILLE ROAD
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etc. The deviations in the change from the old to the new locations left homes and lands on the old route, which if closed would work irreparable injury to the owners. The State Highway Commission is given exclusive statutory power to eliminate grade crossings, "close to use such grade crossing." *Rockingham Co. v. R. R.*, 197 N. C., 116. This special provision was put in the act to preserve human limb and life, on account of the known danger at grade crossings. See *Hinnant v. Highway Commission*, 198 N. C., 293.

Some 9,000 miles of road under this act has been taken over by the State Highway Commission and hard-surfaced and made dependable, at the cost of about $183,000,000, including Federal aid. In reading the act carefully, we are satisfied that the General Assembly, and those who were responsible for this State Highway Road Act, never intended, and the language does not indicate, that people who had built homes on the old roads should be left without egress and ingress to the new improved road when necessary deviations were made. It may be noted that the State Highway Commission now has entire control of all the roads of the State. Laws 1931, chap. 145, page 187. This case is like that of *Sloan v. State Highway Dept.*, 150 S. C. (148 S. E., 183), at pp. 340-1: "The proposed new road, because of its proximity and its location with respect to the abandoned section of the existing road, may be easily and quickly reached from same. Further, the abandoned part of the old road cannot be closed without the consent of those whose property fronts thereon or over whose lands it passes. *Powell v. Spartanburg County*, 136 S. C., 371, 134 S. E., 367."

Hoke, J., in *Tise v. Whitaker*, 146 N. C., p. 375, lays down the rule long recognized in this State: "It is well understood with us that the right to a public way cannot be acquired by adverse user, and by that alone, for any period short of twenty years. It is also established that, if there is a dedication by the owner, completed by acceptance on the part of the public, or by any persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms, or it may be implied from conduct on the part of the owner; and, while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized and have been applied with us in numerous and well considered decisions." *Draper v. Conner*, 187 N. C., 18 and cases cited; 18 C. J., 40, 41 and 51; *Durham v. Wright*, 190 N. C., at p. 571; *Weaver v. Pitts*, 191 N. C., at p. 748.

In *S. v. Howell,* 90 N. C., at p. 706-7, we find: "The fact that a public road is laid off on a man's land does not deprive him of the freehold of the land covered by the road. His title continues in the soil, and the public acquires only an easement, that is, the right of passing and repassing along it. *S. v. Davis,* 80 N. C., 351; *Dovaston v. Payne,* 2 Smith, L. C., 90."

In *Rouse v. Kinston,* 188 N. C., at p. 11, we said: "In the present case the defendant denies the right of plaintiff to recover damage 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." Likewise electric transmission poles, *Crisp v. Light Co.,* 201 N. C., at p. 50. The defendant has the freehold of the land, but, from all the evidence of record, plaintiff has an easement of ingress, egress and regress over the old road.

In 2 Elliott, Roads and Streets, *supra,* part sec. 850, p. 1107, the law is stated as follows: "In addition to the right of the public to maintain a suit in equity for an injunction, private citizens who are specially injured by an obstruction and interested in preventing its continuance may, upon a proper showing, maintain a suit in equity for an injunction." *Butler v. Tob. Co.,* 152 N. C., 416; *Crawford v. Marion,* 154 N. C., 75; *Wheeler v. Construction Co.,* 170 N. C., 427; 29 C. J., pages 552-3; 13 R. C. L. "Highways," sec. 201, pp. 40-1; 2 Lewis on "Eminent Domain" (3d ed.), p. 1596.

In 1 Lewis on "Eminent Domain," pp. 368-9, the matter is stated thus: "But it would seem that both the public and those claiming the fee should be estopped from denying the existence of a private right of access and of light and air, as to those who have purchased or improved abutting property on the faith of the advantage offered by the street or highway and that this private right of access should be held to include an outlet in both directions to the general systems of streets. Many cases hold that these private rights exist in favor of every abutting owner without considering how the street was established or how such owner obtained title to his property."

In *Crawford v. Marion, supra,* at pp. 75-6, it is said: "The remedy by injunction is appropriate to the abutter in a proper case. It will lie to prevent the deprivation of his right of access (Elliott, Roads and Streets, sec. 709; *Carter v. Chicago,* 57 Ill., 283; *Callaman v. Gilman,* 107 N. Y., 361), and may be joined in the same action with a demand

for damages. *Ross v. Thompson,* 78 Ind., 99. The right of ingress and egress over one's own land to the public streets and roads is an incident to ownership and constitutes a property right."

In *Woolen Mills v. Land Co.*, 183 N. C., at p. 513-14, we find: "With reference to their nature injunctions are classified as preventive and mandatory—the former commanding a party to refrain from doing an act, and the latter commanding the performance of some positive act. While in the greater number of instances injunctions is a preventive remedy, there is no doubt that the court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear; and, if necessary to meet the exigencies of a particular situation, the injunctive decree may be both preventive and mandatory. Beach on Injunctions, sec. 97; High on Injunctions, sec. 1, *et seq.*; 22 Cyc., 741, *et seq.* . . . When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case, it is not necessary to await the final hearing. If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits, and the defendant compelled to undo what he has done. Beach, *supra*, sec. 1019." For the reasons given the judgment below is

Reversed.

BANK OF PEACHLAND v. J. M. FAIRLEY AND F. H. FAIRLEY, PARTNERS UNDER THE FIRM NAME OF FAIRLEY BROTHERS, CHARLES RAYMOND STOREY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 27 January, 1932.)

1. Appeal and Error A f—Rights of appealing party only will be considered, but his rights are not affected by failure of another party to appeal.

Where in an action by a bank against a depositor, the cashier, and the surety on the cashier's bond to recover the amount of an overdraft of the depositor's account caused by reason of the nonpayment of the depositor's draft against which he had been allowed to check, the bank alleges that the draft was immediately credited to the customer's account by reason of false and fraudulent representations made by the depositor in respect thereto, and the jury finds the issue of fraud in favor of the plaintiff, and judgment is entered thereon against the depositor and the surety, providing for execution against the person of the depositor in the event execution was returned unsatisfied, and only the surety appeals

therefrom: *Held*, the Supreme Court cannot change the issues in so far as they affect the defendants who had not appealed, but their failure to appeal does not affect the rights of the appealing surety.

2. **Principal and Surety B d—Held: evidence failed to disclose acts of cashier for which bank could recover against surety on his bond.**

Where in an action by a bank against the surety on the cashier's bond the evidence tends only to show that the cashier, acting in good faith and in his judgment for the benefit of the bank, had credited the account of a depositor with drafts drawn by the depositor on others, and permitted the depositor to check against the drafts before they were collected and paid, causing an overdraft of the depositor's account when the drafts were returned, there is not sufficient evidence to support an allegation of fraud and collusion between the depositor and the cashier who had credited the depositor's account, and a recovery may not be had by the bank against the surety on the cashier's bond which provided for liability only in the event of fraud, dishonesty, larceny, theft, etc., or some dishonest or criminal act on the part of the cashier, and the defendant's surety's motion as of nonsuit should have been allowed.

STACY, C. J., not sitting.

APPEAL by the defendant, United States Fidelity and Guaranty Company, from *Stack, J.*, at March Term, 1931, of ANSON. Reversed.

On 1 December, 1927, the defendants, Fairley Brothers, deposited with the plaintiffs two drafts, one in the sum of $3,792.11, and the other in the sum of $2,607.89. Both these drafts were payable to the order of the plaintiff, and were drawn by Fairley Brothers—one on Aragon Baldwin Cotton Mills, and the other on Autz and Company. The account of defendants, who were customers of the plaintiff, was credited with the amount of said deposit, to wit: $6,400. Both drafts were duly forwarded by plaintiff for collection. The draft on Autz and Company for $2,607.89, was paid on its presentation to the drawee. The draft on Aragon Baldwin Cotton Mills for $3,792.11, was duly presented for payment to the drawee and dishonored by nonpayment. This draft was promptly returned to plaintiff, and was charged to the account of Fairley Brothers on 10 December, 1927, with the result that said account was overdrawn on said day, as shown by the books of the plaintiff. The defendants, Fairley Brothers, did not have sufficient funds to their credit with the plaintiff on 10 December, 1927, for the payment of the dishonored draft. They subsequently made payments from time to time on the overdraft shown on the books of the plaintiff, reducing the amount thereof to $2,181.42. Fairley Brothers are now indebted to the plaintiff by reason of said overdraft in the sum of $2,181.42, with interest thereon from 1 December, 1927. There was no evidence at the trial tending to show that the defendants, Fairley Brothers, made any false and fraudulent representations to the plaintiff at the time they deposited the said drafts, and thereby induced plaintiff to give them credit for the amount

of their deposit. There was evidence tending to show that Fairley Brothers represented to plaintiff that the drafts were good and would be paid upon presentation.

The defendant, Charles Raymond Storey, was the cashier of plaintiff on 1 December, 1927. As such cashier he credited the account of Fairley Brothers with the amount of the two drafts deposited with plaintiff by them on said day. Between the 1st and the 10th of December, 1927, the said defendant, as cashier of the plaintiff, paid checks drawn on plaintiff by Fairley Brothers and charged same to their account. The books of the plaintiff showed that by reason of the deposit of $6,400, made on 1 December, 1927, Fairley Brothers had sufficient funds to their credit with plaintiff for the payment of said checks. When the draft for $3,792.11 was returned unpaid, the defendant, Charles Raymond Storey, charged the same to the account of Fairley Brothers, because of their liability as drawers of the dishonored draft, with the result that said account was overdrawn on 10 December, 1927. The defendant immediately notified Fairley Brothers that their draft on Aragon Baldwin Cotton Mills had not been paid, and demanded that they pay the same to the plaintiff, as holder of the draft. Fairley Brothers have made payments on their overdraft from time to time, thus reducing the amount thereof to $2,181.42.

Charles Raymond Storey, as a witness for the plaintiff, testified as follows: "I was cashier of the Bank of Peachland in December, 1927. Fairley Brothers presented for deposit to their credit a draft for $3,792.11 on Aragon Baldwin Cotton Mills of Whitmire, S. C. There was no bill of lading attached to the draft. They brought it in as a regular deposit, and I gave them credit for it. I permitted them to check against it immediately. This was on 1 December, 1927, and the draft came back on 10 December, 1927. I charged the draft to their account. On 28 December, 1927, Fairley Brothers gave me two drafts aggregating the sum of $1,000. Both these drafts were paid and the proceeds credited on the draft which had been returned. They gave me other drafts from time to time which were not paid. On 9 February, 1928, I drew on Fairley Brothers for $2,792.11. This draft was not paid. At their meeting on 12 January, 1928, I made up a financial statement for the directors. I did not tell them about the $2,792.11, then owing by Fairley Brothers on their unpaid draft dated 1 December, 1927. They asked me about overdrafts, and I showed them the overdrafts. I did not mention the Fairley matter as I did not consider the amount due by them on their unpaid draft as an overdraft of their account. I did not try to keep anything from the directors. I kept on the books of the bank a complete record of the Fairley transaction. The

bank made good money out of the account with Fairley Brothers. They bought and sold cotton. I charged them interest at the rate of 8 per cent, and 1/8 of one per cent for collecting their drafts. I did not make anything for myself out of their account. I did not fraudulently conspire with Fairley Brothers. They were customers of the bank when I became cashier. I continued to do business with them, just as its books showed the bank had done. My recollection is that Fairley Brothers told me when they deposited the drafts on 1 December, 1927, that they were good and would be paid. I had no reason to doubt that both drafts would be paid on presentation."

J. Y. Britt, as a witness for the plaintiff, testified that he succeeded Charles Raymond Storey as cashier of the Bank of Peachland. He said: "When I became cashier, Mr. Storey owed nothing to the bank, except $90.00 which he has paid. He had not tried to destroy any of the records. Not a single one of them was mutilated. I have not found anything wrong; no moral turpitude whatever. All the records kept by Mr. Storey were in good order. These records show that Fairley Brothers did a large business with the bank while Mr. Storey was cashier. This business was profitable for the bank. The entire transaction involving their draft for $3,792.11 and the payments made on the draft by them, is shown on the records made by Mr. Storey as cashier."

The defendant, United States Fidelity and Guaranty Company, executed and filed with the plaintiff a bond as surety for Charles Raymond Storey, its cashier. This bond was dated 21 December, 1927, and superseded a bond executed by the Atlantic Surety Company of Raleigh, N. C., and filed with the plaintiff on 12 January, 1927. The pertinent provisions of the bond executed by the defendant are as follows:

"United States Fidelity and Guaranty Company
Baltimore, Maryland.

No. 48-01-1001-28. $10,000.00.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, as surety (hereinafter called the surety) does hereby agree to pay into Bank of Peachland, N. C. (hereinafter called employer), within ninety days after presentation of proof of loss, as hereinafter provided, the amount of any loss, not exceeding $10,000, which the employer may sustain in respect to any moneys, funds, securities, or other personal property of the employer, or for which the employer may be responsible, through any act of fraud, dishonesty, larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, or misapplication, or any other dishonest or criminal act or omission committed by Charles Raymond

Storey (hereinafter called the employee) acting alone or in collusion with others, while in any position in the continuous employ of the employer, after 12 o'clock noon of the 10th day of January, 1928, but before the employer shall become aware of any default on the part of the employee, and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen."

Attached to the said bond is a rider, executed by the defendant, the pertinent provisions of which are as follows:

"To be attached to Fidelity Bond No. 48-01-1001-28 executed by the United States Fidelity and Guaranty Company (hereinafter called surety) dated 10 January, 1928, in favor of Bank of Peachland (hereinafter called employer) and covering Charles Raymond Storey, Peachland, N. C.

Whereas, the employer has been carrying fidelity suretyship as follows: Charles Raymond Storey, amount $10,000; surety, Atlantic Surety Company, dated 16 November, 1926.

Whereas, said fidelity suretyship, as of the effective date of the attached bond, has been canceled, or allowed to expire, or has been terminated by agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider; and,

Whereas, said fidelity suretyship may provide that any loss thereunder shall be discovered, or claims therefor shall be filed, within a certain period after the final expiration, cancellation or termination thereof,

Now, therefore, it is hereby understood and agreed as follows:

(1) That the attached bond shall be construed to cover, subject to its terms, conditions and limitations, any loss or losses under said fidelity suretyship which shall be discovered after the expiration of any such period, or of no such period, after the bar of the statute of limitations, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder, and which would have been recoverable under said fidelity suretyship had it continued in force, and also under the attached bond had such loss or losses occurred during the currency thereof."

There was evidence tending to show that plaintiff first received information of the loss sustained by it by reason of the nonpayment of the draft drawn by Fairley Brothers on Aragon Baldwin Cotton Mills, dated 1 December, 1927, on 7 March, 1928, and that the defendant, United States Fidelity and Guaranty Company had notice of plaintiff's claim for such loss prior to 11 April, 1928. The said defendant denied liability under the bond for such loss.

The issues submitted to the jury were answered as follows:

"1. Did the defendants, J. M. Fairley and F. H. Fairley, trading as Fairley Brothers, obtain credit at the Bank of Peachland on 1 December, 1927, for the draft of $3,792.11, drawn on Aragon Baldwin Cotton Mills, by false and fraudulent representations, as alleged in the complaint? Answer: Yes.

2. Did the defendant, Charles Raymond Storey, while acting as cashier of the plaintiff bank, and in collusion with Fairley Brothers, fraudulently permit the said Fairley Brothers to check against the draft for $3,792.11, before the same had been cleared and paid, in violation of the rules and instructions which had theretofore been given him by the board of directors of said bank, as alleged in the complaint? Answer: Yes.

3. Did the said Charles Raymond Storey falsely and fraudulently conceal the overdraft and indebtedness of Fairley Brothers from the board of directors of the Bank of Peachland at their meeting held on 12 January, 1928, as alleged in the complaint? Answer: Yes.

4. Did the plaintiff comply with the terms of its bonds with respect to the manner of filing its claim with the United States Fidelity and Guaranty Company, and, if not, did the United States Fidelity and Guaranty Company waive strict compliance therewith by disclaiming liability upon said bonds, as alleged in the complaint? Answer: Yes.

5. What amount, if any, is the plaintiff entitled to recover of the defendant, J. M. Fairley and F. H. Fairley, trading as Fairley Brothers? Answer: $2,181.42, with interest from 1 December, 1927.

6. What amount of damages, if any, is the plaintiff entitled to recover of the United States Fidelity and Guaranty Company on account of the bonds sued on in this action by reason of the wrongful conduct of Charles Raymond Storey? Answer: $2,181.42, with interest from 1 December, 1927."

On the foregoing verdict, it was ordered, considered and adjudged by the court:

"1. That the plaintiff, Bank of Peachland, recover of the defendants, J. M. Fairley and F. H. Fairley, partners trading under the firm name of Fairley Brothers, the sum of $2,181.42, with interest on said amount from 1 December, 1927, until paid, together with the costs of this action; and the jury having found by their verdict that the indebtedness of the defendants, J. M. Fairley and F. H. Fairley, was incurred by false and fraudulent representations, it is ordered and adjudged by this court that if an execution against the property of the defendants, J. M. Fairley and F. H. Fairley, is returned unsatisfied, then and in that event, the said Bank of Peachland shall be entitled to an execution against the persons of the said J. M. Fairley and F. H. Fairley.

2. That the Bank of Peachland recover of the defendant, the United States Fidelity and Guaranty Company, the sum of $10,000, to be discharged upon the payment of the sum of $2,181.42, with interest on said amount from 1 December, 1927, until paid, together with the costs of this action to be taxed by the clerk."

From this judgment, the defendant, the United States Fidelity and Guaranty Company, appealed to the Supreme Court.

Robinson, Pruette & Caudle for plaintiff.
John C. Sikes for defendant.

CONNOR, J. The defendants, Fairley Brothers, did not appeal to this Court from the judgment rendered against them in the Superior Court. In their answer to the complaint, they denied the allegations therein that they induced the plaintiff by false and fraudulent representations to credit their account with the amount of their draft, dated 1 December, 1927, for $3,792.11, or to pay their checks drawn on plaintiff before their said draft was collected by the plaintiff. They admit that the draft was dishonored by nonpayment upon its presentation to the drawee, and that by reason of such dishonor, they were liable as drawers of the draft to the plaintiff for its amount. They did not resist the demand of the plaintiff for judgment against them in this action for the balance due on the draft. We fail to find in the record any evidence tending to sustain the allegations of the complaint involved in the first issue. The answer in the affirmative to this issue supports the order in the judgment for the issuance of an execution against the persons of these defendants. It does not, however, affect the right of the plaintiff to recover of the defendant, United States Fidelity and Guaranty Company, in this action.

There was no judgment at the trial of this action in the Superior Court against the defendant, Charles Raymond Storey. No issue involving his liability to plaintiff for any specific sum of money was submitted to the jury. For this reason, this defendant did not appeal to this Court. We fail to find in the record any evidence tending to sustain the allegations in the complaint involved in the second and third issues. We cannot, however, disturb the affirmative answers to these issues insofar as they affect the defendant, Charles Raymond Storey. They do not, however, affect the right of the plaintiff to recover of the defendant, United States Fidelity and Guaranty Company in this action.

In the absence of any evidence at the trial of this action, tending to show that the plaintiff has sustained a loss of its money or other personal property, through an act of fraud, dishonesty, larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction or mis-

application or other dishonest or criminal act or omission committed by its cashier, Charles Raymond Storey, during the period covered by its bond, the defendant, the United States Fidelity and Guaranty Company, is not liable to plaintiff in this action as surety for said cashier. The bond executed by the defendant as surety for the cashier of the plaintiff does not cover a loss sustained by it solely by reason of an overdraft permitted by its cashier, although without authority of its board of directors. The cashier is civilly but not criminally liable for such loss. N. C. Code of 1931, sec. 221(1).

In *First National Bank of Edgewater v. National Surety Company*, 243 N. Y., 34, 152 N. E., 456, 46 A. L. R., 967, it was held that the act of a bank cashier in permitting an overdraft by a customer through an honest mistake of judgment, or to help the bank, or in the ordinary course of the bank's business, without any dishonest intent or purpose, is not within a fidelity policy insuring against loss through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, misapplication or misappropriation, or other dishonest or criminal act or omission of the cashier. We think the cited case was well decided.

There was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit at the close of the evidence. For this reason, the judgment against the appealing defendant is

Reversed.

STACY, C. J., not sitting.

CITIZENS BANK v. E. W. GROVE, JR., AND ST. LOUIS UNION TRUST COMPANY, EXECUTORS AND TRUSTEES OF THE ESTATE OF E. W. GROVE, DECEASED.

(Filed 27 January, 1932.)

1. Executors and Administrators C d—Where estate receives benefit of proceeds of notes signed by deceased's agent the estate is liable.

Where the general manager of certain concerns of the deceased borrows money on notes from a bank shortly after the death of the deceased and the proceeds thereof are used for the exclusive benefit of the deceased's estate, the personal representatives of the deceased are liable to the bank therefor in their representative capacity, although at the time of paying one of the notes they were unaware that the relationship between the general manager and the deceased was that of principal and agent, the estate having received the benefits of the unauthorized acts of the agent and the executors making no offer of restoration, they may not repudiate the acts of the agent to the injury of the other party, and having the power to make the contracts they also had the power to ratify them.

2. Principal and Agent C a—Where proceeds of notes are used exclusively for estate the executors may ratify agent's unauthorized execution thereof.

Although, ordinarily, death terminates the relationship of principal and agent, where the agent after the death of the principal executes notes, the proceeds of which are used for the exclusive benefit of the estate, the estate is liable therefor upon the principle that where the principal receives the benefits of an unauthorized act of the agent he will be deemed to have ratified the act as he will not be allowed to accept the benefits without bearing the burdens, the executors and trustees retaining the benefit of the notes for the estate having had the authority to make and execute the notes in the first instance.

3. Executors and Administrators C c—Executors and trustees of estate held estopped to deny authority of agent appointed by them to execute notes.

Where the executors and trustees of an estate appoint the manager of certain concerns of the deceased to continue to act in that capacity after the death of the deceased, and thereafter the manager executes certain notes the proceeds of which are used exclusively for the payment of debts contracted by the deceased before his death and to keep up the property of the deceased under his management, the executors and trustees are thereafter estopped to deny either that the acts of the manager in executing the notes were not within the scope of the employment or that they were ignorant of the fact that the relation which had existed between the deceased and manager prior to the deceased's death was that of principal and agent and not that of partners.

APPEAL by defendants from *Stack, J.*, at September Term, 1931, of MADISON.

The parties waived a trial by jury and agreed upon the following facts:

1. Citizens Bank is a corporation duly organized and was doing business at the time hereinafter mentioned in the county of Madison.

2. The defendants, E. W. Grove, Jr., and St. Louis Union Trust Company were the duly qualified executors of E. W. Grove, deceased, who died testate in the city of Asheville, on 27 January, 1927, and his last will and testament has been duly admitted to probate in the counties of Buncombe and Madison, in the State of North Carolina.

3. The defendants duly qualified as executors under said will in the State of North Carolina on 7 February, 1927, and have continued to administer said estate as such until this time.

4. The said E. W. Grove, deceased, for some time prior and up to the date of his death had done business in the State of North Carolina under the name and style of Grove-Ellerson Stone and Sand Company, and under the name and style of Laurel River Live Stock Company, and W. R. Ellerson, during such time, and up to the date of his death, had general management and control of the two businesses, operated

under the names and styles above mentioned, and from time to time, prior to and up to the death of the said E. W. Grove, deceased, the said W. R. Ellerson, under the name and style of Grove-Ellerson Stone and Sand Company, and Laurel River Live Stock Company, borrowed money and executed notes therefor, from the plaintiff bank, and carried accounts with the said bank, in the names of both Grove-Ellerson Stone and Sand Company and Laurel River Live Stock Company, checking the same out in the usual course of the business, on checks signed in the names and styles above mentioned, by him as manager.

5. Upon qualification of the defendants, the said W. R. Ellerson was employed by the defendant executors in connection with the administration of the property formerly operated under the name and style of Grove-Ellerson Stone and Sand Company, and Laurel River Live Stock Company, and continued in the service of said executors until about August, 1927.

6. On or about 8 February, 1927, the said W. R. Ellerson, in the name of the Grove-Ellerson Stone and Sand Company, executed and delivered to the plaintiff, Citizens Bank, a note of $1,000, due and payable on 7 March, 1927, in words and figures as set out in paragraph 6 of the complaint, except as to date and maturity, and, thereafter, in renewal of the note above mentioned, in the name of the Grove-Ellerson Stone and Sand Company, executed and delivered a note for the sum of $1,000. in words and figures as set out in paragraph 6 of said complaint, and the money received therefor was applied by the said Ellerson, to indebtedness of the defendants' testator, contracted in the name of Grove-Ellerson Stone and Sand Company, prior to the death of the said testator.

7. On or about 27 May, 1927, the said W. R. Ellerson, in the name of the Laurel River Live Stock Company, executed and delivered to the plaintiff, a note for $400, in words and figures as set out in paragraph 6 of said complaint, and the money received therefor deposited in plaintiffs' bank, under the name and style of Laurel River Live Stock Company, and $330.21 thereof applied to an overdraft of said account, as of 27 May, 1927, and the balance thereof applied in payment of general expense in the maintenance and preservation of the estate; the said overdraft having been created during the month of May, 1927, and applied to the general expense of the maintenance and preservation of the estate.

8. The defendant executors had no knowledge of the execution and delivery of the notes hereinbefore mentioned, until some time in September, 1927, when demand was made by the plaintiff bank for the payment thereof, and payment refused, and both of the said notes were at the institution of this action and still are, unpaid.

9. The settlement by the defendants with W. R. Ellerson, individually, as alleged in paragraph 7 of said complaint, had no bearing on, and did not involve the subject-matter of this cause of action.

10. The defendants paid to the plaintiff bank a note, executed by W. R. Ellerson, in the name of Grove-Ellerson Stone and Sand Company, dated 25 February, 1927, and paid as aforesaid, on 31 December, 1928, said payment having been made under the mistaken apprehension on their part that the relation between Ellerson and their testator was that of partners.

11. The negotiations and transactions between the said plaintiff and the said Ellerson, were made in good faith on the part of both, but without the knowledge of the defendant executors.

His Honor gave judgment for the plaintiff, noting therein that the estate of E. W. Grove (the testator) had received the benefit of the loans. The defendants excepted and appealed.

John A. Hendricks and C. B. Mashburn for plaintiff.
Merrimon, Adams & Adams for defendants.

ADAMS, J. The appellants concede the familiar doctrine that as a general rule all simple agencies are terminated by the death of the principal. *Duckworth v. Orr,* 126 N. C., 674; *Wainwright v. Massenburg,* 129 N. C., 46; *Fisher v. Trust Co.,* 138 N. C., 90. But they say that the doctrine of ratification or estoppel precludes the appellants from asserting this defense. Whether they are correct must be determined by applying the law to the facts upon which the parties have agreed.

It is admitted that for sometime immediately preceding the testator's death Ellerson had had the general management and control of the business transacted by the Grove-Ellerson Stone and Sand Company and the Laurel River Live Stock Company, under each of which titles E. W. Grove had conducted the business. For the benefit of these concerns Ellerson borrowed money from the plaintiff, made deposits in the name of each company, and checked the money out in the usual course of business.

The testator, E. W. Grove, died on 27 January, 1927. On 6 February Ellerson, in the name of Grove-Ellerson Stone and Sand Company, executed and delivered to the plaintiff a note of $1,000, which he renewed at maturity. The money he received on this note was applied to certain indebtedness of the testator contracted during his lifetime in the name of the company; and the debt, had it not been paid, would be a present claim against the estate, for the payment of which the defendants in their representative capacity could be held responsible.

The money received on the note of $400 executed on 27 May, 1927, by the Laurel River Live Stock Company was applied in part to an overdraft on its account with the plaintiff and in part to the maintenance and preservation of the estate. True, the overdraft occurred in the month of May, but the amount derived from the overdraft had previously been applied to the general cost of preserving the property and maintaining the business. So, the proceeds of both notes were used for the exclusive benefit of the testator's estate.

To the appellants' contention that the death of the testator terminated the agency and that Ellerson had no authority to borrow the money or to execute the notes, several answers may be given. Where an agent who is not authorized to do so borrows money on behalf of his principal and applies it in satisfaction of the legal obligations of his principal and the latter knowingly retains the benefits of such payments, the transaction constitutes as between the principal and the lender the relation of debtor and creditor. Having received the benefits of the unauthorized act the principal will be deemed to have ratified the act and to have barred his repudiation of it to the injury of the other party. He cannot accept the benefits without bearing the burdens; he must duly repudiate the transaction or perform the contract in its integrity. *Lane v. Dudley,* 6 N. C., 119; *Miller v. Lumber Co.,* 66 N. C., 503; *Rudasill v. Falls,* 92 N. C., 222; *Christian v. Yarborough,* 124 N. C., 72; *Hall v. Giessell,* 179 N. C., 657.

The appellants knew nothing of the execution of the notes until September, 1927, when the plaintiff demanded payment. In response to the demand they disclaimed liability but made no offer of restitution, content no doubt with the benefits the estate had received. The agent's acts, it may be noted, were not void, illegal, or contrary to public policy; at most they were merely voidable. Any one who has the capacity to make a contract of agency may ratify an act assumed to be done in his behalf without authority; and, according to the maxim, every ratification has a retroactive effect and is equivalent to a prior command.

When the appellants qualified they employed Ellerson "in connection with the administration of the property" formerly operated by the two companies of which he had been appointed general manager by the testator. They qualified as executors and trustees—not only as personal representatives but as trustees of the property. The fifth paragraph of the agreed statement indicates that the appellants continued or renewed Ellerson's appointment. This, we think, is a natural and logical interpretation which should estop the appellants from claiming either that the acts they complain of were not within the scope of the employment or that at the time they paid the plaintiff a note executed by

Ellerson in the name of the Grove-Ellerson Stone and Sand Company, which, the appellee insists, was an express ratification of the agent's authority, they were ignorant of the relation that had existed between Ellerson and their testator. It was incumbent upon them to know the relation.

It may incidentally be remarked in conclusion that *Snipes v. Monds*, 190 N. C., 190, cited by the appellants is not applicable to the facts. See C. S., 176(a). Judgment

Affirmed.

BANK OF WADESBORO v. NORTHWESTERN CASUALTY AND SURETY COMPANY AND C. C. WHEELER.

(Filed 27 January, 1932.)

1. **Principal and Surety B b — Held, in this action the complaint sufficiently alleged that the required notice has been given the surety.**

Where the complaint in an action on the bond given by a contractor for construction of a highway alleges that a statement of the claim against the surety on the bond was filed with the defendant surety company within six months after the project was completed, it is a sufficient allegation of compliance with the provisions of N. C. Code, 3846(v) requiring such notice be filed with the general agent of the surety in this State, and the defendant surety's demurrer on the ground that the complaint failed to state a cause of action because it failed to sufficiently allege compliance with the statute cannot be sustained.

2. **Same—Acceptance of draft by contractor does not ordinarily bar action on surety bond for materials for which draft was drawn.**

Where a materialman furnishes crushed stone used by a contractor in the construction of a highway, and draws drafts on the contractor with the bill of lading attached for the amount thereof, and the contractor accepts the drafts, but fails to pay the drafts upon maturity: *Held*, the acceptance of the drafts by the contractor will not bar an action by the materialman or his assignee on the bond of the contractor filed with the State Highway Commission as provided by statute, where there is no agreement between the contractor and the drawer that acceptance should constitute payment.

3. **Same—Held transferee of drafts for material used in highway could maintain action on contractor's bond.**

The assignment of a debt carries with it the security the assignor has for the payment of the debt, and where a materialman furnishes material to a contractor which is used in the construction of a public highway, and draws drafts on the contractor for the amount due therefor which are assigned and negotiated to a bank, and the contractor accepts the drafts but fails to pay them at their maturity: *Held*, the bank may maintain an action on the contractor's bond for the amount due thereon,

and the surety's demurrer on the ground that the complaint failed to allege that, at the time of the assignment and negotiation of the drafts, the accounts of the materialman were also assigned cannot be sustained.

APPEAL by defendant, Northwestern Casualty and Surety Company, from *Finley, J.*, at July Term, 1931, of STANLY. Affirmed.

This action was heard on the demurrer of the defendant, Northwestern Casualty and Surety Company.

The demurrer was on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action on which the defendant is liable to plaintiff as alleged therein.

From judgment overruling the demurrer, the defendant appealed to the Supreme Court.

R. L. Smith & Sons and Charles Ross for plaintiff.

C. H. Gover for defendant.

CONNOR, J. This action is to recover on a bond which was executed by the defendant, C. C. Wheeler, as principal, and the defendant, Northwestern Casualty and Surety Company, as surety. The bond was executed and delivered to the North Carolina Highway Commission, in compliance with the provisions of a contract entered into by and between the said C. C. Wheeler and the said Highway Commission, by which the said C. C. Wheeler contracted and agreed with the said Highway Commission to provide and furnish all the materials and to do and perform all the labor required for the construction and completion of that portion of State Highway No. 74, known as Project No. 689. One of the conditions of said bond is that the said C. C. Wheeler, the contractor "shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them, or any of them, for all such labor or materials for which the contractor is liable."

After the execution and delivery of said bond, W. H. Haywood, operating under the name of Mt. Gilead Supply Company, pursuant to his contract with the said C. C. Wheeler, furnished, from time to time, crushed stone to be used by the said C. C. Wheeler in the construction of Project No. 689. This crushed stone was used by the said C. C. Wheeler as material in the construction of said project, in accordance with his contract with the North Carolina Highway Commission. The contract price of the crushed stone furnished by the said W. H. Haywood, and delivered by him to the said C. C. Wheeler, in three shipments—one on or about 21 November, 1928, and two on or about 15 December, 1929—was $2,905.05.

In accordance with the terms of the contract between C. C. Wheeler and W. H. Haywood, at the times the crushed stone was furnished by him to the said C. C. Wheeler, the said W. H. Haywood drew three drafts, each payable to Mt. Gilead Supply Company, on C. C. Wheeler. The aggregate amount of these drafts was $2,905.05. Each of the drafts was payable at the Bank of Wadesboro, and was duly accepted by the defendant, C. C. Wheeler. On the face of each of said drafts are the following words: "In settlement of invoice of crushed stone, Project No. 689, Stanly County." All of these drafts were duly assigned, transferred and negotiated by the Mt. Gilead Supply Company, for value and before maturity, to the plaintiff. They are now due and unpaid.

It is alleged in the complaint that "under the terms of the contract bond (a copy of which is attached and marked 'Exhibit B'), the defendant, Northwestern Casualty and Surety Company, is liable for the payment of the said Mt. Gilead Supply Company, and by virtue of the trade acceptances and assignments heretofore referred to, the defendant, Northwestern Casualty and Surety Company, became liable to the plaintiff for same."

"12. That after the said trade acceptances became due and payable at said bank, and the defendant, C. C. Wheeler, failed to pay same as he had agreed to do, the plaintiff notified the defendant Surety Company of the existence of said trade acceptances and the assignment to the plaintiff by the Mt. Gilead Supply Company and made demand that the defendant Surety Company pay same, which payment it has failed, neglected and refused to make."

"13. That upon failure and refusal of each of the defendants to pay above claim, and in accordance with the provisions of chapter 260 of the Public Laws of North Carolina, Session of 1925, and within six months after the completion of said Project No. 689, plaintiff duly filed with each of the defendants formal statements of its claim against the defendant, C. C. Wheeler, and within six months plaintiff likewise filed similar statements with the said North Carolina Highway Commission."

"14. That in accordance with the provisions of chapter 260 of Public Laws of North Carolina, Session of 1925, and of chapter 11 of the Public Laws of North Carolina, Session of 1923, plaintiff, at the time of bringing this action, intends to have published, once a week for four successive weeks in the Stanly *News and Press*, a newspaper published and in general circulation in Stanly County, North Carolina, a notice to all persons, informing them of the pending of this action, and the names of the parties, and briefly informing them of its purposes and likewise informing all persons entitled to bring an action on the bond, that unless sooner served with process they have twelve months from its institution

within which to intervene therein, a copy of which notice is attached hereto as 'Exhibit C,' and made a part of this complaint."

The first contention of the defendant in support of its exception to the judgment overruling its demurrer, is that plaintiff has not alleged in its complaint that a statement of its claim against the defendant, a corporation, as surety on the bond, was filed with its general agent in this State, as required by statute. N. C. Code of 1931, section 3846(v). It is alleged, however, that a statement of the claim was filed with the defendant within six months after Project 687 was completed. This is a sufficient allegation by the plaintiff that it has complied with the statutory provision, which is as follows:

"No action shall be brought upon any bond given by any contractor of the highway commission by any laborer, materialman, or other person until and after the completion of the work contracted to be done by the said contractor. Any laborer, materialman, or other person having a claim against the said contractor and the bond given by such contractor, shall file a statement of the said claim with the contractor and with the surety upon his bond, and in the event that the surety is a corporation, with the general agent of such corporation within the State of North Carolina, within six (6) months from the completion of the contract, and a failure to file such claim within said time shall be a complete bar against any recovery on the bond of the contractor and the surety thereon."

The statutory requirement is manifestly for the purpose of relieving a corporate surety of liability on the bond, when the statement is filed only with its local agent in this State. The defendant's contention that no cause of action is stated in the complaint for the reason that it is not alleged therein that a statement of plaintiff's claim was filed with its general agent in this State, cannot be sustained.

The second contention of the defendant is that upon all the facts alleged in the complaint the account of W. H. Haywood, operating under the name of Mt. Gilead Supply Company, for the crushed stone furnished as material for the construction of Project 689, was paid by the acceptances of the drafts drawn on him by C. C. Wheeler, and that for this reason the defendant is not liable for said accounts by reason of its execution of the bond. In the absence of allegations in the complaint showing that it was agreed by and between W. H. Haywood and C. C. Wheeler, that the acceptance by C. C. Wheeler of the drafts drawn by him by W. H. Haywood, was a payment of the accounts, this contention cannot be sustained. *Moore v. Material Co.*, 192 N. C., 418, 135 S. E., 113; *Electric Co. v. Deposit Co.*, 191 N. C., 653, 132 S. E., 808. In the last cited case, it is said that the acceptance by the materialman of a

ninety-day trade acceptance for the amount due by the contractor, as a matter of business convenience, is not a bar to his right to recover on the bond.

The third contention of the defendant is that plaintiff does not allege in its complaint that W. H. Haywood, operating under the name of Mt. Gilead Supply Company, at the time the drafts were assigned, transferred and negotiated to the plaintiff, also assigned his accounts against the defendant, C. C. Wheeler, for material furnished for use on Project No. 689, and that for this reason the plaintiff has failed to state in its complaint a cause of action against the defendant. It is well settled as a principle of law that the assignment of a debt carries with the security which the assignor has for the debt, and that the assignee has the benefit of such security. *Trust Co. v. Porter,* 191 N. C., 672, 132 S. E., 806. This principle is applicable in the instant case, and for this reason this contention of the defendant cannot be sustained.

As none of the contentions of the defendant on its appeal to this Court can be sustained, the judgment overruling its demurrer, is

Affirmed.

CARRIE AVERY, GUARDIAN OF BUNA AVERY, JUDGE AVERY, WAIGHTSTILL AVERY, AND CORINA AVERY, MINOR HEIRS AT LAW OF W. W. AVERY, DECEASED; AND IRA VANCE, ADMINISTRATOR OF W. W. AVERY, DECEASED, v. E. C. GUY AND J. WALTER WRIGHT, TRADING AS PARTNERS IN A LUMBER BUSINESS UNDER SOME FIRM NAME.

(Filed 27 January, 1932.)

1. Executors and Administrators F a—Where personalty is insufficient to pay debts of estate, realty may be sold under order of court.

Where the personal estate of an intestate is insufficient to pay the debts of the estate, including the costs of administration, the administrator may apply to the Superior Court for an order to sell real estate of the intestate to make assets, C. S., 74, the heirs of the deceased being necessary parties to the proceedings, C. S., 80, the heirs at law taking the land subject to the payment of the debts of the estate where the personalty is insufficient therefor.

2. Executors and Administrators C f—Rights of heirs held not prejudiced by nonsuit in guardian's action to set aside award to administrator.

Where, after the death of the intestate a lumber company cuts some timber from lands beyond the boundaries described in their timber deed from the intestate, and a settlement is made therefor with the administrator of the estate in accordance with an award made by appraisers appointed by the court by agreement of counsel, and it appears that the personalty of the intestate was not sufficient to pay all debts of the

estate, and that the heirs at law of the intestate, through their guardian, are parties plaintiff and that they are entitled to payment from the administrator, after the debts of the estate are paid, of any surplus: *Held*, a judgment as of nonsuit in an action brought by the guardian of the heirs at law to set aside the award as not being binding on her will not be disturbed on appeal, no harm having resulted to the minor heirs at law, and the judgment not being prejudicial as to them.

3. Appeal and Error J c—A new trial will not be granted for error which is not prejudicial.

The Supreme Court will not grant a new trial where the alleged error is not prejudicial to the appellant and there is no prospect of ultimate benefit to him if the judgment should be set aside.

APPEAL by plaintiff Carrie Avery, guardian, aforesaid, from *Sink, J.*, at April Term, 1931, of AVERY. Affirmed.

The court below rendered the following judgment: "This cause coming on for hearing and being heard before his Honor, and it appearing to the court upon the admitted facts that the plaintiffs are barred and estopped from further asserting their claim in this cause, it is, therefore, considered, ordered and adjudged that the plaintiffs be and they are hereby nonsuited in this cause." Plaintiff, Carrie Avery, guardian, excepted to the judgment as signed, assigned error and appealed to the Supreme Court.

R. W. Wilson and Max C. Wilson for plaintiffs.

J. W. Ragland for defendants.

CLARKSON, J. C. S., 74, in part, is as follows: "When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the Superior Court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent," etc.

Upon the death of a person owing debts the land descends to the heirs at law subject to the payment of the same, after exhausting the personal property. The heirs of the deceased are necessary parties to the proceeding. C. S., 80.

It was contended by plaintiff, Carrie Avery, guardian of the heirs at law of W. W. Avery, that defendants violated their timber contract with W. W. Avery. That defendants cut certain timber after W. W. Avery's death which was not included in the contract. The defendants set up an award under a consent order made 21 June, 1930, in the present cause. Ira Vance, Sam G. Smith and Vance Palmer being appointed to investigate and make an award, which was done.

The defendants contend that "settlement of this cause of action on the basis of $4.00 per M. feet, stumpage, for the amount of timber estimated and reported as aforesaid, which said offer these defendants accepted, and paid the said Vance accordingly, and took a release from him duly executed and for full value and before the filing of the complaint herein, which said release these defendants now plead in bar of the plaintiffs' action and right of recovery herein."

The release set up, is as follows:

"Whereas, the above entitled action was instituted in the Superior Court of Avery County for the purpose of collecting the balance due by E. C. Guy and Company to W. W. Avery estate on account of timber cut from the lands of the said W. W. Avery estate, under a contract or deed made before the death of the said W. W. Avery, some of said timber having been cut beyond the boundaries of said deed by mistake; and,

Whereas, by consent of the parties to said action, an estimate was made of the timber so cut beyond said boundaries, said estimate having been made by Sam Smith, Ira Vance and Vance Palmer, to be 50,000 feet; and,

Whereas, the said 50,000 feet so cut by mistake, added to the amount cut from the boundaries of said deed, makes a total of 388,963 feet at $4.00, making $1,555.85, on which has been paid $1,208.50, leaving a balance of $347.35. Which said amount is this day paid to Ira Vance, administrator of the estate of W. W. Avery, deceased, in full satisfaction and settlement of said matter, receipt of which, by the said Ira Vance, administrator, is hereby acknowledged. This 16 July, 1930. Ira Vance, administrator of the estate of W. W. Avery, deceased. Witness: Eugene Eller."

The plaintiff in reply says: "That Ira Vance, acting in the capacity of administrator, has settled all of the debts of the late W. W. Avery, and the estate except his commission and expenses and about $75.00 of debts incurred in the administration thereof. That the balance of any funds collected in this cause belongs to the wards of Carrie Avery, guardian. That she was not consulted in said attempted settlement; that she did not know such attempted settlements were contemplated, and that such attempted conditional transactions between the plaintiff, Ira Vance, and the defendant, E. C. Guy, does not constitute a bar to the prosecution of this action, as the plaintiff, Carrie Avery, is advised and believes."

If the defendants cut any timber under the contract made with W. W. Avery before his death, and had not accounted for it, then the action must be brought by the administrator of the estate, Ira Vance, and not by plaintiff Carrie Avery, guardian.

The administrator of the estate of W. W. Avery, Ira Vance, is a party plaintiff. It appears that there is a small amount of debts of the estate of W. W. Avery unpaid. The recovery in the action, if there are debts, would go to Ira Vance, administrator, to pay the debts of W. W. Avery, and any balance to Carrie Avery, guardian. As all the heirs at law of W. W. Avery, through their guardian, are parties plaintiff, and were when the settlement was made, we see no good reason to disturb the judgment of the court below. It appears in the record that those appointed in the action to estimate the timber *"having been appointed by the court by the agreement of counsel in this action."* We do not think that the principle of law as set forth in *Garland v. Improvement Co.*, 184 N. C., at p. 556, case cited by plaintiff guardian, applicable.

Conceding, but not deciding, that there was error in the judgment of the court below, yet on the entire record there is not such prejudicial or reversible error for which the judgment should be set aside.

In *Booth v. Hairston*, 193 N. C., at p. 281, speaking to the subject, is the following: "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 nongranting 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." The judgment of the court below is

Affirmed.

MRS. CELESTE S. STALEY v. ROYAL PINES PARK, INCORPORATED, AND FRED SEEL.

(Filed 27 January, 1932.)

1. Pleadings D d—Demurrer on ground that complaint does not state cause of action may be interposed at any time.

A demurrer to the complaint on the ground that the complaint does not state a cause of action may be interposed at any time, even on appeal to the Supreme Court, but the demurrer is overruled in this case, the complaint sufficiently alleging a cause of action for actionable negligence.

2. Evidence D a—Competency of testimony as a part of the res gestæ.

In order for a declaration to be admissible as a part of the *res gestæ* it is necessary that the act itself should be admissible apart from the declaration that accompanies it, that the declaration should be uttered simultaneously, or almost simultaneously, with the occurrence of the act, and that it should be in explanation of the act.

3. Same—Evidence in this case held not competent as being a part of the res gestæ.

Where the plaintiff is injured by falling down a flight of stairs leading to the "ladies rest room" in an amusement park and brings action against the owner thereof alleging that the stairs were not in a reasonably safe condition, a deposition of the plaintiff to the effect that the one who had given her permission to use the stairs had said after the accident that he was sorry and that they had intended to fix the stairs, is improperly admitted in evidence as a part of the *res gestæ*, the act of giving permission not being such an act, exercised simultaneously with the injury, as the term *res gestæ* implies, and the declaration being made after the injury and the plaintiff failing to establish that it was made within the time necessary to constitute a part of the *res gestæ*, and it not being of a subsisting fact but an expression of a preëxisting state of mind.

4. Evidence G b—Testimony in this case held not competent as being of declaration against interest.

The power to make declarations against the interest of a company cannot be inferred as incidental to the duties of a general agent in charge of the current dealings of the business, and where declarations of a "person in charge" of the business are sought to be introduced in evidence and there is no evidence of the scope of the agent's authority, the admission of the evidence against the company as a declaration against its interest is reversible error, the burden being upon the plaintiff to establish the competency of this evidence.

APPEAL by defendants from *McElroy, J.*, at May Term, 1931, of BUNCOMBE. New trial.

Galloway & Galloway for plaintiff.
Bourne, Parker, Arledge & DuBose for Royal Pines Park, Inc.

ADAMS, J. This action was instituted to recover damages for personal injury suffered by the plaintiff. Pleadings were filed, the cause came on for hearing, and the jury answered the issues of negligence, contributory negligence, and damages in favor of the plaintiff. Judgment was rendered on the verdict, and the defendants appealed.

In this Court the Royal Pines Park, Inc., moved to dismiss the action for the alleged reason that the complaint does not state a cause of action. This is one of the two grounds of demurrer which may not be waived but may be interposed at any time, even on appeal to the court of last resort. *Hunter v. Yarborough*, 92 N. C., 68; *Holstead v. Mullen*, 93 N. C., 252. But the motion must be denied. The complaint states facts which are sufficient to constitute a cause of action; and the evidence is not so meager as to require a dismissal of the action.

The plaintiff is a resident of Florida; the defendant Seel is a resident of Buncombe County; and the Royal Pines Park, Inc., is a corporation organized under the laws of North Carolina. The plaintiff alleges

that the defendants for profit operated a playground for the amusement and entertainment of the public; that she went upon the premises and was given permission to use the "ladies' rest room," to reach which it was necessary for her to go down a flight of steps; that the carpet on the top steps had worn away; that the bare steps had become "slick, worn, water-soaked, slippery, very dangerous" and were not "in a reasonably safe condition"; and that in going down the steps she fell and was injured by reason of the defendants' negligence.

The plaintiff's deposition was offered in evidence and to the admission of the following part of it the defendants excepted: Q. Was anything said to you by any one after you had received the fall you have just described? A. Yes. Q. What was said and by whom? A. The man in charge of the premises who had given me permission to use the ladies rest room came to where I was at the foot of the steps and said, "I am awfully sorry that you got hurt. We had intended to fix that carpet, but have just neglected to do so."

This evidence was improperly admitted unless it was competent either as a part of the *res gestæ* or as a declaration against interest.

As a rule the law subjects to two tests all testimony submitted to a jury: the sanction of an oath and an opportunity for cross-examination. One of the exceptions to the rule admits declarations which constitute a part of the act, usually described as *res gestæ*. *S. v. Dula*, 61 N. C., 211. Such evidence is admissible under the following conditions: There must be (1) an act in itself admissible in the case independently of the declaration that accompanies it; (2) a declaration uttered simultaneously, or almost simultaneously, with the occurrence of the act; and (3) the explanation of the act by what is said when it happens. The declaration is not admissible unless the act which it characterizes is in itself admissible. So, the first inquiry is whether there is any evidence that the declarant did anything so closely related as to become a necessary incident of the litigated act—*i. e.*, the alleged negligent injury.

The record discloses no sufficient evidence to this effect. The one to whom she applied merely gave the plaintiff permission to use the room, and his permission was nothing more than his formal consent; it was in no sense such exertion of power, exercised simultaneously with the injury, as the term *res gestæ* implies. The time when the leave was granted or when the plaintiff availed herself of it is a matter of speculation. There is, therefore, no evidence of such an act by the asserted agent or employee of the defendants as is prerequisite to the admission of the proffered declaration. *S. v. Dula, supra.*

Furthermore, the plaintiff testified that the alleged declaration was made after the injury. This is indicated by her counsel's question. How long afterwards is not shown. Declarations are not admissible as *res*

gestæ unless made during the course of the main transaction or in connection with it immediately thereafter. *Bumgardner v. R. R.*, 132 N. C., 438; *S. v. Peebles*, 170 N. C., 763; *Batchelor v. R. R.*, 196 N. C., 84. Let us concede, as suggested in *S. v. Spivey*, 151 N. C., 676, and *S. v. Bethea*, 186 N. C., 22, that the *res gestæ* cannot be arbitrarily confined within any limit of time; still in considering the defendants' exception we cannot infer, in the absence of evidence on the point, that the declaration was made within such period as would justify its admission. That was a matter of proof, and it was incumbent upon the plaintiff to establish her case upon competent evidence.

It may be noted, in addition, that the declaration relates, not to a concomitant act, but to a purpose previously entertained. In form it is narrative; it does not characterize a subsisting fact; it deals with the past; it purports to express a preëxisting state of mind.

For the reasons given we conclude that the evidence was not competent as *pars rei gestæ*. *Simon v. Manning*, 99 N. C., 327, 331; *Queen v. Ins. Co.*, 177 N. C., 34.

We are also of opinion that it is not competent as a declaration against interest. There is no proof that the person who made the statement is the defendant Seel; the question is whether the statement made by the person who is in charge of the premises is binding on the defendants. Evidently it was not. It was said in *Smith v. R. R.*, 68 N. C., 107: "The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past, cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company." This principle is applicable even if "the person in charge" was, as the plaintiff contends, the general agent of the defendants; but there is an impressive absence of evidence as to the scope of the agent's authority. *Wallace v. R. R.*, 70 N. C., 178; *Pope v. R. R.*, 88 N. C., 573. For error in the admission of evidence there must be a new trial.

New trial.

HENDERSON CHEVROLET COMPANY, INCORPORATED, v. F. B. INGLE.

(Filed 27 January, 1932.)

Bills and Notes I b—Due diligence must be used in presenting check, and in this case maker showed meritorious defense on motion to set aside judgment thereon.

A check is only conditional payment, but the payee must exercise due diligence in presenting it for payment, and where his failure to exercise such diligence causes loss he must suffer it, due diligence being determined

in accordance with the facts and circumstances of each particular case, C. S., 3168, 2978, and where upon a motion to set aside a judgment for surprise and excusable neglect, C. S., 600, it appears that the movant's neglect was excusable, and that his defense was that the plaintiff's agent went to the drawee bank to cash the defendant's check, saw there was a run on the bank, and stood in line in front of the paying teller's window from 10:30 a.m. to 1:00 p.m. without getting the check cashed, that the bank did not close until 2:00 p.m., and it is found as a fact that others standing in line behind the plaintiff's agent, and who remained in line, cashed their checks: *Held*, an order denying the defendant's motion to set aside the judgment on the ground that the defendant had not showed a meritorious defense is error.

APPEAL by defendant from *Schenck, J.*, at August Special Term, 1931, of HENDERSON. Reversed.

R. L. Whitmire for plaintiff.
Galloway & Galloway for defendant.

CLARKSON, J. This was a motion of defendant to set aside a judgment rendered in favor of plaintiff and against defendant at May-June Term, 1931, of the Superior Court of Henderson County, under C. S., 600 for excusable neglect.

Defendant, F. B. Ingle, had sufficient funds in the American National Bank of Asheville, to meet a check drawn on the bank for $142 which was delivered to plaintiff, about ten o'clock a.m., on 19 November, 1930, at its office in Hendersonville, to pay the last note due by defendant to plaintiff for a Chevrolet sedan.

The court below found the following facts: "That the plaintiff sent its representative from Hendersonville to Asheville on the morning of 20 November, 1930, and said representative entered said American National Bank building about 10:30 o'clock a.m. I find that there was 'a run' being made on said bank on said morning of 20 November, 1930, from the hour of its opening (9 a.m.)—and continued throughout the day, and that said bank failed to open its doors on 20 (21) November, 1930, and has since said date failed to open, but has been taken over for liquidation purposes; that the representative of plaintiff, after entering said bank at 10:30 a.m., remained in said bank until about one o'clock p.m., on 20 November, 1930, but did not get said check cashed, and came out of said bank building before said bank was closed, on account of the large number of persons who were in said bank seeking to withdraw their deposits, anticipating the closing of said bank. . . . I find that other persons who entered said bank at a later hour than did the representative of plaintiff, Chevrolet Company, and took their place in the line of persons waiting to get to paying teller's windows, got

checks cashed which had been drawn on said American National Bank. I find that other persons to whom defendant, Ingle, had given checks on said bank on same day as that on which plaintiff received its check, presented said checks for payment at the paying teller's windows in said American National Bank and received cash for the amount of their respective checks. I conclude, as a matter of law, that the defendant had a valid, legal excuse for not being present at the trial of the cause when judgment was entered against him at the May-June Term, 1931, of Henderson County Superior Court, but I am of opinion, and so hold, as a matter of law, that the defendant, had he been present, did not have a meritorious defense to the action of the plaintiff, for that under the facts herein found the check given did not settle the obligation of the maker, F. B. Ingle, and that the plaintiff had the right to proceed in its action against him, and the motion of the defendant to have the judgment set aside is denied. The court holds this as a matter of law and not as a matter of discretion."

The only question involved on this appeal: Did the court below err in holding as a matter of law that the defendant did not have a meritorious defense? We think so.

C. S., 3168, is as follows: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

C. S., 2978: "In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

In 5 R. C. L., p. 506, "Checks," sec. 30, the following principle is laid down: "The holder of a check is bound to use due diligence in obtaining the money, and must present it and demand payment within a reasonable time. It is provided in the Negotiable Instruments Law that a check must be presented for payment within a reasonable time after it is issued. If, however, the holder has knowledge of the insolvency or precarious condition of the bank, he must present the check for payment at once at the first opportunity, or the drawer will be relieved from liability."

"It is well settled that, in the absence of an agreement to the contrary, a check or promissory note of either the debtor or a third person, received for a debt, is merely conditional payment—that is, satisfaction of the debt if and when paid; but that acceptance of such check or note implies an undertaking of due diligence in presenting it for payment. And if he from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment." *Dille v. White,* note 10 L. R. A. (N. S.), 541; *Bank v. Barrow,* 189 N. C., at p. 308.

In 21 R. C. L., p. 66 "Payment," part sec. 65, we find: "The acceptance of a check implies an undertaking of due diligence in presenting it for payment. And, if he from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment of the debt for which it was given. If a creditor receiving a check is guilty of laches in presenting it, or in giving notice of nonpayment, after presentment, and the bank in the meantime suspends payment, he thereby makes it his own, and it operates as payment of his debt; the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them."

It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man. Bigelow, Torts, 261. The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. Cooley Torts, 630. The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done. *Baltimore & P. R. Co. v. Jones,* 95 U. S., 441, 24 L. Ed., 506.

In the present case plaintiff's representative knew that there was a "run" on the bank and stood in line with defendant's check to cash it from 10:30 to 1:00 o'clock. Defendant had the money in the bank, the bank closed at 2:00 o'clock. Other persons got in line at a later hour than plaintiff's representative and got their money. We cannot hold, as the able judge did in the court below, that the conduct of plaintiff's representative, under the circumstances, did not settle the obligation. We think it did. Plaintiff's representative, if he had stood until 2:00 o'clock, would have been able to have cashed the defendant's check, as others in the line behind him got their checks cashed. He was too impatient and left. The findings of fact lead us to the conclusion that plaintiff's representative, in leaving the bank at one o'clock, instead of staying until two o'clock, was not such conduct, under the facts and circumstances of this case, as that of a prudent man. Plaintiff's representative failed to observe that degree of care, precaution and vigilance the circumstances justly demanded. For the reasons given, the judgment of the court below is

Reversed.

WACHOVIA BANK AND TRUST COMPANY v. E. D. TURNER AND HIS WIFE, BERNICE E. TURNER, AND R. C. CLICK.

(Filed 27 January, 1932.)

Judgments K b—Wife's neglect to file answer upon assurances of husband that he would do so held excusable in joint action against them.

Where a husband and wife living together are sued on a joint cause of action, and the wife, relying on the assurances of her husband that he would employ counsel and cause an answer to be filed in her behalf, neglects to file an answer within the time prescribed, and a judgment by default is entered against her, and immediately upon notice of the judgment she employs counsel and moves to set aside the judgment for surprise and excusable neglect, C. S., 600: *Held*, the neglect of the wife is excusable, and upon a proper showing of a meritorious defense, her motion is properly allowed, the provisions of the Martin Act, C. S., 2507, not affecting the relation of husband and wife or the rights and duties arising therefrom.

APPEAL by plaintiff from *Clement, J.*, at April Special Term, 1931, of FORSYTH. Affirmed.

This action was begun in the Forsyth County Court. The summons and a copy of the verified complaint filed therein were duly served on each of the defendants. The cause of action alleged in the complaint was founded on a promissory note for the sum of $750, dated 11 January, 1929, and due on 10 June, 1929. The note sued on is payable to the plaintiff; it is alleged in the complaint that the note was executed by the defendants, E. D. Turner and his wife, Bernice E. Turner, and was endorsed, before its delivery to the plaintiff, by the defendant, R. C. Click.

Neither of the defendants filed an answer to the complaint within the time prescribed by statute. On 5 May, 1930, judgment by default final was rendered by the clerk of the Forsyth County Court in favor of the plaintiff and against the defendants for the sum of $750, with interest and costs.

On 22 September, 1930, pursuant to notice in writing served on the plaintiff, the defendant, Bernice E. Turner, moved before the clerk of the Forsyth County Court that the judgment rendered by said clerk on 5 May, 1930, in this action be set aside and vacated, on the ground that she has a meritorious defense to said action, and that her neglect to file an answer to the complaint, setting up such defense, was excusable. Upon the hearing of this motion, the clerk found from all the evidence that the defendant, Bernice E. Turner, has a meritorious defense to the action, but that her neglect to file an answer to the complaint was not

excusable. The motion was denied, and defendant appealed to the judge of the Forsyth County Court. At the hearing of this appeal, the judge approved the findings of fact and conclusions of law made by the clerk, and affirmed his order denying defendant's motion. The defendant excepted and appealed to the judge of the Superior Court of Forsyth County. At the hearing of this appeal, defendant's assignments of error were sustained.

From judgment reversing the judgment of the judge of the Forsyth County Court, and remanding the action to said court, with direction that the judgment by default final against the defendant be set aside and vacated, and that defendant be allowed to file an answer to the complaint in said court, plaintiff appealed to the Supreme Court.

Fred S. Hutchins and H. Bryce Parker for plaintiff.
Peyton B. Abbott and Hastings & Booe for defendant.

CONNOR, J. In her affidavit filed with the clerk of the Forsyth County Court in support of her motion that the judgment rendered in this action in favor of the plaintiff and against her, be set aside and vacated, the defendant, Bernice E. Turner, denies that she executed the note sued on in this action as alleged in the complaint; she alleges that she did not sign the note as maker or otherwise, and that if her name appears thereon, it is a forgery, or at least that it was signed to the note without her authority. There was evidence at the hearing of the motion by the clerk in support of defendant's affidavit. The clerk found from all the evidence that defendant has a meritorious defense to the action. This finding was approved by the judge of the Forsyth County Court, on defendant's appeal from the order of the clerk of said court denying her motion. It was also approved by the judge of the Superior Court of Forsyth County on defendant's appeal from the judgment of the judge of the Forsyth County Court, affirming the order of the clerk of said court. It is therefore established that defendant has a meritorious defense to the action, and that if this defense is sustained at a trial of the action on its merits, the defendant is not liable to the plaintiff on the note sued on in this action.

It appears from the affidavit of the defendant that at the date of the service of the summons and complaint in this action on the defendant and her husband, E. D. Turner, the said defendants were living together as husband and wife in the city of Winston-Salem; that her husband assured the defendant that he had employed counsel to defend the action, and that he would look after her defense and file an answer to the complaint in her behalf; that the defendant relied upon the assur-

ance of her husband that he would cause an answer to be filed in defendant's behalf, setting up her defense to the action; and for this reason defendant did not attend the court in person or by attorney; and that she did not discover until after she was notified by the attorney for the plaintiff that judgment had been rendered in the action against her, that no answer had been filed therein on her behalf. Immediately upon receiving such notice defendant employed counsel, and caused notice to be served on plaintiff that she would move that the judgment be set aside and vacated in accordance with the provisions of C. S., 600.

The clerk of the Forsyth County Court found that the neglect of the defendant to file an answer to the complaint within the time prescribed by statute was not excusable, and for this reason, notwithstanding his finding that defendant has a meritorious defense to the action, denied her motion. The judge of the Forsyth County Court was of opinion that there was no error in the order of the clerk of said court, denying defendant's motion, and for that reason affirmed said order. The judge of the Superior Court of Forsyth County sustained defendant's assignments of error based upon her exceptions appearing in the record, reversed the judgment of the judge of the Forsyth County Court, and remanded the action to said court, with direction that the judgment by default final against the defendant be set aside and vacated, and that defendant be allowed to file an answer in said court to the complaint, setting up her defense to the action.

The question of law presented by this appeal may be stated as follows: Is the neglect of a wife, who is living with her husband, and who is sued on a joint cause of action with her husband, to file an answer to the complaint, within the time prescribed by statute, because of the assurance of her husband that he will employ counsel and cause an answer to be filed setting up a meritorious defense to the action in her behalf, excusable within the provisions of C. S., 600? We are of the opinion that under these circumstances her neglect is excusable. It was so held in *Nicholson v. Cox,* 83 N. C., 49, and in *Sikes v. Weatherly,* 110 N. C., 131, 14 S. E., 511. The decision in neither of these cases has been overruled or modified by this Court.

C. S., 2507, known as the Martin Act, does not affect or purport to affect the relation of husband and wife, or their mutual rights and duties growing out of the marital relation. As said by *Merrimon, C. J.,* in *Sikes v. Weatherly, supra,* the wife may rely upon her husband's promise to employ counsel for her, at her request, when a summons in a civil action has been served on her. Her neglect to file an answer to the complaint, because of her reliance on her husband's promise to do so, is excusable. The judgment is

Affirmed.

MORRIS PLAN INDUSTRIAL BANK AND L. K. MARTIN v. E. D. TURNER AND HIS WIFE, BERNICE E. TURNER.

(Filed 27 January, 1932.)

(For digest see *Bank v. Turner, ante*, 162.)

APPEAL by plaintiff from *Clement, J.*, at April Special Term, 1931, of FORSYTH. Affirmed.

This action was heard by the judge of the Superior Court of Forsyth County on the appeal of the defendant, Bernice E. Turner, from the judgment of the judge of the Forsyth County Court, affirming the order of the clerk of said court, denying the motion of the defendant that the judgment by default final rendered against the defendant in this action be set aside and vacated on the ground that her neglect to file an answer to the complaint within the time prescribed by statute, was excusable. C. S., 600.

The clerk of the Forsyth County Court found from all the evidence that the defendant, Bernice E. Turner, has a meritorious defense to the action. This finding was approved by the judge of the Forsyth County Court and also by the judge of the Superior Court of Forsyth County. Defendant's assignments of error based on her exceptions to the conclusions of law by the clerk, which were approved by the judge of the Forsyth County Court, that the neglect of defendant to file an answer to the complaint was not excusable, were sustained by the judge of the Superior Court of Forsyth County.

From judgment reversing the judgment of the judge of the Forsyth County Court, and remanding the action to said court with directions that the judgment by default final against the defendant be set aside and vacated, and that defendant be allowed to file an answer to the complaint in said court, plaintiff appealed to the Supreme Court.

DuBose & Weaver for plaintiff.

Peyton B. Abbott and Hastings & Booe for defendant.

CONNOR, J. The question of law presented by this appeal is identical with that presented by the appeal in *Bank v. Turner, ante*, 162. In accordance with the decision in that case, the judgment herein is

Affirmed.

FARMERS NATIONAL BANK AND TRUST COMPANY v. E. D. TURNER AND HIS WIFE, BERNICE E. TURNER.

(Filed 27 January, 1932.)

(For digest see *Bank v. Turner, ante*, 162.)

APPEAL by plaintiff from *Clement, J.*, at April Special Term, 1931, of FORSYTH. Affirmed.

This action was heard by the judge of the Superior Court of Forsyth County on the appeal of the defendant, Bernice E. Turner, from the judgment of the judge of the Forsyth County Court, affirming the order of the clerk of said court, denying the motion of the defendant that the judgment by default final rendered against the defendant in this action be set aside and vacated, on the ground that her neglect to file an answer to the complaint within the time prescribed by statute was excusable. C. S., 600.

The clerk of the Forsyth County Court found from all the evidence that the defendant, Bernice E. Turner, has a meritorious defense to the action. This finding was approved by the judge of the Forsyth County Court and also by the judge of the Superior Court of Forsyth County. Defendant's assignments of error based on her exceptions to the conclusion of law by the clerk which was approved by the judge of the Forsyth County Court, that the neglect of defendant to file an answer to the complaint was not excusable, were sustained by the judge of the Superior Court of Forsyth County.

From judgment reversing the judgment of the judge of the Forsyth County Court, and remanding the action to said court, with direction that the judgment by default final be set aside and vacated, and that defendant be allowed to file an answer to the complaint, in said court, plaintiff appealed to the Supreme Court.

DuBose & Wearer for plaintiff.

Peyton B. Abbott and Hastings & Booe for defendant.

CONNOR, J. The question of law presented by this appeal is identical with that presented by the appeal in *Bank v. Turner, ante*, 162. In accordance with the decision in that case, the judgment herein is

Affirmed.

TOWN OF HIGHLANDS ET AL. v. CITY OF HICKORY ET AL.

(Filed 27 January, 1932.)

Municipal Corporations A b—Statute revoking town charters and extending limits of city to include their territory held valid.

There are no constitutional limitations on the power of the General Assembly to provide by statute for the extension of the corporate limits of a municipal corporation or for the repeal of a statute under which a municipal corporation was organized, and a statute providing for the revocation of the charters of two towns, and the extension of the limits of a city to take in the contiguous territory formerly included within the limits of the towns is valid.

APPEAL by plaintiffs from *Moore, J.*, at Chambers, in Newton, on 18 July, 1931. From CATAWBA. Affirmed.

This is an action to enjoin the holding by the defendants of a special election on 6 July, 1931, under the provisions of an act of the General Assembly of this State, and for judgment that said act providing (1) for the extension of the corporate limits of the city of Hickory, by including therein the territory now embraced within the corporate limits of the town of Highlands and of the town of West Hickory, respectively, and (2) for the repeal of the statutes under which the said towns of Highlands and West Hickory are now organized as municipal corporations, is unconstitutional and void.

The action was begun on 3 July, 1931. On 4 July, 1931, a temporary restraining order was issued therein by Sink, J., restraining and enjoining the defendants, jointly and severally, from certifying the results of the special election to be held on 6 July, 1931, under the provisions of chapter 41, Private Laws of North Carolina, 1931, and requiring the defendants to appear before Moore, J., at Newton, on 8 July, 1931, and then and there show cause, if any they had, why the temporary restraining order should not be made permanent.

At the hearing pursuant to said order, the temporary restraining order was dissolved.

It was ordered, adjudged and decreed that the act of the General Assembly of this State under which the special election was held on 6 July, 1931, was valid in all respects.

Plaintiffs excepted and appealed from the judgment to the Supreme Court.

Louis A. Whitener and John C. Stroup for plaintiffs.

Self, Bagby, Councill, Aiken & Patrick, J. L. Murphy, Jr., R. H. Shuford and Theodore C. Cummings for defendants.

CONNOR, J. At the date on which this action was begun, to wit: 3 July, 1931, the city of Hickory, the town of Highlands, and the town of West Hickory were municipal corporations, organized and existing under the laws of this State. They were located in Catawba County, and were exercising all the powers conferred upon them by statute. The town of Highlands adjoined the city of Hickory on the east; the town of West Hickory adjoined said city on the west. The territory included within the corporate limits of said towns, respectively, was contiguous to the territory included within the corporate limits of the city of Hickory.

At its regular session held in 1931, the General Assembly of this State enacted chapter 41, Private Laws 1931. This act is entitled, "An act for the extension of the corporate limits of the city of Hickory, for an election in furtherance thereof, for the repeal of the charters of other towns within the extended limits, and for other purposes." The validity of this act is challenged by the plaintiffs in this action on the ground that the General Assembly was without power, because of constitutional limitations, to enact the same. This challenge cannot be sustained. There are no limitations in the Constitution of this State or of the United States upon the power of the General Assembly to provide by statute for the extension of the corporate limits of a municipal corporation organized and existing under the laws of this State, or for the repeal of a statute under which a municipal corporation in this State was organized.

In *Lutterloh v. Fayetteville*, 149 N. C., 65, 62 S. E., 758, it is said: "We have held in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion. *Dorsey v. Henderson*, 148 N. C., 423, 62 S. E., 547; *Perry v. Commissioners*, 148 N. C., 521, 62 S. E., 608; *Manly v. Raleigh*, 57 N. C., 372. Consequently, it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature. With its wisdom, propriety, or justice we have naught to do. It has therefore been held that an act of annexation is valid which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation, having a large

unprovided for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation."

Lutterloh v. Fayetteville is cited in *Chimney Rock Co. v. Lake Lure,* 200 N. C., 171, 156 S. E., 542, as authoritative in this jurisdiction. See, also, *Penland v. Bryson City,* 199 N. C., 140, 154 S. E., 88, and *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624.

We have examined the provisions of chapter 41, Private Laws 1931, with respect to the organization and government of the city of Hickory after its corporate limits have been extended as provided in the act. The contention of the plaintiffs that certain of these provisions are not valid cannot be sustained. There is no error in the judgment that the act is valid in all respects. The judgment is therefore

Affirmed.

J. E. HASTY ET AL. v. TOWN OF SOUTHERN PINES ET AL.

(Filed 27 January, 1932.)

(For digest see *Highlands v. Hickory, ante,* 167.)

APPEAL by plaintiffs from *Finley, J.,* at Chambers in Carthage, on 30 September, 1931. From MOORE. Affirmed.

This is an action to enjoin the defendant, the town of Southern Pines, its mayor and board of commissioners, from exercising as a municipal corporation, within the corporate limits of the town of West Southern Pines, governmental powers, and for judgment declaring that an act of the General Assembly of this State, repealing the statute under which the town of West Southern Pines was incorporated as a municipal corporation, and extending the corporate limits of the town of Southern Pines to include therein the territory included within the corporate limits of the town of West Southern Pines, unconstitutional and void.

The action was heard on a demurrer to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action on which the plaintiffs are entitled to the relief demanded.

The demurrer was sustained and the action dismissed. Plaintiffs excepted and appealed to the Supreme Court.

R. M. Andrews for plaintiffs.
Ernest N. Poate and U. L. Spence for defendants.

CONNOR, J. The town of West Southern Pines in Moore County, North Carolina, was incorporated by an act of the General Assembly

of this State, chapter 210, Private Laws 1923. It was duly organized and in existence as a municipal corporation on 3 March, 1931. At its regular session in 1931, the General Assembly enacted chapter 39, Private Laws 1931. This act is entitled, "An act to repeal and abrogate the charter of the town of West Southern Pines in Moore County, and to annex the territory within the territorial limits thereof to the town of Southern Pines." By its terms this act became in full force and effect on 3 March, 1931.

Plaintiffs, who are citizens of this State and residents of the territory included within the corporate limits of the town of West Southern Pines, challenge the validity of chapter 39, Private Laws 1931, on the ground that the General Assembly was without power, because of constitutional limitations, to enact the same. This challenge cannot be sustained. The judgment is affirmed in accordance with our decision in *Highlands v. Hickory, ante,* 167.

Affirmed.

GENERAL MOTORS ACCEPTANCE CORPORATION v. J. L. FLETCHER.

(Filed 27 January, 1932.)

Principal and Agent A a—Evidence in this case held sufficient to raise prima facie case of agency for collection.

Where there is evidence that an alleged agent has repeatedly collected money owed to the alleged principal, and that the alleged principal has received the money and applied it to the debts, it is sufficient to make out a prima facie case of agency, and where, in an action by a credit company on a note transferred to it, the defendant offers evidence of payment to the automobile dealer who had transferred the note to the plaintiff, together with such evidence of agency, and the jury finds the fact of agency in favor of the defendant: *Held,* a judgment entered thereon that the plaintiff recover nothing on the note is correct.

APPEAL by plaintiff from *Oglesby, J.,* at September Term, 1931, of FORSYTH. Affirmed.

This is an action to recover on a negotiable instrument executed by the defendant, payable to the order of the Lindsay Fishel Buick Company, and negotiated for value and before maturity by the said Buick Company to the plaintiff.

The action was begun and tried in the Forsyth County Court. The issues submitted to the jury were answered as follows:

"1. Did the defendant execute and deliver to the Lindsay Fishel Buick Company his written obligation as alleged in the complaint? Answer: Yes, by the court upon the pleadings.

2. Did the Lindsay Fishel Buick Company transfer said written obligation to the General Motors Acceptance Corporation before maturity, and for value, as alleged in the complaint? Answer: Yes, by the court upon the pleadings.

3. Was the Lindsay Fishel Buick Company the agent of the plaintiff, General Motors Acceptance Corporation, with authority express or implied, to receive for it the payments as alleged in the answer? Answer: Yes.

4. Did the defendant, J. L. Fletcher, pay to the Lindsay Fishel Buick Company, as agent for the plaintiff, the amount of said written obligation, as alleged in the answer? Answer: Yes.

5. In what amount, if any, is the defendant indebted to the plaintiff? Answer: Nothing."

From judgment that plaintiff recover nothing of the defendant, plaintiff appealed to the judge of the Superior Court of Forsyth County. Its assignments of error on this appeal were not sustained.

From judgment affirming the judgment of the Forsyth County Court, plaintiff appealed to the Supreme Court.

Shuping & Hampton for plaintiff.
Parrish & Deal for defendant.

CONNOR, J. On its appeal to this Court, plaintiff relies on its assignments of error based on its exceptions to the rulings of the judge of the Superior Court on its appeal from the judgment of the county court with respect to its exceptions at the trial pertinent to the third issue. In view of the admissions in the pleadings, this is the determinative issue in this action. The execution by the defendant of the negotiable instrument sued on in this action, its transfer by the endorsement of the Lindsay Fishel Buick Company for value and before maturity to the plaintiff, and the payment of the amount of said instrument by the defendant to the Lindsay Fishel Buick Company, after its transfer and before its maturity, are admitted. The defense interposed by the defendant is that the Lindsay Fishel Buick Company was the agent of the plaintiff, for the collection of said instrument, and that therefore the payment of the same by the defendant to the said Buick Company discharged the defendant from liability on the instrument.

There was evidence at the trial tending to show that the Lindsay Fishel Buick Company was the agent of the plaintiff, as alleged in the answer; this evidence with evidence offered by the plaintiff to the contrary was submitted to the jury under instructions which are free from error.

The judgment is affirmed under the authority of *Credit Co. v. Greenhill,* 201 N. C., 609, 161 S. E., 72; *Bank v. Howell,* 200 N. C., 637, 158 S. E., 203, and *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 the 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. This principle is applicable in the instant case. There was no error in the judgment affirming the judgment of the county court. It is

Affirmed.

DEPENDENTS OF FRED POOLE, DECEASED, v. D. T. SIGMON ET AL.

(Filed 27 January, 1932.)

1. **Master and Servant F i—Findings of fact of Industrial Commission are conclusive on the courts only when supported by evidence.**

   The findings of fact of the Industrial Commission in a hearing before it are conclusive on the courts only when there is evidence in support thereof, and on appeal to the Superior Court it has jurisdiction to review the evidence in order to ascertain whether the findings of the Industrial Commission are supported thereby.

2. **Same—Where jurisdictional findings of Commission are not supported by evidence the Superior Court on appeal should set aside its award.**

   Where the findings of fact of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five workers, N. C. Code of 1931, sec. 8081(u), are not supported by any evidence in the hearing before it, the findings are jurisdictional, and upon appeal to the Superior Court the award should be set aside and vacated.

APPEAL by the defendant, D. T. Sigmon, from *Moore, J.,* at July Term, 1931, of CATAWBA. Reversed

This is a proceeding begun before the North Carolina Industrial Commission for an award of compensation to be paid to the dependents of Fred Poole, deceased, by the defendant, D. T. Sigmon, pursuant to the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was heard in the Superior Court of Catawba County upon the appeal of the defendant, D. T. Sigmon, from the award made by the Industrial Commission. This award was made by the Commission

upon its findings of fact and conclusions of law as appear in the record. The award was approved by the judge of the Superior Court.

From judgment affirming the award, the defendant, D. T. Sigmon, appealed to the Supreme Court.

Clarence Clapp and Walter C. Feimster for appellant.
No counsel for appellee.

CONNOR, J. We find no evidence in the record certified to this Court on defendant's appeal from the judgment of the Superior Court, tending to support the finding by the North Carolina Industrial Commission, that Fred Poole, deceased, at the date of his fatal injuries, was an employee of the defendant, D. T. Sigmon. All the evidence shows that he was an employee of the defendants, Allen and Mathis. Nor do we find any evidence tending to support the finding that at said date the defendant, D. T. Sigmon, had in his employment, for any purpose not less than five employees. For this reason there was error of law in the findings of fact made by the said Industrial Commission, upon which the said Commission made its award in this proceeding, and in the judgment of the Superior Court affirming said award.

The findings of fact made by the North Carolina Industrial Commission, in a proceeding pending before the said Commission, are conclusive on an appeal from said Commission to the Superior Court, only when there was evidence before the Commission tending to show that the facts are as found by the Commission. Otherwise, the findings are not conclusive, and the Superior Court, on an appeal from the award of the Commission, has jurisdiction to review all the evidence for the purpose of determining whether as a matter of law there was any evidence tending to support the finding by the Commission. *West v. Fertilizer Co.*, 201 N. C., 556. If the fact as found by the Industrial Commission is jurisdictional, as in the instant case, and there was no evidence tending to support the finding, the award should be set aside and vacated.

As there was no evidence at the hearing of this proceeding by the Industrial Commission tending to show that the deceased was an employee of the defendant at the date of his fatal injuries, or that at such date the defendant had in his employment five or more employees (N. C. Code of 1931, sec. 8081(u), there was error in the award made by the Industrial Commission against the defendant. The award should have been set aside and vacated by the Superior Court. The judgment affirming the award is

Reversed.

HUNTER K. PENN AND E. E. EMERSON, RECEIVERS OF THE TWIN CITY BUILDING AND LOAN ASSOCIATION, v. J. FRANK KING AND HIS WIFE, KATE M. KING.

(Filed 27 January, 1932.)

1. Trial D a—Where upon admissions in the pleadings the plaintiff is entitled to recover any amount the granting of a nonsuit is error.

Where on the admissions in the pleadings the plaintiff is entitled to recover any amount it is error for the trial court to dismiss the action as in case of nonsuit, and the fact that the defendant had tendered the amount admitted to be due with interest and cost to the time of filing answer, C. S., 896, and had paid it into court subject to the plaintiff's order does not vary this result.

2. Building and Loan Associations D a—Amount paid on stock by borrowing stockholder should not be credited to debt upon insolvency of association.

Where in an action by a receiver of a building and loan association the issue is raised as to whether the defendant had made payments in monthly installments on the amount borrowed from the association or whether the payments were installments on stock purchased by him: *Held*, the issue should be submitted to the jury, and if it should find that the defendant was a shareholder he is not entitled to have the amounts paid by him on his stock credited to his indebtedness to the association.

APPEAL by plaintiff from *Warlick, J.*, at June Term, 1931, of ROCKINGHAM. Reversed.

This is an action to recover the balance due on a loan of money made by the Twin City Building and Loan Association to the defendants on 16 April, 1921.

In their complaint, the plaintiffs allege that on 16 April, 1921, the Twin City Building and Loan Association loaned to the defendants the sum of $1,500, and that there is now due on said loan the sum of $1,347.85, with interest from 21 June, 1930. They demand judgment that, as receivers of the said association, they recover of the defendants the said sum as the balance due on said loan.

In their answer, the defendants admit that on 16 April, 1921, the defendant, J. Frank King, borrowed from the Twin City Building and Loan Association the sum of $1,500. They allege that said loan was payable in monthly installments, and that the said J. Frank King has paid all the installments on said loan, except the installment amounting to $27.45 due on 1 June, 1927. They allege that they have tendered to the plaintiffs the said sum of $27.45 and have paid said sum into the office of the clerk of the Superior Court of Rockingham County, subject to the order of the plaintiffs.

In their reply, the plaintiffs admit that monthly payments were made by the defendants to the Twin City Building and Loan Association, as alleged in their answer. They allege, however, that said monthly payments were not made on the loan to the defendants, but were made on shares of stock in the Twin City Building and Loan Association, which had been subscribed for by the defendant, J. Frank King. They further allege that the Twin City Building and Loan Association is now insolvent, and that as receivers of said insolvent Association they are now engaged, under orders of the court, in liquidating its affairs.

The defendants deny, for want of information and belief, that the Association is insolvent.

At the close of the evidence for the plaintiff, defendants' motion for judgment as of nonsuit was allowed, and plaintiffs excepted.

From judgment dismissing the action as upon nonsuit, plaintiffs appealed to the Supreme Court.

J. M. Sharp and Allen H. Gwyn for plaintiffs.
Allan D. Ivie, Jr., and Shuping & Hampton for defendants.

CONNOR, J. On the admissions in the pleadings in this action plaintiffs were entitled to judgment that they recover of the defendant, J. Frank King, at least, the sum of $27.45, with interest from 21 June, 1930, and the costs of the action. The tender alleged in the answer does not relieve the defendant, J. Frank King, from liability to plaintiffs for the amount admitted to be due on the loan to him by the Twin City Building and Loan Association, with interest and costs which accrued prior to the filing of the answer. C. S., 896. There was error in the judgment dismissing the action. For this reason, the judgment must be reversed.

The determinative issues raised by the pleadings in this action should be submitted to the jury. If the jury shall find from the evidence that the defendant, J. Frank King, is a shareholder of the Twin City Building and Loan Association and that said Association is insolvent, then the monthly installments paid by him to the Association should be applied to the payment of his dues as a shareholder, and not as credits on his indebtedness to the Association. *Rendleman v. Stoessel,* 195 N. C., 640, 143 S. E., 219. Otherwise, the payments should be applied on the indebtedness, and judgment rendered for the balance due. The judgment dismissing the action as of nonsuit is

Reversed.

CHARLES A. CABE, DECEASED, JOHN C. BUCHANAN, GUARDIAN OF MRS. CHARLES A. CABE, AND MRS. CHARLES A. CABE, v. PARKER-GRAHAM-SEXTON, INCORPORATED, AND TRAVELERS' INSURANCE COMPANY.

(Filed 27 January, 1932.)

1. Master and Servant F b—Evidence held sufficient to support finding that death was caused by poisonous gases in tunnel.

In a proceeding for compensation under the provisions of the Workmen's Compensation Act the evidence tended to show that the deceased was employed to run a gas dinkey engine for the removal of muck from a tunnel, that the gasoline engine was left running in the tunnel and generated deadly carbon monoxide gas, that blasts of dynamite were frequently set off in the tunnel which generated deadly nitrous oxide gas, that the tunnel had just been bored through and that, before the time of the injury, certain appliances for ventilating the tunnel had been removed, and that the gases would collect in pockets in the muck and drift to and fro in the tunnel, with further testimony of physicians who had attended the deceased and who had qualified as experts, that the deceased had died from poisonous gas, is *Held*, sufficient to sustain the finding of the Industrial Commission that the death of the deceased was directly caused by carbon monoxide or nitrous oxide gas, and that his death was compensable as arising out of and in the course of the employment of the deceased.

2. Master and Servant F i—Findings of fact supported by competent evidence are conclusive on appeal from Industrial Commission.

The findings of fact by the Industrial Commission are conclusive on the courts when supported by any sufficient competent evidence.

3. Master and Servant F c—Defendant held not entitled to autopsy under the facts and circumstances of this case.

The provisions of the Workmen's Compensation Act that an autopsy may be had under certain circumstances at the expense of the party demanding it does not contemplate that a party should have such right absolutely after the body has been interred for a long time, and the refusal of the Industrial Commission in its discretion to allow a motion therefor, first made formally at the hearing, will not be held for error when the condition of the body would not reveal the information sought under the facts and conditions of the case. Ordinarily after the body has been buried it is a matter within the court's discretion whether disinterment will be ordered, the body then being *in custodia legis*.

APPEAL by defendants from *Moore, J.*, at January Term, 1931, of HAYWOOD. Affirmed.

This action was regularly instituted before the North Carolina Industrial Commission, and from an award of the hearing Commissioner and of the full Commission, an appeal was taken to the Superior Court of Haywood County where, upon a hearing, judgment was entered con-

firming the award of the Industrial Commission. From the judgment confirming said award, the defendants excepted, assigned error and appealed to the Supreme Court.

It was in evidence on the part of plaintiff, that the condition of Charles A. Cabe's health was good when he went in the tunnel at 7 o'clock the night of 23 July to work. He was driving a gas dinkey or motor truck run by gasoline, used to pull five to ten muck cars, in and out of the tunnel hauling muck. The gas dinkey ran some 7,000 feet into the tunnel from where the muck was being removed. High explosives of dynamite were constantly being shot. Foul and irritating fumes were in the tunnel, since the tunnel had been "holed through," and the gases pretty much in there all the time. The smoke and gases would drift back and forth and would sometimes go one way and sometimes another. The smoke from the detonations would drift back and forth and there was no artificial means of ventilating the tunnel at that time. These safety means had been taken out. No exhaust or intake fans and no air shaft through the roof on the side where they were working. There were fumes in the tunnel from the gas dinkey and the presence from this kind of gas at the time the bottom was being disturbed—there were bad odors at all times. The blow gun blew the smoke up and it was very bad. The effects on a man in the proximity was, he would have severe headaches and become sick at his stomach, and he would vomit. This condition had been there in the tunnel prior to 23 July, 1929, ever since there had been a gas motor in there. There was a difference in the smell of the gas and the dynamite explosion, and these different odors and gases were present on the evening of 23 July, 1929. The morning of the 24th, Charles A. Cabe was very sick and told his brother "he was sick enough to die." He became unconscious and blind on the 24th, and died the next evening. He was vomiting and was pale and yellow.

Linden Cabe, a witness for plaintiff and a brother of Charles A. Cabe, testified, in part: "On the morning of the 24th, he said to hurry and get him home. He said he was going to die before he got there. *He said he was sick on gas, sick enough to die.* . . . He said we were running off the road, and the witness discerned that his eyesight was failing him. He kept saying we were going to run off. He talked out of his head. There were about 30 men in the crowd working right along together cleaning up muck. Three or four of them got sick. . . . On the 23rd they had been shooting dynamite. The quantity used was 12 or 18 holes. I used one-half stick about 20 inches apart about 20 or 30 shots. They were 3 or 4 feet deep. The high places were 12, 14 or 18 inches above the ordinary bottom. In some places only five inches. We

would put a hole down to grade and used about a quarter of a stick or half a stick. They would explode as many holes as they got ready. The most I remember was 24. They set off this many about 4 or 5 times. They would come about 2 and a half hours apart. When they started to set them off, we went back a little ways in the tunnel and then went right back. It was the orders to go back. I always went back and put up the lights, and if it was all right, I would call in the men. . . . Only three men made any complaint that I knew of. They complained of gas sickness and headache. . . . I told them that morning that gas and powder smoke was too heavy and not to get too hot, they might get knocked out, and they obeyed my orders. Sometimes we kept the gas dinkey running in the tunnel all the time. . . . The muck was blown up by an air gun. It was used to loosen the muck. It has been packed there a long time and had water running over. We could hardly loosen it up with a pick or shovel. We had to blow it up with an air gun and load it into cars. . . . We didn't use powder in the tunnel only dynamite. It had the smell of dynamite in it and a smell like the gas from the exhaust of the gas motor. We let the motor run in there."

Loney Cabe, testified, in part: Was foreman working in tunnel, and brother of Charles A. Cabe. "I went to work a little earlier than he (Charles A. Cabe). They had done some shooting that night. I don't remember how many shots, probably 30 or 40. About 15 to 25 shots at one time. After the shots the smoke would drift toward Sterling Creek until the air changed. . . . Before we broke through, there was a fan over the intake operated by electricity. It carried air in and would force the smoke back. . . . About midnight I first observed that Charles was sick. I went to the motor where he was lying and asked him what was the matter. He said he felt awful bad. Before that, his health had been good. He was lying on top of the motor. . . . I saw him as we were coming off next morning at quitting time. . . . His face on the outside was pieded. It was red and yellow. It was just red and yellow pieded. . . . We took him over to the car and then on home. He said, 'let me lay down. I am sick enough to die.' *He said he was made sick from driving that motor. The gas or something like that.* As we came on home up on the mountain he became unconscious and was talking out of his head. I could discern he was beyond knowing anything. . . . From the time we got Charles home on Wednesday afternoon, he was in an awful shape until he died. *He was burning just like his lungs had been set on fire, and I couldn't start to explain it. He coughed up something from his lungs.* It was different from anything I had ever smelled."

Dr. Grover C. Wilkes testified, in part: "I am a practicing physician and graduate of the North Carolina Medical School and Medical College of Virginia. I am licensed to practice in North Carolina. Have been practicing 14 years. Had two and a half years experience in the World War in this country and in France in the capacity of captain. I did everything in general medicine, very little surgery. General practice. In the army I took a special course and studied gas in school. I have, during recent months, had occasion to review authorities on the subject. That was before the death of these people. . . . I saw Charles A. Cabe on 24 July, 1929. *I found him in a condition that I considered the result of carbon monoxide poisoning.* He became unconscious. He was prostrate. He was breathing very heavily when I saw him. His pulse was racing. His temperature was very slightly increased, and he was unconscious. . . . There has been two cases of carbon monoxide gas poisoning in the same family and they both died."

Dr. F. Angel testified for the claimants: "My name is Dr. Furman Angel. I live at Franklin and am 32 years old. I graduated at Jefferson Medical College in 1918. I spent 3 years in the U. S. Naval Service in the U. S. Naval Hospital, I returned to Philadelphia and spent 2 years and 6 months in the Pennsylvania Hospital. I practiced surgery in the Naval Hospital. I own a hospital of 70-bed capacity. I have the assistance of two doctors and 28 nurses, and perform about 1,400 major operations per year. I have been operating in this hospital since August, 1923. I had three years service in the Naval Medical Corps. My practice is confined to surgery at the hospital. I have no general practice at all. We treat all kinds of cases, but surgery is our specialty. In my practice I have occasion to treat persons suffering from carbon monoxide gas poisoning. I imagine I have treated in the neighborhood of a dozen cases since I have been practicing medicine. I was called to treat Linden Cabe in my hospital. I was called on and treated Charles A. Cabe at his home. At the time I saw Mr. Cabe, he was practically dead. I saw him about 5 hours prior to his death, the day before he died, I saw him in the afternoon and he died at 7 o'clock that evening. He had a great shortness of breath; a fast pulse; he was not synose, but had a very livid color, the color of a dying man. The symptoms present in a case of poisoning from carbon monoxide gas is the patient will have gastric distress, shortness of breath, fast pulse, and usually have a pink color, and one that persists after death. Headaches, nausea and vomiting are symptoms, seeing obstacles or illusions are symptoms. Some of the causes that produce or generate carbon monoxide gas are combustion of gas in some type of motor, that is the commonest. Dynamite blasts will

not produce much of it, that produces a nitrous gas. Dynamite will produce a deadly gas whether in confined space or not; it is worse in confined space. In such a tunnel as has been described in the evidence, *it is my knowledge and experience that this gas will accumulate and remain in the muck. Either gas has an affinity for mud or muck.* Pockets, known as air pockets, will form in a tunnel and the gas remains in those pockets indefinitely, and the gas has an affinity for that sort of place more than in the natural air. It is my opinion Charles A. Cabe died from *some kind of gas poisoning.* I did not have a special test made to determine just what kind, *but he died from gas poisoning.*"

R. S. Perry, testified for claimants, in part: "My residence is at Cove Springs, Ga. I am now engaged in the chemical business. I am in the chemical business and doing consulting work in mining and engineering problems. I am with a corporation, I am president of it. I was educated at Lehigh University in Chemical Engineering; and in the Royal School of Mines, in Saxony. I hold degrees from these colleges; I have no other degrees. I have special work in mining and metallurgy in Germany. The degree from Lehigh University is the degree of analytical chemistry in B.S. I am a life member of the American Institute of Mining and Metallic Engineering; life member of the Master Builders Association of Pennsylvania; I am a life member of the Educational Bureau of Paint and Varnish; I am a Fellow of the Institute of American Chemists; member of the Franklin Institute; member of the American Society of Testing Materials. Since I have been a grown man my profession has been that of paint, varnish, and consulting work and professional work in occupational and other poisonous gases and nuisances and mining work. As a mining engineer I have discovered and operated mines in Alabama, Georgia, Tennessee, Arkansas and Virginia. I have had experience in mines and other places where tunnels were being built, several tunnels in Georgia, Arkansas and Virginia. At present my engineering offices are at Atlanta." On cross-examination: "Q. Mr. Perry, with the headed-in condition with the draft of air blowing and this man riding in and out as stated to you; this man about midnight complained and said that he is sick and feels awfully bad, and tells his foreman that he does not believe that he can work on until morning, but does; he goes in and out of the tunnel with the dinkey a number of times between then and morning; at 7 o'clock his shift goes off; he goes to his quarters and goes to the dining room; he sits down behind the stove and says he is sick enough to die; he says that he is about to freeze to death, chilly, he declines to eat any breakfast; he vomits on two occasions; says he is sick enough to die; an hour elapses and he goes up to the top of the mountain; he is weak

in the legs; he does not keep up with the other men; he gets in an automobile at 9 o'clock in the morning, conscious; he is pale and is a whiteish looking color; he says he is deathly sick; he believes he is going to die: he wanted his brothers to carry him home; he was driving in fresh air until 10:30; he said to look out, you were running off the bank, he was driving in the air 70 or 80 miles; he had a doctor sometime between the time he arrived home that evening and the next evening when he died; he wakes up and recognizes that he is home; he says 'I am at home'; he was perfectly conscious; when the doctors talked to him he is able to recognize folks; he talked perfectly rational; he died at seven o'clock in the evening; is it your opinion that he died from the effect of one or more poisonous gases? A. Accepting contravening evidence, which I heard, I would conclude that he died from the effect of one or more poisonous gases. Q. Leaving out the other facts? A. My opinion is that he died as stated. Q. *From carbon monoxide gas?* A. *From the effect of one or more poisonous gases. Q. What other?* A. *Carbon monoxide; nitrous oxide.* . . . Q. If a man dies from the effects of carbon monoxide gas poisoning it will show in the blood taken from the body the morning before he died; the test the chemist made showed absolutely no poison from carbon monoxide in the blood; would that not indicate strongly that he died from some other cause? A. It is purely negative; there is no reason to suppose that carbon monoxide will remain in the hemoglobin or the blood. Q. Experts here made the statement that it would show; and the chemist found negative in the blood. A. If they found carbon monoxide in the blood it would be positive; if they did not discover it it would be negative. Negative means that they just did not discover it. Negative as used here means 'failure to discover.' "

Upon a hearing in the court below, a judgment was entered sustaining the award of the Industrial Commission. The defendants excepted, assigned numerous errors and appealed to the Supreme Court. The material ones will be considered in the opinion.

Doyle D. Alley and Alley & Alley for plaintiffs.
Johnson, Smathers & Rollins for defendants.

CLARKSON, J. The findings of fact and award by the North Carolina Industrial Commission is as follows: "It is admitted and found as a fact by the Commission that carbon monoxide gas can be produced by the improper combustion of gas and other explosive liquids and gas detonation; and that it is found in the excessive gas exhaust from a gas engine when idling in large quantities; that it is also found that

the explosion of dynamite produces both carbon monoxide and nitrous monoxide gases. Upon consideration of all the evidence the Commission finds as a fact: That the claimant at the time of the alleged accident was in the employ of the defendant. . . . That the accident and injury to the plaintiff arose out of and in the course of his employment and that his death was the direct result of poisoning from carbon monoxide or nitrous monoxide gas involuntarily inhaled in the Cataloochee Tunnel."

The defendants contend: First, was there sufficient competent evidence to sustain the findings of fact and the award in this case? We think so. "The findings of fact by the Industrial Commission in a hearing before them is conclusive on appeal when there is sufficient competent evidence to sustain the award." *Williams v. Thompson,* 200 N. C., at p. 465.

The defendants contend: Second, was there any evidence of an accidental injury resulting in the death of the deceased? We think so. Charles A. Cabe was working for defendant in the Cataloochee Tunnel, on the night of 23 and 24 July, 1929, and it was contended that he died on 25 July, 1929, from the effects of carbon monoxide or nitrous oxide gas poisoning.

The Cataloochee Tunnel extended from the mouth of Cataloochee Creek to Waterville, a distance of seven miles, and was 12 feet 8 inches high, and 11 feet wide. At the time of the accident, there were four crews, of about thirty men each, working in the tunnel, approximately 2,000 feet apart, and the crews worked day and night. There were two gasoline engines or motor trucks working in the tunnel, one coming in and going out from each end, at intervals of about eighteen minutes. The trucks were ordinary motor trucks, running on an iron track, and pulled from five to ten cars and were used to haul concrete into and muck out of the tunnel. At intervals of about two and a half hours during the day, and all through the night of 23 July, 1929, thirty or forty shots and between twelve and eighteen holes of dynamite were exploded in the tunnel. At the time of the injury to the deceased, the tunnel had been "holed through," which is to say that the two crews that began to bore the tunnel from each side of the mountain had met in the middle, and all artificial ventilation had been removed. On the morning of 24 July, 1929, shortly after midnight, the deceased, while engaged in operating one of the gas dinkeys or motor trucks, and after having worked in the tunnel since seven o'clock of the evening of 23 July, complained of being sick, and was discovered by his brother lying upon top of the truck inside of the tunnel, while the cars were being loaded with muck. Before quitting time, at about seven o'clock, on the morning of 24 July, he again complained of being sick, and said he

would have to be taken home. Upon arrival at his home, a doctor was called, and on the following day, 25 July, 1929, he died.

The plaintiffs contended, and offered evidence tending to prove, that the death of Charles A. Cabe was caused by poisoning from carbon monoxide or nitrous oxide gas. The defendants, on the other hand, contended that the death of deceased was not caused by carbon monoxide or other gas poisoning, but that his death was due to some disease. Upon these conflicting contentions, the Industrial Commission found as a fact that the death of the deceased "was the direct result of poisoning from carbon monoxide or nitrous oxide gas involuntarily inhaled in the Cataloochee Tunnel." Opinion reported in Volume II of the Opinions of the North Carolina Industrial Commission, at page 8.

The findings of fact were sustained by the court below, and we think there was ample evidence.

All of the evidence which we have recited above was unobjected to, and it discloses (1) That Charles A. Cabe was a healthy man when he went into the tunnel to work at 7 o'clock the evening of 23 July. At 12 o'clock he was sick and continued so until quitting time next morning at 7 o'clock, then he was very sick and wanted his brothers to hurry and get him home. He said *"He was sick on gas, sick enough to die." "He said he was sick from driving that motor"* (the gas dinkey). He had illusions, was unconscious, blind and talking out of his head, vomiting, his coloring and many other known symptoms were those of gas poisoning. His brother said *"He was burning just like his lungs had been set on fire." "He coughed up something from his lungs."* Dr. Grover C. Wilkes, a physician of more than ordinary experience, testified "I found him in a condition that I considered the result of *carbon monoxide poisoning."* Dr. F. Angel, a physician of great experience, testified: *"It is my opinion Charles A. Cabe died from some kind of gas poisoning . . . but he died from gas poisoning."* R. S. Perry, a mining engineer, of much experience, testified: "Q. *From carbon monoxide gas?* A. *From the effects of one or more poisonous gases.* Q. What other? A. *Carbon monoxide, nitrous oxide."* (2) That before the tunnels had been "holed through," there were artificial measures of ventilating the tunnel, but on the night of the 23d and 24th, and some time prior, they had been taken out. The smoke and gases would drift back and forth. About every two and a half hours large quantities of dynamite were put in the holes and shot. The muck was blown up by an air gun and loaded on muck cars, a gas dinkey or motor truck run by gasoline, hauled the muck cars, and was driven by Charles A. Cabe. There was stench and a deadly gas from muck that was being blown up. There were fumes from the gas dinkey, which sometimes was kept

running in the tunnel all the time. Foul and irritating fumes in the tunnel since it had been "holed through." About midnight Charles A. Cabe was lying on the top of the motor feeling "awful bad," but he worked on until quitting time, 7 o'clock, then was heard his pitiful wail "sick on gas, sick enough to die." Three of the men "complained of gas sickness and headaches." We think there was ample evidence to sustain the ruling of the court below upholding the finding of the Industrial Commission. The defendants introduced evidence, but under our practice in this jurisdiction, it is the well settled rule and accepted position that, on 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.

Public Laws 1929, chap. 120, known as the "Workmen's Compensation Act," sec. 2(f), 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."

We think the evidence clearly indicates that Charles A. Cabe sustained an injury by accident arising out of and in the course of his employment. The evidence negatives that it was an occupational disease. *Matthiessen & Hegeler Zinc Co. v. Industrial Board,* 284 Ill., 378, 120 N. E., 249; *City of Joilet v. Industrial Commission,* 291 Ill., 555, 126 N. E., 618.

The case of *Industrial Commission v. Tolson,* 37 Ohio App., 282, 174 N. E., 622, is similar to the case at bar. There a miner who had always been healthy, strong and vigorous, after firing a shot or shots, in the common parlance of mining affairs is known as the process by which coal is loosened, became ill, left the mine and went to a doctor and from there went to his home and died a few days later. The doctor testified that he was suffering from monoxide poisoning; that he had every appearance of it, a flushed face, and other conditions that follow such poisoning. The principal question with which the court was concerned in this case was whether monoxide poisoning was an accidental injury within the provisions of the Workmen's Compensation Act. It was held that such an injury was accidental and that poisoning from carbon monoxide gas was not an occupational disease.

The defendants contend: (3) "Is the right to have an autopsy, granted under section 27 of the North Carolina Workmen's Compensation Act, a matter within the discretion of the North Carolina Industrial Com-

mission and/or can claimants recover where they have denied the right of autopsy?" We think under the facts and circumstances of this case the carrier had no right to have an autopsy.

Laws 1929, *supra*, sec. 27, the latter part is as follows: "The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same."

The defendant, Travelers' Insurance Company, requested of the North Carolina Industrial Commission an autopsy of Charles A. Cabe, deceased. The plaintiffs' attorneys wrote the Insurance Company refusing to give consent, and said: "Upon due investigation of the law, we are of the opinion that there is a wide difference between an autopsy, pure and simple, and a post-mortem examination to be made after interment. We are, therefore, advising our client to resist your request for disinterment. The body of the deceased was interred on 24 July, 1929, more than one month ago, and in view of the fact that the body was not embalmed, together with sentimental reasons, the widow and other members of deceased's family, are seriously emphatic in their refusal of a disinterment."

The defendants contend that "The court erred in denying the defendants' motion for an autopsy, upon the following findings of fact by the court below: 'That, on 24 August, the defendant carrier requested in writing of John C. Buchanan, administrator of the estate of Charles A. Cabe, deceased, and guardian of his widow, the right to have an autopsy performed; that, on 27 August, Messrs. Alley & Alley, attorneys for the widow and attorneys for the guardian of the widow and the administrator of the estate, wrote the defendant carrier denying the request, and copy of which letter is hereto attached and made a part of the record hereof; copy of which letter was forwarded to the Industrial Commission; that there was no formal request made upon the Industrial Commission for an autopsy until the case was called for hearing in Waynesville on 8 November, 1929; that the deceased, Charles A. Cabe, was buried on the evening of 27 July, 1929, in a wooden coffin, and without having been embalmed; that an autopsy at this time would not reveal the cause of the death of Charles A. Cabe, and further that an autopsy on 17 August, the date of the request upon the widow of the deceased, would not have revealed the cause of the death of Charles A. Cabe.' Upon the foregoing findings of fact, the Commissioner, in his discretion, denies the motion of the defendants for an autopsy, and the defendants duly excepted and assigned error. We do not think the exception and assignment of error can be sustained.

In 17 C. J., at p. 1139-40, under the subject of "Dead Bodies," we find the following statement: "Except in cases of necessity or for

laudable purposes the policy of the law is that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed. . . . There is a distinction between the rights existing prior to burial and those after burial; because after its interment the body is in the custody of the law, and a disturbance of its resting place and its removal is subject to the control and direction of a court of equity in any case properly before it. The right to have a dead body remain unmolested is not an absolute one; it must yield where it conflicts with the public good or where the demands of justice require such subordination. *A court will not, however, order a body to be disinterred unless there is a strong showing that it is necessary and the interests of justice require it.*" (Italics ours.)

In the case of *Thompson v. Deeds*, 93 Iowa, 228, 230, 35 L. R. A., 56, it is said: "A proper appreciation of the duty we owe to the dead, and a due regard for the feelings of their friends who survive, and the promotion of the public health and welfare, all require that the bodies of the dead should not be exhumed, except under circumstances of extreme exigency."

"Civilized countries have always recognized and protected as sacred the right to Christian burial and to an undisturbed repose of the human body when buried. The unauthorized disinterring of the body of a deceased human being is an indictable offense both at common law and by statute, regardless of the motive or purpose for which the act is done." 8 R. C. L., part sec. 16, at p. 694. C. S., 4320, 4321, 4322; *S. v. Wilson*, 94 N. C., at p. 1020; *Humphrey v. Church*, 109 N. C., 132; *S. v. McLean*, 121 N. C., 589, 42 L. R. A., 721.

The conduct of the Insurance Company, the carrier, in this action, does not appeal to a sense of justice. The carrier requested the North Carolina Industrial Commission to exhume the body of Charles A. Cabe sometime after he was buried. We find nothing in the statute giving the right. All the evidence in this action, taking a common sense view of the record, shows that the employer did not in the exercise of due care, provide for its employee Charles A. Cabe a safe place to work. He and his brother were both killed by the deadly gas in the tunnel and others were made sick. The expert witnesses of plaintiffs and defendants may differ, but the admitted facts cannot be ignored. From the testimony of plaintiff's expert witnesses, the blood test is not always controlling. We think the Industrial Commission on the facts had the right to deny the Insurance Company, the carrier, an autopsy. Ordinarily this is a matter of discretion when applied for by those having the right.

One of the primary objects and purposes of compensation laws is to grant certain and speedy relief to injured employees, or, in case of death, to their dependents. The deceased was killed about two and a half years

ago, and this proceedings was instituted shortly after his death in an effort to collect the compensation that his widow is entitled to. This delay is unjustifiable. It is not righteous for the carrier to delay payment so as to force an indigent or poor person to take less than the law allows under the act. From a careful review of the record, the judgment below is

Affirmed.

STATE v. J. M. BREWER.

(Filed 27 January, 1932.)

1. **Criminal Law L c—Finding that witness is an expert is conclusive on appeal when finding is supported by competent evidence.**

The adjudication by the Superior Court that a witness is an expert will not be disturbed in the Supreme Court on appeal when there is competent evidence to support his finding.

2. **Criminal Law G i—Where expert has made proper examination of bank's assets he may testify that bank was insolvent at certain date.**

Upon the trial of a bank official under the provisions of section 224(g), N. C. Code (Michie), for permitting deposits to be taken by employees when he knew the bank to be insolvent, testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral, that the bank was insolvent at the time in question is not objectionable and an exception thereto by the defendant will not be sustained on appeal.

3. **Banks and Banking I b—In prosecution for permitting deposits when bank was insolvent testimony of reports to Commission is properly excluded.**

On the trial of a bank official for permitting deposits to be taken by employees when he knew the bank to be insolvent, section 224(g), N. C. Code (Michie), a question asked a certified public accountant who had testified to the bank's insolvency as to whether he had considered reports made to the Corporation Commission covering a certain period is properly excluded as *res inter alios acta*.

4. **Appeal and Error J e—It must appear what excluded testimony would have been in order for exception to be considered on appeal.**

Where an exception is entered to the exclusion of certain testimony it must appear of record on appeal what the testimony, if permitted, would have been, or the exception will not be considered.

5. **Criminal Law I g—Misstatement of contentions of a party should be brought to trial court's attention in apt time.**

Exception to the statement of a party's contentions in his charge to the jury must be taken in apt time or it will not be considered, and in this trial of a bank officer for permitting deposits in his bank with

knowledge of its insolvency, the statement of the contention that the bank was operating on less than the required legal reserve, was a pertinent circumstance to go to the jury bearing upon the knowledge of the defendant of the bank's insolvency.

6. Same—Bank is insolvent within the meaning of the statute when the market value of its assets is less than its liabilities.

A bank is insolvent within the meaning of the statute making an officer criminally liable for permitting deposits to be received with knowledge of its insolvency, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors or other creditors, and *Held*, the charge of the court upon the evidence in the case was correct.

7. Same—Bank officer's admission that he knew of insolvency held competent in prosecution for permitting deposits knowing insolvency.

Upon the trial in this case of an officer of an insolvent bank for permitting deposits to be received after knowledge of its insolvency: *Held*, testimony of the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is held competent on appeal.

8. Same—Instruction in this prosecution for permitting deposits knowing of bank's insolvency held correct.

Where an officer of a bank is on trial under an indictment charging that he permitted deposits to be made in the bank when he knew it was insolvent, an instruction supported by the evidence is not erroneous that the jury must not convict upon an assumption of the defendant's guilt but that they must find beyond a reasonable doubt from the evidence that the defendant was guilty of the offense charged against him, or that he had actual knowledge of the insolvency as defined by the court, and that the opinion of bank auditors and examiners is not conclusive.

9. Criminal Law L c—On appeal in criminal action the Supreme Court can review only matters of law or legal inference.

The Supreme Court on appeal in a criminal action against an officer of an insolvent bank for permitting deposits to have been received with knowledge of the bank's insolvency can review only matters of law or legal inference. Art. IV, sec. 8.

APPEAL by defendant from *Barnhill, J.*, at June Term, 1931, of WAKE. No error.

This was a criminal action against John M. Brewer, T. E. Bobbitt, S. W. Brewer, T. M. Arrington and R. M. Squires, tried before his Honor, M. V. Barnhill, and a jury, at the June Special Term, 1931, of Wake Superior Court, upon a bill of indictment found at the June Term, 1931, of said court, charging said defendants, including said John M. Brewer, he being an officer, to wit, president of the Citizens Bank of Wake Forest, N. C., with receiving, or permitting to be received, deposits in said bank at said time knowing the said bank to be insolvent in violation of section 224(g), N. C. Code, 1927 (Michie). At the con-

clusion of the State's evidence motion for judgment as of nonsuit as to the defendants, T. M. Arrington and R. M. Squires, was allowed by the court below. There was a verdict of not guilty by the jury as to defendant, S. W. Brewer. Upon the foregoing charge the defendant, John M. Brewer, was placed upon his trial and pleaded not guilty. The jury returned a verdict of guilty.

The court below rendered judgment on the verdict: "And now, the defendant, J. M. Brewer, being at the bar of the court in his own person, and the judgment of the court being prayed by J. C. Little, Esq., solicitor for the State; it is ordered, considered and adjudged that the defendant, the said J. M. Brewer, now here, be imprisoned in the State prison at Raleigh, N. C., for an indeterminate sentence of not less than one year nor more than three years, as provided by section 7738 of the Consolidated Statutes of North Carolina." The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

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

Chas. U. Harris, Willis G. Briggs, W. H. Sawyer and Wm. B. Jones for defendant.

CLARKSON, J. The defendant was indicted under section 224(g) N. C. Code, 1931 (Michie), which is as follows: "Any person, being an officer or employee of a bank, who receives or being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein when he has knowledge that such bank is insolvent, shall be guilty of a felony, and upon conviction thereof shall be fined not more than five thousand dollars or imprisoned in the State prison not more than five years, or both. *Provided,* that in any indictment hereunder insolvency shall not be deemed to include insolvency as defined under subsection (d) in the definition of insolvency under section two hundred and sixteen (a). (1921 chap. 4, sec. 85; 1927 chap. 47, sec. 17.)"

C. S., 216(a), in part: "The term 'insolvency' means: (a) when a bank cannot meet its deposit liabilities as they become due in the regular course of business; (b) when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; (c) when its reserve shall fall under the amount required by this act, and it shall fail to make good such reserve within thirty days after being required to do so by the commissioner of banks; (d) whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created."

R. S. Gochenour, a witness for the State, who, after proper inquiry, was adjudged an expert by the court, testified, in part: After relating his experience as a public accountant; that he was a member of the firm, or employed by the firm of A. M. Pullen and Company, certified public accountants, and that he was employed by the Banking Department of the State Corporation Commission to examine the books of the bank with the idea of determining its assets and liabilities, and that he did investigate the value of the papers and other property of the bank, whereupon the following questions were asked him: "Q. Did you investigate the value of the papers and other property of the bank? A. Yes, sir. Q. Please state to his Honor and the jury to what extent and how you investigated the value of the assets, the notes and other property of the bank. A. Well, I got the directors together, all of the board of directors—Q. Right there; that includes the defendants here? A. Yes, sir. Q. All of them? A. All of them were there. I got the opinion of them individually and collectively on the value of the various assets, and after that I had the cashier of the other bank in Wake Forest go over the assets and give me his opinion on them and also one other outside disinterested party, taking each asset individually. Q. Please state whether or not you consulted each one of these defendants, to wit, T. E. Bobbitt, J. M. Brewer, S. W. Brewer, T. M. Arrington, and R. M. Squires. A. I am absolutely certain about all of them, except Dr. Squires. I think he was there too, but I am not absolutely certain about him. Q. Mr. Gochenour, from your examination of the bank's books, its assets and liabilities, including all property of the bank and all liabilities of the bank, please state whether or not you formed an opinion at that time as to whether the bank was solvent or insolvent. A. Is it proper for me to ask for a definition of the word 'insolvency,' so there will be no misunderstanding as to what is meant? Q. Keeping in mind the same question that I asked you, and keeping in mind that the law of North Carolina is that a bank is considered insolvent when the actual cash market value of its assets is insufficient to pay the liabilities to the depositors and other creditors, assuming that to be the correct legal definition of the term 'insolvent,' please answer the question I asked you. (To all the foregoing questions and answers, defendants in apt time objected; objection overruled; defendants excepted.) Q. Go ahead and state whether you had formed an opinion at that time? A. Yes, sir. Q. From your examination of the assets and liabilities, from your examination of this bank's books, and from information you obtained from these very defendants on trial here, please state whether or not, in your opinion, on 26 March, 1929, and also on 25 March, 1929, the Citizens Bank of Wake Forest was solvent

or insolvent. (Objection by all defendants; objection overruled; defendants excepted and assigned error.) A. Yes, sir, it was insolvent. I am basing that opinion upon my examination of what constituted the assets, plus the information gained from these various defendants." The witness, Gochenour, further testified "that the estimate at that meeting was made on each asset separately and all were asked to state fully their opinion in regard to it, and they either concurred openly or did not make any objection to the values as discussed openly at the meeting."

The witness went into detail as to the value of the assets and liabilities of the bank and testified that the bank was insolvent $102,273.19, the total liability of the bank was $185,198.98 and face value of assets was $185,404.65, leaving a net face value of $205.67. The total amount of deposits was $134,988.21. "A certificate of deposit issued to W. R. Powell, Commissioner of the Sinking Fund of the town of Wake Forest was $8,627.24 and accrued interest on that certificate of $138.03. There was a deposit of J. Milton Mangum, treasurer of Wake County for $36,000 and accrued interest on that deposit of $463.89." The witness further testified that the defendant, J. M. Brewer, at the time the bank failed was according to the bank's books indebted to the bank, by both direct and indirect liability in the sum of $18,417.63, to which testimony the defendant objected and excepted and assigned error. The witness further testified that according to the bank's books the defendant had on deposit to his personal account the sum of 23 cents. The witness was permitted to testify that the firm of W. C. Brewer and Company (J. M. Brewer being a partner), had an overdraft in the bank amounting to $3,167.63. That cash in the bank when it closed, according to witness' audit, was $781.90. The witness further testified that as a part of the assets carried on the books of the bank was equity in real estate at $64,076.60. "That all these items of real estate were received by the bank as result of foreclosure proceedings prior to 1 December, 1924; that these items of real estate had been carried on the books of the bank at the amount paid for them at foreclosure proceedings, to wit, $64,076.60, from 1 December, 1924, until the day the bank closed; that there were first mortgages of $44,388.64 ahead of the amount at which the bank bought the land in at foreclosure." The witness further testified that the condition disclosed by the investigation of the books showed that the trouble of the bank was depreciation of land values and insolvency of makers of notes and that the witness did not find a false entry in the bank and did not find a concealment or anything of that kind and that the books were clear and that anyone could have examined the books covering five or ten years and arrived at its condition, and there was no suggestion of any substitution of books and apparently those were the same books that they had had all the time.

C. I. Taylor testified, in part, that most of the assets of the bank had been deposited with certain creditors for their protection; that one bank in Raleigh had $52,000 as security and that J. M. Mangum, county treasurer, had $31,816 as security; that certain assets had been pledged for the payment of certain particular claims against the bank; and that the real estate which the bank had owned had been pledged by first mortgage to secure loan upon it.

We do not think that the foregoing exceptions and assignments of error made by defendant, as above set forth, to the testimony of the State's witness Gochenour, can be sustained. The competency of this kind of evidence is now well settled in this jurisdiction.

In *S. v. Hightower,* 187 N. C., at p. 304, speaking to the subject: "The business of examining banks undoubtedly falls within the classification of trades and pursuits, requiring special skill or knowledge, and hence one versed in its intricacies, we apprehend, should be permitted to speak as an expert." At p. 307: "Applying these principles to the instant case, we think the better practice would have been for Latham and Coursey to have stated the facts or to have detailed the data before drawing their conclusions or giving their opinions in evidence, but we shall not hold it for legal or reversible error that such was not required as a condition precedent to the admission of their opinions in evidence before the jury. *S. v. Felter,* 25 Iowa, 75 *S. v. Foote,* 58 S. C., 218. Speaking to a similar question, in *Commission v. Johnson,* 188 Mass., p. 385, *Bradley, J.,* said: 'By this form of examination no injustice is done, for whatever reasons, even to the smallest details, that an expert may have for his opinion can be brought out fully by cross-examination.'"

Gochenour testified: "I got the directors together, all the board," including defendant J. M. Brewer, except Dr. Squires. "I got the opinion of them individually and collectively on the value of the various assets. . . . Yes, sir, it was insolvent. I am basing that opinion upon my examination of what constituted the assets, plus the information gained from these various defendants."

The defendant contended that the State's witness, Gochenour's, testimony that the bank was insolvent, and his opinion of the aggregate value of its assets, was clearly incompetent and inadmissible. We cannot so hold. The record discloses in regard to the witness for the State, Gochenour, *"who after proper inquiry, was adjudged an expert by the court."* "Whether or not a witness is an expert is a question for the court below to decide, and if there is any evidence that a witness is an expert, the decision of the court below will not be reviewed on appeal." *Shaw v. Handle Co.,* 188 N. C., at p. 232. "Whether a witness is competent to testify as an expert is a question primarily addressed

to the sound discretion of the court, and his discretion is ordinarily conclusive. *S. v. Wilcox,* 132 N. C., 1120; *Hammond v. Schiff,* 100 N. C., 161." *Liles v. Pickett Mills,* 197 N. C., at p. 773.

The record discloses that Gochenour, "after relating his experience as a public accountant." N. C. Code, *supra,* sec. 7024(a), defines "Practice of Public Accounting" as follows: "A person engaged in the practice of public accounting, within the meaning and intent of this chapter, who offers his or her services to the public as one who is qualified to render professional service in the analysis, verification and audit of financial records and the interpretation of such service through statements and reports." Section 7024(f) makes it unlawful for any person, firm, etc., to engage in the practice of public accounting without receiving certificate of qualification from the State Board of Accounting.

In *Loan Assn. v. Davis,* 192 N. C., at p. 112, speaking to the subject: "Defendant's objections were properly overruled. Both witnesses were expert accountants—one a certified accountant, and the other a bank officer of long experience. It was competent for them to testify as to the effect upon the accounting of these entries. *S. v. Hightower,* 187 N. C., 300." *Bank v. Crowder,* 194 N. C., 331; *S. v. Maslin,* 195 N. C., at p. 540; *S. v. Rhodes, ante,* 101.

The witness Gochenour was asked by defendant: "Q. Did you investigate in making the audit for comparative purposes or any other purpose, reports made by bank examiners to the Corporation Commission as to the condition of this bank at various times, beginning in 1924, and until the bank closed?" (To this question the State objected; objection was sustained; defendant excepted and assigned error.) We think the objection and assignment of error cannot be sustained. Neither the Corporation Commission nor any other agency could give defendant permission to violate the statute. The matter was *res inter alios acta alteri non debet.* Again, the record does not disclose what the answer of the witness would have been, so this Court could determine its relevancy, competency or materiality. *Newbern v. Hinton,* 190 N. C., 111.

The defendant contends that the court erred in charging as to operating the bank without legal reserve. The following is what is complained of: "The State contends that the officers of any bank being operated with its reserve, as provided by statute, short by more than $14,000 when the total amount required is less than $18,000, must know that it was in bad condition; and that that circumstance is such as to put them on notice that the bank was insolvent at that time." This was in the contentions, and if defendant thought it error he should have objected at the time, otherwise the matter is waived. *S. v. Sinodis,* 189 N. C., at p. 571. This might not be direct evidence of insolvency,

but we think it is a pertinent circumstance to go to the jury as bearing upon the knowledge which the defendant had of such insolvency. The exception and assignment of error cannot be sustained.

The defendant contends that the court erred in its definition of the term insolvency: "A bank is considered insolvent, gentlemen, *when the actual cash market value of its assets is not sufficient to pay its liabilities to depositors and other creditors.* That is to say, if you find from the evidence that the total liabilities were $185,198.98, and you find that the total assets, the cash market value, amounted to less than that, then the bank was not solvent. If you take into consideration the land, money on hand, and notes, and find that the market value was less than $185,198.98, then the bank was insolvent. If the land was worth as much as it was carried on the books for, and if the notes were worth as much as they were carried on the books, and the other assets were worth as much as appeared from the books, then, according to the testimony, the assets totaled more than the liabilities; but if the land or the notes, or both together, had an actual market value so as to bring it below $185,198.98, then the bank was insolvent." The part of the charge of the court below set forth in italics is almost the identical language of the statute. The balance is a detailed explanation from the facts in the case. We think the exception and assignment of error untenable.

C. M. Medlin, a witness for the State, testified, in part: "That he was a resident of New Light, Wake County, and a depositor in the bank and that after the closing of the bank he had a conversation with the defendant Brewer about the solvency or insolvency of the bank. Q. Did you have a conversation with him about the solvency or insolvency of the Citizens Bank of Wake Forest? A. Yes, sir, about the bank. Q. When did the conversation take place? A. The 28th day of March. Q. The bank closed when? A. The 26th of March, 1929. Q. Where did that conversation take place? A. Down at Mr. Brewer's office. Q. Was it relative to the solvency or insolvency of the bank? A. Relative to the condition of the bank. . . . Q. Tell what your conversation with Mr. Brewer was? A. I went to see Mr. Brewer on the 28th. Mr. Brewer was sitting in his office. I stepped in and said 'Mr. Brewer, what were you doing to let our bank close?' He said he could not help it, he had carried it as long as he could. I said, 'If you were going to close, why didn't you close before the farmers sold their crops and put the money in?' His reply was that the farmers had no money. I said 'Mr. Brewer, it looks strange to me that you would run this bank on until the farmers had no money and then close.' He said 'We could have carried it a little longer, but it would have caught the hotels if we

had carried it on to the end of the month.' The court: catch the hotels? Witness: Yes, sir, catch the hotels. Q. Go ahead. A. I said 'How long has this bank been in this bad condition?' He said, 'Oh, this bank has been busted for two years or more. I bought too much land. I bought four hundred bales of cotton and stored it.' " The witness further testified, on cross-examination, that Mr. Brewer told him that he had never bought 400 bales of cotton with the bank's money.

At the request of defendant, the court below gave the following charge: "The statute requires that the defendant had actual, not inferential, knowledge of the insolvency of the bank at the time the deposits were received. The court charges you that you cannot convict this defendant upon any assumption that he should have known that the bank was insolvent. It is the duty of the jury *to find from the evidence, beyond a reasonable doubt, that the defendant had actual knowledge of the insolvency of the bank as insolvency is defined to you by the court.* The question of insolvency is one that must be determined by the jury, and the court charges you that the opinion of bank auditors, and examiners is not conclusive on this point, but the jury shall give this testimony such weight and credence in the light of all the evidence as it thinks proper. *The evidence must be sufficient to prove beyond a reasonable doubt that the bank was insolvent and that this fact was actually known to the defendant.*" (Italics ours.)

The court below charged the jury that the defendant had requested the instruction "it is just as much the law as if the court had given them to you on its own initiative."

The court below gave the contentions of the State and defendant fairly and accurately. The court charged: "As to the defendant, J. M. Brewer, if you find beyond a reasonable doubt that the bank was insolvent; that he, as an officer of the bank, had knowledge of its insolvent condition; that, after such knowledge, he permitted Bobbitt or any other officer or employee to receive deposits, knowing of its insolvency, your duty is to return a verdict of guilty. If the evidence does not so satisfy you, beyond a reasonable doubt, you will return a verdict of not guilty. . . . Now, the State has offered certain evidence for you to consider, and from that testimony you will determine the guilt or innocence of the defendant in this case. In that connection, the court wishes to caution you that, while only the State offered evidence, you have no right to consider that fact adversely to the defendant, and it is in no wise to be considered by the jury adversely to the defendant. His failure to offer evidence is not an admission of guilt nor is it a circumstance tending to show that he is guilty, nor is it a circumstance to be considered by the jury adversely to the defendant. On the other hand,

when you come to consider the testimony of the State you do have the right to take into consideration that the evidence offered by the State was uncontradicted. . . . The court would say further, gentlemen, that you have no right to convict this defendant on account of sympathy for the depositors who lost money in the bank; neither have you a right to acquit him because of sympathy for him or those dependent upon him. It is your duty to find a verdict according to the facts in this case and the interpretation of law as laid down to you by the court."

The court below defined "permit," "market value," mentioned in the statute, to which no exception was taken by defendant. We think the court charged the jury on every phase of the evidence and the law applicable thereto.

It may be noted that the testimony of Medlin, a witness for the State, was uncontradicted. In the conversation he had with the defendant, is the following: *"I said, 'How long has this bank been in this bad condition?' He said 'Oh, this bank has been busted for two years or more. I bought too much land. I bought four hundred bales of cotton and stored it.'"* Defendant did not deny having made this statement.

This Court, under Article IV, section 8 of the Constitution of North Carolina, has the "Jurisdiction to review upon appeal, any decision of the courts below upon any matter of law or legal inference." The question was one of fact for the jury to determine. We find in law no error in the trial by the able judge in the court below.

No error.

J. B. JACKSON v. DAIRYMEN'S CREAMERY AND INDEPENDENCE INDEMNITY COMPANY.

(Filed 27 January, 1932.)

1. Master and Servant F b—Evidence held to sustain finding that claimant received injury in accident in course of his employment.

Evidence introduced before the Industrial Commission that the applicant for compensation under the provisions of the Workmen's Compensation Act was employed to deliver milk and to solicit customers during a price war, or competition, and whose duty it was to return the delivery truck at times after regular hours owing to the effort to retain the employer's customers, and that the employee on the occasion in question was working after the usual time of returning the truck and incidentally ate his supper, played pool for a short time, and while engaged in his duty of returning the truck to the employer's premises met with the accident in question, is *Held*, sufficient to sustain the finding of the full Commission that the accident occurred during the course of the applicant's employment and arose out of it, and the judgment of the Superior Court sustaining the award will be sustained on appeal.

2. Same—Mere possession of whiskey by employee at time of accident will not bar recovery of compensation.

The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession whiskey contrary to our statutes, 3 C. S., 3411(b) does not alone prevent the recovery of compensation, it appearing that the whiskey had remained untouched and that such possession had no connection with the accident or in any manner was a contributing cause.

APPEAL by defendants from *MacRae, Special Judge,* at Regular August-September Mixed Term, 1931, of BUNCOMBE. Affirmed.

The opinion for the full North Carolina Industrial Commission in the above entitled action, by Matt H. Allen, chairman, filed 11 July, 1931, is as follows:

"This was an appeal to the full Commission from an award of Commissioner Dorsett denying compensation. The claimant was employed by the Dairymen's Creamery which was located just outside of the city of Asheville on Route No. 4. His duties consisted of delivering milk to cafes, stores and hospitals in the city of Asheville, and ordinarily his day's work ended about seven o'clock p.m., but he was required to deliver milk outside of regular hours if called upon to do so, and at the time of this accident there was evidence that there was a price war on in Asheville among those engaged in selling dairy products and that it was the duty of this claimant to solicit business and to engage and encourage the patronage of all regular customers. The claimant lived on the premises of the employer and it appears from the evidence that it was his duty after the day's work to return the truck to the premises of the employer.

On 13 September, 1930, the claimant, after making the regular rounds and making certain special deliveries, parked the truck down town and attended to business of his own and engaged in certain amusements such as playing pool and that sometime between 11 o'clock and midnight, while driving the truck from the city of Asheville to the premises of the employer for the purpose of returning the truck to its proper place the plaintiff met with an accident resulting in a compound fracture of the right leg with extensive bone injuries and injury to the muscles of the leg, with paralysis of one group of muscles in the front of his leg, and with a simple fracture of the left leg.

Upon this evidence Commissioner Dorsett found as a fact that there was a diversion on the part of the plaintiff from the scope of his regular employment and that although the accident occurred while he was in the act of returning the truck to his employer's premises as he was required to do, nevertheless the accident did not arise out of and in the course of his employment.

The full Commission cannot reach this conclusion from the evidence. In the case of Brown *v.* Hildebran, Docket 270, filed 7 May, 1930, and reported in the March Advance Sheet, this Commission adopted the rule that if a master would have to respond in damages to a third party for an injury inflicted by his servant, then the servant under the Workmen's Compensation Act is entitled to recover, and if we apply this rule to the instant case, this claimant is entitled to compensation.

If this claimant had met with an accident during the period of time between his last delivery of milk and collection of account and the time that he boarded the truck to return to the dairy and while engaged in matters that had no connection with the master's business we would have before us the question as to whether or not such deviation had the effect of suspending the relationship of master and servant, but this is not the case, because the claimant met with his accident on the return trip to the dairy and after he had completed his personal business, and the master's business was resumed at the time he boarded the truck for the purpose of returning it to its proper place, and this being true the full Commission holds that the admitted deviation of from one to two hours does not bar a recovery. See *Jones v. Weigand*, 134 Appellate Division, New York, 644; Peppers *v.* Wiggins Drug Stores, Inc., N. C. Ind. Com., Vol. 1, p. 164; *Bryan v. Bunis*, 208 Appellate Division, Supreme Court, New York, page 389; *Kohlman v. Hyland*, 54 N. D., 710; 50 A. L. R., 1437; *Riley v. Standard Oil Co.*, 231 N. Y., 301.

The full Commission concludes that even if this claimant temporarily abandoned his master's business when visiting the barber shop and pool room and other places on his personal business and for his personal amusement, he resumed it on starting to return the truck of the master to its proper place.

Upon consideration of all the evidence in this case the Commission directs that the finding of Commissioner Dorsett that the accident did not arise out of and in the course of the employment be and the same is hereby vacated and set aside, and that the following findings of fact be substituted therefor, to wit: (1) That the claimant, J. B. Jackson, at the time of his alleged injury, was in the employ of the defendant, Dairymen's Creamery. (2) That on 13 September, 1930, he sustained an accident and injury which arose out of and in the course of his employment. (3) That at the time of the accident and injury his average weekly wages amounted to $17.50 per week. (4) That the claimant has been totally incapacitated from the performance of ordinary labor since 13 September, 1930. (5) That the extent of his permanent disability cannot be determined at this time.

It is thereupon ordered that an award issue providing for the payment of compensation to the claimant at the rate of $10.50 per week to begin

as of 13 September, 1930, and to continue until further order of this Commission and that the defendants pay all hospital and medical bills. It is further ordered that this case be set for further hearing at such time as the injuries of the claimant may reach a permanent status."

The defendants appealed from this opinion to the Superior Court. The following judgment was rendered: "This cause coming on to be heard and being heard before the undersigned judge of the Superior Court duly commissioned to hold the regular August-September Mixed Term for Buncombe County while said court was sitting in regular session, upon the defendants' appeal from the North Carolina Industrial Commission, and after hearing argument of counsel for both plaintiff and defendants, and the court being of the opinion that the findings of fact, conclusions of law and award of the Industrial Commission should be affirmed, it is, ordered, adjudged and considered that the findings of fact, conclusions of law and award heretofore made in this matter by the Industrial Commission be and the same hereby are in all respects affirmed, and the case is hereby remanded to the Industrial Commission for further proceedings according to law."

The exceptions and assignments of error made by defendants, are as follows: "The Commission erred in finding as a fact that on 13 September, 1930, the claimant sustained an accident and injury which arose out of and in the course of his employment, and respectfully submit that said finding of fact should have read as follows: 'That on 13 September, 1930, the claimant sustained an accident and injury which did not arise out of or in the course of his employment.' The Commission erred in not finding as a fact that the claimant, J. B. Jackson, sustained an accident and injury occasioned by the intoxication of the said claimant. The Commission erred in awarding claimant compensation for the injuries received on 13 September, 1930." The exceptions and assignments of error and necessary facts will be considered in the opinion.

Anderson & Howell for plaintiff.
Johnston & Horner and F. M. Tongue for defendants.

CLARKSON, J. The questions involved: (1) Did the accident in this action arise out of and in the course of the plaintiff's employment? We think so. (2) Is there any evidence from which the Commission could find that the injury was occasioned by the intoxication of the plaintiff? We think not.

We think there was sufficient competent evidence to sustain the findings of fact "that on 13 September, 1930, he (plaintiff) sustained an accident and injury which arose out of and in the course of his employ-

ment." Public Laws 1929, chap. 120, known as the "N. C. Workmen's Compensation Act," sec. 2(f). "The findings of fact by the Industrial Commission in a hearing before them is conclusive upon appeal when there is sufficient competent evidence to sustain the award." *Williams v. Thompson,* 200 N. C., at p. 465.

The evidence was to the effect that plaintiff was in the employ of the defendant, Dairymen's Creamery, that had its place of business just outside of Asheville. Plaintiff every night, usually about seven o'clock, left his truck in the back yard of the creamery, where he lived about 50 feet from the creamery. There was a "milk war" on in Asheville, price cutting, etc., customers were changing due to lower prices.

Plaintiff testified, in part: "I was employed by the Dairymen's Creamery. I was delivering milk to cafes and stores and hospitals and had charge of what is known as a 'milk route.' I was supposed to get up and get to town by six or six-thirty. I generally loaded up about five-thirty. That is what I did on the 13th. . . . I went back the third time and got some more milk. I don't know about what time it was I left the plant the third time. I had no watch. I guess about eight o'clock. It was between sundown and dark when I got the last order. I gave it to the Broadway Cafe. . . . I went to Rogers Cafe and ate supper and then I went and got a hair cut, shave and shoe shine in the Square Barber Shop, and then I went to Chase Street and finished collecting on a bill. That was after supper. I talked to several of my customers and then went back to the cafe. . . . I parked my truck in front of Rogers Cafe. It was there probably an hour or two, maybe two hours. Q. What I want to know is, during that two hours you were engaged in eating supper and getting a hair cut and attending to these collections, did that take the entire two hours your truck was parked? A. It did, and talking to those fellows and spending time with them. I did not take any time during that time to go out on any pleasure expedition of my own. . . . I might have shot one game of pool or two games or something like that the night I was hurt. I can't say positively how many games I did shoot. I may have gone in there and shot one game. I think it was one or maybe two games. That was after supper. . . . I was not in there very long, just a few minutes. That was after I had attended to all my collections and stuff, after I got through. I was through with everything. I got through with my collections around ten or eleven o'clock. . . . When my people employed me, they employed me to get all the business I could and gave me orders to hold every customer I could regardless of how I could hold them until milk came down right away. They said to hold them from day to day until milk came back down and not to let them quit, but to tell

them they would make it right with them. . . . I didn't use my truck from that time until I started back and had the wreck. It was parked all the time from then until I started back home. It was between nine and ten o'clock when I made my delivery to the Broadway Cafe. . . . It was between seven and eight o'clock, somewhere along there when I left town to go back there. I went out there and got the milk and came to town. . . . I have a five-year certified statement for driving without an accident."

Plaintiff, when he took the truck where it was parked and started home to the plant on Craggy Road, went a direct route. He testified further: "It was about eleven o'clock that I was hurt. I met a car. It was kind of foggy and the light glared in my face and blinded me. I cut out on the side of the road and whenever the car passed by I was blinded and cut back to the left and I cut too far and when I hit the edge of the curb the lights shone up and I could see I was too far on the left-hand side. I cut back to the right and the steering wheel turned over. One of the cross-arms on the steering wheel had been broken several weeks and whenever I cut it back the other way the other one came out. I had it come out once before then. It had come out and turned over one time before, running slow. The wheel turned over and bent like that. I had no control over it and it shot across the road. Whenever I hit the curb my steering wheel turned and I turned back into the road as I turned it to the right. The arm was broken off the left side and had been wrapped with tape. I had complained of it. When it was first taped Mr. Mason wrapped it and said he would try to get one right away. It was too light a steering wheel for that heavy a truck."

Defendants introduced George Netherton, who testified, in part, that he was bookkeeper for the defendant creamery at the time of the injury to plaintiff. "He is supposed to get off from work as soon as he gets through. He has no regular time. His time is not limited. He is supposed to take care of his customers regardless of what time it is. I don't think he would be supposed to work all night. His employment has no limit. . . . We had a hard time holding our customers at that time, and it was part of his duties to interview and hold customers."

Defendants introduced R. H. Mason, manager of defendant's creamery and directly in charge of plaintiff, who testified, in part: "He came to work about six o'clock in the morning. He got his morning deliveries and worked his trade. He was responsible for his collections and for building up his route and keeping it up. . . . Generally speaking, he was off around seven o'clock. There were times when he worked later than that. All the trucks had to be in the yard when a man finished his work. It is the drivers' business to solicit new business, and some busi-

ness was solicited at night, some in the day time. Some cafes were busy, and he could do more with them at night. . . . There were no stated hours. . . . It is customary for our delivery men to keep trucks out after working hours while they are calling on our customers and making collections. It has happened that our drivers brought our trucks in sometimes at very late hours for that reason. No special permission was given Jackson to keep the truck out at night if he was calling on trade in the interest of our business, but it was taken for granted. That practice had our sanction. Ordinarily the trucks were in around seven o'clock. At that time, however, there was quite a bit of price cutting with regard to the sale of milk, and customers were changing due to the lower prices and there was a hard drive maintained at that time in order to keep the customers we had and gain some more. The steering wheel had been broken. A portion of it was broken and had been taped up."

From *Parrish v. Armour & Co.*, 200 N. C., at p. 660, we again quote Pollock on Torts, 6th ed., at p. 84, as follows: "Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. Distinctions are suggested by some of the reported cases which are almost too fine to be acceptable. The principle, however, is intelligible and rational. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own,' the master is no longer answerable for the servant's conduct."

The plaintiff had parked his truck in front of Rogers Cafe, some one or two hours before the injury. He had been on duty from 5:30 o'clock until after his regular hours, to hold his employers' business. His was not "eye service" during the *milk war*. "Servants, obey in all things your masters according to the flesh; not with eye service, as men-pleasers; but in singleness of heart, fearing God." Colossians 3:22. After being on duty some fifteen hours, he parked his truck in front of the cafe, no doubt hungry from his arduous duties, and went into the cafe and ate supper; then he got a hair cut, shave and shoe shine, collected a bill, talked to several customers, played a game of pool—all these took an hour or two—and then got in the truck and started home. Plaintiff is not a machine, in daily tasks human needs must be considered and recognized. He was not injured during the hour or two in which the truck was parked, but when in the truck going to his home and where

the truck was kept. We cannot hold, under the facts and circumstances of this case, that during the interim, for the purposes above mentioned, there was such a total departure from the course of the master's business that would bar recovery. *Parrish v. Armour, supra,* at p. 654; *Bellamy v. Mfg. Co.,* 200 N. C., 678.

In Willis' Workmen's Compensation (27th ed.), at p. 29, we find: "In giving judgment in *Benson v. Lancashire and Yorkshire Rail Co.* (1904), 1 K. B., 242; 6 W. C. C., 20, *Mathew, L. J.,* said (at p. 251): 'I do not think that the protection given by the act can be confined to the time during which a workman is actually engaged in manual labor, and that he would not be protected during the intervals of leisure which may occur in the course of his daily employment. A workman is not a machine, and must be treated as likely to act as workmen ordinarily would during such intervals; and, as regards any reasonable use which, while on the employer's premises, he may make of moments when he is not actually working, I must not be supposed to say that he would be thereby deprived of the protection of the act.' . . . Where his actual work is finished but the workman is waiting for his pay (*Mayor v. Leyland* (1920), 13 B. W. C. C., 115). So, when a drayman's employment kept him about the streets without any regular intervals for meals, it was held to be incidental to his employment that he should leave his dray during the course of the day for the purpose of obtaining reasonable refreshment. (*Martin v. Lovibond* (1914), 2 K. B., 227; 7 B. W. C. C., 243). . . . (At p. 77): If during meal-times or other intervals, the workman remains on the employer's premises under such circumstances that he continues in the course of his employment, . . . the risks of so doing, for example, locality risks, . . . or risks arising from reasonable acts . . . are risks incidental to his employment."

The cases cited in the opinion of the Industrial Commission are in accordance with the position here taken. *Kohlman v. Hyland,* 54 N. D., 710, 210 N. W., 643, is annotated in 50 A. L. R., 1437.

As to the second exception and assignment of error, there is no evidence on the record to sustain the contention that plaintiff was intoxicated when he was injured. There is evidence that he bought a bottle of liquor on his way home, but he did not drink any of it and it was broken when the accident occurred. He is guilty of buying and possessing liquor, contrary to the statute (3 C. S., sec. 3411(b), but we cannot see how that would deprive plaintiff of a recovery in this action for his serious injuries. His injuries consisted of two broken legs, a stab wound in the back and minor bruises, also cuts over the body. The judgment below is

Affirmed.

STATE v. JOHN D. LANCASTER.

(Filed 27 January, 1932.)

1. Criminal Law G i—Expert may testify to shortage in sheriff's accounts where he has examined records properly identified.

On the trial of a sheriff for embezzlement it is competent for a witness who has been qualified and found by the court to be an expert in such matters, to testify from his examination of the books and records identified as the public records of the sheriff's office, and likewise those in the office of the county auditor, that there was a shortage in the sheriff's accounts and as to the amount appearing to have been collected and not reported or accounted for by the sheriff, it being a matter of cross-examination of the defendant as to explanation of specific items appearing in the books and accounts from the books introduced in evidence.

2. Embezzlement B c—Testimony of statement of defendant concerning shortage held competent in prosecution for embezzlement.

Upon the trial of the sheriff of a county for embezzlement of the county's funds it is competent for witnesses to testify that the sheriff, when the amount of the alleged shortage was revealed to him, stated that it was more than he had thought, and that, upon time to make good being given him from time to time, he had repeatedly given his promise to make a full accounting.

3. Witnesses B b—Court in its discretion may allow State to call witnesses subpœnaed by defendant.

It is a matter within the discretion of the trial court in a criminal prosecution to permit the State to call and examine witnesses subpœnaed by the defendant.

4. Embezzlement A a—Essential element of fraudulent intent may be inferred from the circumstances.

While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, C. S., 4276, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable.

5. Criminal Law G a—Charge in this case did not violate rule that failure to testify raises no presumption against defendant.

Where the defendant in a criminal prosecution for embezzlement does not take the stand, an exception to the statement of the contentions of the State that the defendant did not deny the alleged shortage when accused of it at the time it was discovered will not be held for error as violating the defendant's right that no presumption against him should be raised from his failure to testify, and if the charge was a misstatement of the contentions it should have been called to the trial court's attention in apt time.

STATE *v.* LANCASTER.

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

The defendant was tried on the following bill of indictment: "The jurors for the State upon their oath present: That John D. Lancaster, not an apprentice nor within the age of 16 years, late of the county of Edgecombe, on ..... January, 1930, with force and arms at and in the county aforesaid, then and there holding the office of sheriff of said county, by virtue of said office did take into his possession $11,500, belonging to said county, and said money, so taken, feloniously, fraudulently, knowingly and wilfully did embezzle, misapply and convert to his own use, against the form of the statute in such case made and provided, and against the peace and dignity of the State. Gilliam, solicitor." The defendant pleaded not guilty. The jury returned a verdict of guilty.

The judgment of the court below is as follows: "It is considered, ordered and adjudged by the court that the defendant be confined in the State's prison for a term of not less than two years nor more than six years, and that the sheriff of Edgecombe County be charged with the execution of this judgment." The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

The necessary facts will be set forth in the opinion.

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

V. E. Fountain and Henry C. Bourne for defendant.

CLARKSON, J. The first question involved: Is it reversible error for the court below to permit, over the objection of the defendant, expert testimony of witnesses for the State, as to an audit of public records made by them and their conclusions from such investigation of the records? We do not think it error.

Frank Gorham, a witness for the State, it is admitted is an accounting expert. He was a competent witness to testify. *S. v. Brewer, ante,* 187; *S. v. Rhodes, ante,* 101.

Defendant was sheriff of Edgecombe County, Gorham was employed by the commissioners of said county to make an audit of the books of the sheriff's office. It covers the period from 1 July, 1929, to 27 March, 1930. He testified, in part, as follows: "Q. Did your audit show any difference between the amount collected in taxes by the sheriff, Lancaster, and the amount for which he accounted to the proper authorities? A. Yes. The audit was made from the original tax levy that was furnished defendant by the county accountant's office and from reports that had been made in defendant's office by his office help and from

records in the county accountant's office. The audit is based entirely on records which I found in the sheriff's office and the auditor's (accountant's) office. The records in the sheriff's office were delivered to me by some one in the office after the defendant had resigned and the records in the auditor's office were delivered to me by the auditor, M. L. Laughlin. As far as I know the records which I examined were the original county records. They were presented to me and the records were such as are kept in counties generally. Q. Was there any difference in the amount collected and the amount accounted for? A. Yes. Q. What was the difference? A. The difference was between amounts collected and reported and amount of deposits that were made to the sheriff's account from which the various funds were paid—it was $13,190.58." The court below admitted the evidence over objection of the defendant. The defendant excepted and assigned error. We do not think the exception and assignment of error can be sustained. The accounting expert went into detail showing the shortage.

In *S. v. Rhodes, supra,* speaking to the subject: "Where a fact can be ascertained only by the inspection of a large number of documents made up of many detailed statements it would be practically out of the question to require the entire mass of documents and entries to be read by or in the presence of the jury. As such examination cannot conveniently be made in court the results may be shown by the person who made the examination. Wigmore on Evidence (2 ed.), sec. 1234; Chamberlayne on Evidence (Vol. 3), sec. 2317. The production of the documents and the privilege of cross-examination and of the introduction of evidence afford ample protection of the defendant's rights."

In Chamberlayne, the Modern Law of Evidence, Vol. 3, sec. 2317, we find: "A unique forensic situation in which the summary or conclusion of a witness customarily is received is where a very large number of entries, records or separate documents of any sort or kind are submitted. Under such circumstances, a competent witness is permitted to state, from his observation and examination, his conclusion as to what the papers show. The necessity for this concession lies not, as in case of ordinary conclusions, in the difficulty of laying original facts before the jury, provided that time could be spared for the purpose. No difficulty attaches to proving the individual facts of these separate entries. Nor is the subject-matter necessarily one of technical skill. The consumption of time, however, might well be unduly large concerning the existence of matters not seriously controverted. For the expediting of trials a presiding judge may well be justified in economizing the court's time by receiving the conclusion of the witness. The rights of the adverse party are frequently safeguarded by requiring the production of

the original books of account or other documents. In other cases all that may be required is their presence in court, if demanded, or even their introduction into evidence, to render effective the extended cross-examination which will usually be accorded. As is abundantly shown in the foregoing decisions, *the rule is equally applicable to criminal as to civil cases.*" (Italics ours.)

M. L. Laughlin, a witness for the State, testified, in part, that he was auditor of Edgecombe County. That the taxbooks made up by himself and assistants were turned over to the defendant sheriff 1 October, 1929. The matter was called to the attention of the board of county commissioners, on 13 March, 1930, of alleged difference between the collections of the sheriff and the amounts for which he had accounted. The board met that night and defendant sheriff attended. "We asked him if he could not make a deposit to cover the amount of money that he was due the county, and he replied that he had about sixteen or seventeen thousand dollars in checks and money in his vault and that he would straighten out the matter the following day. About 8 March, after the accounts for the first of March had been audited and report had been made by Mr. Lancaster, I asked him for checks to cover the turnover and he told me he would attend to it that afternoon. Q. How much did your records show he was due you at that time? A. About $23,000 just prior to the first of March." This evidence was admitted over the objection of defendant, the defendant excepted and assigned error. We think from the authorities cited above, in this and other jurisdictions, the county accountant's testimony was competent.

The auditor further testified that the defendant, on 14 March, deposited $7,044.07 and later one or two little deposits. At the request of the defendant he was given further time. The auditor further testified that defendant said "that he didn't have any idea he was out of the way as much as he was, that if they would give him a little more time, say twenty-four hours, he would clear the matter up. They granted him four days time. We had another meeting on the night of 24 March, he was present only a small part of that meeting, the biggest thing he did was resign, and after he resigned he got out. At that meeting he made the statement that on the first Monday in March he was very busy, and the road board was meeting in his back office and two or three other people were in there from Rocky Mount, and he had a bunch of money lying on his desk and he was called out, and when he returned, approximately $14,000 was gone. That was the first time he had said anything about that. He said he had not told it before because he was hoping to catch the one that did it. I made an audit

from the records which were turned over to Mr. Lancaster and reports which were made in his office. . . . Q. What was the difference according to your audit between the amount of money which he collected, total amount which he collected, and the total amount which he paid off? A. $14,756.32." The above question and answer was objected to by defendant and exception and assignment of error taken. For the reasons given in the authorities above cited, we think the evidence is competent.

W. E. Page, chairman of the board of county commissioners, testified, in part, which is unobjected to: "The alleged shortage was called to my attention on 13 March, by Mr. Laughlin. I called a meeting for that night and Mr. Lancaster was present. We talked to Mr. Lancaster about the alleged amount not turned over and he told us the reason he had not turned over the money, he had a few bad checks and did not want to get his entire book in bad shape, that his bank book was in balance, he said he had $16,000 or $17,000 in his vault and that he was holding it on account of the few bad checks that had come back, and he told us that if we would give him to the following Saturday he would make all of his arrearage good. The board told him that unless he could make satisfactory settlement that they would be forced to ask for his books. We had another meeting on the 20th. He had not made good by that time and asked us to prolong that time until the following Monday. It was not deposited or made good by that time. We had the final meeting on 24 March, and the money had not been deposited at that time. The alleged shortage at that time according to my recollection, was $12,000 or $14,000. At the last meeting he made the statement that on the first Monday when he was getting ready to make his deposit his room being full of people that he was called out quickly and left and when he came back he was about fourteen thousand dollars short. He said he had not reported this as he thought he could spot the people who had gotten his money but he failed to get them. He said the money was in the private office back of the main office. He said the road board was meeting there and some other people."

Miss Dolores Pitt, who at the time it is alleged the sheriff misappropriated or embezzled the money, was clerk in his office, testified that she collected the money and that at the time she collected the money she gave the person who paid the tax a receipt and kept blue duplicate sheet but that she made out all turnover sheets and she herself gave these turnover sheets to the auditor and attached to this sheet duplicate blue copy of the tax receipt that she gave the people when they paid the taxes; that she turned over into the possession of the sheriff all the money that was collected on taxes in that office while

she was there. The State further offered evidence tending to show that she had nothing to do with the money after she turned it over to the sheriff, that the sheriff made deposit in the bank and looked after the money after it was in his possession.

At the close of the State's evidence and at the close of all the evidence the defendant made motions to dismiss the action or for judgment of nonsuit. C. S., 4643.

We think the evidence ample to be submitted to the jury. In fact, defendant has never denied the shortage, and was given time to pay it when called to his attention, and said he had the money in his vault. He stated "he didn't have any idea he was out of the way as much as he was." Then, afterwards, he made the statement "He was getting ready to make his deposit, his room being full of people, that he was called out quickly and left and when he came back he was about $14,000 short."

The next contention of defendant: Is it error for the court to permit at the conclusion of the defendant's evidence, the defendant having offered evidence only as to his character, to permit the solicitor to call and cross-examine three witnesses which had been summoned and sworn for the defendant, but not offered as a witness, upon matters not theretofore disclosed by the evidence in the case? We do not think it error.

We think this a matter which is ordinarily in the sound discretion of the court below. *S. v. Allen,* 107 N. C., 805; *Smith v. R. R.,* 147 N. C., 607. On the record there is no evidence of the abuse of this discretion.

The defendant further contends that the court below in charging the jury as to the essential elements of the crime of embezzlement, did not mention the intent of the defendant as a necessary element. We do not think the contention can be sustained.

The following is stated in *S. v. McDonald,* 133 N. C., at pp. 683-4: "The crime of embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner. *Embezzlement was not a common law offense. S. v. Hill,* 91 N. C., 561. . . . It was made a crime in this State by The Code, sec. 1014 (C. S., 4268). . . . In embezzlement there must have been not only a relation of trust and confidence between the owner and the person who is charged with the conversion, but the property must have been appropriated with a fraudulent purpose. Clark's Criminal Law, secs. 99 and 100. We think, therefore, that the conversion of funds by a person who has been entrusted with them becomes criminal as an embezzlement only by reason of this corrupt intent, and it is as necessary for the State to establish the intent as a fact independent of the conversion as it is to prove the bad intent in a prosecution for larceny as

a fact apart from the taking. The intent to defraud is no more implied in a case of embezzlement than the felonious intent is from the act of taking in a case of larceny."

In *S. v. Falkner,* 182 N. C., at p. 795-6, we find: "Again, in *S. v. Morgan,* 136 N. C., 628, *Walker, J.,* speaking for a unanimous Court, says: 'If the act may be innocent or not according to the intent with which it is done, or if its criminality depends upon the intent, it is incumbent on the State to show the intent or to show the facts and circumstances from which the intent may be inferred by the jury, and it is necessary that the jury should find the intent as a fact before the defendant charged with the commission of the act can be adjudged guilty of a crime,' citing *S. v. McDonald,* 133 N. C., 680."

Intent is inferred from facts in evidence, and it is rarely shown by direct proof. There was ample evidence to go to the jury to sustain the offense charged in the bill of indictment. C. S., 4270. The court below charged the jury: "The crime of embezzlement is the felonious and fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of another. To embezzle is for an agent fraudulently to misapply the property of his principal. . . . That the State must satisfy you from the evidence beyond a reasonable doubt that this defendant knowing that this property was not his own, converted it to his own use. . . . The defendant contends there is no evidence that there is any intent to defraud the county, no evidence that Mr. Lancaster appropriated it for his own use or used it for the benefit of anyone else. . . . The law, as I understand it, is this, that when an act is committed, the intent to do the act is criminal, but when the act becomes criminal only by reason of the intent unless the intent is proven the offense is not proven and this intent must be found by the jury as a fact from the evidence. You, the jury, must say from the evidence whether the State has offered evidence which would satisfy you beyond a reasonable doubt, not only that the defendant is short, did not turn over the money, but that he did that with the intent to defraud the county, that he had the felonious or fraudulent intent to misappropriate the money. If you are so satisfied of this from the evidence, beyond a reasonable doubt, it would be your duty to convict the defendant. But remember that you must find that this shortage was done with the felonious and fraudulent intent to misappropriate this money which belonged to the county." Taking the charge as a whole, with the contention of defendant, as stated by the court below, we think the charge full and plenary. The fraudulent intent, within the meaning of the statute, is the intent to "embezzle or otherwise wilfully and corruptly use or misapply," the money of the county for purposes other than that for which they are held. C. S., 4270, *supra. S. v. Dunn,* 138 N. C., 672.

"The fraudulent appropriation is to be inferred from facts. . . . Flight, concealment, *evasions,* form strong elements of proof." 2 Wharton's Criminal Law ((11th ed.), part sec. 1277, pp. 1490-1-3.

A group of exceptions and assignments of error made by defendant is in reference to alleged comments by the court below upon the failure of the defendant to take the witness stand in his own behalf. C. S., 1799, in part, is as follows: "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him," etc.

An examination of the record, we think, shows that the court made no comment upon the failure of the defendant to testify in his own behalf. The court below stating the contentions of the defendant, in substance said that the defendant did not have to go upon the witness stand, but could rely on the State's evidence. All the references complained of in defendant's brief refer to the fact that defendant did not deny the shortage at the time it was called to his attention by the board of county commissioners, and did not explain the matter. That there was no evidence offered in this case of any mistake in the figures. Defendant might have offered such evidence through other persons familiar with the facts. The matters complained of by defendant, the court below referred to them as *contentions,* if they were inaccurately stated at the time, they should have been called to the attention of the court, otherwise they are waived. *S. v. Geurukus,* 195 N. C., 642. These exceptions and assignments of error cannot be sustained.

The court below gave the contentions accurately, fully and fairly for both the State and defendant. The charge was all that defendant, from the evidence, was entitled to. The court charged: "This defendant comes into court like all defendants in a criminal action in North Carolina. He is presumed to be innocent and that presumption comes in court with him and remains with him throughout the trial and the only way that can be repudiated is for the State to offer evidence which satisfies you beyond a reasonable doubt of his guilt. The burden is always on the State of North Carolina to satisfy you, to offer you evidence in every criminal case which will satisfy you of defendant's guilt beyond a reasonable doubt before you can convict the defendant." The exception and assignment of error that the caution to the jury in effect was an expression of opinion and impinged C. S., 564, is untenable. It was the usual and ordinary warning given to the jury and the court finished the charge as follows: "Let your verdict be a fair and impartial one based on the evidence and the evidence alone. Take the case and say how you find it."

The record shows that the defendant's general reputation up to the time of this indictment was good. This was shown by a long list of witnesses, some 48. There is no error of law in the trial of the action in the court below. The matter was one of fact for the jury to determine; in law, we find

No error.

ALTON W. FRANKLIN AND WIFE, DOROTHY G. FRANKLIN, AND R. P. LYON AND WIFE, RUTH LYON, v. ELIZABETH REALTY COMPANY, H. V. SHERRILL COMPANY, ED SMITH AND WIFE, WILLIE CAMPBELL SMITH, AND B. N. ANDREWS AND WIFE, DAISY ANDREWS.

(Filed 27 January, 1932.)

1. Deeds and Conveyances C g—Development in this case held to have been laid out according to a general scheme or plan.

Where a subdivision is sold into lots by deeds with covenants restricting the use of the land exclusively to dwellings, and the purchasers and their grantees, in reliance on these restrictions and in conformity therewith, build residences of the class designated with the belief and understanding that the restrictions would increase the value of the lots so purchased: *Held*, the plan is a general scheme and each purchaser under the restrictive covenants and warranties in his deed may restrain the building of a store for business purposes by an owner of a lot in the development, and the disregard of the restrictions in a very few instances to so slight an extent as not to materially affect the value of the other lots, under the facts of this case, will not vary the result.

2. Same—Character of development had not so changed in this case as to warrant avoidance of restrictive covenants.

Where lands are plotted into lots and sold with covenants restricting the buildings thereon to residences of a certain class and the purchasers have practically complied with the restrictive covenants in the deeds, the fact that business buildings were erected before these lots were so sold and conveyed on contiguous or adjoining blocks of the city will not alone be sufficient to show that business had extended to the lots with the restrictions and that therefore the restrictions should not equitably be enforced as to the owners of lots which had not yet been built on.

3. Same—Restrictive covenants in this case held not rendered inoperative by subsequent clause in deed.

Where lots in a development are sold and conveyed on a general plan restricting the class of buildings therein to residences, which restrictions have been practically observed, a purchaser of a lot in the development may not successfully contend that the general plan is varied by a further clause in the deed permitting a variation upon the mutual consent of the original grantor and subsequent purchasers under the provisions of the original deed in the development when no such variation has been made, as no harm has been suffered on account of this clause.

APPEAL by plaintiffs from *Harding, J.*, at April Regular Term, 1931, of MECKLENBURG. Affirmed.

This is a civil action brought by plaintiffs against defendants to remove cloud upon plaintiffs' title by virtue of certain restrictive covenants in the deeds under which plaintiffs held title. Plaintiffs pray: "That it be decreed that the restrictions set forth in the deed from Elizabeth Realty Company to H. C. Sherrill Company be declared to be null and void and of no force and effect, and that the plaintiffs be declared to be the owners of said property in fee simple, freed and discharged from said restrictions."

The Elizabeth Realty Company, established a subdivision of thirty-two lots on East Morehead Street in the city of Charlotte, N. C. On 8 March, 1924, by deed duly registered in Book of Deeds 534, p. 170, registry for Mecklenburg County, the defendant Elizabeth Realty Company conveyed to the defendant H. C. Sherrill Company said thirty-two lots with certain restrictive covenants and conditions, one of which is "The property shall be used for residential purposes only," etc. A map of the thirty-two lots, showing the size of the lots, etc., is recorded in Book 332, p. 90 register of deeds office of Mecklenburg County, N. C. All of the lots were sold with restrictions that "the property shall be used for residential purposes only," except one. The one not restricted by deed has a residence built on it in accordance with the restrictions. A further restriction: "No residence or dwelling-house shall be erected or occupied on said lot costing less than $7,500 (servants' house excepted)." The plaintiff, Dorothy G. Franklin, purchased from H. C. Sherrill Company. The other plaintiff, Dr. R. P. Lyon, is successor in title from H. C. Sherrill Company. In the deed above mentioned, from the Elizabeth Realty Company to H. C. Sherrill Company, is the following: "It is hereby understood and agreed by the parties hereto that all the foregoing covenants, conditions and restrictions shall run with the land and shall be held to bind the land and all subsequent owners or occupants thereof, and the acceptance of this deed shall have the same force and binding effect upon the party of the second part, its successors and assigns, as if said deed were signed by the party of the second part." All the deeds from the defendant, H. C. Sherrill Company, conveying various lots contain a clause substantially as follows: "This conveyance is made subject to the restrictions, conditions and reservations set forth in the aforesaid deed from Elizabeth Realty Company." Such is in plaintiffs' deeds.

The plaintiff Dorothy G. Franklin owns lot 4, in block 6 conveyed to her by H. C. Sherrill Company, by deed dated 14 July, 1928, and registered in Book of Deeds 713, page 69, registry for Mecklenburg

County, N. C. The other plaintiff, Dr. R. P. Lyon, owns lot 10 in block 5, conveyed to him by Coy E. Langford and wife, deed dated January, 1925, and registered in Book of Deeds 735, p. 77, registry aforesaid.

The plaintiffs contend: That since the date of the conveyance from the defendant Elizabeth Realty Company to the defendant, H. C. Sherrill Company above referred to, and since the dates of the conveyances from the H. C. Sherrill Company to the plaintiff, Dr. Lyon, successor in title, in this action above referred to, the character of the community in which the said lands are located has been materially changed by the expansion of the city of Charlotte and the spread of industry, causing a fundamental change in the essential character of the property herein referred to.

On the other hand, the defendants contend: That at the time the plaintiffs bought their lots every building on Morehead Street now used for business, about which they complain, except the filling station, was either in existence or in the process of construction, and some were occupied and in use. None that they complain of, or the filling station, is in the Elizabeth Realty Company development. That the Elizabeth Realty Company formerly owned the tract of land in which the plaintiffs' property is located; that, pursuant to a general plan to develop and sell that particular tract as high-class restricted residential property it made and recorded the map thereof recorded in Book 332 at page 90 in the office of the register of deeds for Mecklenburg County, N. C., on which map is shown the property of the plaintiffs and defendants; that 32 lots were shown on said map; and that, as appears from said map, the said restricted area extends from the intersection of Morehead Avenue and the street now known as Harding Place to the intersection of Morehead Avenue and Coddington Avenue. That, the said Elizabeth Realty Company thereafter, pursuant to said general plan, proceeded to sell said lots as shown on said map; that it has sold all or practically all of said lots; that in every deed except one it has inserted the identical restrictions set forth in the complaint; that in said one deed, which was to Chase Brenizer, an officer of the Elizabeth Realty Company, the said restrictions, through inadvertence, were omitted, but that shortly after the execution of said deed he erected upon said property a residence, conforming in all respects to said restrictions, which residence is now owned and occupied by P. C. Whitlock, and that all owners of said lots have fully observed the said restrictions; that all persons buying property in said restricted area, including the defendant, H. C. Sherrill Company, bought in reliance upon said restrictions and general plans; that only a very small percentage of said lots remain unimproved at this time; and that all of said lots, which have been improved, are used

solely for residential purposes, except the lot owned by this defendant, H. C. Sherrill Company, on which a residence has been constructed, but is being temporarily used by Miss Burbank. . . . That there has been no change in the character of the restricted area in which is located the property of the plaintiffs. That to eliminate said restrictions from the plaintiffs' said property, which is located in said restricted area and to permit the plaintiffs to use their said property for business purposes, as they are attempting to do, would violate said general plan and seriously and irreparably damage the property of the other owners in said restricted area.

Plaintiff, Dr. R. P. Lyon, testified, in part: "The other stores facing Morehead Street were then occupied. They were the same ones that are there today, but not the same occupants. It is a fact that every store which faces Morehead Street today was in existence at the time I bought my lot except the filling station. That was built after I bought my lot."

Plaintiff, Alton W. Franklin, testified, in part: "I selected this place because it was a high-class residential place and desirable for my business (photography). I knew that Morehead Street was a restricted area. I understood that everything east of Harding Place was unrestricted. I saw the store on the south side. Saw the cars going back and forth on Morehead Street, but nothing like they are now. All the business places except the Burbank place and the golf course are located east of Harding Place (not in the Elizabeth Realty Company development). . . . I knew the restrictions were there because Mr. Sherrill told me so and I took his word for it. I do not contend there is anything in the deed that was not there when I got it. . . . I was on good terms with Dr. Lyon after the suit was brought. Later on he put the miniature golf course on his lot. I objected to that in a way. I did not go to any one to make objection. . . . I didn't consider it a nuisance and I didn't try to stop him from putting it there. I never mentioned it to him."

Defendant B. N. Andrews testified, in part: My lot would be materially depreciated as much as 50 per cent if the restrictions were removed. The Franklin lot is lot 4, in block 6. The golf course is on lot 10, block 5. . . . I paid $3,000 for the lot and $9,500 or $10,000 for the house."

Mrs. John Moore testified, in part for defendant: That she lives in the Elizabeth Realty Company development, bought a lot in the spring of 1925, built and moved in it May, 1926. "When I bought the lot I knew it was restricted. . . . We liked the location and because it was restricted for residential property. . . . I think lifting the

restrictions on the Franklin and Lyon lots would depreciate the value of my lot considerably, because it would mean that the restrictions on the other lots would be lifted. . . . Miss Burbank has a very distinguished clientele. High class, high toned place, very orderly very attractive and the best of everything and she serves delicious food. She does not run a restaurant. . . . I went to a luncheon. It was exactly like luncheon in a private house."

W. S. Liddel testified, in part for defendants: "I constructed a brick-veneer house at a cost of from $25,000 to $27,000. The lot cost me $4,200. I moved in July, five or six years ago. I have lived there since." This house and lot are in the Elizabeth Realty Company development.

The judgment of the court below was as follows: "This cause coming on to be heard before his Honor, W. F. Harding, presiding judge, and a jury, 27 April, 1931, Regular Term of the Superior Court of Mecklenburg County, and having been heard, and each of the defendants having separately moved for a judgment of nonsuit at the close of the plaintiff's evidence, and these motions having been renewed at the close of all the evidence, and the court being of the opinion that the motion should be allowed: It is therefore, upon motion of H. L. Taylor, attorney for B. N. Andrews and wife, and of C. H. Gover, attorney for H. C. Sherrill Company and Elizabeth Realty Company, ordered, adjudged and decreed that the plaintiffs' action be and the same is hereby dismissed as of nonsuit, and that the plaintiffs be taxed with the costs." From the judgment as rendered, the plaintiffs excepted, assigned error and appealed to the Supreme Court.

Shore & Townsend for plaintiffs.

C. H. Gover, H. L. Taylor and Chase Brenizer for defendants.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence, the defendants moved for judgment as in case of nonsuit. C. S., 567. The court below allowed the motion at the close of all the evidence, and in this we can see no error.

What constitutes a general scheme or plan is stated in 27 R. C. L., under "Vendor and Purchaser," p. 766, part of sec. 531, as follows: "The cardinal test in determining whether a restriction imposed by a grantor in selling lots into which he has divided a tract of land is in pursuance of a general plan or neighborhood scheme has been said to be whether the grantor's representation as to the restriction is made for the purpose of inducing the purchasers of the several lots to pay higher prices by reason of the restriction and their mutual protection on such account. In practice, however, it is frequently difficult to determine

whether restrictions in the conveyance of several lots into which a large tract is subdivided were intended as a general restrictive plan or scheme for the benefit of the several grantees or merely for the personal benefit of the grantor. It has been held that the fact that a landowner has, in selling parts of a tract, imposed restrictions on the use of a number of lots does not itself necessarily show that a general restrictive plan or scheme was intended. And it has been held that a general plan or scheme for all the purchasers of lots on a street as platted does not appear from the fact that most of the lots are sold subject to building line restrictions, where no restrictions are shown on the plat and none are imposed on some of the lots first sold and it is further shown that there have been many violations of the restrictions by lot owners and such violations have not been resisted by other purchasers. On the other hand the fact that additional restrictions are incorporated in the conveyance of some of the lots does not show that a common restriction in all of the conveyances was not in pursuance of a general plan and consequently for the benefit of the several grantees. And there may be departure in a few instances in the sale of lots without restrictions without defeating what is otherwise an apparent general scheme of improvement."

We think under all the evidence that appears in this record, the Elizabeth Realty Company development was a general scheme or plan. *Johnston v. Garrett,* 190 N. C., 835; *Bailey v. Jackson,* 191 N. C., 61.

In *Johnston v. Garrett, supra,* at p. 838, the law is stated as follows: "The Stephens Company, the owner of the land platted as block 3-A, subdivided said block and sold distinct parcels thereof to separate grantees, imposing restrictions practically identical upon the use of each parcel or lot pursuant to a general plan of development or improvement; the lots now owned, respectively by plaintiffs and defendant, are included within block 3-A, and are held under deeds, containing practically identical conditions and restrictions, which the grantees in said deeds as recited therein understood and agreed were for the protection and general welfare of the community, and were covenants running with the land. These conditions and restrictions, upon these facts, may be enforced by any grantee of any of said lots, included within block 3-A, against any grantee of any other lot included in said block. 18 C. J., 394; *Homes Co. v. Falls, supra* (184 N. C., 426)."

That the omission of a restriction from a single deed does not destroy the general plan. *Bailey v. Jackson, supra;* 27 R. C. L., *supra.*

In *Starkey v. Gardner,* 194 N. C., at p. 79, *Brogden, J.,* clearly makes the following observations when equity takes a hand: "The weight of authority is to the effect that if substantial, radical and fundamental

changes have taken place in a development protected by restrictive covenants that courts of equity will not enforce the restrictions. The underlying reason is, we apprehend, that such changes destroy the uniformity of the plan and the equal protection of the restriction. For instance, if a residential development should, in the course of time, by the growth of a city or other cause, become valuable as business property and business houses should indiscriminately invade the development, then the restriction would bear unequally upon the various owners and equity would not permit the entrenching of such inequality." *Higgins v. Hough,* 195 N. C., 652; *Stroupe v. Truesdell,* 196 N. C., 303.

In *McLeskey v. Heinlein,* 200 N. C., at p. 292-3, it is said: "When persons desiring to become home owners purchase property in a subdivision protected by certain desirable restrictive covenants, *the security of such covenants ought not to be destroyed by slight departures from the original plan,* and valid restrictions appearing in all the deeds for lots in such subdivision should not be eliminated and wiped out because of immaterial violations of such restrictions. . . . *There is no fact tending to show any violation of the restriction within the subdivision itself,* except the fact that the owners of seven lots have signed releases in order to permit the owner of lot 13 to erect an art studio on said lot. The nature of such building does not appear. However, we are of the opinion that the evidence does not show such 'substantial subversion of fundamental change in the essential character of the property' as to warrant the removal of the restrictions." (Italics ours.)

In the present action we do not think there is any such departure or violation of the restrictive covenants and conditions in the subdivision itself that plaintiffs can complain of.

In practically all of the deeds from the Elizabeth Realty Company, the following clause appears: "12. Provided, however, that any of the conditions and restrictions herein contained may be at any time and in any manner changed by and with the mutual written consent of the parties of the first part, or its successors and the owner or owners for the time being of the lot of land hereby conveyed."

It is contended by plaintiffs that this proviso authorizing modification by grantor defeats the general plan.

This is the most serious contention we have to deal with, but on the present record plaintiffs have suffered no harm on account of this clause. The grantor has not materially changed any restrictive covenants or conditions, and none in regard to the property not being used for residential purposes. The slight departure of plaintiff, Dr. Lyon, himself, as to the use of his lot for the miniature golf course and Miss Burbank's "high class, high toned place" are not such that, under the facts

of record, affect the restrictive covenants and conditions of the deeds. Again, plaintiffs knew all about the restrictive covenants and conditions in their deeds when they purchased their lots, and should not now be allowed, except for good cause shown, to breach their solemn agreement. Those who have invested their money on the faith of these restrictions, covenants and conditions, are entitled to have the contract performed as written, unless there are equitable reasons to the contrary—none appear in this record. For the reasons given the judgment is

Affirmed.

STERLING LUMBER COMPANY v. N. W. ABERNATHY, SHERIFF OF CHEROKEE COUNTY AND R. C. MOORE; AND R. C. MOORE v. J. W. RUTHERFORD AND STERLING LUMBER COMPANY.

(Filed 27 January, 1932.)

Appeal and Error F b—Where no exceptions to referee's report are made, a correct judgment entered thereon will be affirmed on appeal.

Where a party in an action which has been referred to a referee makes no exception to the referee's report he is entitled to judgment only in accordance with the report, and a correct judgment entered thereon will be affirmed, and he may not contend that he is entitled to a relief which is not supported by the findings of fact or the conclusions of law of the referee.

APPEAL by Henry McAden, trustee for the heirs at law of R. Y. McAden and Mary T. McAden, intervener, from *Harwood, Special Judge,* at April Term, 1931, of CHEROKEE. Affirmed.

At November Term, 1929, of the Superior Court of Cherokee County, the above entitled actions then pending in said court, were consolidated and referred for trial.

At January Term, 1930, by an order of said court, Henry McAden, trustee for the heirs at law of R. Y. McAden and Mary T. McAden, intervened in the action entitled "R. C. Moore *v.* J. W. Rutherford *et al.*," and thereafter filed his pleading therein.

The consolidated actions were heard by the referee who filed his report on 13 December, 1930. This report came on for hearing at April Term, 1931, and was in all respects confirmed. There were no exceptions to the findings of fact or conclusions of law set out in said report.

From judgment in accordance with the report of the referee, the intervener, Henry McAden, trustee, appealed to the Supreme Court.

M. W. Bell for appellant.
L. B. Prince for appellee.

PER CURIAM. There was no error in the refusal of the judge to sign the judgment tendered by the intervener. The contention of the intervener that he was entitled to judgment on the bond executed by the Sterling Lumber Company as principal, and Columbia Casualty Company, as surety, to R. C. Moore, cannot be sustained. There is no finding of fact or conclusion of law in the report of the referee to support this contention. The intervener did not except to the report of the referee, and for this reason is entitled to judgment only in accordance with the report.

There is no error in the judgment signed by the judge. It is in accordance with the report of the referee and is, therefore,

Affirmed.

J. REGGIE GREER, ADMINISTRATOR OF W. T. GREER, DECEASED, AND ALICE GREER, v. THE BANK OF DAMASCUS AND W. R. BAUGUESS, TRUSTEE.

(Filed 27 January, 1932.)

Trial A b—Order continuing action upon defendant's paying into court sum in excess of that demanded in the action held erroneous.

Upon the exercise of the trial judge of his discretionary power of withdrawing a juror and continuing the case, his order that the defendant pay into court an amount in excess of the plaintiff's demand affects a substantial right and is erroneous, and in this case the judgment is modified and affirmed.

APPEAL by defendant from *Oglesby, J.*, at July Term, 1931, of ASHE. Modified and affirmed.

This is a civil action brought by plaintiffs against defendant. "Wherefore, the plaintiffs pray judgment against the Bank of Damascus for the sum of $3,000 and interest on it from 20 September, 1927, until paid, together with the cost of this action."

The defendants denied plaintiffs' right to recover and set up new matter and counterclaim.

The judgment of the court below was as follows: "This cause coming on to be heard before his Honor, John M. Oglesby, judge presiding, and a jury, the court, in its discretion, withdrew a juror and continued this cause, and ordered that defendant, the Bank of Damascus, pay into this

court before the next term thereof the sum of $7,000, to be disbursed according to law, it appearing to the court, by admission of the Bank of Damascus, that the purchase price bid by said bank had not been paid."

T. C. Bowie for plaintiffs.
W. R. Bauguess and U. S. G. Bauguess for defendants.

PER CURIAM. This controversy was here before—*In re Bauguess,* 196 N. C., 278. The plaintiffs only contend that they can recover $3,000 and interest. Why, therefore, compel defendants to pay $7,000 into court? We think in the interest of justice the court should not have ordered more than $3,000 and interest, the amount plaintiffs sue for, to be paid into court. It was discretionary for the court below to withdraw a juror. *Wolf v. Goldstein,* 192 N. C., 818; *S. v. Guice,* 201 N. C., 761. The ordering of $7,000 to be paid into court affected a substantial right.

In modifying and affirming this judgment, we do not desire it to be understood that the other questions appearing of record were considered, that arose on the trial in the court below. They are not passed on or decided on this appeal. The judgment is

Modified and affirmed.

STATE v. DR. J. R. BROWN.

(Filed 27 January, 1932.)

Criminal Law G b—Testimony in this case held irrelevant to the issue and its admission constituted reversible error.

Upon the trial of a physician for procuring an abortion (C. S., 4226) testimony of a conversation between the physician and the woman as to an abortion about four months prior to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error.

APPEAL by defendant from *MacRae, Special Judge,* and a jury, at August Term, 1931, of MOORE. New trial.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.
L. R. Varser and H. F. Seawell for defendant.

PER CURIAM. The defendant was indicted under C. S., 4226, which is as follows: "If any person shall wilfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman,

advise or procure any such woman to take any medicine, drug or other substance or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court."

The prosecuting witness is the mother of seven children, the first born in 1917. She has been married twice, her first husband is dead. She left her second husband. She gave birth to a bastard child on 28 September, 1930. A week before Christmas 1930, she had her regular menstrual period. The next regular time was about 18 January, 1931. "I had had sexual intercourse with a man shortly before that time." About 24 January, 1931, she went to see defendant. She testified, in part: "I felt bad and didn't have any appetite and didn't feel like I had any ambition and asked if he could not do something for me and he asked to look me over and examine me and he did examine me. I did not tell him that I was pregnant. . . . He did not do anything except use some kind of instrument to dilate the vagina. . . . He examined me only a few minutes. There was nothing much said at the time and he told me if I didn't get to feeling better to come back. . . . After I had been to see the defendant on 24 January, I saw him one morning in Aberdeen in the drug store. He happened to be in there and came over and spoke to me and asked how I was feeling. This was about three days before I went to the hospital. I hold him I didn't feel very bad and he told me down there that I was pregnant and he knocked it up. I did not pay him anything for his services."

Prior to the birth of her bastard child on 28 September, 1930, the prosecuting witness was asked by the State in reference to a conversation she had had with defendant in regard to an abortion. The defendant objected. The objection was overruled. Defendant excepted and assigned error. We think the question prejudicial and constitutes reversible error. The prosecuting witness went to see defendant as she felt bad, about 24 January, 1931, and did not tell defendant she was pregnant. Her regular period was 18 January, and shortly before that time she had sexual intercourse with a man. The conversation prior to the birth of the bastard child on 28 September, 1930, was not relevant to the crime that defendant was charged with and on trial for in this case. For the reasons given, there must be a

New trial.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1932

IN THE MATTER OF THE CUSTODY OF KATHERINE TENHOOPEN, MINOR.

(Filed 17 February, 1932.)

1. Courts A a—Respondent's motion for removal of hearing for custody of minor child to juvenile court held properly denied.

Where the father of a minor child brings a writ of *habeas corpus* in the Superior Court for the custody of the child, the respondent being the maternal grandmother of the child in whose care the child was left by its mother, the writ is governed by the provisions of C. S., 2241 and the Superior Court has original jurisdiction, and the respondent's motion to transfer the hearing from the Superior Court to the juvenile court is properly overruled. C. S., 5039(3).

2. Parent and Child A c—The contest in this case was in effect between husband and wife for custody of minor child and C. S., 2241 applied.

Where a minor child is left in the care of its maternal grandmother by its mother while she went to another state in order to establish residence for bringing divorce proceedings, and the father of the child brings a writ of *habeas corpus* against the grandmother for the custody of the child: *Held*, the contest is to all intents and purposes between the husband and wife for the custody of the child and the writ comes within the spirit and letter of C. S., 2241, giving the Superior Court jurisdiction to award the custody of the child under the provisions of the statute.

3. Same—The father is the natural guardian of his child and is ordinarily entitled to its custody.

It is the moral and legal duty of a father to support and educate his children, and, as a general rule, he is the natural guardian of his children and is entitled to the custody and control of his children against all the world.

IN RE TENHOOPEN.

APPEAL by Mrs. E. T. Harmon, respondent, from *Sink, J.*, 14 July, 1931. From GUILFORD. Affirmed.

This is a case heard before his Honor, H. Hoyle Sink, judge, upon writ of *habeas corpus,* in which the petitioner, Paul E. TenHoopen, father of the minor in question, asked that the custody of his child, Katherine TenHoopen, a minor child five years of age, be awarded to him. The child being at the time of the issuing of the writ in the custody of the respondent, Mrs. E. T. Harmon, the maternal grandmother of the child, who lives in High Point, North Carolina, the petitioner being a resident of the city of Cleveland, State of Ohio, where he was transferred by his employer, the Cyclone Fence Company. He formerly owned a home in Charlotte, N. C., where he and his wife and children resided.

The court below found the facts and rendered judgment as follows: (a) That the minor, Katherine TenHoopen, heretofore declared by the court to be in its custody, was left by its mother, Katherine TenHoopen, with its maternal grandmother, Mrs. E. T. Harmon, of High Point, N. C., while she, the mother, went to the State of Nevada for the purpose of establishing a residence and obtaining a divorce from the petitioner herein. (b) That the maternal grandmother, Mrs. E. T. Harmon, is a woman of the highest character and has the absolute confidence of the court, and is financially and otherwise capable and willing to care for and rear said minor. (c) That the petitioner, Paul E. TenHoopen, being the father of the minor, Katherine TenHoopen, is able and worthy of the custody of said minor. Wherefore, it is ordered, adjudged and decreed that the custody of the minor, Katherine TenHoopen, be awarded to the father, Paul E. TenHoopen, upon the following conditions: (1) That the petitioner, Paul E. TenHoopen, before receiving the custody of Katherine TenHoopen, shall file a bond, to be approved by the clerk of the Superior Court of Guilford County, with said clerk of the Superior Court of Guilford County, providing for its forfeiture in the event of the petitioner's, Paul E. TenHoopen's, failure to return the minor, Katherine TenHoopen to the jurisdiction of this court upon thirty days' notice at any time within the period of three years from this date, and providing further that the petitioner, Paul E. TenHoopen, and others in whose custody he may leave said minor, will permit said minor to be returned to High Point, N. C., to be placed in the custody of Mrs. E. T. Harmon, for such part or all of the vacation period beginning fifteen days after the close of her school and to be returned to the residence of the petitioner within fifteen days prior to the opening of the fall term of the school, to which said minor shall go, the child to be at all times in the legal custody of Mrs. E. T. Harmon during her stay in

North Carolina, and shall be brought to and from North Carolina at the expense of said Mrs. E. T. Harmon. (2) It is further provided that either parent of said Katherine TenHoopen shall be permitted to see the said minor at all reasonable and convenient times during the life of this order regardless of whether she be, for the time being, in the custody of her father, Paul E. TenHoopen, or in the temporary custody of her grandmother, Mrs. E. T. Harmon. (3) Pending the filing of the bond as herein provided for, the petitioner being allowed thirty days to file same, and the appeal, if any, to the Supreme Court of North Carolina, the custody of the child is temporarily awarded to Mrs. E. T. Harmon.

The respondent made numerous exceptions and assignments of error and appealed to the Supreme Court.

Gold, York & McAnally and D. H. Parsons for respondent, Mrs. E. T. Harmon.

Stancill & Davis for petitioner.

CLARKSON, J. We think the only material exception and assignment of error made by respondent, is as follows: "That the court below overruled the written motion of the respondent to transfer the hearing and controversy relative to the custody of the minor child to the Juvenile Court of the city of High Point." We do not think this exception and assignment of error on the part of the respondent, the maternal grandmother of the child, can be sustained on the facts of this record. The respondent contends that C. S., 5039 is applicable. We cannot so hold.

This statute is in part, as follows: "The Superior Courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at the time within their respective districts: (3) Who is dependent upon public support or who is destitute, homeless, or abandoned, or whose custody is subject to controversy. When jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purpose of this article during the minority of the child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interests of the State."

The above statute has been so often discussed that we refer to some of the cases: *In re Hamilton,* 182 N. C., 44, *S. c.,* 183 N. C., 57, petition to rehear dismissed; *In re Blake,* 184 N. C., 278; *In re Coston,* 187 N. C., 509. It may be noted in the *Hamilton case, supra,* that the

mother of the child was dead. Under the facts and circumstances of this case, we think that this writ of *habeas corpus* comes within the spirit, as well as the letter, of section 2241, which is as follows: "When a contest shall arise on a writ of *habeas corpus* between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same; provided, that where the father is a nonresident of North Carolina and the custody of the child has been awarded, by an order of a court of this State, to the mother who is a resident of North Carolina, no motion on the part of such nonresident father may be heard or entertained by the court for a modification of the order of the court, unless such father has first shown under oath that, since the making of the original order, he has regularly contributed to the support of said child according to his means and according to the needs of the child, and, if said motion is heard and at said hearing such fact is not established to the satisfaction of the court, the motion for a modification of the order shall be denied, unless the court shall find that, at the time of said hearing the mother is not a fit and proper person to have the custody of said child. *Provided,* that this act shall only apply after the case has been reopened on time."

The child was in the constructive custody of the wife, the actual or temporary custody being in the maternal grandmother, as agent of the wife. We think this, to all intents and purposes, a contest between the husband and wife for the custody of the child, and comes within the statute. C. S., 2241, *supra.* The whole matter has been gone into thoroughly in a similar case, and we see no reason to repeat. *Clegg v. Clegg,* 186 N. C., 28, *S. c.,* 187 N. C., 730.

We think there was sufficient competent evidence to sustain the findings of fact by the court below. Taking the evidence unobjected to on the record, we think it sufficient for the court below to base its findings of fact and conclusions of law. If the evidence was incompetent in reference to the wife, we think it immaterial. We hold that the father is the natural guardian of his children, and as a general rule and at common law has the paramount right to the custody and control of his children against all the world. It is the moral and legal duty of the father to provide for the protection, maintenance and education of his

children. *Newsome v. Bunch,* 144 N. C., 15; *In re Turner,* 151 N. C., 474; *In re Means,* 176 N. C., at p. 307.

In re Means, supra, at p. 313, it is said: "In *Newsome v. Bunch,* 144 N. C., 15 (*S. c.,* 142 N. C., 19), the child was awarded to a nonresident father, who had shown that he was worthy and in every way qualified to care for it, and a like principle is approved and applied elsewhere in well considered cases. *Ex Parte Davidge,* 72 S. C., 16; *Wood v. Wood,* 5 Paige Chan., 596; 29 Cyc., 1600. It may be well to note that on a hearing of this kind the judgment is not intended to be a final determination of the rights of the parties touching the care and control of the child, but, on a change of conditions, properly established and in the courts of the mother's domicile or other courts having jurisdiction, the question may be further heard and determined. 29 Cyc., 1605, citing *McGouch v. McGouch,* 126 Ala., 170, and other cases."

In Peck, Domestic Relations, 3d ed. (1930), chap. 18, p. 371, sec. 30, it is said: "The father has at common law the unquestioned right of custody and control over his minor children as against the mother, and still more clearly as against any third person." *Patrick v. Bryan, ante,* 62.

We see no reason to disturb the judgment of the court below. *In re Blake,* 184 N. C., 278. The judgment is

Affirmed.

LELIA M. BROWN v. MARGARET TURNER, ADMINISTRATRIX OF FRANK TURNER, DECEASED.

(Filed 17 February, 1932.)

1. Mortgages F a—Mortgagor's liability to mortgagee is not changed by mortgagee's agreement with subsequent purchaser to release part of land.

Where land subject to a mortgage is sold successively by deeds in which the grantees assume the mortgage indebtedness, and thereafter the mortgagee releases a part of the land from the mortgage lien by agreement with a subsequent purchaser without the knowledge or consent of the mortgagor: *Held,* the primary liability of the mortgagor to the mortgagee is not affected by the release, and the mortgagee may recover against the mortgagor on a note executed by him and secured by the mortgage.

2. Mortgages C a—Personal liability on note secured by a mortgage is not merged therein.

The execution of a mortgage does not merge the personal liability of the mortgagor on his note secured thereby, and the mortgagee, upon default, may sue either *in personam* on the note or *in rem* by foreclosure, or may unite both remedies in one action.

3. Mortgages C d—As between the parties a release of part of land from mortgage does not affect mortgagee's lien on the remainder.

As between the original parties a release of part of the land mortgaged from the mortgage lien does not affect the mortgagee's lien on the remainder, which is security for the whole debt.

APPEAL by defendant from *Stack, J.*, at September Term, 1931, of BUNCOMBE. Affirmed.

This is an action on a promissory note for $375 executed and delivered to the plaintiff by Frank Turner, the defendant's intestate. Trial by jury was waived, the material facts being as follows:

On 13 May, 1926, Frank Turner bought from the plaintiff and her sister, Ida M. Cathey, two houses and lots described as lots 8 and 9 at the price of $3,000. He paid $750 and executed six notes for $375 each, aggregating $2,250. To secure payment he executed a deed of trust on both lots to the Central Bank and Trust Company. Prior to 8 May, 1928, the debt had been reduced to $1,500, and prior to this date W. B. Cathey through *mesne* conveyances had acquired Frank Turner's title to the lots. Cathey made improvements in the house on lot 9, thereby increasing its value $500. The value of lot 9 was then $2,000 and the value of lot 8 was $1,500. On 8 May, 1928, the plaintiff and her sister, Ida M. Cathey, made an agreement with W. B. Cathey that the trustee should release lot 9 from the operation of the deed of trust, so that said Cathey might obtain a first mortgage loan on the property. By consent of these parties the Central Bank and Trust Company released lot 9 on 8 May, 1928, without notice to Frank Turner. Cathey then executed a mortgage or deed in trust on this lot to secure $1,200 which he borrowed from the Blue Ridge Building and Loan Association. At this time Cathey paid $750 of the remainder due on the notes ($1,500) secured by the deed of trust to the Central Bank and Trust Company and paid the interest on the remaining $750 to 13 November, 1928, leaving unpaid two notes for $375 each, the one in suit held by the plaintiff and the other by Ida M. Cathey. The trustee held lot 8 as security for these notes. Lot 9 was sold under the mortgage given by Cathey.

The defendant contends upon these facts that Cathey became the principal debtor and Frank Turner a surety, who was discharged from liability to the mortgagee by the trustee's release of one of the lots.

The other question is whether the action is barred by the provisions of section 100 of the Consolidated Statutes.

John H. Cathey and James E. Rector for plaintiff.

J. E. Baumberger and F. W. Thomas for defendant.

ADAMS, J. An agreement by the purchaser of an equity of redemption with his vendor that he will assume and pay the mortgage debt will render him personally liable, not only to his grantor but also to the holder of the mortgage. As between themselves the purchaser is regarded as the principal debtor and the grantor as surety; and the mortgagee's right to maintain an action upon this agreement rests upon the ground that the contract of the purchaser is a collateral stipulation obtained by the mortgagor, which by equitable subrogation inures to the benefit of the mortgagee. The mortgagee is entitled to appropriate for his debt any security held by his debtor for its payment, but he has no rights against the purchaser which could not under the contract of purchase have been claimed by the original debtor; and in the application of this equitable doctrine the mortgagee has been allowed to enforce the personal liability of the purchaser only to the extent of a deficiency upon a foreclosure sale of the mortgaged premises and only if the party to whom the purchaser's agreement was given was himself personally liable for the payment of the mortgage debt. The mortgagor of course remains liable to the mortgagee as the debtor to whom the credit was directly extended. This is the principle set forth in *Baber v. Hanie,* 163 N. C., 588. On the principle that one for whose benefit a promise is made may maintain an action upon the promise, it is held in a later case that the mortgagee may sue the mortgagor's grantee who has assumed the payment of the debt without foreclosing the mortgage or joining the mortgagor in the action. *Rector v. Lyda,* 180 N. C., 577. See *Keller v. Parrish,* 196 N. C., 733, and *Parlier v. Miller,* 186 N. C., 500.

We have restated these principles for the reason that the defendant cites *Baber v. Hanie* and *Parlier v. Miller* as authority for the position that the mortgagor and the person assuming the payment of the mortgage debt sustained the relation of surety and principal not only as between themselves, but as between themselves and the mortgagee. We do not concur in this statement. The only parties to the present action are the holder of one of the notes and the administratrix of Frank Turner, the mortgagor. Neither of the vendees who assumed the debt is a party. The object of the action is to procure a judgment on the mortgagor's note, not to foreclose the mortgage or to adjudicate the rights of all persons who were connected with the several transactions. The only asserted counterclaim set up in the answer consists simply of averments upon which it is sought to dismiss the suit and to bar the plaintiff's recovery of a judgment. The only point in issue is whether the defendant is indebted to the plaintiff on the note.

The doctrine that the purchaser of an equity of redemption assuming the payment of the mortgage debt is the principal and his grantor the

surety, obtains as between themselves and does not preclude the mortgagee from proceeding against the mortgagor as his principal debtor, at least when he does not assent to the agreement. So far as the mortgagee is interested the mortgagor is not a mere surety. The mortgagee is not required first to foreclose his mortgage; he may bring suit only on the note. The fact that the mortgagor has sold the equity of redemption to a purchaser who assumes the mortgage debt does not change the right of the holder of the note to pursue the personal remedy. He may bring an action *in personam* or an action *in rem*, or he may pursue both remedies in one action. The debt is the primary obligation between the parties and the note is the primary evidence of the debt. The execution of the mortgage does not merge the mortgagor's personal liability. 2 Jones on Mortgages (7th ed.), sec. 1220; 41 C. J., 733, sec. 783; *Ellis v. Hussey*, 66 N. C., 501; *Silvey v. Axley*, 118 N. C., 959; *McCaskill v. Graham*, 121 N. C., 190. His Honor was therefore correct in holding that the release of the lien on one of the lots did not discharge the primary liability of the mortgagor. As between the original parties the release of a part of the mortgaged premises does not affect the mortgagee's lien upon the residue; this is bound for the whole debt. 2 Jones, *supra*, secs. 722, 981.

Upon the facts found by the trial court the action is not barred by section 100 of the Consolidated Statutes. Judgment

Affirmed.

CHARLES N. PARKER AND FRED A. BISHOP v. CENTRAL BANK AND TRUST COMPANY OF ASHEVILLE, ET AL.

(Filed 17 February, 1932.)

1. Banks and Banking C c—Definition of "deposit for a specific purpose."

In order to constitute "a deposit for a specific purpose" as defined by law it is necessary that the parties intend at the time that the proceeds of the deposit shall remain segregated and not be used by the bank in its ordinary business or commingled with its general funds, that there be an agreement, express or implied, that the deposit shall not constitute a part of the general funds of the bank or be subject to its exclusive use or control, that the bank have notice or knowledge of the character of the deposit at the time it is made, and that the deposit must in fact swell the assets of the bank, and the mere tracing of the money into the common funds of the bank is not a sufficient identification or segregation of the deposit.

2. Banks and Banking H d—Deposit in this case held to be for specific purpose and constituted a preferred claim against receiver.

Where a sum is deposited in a bank under an agreement that the bank hold the funds and distribute them in accordance with an award to be made between the interested parties by arbitration, and the bank receives the deposit and gives a receipt therefor stating that it had received the amount deposited in escrow under the agreement and that it would pay the sum to the interested parties in accordance therewith, and the deposit is credited to the bank's "escrow agreement account" in its trust department, and the bank becomes insolvent: *Held*, the deposit was delivered to the bank under an agreement that it be applied to a particular purpose, and the bank had sufficient knowledge and notice of the trust character of the deposit and the purpose to which the deposit was to be applied, and the deposit was "a deposit for a specific purpose," entitling the claimants to a preferred claim therefor against the assets of the bank in the receiver's hands.

CIVIL ACTION, before *Stack, J.*, at November Term, 1931, of BUNCOMBE.

The cause was submitted upon an agreed statement of facts, which, in substance, are as follows: Prior to 23 January, 1928, the plaintiffs rendered certain services upon the Arcade Building in Asheville, belonging to the estate of E. W. Grove. A dispute arose with respect to such services and it was agreed that the division of the fund should be determined by arbitration. Thereafter the Grove estate paid by check the sum of $21,241.71. The check was endorsed by plaintiffs as follows: "Pay to the order of the Central Bank and Trust Company, for special deposit as an escrow, subject to the terms of the agreement between the undersigned payees, of date 23 January, 1928. Charles N. Parker, Fred A. Bishop." On the same day this check was deposited in the defendant, Central Bank and Trust Company, and said bank gave a receipt for said fund as follows: "We have had deposited with us escrow agreement, dated 23 January, 1928, between Fred A. Bishop, of Richmond, Virginia, and Charles N. Parker, of Asheville, N. C. We are also in receipt of check dated 26 August, 1929, for $21,241.71, payable to Fred A. Bishop and Charles N. Parker. This check is drawn by estate of E. W. Grove by St. Louis Union Trust Company of St. Louis, Mo. These funds will be paid out by us in accordance with the terms of the escrow agreement. The escrow agreement referred to was the agreement between Bishop and Parker that the division of said fund between them should be determined by arbitration. The last paragraph of the escrow agreement was as follows: "It is further agreed that upon settlement with said Grove estate by private treaty or upon rendition of the final judgment against said Grove estate, that the attorneys of the parties hereto shall have the right to collect and receive the moneys

found to be due to the parties hereto, or either or both of them, in accordance with the terms of said settlement or judgment, and the same forthwith to deposit as an escrow in the Central Bank and Trust Company of Asheville, N. C., subject thereafter to be disbursed to the parties respectively, in accordance with the terms of the award of the arbitrators, as hereinbefore provided."

The sum in controversy was received by the trust department of defendant and deposited in the commercial department of said bank and entered on the books of the bank and credited to the account known as the "escrow agreement account." Thereafter, on 10 November, 1930, the defendant suspended business and closed its doors.

Subsequently, on 12 December, 1930, the arbitrators, after hearing the evidence, awarded $1,401.67 of said fund to the plaintiff, Bishop, and $19,801.67 to the plaintiff, Parker. After the award was made the plaintiff made demand upon the liquidating agent of the defendant to deliver said fund in accordance with the terms of the deposit and escrow agreement. The defendant declined to deliver said fund upon the ground that the money had become intermingled with other funds of defendant, and that plaintiffs thereupon were merely unsecured creditors of the bank. The cause was heard and the trial judge entered a judgment, the pertinent portion of which is as follows: "It is, thereupon, ordered, adjudged and decreed that the claim of the plaintiffs be and the same is hereby allowed as a preferred claim against the assets of the Central Bank and Trust Company, and when final settlement is made by said defendant the said claim shall be allowed priority in payment over the claims of the common creditors and shall either be paid in full, as a preferred claim, or, in the event of an insufficient amount, to pay all of the preferred claims, then it shall share pro rata with the other preferred claims against the said Central Bank and Trust Company."

From the foregoing judgment the defendant appealed.

Merrimon, Adams & Adams and Carter & Carter for plaintiffs.
Johnson, Smathers & Rollins for defendants.

BROGDEN, J. The questions of law involved in the appeal may be stated as follows:

(1) Is the deposit which is the subject of the controversy "a deposit for a specific purpose" as contemplated and defined by law?

(2) Does such deposit entitle the owner or beneficiary thereof to a preferred claim upon the assets of an insolvent bank?

Bank deposits are classified by law as general deposits, special deposits, and deposits for a specific purpose. The definitions of such de-

posits are set forth in *Corporation Commission v. Trust Co.*, 193 N. C., 696, 138 S. E., 22. The Court says: "A deposit for a specific purpose is made when money or property is delivered to a bank to be applied to a designated object, or for a purpose which is particularly defined, as, for example, the payment by the bank of a specified debt. It is neither general nor wholly special. It partakes of the nature of a special deposit to the extent that the title remains in the depositor, and does not pass to the bank. The consequence is that the money, if not applied, or if misapplied, may be recovered as a trust deposit." The general principles governing such deposits have been discussed and applied in the following cases, to wit: *Bank v. Davis*, 114 N. C., 343, 19 S. E., 280; *Corporation Commission v. Trust Co.*, 193 N. C., 696, 138 S. E., 22; *Corporation Commission v. Trust Co.*, 194 N. C., 125, 138 S. E., 530; *Bank v. Corporation Commission*, 201 N. C., 381, 160 S. E., 360. The whole question is discussed with great clearness of detail by *Parker, Circuit J.*, in *Poission v. Williams; First National Bank of Ventura v. Williams; Marshburn v. Williams*, 15 Fed. (2d), pp. 582, *et seq.*

The foregoing decisions and others of like tenor establish certain ear-marks or indicia by which a deposit for a specific purpose or a trust deposit may be recognized and established. These indicia may be classified as follows: (1) The parties must intend at the time the deposit is made that the proceeds thereof shall remain segregated and not commingled with the general funds of the bank and used by it in accordance with the ordinary customs or usages of banking practice; (2) there must be an agreement, express or implied, that such deposit shall not constitute a part of the general funds of the bank and subject to its exclusive use and control in the ordinary course and prosecution of its business; (3) notice or knowledge of the trust character of the deposit must be disclosed or appear at the time the deposit is received by the bank; (4) the deposit must, in fact, swell or increase the assets of the bank; (5) the mere tracing of the money into the common funds of the bank is not a sufficient identification or segregation of the deposit.

Applying the pertinent principles of law to the facts disclosed by the record, it is manifest that the deposit involved in this case was delivered to the bank to be applied to a designated object or for a purpose particularly defined in the escrow agreement. This escrow agreement put the bank upon notice that the fund was to be held pending an arbitration proceeding and to be disbursed in accordance with the award. Indeed, the bank received the fund with sufficient knowledge of the trust character and quality of the deposit, upon express agreement that such fund was to be used exclusively for the designated purpose. Therefore, the

court is of the opinion that the fund was a trust deposit. Consequently, the law, as applied by decisions and textwriters impresses upon such fund a preferential quality. Hence, it is concluded that the judgment was correct.

Affirmed.

EVERETT GOSNELL, BY HIS NEXT FRIEND, S. K. GOSNELL, v. SOUTHERN RAILWAY COMPANY, BILTMORE HOSPITAL, INCORPORATED, AND HALCYONE PARKER HILLIARD, EXECUTRIX OF DR. WM. D. HILLIARD.

(Filed 17 February, 1932.)

1. Physicians and Surgeons D b—Person employing physician is liable to injured party only for failure to use due care in selecting physician.

Where an employer, in recognition of his legal or moral duty, employs a physician or surgeon to attend an injured employee, the only duty which the employer owes the employee in this respect is to exercise reasonable care in the selection of the physician or surgeon, and where, in an action by the employee against the employer to recover damages for the negligent treatment of the employee by the physician selected by the employer, there is no allegation that employer failed to exercise reasonable care in the selection of the physician, a judgment dismissing the action as to such employer is correct.

2. Hospitals C a—Hospital is not liable for negligence of physician not employed or selected by it.

A hospital which undertakes to furnish only the facilities for an operation or for the treatment of a patient is not responsible for the negligence of a physician chosen by the injured person or by a third person for him, and where, in an action against a hospital for damages caused by the negligence of a physician, there is no allegation that the physician was employed by the hospital or treated the patient as agent of the hospital, the action is properly dismissed as to the hospital, there being no cause of action stated against it.

3. Judgments L b—Judgment for personal injury against tort-feasor will not bar action against physician for negligent treatment of injuries.

A judgment recovered against a person negligently causing a personal injury to the plaintiff will not bar an action by the plaintiff against a physician or his executrix for damages caused by the negligent treatment of such injuries by the physician, the two causes of action being separate and distinct, and the second action not arising out of the negligence alleged in the first.

APPEAL by plaintiff from *Stack, J.*, at October Term, 1931, of MADISON. Affirmed as to defendants, Southern Railway Company and Biltmore Hospital, Incorporated; reversed as to defendant, Halcyone Parker Hilliard, executrix.

This is an action to recover of defendants damages for personal injuries suffered by plaintiff, resulting from the unskillful and negligent treatment of plaintiff's broken leg by Dr. William D. Hilliard, testator of the defendant, Halcyone Parker Hilliard, executrix, such treatment having been given to plaintiff while he was in a hospital owned and operated by the defendant, Biltmore Hospital, Incorporated, pursuant to the employment of the said Dr. Hilliard by the defendant, Southern Railway Company, to treat plaintiff's broken leg, as a physician and surgeon, in said hospital.

On or about 8 August, 1926, plaintiff, one of its employees, was injured by the negligence of the defendant, Southern Railway Company. The said defendant caused the plaintiff to be taken immediately after he was injured to a hospital owned and operated by the defendant, Biltmore Hospital, Incorporated, and to be treated in said hospital professionally by Dr. William D. Hilliard, a physician and surgeon, duly licensed to practice his profession in this State. At the time he was employed by the defendant, Southern Railway Company, to treat the plaintiff, and while he was treating plaintiff in the hospital owned and operated by the defendant, Biltmore Hospital, Incorporated, Dr. Hilliard was actively engaged in the practice of his profession in Buncombe County, North Carolina.

As the result of his injuries caused by the negligence of the defendant, Southern Railway Company, plaintiff's leg was broken between the knee-joint and the hip-joint. At the request of the defendant, Southern Railway Company, and pursuant to his employment by said company, for that purpose, Dr. Hilliard undertook to treat and did treat plaintiff's broken leg, while he was in the hospital. It is alleged in the complaint and, for the purposes of this appeal, admitted by the defendants, that his treatment was unskillful and negligent, and that as the result of said unskillful and negligent treatment, plaintiff was seriously and permanently injured, to his great damage.

This action was begun on 4 January, 1928, to recover of the defendants as damages for the injuries resulting from the unskillful and negligent treatment of plaintiff's broken leg, the sum of $10,000. Since the commencement of the action, Dr. William D. Hilliard has died. His executrix, Halcyone Parker Hilliard, has been duly made a party to the action.

On 6 October, 1926, the plaintiff instituted an action in the Superior Court of Buncombe County against the defendant herein, Southern Railway Company, to recover damages for the personal injuries suffered by him, resulting from the negligence of said defendant on 8 August, 1926. That action was tried at the October Term, 1927, of the Superior

Court of Buncombe County and resulted in a judgment that plaintiff recover of the defendant, Southern Railway Company, the sum of $2,750. That judgment has been fully satisfied by the payment to the plaintiff by the Southern Railway Company of its amount.

When this action was called for trial, after the pleadings had been read, the court was of opinion that upon the facts admitted therein, as above set out, the plaintiff was not entitled to recover of the defendants, or of either of them.

From the judgment dismissing the action, in accordance with the opinion of the court, plaintiff appealed to the Supreme Court.

John A. Hendricks for plaintiff.

R. C. Kelly, Guy Roberts and Jones & Ward for defendant, Southern Railway Company.

Johnson, Smathers & Rollins for defendants, Biltmore Hospital, Incorporated, and Halcyone Parker Hilliard, executrix.

CONNOR, J. It is well settled in this and other jurisdictions that where an employer, in recognition of his legal or moral obligations to his employee, employs a physician or surgeon to render professional services to his employee, who is in need of such services, whether as the result of the negligence of the employer or otherwise, the only duty which the employer owes to such employee, is to exercise reasonable care in the selection and employment of the physician or surgeon. Where the employer has exercised such care, and has employed a physician or surgeon who is duly licensed to practice his profession in this State, who is actively engaged in such practice, and who is not known to the employer as wanting in professional skill or character, the employer will not be held liable for damages resulting from the unskillful or negligent treatment of his employee by the physician or surgeon employed by him. *Barden v. R. R.*, 152 N. C., 318, 67 S. E., 971. The general rule is that an action for damages caused by the negligence or unskillfulness of a physician or surgeon engaged by one person to attend upon another, professionally, cannot be maintained against the employer, unless he was himself chargeable with a want of proper care in the selection and employment of the physician or surgeon. 19 A. L. R., p. 1183. In the absence of an allegation in the complaint in the instant case that the defendant, Southern Railway Company, failed to exercise reasonable care in the selection and employment of Dr. Hilliard to treat the plaintiff, professionally, after he was injured by the negligence of said defendant, the facts stated in the complaint are not sufficient to constitute a cause of action against the defendant, Southern Railway Company.

For this reason, there is no error in the judgment dismissing the action as to said defendant.

In *Penland v. Hospital,* 199 N. C., 314, 154 S. E., 466, it is said: "The owner of a hospital, whether an individual, firm or corporation, is not liable for damages resulting from a surgical operation, or from treatment, medical or otherwise, in said hospital, when the surgeon who performed the operation or the physician who treated the patient, was employed by the patient, or by some one other than such owner, and the damages resulted from the negligence of such surgeon or physician. The owner of the hospital, when the hospital is conducted for his, their, or its gain, and not for charitable purposes, is liable for such damages when they result from injuries caused by the negligence of such owner, or by the negligence of his, their or its agents, servants or employees acting within the scope of their employment. When the owner of the hospital undertakes only to furnish the facilities for the operation, or for the treatment of the patient, and the patient selects and employs the surgeon who operates on or the physician who treats the patient, such owner, although he, they or it charges for the use of the facilities furnished, is not liable for damages resulting solely from the negligence of the surgeon or physician." In the complaint in the instant case, it is not alleged that Dr. Hilliard was an employee of the defendant, Biltmore Hospital, Incorporated, or treated the plaintiff as the agent of said defendant. In the absence of such allegations, the facts stated in the complaint are not sufficient to constitute a cause of action against the defendant, Biltmore Hospital, Incorporated. For this reason there is no error in the judgment dismissing the action as against the said defendant.

The cause of action alleged in the complaint in this action against Dr. William D. Hilliard, upon which plaintiff demands judgment against the defendant, Halcyone Parker Hilliard, his executrix, did not arise out of the negligence of the defendant, Southern Railway Company. It arose out of and is founded upon the unskillful and negligent treatment of plaintiff's broken leg by Dr. Hilliard. The judgment recovered by the plaintiff against the Southern Railway Company in the action tried in the Superior Court of Buncombe County and fully satisfied by said company before the commencement of this action, is not a bar to plaintiff's recovery in this action against the defendant, Halcyone Parker Hilliard, executrix of Dr. William D. Hilliard. The cause of action on which said judgment was recovered is separate and distinct from the cause of action alleged in the complaint in this action. For this reason plaintiff is not barred from recovery against said defendant

in this action by said judgment. There is error in the judgment dismissing the action as to the defendant, Halcyone Parker Hilliard, executrix.

The judgment dismissing the action as to the defendants, Southern Railway Company and Biltmore Hospital, Incorporated, is

Affirmed.

As to the defendant, Halcyone Parker Hilliard, executrix, it is

Reversed.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. JOHN C. HILL.

(Filed 17 February, 1932.)

1. Indemnity A b—Sheriff held liable on agreement to indemnify surety on his bond under the facts of this case.

Where a sheriff in his application for a surety bond obligates himself among other things to indemnify the surety against loss arising from the execution of the bond, and in an action against the surety in the Federal Court in another State a judgment is rendered against it on the bond for an alleged assault by the sheriff's deputies on offenders against the laws of this State whom the deputies arrested there and brought back here: *Held*, the surety has suffered loss by reason of the execution of the bond and may recover the amount of such loss against the sheriff on his agreement to indemnify, the action being on the contract of indemnity executed here and not on the judgment rendered in the other state, and the principle that courts of one state will not take jurisdiction of an action brought on the bond of an officer of another state has no application to the present action.

2. Controversy without Action C a—Agreement that court should render judgment on facts agreed waives all defenses set up in answer.

Where a defendant agrees that the court should render judgment according to an agreed stetement of facts submitted to it he thereby waives all defenses set out in the answer theretofore filed.

STACY, C. J., not sitting.

APPEAL by plaintiff from *Stack, J.*, at May-June Term, 1931, of HENDERSON. Reversed.

This is an action to recover on a contract by which the defendant covenanted and agreed to indemnify the plaintiff against loss by reason or in consequence of the execution by the plaintiff of a bond as surety for the defendant.

The action was heard and tried on an agreed statement of facts, which appears in the record. These facts are substantially as follows:

At the election held in Henderson County, North Carolina, in November, 1926, the defendant, John C. Hill, was elected sheriff of said county for a term of two years, beginning on or about 1 December, 1926. Before qualifying as such sheriff, the defendant was required by statute to execute and file with the board of commissioners of Henderson County, an official bond, payable to the State of North Carolina, and conditioned as provided by statute, C. S., 3930.

On 22 November, 1926, the defendant applied to the plaintiff to become his surety on said bond.

The plaintiff is a corporation organized under the laws of the State of Maryland, with its principal office in the city of Baltimore, in said State, and duly licensed to execute bonds in the State of North Carolina, as surety. The application made by the defendant to the plaintiff was in writing, and contained the following paragraph:

"I certify that the answers given to the foregoing interrogations are true, and in consideration of the United States Fidelity and Guaranty Company executing the bond herein applied for, I do hereby covenant, promise and agree to pay the premium of $25.00 per annum, in advance, during the continuance of the bond, and to indemnify and keep indemnified the said company from and against any and all loss, cost, charges, suits, damages, counsel fees, and expenses of whatever kind or nature (including such costs and expenses, if any, which may be incurred by said company in case it shall institute legal proceedings to be relieved from further liability on said bond), which said company shall or may, for any cause, at any time, sustain, or incur, or be put to, for or by reason or in consequence of said company having entered into or executed said bond."

In consideration of the covenants and agreements of the defendant contained in said application, the plaintiff executed, as surety, the official bond, which the defendant was required to file and did file with the board of commissioners of Henderson County. This bond was duly approved, and recorded as required by statute.

While the said bond was in force, one H. A. Cook instituted an action thereon in the Court of Common Pleas of Greenville County, in the State of South Carolina, to recover damages for an assault made on him by two deputies of the defendant. In said action it was alleged that two deputies of the defendant wrongfully and unlawfully assaulted and arrested the said H. A. Cook, in the city of Greenville, South Carolina, and kidnapped and unlawfully carried him into the State of North Carolina. On the petition of the defendant, the action was removed from the State court to the United States District Court for the Western District of South Carolina, for trial. The defendant in this action was

not a party to the action instituted on his bond in South Carolina; the said defendant was, however, notified by the plaintiff of the pendency of the action, and, with his attorney, attended the trial, where he testified as a witness for the plaintiff. The defendant was requested by the plaintiff not to join himself as a defendant in said action, for the reason that plaintiff was of the opinion that without such joinder the court in which said action was pending for trial, was without jurisdiction.

At the trial of the action in the United States District Court for the Western District of South Carolina, judgment was rendered against the plaintiff for the sum of $1,000, and costs.

The plaintiff has paid the amount of said judgment, to wit: $1,181.60, and has also paid as a fee to its counsel in said action the sum of $500.

The court was of opinion that on the statement of facts agreed, the plaintiff is not entitled to recover of the defendant in this action, and therefore dismissed the action.

From judgment dismissing the action, and taxing it with the costs, the plaintiff appealed to the Supreme Court.

Ewbank, Whitmire & Weeks for plaintiff.
Ray, Redden & Redden for defendant.

CONNOR, J. After the pleadings had been filed in this action, and when the same came on for trial, the parties submitted to the court an agreed statement of facts. It was agreed that if on these facts the court should be of opinion that plaintiff is entitled to recover, judgment should be rendered that plaintiff recover of the defendant the sum of $1,681.50 and the costs of the action, and that if the court should be of opinion that plaintiff is not entitled to recover, judgment should be rendered, dismissing the action. The court was of opinion that on the facts agreed, plaintiff is not entitled to recover, and thereupon rendered judgment dismissing the action. In this there was error.

By his agreement that the action should be submitted to the court for judgment on the facts agreed, the defendant waived all defenses set out in his answer. It was agreed that plaintiff had sustained a loss in the sum of $1,681.50, by reason and in consequence of its execution of the bond as surety for the defendant. Under the terms of his covenant contained in his written application to the plaintiff, the defendant is liable to the plaintiff for the sum of $1,681.50. Judgment should have been rendered that plaintiff recover of the defendant the sum of $1,681.50, and the costs of the action.

This is not an action on the judgment rendered by the United States District Court for the Western District of South Carolina. The question

discussed in the brief filed for the defendant on his appeal to this Court is not presented on the record. In *Brower v. Watson,* 146 Tenn., 626, 244 S. E., 362, 26 A. L. R., 991, it was held that the courts of one state will not take jurisdiction of an action by a citizen of another state for injury caused to him by breach of the bond of a sheriff, given under the laws of such other state, by an act committed there, when the bond is payable to the state, and the action is to be brought in its name. This principle is sound, but it has no application in the instant case. The judgment is

Reversed.

STACY, C. J., not sitting.

L. S. GORDON ET AL. V. A. L. PENDLETON ET AL.

(Filed 17 February, 1932.)

1. Appeal and Error E h—Although record is not clear in this case the appeal is considered on theory of trial in lower court.

In this action brought against the officers of an insolvent bank by its stockholders and creditors alleging damages caused by the defendant's neglect in its management, a demand upon the receiver to bring the action and its refusal to do so does not clearly appear of record, but it appearing upon information of counsel that the case was not decided in the lower court on this point and that the demand and refusal had been made, the Supreme Court accordingly considers the case on appeal.

2. Corporations C c—Corporate officers are liable for wilful or negligent failure to exercise due care in the performance of their duties.

The directors and managing officers of a corporation are not liable in damages for mere errors of judgment or slight omissions in the performance of their duties, but they are liable in proper cases for loss or depletion of the corporation's assets due to their wilful or negligent failure to exercise reasonable diligence in the performance of their official duties, they being regarded as in the nature of trustees and being required to exercise that degree of care that a man of ordinary prudence would reasonably use in the conduct of his personal business under the circumstances, and upon a breach of this legal duty the corporation may sue in case of solvency, and when insolvent, the receiver may do so.

3. Banks and Banking H b—Evidence in this case held insufficient to sustain action against officers for wrongful depletion of assets.

In this action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the statutory limit, C. S., 220(d), and in making loans to themselves or upon paper with their endorsement without sufficient security, C. S., 221(n): *Held,* the evidence is insufficient to be submitted

to the jury, it appearing that no loss to the assets of the bank had been caused by the acts of the officials, and the judgment of the lower court dismissing the case as of nonsuit is sustained on appeal.

APPEAL by plaintiffs from a judgment of nonsuit rendered by *Frizzelle, J.*, at November Term, 1931, of PASQUOTANK.

The Carolina Banking and Trust Company was a corporation which transacted a banking business in Elizabeth City from 21 October, 1921, until 12 August, 1929. At the latter date the Corporation Commission took charge of its affairs and put it in process of liquidation on account of its alleged insolvency. When the doors were closed some of the defendants were directors, one was president, one, vice-president, one, cashier, and another assistant cashier. The complaint alleges that others were members of the loan board and of the executive committee.

The plaintiffs L. S. Gordon and G. E. Pritchard, who were stockholders, instituted the present action in their own right and as creditors, and on behalf of all other creditors of the corporation. They alleged that before beginning the action they called upon the Corporation Commission to bring suit and that the Corporation Commission declined to do so or to join in this action.

The plaintiffs allege in substance, but with minute detail, that the defendants failed and refused to perform their duties with a fair and reasonable measure of skill; failed and refused to regulate and manage the business of the corporation with a reasonable degree of safety; failed and refused to exercise due diligence in the collection of solvent loans and to disclose the impairment of the bank's capital and the insufficiency of its surplus and wrongfully permitted its officers and directors to borrow money from the bank without good collateral or ample security and without the approval of a majority of the board of directors expressed by written resolution; also that the officers, employees and directors unlawfully made loans to themselves, to each other and to other persons in excessive and unlawful amounts upon direct and indirect obligations, and in other respects failed and refused to perform the duties imposed upon them by law.

They further allege that by reason of the negligence of the defendants in the respects set out in the complaint the bank was destroyed and rendered insolvent; that its debts were left unpaid and that its assets were greatly impaired, by reason of which plaintiffs have been damaged in a large amount.

The defendants in their answer denied the material allegations of the complaint and alleged that the plaintiffs were stockholders in the bank, and that they had circulated slanderous, defamatory and derogatory reports with reference to its solvency, to the great damage of the defend-

ants. At the close of the plaintiffs' evidence the defendants moved for nonsuit; their motion was allowed and the plaintiffs excepted and appealed.

Ward & Grimes for plaintiffs.

Ehringhaus & Hall, J. H. LeRoy, Jr., and McMullan & McMullan for defendants.

ADAMS, J. We are informed that the present action was instituted after the plaintiff had ineffectually requested the banking department of the Corporation Commission to bring suit against the defendants for delinquency in the discharge of their duties. Proof of the demand and refusal is not clearly set out in the record but we are told that the action was not dismissed for the reason that the demand had not been made. In the briefs, as in the oral argument, only one question is debated: that is, whether the plaintiffs' evidence is of sufficient probative force to call for the verdict of a jury. If it is not, the plaintiffs' counsel, while insisting upon its sufficiency, commendably indulges the "hope that the judgment below will be affirmed."

It is an established principle that the directors and managing officers of a corporation, though ordinarily not responsible for mere errors of judgment or slight omissions, are to be considered and dealt with as trustees, or *quasi*-trustees, in respect to their corporate management, and in proper cases may be held liable for loss or depletion of the company's assets due to their wilful or negligent failure to perform their official duties. *Ham v. Norwood,* 196 N. C., 762; *Corporation Commission v. Bank,* 193 N. C., 113; *Besseliew v. Brown,* 177 N. C., 65. It is said in the case last cited that when they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances and charged with a like duty; that if there is a breach of legal duty in this respect, causing a loss of the company's assets, the corporation may sue; and that in case of insolvency the action may be maintained by the receiver.

The appeal raises the question whether the evidence with its legitimate inferences reveals such disregard of this principle as reasonably requires a reversal of the judgment. The chief assault of the plaintiffs is directed to the defendants' alleged official delinquency in making loans that were unauthorized and unsecured and in permitting a reserve deficiency. We have endeavored to analyze the evidence in reference to these matters and have concluded that the plaintiffs' position cannot be maintained. A detailed statement of the exhibits would involve intricate calculations and would serve no useful purpose. For this reason we restrict the opinion to a statement of the result of our investigation.

With respect to the loans, the defendants have accepted the plaintiffs' statement that the total direct liability of the directors, their families and corporations, was $111,071, and that the endorsements amounted to $102,428.98. The plaintiffs contend that some of these loans were made without good collateral or ample security in breach of C. S., 221(n) and that others were in excess of the amount which the bank was authorized to lend under C. S., 220(d). The defendants admit that the sum $111,071 represents the direct liabilities, but they contend that the indirect obligations of $102,428.98 involve many duplications which, when properly considered, reduce the aggregate obligations of the defendants to an amount but slightly in excess of the sum stated as their direct obligations; and, further, that the estimated financial worth of the defendants exceeds $800,000. The defendants further contend that if no allowance be made for the duplication and the total obligations be measured by the reduced amount of the capital stock (reduced from $250,000 to $125,000) and a few loans according to this standard were in excess of the legal limit, still the loans were made before the capital stock was reduced, and after the reduction every effort consonant with sound banking was made to curtail the loans. As a result, they say, no loan exceeded the limit at the time it was made.

The defendants admit that through inadvertence they made some loans that were unauthorized but insist that upon request of the bank examiner the error was corrected.

We do not see that the plaintiffs' position is materially aided by his contention in reference to the reserve deficiency.

Upon an inspection of the record we find no convincing or satisfactory evidence that the alleged negligent acts of the defendants resulted in any pecuniary loss either to the bank or to the plaintiffs. The judgment is therefore

Affirmed.

G. M. GLENN, TRUSTEE, v. ROSS ASHBY, AGENT.

(Filed 17 February, 1932.)

Deeds and Conveyances C c—Grantee in deed in this case took fee simple under rule in Shelley's case, and limitation over was defeated.

Construing a deed in consideration of natural love and affection to the grantor's grandson by name "for life with remainder to his bodily heirs by ....., if any, otherwise to M.": *Held*, the grantee acquired a fee-simple title under the rule in *Shelley's case*, and the limitation over to M. was defeated by the grantee's having living children, the condition not stipulating that the limitation over should take effect upon the death of the grantee without bodily heirs him surviving.

GLENN *v.* ASHBY.

APPEAL by defendant from *Small, J.*, at October Term, 1931, of FRANKLIN. Affirmed.

This is a controversy without action involving the construction of the following clauses in a deed executed by J. Y. Medlin and Cora T. Medlin to Rex Weathersby on 24 August, 1925:

"That said Cora T. Medlin and husband, J. Y. Medlin, in consideration of the natural love and affection which they have for their grandson, Rex Weathersby, have bargained and sold, and by these presents do grant, bargain, sell and convey to said Rex Weathersby for life with remainder to the bodily heirs of said Rex Weathersby by....., if any, otherwise to J. R. Medlin, certain tracts or parcels of land in Franklin County, State of North Carolina, adjoining the lands of D. W. Spivey and others and bounded as follows, . . .

"To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to the said Rex Weathersby for life with remainder to the bodily heirs of said Rex Weathersby, if any, otherwise to J. R. Medlin to their only use and behoof forever."

On 14 November, 1929, Rex Weathersby and his wife executed and delivered to G. M. Glenn, trustee, two deeds of trust conveying the real property in controversy. The trustee exposed the property to sale under the terms of the trust and the defendant became the last and highest bidder subject to the approval of title. The sale was confirmed by the clerk. The trustee tendered a deed and the defendant declined to accept it on the ground that the title acquired by Weathersby is defective in that the fee is or may be defeated by the ulterior limitation in his deed. It is admitted that Rex Weathersby has children.

It was adjudged at the hearing that the plaintiff as trustee can convey title in fee simple and that the defendant is obligated to comply with his bid. The defendant excepted and appealed.

Gatling & Morris for plaintiff.

James E. Shepherd and S. Brown Shepherd for defendant.

ADAMS, J. The controversy turns upon the question whether Rex Weathersby acquired a title in fee simple under the rule in *Shelley's case*. The plaintiff insists that the rule applies and that he can therefore convey to the grantee an indefeasible title, while the defendant takes the position that the ulterior limitation prevents the application of the rule. His Honor adopted the plaintiff's view.

Conceding the position that if the terms of the devise carry the entire estate in fee tail whether general or special the first devisee takes an estate in fee, we find that the phrase, "heirs of Rex Weathersby by

....," is unimportant. *Morehead v. Montague,* 200 N. C., 497; *Sessoms v. Sessoms,* 144 N. C., 121; *Jones v. Ragsdale,* 141 N. C., 200.

The property is conveyed to "Rex Weathersby for life with remainder to the bodily heirs of said Rex Weathersby by ....." This clause standing alone transfers a title in fee to the grantee, but it is followed by the words "if any"—*i. e.,* if there are any bodily heirs. It is admitted that the grantee has children, living bodily heirs. The condition imposed by the words "if any" is thus fulfilled and the limitation to Medlin is defeated. By the express terms of the deed Rex Weathersby takes the fee. Substantially similar language was construed in *Radford v. Rose,* 178 N. C., 288, in which it is said, "Note that the language is not 'dying without bodily heirs,' or 'leaving no bodily heirs,' but that 'they have no bodily heirs,' a condition fully met by the fact that the plaintiff has three bodily heirs, to wit, three living children."

Upon the agreed facts it is not necessary to intimate what the effect would have been had the ulterior limitation depended upon the death of Rex Weathersby without bodily heirs surviving him. Judgment

Affirmed.

WARREN G. MYERS v. W. R. FOREMAN.

(Filed 17 February, 1932.)

1. **Appeal and Error H b—Upon death of appellant after docketing of appeal his executor is allowed to be made a party under Rule 37.**

   In this case the appellant died after the case was docketed and the motion of his executor that it be made a party was allowed under Rules of Practice in the Supreme Court, No. 37, the motion being made before the case was called for hearing in its regular order.

2. **Trial E c—In this case a new trial is awarded for the failure of the instructions to state material evidence in the case.**

   Where the charge of the trial court fails to state the evidence of a party relative to a material point and which directly bears on the amount recoverable, a new trial will be awarded when prejudice is shown for the failure of the charge to comply with the provisions of C. S., 564, requiring that the trial court shall state in a plain and correct manner the evidence given in the case.

APPEAL by defendant from *Oglesby, J.,* at June Special Term, 1931, of MECKLENBURG. New trial

Plaintiff and defendant were engaged as partners, under the firm name of Warren G. Myers and Company, at Charlotte, N. C., in the business of selling machinery, supplies and equipment, from about 1 September,

1923, to 1 January, 1930. The partnership was dissolved on 1 January, 1930. This action was begun on 3 March, 1930. Both plaintiff and defendant upon the facts alleged in their pleadings pray for an accounting between them as partners, each contending that upon a proper accounting in accordance with the terms of their partnership agreement, the other is indebted to him.

The action was first tried by a referee under an order made upon the motion of the defendant. The plaintiff excepted to this order, and thereby reserved his constitutional right to a trial by jury of the issues of fact arising upon the pleadings. C. S., 573. The referee heard the evidence offered at the trial before him by both the plaintiff and the defendant, and thereafter duly filed his report, setting out therein both his findings of fact and his conclusions of law, as required by statute, C. S., 579.

The referee found that the net profits of the partnership entered into by plaintiff and defendant in August, 1923, and dissolved on 1 January, 1930, amounted to the sum of $8,903.60, and that in accordance with the terms of the partnership agreement, the account of each partner should be credited with one-half of this sum, to wit: $4,451.80. He also found that the plaintiff had received from the partnership the sum of $10,152, in money and merchandise, and was therefore indebted to the partnership in the sum of $5,700.20. He further found that the defendant from time to time during the existence of the partnership had loaned to it the sum of $9,360.19, in money, and that since its dissolution on 1 January, 1930, the defendant had paid a note for $1,500, which had been executed by the partnership. The aggregate of these sums is $10,860.19. The referee found that the defendant had received from the partnership during its existence the sum of $9,411.49, and that therefore the partnership is indebted to the defendant in the sum of $1,448.70.

Upon these findings of fact, the referee concluded that plaintiff is indebted to defendant in the sum of $3,574.45, with interest. On the report of the referee, the defendant is entitled to judgment that he recover of the plaintiff the sum of $3,574.45, with interest and costs.

Plaintiff duly excepted to the findings of fact and conclusions of law made by the referee and set out in his report. With his exceptions to the findings of fact made by the referee, plaintiff tendered issues upon which he demanded a trial by jury. The action was thereupon tried by a jury.

The issues submitted to the jury were answered as follows:

"1. Did the plaintiff and the defendant enter into a partnership agreement as alleged in the complaint? Answer: Yes.

2. What was the amount of the net profits from the business of said partnership? Answer: $17,000.70.

3. In what amount, if any, is defendant indebted to plaintiff as alleged in the complaint? Answer: $8,500.35.

4. In what amount, if any, is plaintiff indebted to defendant as alleged in the answer and cross-complaint? Answer: $2,618."

From judgment on the verdict of the jury that plaintiff recover of the defendant the sum of $5,882.35, with interest and costs, the defendant appealed to the Supreme Court.

H. L. Taylor and T. L. Kirkpatrick for plaintiff.
Shore & Townsend for defendant.

CONNOR, J. After this appeal was docketed in this Court, and before it was called for hearing in its regular order, the defendant, W. R. Foreman, died. His executor, American Trust Company, voluntarily appeared in this Court by its counsel and moved that it be made a party defendant in the action, in its representative capacity. The motion was allowed in accordance with the Rules of Practice in this Court. Rule 37.

The testimony of the witnesses who testified at the trial before the referee was reduced to writing and filed in the record, as required by statute. C. S., 577. This testimony, together with the exhibits offered by both the plaintiff and the defendant at the trial before the referee, was the only evidence submitted to the jury, in accordance with the provisions of the statute. C. S., 573. The issues appearing in the record were answered by the jury from this evidence, under the charge of the court. The referee found that the net profits of the partnership, from its commencement in August, 1923, to its dissolution on 1 January, 1930, were $8,903.60, while the jury found from the same evidence that the net profits of the partnership during its existence were $17,000.70. On an accounting upon the findings by the referee the plaintiff is indebted to the defendant in the sum of $3,574.45, while on an accounting upon the verdict of the jury the defendant is indebted to the plaintiff in the sum of $5,882.35. This wide discrepancy is due in part, we think, to the failure of the judge in his charge to the jury to comply with the provisions of C. S., 564. An examination of the charge set out in the transcript filed in this Court shows that it was not in compliance with the provisions of the statute, in that the judge failed to state in a plain and correct manner the evidence given in the case, and failed to declare and explain the law arising on the evidence. No reference is made in the charge to the testimony of the plaintiff that he had received from the partnership the sum of $4,400, for his personal expenses and not for expenses incurred by him in prosecuting the business of the partnership. Conceding that the terms of the partnership agreement were as contended

by the plaintiff and as found by the jury, this sum at least should have been deducted from plaintiff's share of the net profits. The defendant is entitled to a new trial for the error of the court in failing to comply in its charge to the jury with the provisions of C. S., 564. It is so ordered.

New trial.

J. CHARLIE SIMS v. MARY SUE DALTON.

(Filed 17 February, 1932.)

1. **Executors and Administrators C f—Demurrer in action by creditor of estate against beneficiary under the will held properly sustained.**

   The personal representative of a deceased is a necessary party to a suit to recover assets of the estate, and where the holder of one of several bonds secured by a mortgage on the deceased's home place brings action against the beneficiary under the deceased's will to declare the legacy a trust fund for the payment of the bond, and it appears that the bequest is insufficient to pay all the bonds and that the executor and other bondholders have not been made parties, the defendant's demurrer is properly sustained.

2. **Pleadings D b—Defect of material parties plaintiff appearing on face of complaint may be taken advantage of by demurrer.**

   A defect of material parties appearing upon the face of the complaint may be taken advantage of by demurrer, and when not appearing upon the face of the complaint, such defect must be taken advantage of by answer, or the objection will be deemed waived, C. S., 511. The distinction is noted between necessary and proper parties.

APPEAL by plaintiff from *Sink, J.*, 9 November, 1931, of POLK. Affirmed.

This is an action brought by plaintiff against the defendant to recover the sum of $656.00, with interest from 1 August, 1928, on a bond now held by him, given by T. M. (Timothy) Revis, secured by deed in trust to M. R. McCown, trustee, on his "home place," said deed in trust duly registered in register of deeds office for Polk County. The plaintiff contends that under the will of Timothy Revis, his government compensation certificate was willed to defendant with the understanding that plaintiff's bond should be paid and that defendant became indebted to plaintiff as aforesaid. "That the defendant, Mary Sue Dalton, received the proceeds of the government compensation certificate of said Timothy Revis in an approximate amount of $1,000, and the said funds in the hands of said defendant, by virtue of the provision of said will of Timothy Revis, became trust funds, to be used in the manner directed and provided in said will."

The defendant demurred, specifying the grounds. The court below sustained the demurrer. Plaintiff, excepted, assigned error and appealed to the Supreme Court. Other necessary facts will be set forth in the opinion.

M. R. McCown for plaintiff.
J. S. Massenburg for defendant.

CLARKSON, J. The plaintiff relies on item 6 of Timothy Revis' will, which is as follows: "It is my special wish, and she has agreed thereto, that inasmuch as I have made Mary Sue Dalton the beneficiary under my government compensation certificate, that she turn over to my executor hereinafter named the sum of five hundred ($500) dollars to be used for the care and living expenses of the said Annie Mitchell, and that the remaining sum of my compensation certificate shall be used by the said Mary Sue Dalton in paying the installments due under mortgage against my home place, which eventually will become the property in fee simple of the said Mary Sue Dalton."

As to War Risk Life and Disability Insurance, see 73 A. L. R., 319.

Plaintiff contends that defendant holds the fund under the will in trust to pay the bond secured by deed of trust which he holds on the "home place." We cannot so hold. It is alleged that the Government Compensation Certificate approximately amounted to $1,000. The record discloses that there were other bonds than plaintiff's secured by the deed of trust. The complaint alleges that plaintiff's indebtedness is "one of the obligations."

As grounds for demurrer, the defendant, in substance, contends (1) That "the plaintiff has not legal capacity to sue." C. S., 511(2); as there arises no relationship as creditor and debtor between plaintiff and defendant; (2) that on the face of the complaint, if plaintiff's contention is correct, it was the executor's right and duty to recover assets. C. S., 170; (3) that on the face of the complaint it appears "There is a defect of parties plaintiff or defendant." C. S., 511(4). It is well settled in this jurisdiction that if there is a defect of material parties, the defendant must take advantage of the same by demurrer if the defect appears from the complaint, and if not, by answer. Otherwise he will be deemed to have waived such objection.

In N. C. Practice and Procedure in Civil Cases (McIntosh), p. 451, part sec. 441, speaking to the subject, we find: "If it appears upon the complaint that there is a defect of parties, plaintiff or defendant, objection is taken by demurrer, and for such defect not so appearing objection is taken by answer. The defect does not refer to the want of some legal

capacity of a party, but to the omission of some who should have been joined either as plaintiffs or defendants. A distinction is made between necessary and proper parties, as to the effect of the demurrer, in that a necessary party must be joined, and a proper party may be joined, if the court deems it advisable." *Lanier v. Pullman Co.*, 180 N. C., 406; *Yonge v. Ins. Co.*, 199 N. C., at p. 17; *Wiggins v. Harrell*, 200 N. C., 336. For the reasons given the judgment of the court below is

Affirmed.

IN THE MATTER OF THE BANK OF WHITEVILLE.

(Filed 17 February, 1932.)

1. Appeal and Error J b—In this case the appeal from the refusal to grant a continuance is dismissed.

An appeal from the refusal to grant a continuance, which involves no question of law or legal inference, will be dismissed. C. S., 560.

2. Appeal and Error E h—Where there is no statement of case on appeal the Supreme Court is limited to correctness of judgment appealed from.

Where the record contains no statement of case on appeal the Supreme Court is limited to the consideration of the judgment, the appeal being considered an exception thereto.

APPEAL by W. H. Roberts *et al.*, from *Barnhill, J.*, at Chambers in Wilmington, 26 September, 1931. From COLUMBUS.

On 10 March, 1931, the Corporation Commission, acting through the chief State bank examiner, took possession of the Bank of Whiteville, a banking institution in Columbus County, for the purpose of liquidating it under authority of C. S., 218(c).

Thereafter, on 14 September, 1931, the Commissioner of Banks, who succeeded to the powers of the Corporation Commission, gave notice to all creditors, depositors and stockholders of the Bank of Whiteville that on 26 September, 1931, or as soon thereafter as counsel could be heard, he would apply to the resident judge of the district for an order authorizing and directing the Commissioner of Banks to sell and transfer certain receivables, the property of the Bank of Whiteville, at private sale, it appearing to the Commissioner that such would be to the interest of all concerned.

The resident judge not being able to hear the matter at the time set, transferred the same to be heard by the judge presiding in the district at Wilmington.

The appellants, depositors in the Bank of Whiteville, appeared before the presiding judge of the district at the time set and asked for additional time within which to prepare their defense to the petition. The court declined to postpone the hearing; whereupon the matter was heard and the petition allowed, the court finding that such action would increase the dividends to the depositors by at least 20 per cent.

The respondents appeal, assigning as error the order of the judge refusing to give them additional time within which to prepare their case.

John D. Bellamy & Sons and Manning & Manning for appellants.

Varser, Lawrence, McIntyre & Henry for appellees, Smith and McKenzie.

Attorney-General Brummitt and Assistant Attorney-General Seawell for appellee, Commissioner of Banks.

STACY, C. J. The granting or refusing a continuance, which involves no question of law or legal inference, is not subject to review on appeal. C. S., 560; *Dupree v. Insurance Co.*, 92 N. C., 418. Hence, following the course pursued in *Goodman v. Goodman*, 201 N. C., 808, 161 S. E., 686, and *Bird v. Bradburn*, 131 N. C., 488, 42 S. E., 936, the appeal will be dismissed.

Furthermore, as the record contains no statement of case on appeal, 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. No reason appears on the face of the record proper for disturbing the judgment.

Appeal dismissed.

JESSE MANGUM v. JOHN HENRY WINSTEAD ET AL.

(Filed 17 February, 1932.)

1. Negligence D c—Nonsuit on plaintiff's action will be sustained where jury finds on defendant's cross-action that plaintiff was negligent.

Where, in an action to recover damages sustained in an automobile collision, a judgment as of nonsuit is entered on the plaintiff's action, and on the defendant's cross-action the jury answers the issue as to the plaintiff's negligence "yes," and finds that the defendant was not guilty of negligence and awards damages: *Held*, upon the plaintiff's ap-

peal from the judgment as of nonsuit on his action the finding of the jury that the plaintiff was negligent would bar his recovery, and the judgment will be sustained.

2. Appeal and Error J d—Burden is on appellant to show error.

On appeal the burden is on the appellant to overcome the presumption against error, the burden of showing error being upon him.

APPEAL by plaintiff from *MacRae, Special Judge,* at June Term, 1931, of DURHAM.

Civil action to recover damages for an alleged negligent injury to plaintiff and his Buick automobile, caused by a collision between said automobile, while being driven by plaintiff's son, and a Chevrolet sedan owned by the defendant, C. H. Winstead, and operated at the time by his son for family use.

The defendant set up a counterclaim and asked for damages sustained in the same collision by reason of the alleged negligence of the plaintiff.

Judgment of nonsuit was entered on the plaintiff's cause of action, and the jury returned the following verdict on the defendant's counterclaim:

"1. Was the defendant, C. H. Winstead, damaged by the negligence of the plaintiff, as alleged in the answer? Answer: Yes.

"2. Did the defendants contribute to their injury or damage, by their own, or either of their own, negligence, as alleged in the reply? Answer: No.

"3. What damage, if any, is the defendant, C. H. Winstead, entitled to recover of the plaintiff? Answer: $181.70."

The plaintiff appeals from the judgment of nonsuit entered on his cause of action and from the judgment rendered on the verdict.

Brawley & Gantt for plaintiff.

F. O. Carver, Victor S. Bryant and B. I. Satterfield for defendants.

STACY, C. J. In the face of the verdict, which is not challenged by the appeal, it would be singular if the plaintiff should also recover in the instant case. One who causes or contributes to an injury by his own negligence is not entitled to damages therefor. Neither plaintiff nor defendant is permitted to recover for injuries resulting from a collision when the negligence of each contributed thereto as a proximate cause. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672. It follows, therefore, that the judgment of nonsuit on plaintiff's cause of action, which seems correct upon the evidence, must, upon its own merits and for this additional reason, be sustained. In any view of the case, the

plaintiff has failed to overcome the presumption against error. *Jackson v. Bell.* 201 N. C., 336, 159 S. E., 926; *Bailey v. McKay,* 198 N. C., 638, 152 S. E., 893. To prevail on appeal, he who alleges error must successfully handle the laboring oar. *Frazier v. R. R., ante* 11; *Poindexter v. R. R.,* 201 N. C., 833, 159 S. E., 926.

Affirmed.

JOHN MILLER v. GLOBE MANUFACTURING COMPANY.

(Filed 17 February, 1932.)

Master and Servant C b—Held; evidence disclosed that injury was from accident that could not have been foreseen, and nonsuit was proper.

Evidence that the plaintiff's injury was caused by his stepping on a small dowel pin swept up with other odds and ends on the floor of the manufacturing plant where he was engaged at work tends to show an injury from an accident which could not have been reasonably foreseen by his employer, and a judgment as of nonsuit will be sustained on appeal.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at March-April Term, 1931, of GUILFORD.

Civil action to recover damages for an alleged negligent injury, tried in the municipal court of the city of High Point where the case was nonsuited and judgment affirmed on appeal to the Superior Court of Guilford County.

The evidence tends to show that plaintiff was employed by the defendant to work in the cabinet room of its manufacturing plant, and on 5 October, 1928, while carrying an arm full of china-closet posts or legs—each being about four feet long—he stepped on a dowel pin, a small piece of wood about an inch and one-half long, which caused him to fall and break his leg. There was an accumulation of trash on the floor "just a little of everything, shavings, dowel pins and just little pieces of stuff that is cut off of furniture," which were swept up in piles from all around the room. Plaintiff testified on cross-examination: "The reason that I stepped on it was not because the dowel pin was so small that I could not see it. I was not looking."

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

Walser & Casey and Phillips & Bower for plaintiff.

Peacock & Dalton and Biggs & Broughton for defendant.

STACY, C. J. Plaintiff's injury seems to have resulted from one of those unfortunate accidents which was not anticipated and could not have been foreseen in the exercise of a reasonable prevision on the part of the defendant. Therefore, under the principles announced in *Goddard v. Desk Co.*, 199 N. C., 22, 153 S. E., 608, *Crisp v. Lumber Co.*, 199 N. C., 343, 154 S. E., 311, *King v. Power Co.*, 198 N. C., 86, 150 S. E., 711, and *Warwick v. Ginning Co.*, 153 N. C., 262, 69 S. E., 129, the judgment will be upheld.

Affirmed.

MRS. LOUISE NEWELL v. J. G. NEWELL.

(Filed 17 February, 1932.)

Appeal and Error J c—Order continuing motion for alimony pendente lite to hearing held not subject to appellate interference.

An order continuing a wife's motion for alimony *pendente lite* to the hearing without prejudice to either party is held not to be subject to appellate interference.

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1931, of MECKLENBURG.

Civil action for divorce *a mensa et thoro,* and for alimony *pendente lite.* C. S., 1666.

From an order continuing plaintiff's motion for alimony to the hearing, without prejudice to either party, the plaintiff appeals, assigning errors.

John Newitt for plaintiff.

J. F. Newell and George W. Wilson for defendant.

STACY, C. J. Conceding, without deciding, that it was error to continue to the hearing plaintiff's motion for alimony *pendente lite,* nevertheless, in the absence of a sufficient showing, which perhaps may yet be made, the refusal to allow the motion is not cause for appellate interference. *Hennis v. Hennis,* 180 N. C., 606, 105 S. E., 274; *Easely v. Easely,* 173 N. C., 530, 92 S. E., 353.

Affirmed.

CHESTER BROWN, ADMINISTRATOR OF M. T. ASKEW, v. SOUTHERN RAILWAY COMPANY AND J. E. DIVELBLISS, AND CHESTER BROWN, TRADING AS CHERO-COLA BOTTLING COMPANY.

(Filed 17 February, 1932.)

1. Death B c—Only personal representative of deceased may bring action for wrongful death.

The right to maintain an action for the wrongful death of a deceased rests exclusively upon our statute, C. S., 160, which requires that the action must be brought within one year from the date of the death by the personal representative of the deceased, and that the recovery thereunder should not be liable for the debts of the deceased but should be distributed to his heirs at law as provided therein, and where the death is caused by the negligence of an employee while acting within the scope of his authority the employer may be joined as a defendant under the doctrine of *respondeat superior.*

2. Master and Servant F a—In action against third person for wrongful death defendant may not set up award as a defense.

Where the administrator of a deceased employee sues an engineer of a train and the railroad company for the deceased's wrongful death, the defendants may not set up the defense that compensation for the employee's death had been paid by his employer under the provisions of the Workmen's Compensation Act since the Compensation Act provides that upon the payment of compensation thereunder for an injury to an employee caused by the negligence of a third person the employer or the insurance carrier shall have the right to maintain an action in the name of the employee and shall be entitled to subrogation of the employee's rights to the extent of the compensation paid him, the balance of the recovery to be paid to the employee or his representative, and C. S., 160 provides that an action for wrongful death can be maintained only by the deceased's personal representative, the *tort-feasors* being liable for their negligence and having no interest in the distribution of the recovery under the provisions of the statute.

3. Master and Servant F a—Liability of employer under Compensation Act is exclusive and he may not be held liable as joint tort-feasor.

The remedy under the Workmen's Compensation Act is exclusive and under the express terms of the statute an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, C. S., 160, the motion of the defendants that the deceased's employer be made a party as a joint *tort-feasor* with them should be denied. N. C., Code of 193[illegible], sec. 8081(r).

APPEALS by both plaintiff and defendants, Southern Railway Company and J. E. Divelbliss, from *Harding, J.*, at June Term, 1931, of BUNCOMBE. Reversed in plaintiff's appeal; affirmed in defendants' appeal.

This action was begun in the Superior Court of Buncombe County. Plaintiff is the administrator of M. T. Askew, who died in the city of Asheville, on 20 January, 1930. The action is to recover of the defendants, Southern Railway Company and J. E. Divelbliss, damages for the death of plaintiff's intestate.

It is alleged in the complaint that on or about 20 January, 1930, plaintiff's intestate was struck and killed by one of the engines of the defendant, Southern Railway Company, while the said engine was being operated by the defendant, J. E. Divelbliss, as an engineer employed by the said Railway Company, at Sulphur Springs crossing on State Highway No. 10; that at the time he was struck and killed, plaintiff's intestate was driving a truck owned by the Chero-Cola Bottling Company of Asheville, as an employee of said company; and that the proximate cause of the death of plaintiff's intestate was the negligence of the defendants, Southern Railway Company and J. E. Divelbliss, as specifically alleged in the complaint. Plaintiff demands judgment that he recover of the defendants, Southern Railway Company and J. E. Divelbliss, the sum of $50,000, as damages for the death of his intestate.

After the complaint was filed, the defendants, Southern Railway Company and J. E. Divelbliss, moved before the clerk of the Superior Court of Buncombe County that Chester Brown, trading as Chero-Cola Bottling Company, be made a party defendant to the action. In support of their motion, the said defendants filed an affidavit tending to show that the death of plaintiff's intestate was caused by the negligence of the Chero-Cola Bottling Company, his employer, and that he contributed to the injuries which resulted in his death by his own negligence. They moved that the Chero-Cola Bottling Company be made a defendant in the action on the ground that if the said defendants by their negligence as alleged in the complaint caused the death of plaintiff's intestate, and for that reason are liable to plaintiff in this action, the said Chero-Cola Bottling Company by its negligence as alleged in the affidavit contributed to his death, and is for that reason jointly liable with defendants to plaintiff in this action. The said defendants relied on the provisions of section 618 of the N. C. Code of 1931, which are to the effect that in all cases pending in the courts of this State, in which the plaintiff seeks to recover damages of the defendant as a joint *tort-feasor,* the defendant may at any time before judgment is obtained, upon motion, have the other joint *tort-feasors* made parties defendant to the action. The motion was allowed by the clerk of the Superior Court and plaintiff appealed to the judge of the Superior Court of Buncombe County.

After summons had been duly served on Chester Brown, trading as Chero-Cola Bottling Company, in accordance with the order of the clerk of the Superior Court, the defendants, Southern Railway Company and J. E. Divelbliss, filed an answer to the complaint. In this answer, they denied the allegations of the complaint, which are essential to plaintiff's cause of action against them. For a third and further answer and defense to said cause of action, the said defendants, alleged in said answer:

"1. That on and prior to 20 January, 1930, the plaintiff's intestate, M. T. Askew, was in the employ of Chester Brown, trading and doing business under the name of Chero-Cola Bottling Company, and that on and prior to said date the plaintiff's intestate and said Chester Brown were operating under the terms and provisions of the Workmen's Compensation Act for the State of North Carolina, as ratified and approved by the General Assembly of North Carolina, on 11 March, 1929, and that pursuant thereto, as defendants are informed and believe, the said Chester Brown, operating as aforesaid, caused to be taken out a certain insurance policy, by the terms of which it was set forth and provided that in the event of the death or injury of the said M. T. Askew, while in the employ of the said Chero-Cola Bottling Company, he or his representatives should receive compensation from said insurance company, in accordance with the terms and provisions of said Workmen's Compensation Act.

2. That as defendants are informed and believe, after the death of the said M. T. Askew, as alleged in the complaint, and after the said Chester Brown duly qualified as administrator of his estate, the said Chester Brown, administrator as aforesaid, entered into negotiations with the Industrial Commission of the State of North Carolina, which Commission is charged with the supervision and approval of settling with the employees when injured, or their representatives in the event of death, and thereafter the said Chester Brown, administrator as aforesaid, accepted a settlement and award as made by the said Industrial Commission as aforesaid; and has disbursed, or is holding said funds for the benefit of the estate of M. T. Askew, deceased.

3. That if the said Chester Brown, trading as Chero-Cola Bottling Company, did not take out insurance for the benefit of plaintiff's intestate and his estate in case of his death, and of other employees of said Chero-Cola Bottling Company, then said Chero-Cola Bottling Company itself, as defendants are advised, informed and believe, through and with the consent of the Industrial Commission, settled with the estate of plaintiff's intestate, to wit: with Chester Brown, administrator, and the said Chester Brown, administrator, has disbursed said funds or is holding them for the benefit of the estate of M. T. Askew, deceased.

4. That said Chester Brown, administrator as aforesaid, in accepting said compensation, on account of the death of the said M. T. Askew, is barred to prosecute this action against these answering defendants on his own behalf, and these defendants hereby plead said settlement, acceptance and award so made by said administrator in bar of the plaintiff's right to prosecute this action.

5. That the plaintiff, Chester Brown, administrator of the estate of M. T. Askew, deceased, is not the real party in interest in the institution and prosecution of this action; that in the event of any recovery in said action, said sum so recovered would not, in law, or in fact, go to the estate of M. T. Askew, deceased, but to the contrary, would be disbursed by the said Chester Brown, administrator, either to the Chero-Cola Bottling Company, or to the insurance company which was carrying the liability and risk on the Chero-Cola Bottling Company; that these answering defendants are not advised as to the name of said insurance company, but they aver and say that said insurance company or the Chero-Cola Bottling Company above mentioned, is the real party in interest, and should be made a party to this action, in order that defendants may be advised of their rights in the premises."

After the answer had been filed by the defendants, Southern Railway Company, and J. E. Divelbliss, the plaintiff in apt time moved that paragraphs 1, 2, 3, 4 and 5 of the third further answer and defense as set out in said answer be stricken therefrom, for that,

"(a) Said defense states a conclusion of law and puts no facts in issue.

(b) It attempts to set up as a further defense that the plaintiff's intestate, M. T. Askew, received compensation under the Workmen's Compensation Act of the State of North Carolina, and that the plaintiff holds said alleged settlement for the benefit of the estate of M. T. Askew, and for that reason the plaintiff is barred from prosecuting this action; and further attempts to set forth that the plaintiff is not the real party in interest and that the sum so recovered would not in law or in fact go to the estate of the said M. T. Askew, but that the insurance company or the Chero-Cola Bottling Company is the real party in interest; that any and all of such facts, if true, raise questions of law and not questions of fact to be passed upon by the jury; that it is expressly provided in the Workmen's Compensation Act of North Carolina, ratified by the General Assembly on 11 March, 1929, in section 11, that the acceptance of an award under this act for compensation for the injury or death of an employee shall operate as an assignment to the employer of any right to recover damages which the injured employee may have against any other party for such injury or death; and that

such employer shall be subrogated to any such right and may enforce in his own name or in the name of the injured employee, or his personal representative, the legal liability of such party.

"And said section of said act further provides that the amount of compensation paid by the employer or the amount of compensation to which the assured or the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages, but any amount collected by the employer under the provisions of the section, in excess of the amount paid by the employer or for which he is liable, shall be held by the employer for the benefit of the injured employee or other person entitled thereto, less such amounts as are paid to the employer for reasonable expenses and attorney's fees, when approved by the Commission; and said section further provides that when any employer is insured against liability for compensation with any insurance carrier and such insurance carrier shall have paid any compensation for which the employer is liable, or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer and may enforce such rights in its own name and in the name of the injured employee or his personal representative."

When the action came on for trial at June Term, 1931, an order was entered therein by the judge presiding, affirming the order of the clerk making Chester Brown, trading as Chero-Cola Bottling Company, a party defendant, and allowing the motion of the plaintiff that paragraphs 1, 2, 3, 4 and 5 of the third further answer and defense be stricken from the answer.

From this order both the plaintiff and the defendants, Southern Railway Company, and J. E. Divelbliss, appealed to the Supreme Court.

Harkins, Van Winkle & Walton for plaintiff.
R. C. Kelly and Jones & Ward for defendants.

CONNOR, J. This action is to recover damages for the death of plaintiff's intestate. It is alleged in the complaint that his death was caused by the negligence of the defendant, J. E. Divelbliss, while said defendant was engaged in the performance of his duties as an employee of the defendant, Southern Railway Company. The facts stated in the complaint are sufficient to constitute a cause of action against the defendant, J. E. Divelbliss, arising out of tort, by virtue of the provisions of C. S., 160, and against the defendant, Southern Railway Company, on the principle of respondeat superior. It is well settled, of course, that an employer is liable for damages resulting from the tort of his employee, committed

in the course of his employment. This principle is founded on the maxim of the law that one who does a thing through another, does it himself. *Qui facit per alium facit per se.*

The right to recover damages for the death of a human being caused by the wrongful act of another, did not exist at common law. It is altogether statutory. In this State the right of action is conferred by C. S., 160. In *Hinnant v. Tidewater Power Co.*, 189 N. C., 120, 126 S. E., 307, it is said by *Adams, J.*, "In *Baker v. Bolton*, 1 Camp., 493, *Lord Ellenborough* said: 'In a civil court, the death of a human being could not be complained of as an injury.' Whatever the foundation on which this rule is made to rest—whether on the ground that a personal right of action dies with the person, or that the value of a human life may not become the subject of judicial computation, or that the relation of the parties is terminated by death—it is true as stated in *Insurance Company v. Brame*, 95 U. S., 754, 24 L. Ed., 580: 'The authorities are so numerous and so uniform to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found.' Hilliard on Torts 87, sec. 10. *Hatch v. R. R.*, 183 N. C., 617, 112 S. E., 529, *Mitchell v. Talley*, 182 N. C., 683, 109 S. E., 882, *Hood v. Telegraph Co.*, 162 N. C., 70, 77 S. E., 1096, *Broadnax v. Broadnax*, 160 N. C., 432, 76 S. E., 216, *Bolick v. R. R.*, 138 N. C., 370, 50 S. E., 689, *Killian v. R. R.*, 128 N. C., 261, 38 S. E., 873." See *Tieffenbrun v. Flannery*, 198 N. C., 397, 151 S. E., 857, in which the decision rests upon the proposition that the action is statutory and does not exist at common law.

It is well settled, therefore, that the right to maintain an action to recover damages for the death of a human being in the courts of this State, upon the allegation that the death was caused by the wrongful act of the defendant, is conferred by statute, and must be begun and prosecuted in accordance with statutory provisions. It is provided by statute that the action must be begun within one year after the death, by the executor, administrator or collector of the decedent, and that "the amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." C. S., 137, ch. 1. Damages for the wrongful death may be recovered only by the personal representative of the decedent; the amount recovered must be paid by such representative only to persons designated by the statute as the beneficiaries of the recovery. Such

persons are beneficiaries not primarily because of their relationship to the decedent, as his next of kin, or heirs at law, but by virtue of the statute under which the action is begun and prosecuted to judgment.

It has been held by this Court that a widow has no right of action for the wrongful death of her husband, by reason of her relationship to the deceased as his widow. *Howell v. Commissioners,* 121 N. C., 362, 28 S. E., 362. A father as such cannot recover damages for the wrongful death of his son. *Hope v. Peterson,* 172 N. C., 869, 90 S. E., 141. No part of the amount recovered can be applied to the payment of the widow's "Year's Support," provided by statute, C. S., 4108. *Broadnax v. Broadnax,* 160 N. C., 432, 76 S. E., 216. The personal representative of the deceased holds the amount recovered by him as damages for the wrongful death of the decedent, not as assets of the estate of the decedent, but in trust for the beneficiaries designated by the statute. *Avery v. Brantly,* 191 N. C., 396, 131 S. E., 721.

It must be conceded for the purpose of deciding the question of law presented by plaintiff's appeal from the order of the judge affirming the order of the clerk of the Superior Court of Buncombe County, that the Chero-Cola Bottling Company be made a party defendant in this action, that said company by its negligence, concurring with the negligence of the defendants, J. E. Divelbliss and Southern Railway Company, as alleged in the complaint, caused the death of plaintiff's intestate; that at the time of his death, plaintiff's intestate was an employee of the Chero-Cola Bottling Company and was engaged in the performance of his duties as such employee; that plaintiff's intestate and the said Chero-Cola Bottling Company, by reason of their relation as employee and employer, and of their acceptance thereof, were subject to the provisions of the North Carolina Workmen's Compensation Act; and that in accordance with the provisions of said act, the said Chero-Cola Bottling Company or its insurance carrier, has paid to plaintiff the amount awarded or approved by the North Carolina Industrial Commission, as compensation for the death of his intestate.

On the foregoing facts, the Chero-Cola Bottling Company was liable to plaintiff, as a joint *tort-feasor,* for the damages resulting from the death of his intestate, unless by virtue of the provisions of the North Carolina Workmen's Compensation Act, the said company was relieved of such liability. If the said company is liable as a joint *tort-feasor,* there was no error in the order of the judge affirming the order of the clerk.

In *Hipp v. Farrell,* 169 N. C., 551, 86 S. E., 570, it is said: "Authority here and elsewhere is to the effect that where the wrongful acts of two or more persons concur in producing a single injury, and with or

without concert between them, they may be treated as joint *tort-feasors*, and, as a rule, sued separately or together, at the election of the plaintiff. *Hough v. R. R.*, 144 N. C., 692, 57 S. E., 469. The only case with us which tends to impose any restriction on the position is that of *Guthrie v. Durham*, 168 N. C., 573, 84 S. E., 859, where on a question of primary and secondary liability of joint *tort-feasors*, it was held that, on application of the defendants, the person primarily liable should be made a party, the policy and purpose of our present Code of Procedure requiring that every feature of a given controversy should be settled in one action as far as consistent with the orderly and efficient administration of justice." See *Bowman v. Greensboro*, 190 N. C., 611, 130 S. E., 502.

A plaintiff who has been injured by the wrongful act or acts of two or more persons, who are liable to him as joint *tort-feasors*, may sue one or more of such persons, at his election. But since the enactment of chapter 68, Public Laws 1929 (see section 618 of N. C. Code, 1931), at any time before a judgment is obtained, the joint *tort-feasors* who are sued, may, upon motion, have the other joint *tort-feasors* made parties defendant. This statute is applicable only where the persons sought to be made parties defendant are, upon the facts alleged in support of the motion, liable as joint *tort-feasors*.

In *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 256, it is said that the General Assembly of this State by its enactment of chapter 120, Public Laws 1929, known as the Workmen's Compensation Act, discarded the theory of fault as the basis of liability of an employer to his employee, when both have become in accordance with its provisions, subject to said act, and conferred an absolute right of compensation on every employee who is injured by an accident arising out of and in the course of the employment. In consideration of the enlarged liability of the employer to an injured employee, the employee is deprived by the act of certain rights and remedies which he had prior to its enactment, both at common law and under statutes of this State. Section 11 of said act (N. C. Code, 1931, sec. 8081(r), expressly provides that "the rights and remedies herein granted to an employee, when he and his employer have accepted the provisions of this chapter, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representatives, parents, dependents or next of kin, as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

By virtue of the foregoing provision of the statute, the Chero-Cola Bottling Company, on the facts appearing in the record, and admitted

for the purposes of plaintiff's appeal, is not liable to plaintiff as a joint *tort-feasor*. The said company has been expressly relieved of such liability by the provisions of the statute. For this reason, there was error in the order of the judge affirming the order of the clerk of the Superior Court of Buncombe County. The order is reversed.

It is further provided in section 11 of chapter 120, Public Laws 1929 (N. C. Code, 1931, sec. 8081(r), that when "such employee, his personal representative or other person may have a right to recover damages for such injury, loss of service or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this chapter, and prosecute the same to its final determination; but either the acceptance of the award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy." This provision manifestly precludes an employee who has been awarded and paid compensation by his employer for an injury under the provisions of the North Carolina Workmen's Compensation Act, from prosecuting an action against a third person for damages for the same injury; and also precludes an employee who has recovered damages for his injury from a third person, from claiming compensation from his employer under the act. It does not affect the right of the employer or of the insurance carrier, who has paid the award, from maintaining an action against the third person, who by his wrongful act has caused the injury for which compensation was awarded and paid. With respect to the right of the employer to maintain an action against a third person who by his wrongful act has caused an injury to the employee, resulting in damages, it is provided by the statute that "the acceptance of an award under this chapter against an employer for compensation for the injury or death of an employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative, or other person, may have against any other party for such injury or death; and such employer shall be subrogated to any such right and may enforce, in his own name, or in the name of the injured employee, or his personal representative, the legal liability of such other party." It is also provided by the statute that where an insurance carrier has paid the compensation awarded to the injured employee, or to his personal representative, the insurance carrier shall have the same right to maintain an action against the third person, as that conferred by the statute on the employer. In either case, the action is prosecuted not in behalf of the injured employee, or of the persons who are designated as beneficiaries of the recovery, under C. S., 160, but

in behalf, primarily, of the employer or of the insurance carrier. The amount recovered is applied first to the reimbursement of the employer or of the insurance carrier for such sums as may have been paid by either of them to the employee or in case of his death to his personal representative. Only the excess, if any, is payable to the injured employee, or to such persons as may be entitled thereto.

The payment by the Chero-Cola Bottling Company or by its insurance carrier of the award made or approved by the North Carolina Industrial Commission, is not a bar to the prosecution by the plaintiff of this action against the defendants, J. E. Divelbliss and Southern Railway Company. This action is expressly authorized by statute, and neither the Chero-Cola Bottling Company nor its insurance carrier is a necessary or proper party, although they are primarily the beneficiaries in whose behalf the action is prosecuted by the plaintiff as the personal representative of the deceased employee, C. S., 449. The statute provides for the distribution of the amount recovered in the action, if any, and neither the defendant, J. E. Divelbliss, nor the defendant, Southern Railway Company, has any interest in such distribution.

The allegations of paragraphs 1, 2, 3, 4 and 5 of the third further answer and defense are irrelevant. The facts alleged in said paragraphs do not constitute a defense to this action. They are immaterial, and do not affect the right of the plaintiff to recover, nor the amount of the recovery. These paragraphs were properly stricken from the answer, on motion of the plaintiff. C. S., 537. It is expressly provided by statute that "the amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible as evidence in any action brought to recover damages, but any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable, shall be held by the employer for the benefit of the injured employee or other person entitled thereto, less such amounts as are paid by the employer for reasonable expenses and attorneys' fees when approved by the Commission."

There was no error in the order that paragraphs 1, 2, 3, 4 and 5 of the third further answer and defense filed by the defendants be stricken from their answer. The order in that respect is affirmed.

Reversed in plaintiff's appeal.

Affirmed in defendants' appeal.

STATE v. CHARLEY BEAL, HAZEL McMAHAN, BOSE FAIN, MARY BEST, AND LEE ELLEN HARBIN.

(Filed 17 February, 1932.)

1. **Criminal Law F c—Where new trial is granted on appeal from conviction on one count plea of former jeopardy as to other counts is bad.**

Where the defendants, under indictment charging them with breaking and entering a store with intent to commit larceny, with larceny, and with receiving stolen property, are found guilty on the last count, and on appeal their request for a new trial is granted: *Held*, although there are some technical differences between a *venire de novo* and a new trial they both have the same result, and upon the subsequent trial the defendants' objection to a trial upon a new indictment containing substantially the same charges as the original and their plea of former acquittal as to the first two counts cannot be sustained, the granting of a new trial upon the defendants' request carrying with it a new trial upon all the counts in the indictment.

2. **Criminal Law G f—Admissions of one defendant were properly confined to question of his guilt in exclusion of that of other defendants.**

Where several defendants are on trial for the same offenses in one action, the admission in evidence of testimony of admissions of one of the defendants will not be held for error upon objection of the other defendants where it appears that the trial court carefully instructed the jury to consider the admissions only on the question of the guilt of the defendant making them.

APPEAL by defendants from *Harding, J.*, at August Term, 1931, of CHEROKEE.

The three counts in the indictment charge the defendants (1) with breaking and entering a storehouse occupied by one Lee Shields wherein merchandise, etc., was kept with intent therein to commit larceny in breach of C. S., 4235; (2) with the larceny of the personal property of said Shields; and (3) with feloniously receiving the property knowing it to have been stolen.

The following entry appears in the record:

"Upon the call of this case for trial, the defendants and each of them entered a plea that they, and each of them, had theretofore been tried and acquitted of the offense of burglary, and of the offense of larceny, alleged in the bill of indictment, and they and each of them requested the court to submit an issue to a jury on the said plea of former acquittal. To the charge of receiving stolen goods knowing them to have been stolen the defendants pleaded not guilty. Upon such plea the State and defendants admitted, and the court found, the following facts:

STATE *v.* BEAL.

1. That the defendants were placed on trial at the March Term, 1930, upon the following bill of indictment, to wit: "State of North Carolina—Cherokee County — Superior Court — March Term, 1930. The jurors for the State, upon their oath present that Charley Beal, Hazel McMahan, Bose Fain, Mary Best, Jimmy Hunt, and Lee Ellen Harbin, late of the county of Cherokee, on 31 March, 1930, with force and arms at and in the county aforesaid, a certain store-house, shop, warehouse, banking house, counting house, and building, occupied by one Lee Shields, wherein merchandise, chattels, money, valuable securities were, and were being kept, unlawfully, wilfully, and feloniously did break and enter with intent, the merchandise, chattels, money, valuable securities of the said Lee Shields then and there being found, to steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors for the State upon their oaths aforesaid do further present: that the said Charley Beal, Hazel McMahan, Bose Fain, Mary Best, Jimmy Hunt, Lee Ellen Harbin, afterwards, to wit: on the day and year aforesaid, with force and arms at and in the county aforesaid, the following articles of personal property, to wit: meat, lard, coffee, automobile fixtures, money and merchandise, goods and wares, of the value of fifty dollars, the goods, chattels and moneys of one Lee Shields, then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

"And the jurors for the State upon their oaths aforesaid do further present: that the said Charley Beal, Hazel McMahan, Bose Fain, Mary Best, Jimmie Hunt, and Lee Ellen Harbin, afterwards, to wit: on the day and year aforesaid with force and arms at and in the county aforesaid, the said meat, lard, coffee, automobile fixtures, money, merchandise, goods and wares of the value of fifty dollars, of the goods, chattels and moneys of the said Lee Shields before then feloniously stolen, taken and carried away, feloniously did receive and have the said meat, lard, coffee, money, merchandise, goods and automobile fixtures then and there, well knowing said goods, chattels and moneys to have been feloniously stolen, taken and carried away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State. DAVIS, *Solicitor.*"

2. "That the cause went to the jury after evidence having been offered and argument of counsel made, and the jury came in and rendered a verdict as follows: 'All of the defendants guilty on the third count of having these goods in their possession, knowing them to be stolen goods.' 'Not guilty as to the breaking and entering, and for larceny.'

"Upon the coming in of the verdict the defendants and each of them moved to set aside the verdict.

"Motion overruled by the presiding judge.

"The defendants in apt time excepted.

"The defendants moved the court for arrest of judgment and for the release of the defendants.

"Motion overruled. And defendants in apt time excepted.

"Upon the verdict the court rendered the following judgment: It is the judgment of the court that the male defendants, to wit: Charley Beal, Bose Fain, and Jimmie Hunt, be confined in the jail of Cherokee County for a period of two years and assigned to work on the public roads of any county with which the commissioners may make arrangements; and that the female defendants Hazel McMahan, Mary Best, and Lee Ellen Harbin, be confined in the jail of Cherokee County for a period of two years.

"Thereupon defendants and each of them appealed to the Supreme Court of North Carolina.

"Before said judgment was pronounced but after coming in of the verdict the defendants moved to set aside the verdict and for a new trial. Motion overruled, and defendants excepted. The defendants then moved in arrest of judgment and for their release and discharge from custody, motion overruled and defendants excepted. Notice of appeal was given in open court, and further notice waived; appeal bond in the sum of $1,000 fixed for each defendant.

"The cause was regularly docketed in the Supreme Court and there heard upon the exceptions set out in the record to the Supreme Court, as appears in the record of the case in the Supreme Court.

"From the certified opinion of the Supreme Court, this court finds as a fact that the defendants' assignment of error based on the exceptions therein was sustained and that the Supreme Court ordered a *venire de novo.*

"At the March Term, 1931, the solicitor sent a new bill in this case which bill was returned 'a true bill' by the grand jury, and this cause on such new bill is the same cause that was tried at the March Term, 1930, in which verdict was rendered and judgment pronounced and from which defendants appealed to the Supreme Court and which was heard in the Supreme Court and a *venire de novo* ordered. When this cause came on for trial counsel for defendants moved the court to go to trial on the three counts in the bill of indictment found at the March Term, 1930, and not in the bill found at the March Term, 1931.

"Upon the foregoing admissions and findings of fact the court is of opinion, and holds, that the pleas of defendants of former acquittal on

the first and second counts in the bill of indictment of March Term, 1931, cannot be sustained, and declines to submit an issue to the jury on the former acquittal. To this ruling of the court the defendants and each of them excepted, and this constitutes defendants' Exception No. 1.

"To the failure of the court to hold, on the foregoing admissions, that the defendants had been tried, and acquitted, of the offenses of burglary and of larceny alleged in the bill of indictment, the defendants except and this constitutes defendants' Exception No. 2.

"The defendants moved the court that the trial proceed under the bill of indictment found at the March Term, 1930, and not under the indictment found at the March Term, 1931, and on the third count in said bill. Motion overruled and defendants except, and this is Exception No. 3.

"Whereupon the defendants were placed on trial under all three counts contained in the bill of indictment found at the March Term, 1931, and the defendants again excepted, and this is their Exception No. 4."

In the case at bar the jury returned as their verdict: "All five defendants guilty on the first and second counts."

Judgment was pronounced on the verdict and the defendants excepted and appealed.

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

Hill & Gray and Moody & Moody for defendants.

ADAMS, J. At the March Term, 1930, of the Superior Court of Cherokee County the defendants were indicted for storebreaking, larceny, and receiving stolen goods knowing them to have been stolen. They were put on trial and the jury returned the following verdict: "All of the defendants guilty on the third count of having these goods in their possession, knowing them to have been stolen. Not guilty as to breaking and entering and for larceny." The defendants moved to set aside the verdict and to arrest the judgment. Their motions were overruled; they excepted; and from the judgment on the verdict they appealed. This Court awarded a *venire de novo* on the authority of *S. v. Barbee,* 197 N. C., 248, in which it was held that a finding by the jury that the defendants were guilty of having the property in their possession knowing it to have been stolen was not responsive to the indictment and was not sufficient to support a judgment. *S. v. Beal,* 200 N. C., 90.

At March Term, 1931, of the Superior Court the grand jury returned another bill against the defendants, which, according to the

finding of the trial court, states "the same cause that was tried at the March Term of 1930." When the present case was called in the Superior Court the defendants moved that the court proceed on the third count in the bill found at March Term, 1930, and that an issue of former acquittal be submitted on the first and second counts. Both motions were denied. Whether this ruling is correct depends upon the legal effect of the decision of this Court awarding a *venire de novo*.

We need not point out the technical distinction between a *venire de novo* and a new trial, for while they differ in material respects they agree in this, that both award a new trial. The contention that a new trial extends to the whole case is deduced from the principle that the defendant in a criminal action cannot claim protection under a verdict which at his instance is set aside, and that the granting of a new trial left nothing to support the verdict but placed the parties in the position they would have occupied had there been no trial. In the brief which they filed in *S. v. Beal, supra,* the defendants insisted that "they should have a new trial," and a new trial was granted them. At the second trial they claimed exemption from prosecution on the first and second counts on the ground that on these they had previously been acquitted.

The defendants cite a number of authorities from other states in support of their position, and it must be admitted that in other jurisdictions there is marked diversity of opinion on the question. But this Court is committed to the opposing view, and we cannot now accept the proposed doctrine without overruling our own decisions.

In *S. v. Stanton,* 23 N. C., 424, in an opinion written by *Ruffin, C. J.,* the Court established the principle that where a defendant who is acquitted upon one count in an indictment and convicted upon another appeals and a *venire de novo* is awarded there must be a retrial upon the whole case. There in the first count the indictment charged the defendant with forgery and in the second with uttering and publishing the paper knowing it to have been forged. The Court granted a new trial and said, "As this is done at the instance of the prisoner, the former verdict must be set aside entirely, and a *venire de novo* awarded to retry the whole case."

The decision was made in 1841 and on the point in question it has been cited with approval in *S. v. Grady,* 83 N. C., 643; *S. v. Craine,* 120 N. C., 601; *S. v. Freeman,* 122 N. C., 1012; *S. v. Gentry,* 125 N. C., 733; *S. v. Matthews,* 142 N. C., 621; and in the concurring opinion in *S. v. Davis,* 175 N. C., 723. The sentiment expressed by *Smith, C. J.,* in *S. v. Grady, supra,* may therefore be deemed pertinent: "In this State it has been ruled, *Chief Justice Ruffin* delivering the opinion of himself and his able associates, that when, at the instance of a convicted

prisoner charged in several counts in an indictment, on some of which he is found not guilty, a new trial is awarded, the entire verdict is set aside and he is put on trial as before upon the entire bill. *S. v. Stanton,* 23 N. C., 424. We should be reluctant to disturb the doctrine laid down upon such high authority, and so long since acquiesced in, except upon the most cogent conviction of its error, notwithstanding the weight of modern authority to the contrary."

The foregoing cases are applicable if the two bills are identical; but while the transactions referred to are the same the second and third counts in the second bill are not identical with, but an enlargement upon, the corresponding counts in the first. The difference consists in the number, description, and value of the articles charged to have been stolen or feloniously received. If the bill returned in March, 1931, is in effect a new bill, the defendants were properly tried upon it pursuant to the practice approved in *S. v. Lee,* 114 N. C., 844 and other cases. So, whether the counts in the two bills are essentially different or practically identical, the first four exceptions must be overruled.

It is suggested by the appellants that some of the cases approving *S. v. Stanton, supra,* merely hold that in an indictment for murder a new trial on a verdict for manslaughter reopens the whole case on the principle that manslaughter is a lesser degree of the offense charged; but no decision of this Court has reversed or modified the doctrine laid down in the *Stanton case,* which deals with the exact question under consideration.

These are the principal exceptions. There are others relating to the admission of evidence but they are without merit. It was competent for the State to show where the defendants were and the circumstances under which they were arrested, the relation they sustained to one another and the articles that were found in their possession, not excluding "a small quantity of liquor." Testimony concerning the admission of Mary Best was restricted to the question of her guilt, and if it did not tend to implicate her it was certainly not prejudicial to her codefendants. His Honor was careful to instruct the jury with great clearness that the testimony as to her admission should not be considered as against the others. In the charge there is no prohibited expression of opinion and no reversible error with respect to the possession of the goods.

The motion for nonsuit was properly refused. Upon a careful inspection of the record we find

No error.

MINNIE SWAINEY, ADMINISTRATRIX OF JAMES SWAINEY, *v.* THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, AND B. M. BEALER, JR.

(Filed 17 February, 1932.)

1. Highways B o—Evidence of defendant's negligence held insufficient to be submitted to the jury.

Where, in an action to recover damages for the negligent killing of the plaintiff's intestate, there is evidence only that the intestate was killed while riding a bicycle at or near a street intersection by being struck by an auto-truck driven by the defendant: *Held,* the defendant's motion for judgment as of nonsuit should be allowed, the mere fact of the collision raising no presumption of negligence, and there being no evidence to support the allegations of the complaint as to the negligent driving of the defendant.

2. Negligence A e—There is no presumption of negligence from a collision on a highway or street.

The mere fact of a collision on a street or highway raises no presumption that either party was negligent.

APPEAL by defendants from *Stack, J.,* at October Term, 1931, of BUNCOMBE. Reversed.

This action was begun and tried in the General County Court of Buncombe County. The plaintiff is the administratrix of her son, James Swainey, who died in the city of Asheville, on 25 October, 1930. This action is to recover damages for his death.

In her complaint plaintiff alleges that the death of her intestate was the result of personal injuries which he suffered on 22 October, 1930, and which were caused by a collision at the intersection of Merrimon Avenue and Maney Avenue in the city of Asheville, between a bicycle on which he was riding, and an automobile which was owned by the defendant, the Great Atlantic and Pacific Tea Company, and driven by the defendant, B. M. Bealer, Jr. She alleges that the collision was caused by the negligence of the defendant, B. M. Bealer, Jr., who was an employee of his codefendant, and that at the time of the collision, the said defendant was engaged in the performance of his duties as such employee, and was acting within the scope of his employment. The specific acts of negligence on the part of the defendant, B. M. Bealer, Jr., alleged in the complaint as the proximate cause of the collision, are as follows:

"(a) The careless, negligent, wrongful and unlawful operation of said Buick automobile by the defendant at a dangerous, reckless and unlawful rate of speed;

(b) The wrongful and unlawful operation of said automobile by the defendant in driving same around the corner of a street intersection without going beyond the center of said intersection as provided by the

laws of this State for the safety of the citizens thereof, and without giving a signal or warning;

(c) The wrongful and unlawful operation of said automobile around the corner of a street intersection at a greater rate of speed than allowed by the laws of this State in such case made and provided, to wit, more than fifteen miles per hour;

(d) The careless and negligent operation of said automobile without keeping a proper look-out for the rights and safety of this plaintiff's intestate, and others who might be using said street or crossing said intersection at the time and place alleged;

(e) In the wrongful and negligent manner in which the defendant cut over on to the left-hand side of Merrimon Avenue and around the left-hand corner of Maney Avenue, at such an excessive rate of speed as to make it entirely impossible for this plaintiff's intestate to avoid the collision, although as this plaintiff is advised, informed and believes, he made every effort so to do."

At the trial of the action there was evidence tending to show that between six-thirty and seven o'clock, p.m., on 22 October, 1930, there was a collision at the intersection of Merrimon Avenue and Maney Avenue, in the city of Asheville, between a bicycle on which plaintiff's intestate was riding, and an automobile owned by the defendant, the Great Atlantic and Pacific Tea Company, and driven by the defendant, B. M. Bealer, Jr., an employee of said company; and that as the result of said collision, plaintiff's intestate suffered personal injuries from which he died on 25 October, 1930.

The only witness who testified that he saw the collision testified that he did not see the automobile or the bicycle before the collision. This witness was at a filling station located on the corner of Merrimon Avenue and Maney Avenue, standing in front of his automobile, and pouring water into its radiator, at some distance from the intersection of said avenues. He heard a big, dull thud. He looked up and saw that some object, which he immediately discovered was a bicycle, had struck the automobile about its windshield. He went at once to the scene of the collision, and there found plaintiff's intestate lying on the street. The boy was unconscious, and was bleeding at the nose and at the mouth. His feet were pointing down Merrimon Avenue, and his head toward Grace Street. The defendant, B. M. Bealer, Jr., had driven the automobile some distance up Maney Avenue. When he was informed of the accident, he returned at once to the scene. The defendant said that he had not realized that there had been a collision between the automobile which he was driving and a bicycle—that he thought he had run over a pan in the street. The boy was taken by the witness and the

defendant to a hospital in the city of Asheville, where he died on 25 October, 1930.

There was no evidence tending to show at what rate of speed either the automobile or the bicycle was being driven before the collision, nor was there any evidence tending to show where the collision occurred with respect to the intersection of Merrimon Avenue and Maney Avenue. Plaintiff offered no evidence tending to show that the defendant, B. M. Bealer, Jr., had turned the automobile from Merrimon Avenue into Maney Avenue before the collision. There was evidence tending to show that the bicycle which approached the intersection of the avenues along Merrimon Avenue, proceeding in a southerly direction, struck the automobile about the windshield. The automobile approached the intersection on Merrimon Avenue, proceeding in a northerly direction. There was no light on the bicycle. The collision occurred between six-thirty and seven o'clock, p.m., on 22 October, 1930.

There was evidence tending to show that plaintiff's intestate at the time of his death was about 16 years of age; that he was employed as a messenger boy by the Postal Telegraph Company and was engaged in the performance of the duties of such employment at the time of the collision. The evidence tending to show that he was a boy of fine character and of great promise was not contradicted at the trial.

At the close of the evidence for the plaintiff, both defendants moved for judgment as of nonsuit. The motion was denied, and defendants excepted. Neither defendant offered evidence.

The issues involving the liability of each defendant were answered in accordance with the contentions of the plaintiff. From judgment that plaintiff recover of the defendants the sum of $25,000, the amount assessed by the jury as her damages, the defendants appealed to the judge of the Superior Court of Buncombe, assigning numerous errors at the trial in the General County Court.

At the hearing of defendants' appeal, their assignments of error were specifically overruled. From judgment affirming the judgment of the General County Court, the defendants appealed to the Supreme Court.

Braxton Miller, Campbell & Sample and Zeb. V. Curtis for plaintiff.

Joseph W. Little for defendant, Great Atlantic and Pacific Tea Company.

Carl W. Greene for defendant, B. M. Bealer, Jr.

CONNOR, J. On defendants' appeal from the judgment of the General County Court in this action, there were assignments of error based on fifty-six exceptions duly noted by the defendants at the trial in the General County Court. Each of these assignments of error was duly

considered, and ruled on by the judge of the Superior Court, as shown by the record. *Smith v. Texas Co.*, 200 N. C., 39, 156 S. E., 160. None was sustained. Each was specifically overruled. The judgment of the General County Court was affirmed.

On defendants' appeal from the judgment of the Superior Court, there are twenty-two assignments of error, each based on an exception duly noted by the defendants to the ruling of the judge of the Superior Court on an exception noted by the defendants at the trial in the General County Court. The questions of law involved in this appeal are duly presented to this Court. As we are of opinion, however, that there was error in overruling defendants' exception to the refusal of the judge of the General County Court to allow their motion for judgment as of nonsuit, at the close of the evidence, we have not considered and do not pass on assignments of error based on other exceptions.

There is no presumption of negligence arising out of a collision between a bicycle and an automobile, where the collision occurs on a public road or a street. In the absence of negligence on the part of the rider of the bicycle, or of the driver of the automobile, as the cause of the collision, there is no legal liability on the part of either to the other for damages resulting from the collision. Where the collision was accidental no action for the recovery of damages can be maintained. *Austin v. R. R.*, 197 N. C., 319, 148 S. E., 446.

In the instant case after a careful consideration of the evidence set out in the record, we fail to find any evidence sufficient to sustain the allegations of the complaint. In the absence of such evidence, defendants' motion for judgment as of nonsuit at the close of the evidence should have been allowed. C. S., 567. For error in overruling defendants' assignment of error based on their exception to such refusal, the judgment affirming the judgment of the General County Court must be

Reversed.

J. J. PIERCE v. F. H. BIERMAN, MABEL B. BIERMAN, LEX MARSH, JR., LEX MARSH COMPANY, A CORPORATION, G. L. BRYSON, H. L. McKEE AND HOME REAL ESTATE AND GUARANTY COMPANY, A CORPORATION.

(Filed 17 February, 1932.)

Fraud A b—Evidence held insufficient to show deception constituting fraud.

All prior negotiations are merged in the written instrument in the absence of fraud, mistake or other maintainable equity, and the law presumes that the parties to a contract have deliberately chosen words

fit and suitable to express their meaning and intent, and where a contract for the exchange of real property between the parties is reduced to writing and the complaining party has read it and deliberated several days before executing it: *Held*, he may not recover against the other party damages caused by his ignorance of the difference between the legal liability of taking property subject to a mortgage and assuming to pay a mortgage debt thereon, and where the evidence tends only to show a mistake based upon such ignorance a motion as of nonsuit should be allowed.

CIVIL ACTION, before *Harding, J.*, at March Term, 193[illegible], of MECKLENBURG.

The plaintiff instituted an action against the defendants, F. H. Bierman and wife, to recover $600 evidenced by three promissory notes. The defendants, Bierman and wife, filed a petition asking that the other defendants be made parties to the suit. This was done. Thereupon the Biermans filed an answer admitting the execution of the notes held by the plaintiff and setting up a cross-action against the other defendants. The cross-action of Bierman and wife against their codefendants is founded in substance upon the following facts: Bierman and wife owned a lot in Mecklenburg County on Hutchison Avenue, sometimes referred to as the Derita Road property. The defendant, Lex Marsh, and H. J. Anthony owned a piece of property in Mecklenburg County known as the North Brevard Street property. The defendant, McKee, was a real estate agent in Charlotte, who approached the Biermans and inquired if they would be interested in trading or exchanging the Hutchison Avenue property for the Brevard Street property. Thereafter Bierman looked over the Brevard Street property owned by Lex Marsh, and, after examining the property, notified the defendant, McKee, that he was interested and requested McKee to come to see him about the trade.

On 6 September, 1928, all of the defendants entered into a written contract stipulating "that Bierman and wife were to convey to Lex Marsh Company, their executors or assigns a lot of land fronting on Derita Road. . . . Lex Marsh Company, their executors or assigns, agree to take title to the above mentioned property, subject to $12,000, payable $2,000 per year over a period of six years." Lex Marsh Company agreed to convey to Bierman and wife the North Brevard Street property, and F. H. Bierman and wife, Mabel B. Bierman, agreed "to assume and execute a total mortgage of $20,000, and agree to pay together with interest from date of transfer of the property."

Thereafter on 18 September, 1928, Bierman and wife executed a warranty deed to the defendant, G. L. Bryson, conveying the Derita Road property in which said deed it is provided: "This conveyance is made subject to the indebtedness represented by said deed of trust in

the amount of $12,102." On the same day Lex Marsh and Anthony conveyed to Bierman and wife the Brevard Street property by a warranty deed, which said deed contains the following stipulations in the warranty clause: "Except for that certain deed of trust to E. J. Caffrey, trustee for the Mechanics Perpetual Building and Loan Association, recorded in Book ....., at page ....., of the Mecklenburg registry, securing a loan in the gross amount of $12,000, on which there is a balance of $11,550, which balance the parties of the second part hereby assume and agree to pay."

The final result of these transactions was that Bryson, Bierman's grantee, received Bierman's property subject to a mortgage or deed of trust of $12,102, whereas Bierman received the Brevard Street property and agreed to assume and pay off a mortgage or deed of trust of $11,550 thereon.

Bierman and his wife allege that the other defendants played a trick on them or defrauded them by reason of the fact that McKee, the real estate agent, gave them to understand that each party to the transaction was to assume and pay the indebtedness of the other, whereas, in fact, Bierman assumed the payment of the mortgage on the Brevard Street property, while Bryson purchased Bierman's property subject to a mortgage, thereby incurring no personal liability. Bierman testified that he completed the tenth grade in school and "at that time that was considered a pretty good education." He further testified that when the defendant, McKee, brought him the contract "I did not sign it . . . because I wanted to look it over, examine it, and see if it was in accordance with the terms I had talked over with him. I read it and the same language is in it now as was in it when I read it. I did not read it over while McKee was in my office, but did read it over sometime within a day or two after I got it. I read it over to my wife, and she is a woman of similar education to mine. I discussed the contract with her. I read the deeds made pursuant to that contract and checked them over to see whether they conformed with the terms of the contract, and found they did." He further testified that he examined the Brevard Street property thoroughly and "after my investigation I thought the trade I was getting was a better proposition than the one I had. I called McKee in a day or two and told him I would like to see him and would be interested in making a trade. He came to see me. I told him I had made an inspection of the property and that I was interested. I told him that I would be interested in the proposition and to go to Lex Marsh and get his proposition. The proposition came to me from Lex Marsh Company. In a few days McKee came back to me and brought a proposition from Lex Marsh Company. . . . Mr. McKee was very much

interested in getting me to sign the contract, but I did not sign it that day. I wanted time to read it over, study it, and talk it over with my wife, and did that. Then both of us signed it. I took it up with my wife and signed it, and two or three days later called Mr. McKee and asked him to come down in reference to it." There was further testimony that Bierman first discovered the difference between buying property subject to a debt and assuming and agreeing to pay the debt in November, 1928. There was further evidence that on 6 February, 1929, after Bierman had made complaint, that Bryson reconveyed the Derita Road property back to him in exactly the same condition and subject to the same encumbrance originally existing, and that Bierman reconveyed to the Lex Marsh Company the Brevard Street property. There is some controversy as to whether Bierman paid out anything on either project.

There was no controversy with respect to the right of plaintiff to recover $600 on the notes held by him as the jury found he was an innocent purchaser for value.

The issues upon the cross-action are as follows:

1. "Did the defendants, Lex Marsh, Jr., Lex Marsh Company, G. L. Bryson and H. L. McKee, or either of them, fraudulently induce F. H. Bierman and wife, Mabel B. Bierman, to enter into contract, whereby F. H. Bierman and wife conveyed certain real estate on Derita Road to Lex Marsh Company or its assigns, subject to indebtedness of $12,102.68, as alleged in the cross-complaint of F. H. Bierman and wife, Mabel B. Bierman?"

2. "Did the defendants, Lex Marsh, Jr., Lex Marsh Company, G. L. Bryson and H. L. McKee, or either of them, fraudulently induce F. H. Bierman and wife to enter into a contract whereby Lex Marsh, Jr., and others conveyed to F. H. Bierman and wife, Mabel B. Bierman, certain real estate on Brevard Street, on which real estate F. H. Bierman and wife assumed and agreed to pay mortgage indebtedness of $20,000?"

3. "Have defendants, F. H. Bierman and wife, Mabel B. Bierman, been damaged by the fraud of said defendants?"

4. "What actual damages, if any, are the defendants, F. H. Bierman and wife entitled to recover?"

5. "What punitive damages, if any, are defendants, F. H. Bierman and wife, entitled to recover?"

The jury answered the first issue "Yes," the second issue "Yes," the third issue "Yes," the fourth issue "$1,600," and the fifth issue "None."

From judgment upon the verdict the defendants, Lex Marsh Company, Lex Marsh, Jr., Bryson and McKee, appealed.

Bridges & Orr for F. H. Bierman and Mabel B. Bierman.

Fred B. Helms for Lex Marsh, Jr., Lex Marsh Company, G. L. Bryson, and H. L. McKee.

BROGDEN, J. The defendants in the cross-action instituted by Bierman, assert that there was no competent evidence of fraud or conspiracy, and that the cross-action should have been nonsuited upon motion duly made. The difference in the liability imposed arising from the purchase of property "subject to a debt" and that arising when a purchaser "assumes and agrees to pay a debt" is defined and applied in *Keller v. Parrish*, 196 N. C., 733, 147 S. E., 9; *Harvey v. Knitting Co.*, 197 N. C., 177, 148 S. E., 45. It is obvious from the evidence that Bierman did not understand the difference between these two legal terms or the degree of liability imposed thereby, but he was an intelligent man and signed the contracts of exchange and executed the deed for his own property after full study, investigation and deliberation.

Decisions of courts and works of approved textwriters agree that, when a party of full age executes and delivers a written contract, all prior verbal negotiations are merged in the written instrument in the absence of fraud, mistake or other maintainable equity. Moreover, in such cases the law assumes that the parties have deliberately chosen words fit and suitable to express the intent and meaning of the transaction. The general aspects of the law upon the pertinent facts are stated in *Conservatory v. Dickenson*, 158 N. C., 207, 73 S. E., 990; *Forbes v. Knitting Mill*, 195 N. C., 51, 141 S. E., 352; *Cromwell v. Logan*, 196 N. C., 588, 146 S. E., 233; *Elam v. Realty Co.*, 182 N. C., 599, 109 S. E., 632; *Burton v. Insurance Co.*, 198 N. C., 498, 152 S. E., 396.

Applying the rules of law to the facts, the Court is of the opinion that the motion for nonsuit upon the cross-action should have been granted.

Reversed.

W. C. JORDAN v. F. S. WETMUR, TRADING AS WETMUR MOTOR COMPANY, DEFENDANT; CAROLINA DISCOUNT CORPORATION, INTERVENER.

(Filed 17 February, 1932.)

1. Evidence C c—Burden is on intervener to establish his claim.

The burden is on an intervener to establish his claim or title.

2. Chattel Mortgages B b—Prior registered chattel mortgage has priority of lien over subsequently registered title-retaining contract.

Where the purchaser of an automobile signs a title-retaining contract to secure the balance of the purchase price, and, prior to making the

down payment and the delivery of the car, executes a chattel mortgage thereon to a third person to secure money borrowed, and the chattel mortgage is registered prior to the registration of the title-retaining contract: *Held*, the lien of the chattel mortgage is superior to that of the title-retaining contract. C. S., 3311, 3312.

APPEAL by defendant Carolina Discount Corporation, intervener, from *Stack, J.*, and a jury, at May-June Term, 1931, of HENDERSON. No error.

The facts undisputed are as follows: The plaintiff introduced in evidence a chattel mortgage from C. G. Howard to W. C. Jordan, dated 16 January, 1930, filed for registration 16 January, 1930, at ten-twenty a.m., and recorded in Book 63, at page 28, in the records of chattel mortgages for Henderson County, which chattel mortgage secured the payment to the plaintiff of the sum of $126, and conveyed to the plaintiff mortgagee one Ford touring car, No. A-2101897, model 1929. The plaintiff also introduced a note attached to the said chattel mortgage given by the said C. G. Howard to W. C. Jordan, bearing the same date as the chattel mortgage and being in the amount of $126.

Plaintiff testified, in part: "I took this mortgage and note from C. G. Howard. He came in one or two days before he got the money and said he wanted to borrow $120 to pay for a car, and would give a mortgage on the car for that much. I agreed to lend him $126, including interest, and on 18 January he came back with the mortgage all signed and recorded. I don't know who drew it. I came to the courthouse to see if there was anything ahead of the mortgage and did not find anything so I came back and gave him the check and he turned over to me the note and mortgage. This was on 18 January. . . . Howard told me he had bought a car from Wetmur and this money was to pay for it. . . . When Howard came in and got the money, he said he was going to finish paying for a car."

The evidence on the part of the defendants: Ralph Hester, manager for Wetmur Motor Company, testified, in part: "Mr. Howard came to our place on 16 January, 1930, and wanted to trade cars. He had a 1928 Ford roadster that he wanted to trade in. We agreed on a price for his old car and he said he did not have quite enough money to make the first payment, but asked us to go ahead and trade and fix up the papers and then hold the papers and the car until he got enough money to make the down payment. He kept his old car and said he would use that until he got the rest of the money to make the down payment. He signed the contract for the car. We filled out an application for a license and title and gave that to him and he went to Asheville and got the tag and put it on the 18th, saying that he had a government check

and could finish paying for it and wanted to get the car. The car was then stored in our place. It had never been delivered. He made the cash payment and delivered his old car and the sales contract and we delivered the new car on 18 January, 1930."

The intervener, Carolina Discount Corporation, then offered in evidence a conditional sales contract between Wetmur Motor Company, dealer, and C. G. Howard, purchaser, dated 16 January, 1930. The conditional sales agreement recites that Wetmur Motor Company had on the date thereof agreed to sell and C. G. Howard agreed to buy a Ford touring car, model 1929, motor No. A-2101897, for the price of $594, of which the buyer had on that date paid to the seller the sum of $182, leaving a balance of $412.32, payable in 12 monthly installments of $34.36, each payment to be evidenced by the buyer's promissory note, the payment of which notes to be secured by the said conditional sales agreement. The agreement further provided that title to the car and extra equipment shall not pass on delivery to the buyer but shall remain vested in and be the property of the seller, or assigns, until the purchase price has been fully paid. The conditional sales agreement further provides that in the event of default by the buyer, the seller may, without demand or notice, take possession of the car, and all rights of the buyer under the agreement shall cease and terminate absolutely thereupon. The said conditional sales agreement contains an assignment thereof by the Wetmur Motor Company to Carolina Discount Corporation dated 16 January, 1930.

R. B. Hester (recalled), testified: "Mr. Howard made cash payment for this automobile on 18 January, by a government check. I think $117.70 was what he paid. Then we delivered the car. We got the money from the Carolina Discount Corporation on 18 January. We did not deposit the draft until after the car was delivered. (Cross-examination.) We made out the papers with Howard on 16 January, and he signed them then. The terms of the sale were all agreed upon and the sales contract I have been talking about was signed on 16 January, so that all he had to do was to come back and bring the cash payment and get the car, which he did on the 18th. On the 16th we gave him an application to get the title. He said he wanted to wait until he got the rest of the money, but he went to Asheville and got the license and put it on the car the next day, and said as soon as his government check came in he would come and get it. He got his license on the 17th. The Wetmur Motor Company signed an application for his license on the 16th, declaring him to be the owner of the car. He drove the car out on the 18th. Howard was killed about a year ago. I

don't think he left anything. Q. The application for title, state whether or not that showed a lien in favor of the Carolina Discount Corporation? A. Yes, it did."

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

"1. Is the intervener the owner of and entitled to the possession of the car sued for? A. No.

2. If not, what was the value of the car at the time it was possessed by the intervener? A. $200 (by consent)."

The court below rendered judgment for plaintiff on the verdict, the intervener assigned error and appealed to the Supreme Court.

Shipman & Arledge for plaintiff.
Smith & Joyner for intervener.

CLARKSON, J. The first issue, which is determinative of the action, is as follows: "Is the intervener the owner of and entitled to the possession of the car sued for?"

The court below charged the jury "If you believe the evidence and all the evidence you will answer that issue "No." We think the charge of the court below correct under the facts and circumstances of this case.

The Carolina Discount Corporation is the intervener in this action. The burden is on it to show title—it has the laboring oar.

Speaking to the subject, it is held in *Hill v. Patillo,* 187 N. C., at p. 532: "In such a proceeding the intervener is not called on or required, and indeed he is not permitted to question the validity of plaintiff's claim against defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervener has himself become the actor in the suit and on authority is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff." *Lockhart v. Insurance Co.,* 193 N. C., at p. 12.

It will be noted that the conditional sales agreement under which the intervener claims the automobile is dated 16 January, 1930. It is therein recited "Wetmur Motor Company had on the date thereof agreed to sell and C. G. Howard agreed to buy a Ford touring car," etc. The terms were all settled and agreed upon in writing—"The coming together of two minds on a thing done or to be done." *Overall Co. v. Holmes,* 186 N. C., at p. 431.

This conditional sales agreement was signed by Howard on 16 January, and "all he had to do was to come back and bring the cash payment and get the car, which he did on the 18th." On the 16th Howard

made a chattel mortgage to W. C. Jordan, the plaintiff, which was duly recorded on that day. Plaintiff Jordan agreeing to lend Howard on the car $126 taking his note and chattel mortgage. On 18 January plaintiff went to the records and found nothing prior to this chattel mortgage and gave Howard the money. On the same day Howard gave Wetmur Motor Company the amount agreed upon under the conditional sales agreement.

C. S., 3312, is as follows: "All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the State, then in the county where the personal estate or some part thereof is situated, or in case of choses in action, where the donee, bargainee or mortgagee resides." Under C. S., 3311, provision is made as to registration of chattel mortgages.

In *Ellington v. Supply Co.*, 196 N. C., at p. 789, citing numerous authorities, is the following: "In construing the registration laws of this State, this Court has consistently held that no notice, however full and formal, will supply the place of registration." *Duncan v. Gulley*, 199 N. C., 552.

Under the facts and circumstances of this case, to have priority over plaintiff's chattel mortgage the conditional sales agreement should have been recorded first.

Plaintiff took precaution to examine the record before lending his money to Howard on the chattel mortgage which was recorded, the conditional sale was not recorded at that time.

In *Best v. Utley*, 189 N. C., at p. 364-5, the following observation is made: "The public policy, upon which our registration laws are founded, favors an interpretation and construction of statutes relative to probates and registration, which will encourage confidence in records affecting titles, rather than suspicion, doubt, or uncertainty."

The intervener has the burden to show title, from the facts appearing on this record, we do not think it has done this. In the judgment in the court below, we find

No error.

STATE OF NORTH CAROLINA, UPON RELATION OF PASQUOTANK COUNTY; J. C. THOMPSON, C. A. OWNLEY, W. O. ETHERIDGE, G. D. JENNINGS, JOHN T. WILLIAMS, H. CARTWRIGHT AND C. B. MUNDEN, COMMISSIONERS OF PASQUOTANK COUNTY; N. E. AYDLETT, CLERK SUPERIOR COURT OF PASQUOTANK COUNTY; AND N. E. AYDLETT, RECEIVER OF BERENICE AND ESTHER LEE BAILEY, ROSA AND SAMUEL BATEMAN, ALMA BERRY, CHILDREN OF MARY W. BRIGHT, MILTON BRIGHT, VIVIAN BRIGHT, WAYLAND BRITTON, ERNEST F. CARTWRIGHT, JOHN T. CARTWRIGHT, STERLING W. CARTWRIGHT, MARGARET CHORY, BRUCE CLIFTON, GRAHAM COMMANDER, RAYMOND AND ROLAND DOWNING, BESSIE AND MILDRED EVANS, DANIEL B. FEARING, GLENN AND EUGENE GODFREY, CURT HEATH, JR., ROBERT AND ISAAC HOLLY, HEIRS AND WIFE OF B. F. JAMES, LUTHER JERNIGAN, VIOLA JERNIGAN, IRVING L. AND WILLIE M. JOHNSON, RUDOLPH JONES, ROBERT V. LAMB, ANN MARKHAM, HENRY C. MARKHAM, MARGARET MARKHAM, VIOLET, EDGAR, RUBIE AND EDWIN MORGAN, OLIVER, ERNEST W., ODEL AND VERNON L. OVERTON, RICHARD PENDLETON, FANNIE MAY, BENJAMIN AND CLARA ROGERSON, CLARA ROLFE, JULIAN, MARY AND ELEANOR RAPER, PHOEBE SESSOM, JOHN AND FRANK SUTTON, FRANCES TOXEY, JOHNNIE L., INEZ, CARLTON, LILLIAN AND RUTH B. WELCH, KATIE, MINNIE, GRANDY, THELMA, RUTH AND ETHEL WHALEY, ELIZABETH WHITE, MARY LOUISE WHITE, ROSALIA, DURAD AND MABEL WHITEHEAD, BERENICE AND SARAH WILLIAMS, CATHERINE CHORY WILLIAMS, MARGARET WILSON, GEORGIA HEATH, v. AMERICAN SURETY COMPANY OF NEW YORK AND JOHN L. ROGERSON, ADMINISTRATOR OF ERNEST L. SAWYER, DECEASED.

(Filed 17 February, 1932.)

Costs C a—Order taxing future costs in this case held premature.

An order continuing a receivership involved in an action and taxing the defendants with all costs accruing is held premature as to the taxing of future costs and to that extent the judgment is modified on appeal.

APPEAL by defendant Surety Company from *Frizzelle, J.*, at November Term, 1931, of PASQUOTANK. Error.

M. B. Simpson and Ehringhaus & Hall for plaintiffs.
J. H. LeRoy, Jr., and P. W. McMullan for defendants.

PER CURIAM. This case was here before—*Pasquotank County v. Surety Co.*, 201 N. C., 325.

The following judgment was rendered by the court below: "This cause coming on to be heard, and it appearing to the court that the opinion of the Supreme Court affirming the judgment heretofore rendered has been certified to this court and been on file for more than ten days prior to

this term; and it further appearing from said opinion that the plaintiffs are entitled to the possession of the notes and securities referred to in the judgment in this case as collateral security for the full amount of the indebtedness herein adjudged against the defendant administrator in the sum of $59,811.81, with interest thereon from 9 April, 1929, and to have the receivership heretofore ordered in this cause discharged and terminated; and it further appearing that the defendants herein have requested the court to continue the receivership; it is now, therefore, ordered that this cause be retained and the receivership continued for further orders and that said receivers continue to make diligent effort to collect said securities, reporting their progress from time to time to this court. It is further ordered that all collections shall be turned over in toto to the plaintiffs until the amount of same plus the recovery heretofore obtained against the bonds shall be equal to the full amount of the indebtedness adjudged against the administrator. *The plaintiffs will recover against the defendants the costs of the receivership from this day forward,* and the costs in this action to be taxed by the clerk."

We think that so much of the judgment that the plaintiff recover against the defendants "costs of the receivership from this day forward" premature and should be stricken out. To this extent there is error in the judgment.

Error.

GEORGE MILES v. J. K. MCIVER.

(Filed 17 February, 1932.)

Negligence D c—Evidence of negligence in this case held sufficient to be submitted to the jury.

Evidence tending to show that the owner of an automobile when changing a tire upon the highway offered to pay a colored boy to help him and told the boy to get under the car and jack it up at the axle, that the jack used was defective and that when the owner pulled off the tire sought to be changed the jack under the car slipped, causing the automobile to fall on the colored boy to his injury is *Held,* sufficient upon the issue of actionable negligence of the owner of the car.

APPEAL by defendant from *Devin, J.,* and a jury, at December Term, 1931, of MARTIN. No error.

This is an action for actionable negligence, brought by plaintiff against defendant. The defendant denied negligence and set up a plea of contributory negligence.

The defendant testified, in part: "I am the plaintiff in this action, and live near Hobgood. I was injured on 8 April, 1930. . . . Was hurt on the highway. I was on my way home and passed the defendant, his car was standing on the road and I approached him and said, 'It looks like you are in trouble. Can I do anything for you?' He had a flat tire. He asked me to help him and said he would pay me. I told him I would try to do what he told me. He told me to try to jack up the frame and he had two jacks and I jacked up the frame and when I jacked up the wheel it fell on my chest. I was under the automobile when it fell on me. I have helped jack up automobiles, but I had never been under one. He asked me to go under the car and jack up the axle so he could get the wheel off. He had two jacks. I jacked one under the frame of the car and went under there to jack it up so he could get the wheel off and it fell. Mr. McIver was standing on the outside when it fell. I jacked up the frame before I went under the car and then went under there to jack up the axle so he could get the wheel off. It was the rear right wheel. The axle fell right across my breast. It moved somehow or other. I was under the rear of the car right under the axle. I was not under the middle of the axle and not right at the end of it. Mr. McIver was on the outside. He got it off of me as quick as he could. The car was on the jack under the frame when I went under it. I went under the car and placed the jack under the axle and jacked it some more. There was one jack on the outside and one under the car. Mr. McIver got the wheel off while I was under the car. Q. State whether or not that is what made the car fall on you? A. I was under there and I think that is how come it to fall. The car fell when he pulled the wheel off. I was badly hurt. (Cross-examination.) When he pulled it off it fell on me. . . . Q. You knew before you got under there that if the thing fell down you would get hurt? A. I didn't have any idea it would fall. Q. You don't say Mr. McIver thought it would fall? A. I don't think he did. Q. How hard do you say he pulled on the wheel? A. I don't know. Hard enough to pull it off. . . . One jack was not as good as the other. The sorry jack was the one under the axle, under there where I was. I think that is the one I had. *I had the one that wouldn't half hold under there. I didn't know it wouldn't half hold until I was under there.* . . . I kept on jacking it up. Q. Knowing it might fall down? A. If he had not snatched the wheel off it would not have moved. Q. You say you don't know how hard he was pulling it? A. No, sir. He snatched it hard enough to get it off."

Dr. E. E. Pittman testified, in part: "I know George Miles. I treated him for a chest injury. He came to me fifteen or twenty minutes after

the accident occurred. I did not have access to an X-ray, but I found possibly three or four ribs broken. . . . He spat up blood for the time I was taking care of him and I saw him myself expectorate blood. The injury was caused from the force or weight of the car falling on him. Q. State whether or not he was injured internally? A. I know he had broken ribs and from the fact that he was expectorating blood, we would expect some internal injury."

Sheriff Roebuck testified: "I know George Miles. Know his general character and reputation. It is as good as the average darkey."

John Hines testified: "I know George Miles. Have known him 8 or 10 years. He lives close to me. I know his general character and reputation. It is good."

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? A. Yes.

2. What damage, if any, is plaintiff entitled to recover therefor? A. $1,510."

Hugh G. Horton for plaintiff.
Jos. W. Bailey for defendant.

PER CURIAM. The defendant introduced no evidence, and at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The motion was overruled and in this we can see no error.

We can see no evidence on this record of contributory negligence on the part of plaintiff. The exceptions and assignments of error on the part of defendant cannot be sustained. The answer of Sheriff Roebuck "it is as good as the average darkey," is not prejudicial. A witness, Hines, testified stronger "I know his general character and reputation, it is good." We see nothing objectionable in the charge of the court below, it fully complies with C. S., 564.

The defendant argued the case and filed an able brief, followed by counter-brief. On this record his contentions cannot be sustained. The evidence on the part of plaintiff we think fully sufficient to be submitted to the jury. It was a question of fact for a jury, and in law we find

No error.

GEORGE LATHAM STEWART, INFANT, BY HIS NEXT FRIEND, W. A. STEWART, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 February, 1932.)

Negligence A d, B c: Master and Servant D a — Anticipation of injury, proximate cause, and independent contractor held properly submitted to jury.

Where in an action against a railroad company there is evidence that the plaintiff was hit in the eye by a loose rock thrown by the wheels of a truck while crossing the right of way of the defendant railroad company at a public crossing, that the loose rock at the crossing had been put there by an independent contractor of the defendant railroad company, a charge presenting for the determination of the jury the questions of intervening negligence and whether the injury could have been anticipated and correctly giving the law arising upon the liability of the defendant for the acts of the independent contractor who had completed the work before the occurrence of the injury, is *Held* not to be erroneous under the facts of this case.

APPEAL by defendant from *Devin, J.*, and a jury, at February Term, 1931, of CRAVEN. No error,

This is an action for actionable negligence, brought by plaintiff against defendant for damages.

The plaintiff alleged in his complaint that the defendant, Atlantic Coast Line Railroad Company, pursuant to contract evidenced by a consent judgment was under the duty of paving part of Queen Street in the city of New Bern, occupied by the defendant's tracks. It was required to pave the space between the rail and the track in accordance with the terms of said consent judgment; and that the defendant, in pursuance of said work and shortly before the injury complained of, had placed or dumped along its tracks on said street a quantity of loose, crushed stone without any binding material or tarvia, as referred to in said contract and judgment, and that said material was allowed to remain there for some length of time, and that this material, loose, crushed rock there was of such character that when the street was opened and automobiles passed over it they had the effect of throwing the rocks and crushed stone; and alleges that on or about the fifth day of September the plaintiff, while standing near the sidewalk on the street on which he lived, was struck in the eye by a piece of crushed stone thrown by a motor vehicle in passing over said loose, crushed stone on defendant's track which the defendant had thereupon placed; and alleges that his injury was due to the negligence of the defendant in placing and allowing such material to remain upon its tracks upon a

street used by the public and by vehicles, and asks to recover damages therefor in the sum of twenty-five thousand dollars.

The defendant filed an answer in which it denied that it was guilty of any negligence in the matter; that pursuant to the judgment referred to by the plaintiff it entered into a contract with an independent contractor to do the paving in accordance with the requirements of such judgment, and that this paving was done by said independent contractor and was entirely completed long before the injury complained of by the plaintiff; that if there was negligence in the manner in which it was allegedly done, that it is not attributable to the negligence of this defendant, but to the negligence of the independent contractor whom the defendant had employed to do the work, and denies that there was any loose stone or crushed stone at that time which could have been foreseen would have been thrown up by the wheel of a motor vehicle in passing over it, and denies any negligence on its part was in law or fact the proximate cause of the injury complained of by the plaintiff.

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

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

2. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,500 and costs of this action."

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material facts and assignments of error will be considered in the opinion.

H. P. Whitehurst, Abernethy & Abernethy and Ward & Ward for plaintiff.

W. B. R. Guion for defendant.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence, defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and in this we think there is no error.

The evidence on the part of plaintiff sustained his contentions and that on the part of defendant sustained its contentions. The jury found for the plaintiff.

The court below in analyzing the matter in the charge, said: "The defendant contends that the work was all completed before this injury complained of; that if there was any negligence that it was that of the independent contractor, and that the contractor did this in his own

way, if he did do so, and that any negligence on the part of the defendant or anybody there was not the proximate cause of the injury to the boy; that it could not have been foreseen; that it was an accident, an accident happening from unknown causes or from an unforeseen result of a known cause. Plaintiff contends that they were negligent in creating those conditions from which in the ordinary use of the street by automobiles it could have been anticipated it would do the very thing that happened in this place. . . . So it is a question for you."

The court below defined accurately negligence, proximate cause, independent contractor and damage.

W. A. Stewart, for plaintiff, testified in part: "I was sitting up in bed at the window, looking out of the window when the truck came out of Bragg's Alley, made a turn with the wheels like that, and when she did, the rocks flew up and in the meantime the boy was struck by a rock and the rocks flew over the porch. The boy was standing right in the door of the house. I could see him at that time. I could see the rocks fly up. Some were fine rocks. They were of all kinds. When the boy cried out, I heard a rock strike the porch. He screamed. His mother was standing there in the passage. She ran and grabbed him. She was standing in the passage. I didn't see his eye until after he came from the doctor. It was then all tied up. It was his right eye. He is now blind in the eye. He lost the sight of the eye."

The question of proximate cause was left to the jury. The court below charged as follows: "If the jury should find that the injury to the plaintiff could not have been caused without the independent acts of the Oaks Farm truck, and that the plaintiff would not have been injured were it not for the truck turning into Queen Street in front of the house of the plaintiff, and that such act could not have been reasonably anticipated by the defendant, then I charge you that the negligence of the defendant could not be considered to be the proximate cause of the injury and the jury should answer the first issue, No. Therefore, if there is a responsible, intervening cause by the person legally responsible for his acts, in this case, the automobile truck, which cause could not in the natural and ordinary course of things be anticipated by the defendant so acting as to make negligence of defendant injurious to a third person, as in this case throwing rock from the roadbed of the defendant, then the person so intervening acts as a non-conductor and insulates the negligence of the defendant, thus making the negligence of the third person the proximate cause of the injury and freeing the defendant from liability because of the fact that his negligence could not have caused the injury without the intervening act of the third person, then I charge you that the negligence of the defendant could not have been considered

the proximate cause of the injury and you would answer the first issue, No. Now, gentlemen, applying these principles of law to the testimony, it becomes a question of fact for you to determine from the evidence whether you find that the Atlantic Coast Line Company was negligent and that its negligence was the proximate cause of the injury complained of by the plaintiff in this case."

We think the special instructions, as prayed for by the defendant, properly declined by the court below. The exceptions and assignments of error, as to the admission and exclusion of evidence, cannot be sustained. We think in the charge of the court below the law applicable to the facts was correctly stated. The contentions were given fairly and impartially for both plaintiff and defendant. On the record we can see no prejudicial or reversible error.

No error.

ATLANTIC JOINT STOCK LAND BANK OF RALEIGH v. N. B. FINCH AND WIFE, BETTIE D. FINCH, C. RICHARDSON, N. H. FINCH AND PEOPLES NATIONAL INSURANCE COMPANY OF NEW YORK.

(Filed 24 February, 1932.)

Fraudulent Conveyances C e—In this action by creditors to set aside deed for fraud a directed verdict in defendant's favor was not error.

In order to set aside a deed to lands from parents to their son it is required that there be a fraudulent intent on the part of the parents and a knowledge of fraud by the son, and where all the evidence tends to show that the son surrendered notes delivered to him by his father for money owed him, and made a cash payment, which, together, constituted a full consideration for the lands at the time of the transaction, and that the land conveyed had been conveyed to the mother by the father in consideration of her relinquishing her right of dower in his other lands for the benefit of his creditors, and that at the time of the transaction the father had property then more than sufficient to satisfy all his debts, and that none of the parties had any fraudulent intent or knowledge of any fraud: *Held*, an instruction directing a verdict if the jury found the facts to be in accordance with the evidence is not prejudicial.

APPEAL by plaintiff from *Moore, Special Judge* and a jury, at December Term, 1931, of NASH. No error.

This is an action by plaintiff against the defendants N. B. Finch and wife, Bettie D. Finch, and N. H. (Herman) Finch, to set aside a deed for fraud.

The evidence on the part of plaintiff was to the effect that on 30 April, 1925, the defendants, N. B. Finch and his wife, Bettie D. Finch, borrowed from plaintiff $30,000, on six tracts of land, totaling 1,200

acres, in Nash County, North Carolina, giving plaintiff a mortgage to secure same—amortization plan. The plaintiff Land Bank surveyed and appraised the tracts at $60,000. Plaintiff introduced in evidence judgment entitled "Atlantic Joint Stock Land Bank, Raleigh Savings Bank and Trust Company, trustees, *v.* Nathaniel B. Finch and wife, Bettie D. Finch," amounting to $25,439.66, with interest, subject to a credit of $15,581.25, the credit being made after the sale of the land, showing judgment rendered 25 November, 1929, credit having been made 18 December, 1930. Confirmation decree by Hon. E. H. Cranmer, judge of the Superior Court rendered at the November Term, 1930, confirming sales of land for purchase price of $16,000. Final account showing credit of $15,581.25 on the amount of the judgment.

Mrs. Bettie D. Finch, an adverse witness for plaintiff, testified, in part: "I released my dower in certain of his real property in consideration of his conveying to me the home place in Spring Hope. Prior to that time I suppose I had signed the notes with my husband which are sued upon by the plaintiff in this action. I did not know that they were notes at that time and I did not own any property. I did not own any property prior to the time this home place was conveyed to me. I did not own any property other than the home place on 5 August, 1929, the date of the deed from me and Mr. Finch to our son, N. H. (Herman) Finch. On 16 August, the date of the execution and registration of that deed I did not own any other property. . . . I conveyed the place to my son to pay off a debt of my husband, which my husband had neglected to pay off four or five years. . . . At that time I had signed my dower rights away to only these six tracts. It was agreed that I was to have the home place to reimburse me for my dower in the Wake and Franklin lands if I would sign the papers. . . . The shrinkage in real estate values all over the country has caused the change in values. All the improvements are the same. I do not know who has got this property now. *I did not intend to defraud my creditors in conveying this land to my son for consideration of the surrender of the notes my husband owed him and payment to me of the money.*"

N. B. Finch owed his son N. H. (Herman) Finch for services rendered before he went to Chicago, which was evidenced by two notes payable to his order, one dated 1 January, 1926, in the sum of $2,210.41, and the other dated 1 January, 1927, for $820.00.

N. B. Finch, an adverse witness for plaintiff, testified, in part: "I am the father of N. H. (Herman) Finch. The deed that I made to my wife, Mrs. Finch, conveyed to her the home place located in the town of Spring Hope, was made at or about the time that I made composition in bankruptcy with my creditors. I do not recall the date. Upon my conveying to her the home place in Spring Hope she released

to my creditors her dower interest in certain of my farm property located in Wake and Franklin counties. The property that she released her dower in was conveyed to Mr. Moss as trustee for certain unsecured creditors. I retained a part of my town property. . . . Every creditor who had security on farm property or collateral such as notes and mortgages retained the amount of security they had, accepting that in discharge of the debt. The unsecured creditors accepted in the composition this real property which was conveyed to Mr. Moss. All creditors who had accounts over $200 were protected by this deed to Mr. Moss. All creditors holding accounts under $200 were paid off in cash, forty cents on the dollar. . . . At the time they got a deed the land was in very near the same condition as when it was mortgaged to them. In good condition. In my opinion the security held by the Land Bank in its mortgage was amply sufficient to pay the debt at the time my wife and I conveyed the home place to our son, N. H. (Herman) Finch. . . . *According to their appraisal and what I had paid on it I felt* sure there would be a surplus. The tax value was $34,000. I am 74 years old, and have lived my life in this county. I have lived in Spring Hope for 35 years, and in that time I have been a merchant, supply man, president of a bank, and occupied positions of trust. I have never been drunk. *When the depression started in North Carolina and all over the world I began to lose money too, and values shrunk. At the time my wife and I conveyed the home place to our son I did not have any purpose in my mind to defraud any creditors.*"

N. H. (Herman) Finch, an adverse witness for plaintiff, testified, in part: "I was born and raised at Spring Hope, N. C. I left there 5 years ago 5 January, 1927. I went to Moody Bible Institute in Chicago, Ill. I am now a minister. . . . On 5 August, 1929, in my opinion, the home place was worth approximately between three and four thousand dollars. . . . I have not collected any rents from it. I have paid taxes. I sent the money to my mother. . . . Some day I am coming back here to live, the Lord willing, and then I will take up my abode for myself and my wife and family. . . . I went to Chicago, Ill., and he (his father) is now reimbursing me by giving me that home place in Spring Hope to fulfill this debt on the notes that I had in my possession and when he transferred the deed."

On cross-examination by defendants, the following letters were introduced in evidence:

"Spring Hope, N. C., 3 August, 1929.

Dear Herman: We have been talking to Lillian about the home place in Spring Hope. Your papa and I have decided to let you have it for $3,000 (dollars) by paying $100.00 in cash and will take up the notes

that you hold against your papa. The balance of the purchase price. You can send us the $100.00 in cash. I trust you are all well. Give Baxter a good hug for me. Much love. Mama."

"153 Institute Place, Chicago, 8 August, 1929.

Dearest Mama: I received your letter, and was glad to hear from you. You said that you and papa have decided to sell me the home place in Spring Hope for ($3,000) three thousand dollars, if I will pay ($100) one hundred dollars in cash when the deed is made to me, and will take the two notes that I hold against papa in payment for the balance due after giving credit for ($100) one hundred dollars that I am sending you today in cash. I am sending you the two notes that I hold against papa. When the deed is made to me you can keep it until I call for it. I am getting along nicely in my work. I am glad that my little family has arrived, but I wish that you could have been with them. With love. Herman."

The witness continued: "I sent all the notes and money back and the deed was thereupon executed. My mother retained the custody of the deed as I requested her to do in that letter. When I went to Chicago 5 years ago to begin work, I went as a student in the Moody Bible Institute. I was graduated from the Institute. I am now engaged in work with the Chicago United Mission. I receive a salary of $115.00 per month in addition to my board and lodging. Two churches are back of this mission, the Congregational and the Presbyterian. My work is there and I am back home on account of this law suit. I am married and have a family consisting of a wife and two children. I married a Nash County girl from Whitakers, N. C. It appears from the correspondence that I paid for this home place, notes aggregating over $3,000 exclusive of interest and $100 that my father sent me. My mother and father have been allowed by me to remain in possession of the home place since they made me the deed. I have not felt any desire whatever to put them out. The place is insured in my name. . . . When I left in 1925 my father was in good financial condition, excellent so far as I knew. I did not have any knowledge that my father was trying to defraud his creditors in making this deed to me. I did not have any knowledge that my mother was trying to defraud her creditors in making the deed to me. *Even if they had been attempting to defraud their creditors I would not have participated in it, and I did not. At the time of the whole transaction I was studying for the ministry, Christian ministry.*"

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

"1. In what amount were the defendants, N. B. Finch and Bettie D. Finch indebted to plaintiff bank on 5 August, 1929? Answer: $10,000.

2. Was the deed from N. B. Finch and wife, Bettie D. Finch, to N. H. (Herman) Finch, given for the purpose of delaying, hindering and defrauding plaintiff in the collection of said debt, as alleged in the complaint? Answer: No.

3. Did the defendant, N. H. (Herman) Finch have knowledge of and participate in such fraudulent intent? Answer: No."

The C. Richardson transaction we do not think necessary to be considered from the position we take in regard to the N. H. (Herman) Finch transaction.

The defendants introduced no evidence. The court below instructed the jury as follows: "The first issue is answered $10,000 by consent. If you believe the evidence and find the facts as the evidence tends to show, you would answer the second and third issues No."

The jury rendered its verdict in accordance with the peremptory instructions of the court as appears in the record. The court signed the judgment as appears in the record. To the signing of the judgment the plaintiff excepted, assigned error and appealed to the Supreme Court.

Thomas W. Ruffin for plaintiff.
Spruill & Spruill for defendants.

CLARKSON, J. We see no prejudicial error in the peremptory instructions given by the court below. It may be noted that the plaintiff introduced as its witnesses the three parties primarily involved in this controversy, N. B. Finch, his wife Bettie D. Finch, the father and mother, and N. H. (Herman) Finch, the son—a young minister. N. B. Finch and his wife, Bettie D. Finch, testified that they had no intention or purpose in their minds to defraud the plaintiff, and the son testified that he had no knowledge of any fraud on their part. "Even if they had been attempting to defraud their creditors I would not have participated in it, and I did not."

It was in evidence that the "home place" in Spring Hope, N. C., was worth about the $100 and the principal and interest on the notes held by N. H. (Herman) Finch. When the conveyance was made by the father and mother to the son, the $30,000 mortgage had been reduced to some $25,000. The father testified "In my opinion the security held by the Land Bank in its mortgage was amply sufficient to pay the debt at the time my wife and I conveyed the home place to our son, N. H. (Herman) Finch."

In the case of *Aman v. Walker,* 165 N. C., in the fourth declaration of principles, contained in that case, at page 227, the Court speaking to

the subject, said: "(4) If the conveyance is upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid."

Naturally the mother, on account of everything being swept away from them by the deflated conditions, thought the notes of small value. She "knew that Mr. Finch had nothing to pay them with," yet she further testified "I conveyed the place to my son to pay off a debt of my husband, which my husband had neglected to pay off 4 or 5 years."

In *McCanless v. Flinchum,* 89 N. C., at pp. 374-5, the following observations are made: 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 fide of the sale shall be questioned, is a circumstance of suspicion, and evidence tending to show a fraudulent intent." *Bank v. Lewis,* 201 N. C., 155-6.

The contentions of plaintiff are not bourne out by the evidence.

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,* 199 N. C., 429." *Shuford v. Scruggs,* 201 N. C., at p. 687.

We have it admitted on this record that at the time that N. B. Finch and wife, Bettie D. Finch conveyed the 1,200 acres of land to plaintiff bank, to borrow $30,000, the land at plaintiff's appraisal was worth $60,000. The Finches reduced the debt to $25,000, and believed that the land was fully sufficient to bring the mortgage debt on it. Mrs. Finch was only surety for her husband. Plaintiff now owns the land under foreclosure proceeding that it appraised a few years before at $60,000. It has a judgment against Mr. and Mrs. Finch for $10,000 and in this proceeding is charging this old man, 74 years of age, and his wife and

minister son with fraud, because the son had purchased the land at a valuable consideration and let the old folks, in their old age, live in this home place.

Defendants, in their brief, say: "Who could have foreseen the shrinkage in the value of lands that has occurred? Who could have made provision against the catastrophic losses that have come to those we catalogue as the 'great middle class' in North Carolina? In 1925, a man with 1,200 acres of highly improved intensively cultivated farm lands in Nash County, accounted himself, and was reasonably accounted by his neighbors, a wealthy man. Such lands were selling at $100.00 per acre. In 1930, we suddenly waked up to the full significance of the term 'land poor.' Like a thief in the night, this condition came upon us, and the man, who had incurred debt, when a dollar contained only fifty cents in value, was called upon to pay back that dollar when it contained two dollars in value." In the judgment below, we find,

No error.

THE SCHOOL COMMITTEE OF RALEIGH TOWNSHIP, WAKE COUNTY, v. EACH AND ALL THE OWNERS OF TAXABLE PROPERTY WITHIN RALEIGH TOWNSHIP, WAKE COUNTY, NORTH CAROLINA, AND EACH AND ALL THE CITIZENS RESIDING IN RALEIGH TOWNSHIP, WAKE COUNTY, NORTH CAROLINA.

(Filed 24 February, 1932.)

Taxation A a—Whether local unit is administrative agency of State is determinative factor of its right to issue school bonds without vote.

Where the school committee of a special charter school district brings a proceeding to test the validity of certain bonds proposed to be issued without a vote of the qualified electors of the district under chapter 180, Public Laws 1931, and an agreed statement of facts is drawn up and submitted, signed by answering defendants and by defendants making a special appearance and moving to dismiss because they were not properly served with summons: *Held*, whether the plaintiff is a local municipal corporation organized expressly for the purpose of operating and maintaining schools in the district or whether it is an administrative agency of the State for the purpose of providing the constitutional six-months school, Constitution, Art. IX, is a determining factor, and where the record is silent on this point a judgment sustaining the validity of the bonds is erroneous. As to whether a judgment rendered in such proceeding would be binding on all taxpayers in the district, all the taxpayers not having agreed to the facts submitted, *quære?*

ADAMS, J., concurring in part.

CLARKSON, J., concurs with ADAMS, J.

SCHOOL COMMITTEE *v.* TAXPAYERS.

APPEAL by defendants from *Harris, J.*, at Chambers in Raleigh, 7 January, 1932. From WAKE.

Proceedings under chapter 186, Public Laws 1931, instituted 16 November, 1931, to determine the validity of certain bonds proposed to be issued under authority of chapter 180, Public Laws 1931.

Following publication of notice, L. E. Canady and A. G. Nowell came in and filed answer, denied the validity of said proposed bonds as well as the validity of the act which purports to authorize their "validation" by a proceeding such as the present.

J. L. Emanuel and Hugh S. Lee entered a special appearance and challenged the validity of the proceeding for want of proper service, etc.

Thereafter, on 7 January, 1932, in this same proceeding, a controversy without action was submitted on an agreed statement of facts to determine the validity of the said school funding bonds proposed to be issued by "The School Committee of Raleigh Township, Wake County," without a vote of the people, and the proceeds to be used in paying tax anticipation notes, which said notes were given "for the purpose of meeting deficits in the operation of the schools of Raleigh Township, Wake County, occasioned by payment of salaries to teachers and other necessary expenses in the operation of the constitutional six-months term in said township."

The record is silent as to whether the special charter school district of Raleigh Township, Wake County, operates the schools of said district as a local municipal corporation, or as an administrative agency of the State in the discharge of the State's duty under Article IX of the Constitution.

From a judgment validating said proposed bonds and the means of payment provided therefor, the defendants appeal, assigning error.

Caldwell & Raymond and Bunn & Arendell for plaintiff.
Arthur A. Aronson for answering defendants.
W. Y. Bickett for defendants entering special appearance.

STACY, C. J. The exceptions which seek to call in question the validity of chapter 186, Public Laws 1931, may be put aside as academic for the original proceeding apparently was abandoned and the matter thereafter submitted in the form of a controversy without action on an agreed statement of facts to which the plaintiff, the answering defendants and those appearing specially are all signatory. And while the appropriateness of this procedure is not questioned on the present record, it may be doubted whether a judgment, rendered herein, would be binding on all the taxpayers of the district. *McKethan v. Ray*, 71 N. C., 165.

True it is said in *Hervey v. Edmunds,* 68 N. C., 243, "There can be no reason why even after issues joined, the parties may not agree upon a state of facts, and submit it to the judge for his decision." But have all the parties here agreed upon the facts? Compare *Eaton v. Graded School,* 184 N. C., 471, 114 S. E., 689. The provisions of C. S., 626 are limited in their operation. *Burton v. Realty Co.,* 188 N. C., 473, 125 S. E., 3; *Farthing v. Carrington,* 116 N. C., 315, 22 S. E., 9. Definite ruling on this point, however, is also omitted, because the agreed statement of facts would seem to be wanting in sufficiency to support the judgment.

The record is silent as to whether the plaintiff operates and maintains the schools of Raleigh Township, Wake County, as a local municipal corporation, organized expressly for that purpose, or as an administrative agency of the State, so designated by the General Assembly in the discharge of the duty imposed upon it by Article IX of the Constitution to provide and maintain, for at least six months in every year, a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. *Frazier v. Commissioners,* 194 N. C., 49, 138 S. E., 433; *Lovelace v. Pratt,* 187 N. C., 686, 122 S. E., 661; *Lacy v. Bank,* 183 N. C., 373, 111 S. E., 612. This is an essential and determining factor where school bonds are to be issued by a local unit without a vote of the people. *Tate v. Board of Education,* 192 N. C., 516, 135 S. E., 336; *Stephens v. Charlotte,* 172 N. C., 564, 90 S. E., 588. Such was the subject of a specific showing in the case of *Owens v. Wake County,* 195 N. C., 132, 141 S. E., 546.

The importance of this circumstance is perhaps heightened by the existence of chapter 509, Public-Local Laws 1925, which purports to deprive the commissioners of Wake County of any authority to issue bonds of the county without a vote of the people. *Owens v. Wake County, supra.* And it was said in *Frazier v. Commissioners, supra,* that the counties of the State were, by the "County Finance Act," chapter 81, Public Laws 1927 (amended by the "Local Government Act," chapter 60, Public Laws 1931), authorized to issue bonds and notes "for the erection of school houses and for the purchase of land necessary for school purposes, and to levy taxes for the payment of the same, principal and interest, not as municipal corporations, organized primarily for purposes of local government, but as administrative agencies of the State, employed by the General Assembly to discharge the duty imposed upon it by the Constitution to provide a State system of public schools."

Error.

ADAMS, J. (concurring in part): I concur in the opinion of the Court to the extent of saying that there is error in the judgment appealed from, but as to some of the questions therein referred to I reserve an expression of opinion until all the facts are disclosed.

CLARKSON, J., concurs with ADAMS, J.

J. A. MINNIS, ADMINISTRATOR OF C. E. SHARPE, DECEASED, v. W. E. SHARPE, J. L. SCOTT, JOHN M. FIX, J. C. STALEY, MRS. MAUDE G. HOLT, EXECUTRIX OF THE ESTATE OF KIRK HOLT, DECEASED, JAS. N. WILLIAMSON, JR., S. G. MOORE AND C. V. SHARPE.

(Filed 24 February, 1932.)

1. Corporations C c—Directors of corporation are liable for loss caused by their wilful or negligent failure to perform their duties.

The directors of a corporation are neither guarantors of the solvency of the corporation nor insurers of the honesty or integrity of its officers or agents, nor are they required to personally supervise all the details of its business transactions, but they are regarded as trustees or *quasi*-trustees of the corporate property and are liable for such loss as is caused by their wilful or negligent failure to perform their duties, under the rule of that degree of care that would be exercised by an ordinarily prudent man under the circumstances in the transaction of his personal business.

2. Same—Evidence of negligent failure of directors to perform their duties held sufficient to be submitted to the jury.

Where, in an action against the directors of a corporation, the plaintiff's evidence tends to show that he had executed a mortgage on his property to the corporation and had repaid the greater part of the loan, and that thereafter the general manager of the corporation had informed him that it was necessary to refinance the loan and had induced him to execute another mortgage on the same property, but had failed to cancel the notes secured by the original mortgage, which the plaintiff was forced to pay, that the directors had left the corporate management exclusively in the hands of its general manager and that like transactions had been made by the general manager continuously over a period of years: *Held*, while ordinarily the directors would not be charged with notice of single or disconnected acts of mismanagement, it was for the jury to find, under the evidence, whether the mismanagement or fraud of the general manager had been so continuously and persistently practiced as to impute knowledge thereof to the directors and fix them with liability for the loss sustained by the plaintiff.

CIVIL ACTION, before *Devin, J.*, at April Term, 1931, of ALAMANCE.

This was a civil action instituted by the plaintiff against the directors of the Alamance Insurance and Real Estate Company, alleging that

said directors negligently failed to supervise the affairs of the corporation or to examine the business transactions thereof, and "negligently and recklessly delegated the business and the whole management and control of the affairs of said corporation to the said W. E. Sharpe, whose reckless extravagance and fraudulent schemes and devices . . . wrecked said institution, thereby causing loss and damage to the plaintiff," etc.

The evidence disclosed that on 22 November, 1919, C. E. Sharpe and wife executed and delivered a deed of trust to the Alamance Insurance and Real Estate Company to secure sixteen bonds, aggregating $3,200, each bond being in the sum of $200.00. Said deed of trust was recorded 28 November, 1919. Plaintiff offered testimony tending to show that C. E. Sharpe, plaintiff's intestate, paid various sums of money to the Alamance Insurance and Real Estate Company from time to time until on or about 15 November, 1927, when the agents of the Alamance Insurance and Real Estate Company approached plaintiff's intestate and his wife and requested and urged them to execute a new deed of trust to J. H. Joyner, securing $1,900, representing at the time that said sum was the balance due on the original loan, and that the original bonds would be canceled and returned to plaintiff's intestate and his wife. After the Joyner deed of trust for $1,900 had been executed and delivered, plaintiff's intestate and his wife made frequent demand for the cancellation of the original bonds evidencing the $3,200 loan. Finally, after a long period of time, eleven of the original bonds, aggregating $2,200, were returned to plaintiffs, but in the meantime three of said original bonds had been sold to Mrs. J. I. Chandler and two to other customers. The holders of these bonds made demand upon plaintiff for the payment thereof, and Joyner, who holds the $1,900 issue of bonds, is also demanding payment. The plaintiff offered evidence tending to show that W. E. Sharpe was vice-president, director and general manager of the corporation, and that Kirk Holt, deceased, was president thereof.

There was evidence of numerous transactions from 1919 to 1928, involving duplicate and triplicate issues of notes or bonds upon the same property, and these bonds were sold upon representation, by the officers of the Alamance Insurance and Real Estate Company, that such bonds were first mortgage bonds.

The corporation was placed in the hands of a receiver by order of the United States District for the Middle District of North Carolina in December, 1928.

The following issues were submitted to the jury:

1. "Were the defendants guilty of gross negligence and mismanagement in the discharge of their duties as directors of the Alamance Insurance and Real Estate Company as alleged in the complaint?"

2. "If so, what damage is the plaintiff entitled to recover of defendants?"

The jury answered the first issue "Yes, as to all defendants," and the second issue "$1,000."

From judgment upon the verdict the defendants appealed.

Cooper A. Hall and Shuping & Hampton for plaintiff.

W. G. Coulter, M. C. Terrell and Brooks, Parker, Smith & Wharton for certain defendants.

H. J. Rhodes for S. G. Moore and C. V. Sharpe.

BROGDEN, J. What duty does the law impose upon directors of a business corporation?

This cause was considered by this Court upon a former appeal reported in 198 N. C., p. 364, 151 S. E., 735. The decision establishes the proposition that a cause of action was properly alleged against the directors of the company who were parties to the suit.

There was much evidence introduced as to many transactions involving false representations and fraudulent devices in issuing bonds or notes purporting to be secured by first mortgage on real estate, extending over a period of several years. That is to say, a borrower would secure a loan of a certain sum of money and execute a deed of trust or mortgage upon his property. The notes evidencing the loan would be sold by the real estate company to various purchasers. The borrower would make payments to the real estate company from time to time as required by the contract. Before the loan was fully discharged the real estate company would approach the borrower and represent to such borrower that it was necessary to refinance the loan, and the borrower would issue other notes and secure the same by a mortgage or deed of trust upon his property, with the understanding and agreement that the former notes would be returned to him marked paid. The real estate company would sell the second issue of notes to various purchasers, omitting and neglecting to pay off the balance due on the first loan, and thus there would be duplicate and sometimes triplicate issues of notes upon the same property.

The plaintiffs contend that by virtue of the fact that this practice and custom had been in existence for many years, the defendants, as directors of the corporation, while not personally participating in such fraudulent schemes and practices, were nevertheless charged with constructive notice of the methods of doing business and the various misappropriations of money.

Directors are not guarantors of the solvency of a corporation, nor are they insurers of the honesty and integrity of the officers and agents. Neither are they required to personally supervise all the details of business transactions. The general rule of liability imposed by law was thus expressed in *S. v. Trust Co.,* 192 N. C., 246, 134 S. E., 656: "Directors and managing officers of a corporation are deemed by the law to be trustees, or *quasi*-trustees, in respect to the performance of their official duties incident to corporate management and are therefore liable for either wilful or negligent failure to perform their official duties." . . . To the same tenor is the principle announced in *Caldwell v. Bates,* 118 N. C., 323, 24 S. E., 481, where the Court declared "that the directors are liable for gross neglect of their duties, and mismanagement—though not for errors of judgment made in good faith—as well as for fraud and deceit."

The trial judge expressed the measure of liability as follows: "It was the duty of the directors to exercise due care to prevent frauds and wrongs from being practiced upon those who dealt with the corporation in the ordinary course of its business. It was their duty to exercise a degree of care that a reasonably prudent man as the director of a corporation would have exercised under like or similar circumstances and charged with like duty, the degree of care an ordinarily discreet business man would give to his own affairs. . . . The directors are liable if they suffer the corporate property to be lost by gross inattention to the duties of their trust and are not relieved of liability because they have no actual knowledge of wrong doing if that ignorance is the result of gross negligence."

Ordinarily, of course, directors would not be charged with notice by virtue of desultory, occasional or disconnected acts of mismanagement or fraudulent transactions, but in cases where mismanagement and fraud has been persistently and continuously practiced for substantial periods of time a jury must determine whether the directors, in the exercise of that degree of care which the law imposes, should have known of such practices and that persons dealing with the corporation would be injured thereby.

The Court is of the opinion that there was sufficient evidence to be submitted to the jury, and consequently the judgment must be affirmed.

No error.

HENRY EDMONDSON v. W. B. WOOTEN, ELBERT S. PEEL, TRUSTEE, ET AL.

(Filed 24 February, 1932.)

Bills and Notes G c—Evidence of payment to collecting agent held sufficient to be submitted to jury.

Evidence that the maker of a note paid the amount thereof to the payee's agent, that the agent had possession of the note and delivered it to the maker marked paid, that the agent deposited the amount in a bank to the payee's credit and sent the payee a deposit slip in accordance with his instructions, and that thereafter the bank of deposit became insolvent and the payee filed a claim for the amount against the receiver thereof, is *held*, sufficient to be submitted to the jury on the issue of payment to the duly authorized agent of the payee.

APPEAL by defendant, W. B. Wooten, from *Devin, J.*, at December Term, 1931, of MARTIN. No error.

On 13 October, 1927, the plaintiff executed and delivered to the defendant, W. B. Wooten, four promissory notes, three for the sum of $1,000 each, due and payable on or before 1 January, 1929, 1930 and 1931, respectively, and one for the sum of $500, due and payable on or before 1 January, 1932. These notes were secured by a deed of trust executed by plaintiff and his wife, by which they conveyed to the defendant, Elbert S. Peel, trustee, the land described therein. It was admitted that the notes due and payable on or before 1 January, 1929 and 1931, have been paid and fully satisfied, and that the note for $500, was not due and payable at the commencement of this action.

This action is to enjoin the sale of the land described in the deed of trust, on the allegation in the complaint that the note due and payable on or before 1 January, 1930, was paid by the plaintiff on 21 December, 1929. This allegation is denied in the answer filed by the defendant, W. B. Wooten.

The issue submitted to the jury was answered as follows:

"Was the note due 1 January, 1930, paid to the duly authorized agent of the defendant, W. B. Wooten, as alleged in the complaint? Answer: Yes."

From judgment enjoining the sale of the land described in the deed of trust, the defendant, W. B. Wooten, appealed to the Supreme Court.

Hugh G. Horton and J. C. Smith for plaintiff.

H. D. Hardison and Jos. W. Bailey for defendant.

PER CURIAM. There was evidence at the trial of this action tending to show that on 21 December, 1929, the plaintiff paid the amount of the

note due and payable on or before 1 January, 1930, to the authorized agent of the defendant, W. B. Wooten, and that said agent deposited said amount with the Bank of Oak City to the credit of the said defendant in accordance with his instructions. The note was in the possession of the agent at the time payment was made to him by the plaintiff, and was delivered by him to the plaintiff, marked "paid and satisfied." The agent sent to the defendant a deposit slip showing that the amount paid to him by the plaintiff had been deposited with the bank to the credit of defendant. The defendant has filed with the liquidating agent of the Bank of Oak City, which was closed because of its insolvency, on 23 December, 1929, his claim for the amount of the deposit.

There was no error in the refusal of defendant's motion for judgment as of nonsuit at the close of the evidence.

We find no error in the trial. The evidence was submitted to the jury under instructions which are free from error. The verdict is supported by the evidence. The judgment is affirmed.

No error.

FRANK SMITH v. RALEIGH GRANITE COMPANY AND R. G. LASSITER AND COMPANY.

(Filed 2 March, 1932.)

1. Trial D a—On motion of nonsuit only evidence favorable to the plaintiff will be considered.

Upon a motion as of nonsuit the evidence will be considered in the light most favorable to the plaintiff, and only evidence tending to support his cause of action will be considered. C. S., 567.

2. Master and Servant C b—Evidence of failure of one hiring State convicts to provide reasonably safe place to work held sufficient.

Where the plaintiff's evidence tends to show that the defendant hired State convicts to work in his rock quarry and had control of the convicts to the extent of indicating the work to be done by them, that the plaintiff, one of the convicts so hired out, was told by the defendant to shovel rock from a pile so that it could be taken out by a drag pan which was pulled backward and forward by a cable operated by a steam engine, that the cable was frayed and that the plaintiff had repeatedly told the engineer, the defendant's *alter ego*, of its dangerous condition, that at the time of the injury the plaintiff was not actually under the control of the prison authorities, and that the plaintiff, in the performance of his duties, told the engineer to pull the drag pan forward, but the engineer pulled it back and that the plaintiff's clothes caught in the frayed cable, causing the injury in suit, is *Held*, sufficient to be submitted to the jury on the issue of the defendant's failure to exercise due care to provide the plaintiff a reasonably safe place to work.

3. Master and Servant C a—Employer is ordinarily liable for negligence of alter ego.

The duty of an employer to exercise due care to provide his employee a reasonably safe place to work and reasonably safe and suitable tools and appliances is absolute and may not be delegated to another so as to relieve the employer of liability, and the employer is ordinarily liable for the negligence of his *alter ego* which causes injury to an employee.

4. Same—Although one hiring State convicts is not strictly an employer he owes certain duties to them arising from the relation.

Although the relationship of master and servant does not exist in the strict sense of the term between State convicts and one hiring their labor from the State, the one hiring such labor owes certain duties to the convicts incident to the relationship, and in this case the evidence of the failure of the one hiring such convicts to exercise due care to provide a reasonably safe place to work and the negligence of his *alter ego* causing injury to a prisoner was properly submitted to the jury.

5. Master and Servant C e—In this case held: engineer was alter ego of employer and not fellow servant of employee.

Under the facts and circumstances of this case an engineer in charge of a hoisting engine was an *alter ego* of the defendant and the refusal of instructions requested by the defendant relating to the fellow-servant doctrine was not error.

6. Evidence D h: Trial B f—Exception to corroborative testimony will not be sustained when no request that it be restricted is made.

Where an employee has testified to the dangerous condition of a wire cable used in the performance of the work, an exception to the admission of the testimony of another witness as to the condition of the cable will not be sustained where the other witness properly identifies the cable in question and testifies that he saw it a week after the injury in suit, the evidence being competent as corroborative evidence at least, and there being no request that the testimony be restricted for that purpose.

7. Trial E c—Charge in this case held sufficient when construed as a whole.

Where, in an action by an employee for a negligent personal injury, the trial court has correctly charged the law applicable to the facts on the issues of negligence, contributory negligence, and has fully charged the law relating to the question of proximate cause, the defendant's exception to the failure of the court to repeat in other parts of the charge the law of proximate cause will not be held for error, the charge being correct when taken as a whole.

APPEAL by the defendant Raleigh Granite Company from *Moore, Special Judge,* at September Term, 1931, of PITT. No error.

This is an action for actionable negligence brought by plaintiff against the defendants.

The contention of plaintiff was to the effect that he was a Negro and sent to the penitentiary for an attempt to kill. That the officials of the State prison of the State of North Carolina hired certain convicts to

work in the rock quarries of defendant, Raleigh Granite Company, including himself. The defendant Raleigh Granite Company admits that it had no control over plaintiff "other than to indicate the work which the plaintiff was to do." That the Raleigh Granite Company failed in its duty to plaintiff in the exercise of reasonable or due care to provide for plaintiff a safe place to work and appliances safe and suitable for the work which he was instructed to do, and to keep same in safe condition in the exercise of proper care and supervision. That the engineer of the hoisting engine, an *alter ego,* was negligent in the operation. That the failure of these duties were the proximate cause of the injury to plaintiff.

The evidence on the part of plaintiff was to the effect that he was sent to the rock quarry belonging to defendant Raleigh Granite Company. He was put to work by the "boss" of defendant Granite Company, on top of a rock pile. He was given a shovel to push rock down from a rock pile so that a scoop or drag pan could remove it. The drag pan was pulled by a standard three-quarter wire rope, or cable, 6-ply, 19-strand. One pulled it backward and one pulled it forward, they ran through the pulley. The drag pan was pulled forward and backward by the man on the engine, the engineer. The drag pan weighed about 700 or 800 pounds.

The plaintiff worked at this place about two weeks before his injury. The plaintiff testified, in part, that the wire rope or cable "was ragged and old and had a whole lot of frazzles on the rope and looked like it would break any time. Those frazzles were out of that wire. . . . I told the man pulling that wire that it had frazzles sticking up on it and was liable to break any time. . . . I told him about three times and he never did fix it. The same night I was hurt I told him. I told him before that. I told him the night before and he never did fix it and the next night I got caught in it. He or the company did not make any repair of the rope."

The night plaintiff was injured was dark and there was a drizzling rain, the lights went out and when they came on "I couldn't see like I ought to." The injury happened between ten and eleven o'clock at night.

Plaintiff further testified: "I was pushing them rocks down with this shovel and while I was pushing them down I hollered to the man to go forward and instead of going forward he sent it back and that caught my hand and coat, and wound it around up in there and pulled it through the pulley. By reason of that I was injured. There wasn't anything ailed me before that. It cut off my fingers. I told the man in charge of the engine to go ahead and instead of hauling the shovel forward he pulled it back. That flapped the wires against me. . . .

Nobody has ever given me any instructions but to push those rocks down. I did what he told me. I got hurt while doing what he told me. The lights went out just as I was pushing them on down."

Lewis Smith, uncle of plaintiff, testified, in part: "I asked him was he the boss man of that business and he told me yes, and I told him my sister's son got hurt up there and I would like to see him and he told me he was gone to the hospital. I told him how did he get hurt. He told me he got hurt with that there machine up there on the rock pile. I went on around down there to look at it. It has been over three years ago. It was a week after he got hurt when I went up there. . . . That cable had a wheel where that cable went through the pole. The right-hand side of the cable had frazzles on it next to this pan. That right-hand side looked like it had frazzles on it. It looked like it was an old rope. . . . There was frazzles here about that long (indicating), looked like little bristles standing out. Looked like they would tear. I don't know about wrapping around. Those cable wires will catch you and bring you in if you have got on clothes."

The defendant, Raleigh Granite Company, denied any negligence and set up the plea of contributory negligence. There was evidence introduced by defendant to sustain its contentions.

The defendant, Robert G. Lassiter and Company, in further answer "Denies that the plaintiff was employed by or working for this defendant under any contract with the State Prison authorities, or otherwise, and denies that it owns or did own at the time of the alleged injury of which the plaintiff complains, any interest in the Rolesville Quarry mentioned and described in the complaint, and denies that the plaintiff was or has been engaged in any work of any kind under any arrangement with anybody for this defendant."

At the close of plaintiff's evidence, Robert G. Lassiter and Company, made a motion for judgment as in case of nonsuit, which the court below granted.

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

"1. Was the plaintiff injured by the negligence of the defendant (Raleigh Granite Company) as alleged in the complaint? Answer: Yes.

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

3. What damages, if any, is the plaintiff entitled to recover? Answer: $1,125."

The court below rendered judgment on the verdict. The Raleigh Granite Company made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Peter R. Hines and Julius Brown for plaintiff.

Parham & Lassiter and Albion Dunn for defendant Raleigh Granite Company.

CLARKSON, J. The defendant, Raleigh Granite Company, in the court below, at the close of plaintiff's evidence, and at the conclusion of all the evidence, made motions for judgment as in case of nonsuit. C. S., 567. These motions were overruled and in this we can see no error.

We think the evidence, taken in a light most favorable to plaintiff, sufficient in this case to have been submitted to the jury. We only consider the evidence of plaintiff. It was a question for the jury and not for us; nor do we find any error in the trial of the action in the court below.

All the evidence was to the effect that the Raleigh Granite Company had control of the plaintiff "to indicate the work which the plaintiff was to do," and did so indicate the work at the place where the plaintiff was injured. At the time plaintiff was not actually under the control of the State Prison authorities. *Jenkins v. Griffith,* 189 N. C., 633; *Reeves v. Construction Co.,* 194 N. C., 817. Under the facts and circumstances of this case the Raleigh Granite Company owed plaintiff a duty that is well settled in this jurisdiction.

In *Beck v. Tanning Co.,* 179 N. C., at p. 125, we find: "It is unquestionably the duty of the master to use proper care in providing a reasonably safe place where the servant may do his work, and reasonably safe machinery, implements, and so forth, with which to do the work assigned to him (*West v. Tanning Co.,* 154 N. C., 44), and this duty is a primary, and an absolute one, which he cannot delegate to another without, at the same time, incurring the risk of himself becoming liable for the neglect of his agent, so entrusted with the performance of this duty which belongs to the master, for in such a case, the negligence of the agent, or fellow-servant, if he is appointed to act for the master, is the latter's neglect also," citing numerous authorities. *Beck v. Chair Co.,* 188 N. C., 743; *Parker v. Mfg. Co.,* 189 N. C., 275; *Thomas v. Lawrence,* 189 N. C., 521. Liability frequently attaches when injury is caused by negligence of *alter ego,* to aggrieved party. *Howard v. Oil Co.,* 174 N. C., at p. 653.

Speaking to the subject, we find in 21 R. C. L. "Prisons and Prisoners," part sec. 26, p. 1089-90, the following: "While, in a sense, the relation of master and servant may be said to exist between a prisoner and the lessee of his labor, and some authorities so hold, the relation cannot be said to exist in the strict sense, because the service is not voluntary, or for hire or reward, and also because the control exercised by the con-

tractor over the convict is usually limited. Consequently it has been held that where the State, by officers of its own selection, retains the immediate and direct supervision and control of leased convicts, the hirer thereof is not liable to the prisoner for injuries due to negligent acts which he has no power to prevent. He is, however, held to a master's liability to the convict in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has. Therefore, it is held that he is not relieved of the ordinary care towards convicts which he is required to exercise towards his employees, and he will be liable to them for failure to provide a safe place in which to work and for knowingly bringing vicious persons into contact with them. The contractor is also bound to see that the appliances with which the prisoner is working are reasonably safe. . . . But where the prisoner of his own volition chooses an unusually dangerous method of executing the contractor's commands, he may be barred by contributory negligence." See *Holloway v. Moser,* 193 N. C., 185.

Under the facts and circumstances of this case, we do not think that the engineer of the hoisting engine was a fellow-servant of plaintiff, therefore the prayer for instruction by the Raleigh Granite Company to that effect cannot be sustained. *Thompson v. Oil Co.,* 177 N. C., at p. 282; *Robinson v. Ivey,* 193 N. C., at p. 812; *Pyatt v. R. R.,* 199 N. C., at p. 404.

The exceptions and assignments of error as to the testimony of plaintiff's uncle cannot be sustained. A week after plaintiff's injury, he saw the place and the wire cable and described its condition at that time. This was a circumstance—some evidence. Then again, this may not be prejudicial, the evidence was to the effect that the engineer of the hoisting engine, an *alter ego,* who according to plaintiff's evidence he "hollered to the man to go forward and instead of going forward he sent it back and that caught my hand and coat," etc.

In *Blevins v. Cotton Mills,* 150 N. C., at p. 498, we find the following: "It may be well to note that the doctrine we are now discussing refers to the objective conditions, where, from the facts and circumstances, it is reasonably probable that no change has occurred, and must not be confused with the position which obtains with us, that voluntary changes made by an employer after an injury to an employee, and imputed to the employer's negligence, are not, as a rule, relevant on the trial of an issue between them." *Almond v. Oceola Mills, Inc., ante,* at p. 100; 10 R. C. L. "Evidence," sec. 112, p. 943. The evidence was undoubtedly competent to corroborate the plaintiff and no request was made that it be restricted. See latter part of Rule 21 of Practice in the Supreme Court, 200 N. C., at p. 827 and cases cited.

We think the special instructions asked for by defendant properly refused by the court below. It will be noted that the court below submitted an issue of contributory negligence and charged the law on this aspect applicable to the facts. In the charge of the court below we find no error, taking the charge as a whole. The court below charged correctly what was negligence, and further "that such negligent breach of duty was the proximate cause of the injury, the cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed."

The defendants' contentions that in other parts of the charge proximate cause is not repeated, we cannot say, if error, it was prejudicial. In the judgment of the court below, we find

No error.

COMMISSIONER OF BANKS ON RELATION OF CITIZENS BANK v. E. C. WHITE.

(Filed 2 March, 1932.)

1. Banks and Banking H e—Where execution of note is admitted the burden is on maker to prove matters in avoidance against receiver.

The maker of a note to a bank, thereafter becoming insolvent, who admits his liability thereon has the burden of showing payment or of establishing a counterclaim or other matters in avoidance set up against the insolvent bank in an action brought by the Commissioner of Banks on the note.

2. Same—In order for matter to be available as off-set against insolvent bank it must have existed in favor of claimant at time of insolvency.

The right to set off a claim against an insolvent bank against an amount due by the claimant to the bank is dependent on whether the bank was indebted to the claimant at the time of its receivership, and when the obligation of the bank was assigned to the claimant after the receivership there is no mutuality of obligation that would permit the allowance by the receiver of the off-set, nor can the right of subrogation be successfully maintained when the indebtedness assigned, evidenced by the receiver's certificate, arose after the date of the receivership.

3. Same—Held: director indemnifying surety on county deposit was not entitled to off-set assignment of county funds against his note.

A surety company issued to a county a bond indemnifying it against loss for deposits in a certain bank, and the surety company was likewise indemnified against loss by a bond of the directors of the bank. Later the bank became insolvent and went into a receiver's hands. The surety company paid the county the amount of the bond, which covered a part

of the county deposits, and the county assigned to it the part of the deposit thus paid. The directors of the bank paid the surety company the amount of the bond on their contract to indemnify, and received an assignment from the surety company, which they proved and received the receiver's certificate therefor. One of the indemnifying directors owed the bank a note and sought to off-set this obligation with the receiver's certificate issued to him: *Held*, at the time of the insolvency of the bank there was no mutuality of indebtedness between the director and the bank, and the county would be entitled to payment in full of the remainder of its deposit before its indemnitor or its assignee would be entitled to payment on the assigned claim, and a judgment allowing the director the off-set on the assigned claim was erroneous.

4. Indemnity B b—Surety paying part of loss is not entitled to payment on assigned claim until person indemnified is fully paid.

Where a surety company has paid the amount of a bond indemnifying a county against loss of deposits in a bank, and the bond covers a part of the amount of the county's deposit, and the county assigns to the surety company the amount so paid: *Held*, in order for the surety company or its assignee to be entitled to payment on the assigned claim it must be shown that the county had received payment of the full amount of the balance of its deposit.

APPEAL by plaintiff from *Frizzelle, J.*, at September Term, 1931, of CHOWAN.

The facts, as set out in the judgment, are as follows:

1. The defendant, E. C. White, is indebted to the plaintiff in the sum of $1,000, with interest from 30 April, 1931.

2. The defendant, at the request and solicitation of the plaintiff, Citizens Bank, signed an indemnity bond on or about 19 March, 1930, in which the defendant, with 9 other directors of said bank, guaranteed to protect and save harmless the Bonding Company which had issued a depository bond to the county commissioners of Chowan County.

3. The Citizens Bank closed its doors, on account of insolvency, on 27 December, 1930, and soon thereafter the bonding company was compelled to pay to the county the sum of $10,000, on account of the depository bond issued by the said Maryland Casualty Company which had issued such bond, and soon thereafter the said Bonding Company called upon the directors, including this defendant, to make good to it under their indemnifying bond, and the said directors were compelled to pay on account of signing said bond for the benefit of said bank the said $10,000.

4. At the time the said Citizens Bank closed its doors the county had on deposit to the credit of George Hoskins, treasurer of said county, the sum of $18,541.61. When the Bonding Company paid to the county its $10,000 the county assigned to the said Bonding Company $10,000

of its deposit in the said bank. When the directors, including this defendant, paid to the Bonding Company the $10,000 which they were required to pay under their indemnifying bond the said Bonding Company then assigned to the said directors the said $10,000 assigned to it by said county.

The liquidating agent of said Citizens Bank then assigned to each of the 9 paying directors one-ninth of the $10,000, to wit: $1,111.11, and this defendant is the owner of a certificate of proof of claim, No. 172-B, issued to him by said liquidating agent in said amount of $1,111.11.

The court further finds as a fact that at the time the said Citizens Bank closed its doors there was on deposit to the credit of George Hoskins, Treasurer of Chowan County, the sum of $18,541.61, and for the receipt by the county commissioners on their demand of the $10,000 of said amount, the Maryland Casualty Company was liable to said commissioners, and the ten directors, including this defendant, were, at that time, liable to the Bonding Company for the said amount, and the court, applying the broad principles of equity and justice to the facts in this particular case holds, as a matter of law, that the defendant is entitled to use his deposit of $1,111.11, as a set-off against plaintiff's claim of $1,000.

Upon these facts the court adjudged that the plaintiff recover of the defendant $1,000 with interest from 30 April, 1931, and that the defendant have the right of set-off against said judgment together with a claim against the bank or the liquidating agent thereof for the balance of his certificate or proof of claim. The plaintiff excepted and appealed.

Attorney-General Brummitt, Assistant Attorney-General Seawell and W. S. Privott for plaintiff.

J. Fernando White for defendant.

ADAMS, J. When the Citizens Bank closed its doors it held the defendant's promissory note on which the remainder due was one thousand dollars. The defendant admits this indebtedness and therefore has the burden of showing payment or other matters in avoidance. *Bank v. Wilson,* 124 N. C., 561. He undertakes to avoid liability by proof of the alleged counterclaim set out in the statement of facts. We are unable to see how this defense can avail him.

The county treasurer deposited in the bank $18,541.61; the Maryland Casualty Company issued its depository bond in the sum of $10,000 to indemnify the county; the defendant and other directors executed a bond to save the bonding company from loss. After the bank had failed

the Casualty Company paid the county $10,000. It is said that the county then assigned to this company $10,000 of its deposit in the bank, that some of the directors reimbursed the company, and that the company assigned to the directors "the $10,000 assigned to it by the county." Afterwards, the liquidating agent of the bank issued to the nine paying directors certificates showing proof of their claims, each in the sum of $1,111.11. The defendant sets up his certificate against the indebtedness of the bank.

There are several barriers in his way. In the first place, his counterclaim did not exist at the time the bank failed. He then owed the bank $1,000 and the bank owed him nothing. Between them there was no mutuality of demand.

On account of insolvency the bank went out of business on 27 December, 1930. On that day was the defendant its creditor? In *Davis v. Mfg. Co.,* 114 N. C., 321, 329, it is said that creditors of an insolvent bank are those to whom the bank is indebted at the time of its failure, and that if one who is then indebted to the bank afterwards takes the assignment of a claim against it he will not be allowed to use the assigned claim as a set-off. The defendant derives his claim from the assignment of the bonding company. If the bonding company had presented its claim to the plaintiff it would not have been entitled to more than a pro rata part in the distribution of the bank's assets. *Brown v. Brittain,* 84 N. C., 552. The defendant succeeds to no greater rights than his assignor had. The right of set-off against the commissioner of banks is to be governed by conditions existing at the time of insolvency; and as against the commissioner a debtor cannot set up a claim which is assigned to him after the bank becomes insolvent and the commissioner or a liquidating agent takes charge of its assets. *Williams v. Williams,* 192 N. C., 405.

In the second place, there is no proof that the county's claim has been fully paid. It is credited with the payment of $10,000 only. Until the whole amount is paid the county is entitled as against the bank to dividends on $18,541.61, the sum of its deposits. *Brown v. Merchants' Bank,* 79 N. C., 244; *Winston v. Biggs,* 117 N. C., 206; *Bank v. Flippen,* 158 N. C., 334; *Milling Co. v. Stevenson Co.,* 161 N. C., 510. If the defendant's counterclaim is allowed the dividends paid the county will be reduced *pro tanto.*

It will be observed by applying this principle that the Maryland Casualty Company could not share in the assets of the bank until the amount due the county had been fully paid. In *Jenkins v. National Surety Co.,* 277 U. S., 258, 72 L. Ed., 874, it is said: "If the principal is insolvent, any dividends paid the surety on its claim for indemnity

before the creditor's whole claim has been satisfied would decrease the creditor's dividends by his proportionate share of the payments to the surety. They would also result in a species of double proof, detrimental to the principal's other creditors, for the secured creditors would, under the applicable 'chancery rule,' still be entitled to dividends on his entire original claim." The opinion is in recognition of the doctrine that the surety may not claim subrogation against an insolvent debtor until the creditor is paid in full.

The plaintiff is entitled to recover the amount due on his note without any set-off or counterclaim in favor of the defendant.

Error.

JAMES SLADE v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 2 March, 1932.)

Insurance D b—In this case held: beneficiary paying premiums did not have insurable interest in life of insured and could not recover.

Except where there are ties of blood or marriage it must appear that a person would be damaged by the death of another in some way which can be measured by rule of law in order for him to have an insurable interest in the life of the other, and where the evidence discloses that the beneficiary in a policy of accident insurance applied for the policy and paid all premiums, that there was no contractual relationship between the beneficiary and the insured and that there were no ties of blood or marriage between them, the insurance contract is a mere wagering contract and is void at its inception, and a motion as of nonsuit should be granted in an action by the beneficiary thereon.

APPEAL by defendant from *MacRae, Special Judge,* at October Term, 1931, of PASQUOTANK. Reversed.

This is an action on a policy of insurance by which the defendant, in consideration of the payment of premiums as stipulated therein, promised and agreed to pay to the plaintiff as the beneficiary named in said policy, the sum of $1,000, at the death of Charlie Lee, the insured, provided his death resulted from injuries caused "by his being struck by a vehicle which is being propelled by . . . gasoline . . . while insured is walking or standing on a public highway."

The policy was issued on 15 October, 1928. On 3 February, 1931, the insured, Charlie Lee, was struck and killed by a truck which was being propelled by gasoline. At said date, the policy was in full force and effect according to its terms. Proofs of the death of the insured, as required by the policy, were duly furnished to the defendant by the

plaintiff. The defendant denied liability on the policy, and declined to pay the amount thereof to the plaintiff. This action was begun on 17 April, 1931.

The defendant denied liability on the ground that the policy was void (1) for that its issuance was procured by false and fraudulent representations made by the plaintiff with respect to the relationship between himself and the insured, and (2) for that the plaintiff had no insurable interest in the life of Charlie Lee, the insured, at the time the policy was issued, and that plaintiff paid the first and all subsequent premiums on the policy. The defendant further denied liability on the ground that the policy contains a provision that it "does not cover a loss sustained by the insured while under the influence of alcoholic or intoxicating liquors, or while the insured is committing a violation of law," and that at the time of his death the insured was under the influence of alcoholic or intoxicating liquor and was committing an act in violation of law, to wit, transporting intoxicating liquor, unlawfully in his possession.

The plaintiff, as a witness in his own behalf, testified: "I knew Charlie Lee, the insured in the policy sued on in this action. He was not related to me by blood or marriage. He had been living with me for about six months at the time the policy was issued. He continued to live with me for about a year and a half after the policy was issued. He was not living with me at the time of his death. His mother gave him to me. He was then about 13 years of age. His mother and her husband, the boy's father, were living separate and apart from each other. He had left the State. From the time the boy came to live with me, I took care of him, furnished his meals, furnished him a place to sleep, furnished his clothes, and bought his school books. He went to school while he was living with me. During that time, I provided him with all the necessaries of life, and with all the comforts that he had. I had charge and control of him. No one else exercised any control over him. He slept in a room adjoining mine. I own and conduct a café in Elizabeth City, N. C.

"At the time the policy sued on in this action was issued, I had several policies issued by the defendant. One day the agent of the defendant asked me if I had any one—a son or a daughter—on whom I could take out another policy. I told him that I had no lawful children but that I had an adopted son—a boy whom I was treating as a son, and who lived with me as a son. The boy was not there that day. The next day the agent came to see me. He asked the boy his age, and then wrote the policy. I paid the first and all subsequent premiums on the policy. I am the beneficiary named in the policy, and furnished to the defendant proofs of the death of Charlie Lee, the insured.

"The boy was not living with me at the time he was killed. He had left me about six months before his death. He got to stealing from me and I told him he had better go back to his people. I did not run him off, but he left. I told him to go back to his home. I went to his funeral, but did not stay until it was over. I went to Norfolk that day to see my father who was sick. After the boy went back to his people, he would come to my café, from time to time. I gave him food and money. He washed dishes, swept the floor, and did whatever I told him to do."

There was evidence tending to show that after the insured was struck and killed by the truck, a pint bottle containing whiskey was found in his belt under his clothes. This bottle was taken from his person by an officer. There was no evidence tending to show that he had drunk whiskey from the bottle, or that he was under the influence of alcoholic or intoxicating liquors at the time he was struck and killed by the truck.

The mother of the insured is dead. His father had abandoned her and her children, prior to the issuance of the policy of insurance. His whereabouts are unknown.

The issues submitted to the jury were answered as follows:

"1. At the time of the issuance of the policy of insurance sued on, did the plaintiff, James Slade, have an insurable interest in the life of Charlie Lee? Answer: Yes.

2. Did the insured, Charlie Lee, suffer loss of life by being struck by a vehicle which was being propelled by . . . gasoline . . . while insured was walking or standing on a public highway, as alleged in the complaint? Answer: Yes.

3. Was the said Charlie Lee at the said time under the influence of alcoholic or intoxicating liquors as alleged in the answer? Answer: No.

4. Was the said Charlie Lee at said time committing some act in violation of law as alleged in the answer? Answer: No.

5. In what amount, if any, is defendant indebted to the plaintiff? Answer: $1,000, with interest from 4 April, 1931, to date."

From judgment that plaintiff recover of the defendant the sum of $1,000, with interest from 4 April, 1931, and the costs of the action, the defendant appealed to the Supreme Court.

Ehringhaus & Hall for plaintiff.

McMullan & McMullan for defendant.

CONNOR, J. In *Hinton v. Insurance Co.*, 135 N. C., 314, 47 S. E., 474, it is said: "Whatever conflict there may be, and it must be conceded that there is much, as to what constitutes an insurable interest in the life of a person, this Court has adopted a well-defined principle which meets with our approval. *Burwell, J.*, in *College v. Insurance Co.*,

113 N. C., 244, 18 S. E., 175, 22 L. R. A., 291, after naming several cases, says: 'These instances and others that might be mentioned, seem to show that except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life of the insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contract between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent. It must appear that by the death there may be damage which can be estimated by some rule of law for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. Where this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract, and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object they have in view."

Applying this principle to the instant case, it is manifest, we think, that the policy of insurance sued on is a wagering contract, and for that reason no action thereon can be maintained in the courts of this State.

The policy was issued on the application of the plaintiff, who is the beneficiary named therein. The plaintiff was not related by blood or marriage to the insured. There was no contractual relation between the plaintiff and the insured, by reason of which the plaintiff had any interest, pecuniary or otherwise, in the continuance of the life of the insured. The plaintiff paid the first and all subsequent premiums on the policy.

The policy was void at its inception. There was error in the refusal of defendant's motion at the close of all the evidence for judgment dismissing the action as of nonsuit. For this reason the judgment is

Reversed.

BRUCE McKEEL v. JOS. R. LATHAM.

(Filed 2 March, 1932.)

Libel and Slander D c—In this case held: allegation of publication was insufficient to support action for libel.

In order to constitute a publication such as will support an action for libel there must be a communication of the defamatory matter to some third person or persons, and where the complaint in an action for libel alleges that the defendant sent the plaintiff an open post card through the

mails containing libelous matter, without an allegation that such matter was read by some third person, the allegation of publication is insufficient, and the defendant's demurrer should be sustained, with the right of the plaintiff to move to amend, C. S., 515, it not being presumed that the contents of the post card were necessarily communicated to the clerks through whose hands it passed, and presumptions of evidence not being available to supply defects of allegation. Although a general allegation of publication might have been sufficient under C. S., 542, its provisions cannot aid the plaintiff in this action in view of the specific allegations in the complaint.

APPEAL by defendant from *Sinclair, J.*, at September Term, 1931, of CRAVEN.

Civil action to recover damages for an alleged libel.

The complaint alleges:

1. That on 3 January, 1931, the defendant did "wilfully and maliciously compose, publish and utter by sending, directed to the plaintiff, an open post card through the United States mails," which said post card contained a false, slanderous and defamatory libel against the plaintiff as follows:

"Bruce McKeel, Clarks, N. C.

Dear Bruce:

"The only reason why I think you are lower than a thief is that the thief takes without promising anything. I heartily wish you personally all the hard luck possible for the coming year. I will try to remember to send you a card next year. Jos. R. Latham, M.D."

2. That said post card was received by plaintiff through the United States mail.

3. That by reason of "the publication and utterance by the defendant by means of sending the false, slanderous, scandalous, malicious, defamatory and libelous matter through the United States mails as aforesaid," the plaintiff has been greatly damaged in his good name, credit and character, amongst his neighbors and other worthy citizens, to the amount of $15,000.

From a judgment overruling a demurrer, interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action, the defendant appeals, assigning error.

Ernest M. Green and D. L. Ward, Jr., for plaintiff.

H. P. Whitehurst and R. E. Whitehurst for defendant.

STACY, C. J. Without regard to the character of the language used on the post card in question, whether libelous or other, it would seem that the allegation of publication is not sufficient to state a cause of action. McIntosh N. C. Practice and Procedure, 362; Annotation, 24 A. L. R., 237.

Under the general rule that a libel is published when, and only when, it is communicated to some third person, who understands it, it has been held in cases dealing with post cards sent through the mails, that, in order to constitute actionable publication, the post card must have been read or communicated to some person, other than plaintiff and defendant; and in so holding, the courts have not presumed, in the absence of allegation, that the contents of the post card are necessarily communicated to the clerk or clerks through whose hands it passes. 36 C. J., 1228. In this connection, it is perhaps well to observe that presumptions of evidence are not available to supply defects of allegation. *Logan v. Hodges,* 146 N. C., 38, 59 S. E., 349; *Brown v. Lumber Co.,* 167 N. C., 9, 82 S. E., 961; *Simmons v. Morse,* 51 N. C., 7; 36 C. J., 1226.

Nor is the deficiency in the pleading aided by C. S., 542 which provides that in actions for libel or slander it is sufficient to state generally that the alleged defamatory matter was published or spoken of and concerning the plaintiff. A general allegation of publication concerning the plaintiff might have been sufficient. *Carson v. Mills,* 69 N. C., 122; *Watts v. Greenlee,* 13 N. C., 115. But in the instant case the plaintiff alleges that the publication was by sending an uncovered post card through the United States mails, addressed to the plaintiff. It is not alleged that its contents were seen or read by anyone other than the plaintiff and the defendant. To constitute a publication, such as will give rise to a civil action, there must be a communication of the defamatory matter to some third person or persons. *Hedgepeth v. Coleman,* 183 N. C., 309, 111 S. E., 517, 24 A. L. R., 232; *Penry v. Dozier,* 161 Ala., 292. This is so because the gravamen of the complaint is the alleged pecuniary injury or damage to the character or credit of the party defamed, and it is obvious that no such injury or damage can arise without publication. *Freeman v. Dayton Scale Co.,* 159 Tenn., 413, 19 S. W. (2d), 255.

To test the matter, let it be supposed that the plaintiff can show no more than he has alleged, to wit, that the post card in question was mailed by the defendant and received by the plaintiff. If no one else saw it or read it—and it is not so alleged—how has he been libeled? See Annotation, 24 A. L. R., 237. An allegation that others had an oppor-

tunity to read a libelous writing is not equivalent to an allegation that it was read by them. 36 C. J., 1226.

For the defect, as indicated, the complaint should have been held bad as against the demurrer, with the right to move to amend as provided by C. S., 515. *Morris v. Cleve,* 197 N. C., 253, 148 S. E., 253.

Reversed.

WILLIAM MORECOCK v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AS LIQUIDATING AGENT OF THE FARMERS AND MERCHANTS BANK.

(Filed 2 March, 1932.)

1. Banks and Banking H d—Depositor presenting check over counter and obtaining draft on another bank is not entitled to a preference.

The order of preference in the distribution of an insolvent bank's assets is prescribed by statute, sec. 218(c), subsec. 14, N. C. Code of 1931, and where a depositor presents his check for payment over the counter of a bank which charges his account with the amount thereof and gives him a draft drawn on another bank which he deposits in a third bank, and the draft is returned unpaid: *Held,* upon the insolvency of the bank drawing the draft the depositor is not entitled to a preference in its assets, the transaction not coming within the provisions of the statute for a preference when a bank receives a check by "mail, express or otherwise . . . with request that remittance be made therefor," the words "or otherwise" being construed in connection with the other parts of the statute meaning any mode of transportation analogous to those specified in the statute, requiring "remitting" or "sending" the money to the payee of the check.

2. Statutes B a—General words following particular words in a statute will ordinarily be confined to acts or things of same kind.

Where particular words in a statute are followed by general words the latter will be confined, ordinarily, to acts and things of the same kind, under the rule that the meaning of doubtful words may be ascertained by reference to the meaning of words with which it is associated.

APPEAL by defendants from *Moore, Special Judge,* at October Term, 1931, of HALIFAX. Reversed.

The plaintiff alleges that on 6 January, 1931, he had on deposit to his credit in the Farmers and Merchants Bank, of Littleton, $5,340.38 and that he presented his check to the bank for this amount; that in exchange for his check the plaintiff gave him its draft on the Wachovia Bank and Trust Company, of Raleigh, for the face of his check, charging his account with this sum; that the plaintiff immediately deposited the draft given him in the Bank of Halifax, which forwarded the draft to the Wachovia Bank and Trust Company, of Raleigh, for payment and that

payment was refused; that the plaintiff duly filed his claim with the liquidating agent of the bank and is entitled to a lien on the assets for the reason that his claim is preferred to the claims of all unsecured creditors and claimants of the bank.

The defendant, Commissioner of Banks, filed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action for a preference and lien on the assets of the bank in the hands of defendants. The demurrer was overruled, the court being of opinion that the plaintiff is entitled to the lien claimed. The defendants excepted and appealed.

George C. Green for plaintiff.
John M. Picot for defendants.

ADAMS, J. The order of preference in the distribution of the assets of an insolvent bank is prescribed in section 218(c), subsection 14, of the North Carolina Code of 1931. Preference is allowed, so far as pertinent here, on a certified check and a cashier's check in the hands of a third party as a holder for value, and on amounts due on collections made and not remitted or for which final actual payment has not been made by the bank. Subsection 14 contains this proviso: "*Provided,* that when any bank, or any officer, clerk, or agent thereof, receives by mail, express, or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds."

The draft on the Wachovia Bank and Trust Company was neither a certified check nor a cashier's check in the hands of a third party as a holder for value. It did not represent an amount due on unremitted collections. The appellee appeals to the proviso for confirmation of his argument that when a bank receives a check for collection "by mail, express, or otherwise" with request that remittance be made therefor, the charging of such item to the account of the drawer and the nonpayment of a check sent therefor creates a lien in favor of the owner of the item on the assets of the bank, and that the word "otherwise" implies presentation over the counter within the meaning of the clause, "When any bank, or any officer, clerk, or agent thereof receives by mail, express, or otherwise," etc.

There is no allegation in the complaint that the Farmers and Merchants Bank received the plaintiff's check by mail, express, or any analogous mode of transmission. The plaintiff "presented his check" to the bank, and thereupon, with or without his request, the bank in exchange for the check gave the plaintiff a draft on its correspondent in Raleigh. The plaintiff immediately deposited the draft in the Bank of Halifax. The transaction he had with the Farmers and Merchants Bank was entirely personal.

The proviso applies to the receipt by any bank of a check, etc., with request that *remittance,* not manual delivery, be made therefor. One of the conditions imposing liability is a failure to *remit,* or "the nonpayment of a check *sent* in payment therefor." The language excludes the idea of a direct communication when the depositor goes to the bank and personally presents his check for payment.

In his work on Legal Maxims, Broom says: "It is a rule laid down by Lord Bacon, that . . . the coupling of words together shows that they are to be understood in the same sense. And, where the meaning of any particular word is doubtful or obscure, or where the particular expression when taken singly is inoperative, the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument, for . . . words which are ineffective when taken singly operate when taken conjointly." The maxim is, *noscitur a sociis:* the meaning of a doubtful word may be ascertained by reference to the meaning of words with which it is associated. As pointed out in *S. v. Craig,* 176 N. C., 740, 744, it is a recognized principle of statutory construction that when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind. The word "otherwise" was not intended to embrace every means by which a bank may receive a check, but only such as implies the necessity of "remitting" or "sending" the money to the drawer of the check. Under the appellee's construction it is conceivable that depositors having immediate access to an insolvent bank, instead of demanding cash which would not be paid, could call for a draft on a correspondent bank and upon its return unsatisfied could acquire a preference on the assets. To the remaining stockholders such a course would be disastrous.

Judgment

Reversed.

R. E. TAYLOR, W. A. EVERETT, JR., MARY LOUISE EVERETT, AND WILLIAM C. TAYLOR, BY HIS NEXT FRIEND, J. SAM GETSINGER, v. ROBERT L. COBURN, ADMINISTRATOR OF MAC G. TAYLOR, DECEASED, AND CHLOE TAYLOR, WIDOW.

(Filed 2 March, 1932.)

1. Gifts A a—Choses in action may be subjects of valid gifts where sufficient delivery to donee is made.

Choses in action may now be the subjects of valid gifts and their delivery by the donor is sufficient if the donor's surrender of the property is complete and his dominion and control of it relinquished, but delivery may be actual, constructive, or symbolic, and no absolute rule as to the sufficiency of delivery, applicable to all cases, may be laid down.

2. Same—Insurance policy may be given away by parol, and its actual delivery to donee is not indispensable to the gift.

Where an administrator of a deceased is sued for the amount of an insurance policy paid into his hands by the insurer, the plaintiffs claiming that the policy had been given them by the deceased with instructions to pay the premiums thereon as they matured which they had done, and it appears that the deceased had deposited the policy with the insurer to secure money borrowed thereon: *Held*, the administrator's motion as of nonsuit was properly refused, since an insurance policy may be given away by parol and its actual delivery is not indispensable to the gift, and the provisions of the policy relative to assignment are for the benefit of the insurer whose rights are not involved, the amount of the policy having been already paid, and the court properly submitted the question of the sufficiency of the delivery to the jury under instructions which are free from error.

APPEAL by defendants from *Barnhill, J.*, at November Term, 1931, of MARTIN.

The Union Central Life Insurance Company of Cincinnati issued two life insurance policies to Mac G. Taylor, each in the sum of $1,000, in both of which Bettie Taylor, his wife, was named as beneficiary. The policies were numbered respectively 242203, and 495306. The beneficiary, Bettie Taylor, died in August, 1918, and in December, 1919, Mac G. Taylor intermarried with the defendant, Chloe Taylor. After the latter marriage Taylor made Chloe Taylor the beneficiary in policy 495306. In the other policy no change of beneficiary was made except as affected by the terms of the policy.

Taylor borrowed from the Union Central Life Insurance Company of Cincinnati the sum of $280 and deposited with the company the policy numbered 242203 as security for its payment.

After the death of Mac G. Taylor the insurance company paid to his administrator the sum of $1,256.38 on account of policy 242203 and the money is now on deposit for disbursement according to law.

The plaintiffs brought suit against the defendants for the recovery of the amount paid on the policy alleging that Mac G. Taylor during his lifetime gave them the policy in question and instructed them to keep the premiums paid as they matured. They allege that in obedience to the instructions of the insured they, with the assistance of the defendant Chloe Taylor, paid the premiums and that the plaintiffs other than W. A. Everett, Jr., are entitled as against the administrator of Mac G. Taylor to the amount paid on such policy. On the pleadings filed and the evidence introduced the jury returned the following verdict:

1. Did Mac G. Taylor, deceased, give and assign policy of insurance on his life with the Union Central Life Insurance Company No. 242203 to the plaintiffs, other than W. A. Everett, on condition that the plaintiffs pay the accruing installments thereon? Answer: Yes.

2. If so, did the plaintiffs, other than W. A. Everett, in compliance with said gift thereafter pay or procure to be paid said accruing installments? Answer: Yes.

3. Is the defendant, Chloe Taylor, now estopped to assert any interest in said policy as the distributee of the estate of Mac G. Taylor, deceased? Answer: Yes (by consent).

It was thereupon adjudged that the plaintiffs, other than W. A. Everett, Jr., recover of the defendant Robert L. Coburn, administrator, the sum of $1,256.38 with interest from 23 November, 1931, and the cost of the action. The defendants excepted and appealed.

Elbert S. Peele and Coburn & Coburn for appellants.

A. R. Dunning for appellees.

ADAMS, J. The defendants have abandoned all assignments of error except that of the court's refusal to dismiss the action. The motion is founded on the theory that a person whose life is insured cannot make a voluntary gift of a policy without delivering the policy or reducing the transaction to writing or conforming to the stipulations contained in the policy.

It was stipulated that if the policy should be assigned or given as security a duplicate of the assignment should be filed at once with the company and that due proof of interest should be produced when the policy became payable. The evident object of these provisions was the protection of the company; but as the policy has been paid and the company relieved of liability the controverted point is whether the plaintiffs or the administrator is entitled to the fund. The contest between these parties raises the two questions whether a policy of insurance can be given away by parol and whether its actual delivery to the donee is indispensable to the gift.

By the early common law gifts of choses in action were not permitted, the theory being that they were not susceptible of delivery; but the rule is now established that choses in action may be the subject of a valid gift. Accordingly it is generally held that a gift of an insurance policy may be made by delivery without a written assignment. Because delivery of an article may be actual, constructive, or symbolic, no absolute rule, applicable to all cases, can be laid down. It is a settled principle, however, that the donor's surrender of the property must be complete and his dominion and control of it must be relinquished. The principle was clearly stated in the instructions given the jury and has the general support of the authorities. 28 C. J., 645, sec. 39, 657, sec. 60; 12 R. C. L., 935, sec. 12, 943, sec. 20; *Opitz v. Karel,* 99 A. S. R., 1004 and 62 L. R. A., 982; *Gledhill v. McCoombs,* Ann. Cas., 1914D, 294 and annotation; *Wilson v. Featherston,* 122 N. C., 747; *Parker v. Mott,* 181 N. C., 435.

No error.

C. A. GOSNEY, TRUSTEE, v. E. H. MCCULLERS ET AL.

(Filed 2 March, 1932.)

Deeds and Conveyances B b—Unregistered deed, good as between the parties, is valid as against creditors of heir at law of the grantor.

Only creditors of the donor, bargainor, or lessor, and purchasers for value are protected against an unregistered deed, contract to convey, or lease of land for more than three years, C. S., 3309, and such protection does not extend to the creditors of an heir at law of a grantor in a deed which has not been registered, the heirs at law of a deceased taking only the undevised inheritance of which the ancestor was seized at the time of his death, C. S., 1654.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at November Special Term, 1931, of JOHNSTON.

Civil action to determine plaintiff's alleged right to sell an undivided one-third interest in a tract of land in the possession of defendants.

The facts are these:

1. On 5 December, 1910, Ashley Horne and wife, for a valuable consideration, executed a deed, with full covenants of warranty, conveying a house and lot in the town of Clayton to E. H. McCullers and wife, Nellie Horne McCullers, for life, remainder to their daughter, Melba McCullers, in fee.

2. The grantees immediately took possession of said house and lot and have continuously occupied the same as owners thereof, though their deed was not registered until 17 August, 1929.

3. In the meantime, on 22 October, 1913, Ashley Horne died intestate leaving him surviving his widow and three children, Chas. W. Horne, Nellie Horne McCullers and Swannanoa Horne Priddy, as his only heirs at law.

4. None of the heirs of Ashley Horne has made any claim to the house and lot in question, nor is any now claiming an interest therein, but all have recognized the defendants as the true owners thereof.

5. On 31 May, 1927, Chas. W. Horne, was adjudged a bankrupt by the District Court of the United States, and the plaintiff duly appointed trustee of his estate.

6. The plaintiff, as such trustee, brings this action alleging that, under the bankruptcy act, he is deemed to be vested with all the rights, remedies and powers of a creditor of Chas. W. Horne (*Lynch v. Johnson,* 171 N. C., 611, 89 S. E., 61; *Hinton v. Williams,* 170 N. C., 115, 86 S. E., 994), and that in the exercise of said rights he is entitled to sell an undivided one-third interest in the *locus in quo.*

From a judgment for the defendants, rendered on the above facts agreed, the plaintiff appeals, assigning error.

Parker & Lee for plaintiff.
No counsel appearing for defendants.

STACY, C. J. Is an unregistered deed, admittedly good as between the parties, valid as against the trustee in bankruptcy of an heir of the grantor? We think it is.

An heir takes only the undevised inheritance of which the ancestor was seized at the time of his death. C. S., 1654. And by the express terms of the Connor Act, chapter 147, Laws of 1885, now C. S., 3309, only creditors of the donor, bargainor, or lessor, and purchasers for value, are protected against an unregistered conveyance of land, contract to convey, or lease of land for more than three years. *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494; *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 32; *Harris v. Lumber Co.,* 147 N. C., 631, 61 S. E., 604.

Conveyances of land, contracts to convey, and leases of land for more than three years, are declared invalid to pass any property as against creditors of the donor, bargainor or lessor, and purchasers for a valuable consideration, "but from the registration thereof within the county where the land lies"; and as to these creditors and purchasers for value, such conveyances, contracts to convey and leases are to take effect only from and after registration, just as if they had been executed at the time of, and not before, their registration. *Robinson v. Willoughby,* 70 N. C., 358.

The decision in *Bell v. Couch*, 132 N. C., 346, 43 S. E., 911, and *Cowen v. Withrow*, 109 N. C., 636, 13 S. E., 1022, on rehearing 112 N. C., 736, 17 S. E., 575, cited and relied upon by plaintiff, are distinguishable from our present holding, in that, in the cited cases, the rights of purchasers for value claiming under deeds of prior registration, and not those of creditors or the trustee in bankruptcy of an heir of the grantor, as here, were presented for determination.

Affirmed.

W. M. JONES v. STANDARD OIL COMPANY OF NEW JERSEY, INCORPORATED, AND W. J. WALLACE.

(Filed 2 March, 1932.)

1. Courts B b—Court has inherent power to pass upon question of its jurisdiction.

Where an action for a negligent personal injury is brought in a general county court, and the defendants file a plea in abatement on the ground that the statute giving the general county court jurisdiction of this class of actions was unconstitutional and that the court was without jurisdiction of the particular action alleged: *Held*, the county court may determine the question of its jurisdiction in its inherent powers.

2. Courts B a—Legislature may create courts inferior to Superior Court if provision is made for appeal to the Superior Court.

The Superior Court is a court established by the Constitution, Art. IV, sec. 2, and while the General Assembly has no power to destroy or limit its constitutional jurisdiction, it may, under the provisions of the Constitution, create county courts of concurrent or partly concurrent jurisdiction if provision is made for appeal to the Superior Court, subject to review by the Supreme Court upon further appeal, there being no conflict with other provisions of the Constitution, Art. IV, sec. 12, and in this action for a negligent personal injury brought in a general county court the constitutionality of the statute, conferring jurisdiction of this class of actions upon it with provision for appeal to the Superior Court, is upheld, and the defendants' plea in abatement on the ground that the court did not have jurisdiction was properly overruled. Chap. 27, N. C. Code of 1931.

3. Abatement and Revival A b—Constitutionality of statute conferring jurisidiction on court held properly raised by plea in abatement.

Where an action for a negligent personal injury is brought in a general county court and the defendants file a plea in abatement on the ground that the statute conferring jurisdiction of this class of cases on the court was unconstitutional and that the court was without jurisdiction of the particular action alleged: *Held*, the plea in abatement properly raised the question of the constitutionality of the statute and the jurisdiction

of the general county court, but upon the overruling of the plea and appeal to the Superior Court it was not error for the Superior Court to allow the defendants time to file answer.

STACY, C. J., dissenting.

BROGDEN, J., concurs in the dissenting opinion.

APPEAL by plaintiff and by defendants from *Stack, J.*, at July Term, 1931, of BUNCOMBE. Affirmed on plaintiff's appeal. Modified and affirmed on defendants' appeal.

The plaintiff brought suit against the defendants in the General County Court of Buncombe County to recover damages for personal injury alleged to have been caused by the negligent acts of the defendants, which are specifically set forth in the complaint. The defendants filed a demurrer on the ground that the General County Court has no jurisdiction of the action for the reason that the public statutes under which the court purported to exercise jurisdiction conflict with the Constitution of North Carolina and are therefore void. Thereafter, in deference to the decision in *Ellis v. Perley,* 200 N. C., 403, a consent order was entered disallowing the demurrer. The defendants then filed a verified answer in bar and abatement of the plaintiff's action. The plaintiff prayed judgment on the pleadings, saying that his demand was in effect a demurrer to the defendants' pleas and an admission of the facts therein stated. The General County Court gave judgment overruling the answer and plea in abatement and adjudging:

1. That the defendants are in default and that the plaintiff is entitled to judgment by default and inquiry.

2. That the plaintiff have and recover of the defendants such amount of damages as upon proper inquiry may be found by a jury.

3. That this cause be and the same is hereby continued to the July Term, 1931, for trial of the issue as to the amount of damages sustained by the plaintiff.

The defendants excepted and appealed to the Superior Court and Judge Stack rendered the following judgment:

"The court is of the opinion, and so holds, that the question of jurisdiction of the county court cannot be raised by the defendants in this action in the manner attempted before the county court and upon the appeal to this court; but if the jurisdiction can be thus raised in this cause, this court is of the opinion, and so holds, that the county court has jurisdiction to hear and try the case.

"This court is further of the opinion that the defendants in good faith challenged the jurisdiction of the county court by the answer filed, and that when said court overruled the pleas contained in said answer it

should have allowed the defendants to file an answer upon the merits and not render a judgment by default and inquiry.

"Wherefore, it is considered and adjudged, upon this appeal, that the judgment by default and inquiry rendered by the county court be, and the same is, hereby reversed and overruled and the defendants are allowed twenty days from this date, to wit: 25 July, 1931, to file an answer to the allegations in the complaint of the plaintiff. The cause is remanded to the county court, there to proceed according to the ruling of this court and the Code of Civil Procedure."

From this judgment both parties appealed upon assigned error.

Vonno L. Gudger, Geo. O. Perkins and J. Will Pless for plaintiff.
Lee & Lee and Carter & Carter for defendants.

ADAMS, J. In the exercise of its legislative power the General Assembly has made provision for the establishment and organization of general county courts. N. C. Code of 1931, ch. 27, subch. 5, secs. 1608(f)-1608(dd). By the act of 1929 these statutes were made applicable to Buncombe County. Pub. Laws 1929, ch. 159. Section 1608(f)1 provides that if in their opinion the public interest will best be promoted thereby, the commissioners of any county may establish a general county court by resolution reciting the reasons for their action together with the opinion that the call of an election is not necessary. The right of appeal is preserved. Section 1608(cc).

Pursuant to authority thus conferred the board of commissioners of Buncombe County on 30 September, 1929, formally established a general county court, appointed a judge and a prosecuting officer, prescribed their terms of office, and fixed their respective salaries, which were to be payable monthly.

On 24 October, 1930, the plaintiff instituted the present action to recover damages for personal injury suffered through the alleged negligence of the defendants. After their demurrer was overruled the defendants filed a plea purporting to be in bar and in abatement of the action. The asserted ground is the want of jurisdiction; and in support of their plea the defendants assail certain statutes purporting to authorize the creation of the court which, they say, are in conflict with the Constitution. They specifically impeach the validity of the following sections: 1608(g), which provides that if the public interest calls for such action the county commissioners may appoint the judge and prescribe his term of office; section 1608(u) which permits, if it does not presume, the waiver of a trial by jury; section 1608(f)2, which invests the board with power to abolish the court; section 1608(t), which assimilates

process, pleadings, and rules of procedure to the practice in the Superior Court; and section 1608(n), which confers upon the general county court jurisdiction concurrent with the Superior Court in all actions founded on contract, in all actions not founded on contract, in all actions to try title to land and to prevent trespass and restrain waste, and to issue restraining orders and injunctions in all actions pending in the county court.

Before entering upon an examination of the objections interposed to the constitutionality of the several statutes under which the court in question was created, we may take notice of the preliminary proposition urged by the plaintiff and sustained in the judgment: that is, that the jurisdiction exercised by the county court cannot be questioned in this proceeding. The defendants say their plea is not an attack upon the constitutionality of the county court *in toto* or a denial of its right to perform legitimate functions; that the power of the Legislature to authorize the creation of a county court with capacity to exercise inferior criminal and civil jurisdiction is admitted, provided the jurisdiction is in accord with the fundamental law. The plea is intended to raise only one question: whether the county court has jurisdiction of the cause of action set forth in the complaint. The jurisdiction of a court is generally prescribed and defined, and as a rule every court has the inherent power to determine whether it has jurisdiction of a pending action. A justice of the peace, for example, may adjudge whether a cause of action is within or beyond his jurisdiction. So it is with the Superior Court, and indeed with all other courts. On this point the citation of authority is not necessary. It is no less manifest that in such instances the decision of the lower court is subject to review on appeal. Hence we need consume no time in comparing or distinguishing *S. v. Shuford,* 128 N. C., 588, *Chemical Co. v. Turner,* 190 N. C., 471, and analogous cases, which were cited in the briefs or in the oral argument; and as the statutes under which the court was established are neither local, private, nor special we need only remark that its creation is not within the inhibition of the twenty-ninth section of article two. The single question raised by the appellants directs attention to the allotment and distribution of that portion of the power and jurisdiction of the judicial department which does not pertain to the Supreme Court.

In the Constitution of 1868, Art. IV, sec. 4, it was provided that the judicial power of the State should be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and special courts; and in section 19 that the General Assembly should provide for the establishment of special courts for the trial of misdemeanors in cities and towns. These were the only special

courts. *S. v. Pender,* 66 N. C., 314. Article IV, sec. 15, provided that the Superior Court should have exclusive original jurisdiction of all civil actions, whereof exclusive original jurisdiction was not given to some other courts and of all criminal actions in which the punishment did not exceed a fine of fifty dollars or imprisonment for one month. The Convention of 1875 in amending the Constitution retained section 19, which is now Art. IV, sec. 14, but substituted the following for the fourth and fifteenth sections:

"The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law." Art. IV, sec. 2.

"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding, in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution." Art. IV, sec. 12.

To what extent is the General Assembly empowered to allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court to the other courts prescribed in the Constitution or established by law? This is the controlling and decisive question.

The Superior Court is a constitutional court; it cannot be abolished; its inherent powers cannot be destroyed. *Mott v. Commissioners,* 126 N. C., 866; *S. v. Baskerville,* 141 N. C., 811. The General Assembly cannot displace it from its position in the judicial system or establish another court of equal jurisdiction upon a plan different from that provided by the Constitution. *Rhyne v. Lipscombe,* 122 N. C., 650; *Tate v. Commissioners, ibid.,* 661. But an allotment or division of jurisdiction is within the contemplation of Article IV, sec. 12. The Legislature may therefore allot to inferior courts a portion of the jurisdiction of the Superior Court, providing also for the right of appeal. N. C. Pleading & Practice, secs. 53, 54.

The principle was elucidated in the two cases last herein cited and in *Mott v. Commissioners, supra. Rhyne's case* and *Tate's* dealt with the Circuit Court of Buncombe, Madison, Haywood, and Henderson coun-

ties. Under the title of "The Criminal Circuit Court" this court was created by an act of the Legislature ratified 23 February, 1895. It was given exclusive original jurisdiction to hear and determine all crimes, misdemeanors, and offenses committed within the designated counties "fully and to the same extent as the Superior Courts of the State, and exclusive appellate jurisdiction of all offenses tried and determined before a justice of the peace, or other magistrate in said counties respectively." Pub. Laws 1895, ch. 75. At the session of 1897 the General Assembly amended this act by changing the name to "The Circuit Court" of the counties named and by providing that "in addition to the criminal jurisdiction he now has (the judge) shall have also as to all civil actions and special proceedings and all civil business originating or pending in said four counties, or either of them, concurrent, equal jurisdiction, power, and authority with the judges of the Superior Courts of the State, to be exercised at chambers or elsewhere in said counties in all respects as the judges of the Superior Courts of the State have such power, jurisdiction and authority." Pub. Laws 1897, ch. 6.

In *Rhyne's case, supra,* it was shown that an action had been tried before a justice of the peace, from whose judgment an appeal had been taken to the Superior Court of Buncombe. The Circuit Court of the four counties assumed jurisdiction and tried the case at the June Term of 1897. There was a verdict for the plaintiff, which the defendant moved to set aside on the ground that the court had no jurisdiction. The motion was denied and the defendant appealed.

In *Tate's case, supra,* the plaintiff applied to the same Circuit Court for a writ of mandamus to compel the board of commissioners of Haywood County to levy a special tax for working the public roads of the county, which had been authorized by chapter 249 of the Public Laws of 1897. The Circuit Court gave judgment for the plaintiff and the defendants appealed, assigning as error the court's ruling that it had jurisdiction of the cause and that the commissioners were compelled to levy the tax.

In its review of the *Rhyne case* the Supreme Court held that the legislative power to allot and distribute the jurisdiction of the courts below the Supreme Court is subject to the limitation that it must be done "without conflict with the other provisions of this Constitution"; that in making the allotment it cannot create new courts and make the officials thereof elective otherwise than by the people, subject to legislative annulment, without independent tenure of office, and freed from the provisions of rotation, restriction of residence, and the requirement that at least two terms must be held annually in each county, and at

the same time confer upon such courts powers which are the same in all respects as those of the Superior Court. It was said, however, that while the Superior Court must retain its jurisdiction by original or appellate process the General Assembly may make the jurisdiction largely appellate by conferring a part of its jurisdiction on inferior courts. The principle is stated in these words: "Subject to these constitutional restrictions, the General Assembly may allot the jurisdiction below the Supreme Court. It may create criminal courts or circuit courts, city courts, or any other courts, and give them all or such part as it thinks proper, of the original criminal or original civil jurisdiction above that given by the Constitution to justices of the peace, and even as to that it may confer concurrent original jurisdiction with the justices of the peace (for their jurisdiction is not exclusive), but if it gives such courts concurrent jurisdiction, civil or criminal, of such portion of the original jurisdiction which is left to be exercised by the Superior Court, still in such cases an appeal must lie from such inferior or intermediate courts to the Superior Court, as in all other cases in which there is a right of appeal, for the General Assembly cannot, 'without conflict with other provisions of the Constitution,' either deprive the justices of the peace of the jurisdiction conferred on them by the Constitution or deprive the Superior Courts of their constitutional position as Superior Courts over all other inferior courts, and with at least appellate jurisdiction of all matters from which appeals would lie to this Court."

But this Court held that the act conferring upon the Circuit Court jurisdiction equal and concurrent in all respects with that exercised by judges of the Superior Court was unconstitutional and void, and that the plea to the jurisdiction should have been sustained. The judgment was quashed and the cause was remanded to the Superior Court.

Reaching the same conclusion in *Tate v. Commissioners, supra,* this Court said in addition: "It is competent for the General Assembly to give to said Circuit Court, or any other court it may erect, original jurisdiction, either exclusive or concurrent with the Superior Court, civil as well as criminal, of all matters which may originate in said counties, subject to the right of appeal therefrom to the Superior Courts created by the Constitution, and provided, as to concurrent matters, the Circuit Court first acquires jurisdiction, but it cannot transfer the concurrent jurisdiction of cases which have originated and are pending in the Superior Courts downwards to the Circuit or other inferior courts. The intent expressed in section 12, Article IV (which is an amendment to the Constitution), is not to abolish the Superior Courts, but to authorize inferior courts thereto, with such jurisdiction as the General Assembly may think proper to relieve, to that extent, the pressure upon

the Superior Courts, just as the former courts of common pleas and quarter sessions had original jurisdiction of matters below the Superior Court and to some extent concurrent jurisdiction of certain matters with the Superior Courts, but appeals lay from said courts of common pleas and quarter sessions always to the Superior Courts. While the General Assembly could, therefore, confer upon the Circuit Court such original jurisdiction, civil as well as criminal, as it thought proper, either exclusive or concurrent with the Superior Court (subject always to the right of appeal to the Superior Court) that is not the purport and intent of this act."

The power of the General Assembly to allot a portion of the jurisdiction of the Superior Court to inferior courts and to make the jurisdiction of the latter courts exclusive as well as original is sustained in *Bunting v. Gales,* 77 N. C., 283, *S. v. Jones,* 97 N. C., 469, *S. v. Weddington,* 103 N. C., 364, *S. v. Ray,* 122 N. C., 1098, and *S. v. Collins,* 151 N. C., 648 in which it is said that the Legislature has the power, under the Constitution, to establish inferior courts, not only for cities and towns (Article IV, sec. 14), but also for counties. *S. v. Shine,* 149 N. C., 480. The statutes authorizing the general county courts purport to allot only a part of the jurisdiction of the Superior Court and in this respect materially differ from the acts creating the Circuit Court dealt with in *Rhyne v. Lipscombe.*

The criticism in *Mott v. Commissioners, supra,* of such expressions in the *Rhyne case* as "exclusive jurisdiction except as to the right of appeal" is inapplicable to the act under consideration, which purports to confer, not exclusive, but concurrent jurisdiction upon the general county court. In subsequent cases it has been suggested that in *Rhyne v. Lipscombe, supra,* the Supreme Court considered only the relative position as to power and jurisdiction of the Superior Court as a part of our judicial system and the right of the latter alone to hear appeals from the courts of justices of the peace. But by reference to the original file it may be seen that the judge of the Circuit Court prepared an elaborate opinion in defense of the court's jurisdiction, which was a part of the case on appeal. In consequence, the Supreme Court properly considered the question of jurisdiction in connection with pertinent sections of the Constitution. The division or allotment of jurisdiction as therein promulgated has been recognized in many of our decisions, has often been practically applied, and as pointed out in *Sewing Machine Co. v. Burger,* 181 N. C., 241, has been exercised very generally by the Legislature in the establishment of inferior courts.

We conclude, upon consideration of the record, that the General County Court of Buncombe County was lawfully constituted pursuant

to statutes enacted by the General Assembly in the exercise of the powers conferred upon it by the Constitution, and that the court has jurisdiction of the plaintiff's action. With respect to these matters the judgment of the Superior Court is affirmed. There was error in holding that the question of jurisdiction is not raised and in this respect the judgment is modified.

There was no error in allowing the defendants to file an answer. On the plaintiff's appeal the judgment is

Affirmed.

STACY, C. J., dissenting: I am content to rest my dissent largely upon quotations from the Court's opinion.

The following pronouncement, made therein, is not questioned:

"The General Assembly cannot displace it (Superior Court) from its position in the judicial system or establish another court of equal jurisdiction upon a plan different from that provided by the Constitution. *Rhyne v. Lipscombe,* 122 N. C., 650; *Tate v. Commissioners, ibid.,* 661. But an allotment or division of jurisdiction is within the contemplation of Article IV, sec. 12."

It is conceded that the General County Court of Buncombe County is not established upon the same plan as that provided in the Constitution for the creation of Superior Courts. But its equality of jurisdiction in civil matters with that of the Superior Court would seem to result from the following provisions of the statute:

C. S., 1608(n)—"The jurisdiction of the general county court in civil actions shall be as follows:

"1. Jurisdiction concurrent with that of the justices of the peace of the county.

"2. Jurisdiction concurrent with the Superior Court in all actions founded on contract.

"3. Jurisdiction concurrent with the Superior Court in all actions not founded upon contract."

In the second and third paragraphs, just quoted, it appears that the jurisdiction of the general county court is concurrent with that of the Superior Court in all civil actions founded on contract and in all civil actions not founded upon contract. Things equal to the same thing are equal to each other. No point is made of the fact that the general county court is also given civil jurisdiction concurrent with that of the justices of the peace of the county. To this extent its civil jurisdiction is greater than that of the Superior Court. *Machine Co. v. Burger,* 181 N. C., 241, 107 S. E. 14.

Based on the foregoing premises, I do not agree with the following conclusions announced in the Court's opinion:

"The statutes authorizing the general county courts purport to allot only a part of the jurisdiction of the Superior Court and in this respect materially differ from the acts creating the Circuit Court dealt with in *Rhyne v. Lipscombe.*"

BROGDEN, J., concurs in dissent.

MRS. ALICE BYRD v. MARION GENERAL HOSPITAL, DR. J. F. MILLER AND MRS. J. F. MILLER.

(Filed 2 March, 1932.)

1. Hospitals D a—Nurse is not liable for injury caused by executing orders of physician unless it is apparent that injury would result.

Nurses in a hospital in the discharge of their duties must obey and diligently execute the orders of the physician or surgeon in charge of the patient, and they will not be held liable for injury resulting to the patient from executing such orders unless such orders are so obviously negligent as to lead any reasonably prudent person to anticipate that substantial injury would result to the patient therefrom.

2. Same—Evidence in this case held insufficient to be submitted to jury in action against nurse for injury to patient.

Where a family physician diagnoses the condition of his patient and prescribes that she be removed to a private hospital and given treatment in an electric heat cabinet, an appliance approved and in general use, and is present with the nurse attending the patient and sees and approves of the way the body of the patient is prepared for the treatment and directs that the patient remain in the cabinet a certain length of time, and injury results to the patient from being burned: *Held*, the injury must have resulted from one of three causes, and if it resulted from the peculiar susceptibility of the patient to heat due to her condition it resulted from an error in diagnosis by the physician, or if it resulted from the length of time the patient was kept in the cabinet, the length of time was expressly prescribed by the physician, or if it resulted from improper preparation of the body of the patient for the treatment, the physician was present and knew what preparations had been made, and under the circumstances the treatment of the nurse was the treatment of the physician, and the nurse cannot be held liable for the injury, it not being apparent that substantial injury would result from the execution of the physician's orders.

3. Hospitals C a—Where nurse is not liable for injury to patient the hospital cannot be held liable as her employer.

Where an injury to a patient is not attributable to any negligence of the attending nurse the owner or lessee of the hospital employing the nurse cannot be held liable on the doctrine of *respondeat superior.*

4. Negligence A c—Where all facts causing injury are known the doctrine of res ipsa liquitur does not apply.

Where all the facts causing an injury are known and testified to by the witness the doctrine of *res ipsa loquitur* does not apply.

CIVIL ACTION, before *Sink, J.*, at July Term, 1931, of MCDOWELL.

The defendant hospital is a corporation, and it was alleged that said corporation was engaged in running a general hospital for the treatment of diseases. It was further alleged that the defendant, J. F. Miller, was a physician and surgeon, and by virtue of some contractual relationship between him and the hospital, was engaged in the operation and management thereof, and that Mrs. J. F. Miller, the wife of defendant, Miller, was assistant superintendent or assistant manager. The hospital filed an answer alleging that the defendant, Dr. J. F. Miller, had leased the hospital and was operating it on his own account at the time of plaintiff's injury.

A summary of the evidence is as follows: The plaintiff is the wife of Frank Byrd and had given birth to a child on or about 16 January, 1929. Plaintiff's physician was Dr. Bingham, who had no connection whatever with any of defendants, but was engaged in the general practice of medicine. Dr. Bingham had been treating plaintiff and advised the husband of plaintiff that she was threatened with convulsions. He said if she did to rush her up there to the hospital and have them sweated out. Dr. Miller had never seen my wife up to that time. Up to the time the child was born Dr. Miller never was my doctor. Up to the time she was treated in this electric cabinet he never had been my doctor. . . . Dr. Bingham was the man who sent her to the hospital. . . . Dr. Bingham was the man who prescribed this sweat cabinet treatment and the only doctor I had. He was the last one and I followed his advice. I never took any advice from Dr. Miller at all about what treatment to give my wife. So far as I know Dr. Miller had never seen me in my life.

On 22 January, the plaintiff began having convulsions and her husband and certain friends of the family placed the plaintiff in an ambulance and took her to the hospital in order that she might be treated in the "sweat cabinet" owned and operated by the Millers, and sometimes referred to as a baking machine or radiation cabinet. This appliance is a metal box about two and a half feet wide and about two feet high. The top is oval shaped. In front there is a glass window so that anyone can look in and see the patient. One end has a curtain over it and there is a padding upon which the patient lies. The cabinet was equipped with forty electric lights controlled by four switches, there being about ten

lights to each switch. Each bulb carried about forty volts. The head of the patient is not within the machine. The curtain referred to drops below the head, leaving that part of the body totally outside the machine. The undisputed evidence from experts and disinterested witnesses tended to show that the appliance was known as the Burdick type of machine, and that the mechanism was approved and in general use. Dr. Hall, teacher of zoology and physiology at Duke University, testified: "I have used the Burdick cabinet for seven or eight years in my experimental work. I am familiar with the construction and operation of these Burdick cabinets. They are used universally in hospitals. I think nearly every hospital of any size has a similar type of cabinet. . . . It was used during the World War."

The defendant, Mrs. J. L. Miller, testified that on 22 January, 1929, Dr. Bingham called the hospital and that she answered the telephone; that Dr. Bingham called for Dr. Miller, and that witness informed him that Dr. Miller was out of town; that thereupon Dr. Bingham said: "I have a patient that I am sending in that I want sweated in the sweat cabinet immediately, and I will be right along, and you go down and get it ready." In a few minutes the plaintiff, with her friends, arrived at the hospital and Mrs. Miller, who was superintendent of nurses, received the plaintiff and proceeded to prepare her for the sweat cabinet. All her clothing was removed except a light vest, a light gown and an abdominal binder. The plaintiff was then unconscious and was having convulsions about every five minutes.

At this point there is a divergence in the evidence. Mrs. Miller and her witnesses testify that Dr. Bingham came before the plaintiff was placed in the cabinet. The husband of plaintiff testified: "I couldn't say whether Mrs. Miller had placed my wife in this sweat cabinet before Dr. Bingham came in or not." Subsequently he testified: "I won't be positive, but I think I saw my wife in the sweat cabinet before Dr. Bingham got in there." Another witness for plaintiff testified: "After I got there I would say it was at least ten minutes, if not longer, until Dr. Bingham showed up." A witness for plaintiff also testified that she was informed that a hypodermic had been given to the plaintiff a few minutes after she was placed in the cabinet. The hands and feet of plaintiff were tied in order to eliminate the possibility of breaking the electric lights and inflicting cuts during her struggles when seized with convlusions.

Dr. Bingham was not examined as a witness by either party. The defendants, however, offered the testimony of a neighbor of the plaintiff, to wit, Mrs. Davis Bright, who went with her to the hospital. She testified that when the plaintiff was put in the cabinet that Dr. Bingham

was present and going in and out from the cabinet room, and that he directed Mrs. Miller to fix a hypodermic and give it to the plaintiff; that Mrs. Miller requested Dr. Bingham to watch the patient while she prepared the hypodermic. After administering the hypodermic Mrs. Miller asked Dr. Bingham: "How long do you want this patient to stay in here?" and he said: "How long has she been in?" She said: "About thirty minutes." He said: "Let her stay in about ten minutes longer." The nurse who assisted in preparing the plaintiff for the treatment, testified that Dr. Bingham was present at the time the patient was placed in the cabinet, and that she kept a cold cloth on Mrs. Byrd's head, and that Dr. Bingham prescribed the hypodermic which was given by Mrs. Miller. Reverend J. S. Lockaby, rector of the Episcopal Church in Marion, who was in the hospital, testified that he heard the conversation between Mrs. Miller and Dr. Bingham; that he went down and stood in the door of the cabinet room during the time Mrs. Byrd was there, and that Dr. Bingham was present.

The defendant offered the testimony of several witnesses who had been treated frequently in the machine, and the treatment was administered to the naked body and no ill effects resulted. The evidence for defendants tended to show that Mrs. Byrd was suffering with oedema, but there was evidence to the contrary. The defendant also introduced many experts who testified that the treatment of plaintiff by means of dry heat was an improper method of treatment.

Plaintiff introduced evidence of a physician who testified that if the plaintiff had been properly prepared, "covered with Turkish towels, you couldn't burn her." Witness further testified that he had never used a machine like the one in controversy or had never served in a hospital where one was used, and that he knew nothing about the particular type of appliance.

In a few hours after plaintiff was removed from the sweat cabinet it developed that she had suffered serious and painful burns. Her legs and body were severely burned, resulting in the sloughing of tissue and causing exceedingly serious and permanent injuries.

No judgment was sought against the hospital and the following issues were submitted to the jury:

1. "Was the injury to plaintiff caused by the negligence of the defendants, as alleged in the complaint?"

2. "What damage, if any, is the plaintiff entitled to recover of the defendants?"

The jury answered the first issue: "As to Dr. J. F. Miller, yes."

The second issue was answered in the sum of $29,975.

From judgment upon the verdict the Millers appealed.

D. F. Giles and A. Hall Johnston for plaintiff.
Johnson, Smathers & Rollins and T. A. Uzzell for defendant.

BROGDEN, J. What duty does a nurse owe to a patient?

At the outset it must be observed that no judgment was sought against the hospital or the physician of plaintiff who directed that she be sent to the hospital and given the specific treatment, which is the basis of plaintiff's cause of action.

The great majority of cases discussed in the books involve the liability of hospitals for the negligence and inattention of nurses. The liability rests upon the theory that the nurses in discharge of their duties are agents or servants of the hospital. In this case, however, the liability is asserted against the nurse personally, and against her husband who was the lessee of the hospital upon the principle of respondeat superior.

The general rule of legal liability imposed upon hospitals, nurses and physicians undertaking to treat patients are succinctly expressed by *Stacy, C. J.,* in *Pangle v. Appalachian Hall,* 190 N. C., 833, 131 S. E., 42, as follows: "Ordinarily, when a hospital, like the present one, undertakes to treat a patient, without any special arrangement or agreement, its engagement implies three things: (1) that its physicians, nurses and attendants possess the requisite degree of learning, skill and ability necessary to the practice of their profession, and which others similarly situated ordinarily possess; (2) that its physicians, nurses and attendants will exercise reasonable and ordinary care and diligence in the use of their skill and in the application of their knowledge to the patient's case; and (3) that its physicians, nurses and attendants will exert their best judgment in the treatment and care of the case." See, also, *Johnson v. City Hospital,* 196 N. C., 610, 146 S. E., 573; *Bowditch v. French Broad Hospital,* 201 N. C., 168; *Schloendorff v. Society of N. Y. Hospital,* 21 S. W. (2d), 125; *Norwood Hospital v. Brown,* 122 Southern, 411, 22 A. L. R., 341; 39 A. L. R., 1431. These cases and others of like tenor support and fortify the measure of liability expressed in the *Pangle case, supra.*

The great weight of authority, however, establishes the principle that nurses, in the discharge of their duties, must obey and diligently execute the orders of the physician or surgeon in charge of the patient, unless, of course, such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction. Certainly, if a physician or surgeon should order a nurse to stick fire to a patient, no nurse would be protected from liability for damages for undertaking to carry out the orders of the physician. The

law contemplates that the physician is solely responsible for the diagnosis and treatment of his patient. Nurses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment.

The evidence in this case discloses without contradiction the following vital and pertinent facts:

(a) That Dr. Bingham was the physician of plaintiff, who directed that the plaintiff be placed in the custody of defendants or taken to the hospital.

(b) That he examined the plaintiff and diagnosed her disease.

(c) That he specifically prescribed the immediate treatment in the sweat cabinet owned and operated by the Millers.

(d) That he was present at the time the treatment was administered. While there is a conflict in the evidence as to whether he was present when the plaintiff was prepared for the cabinet or when the treatment was actually commenced, there can be no controversy that he was present within ten or fifteen minutes from the time she was placed in the sweating machine.

(e) That the physician, within a few minutes from the time the plaintiff was placed in the cabinet, was thoroughly advised as to how she was prepared for the treatment and the general methods and progress thereof. Indeed, it appeared, without contradiction, that he prescribed a hypodermic during the course of the treatment.

(f) That the physician, being present at the time, directed the nurse specifically to keep the plaintiff in the cabinet for a period of thirty minutes.

(g) That the appliance was approved and in general use, and there is no evidence of any defect in the instrumentality or of excessive heat.

(h) There is no evidence whatever that the defendant, Mrs. Miller, was incompetent or that she did not possess that degree of skill which the law requires, or that, in operating the machine, she failed to exercise the degree of care which the law deems essential.

From the foregoing facts it must be manifest to any impartial mind that the serious and distressing injuries of the plaintiff resulted from one or all of the following factors: (a) her body was improperly wrapped before being exposed to the heat; (b) that she was suffering from some disease rendering her unusually sensitive to heat application; (c) that she was retained in the cabinet for too great a period of time.

If the injury resulted from a peculiar condition of plaintiff's body, producing unusual or abnormal susceptibility to heat, then this was a matter of diagnosis and lay exclusively within the duty of the physician, unless, of course, as hereinbefore indicated, the type of disease was so

pronounced and so well known as to lead the nurse in the exercise of ordinary care to anticipate injury. However, upon that aspect, there is no evidence.

If the injury resulted from subjecting the patient to the heat of the cabinet for an excessive period of time, then the evidence disclosed that such period of time was actually prescribed by the physician who was present during the treatment.

The only aspect, therefore, upon which the liability of the nurse or of her husband, upon the principle of respondeat superior, can be based, is that the patient was improperly wrapped or covered before the treatment was administered. Obviously, if a patient is carried to a hospital by the order of a physician and the nurse undertakes to administer a treatment without instruction from the physician, or when the physician was not present, she will be held liable in damages for any failure to exercise ordinary care, and consequently, would administer such treatment at her peril. But, upon the other hand, if the physician is present and undertakes to give directions, or, for that matter, stands by, approving the treatment administered by the nurse, unless the treatment is obviously negligent or dangerous, as hereinbefore referred to, then in such event the nurse can then assume that the treatment is proper under the circumstances, and such treatment, when the physician is present, becomes the treatment of the physician and not that of the nurse.

Upon the whole evidence the court is of the opinion that, even if it be conceded that the body of plaintiff was not properly prepared for the treatment when her physician stood by without protest or direction, and being fully cognizant of the condition of her body and of all the facts and circumstances surrounding the treatment, the preparation of the body was a part of the treatment prescribed by the physician. Moreover, there is an abundance of evidence, and none to the contrary, that the heat was usually applied to a nude body, resulting in no harmful consequences. So that, there was nothing to indicate to the nurse that the preparation of the body of plaintiff with the acquiescence and implied approval of the physician was obviously dangerous or likely to produce harm.

Of course, if Mrs. Miller was liable in damages, her husband would also be liable because he operated the hospital and employed his wife as superintendent of nurses. Hence if Mrs. Miller is not liable in damages, no recovery could be sustained against her husband.

The court, in reaching a conclusion, has given full consideration to the application of the principle of *res ipsa loquitur*. All the facts causing the injury are known and testified to by various witnesses at the

trial. Hence the doctrine is not applicable for the reasons pointed out in *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251.

The court concludes upon all the evidence and upon the proper application of the pertinent rules of liability, that the motion for nonsuit, duly made, should have been granted.

Reversed.

H. G. WALKER, IDA A. PHELPS, LOUIE W. GRANDY, ANNIE W. BOCHMAN AND HER HUSBAND, R. J. BOCHMAN, v. W. T. PHELPS AND VIRGINIA-CAROLINA JOINT STOCK LAND BANK.

(Filed 2 March, 1932.)

1. Actions B e—Action in this case held to come within provisions of "Declaratory Judgment Act."

"The Uniform Declaratory Judgment Act," ch. 102, Public Laws of 1931, is a remedial statute and its provisions are to be liberally construed to effectuate its purpose of settling rights, status, and other legal relations, and an action instituted thereunder in accordance with its provisions to determine the mutual rights and liabilities of the parties in respect to covenants and restrictions in a deed relating to a drainage ditch or canal upon lands, upon facts admitted in the pleadings, is authorized by the act.

2. Deeds and Conveyances C f—Deed in this case held to create covenants running with land enforceable against grantor or his grantee.

Where the owner of a tract of land lying upon both sides of a drainage canal sells the land lying upon one side of the canal by deed containing stipulations relating to the grantee's right to use and maintain the canal, and requiring the owner of the other land not conveyed by the grantor to contribute to the expense of maintaining the canal in accordance with provisions therefor in the deed: *Held,* the stipulations are covenants running with the land and create a right in the nature of an easement with respect to the land not conveyed by the grantor in the deed, which are binding upon the grantor and all persons claiming under him subsequent to its registration, and where the grantor prior to the execution of the deed has executed a contract to sell the land not conveyed by the deed to another, which contract also contains stipulations relating to the drainage canal, but the contract to convey is registered subsequent to the registration of the deed, the grantee in the deed is not affected by the contract, C. S., 3309, and the person claiming title under the unregistered contract holds such title subject to the easements created in the deed.

APPEAL by defendants from *Grady, J.,* at Chambers, in Nashville, N. C., on 14 October, 1931. Affirmed.

This action was begun on 24 August, 1931, by a petition filed by the plaintiffs in the Superior Court of Washington County, in accordance

with the provisions of chapter 102, Public Laws of North Carolina, Session 1931, known as "The Uniform Declaratory Judgment Act." The relief prayed for by the plaintiffs is a declaratory judgment determining their rights on the facts alleged in their petition.

In response to citations duly served on them, the defendants filed answers to the petition. No issue of fact was raised by said answers; only issues of law were raised by the pleadings.

It appeared from the pleadings that there was a controversy between the parties to the action with respect to the rights of the plaintiffs under a deed executed by the defendant, Virginia-Carolina Joint Stock Land Bank, by which the said bank conveyed the land described therein to the plaintiffs. This deed is dated 1 April, 1930. It was duly recorded in the office of the register of deeds of Washington County on 24 July, 1930. The tract of land conveyed by this deed contains 600 acres, more or less, and is a part of the W. T. Alexander Farm, which was owned by the defendant, Virginia-Carolina Joint Stock Land Bank. This farm contained 1,200 acres, more or less.

On 27 January, 1930, the defendant, Virginia-Carolina Joint Stock Land Bank, entered into a contract in writing with its codefendant, W. T. Phelps, by which it agreed to sell and convey a part of said Alexander Farm, containing 600 acres, more or less, to the said defendant, upon the terms and conditions set out in said contract. This contract was not recorded at the date of the deed from the said bank conveying to the plaintiffs the remaining part of said Alexander Farm.

The W. T. Alexander Farm lies between Lake Phelps and the Scuppernong River, in Washington County. It is drained from the lake to the river by the Mountain Canal. This canal traverses said farm, practically dividing it into two parts. Lateral ditches and drainways have been constructed by which water is carried from the farm into the canal, and thence into Scuppernong River. The canal and these ditches and drainways constitute a common drainage system for the Alexander Farm.

The contract between the defendant, Virginia-Carolina Joint Stock Land Bank, and its codefendant, W. T. Phelps, dated 27 January, 1930, and not recorded at the date of the deed from the defendant bank to the plaintiffs, contains the following stipulations, with respect to the Mountain Canal:

"(a) That the main road along the Mountain Canal is to be at all times kept open for the benefit of the aforesaid tract of land, and the remainder of said Alexander Farm owned by said bank, but gates may be placed across the same.

(b) That said Mountain Canal is to at all times remain open, the expense of keeping the same in condition to be borne by the owner or

owners of the aforesaid tract of land, and the owner or owners of the remainder of said Alexander Farm, said expense to be in proportion to the number of acres of the aforesaid tract and of the remainder of said tract draining into said canal, but the above described tract to be conveyed to the said Phelps is only to be charged with the proportionate part of the upkeep of said canal from the first cross-ditch north of the south line of said tract to Scuppernong River, and the said bank, or any owner or owners of the said Alexander lands shall have the right to go through the lands herein contracted to be sold for the purpose of keeping in repair the said Mountain Canal up to the point to which said Phelps lands are to participate in the upkeep. The repairs and upkeep of said Mountain Canal shall be made by the owner or owners of the aforesaid 600-acre tract, and the owner or owners of the remainder of said Alexander Farm, and if either should decline to pay his part of said repairs, then either party may make said repairs upon giving sixty days written notice to the other party and such portions of such expense as may be chargeable to the party refusing, shall, upon reduction to judgment, constitute a lien upon the lands of the refusing party, which lien shall be superior to all others.

(c) No lands other than the above tract of 600 acres, and the remainder of the said Alexander Farm now owned by said bank shall be allowed to drain in the said Mountain Canal and at no time shall said canal be flooded by water from Lake Phelps, nor shall the waters of said lake be turned through said canal."

The deed from the defendant, Virginia-Carolina Joint Stock Land Bank, to the plaintiffs, dated 1 April, 1930, and duly recorded on 24 July, 1930, contains the following covenants and stipulations:

(a) That the grantees shall have the right of ingress and egress over and along the main road which parallels the Mountain Canal north of the lands above described, which right and privilege shall extend to the said grantees and their successors in title, subject, however, to the right of the owner, or owners, of that portion of the Alexander Farm lying north of the lands above described, to maintain gates across said road.

(b) The lands herein conveyed shall have the right to drain through said Mountain Canal, which said canal is at all times to remain open, the expense of keeping the same in condition to be borne by the owner, or owners of the lands herein conveyed, and the owner, or owners of the remainder of said Alexander Farm, said expense to be in proportion to the number of acres herein conveyed draining into said canal, and of the remainder of said Alexander Farm draining in said canal; and the said grantees and their successors in title, shall have the right to go through that portion of the Alexander Farm situated north of the lands

herein conveyed, for the purpose of keeping in repair the said Mountain Canal. The repairs and upkeep of said Mountain Canal shall be made by the grantees and their successors in title and by the owner, or owners of the remainder of said Alexander Farm, and if either should decline to pay his or their part of said repairs, then either party may make said repairs upon giving sixty days written notice to the other party, and such portion of such expense as may be chargeable to the party refusing shall, upon reduction to judgment, constitute a lien upon the lands of the refusing party, which lien shall be superior to all others.

(c) No lands other than those herein conveyed and the remainder of said Alexander Farm, shall be allowed to drain into said Mountain Canal, and at no time shall said canal be flooded by water from Lake Phelps nor shall the waters of said lake be turned through said canal.

(d) It is intended by this conveyance to give and convey to the grantees and their successors in title, the same use and privilege with respect to said Mountain Canal as formerly owned and enjoyed by the said W. T. Alexander, expressly reserving, however, the same use and privilege for the benefit of the remainder of said Alexander Farm, all subject to the conditions heretofore specified."

The plaintiffs contended that the stipulations contained in their deed with respect to the Mountain Canal are covenants which run with the land conveyed to them by said deed, and that said covenants are binding upon their grantor, Virginia-Carolina Joint Stock Land Bank, and upon all persons claiming title under said bank to any part of the Alexander Farm, subsequent to the registration of their deed. The defendant, W. T. Phelps, contended that said stipulations are not covenants running with the land now owned by the plaintiffs, and that said stipulations and covenants are not binding upon him by virtue of the contract entered into on 27 January, 1930, by and between him and his codefendant with respect to the land described in said contract.

The court was of opinion that the stipulations contained in the deed from the defendant, Virginia-Carolina Joint Stock Land Bank, to the plaintiffs are covenants running with the land conveyed by said deed, and that said covenants and stipulations are binding upon the defendant, Virginia-Carolina Joint Stock Land Bank and upon the defendant, W. T. Phelps, who claims an interest in a portion of the Alexander Farm under the contract dated 27 January, 1930, which was not recorded at the date of the deed from said bank to the plaintiffs.

In accordance with this opinion, it was ordered, considered and adjudged by the court:

(a) That the plaintiffs shall, at all times, have the right of ingress and egress over and along the main road which parallels said Mountain

Canal north of the lands described in their deed, which right and privilege shall extend to the plaintiffs and their successors in title, subject, however, to the right of the owner, or owners, of that portion of the Alexander Farm lying north of the lands described in said deed, to maintain gates across said road.

(b) The plaintiffs shall, at all times, have the right to drain through said Mountain Canal, which canal is at all times to remain open, the expense of keeping the same in condition to be borne by the plaintiffs, or their successors in title, and the owner, or owners, of the remainder of said Alexander Farm, said expenses to be in proportion to the number of acres conveyed to the plaintiffs, which drain into said canal, and of the remainder of said Alexander Farm draining in said canal, and the plaintiffs and their successors in title shall have the right to go through that portion of the Alexander Farm situated north of the lands purchased by them, for the purpose of keeping in repair the said Mountain Canal. The repairs and upkeep of said Mountain Canal shall be made by the plaintiffs and their successors in title, and by the owner, or owners, of the remainder of said Alexander Farm, and if either shall decline to pay his or their part of said repairs, then either party may make said repairs upon giving sixty days written notice to the other party, and such portion of such expense as may be chargeable to the party refusing shall, upon reduction to judgment, constitute a lien upon the lands of the refusing party, which shall be superior to all others.

(c) It is further adjudged that no other lands than those described in the plaintiffs' deed, and the remainder of said Alexander Farm, shall be allowed to drain into said Mountain Canal, and at no time shall said canal be flooded by water from Lake Phelps nor shall the waters of said lake be turned through said canal.

(d) The plaintiff and their successors in title shall have the same use and privilege at all times with respect to said Mountain Canal as were formerly exercised and enjoyed by W. T. Alexander, the owner of the entire Alexander tract, expressly reserving, however, the same use and privilege for the benefit of those who own the remainder of said Alexander Farm, subject to the conditions hereinbefore specified.

"It appearing to the court that the number of acres, owned by the plaintiffs, and claimed by the defendant, Phelps, which drain into said Mountain Canal, have never been ascertained or agreed upon, and that it is necessary for that fact to be established, it is further ordered that a survey of said lands be made by some competent civil engineer, to be appointed by the court, and that he file with the court a map, showing the number of acres embraced within the plaintiffs' deed, which naturally or artificially drain, and have heretofore drained, into said Moun-

tain Canal, and also the number of acres covered by the defendants' contract, which drain, or have heretofore drained, into said canal, and thereupon judgment shall be entered fixing the rights of the parties, and the proportion to be paid by each towards the upkeep of said canal. It is further ordered that the costs of this action be taxed against the defendants.

"It is agreed that this judgment might be signed out of term time and out of the county, to have the same effect as if signed at term time and in the county; and the same is signed at Nashville, N. C., in the Second Judicial District, this 14 October, 1931.

HENRY A. GRADY, *Judge Presiding.*"

From said judgment, the defendants appealed to the Supreme Court.

Zeb Vance Norman for plaintiffs.
W. L. Whitley and Worth & Horner for defendants.

CONNOR, J. There was no error in the judgment in this action. It determines the mutual rights and liabilities of the parties to the action on the facts admitted in the pleadings, and is authorized by the provisions of chapter 102, Public Laws of North Carolina, Session 1931, known as "The Uniform Declaratory Judgment Act." This act is remedial; its purpose is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations and is to be liberally construed and administered. It is so declared in section 12 of the act.

The stipulations contained in the deed from the Virginia-Carolina Joint Stock Land Bank to the plaintiffs, with respect to the Mountain Canal, are covenants which run with the land conveyed by said deed. *Norfleet v. Cromwell,* 64 N. C., 1. The plaintiffs, as grantees in said deed, have the right to use the Mountain Canal for the purpose of draining their land, and further have the right to require their grantor and all persons claiming title to the remainder of the Alexander Farm, subsequent to the registration of their deed, to contribute to the expense of maintaining said canal, as provided in said deed. This right is in the nature of an easement with respect to that part of the Alexander Farm which was not conveyed to plaintiffs. It is enforceable as provided in the deed against the grantor therein, and against all persons claiming title thereto under said grantor subsequent to the registration of the deed to the plaintiffs.

The contract entered into by and between the defendant, W. T. Phelps and his codefendant, Virginia-Carolina Joint Stock Land Bank, dated 27 January, 1930, was not registered at the date of the registration of

the deed under which plaintiffs claim title to the land conveyed to them. Plaintiffs are purchasers for value from the Virginia-Carolina Joint Stock Land Bank, not only of the land described in their deed, but also of the easements granted them with respect to the maintenance of the Mountain Canal. Plaintiffs are therefore not affected by said contract. C. S., 3309. The defendant, W. T. Phelps, claiming title to the land subject to plaintiff's easement, under an unregistered contract, holds such title subject to such easements.

Affirmed.

MRS. W. T. HECKSTALL v. CITIZENS BANK OF WINDSOR, GURNEY P. HOOD, COMMISSIONER OF BANKS, AND HENRY SPRUILL, LIQUIDATING AGENT.

(Filed 2 March, 1932.)

Banks and Banking H d—In this case held: depositor was entitled to preferred claim against receiver of bank.

Where it is established by the jury that a bank, without the knowledge or consent of its depositor, took his bonds and sold them and credited the depositor with the amount in its savings department: *Held*, upon the bank's becoming insolvent the depositor is entitled to a preferred claim against the receiver to the extent of the value of the bonds as a special deposit, it appearing that the depositor had never ratified the act of the bank by drawing on the fund or otherwise.

APPEAL by defendants from *Harris, J.*, at November Term, 1931, of BERTIE. No error.

The plaintiff brought suit to recover the value of certain Liberty Bonds deposited by her in the Citizens Bank of Windsor and alleged to have been converted by the bank. Upon the pleadings and evidence issues were submitted to the jury, who found for their verdict that the bank sold the plaintiff's bonds and deposited the proceeds in the savings department without her authority, and that the deposit was carried in its entirety without the plaintiff's drawing on it or otherwise ratifying such sale. It is admitted that the amount was $400.

It was adjudged on the verdict that the plaintiff is entitled to recover the sum of $400, with interest at 4½ per cent and that she be declared a preferred claimant against the assets of the bank in the hands of the receiver to the amount of her recovery. The defendants excepted and appealed.

J. A. Pritchett for appellants.

Ward & Grimes for appellee.

PER CURIAM. The principal questions in controversy were whether the deposit was general or special and whether the plaintiff was entitled to a preference in the administration of the bank's assets. In effect the jury found that the deposit was special and that the plaintiff is entitled to recover the value of the bonds. We have considered all the assignments of error and find no error. *Corporation Commission v. Trust Co.*, 193 N. C., 696; *Parker v. Central Bank and Trust Company, ante*, 230.

No error.

STATE v. JOHN ROBERT MYERS.

(Filed 9 March, 1932.)

1. Criminal Law G l—Confession in this case held properly admitted in evidence.

The prisoner, held for murder, at first denied guilt and stated that at the time the crime was committed he was riding in an automobile with two other men. Upon a search of his home by an officer certain articles connected with the crime were discovered, whereupon the prisoner told the officers where the pistol with which the crime had been committed could be found and confessed to the murder of the deceased. The officer to whom the prisoner confessed testified that he neither threatened the prisoner nor offered him any hope of reward but that he told the prisoner he had better tell the names of the two men with whom he said he was riding at the time of the crime so that they might be apprehended, and the prisoner's brother suggested that "he had better go on and tell the truth": *Held*, the statements, under the circumstances, were not an inducement for the prisoner to confess, and the admission of the confession in evidence was not error.

2. Criminal Law I l—Where all evidence shows that crime was first-degree murder failure to instruct as to less degrees is not error.

Where upon a trial for murder all the evidence and inferences therefrom unquestionably tend to show that the deceased was killed by one lying in wait and for the purpose of robbery, with evidence tending to establish that the defendant had perpetrated the crime, and there is no evidence in mitigation of the offense, the evidence establishes the crime of murder in the first degree, C. S., 4200, and an instruction to the jury either to convict the defendant of murder in the first degree, if the evidence so satisfied them beyond a reasonable doubt, or to acquit the defendant is not error.

APPEAL by prisoner from *Cranmer, J.*, at January Term, 1932, of PITT. No error.

The prisoner was indicted for the murder of R. H. Hodges and was convicted of murder in the first degree. From a judgment of death by electrocution he appealed, assigning error.

The deceased was mortally wounded at night while on his way home from his store and died a few days afterwards.

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

J. C. Lanier for prisoner.

ADAMS, J. The prisoner neither testified nor offered witnesses in his behalf. His right to remain silent and to rely on what he deemed the insufficiency of the evidence against him was explained and safeguarded by the court's instruction to the jury.

The State's evidence reveals a confession made by the prisoner under the following circumstances: He was at the police station under arrest. He was told by the sheriff that he did not have to answer any questions, to do anything or to tell anything, and that what he said would be used against him. The witness testified that he made no threat, offered no reward, held out no hope of reward, and that the prisoner's statement was voluntary. At first the prisoner denied any connection with the homicide and said that when it occurred he and two other Negroes had gone in a Ford car across the river and down the creek. A few minutes afterwards the sheriff and the prisoner's brother went to the prisoner's house, searched it, and found a coat and a toboggan. Upon their return to the police station the prisoner told them "where to find the gun." In the second search they found two pistols and a bunch of keys. Another search discovered a flashlight. Meantime the prisoner had made a confession to the chief of police. This officer testified that he neither threatened the accused nor offered him any hope, nor suggested that it would be better for him to make a statement. Returning to the station, the sheriff asked the prisoner to repeat his statement. Admitting that he had stolen the pistols he pointed out the one with which the deceased had been killed. When the pistols were shown him and the keys, which belonged to the deceased, he said, "I did it," and related what he had done. On the night of the homicide he stole an Essex car, drove it to Pactolus, and parked it near his victim's place of business. He went into the store and said something about a pair of shoes, but made no purchase. He left the store, went to a lane near the home of the deceased, and there lay in wait. When the deceased came along the prisoner stopped him and demanded his money. He "emptied his pistol at Hodges," caught him, and took his money, his keys, a flashlight, and some papers. He returned to the car and took the shells from the pistol. Unable to start the car, he left it and walked back towards Greenville.

When, in his previous statement, he claimed that two other men were with him the chief of police remarked "You had better tell who it was

so we can get the other men"; and the prisoner's brother suggested that "he had better go on and tell the truth."

The exception to the admission of this evidence must be overruled. The conditions under which a confession should be admitted or excluded are pointed out in a number of our decisions. It should be excluded if it was "wrung from the mind by the flattery of hope or by the torture of fear"; by "some advantageous offer or by threats or actual force"; by the fear of punishment or the hope of escape. *S. v. Patrick,* 48 N. C., 443; *S. v. Graham,* 74 N. C., 646; *S. v. Sanders,* 84 N. C., 729; *S. v. Whitfield,* 109 N. C., 876; *S. v. Rodman,* 188 N. C., 720; *S. v. Fox,* 197 N. C., 478.

The confession in evidence was not made under the impulsion of hope or fear. The suggestion that the accused had better tell who the "other men" were or that he "had better go on and tell the truth" has no element of unlawful inducement. As said in *S. v. Harrison,* 115 N. C., 706, "The rule which is generally approved is, that where the prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession in either case is admissible." No promise was made to induce the confession, no threat was used to extort it. *S. v. Bohanon,* 142 N. C., 695.

The trial judge instructed the jury to return one of two verdicts: an acquittal or a conviction of murder in the first degree. It is contended that the jury should have been permitted to return a verdict for murder in the second degree.

The statute provides that any murder which shall be perpetrated by lying in wait . . . or shall be committed in the perpetration of or in the attempt to perpetrate robbery shall be deemed to be murder in the first degree. C. S., 4200. All the evidence tends unquestionably to establish these two elements. The prisoner waylaid the deceased, shot five times, inflicted a mortal wound, pursued the deceased, and robbed him of his property. By the terms of the statute he was guilty of murder in the first degree, or not guilty. In *S. v. Spivey,* 151 N. C., 676, 685, the rule is stated as follows: "Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, and where there is no evidence and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable

doubt, or of 'not guilty.'" *S. v. Rose,* 129 N. C., 575; *S. v. Dixon,* 131 N. C., 808; *S. v. Newsome,* 195 N. C., 552; *S. v. Sterling,* 200 N. C., 18, 23. The authorities have recently been reviewed and the principle upheld in *S. v. Smith,* 201 N. C., 494. We find

No error.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. BOARD OF EDUCATION OF PENDER COUNTY ET AL.

(Filed 9 March, 1932.)

1. Principal and Surety B b—Surety is entitled to recover loss caused by owner's failure to retain required percentage.

Where a county board of education fails to retain the full percentage of the contract price of a school building as required by the surety bond of the contractor, and thereafter the contractor defaults and fails to complete the building, and, upon the surety's waiver of its option to do so, the county board completes the building with money in its hands applicable to the contract price: *Held,* the surety is entitled to recover against the county board of education the loss sustained by reason of the board's failure to retain the required percentage, but the county board of education had the right to complete the building with the money on hand, and the surety is entitled to recover only the difference between the amount the board would have had on hand if the required percentage had been retained and the amount necessary to complete the building, and the fact that the board had paid a certain sum to the contractor after notice of outstanding claims against the contractor imposes no further liability upon the board upon the facts disclosed by the record.

2. Same—Surety may not recover against individual members of board of education for their failure to retain stipulated percentages.

A surety on the bond of a contractor in the erection of a school building who has suffered loss by reason of the failure of the county board of education to retain the required percentage of the contract price may not recover against the individual members of the board for such failure.

3. Appeal and Error F d—Only the rights of parties appealing will be considered by the Supreme Court.

Where a surety on the bond of a contractor in the erection of a school building appeals from the judgment of the Superior Court he cannot complain of a judgment in favor of another entered against the board which did not appeal.

CIVIL ACTION, before *Midyette, J.,* at June Term, 1931, of PENDER.

The plaintiff, the Surety Company, instituted this action against the board of education and the individual members thereof and certain creditors. The cause was submitted to a referee. In substance the find-

ings of fact are as follows: On 21 January, 1924, the board of education of Pender County entered into a contract with Walter Clark, a contractor, for the erection of a two-story brick and frame high school building at Atkinson, North Carolina. Said building was to be completed on or before 15 August, 1924, and the contract price specified, was $49,618. The plaintiff executed a bond in the sum of $14,404 conditioned upon the faithful performance of said contract. Clark began the construction of said building, but did not complete it on 15 August, 1924. On 29 October, 1924, Clark disappeared and the plaintiff was notified by the architect that the building was not completed, and thereafter the plaintiff waived its option to complete the said school building, and the board of education thereupon completed the same. The plaintiff has paid to creditors furnishing labor and material for said building the sum of $3,050.33. There are other claims outstanding. The contract provided that the board of education should retain fifteen per cent of the contract price. When Clark abandoned the work on 25 October, 1924, the board had paid a total of $46,550 upon the contract price, whereas, in fact, eighty-five per cent of the contract price, aggregated $42,175.30. Hence the board had paid out $4,375.20 in excess of the retained percentage. The trial judge found as a fact that on 8 October, the board paid to Clark the sum of $5,506.38, and at that time had notice of outstanding unpaid bills for material and labor amounting to $3,057.40. It was further found as a fact that the defendant, board of education, failed to hold the retained percentage as required by the contract, and that in failing to do so, the plaintiff was thereby injured. It was further found that on 25 October, the board of education issued to Clark, the contractor, a check in the sum of $132.50 upon the certificate of the architect, and that said check was cashed by the Murchison National Bank, and said funds were used in making the payroll. It was further found as a fact that the defendant, board, at the time of the default, had on hand $3,057.56, and that said board actually expended in completing the building the sum of $3,079.56.

The plaintiff brought this action to recover the sum of $3,050.33 upon the theory that the failure of the board to hold the retained percentage released the surety from liability. The board set up a counterclaim against the plaintiff, alleging that it had suffered damage in the sum of $2,000 by reason of failure of the contractor to complete the building on time. Both parties filed exceptions to the referee's report, and thereafter the cause was submitted to the trial judge. It was agreed that all matters in controversy had been settled except the $132.50 item due the Murchison Bank and the claim of plaintiff against the board of education and the individual members thereof. After hearing the ex-

ceptions the court held that the plaintiff was not entitled to recover anything from the board of education or the individual members thereof, and that the board of education was not entitled to recover from the plaintiff. It was further adjudged that the Murchison National Bank recover of the board of education the sum of $132.50.

From judgment so rendered, plaintiff appealed.

I. C. Wright for plaintiff.

McCullen & McCullen and Bryan & Campbell for Board of Education and Murchison National Bank.

BROGDEN, J. The findings of fact by the referee and the trial judge establish substantially the following fact-status: When Clark, the contractor, defaulted, the board of education had in hand, applicable to the contract price, the sum of $3,067.50 plus the Murchison Bank item of $132.50, making a total of $3,200. If said board had complied with the contract with respect to the retained percentage, as it had agreed to do, it would have had in hand, applicable to the contract price, the sum of $4,375.20. When the default occurred it was the duty of the surety to complete the building. The surety, however, waived its option and the board of education, as it had a right to do, thereupon proceeded to complete the building and paid therefor the sum of $3,079.56. Therefore, the difference between what the board should have had in hand from the retained percentage and what it paid out to complete the building was $1,295.64. Manifestly, when the contractor defaulted and the surety failed to complete the building the board of education had the right to use all funds in its hands, applicable to the contract price, for the completion of the building, there being no evidence of any unreasonable expenditures in the work of completion. In other words, if the board had complied with the contract with reference to the retained percentage, it would have had in hand, after the completion of the building, the sum of $1,295.64. This sum, being a part of the retained percentage, inured to the benefit of the surety that had paid claims of laborers and materialmen in excess of said sum. The identical point was discussed in *Crouse v. Stanley,* 199 N. C., 186, 154 S. E., 40, where it is written: "If the owner had complied with the agreement entered into between the parties he would then have in hand to turn over to the surety the sum of $4,202.80, and thereupon the surety would be entitled to said sum to apply upon the completion of the work. No such amount was available, and thus the surety was deprived of a credit to which it was entitled under the law." *Mfg. Co. v. Blaylock,* 192 N. C., 407, 135 S. E., 136.

The fact that the board, on 8 October, 1924, paid to the contractor the sum of $5,506.38, when it had notice of outstanding bills in the sum of $3,057.40, imposes no liability upon the board upon the facts disclosed by this record. *Hutchinson v. Commissioners,* 172 N. C., 844, 90 S. E., 892; *Warner v. Halyburton,* 187 N. C., 414, 121 S. E., 756; *Mfg. Co., v. Blaylock,* 192 N. C., 407, 135 S. E., 136.

The plaintiff cannot complain of the judgment against the board for $132.50 in favor of Murchison Bank for the reason that the board does not appeal from the judgment.

The court is of the opinion, upon the facts found and set out in the record, that the plaintiff is entitled to recover of the board of education the sum of $1,295.64. No recovery is permissible against the individual members of the board. *Noland v. Trustees,* 190 N. C., 250, 129 S. E., 577.

Modified and affirmed.

IN RE GEORGE C. EUBANKS.

(Filed 9 March, 1932.)

Actions A a: B e—Proceeding in this case did not involve legal controversy and could not be maintained under Declaratory Judgment Act.

A proceeding brought *ex parte*, with no contradicter present, to have the racial status of the petitioner determined and which is not brought for the purpose of determining the petitioner's matrimonial status or his legitimacy, or other legal purpose, presents a social matter rather than a legal controversy, and does not come within the scope of the "Uniform Declaratory Judgment Act," and the proceeding will be dismissed. Ch. 102, Public Laws of 1931.

APPEAL by petitioner from *Sinclair, J.,* at Chambers in Greenville, 27 August, 1931, at Chambers in New Bern, 4 September, 1931. From CRAVEN.

Ex parte proceeding under Uniform Declaratory Judgment Act to have petitioner's pedigree, or racial status, fixed and determined by declaratory order or decree of the court.

The petitioner alleges that his father was a full-blooded white man and his mother half white and half Mohawk Indian, thus rendering the petitioner three-fourths white and one-fourth Mohawk Indian with respect to his blood and race; that a judicial determination to this effect would relieve the petitioner of much embarrassment and humiliation in the vicinity of his residence because of a contrary suggestion relative to

his race having been expressed in the community; and that he is entitled by law to have his pedigree established in this proceeding as he is the only real party in interest.

The judge at first entered a decree agreeably to the prayer of the petitioner, but later struck it out on the ground that he was without authority to entertain the petition and that his first judgment was a nullity for want of jurisdiction.

The petitioner appeals, assigning error.

Joseph Dawson for petitioner.

STACY, C. J. The petitioner is not asking to have his matrimonial status declared, as was the case in *Baumann v. Baumann,* 250 N. Y., 382, nor his legitimacy established, as appeared in *Beresford v. Attorney-General,* L. R. (1918) Prob., 33, note 12 A. L. R., 86. See, also, note, 68 A. L. R., 129. He seeks only to have his racial status determined in an *ex parte* proceeding with no contradicter present. Primarily, his purpose partakes of a social matter rather than a legal controversy.

The proceeding is not within the scope or purview of the Uniform Declaratory Judgment Act, chap. 102, Public Laws 1931. *Poore v. Poore,* 201 N. C., 791, 161 S. E., 532.

Proceeding dismissed.

ALEXANDRA B. HANKINS v. J. R. HANKINS AND WIFE, MINDA HANKINS.

(Filed 9 March, 1932.)

1. Husband and Wife E a—Elements necessary to be established in action for alienation of affections.

In an action by a wife to recover damages for the alienation of the affections of her husband she must establish by proper evidence that she and her husband were happily married and that genuine love and affection existed between them, that such love and affection was alienated, and that the wrongful and malicious acts of the defendant brought about such alienation.

2. Husband and Wife E b—Evidence in this case held incompetent in an action for damages for alienation of affections of husband.

Where, in an action by a wife against her father-in-law to recover damages for the alienation of the husband's affections, the evidence tends to show that the married couple came to live with the husband's father on account of their strained financial circumstances: *Held,* evidence that the defendant's house was in disrepair and that the food,

which was served to all alike, was not good, that the defendant opposed the church and held views of contempt for the marriage ceremony is incompetent, and the judgment of the Superior Court granting a new trial in the county court upon exceptions based upon the admission of such evidence will be affirmed.

3. Evidence I b—Admission of letter in evidence in this case held error.

In an action by the wife against her father-in-law for alienating from her the affections of her husband: *Held*, a letter from the plaintiff's attorney to the defendant listing the wrongs alleged to have been committed by him is *ex parte* and self-serving and incompetent as evidence upon the trial.

4. Husband and Wife E b—In action for alienation evidence of the relations between the parties is competent within limits.

In an action by the wife against her father-in-law to recover damages for the alleged alienation of the affections of the husband evidence of the relationship between the parties is competent and constitutes a proper and vital subject of inquiry, but evidence of the number of parties the plaintiff had in her own house, or of the amount of money the defendant gave his daughters, or of the provision of the defendant to have his body cremated is incompetent and does not come under the rule, such evidence being wholly foreign to the issue and not being of declaration tending to show bias, animus or hostility to the plaintiff or her marriage.

CIVIL ACTION, before *Oglesby, J.*, at September Term, 1931, of FORSYTH.

This action was instituted in the County Court of Forsyth County. The plaintiff married James Hankins, the son of the defendant, in New York, in September, 1923, and afterwards lived in Boston, Massachusetts, for about two years.

The evidence tended to show that James Hankins was supposed to be studying law at Harvard University, but that he fell in love with plaintiff and the marriage resulted. The young couple had a hard time. The husband worked for a doctor in Boston and at the Waldorf Cafeteria. His duties were chiefly those of a janitor at the home and at the office of the doctor. The plaintiff also was working in somewhat the capacity of a servant. In due time a baby was born and the family was becoming involved in debt. In October, 1925, the plaintiff and her husband and baby came to Winston-Salem, North Carolina, to live in the home of defendants. The defendant, J. R. Hankins, father of plaintiff's husband, secured employment for his son at Reynolds Tobacco Company.

The plaintiff testified that when she arrived at the home of her father-in-law and mother-in-law, the defendants in this case, that she received a cold reception. The plaintiff and her husband were assigned a room in the home of defendants on the second story. The plaintiff

offered evidence tending to show that she was pregnant with the second baby at the time she came to the home of her father-in-law.

The evidence in the case covers approximately three hundred printed pages and no effort will be made to recapitulate it in detail. The testimony of plaintiff tended to show that the defendant, her father-in-law, was close-fisted, stingy and parsimonious; that he conceived the idea that plaintiff was extravagant, and that he began to complain about water dripping from the faucets and other petty details. Plaintiff further testified that the antipathy of her father-in-law increased from time to time, and that he called her a "dirty pig" and accused her of being a thief because she wasted water from the faucets in the house; that he called her an "old fool" because she disagreed with some of his religious views, and that upon one occasion when she and her husband were having an argument the defendant, her father-in-law, suggested to his son that he pick up a stick of wood and "knock her on the head"; that the said defendant had inquired of his son if there was no way to upset the marriage, and that he advised his son to throw the plaintiff out of his life. Subsequently plaintiff's husband and her brother-in-law assaulted the defendant and beat him because the father refused to hand over to his sons certain sums of money which they wanted, and that thereafter the father-in-law accused the plaintiff of encouraging the sons to beat the father. Plaintiff further testified that by reason of the hostility of defendants the affection of her husband was thoroughly destroyed and alienated; that he became cross and quarrelsome and finally told his wife, the plaintiff, that she would have to "get to hell away from there."

About the latter part of February or the first of March, 1930, plaintiff left and returned to Boston. The family then consisted of the plaintiff and four babies.

The defendants offered evidence tending to show that the plaintiff was extravagant and totally unwilling to make any reasonable effort to live within the income and earning of her husband, and that she was fiery and high tempered and disposed to "start an argument" with or without cause. There was evidence that the defendant, J. R. Hankins, started with nothing and through years of hard work and self-denial had accumulated a considerable block of Reynolds tobacco stock.

At the conclusion of the evidence a nonsuit was taken as to the mother-in-law, the defendant, Minda Hankins, and the following issues were submitted to the jury:

1. "Did the defendant, J. R. Hankins, maliciously alienate the affections of the plaintiff's husband and cause him to abandon his wife, the plaintiff, as alleged in the complaint?"

2. "If so, did the defendant, J. R. Hankins, act from personal ill-will towards the plaintiff, or wantonly or oppressively, or from reckless indifference to her rights?"

3. "What amount, if any, of compensatory damages is the plaintiff entitled to recover of the defendant, J. R. Hankins?"

4. "What amount, if any, of punitive damages is the plaintiff entitled to recover of the defendant, J. R. Hankins?"

The jury answered the first issue "yes," the second issue "yes," the third issue "$26,000," and the fourth issue "$12,000."

From judgment upon the verdict, the defendant appealed to the Superior Court and duly filed exceptions in accordance with the statute regulating the practice in Forsyth County Court. The cause was heard by Oglesby, judge, who sustained approximately nineteen exceptions assigned by the defendant and overruled about two hundred others, and awarded a new trial. The plaintiff appealed from judgment awarding a new trial, and the defendants appealed from that part of the judgment overruling the two hundred exceptions referred to.

Parrish & Deal for plaintiff.
Manly, Hendren & Womble for defendant.

BROGDEN, J. When the plaintiff instituted her action against the defendants for damages, both compensatory and vindictive, alleging that the affections of her husband had been alienated, the law imposed upon her the duty of showing, by proper evidence, the following facts: (1) that she and her husband were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; (3) that the wrongful and malicious acts of defendant produced and brought about the loss and alienation of such love and affection. *Brown v. Brown,* 124 N. C., 19, 32 S. E., 320; *Powell v. Benthall,* 136 N. C., 145, 48 S. E., 598; *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769; *Rose v. Dean,* 192 N. C., 556, 135 S. E., 348; *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807; *Townsend v. Holderby,* 197 N. C., 550, 149 S. E., 855.

Obviously, if the love and affection of the husband was alienated or destroyed either by his own cupidity, habits, or other cause, without interference or wrongful procurement of a third party, then such third party would not be liable in damages. The plaintiff, however, assumed the burden of proving that the loss of her husband's affection was occasioned and brought about by the wrongful and malicious counsel, advice and procurement of her father-in-law, the defendant, J. R. Hankins. She undertook to show that the house in which she was living

with her father-in-law was in bad repair and that the food was neither dainty nor nourishing, consisting principally of half-cooked cowpeas and collards; that her father-in-law was opposed to the church and that he was a disciple of one Haldeman Julius, who, apparently, was engaged in writing articles attacking and ridiculing the church, and particularly showing contempt for the marriage ceremony sanctioned by the church. She introduced a letter from her counsel to the defendants detailing her statement of the deficiencies and delinquencies of the defendant, her father-in-law.

In substance the foregoing evidence was found by the trial judge to be incompetent, and he sustained exceptions thereto and awarded a new trial. This Court concurs in the ruling of the trial judge with respect to such exceptions.

The plaintiff and her husband voluntarily entered the home of her father-in-law, the defendant, J. R. Hankins. At the time, plaintiff and her husband were hardly able to keep "buckle and tongue" together. If they were willing to accept the hospitality of the father-in-law, the law imposed upon them the duty of taking the home as they found it. If the food was not to the plaintiff's liking, it is sufficient to note that all other members of the family ate the same food. If the room in which plaintiff and her husband lived needed plastering, it was the defendant's home, and the plaintiff and her husband were not compelled to continue to reside therein. The evidence discloses that after some period of time the defendants conveyed a part of their homeplace to the plaintiff and her husband, and that thereupon they built their own dwelling and moved into it. In like manner, the evidence with respect to the defendant's hostility toward the church or his general religious views in the light of the record, was wholly incompetent. The liberality of our Constitution and laws not only recognizes but guarantees to each man the right to construct a religious belief to suit himself, free from the supervision and control of any power on earth. Moreover, the same liberality and security of law stand guard about him even if he has no religion at all. These principles are too fundamental to require debate or elaboration. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. Furthermore, the letter which plaintiff's attorneys wrote to the defendant, listing the wrongs committed by him was, at least, an *ex parte* and self-serving declaration.

The defendant presents to the court approximately two hundred exceptions based upon alleged incompetent evidence and erroneous instructions to the jury. Much of this evidence was admitted for the limited purpose of showing the relationship between the parties. It is useless to discuss the evidence bearing upon the relationship of defendant, Minda Hankins, for the reason that a nonsuit was taken as to her. Manifestly,

the relationship between the parties constitutes a proper and vital subject of inquiry, and consequently the decisions relating to the subject recognize that wide latitude is permissible, but at the same time the courts invariably sound a warning that such evidence may easily wander too far afield. The relationship between the father, the defendant, and his son, plaintiff's husband, and the plaintiff herself, would be competent, but, for example, the number of parties the plaintiff had while she was living in her own house or the amount of money the defendant, J. R. Hankins, gave to his own daughters for school purposes, or that the defendant had provided in his will that his body be cremated, constituted items of evidence wholly foreign to the issue. These were not declarations made by the defendant to the plaintiff or to her husband, or about either of them, showing any bias, animus or hostility to the plaintiff or her marriage, and, therefore, had no proper place in the case.

Having determined that a new trial was properly granted, the court deems it unnecessary and inadvisable to undertake to discuss further the exceptions presented in the defendant's appeal.

Affirmed.

NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM v. J. J. WHITEHURST.

(Filed 9 March, 1932.)

Wills E b—Held: under facts of this case devisee could convey fee-simple absolute title.

Where a testator devises certain lands to his son for life and then to the lawful heirs of his body, if any, and if none to C. and J., and their heirs equally, and the son has no children at the date of the probate of the will but afterwards has living children, and also thereafter purchases all the title and interest of C. and J.: *Held*, the son can convey the fee-simple absolute title. *Glenn v. Ashby, ante*, 244, *Williams v. R. R.*, 200 N. C., 771.

APPEAL by defendant from *Harris, J.*, at January Term, 1932, of WAYNE.

Plaintiff being under contract to convey a certain tract of land to the defendant, J. J. Whitehurst, duly executed and tendered deed therefor, with full covenants of warranty, and demanded payment of the purchase price as agreed, but the defendant declines to accept the deed and refuses to pay the purchase price, claiming that the title offered is defective.

It was agreed that if, in the opinion of the court, under the facts submitted, the plaintiff could convey a good and indefeasible fee-simple title to the tract of land in question, judgment should be entered for the plaintiff, otherwise for the defendant.

From a judgment for the plaintiff, the defendant appeals, assigning error.

W. G. Mordecai for plaintiff.
Langston, Allen & Taylor for defendant.

STACY, C. J. On the hearing the sufficiency of the title offered was properly made to depend upon the construction of the following provision in the joint will of John Smith and Julia P. Smith:

"Item 6. We bequest to our son Mack D. Smith all the lands we own north of Julia P. Woods line during his lifetime and then to the lawful heirs of his body if any, if none we give it to our sons Christopher W. Smith and John Smith and to their heirs equally."

The fact situation is, that at the time of the probate of said will, 16 February, 1901, Mack D. Smith and wife had no children, but five children have since been born to them, all of whom are now living.

On 16 September, 1904, Mack D. Smith purchased from Christopher W. Smith and John Smith all their right, title and interest in said property.

Thereafter on 20 September, 1904, Mack D. Smith and wife conveyed the *locus in quo* to B. F. Barwick, through whom the plaintiff has acquired title by *mesne* conveyances.

Plaintiff's deed is sufficient to convey a fee-simple title, and the judgment may be upheld, either under the principle announced in *Glenn v. Ashby, ante,* 244, or the rule stated in *Williams v. R. R.,* 200 N. C., 771, 158 S. E., 473.

Affirmed.

W. E. HOOKER AND GREENVILLE BANKING AND TRUST COMPANY, EXECUTORS OF MRS. GERTRUDE H. COWARD, v. C. S. FORBES AND CLARA J. FORBES.

(Filed 9 March, 1932.)

1. Process B f—Return of sheriff is prima facie proof of service and contrary must be shown by clear and unequivocal proof.

A sheriff's return noted on a summons in a civil action that the summons had been properly served prima facie establishes such service, and the burden is on the party claiming that service had not in fact been made to prove want of service by clear and unequivocal evidence.

2. Appeal and Error J c—Finding that service of process has been made held conclusive in this case.

Where the trial court upon conflicting evidence finds as a fact that the summons in the action was in fact served on the defendant, the finding is conclusive, and where upon such finding the defendant's motion to set aside a judgment rendered therein by default under the provisions of C. S., 600, on the ground that service had not been made will be upheld.

3. Process C c—Defect in summons held formal and remedial by amendment.

Under the provisions of C. S., 476 that process must be signed by the clerk of the Superior Court having jurisdiction of the action construed with the provisions of C. S., 547, the negligent failure of the clerk to sign his name to the summons in a civil action is a formal defect and one that would be waived by a general appearance, and it is within the authority of the trial judge to permit a correction by amendment *nunc pro tunc*.

APPEAL by defendant Clara J. Forbes from *Cranmer, J.*, at January Term, 1932, of PITT. Affirmed.

On 9 March, 1923, the defendants executed and delivered to Gertrude H. Coward their promissory note under seal for $2,000 payable 9 March, 1924, and on 19 August, 1931, the plaintiffs brought suit to recover the amount due thereon. On 21 September, 1931, no answer having been filed, the clerk of the Superior Court, in accordance with the regular practice and procedure, gave judgment against the defendants in the sum of $2,000 with interest from 9 March, 1929, and the costs of the action. On 18 December, 1931, the defendant Clara J. Forbes notified the plaintiffs that she would make a motion before the judge presiding in the Superior Court on 18 January, 1932, to set aside and vacate the judgment. Her affidavit set out as grounds of her motion the failure of the officer to serve her with process and the failure of the clerk to sign the summons before it was delivered to the officer.

From the evidence introduced the judge found the facts and set them out in the judgment. Clara J. Forbes averred that no summons had ever been served on her in the cause, while the plaintiffs relied upon the officer's return on the summons together with an affidavit of the deputy sheriff that he read the summons to her and left with her a copy of the summons and complaint. The court found that proper service of process had been made.

In reference to issuing the summons the finding is this: "A summons was duly issued out of the office of the clerk of the Superior Court in favor of the plaintiffs and against the defendants in the action on 19 August, 1931, and at the time of the issuance of said summons the plaintiffs duly filed a verified complaint, and at the time the said summons was filled out W. H. Woodard, vice-president of the Greenville Banking

and Trust Company, one of the executors, requested the clerk not to hand the summons to the sheriff until his co-executor could come in and verify the complaint and sign the bond, and on the same date thereafter W. E. Hooker, the other executor, came into the clerk's office, verified the complaint and signed the bond; and thereupon the clerk of the court carried said summons and a copy of said summons and a copy of said complaint for each defendant to the sheriff's office and delivered same to the sheriff or his deputy; and then and there the clerk himself directed the sheriff or his deputy to serve the same upon the defendants, paying to the sheriff his fees for said service; that by oversight the clerk failed to sign said original summons."

It was adjudged that the service of process upon the defendants was valid, that the clerk sign the summons *nunc pro tunc,* and that the motion to set aside the judgment be denied. Clara J. Forbes excepted and appealed.

Harding & Lee for appellant.
Albion Dunn for appellee.

ADAMS, J. The sheriff's return notes the service of process by reading the summons to the defendants and by delivering to each of them a copy both of the summons and of the complaint. As the return is prima facie correct it cannot be set aside unless the evidence in contradiction is clear and unequivocal. *Commissioners v. Spencer,* 174 N. C., 36; *Trust Co. v. Nowell,* 195 N. C., 449. The affidavit of the appellant discredits the return and that of the deputy sheriff supports it. The court found as a fact that the summons had been served as the statutes direct, and this finding is conclusive. *Chemical Co. v. Long,* 184 N. C., 398; *Daugherty v. Commissioners,* 183 N. C., 149. The principal exception relates to that part of the judgment which directs the clerk to affix his signature to the summons *nunc pro tunc.*

When the plaintiffs applied to the clerk for a summons against the defendants they filed a complaint verified by one of the parties. The prosecution bond on the back of the summons was signed on behalf of the Greenville Banking and Trust Company, an executor, but the clerk did not issue the summons until the other executor had signed the bond and verified the complaint. Under the justification of the bond are the jurat and the clerk's signature. After the bond had been justified and the complaint filed the clerk delivered the papers to the sheriff for service upon the defendants, not having signed his name to the summons.

This process must be signed by the clerk of the Superior Court having jurisdiction to try the action. C. S., 476. The question is whether the

omission of the clerk's signature may be supplied by amendment. It is provided that "the judge or court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, by correcting a mistake in the name of a party, or a mistake in any other respect. . . . When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto." C. S., 547. The purpose of the statute is "to facilitate the trial and disposition of causes upon their merits; and to this end when necessary the process and pleadings are liberally reformed by amendments which do not substantially change the claim or defense." *Cheatham v. Crews,* 81 N. C., 343.

In *Henderson v. Graham,* 84 N. C., 496, the summons was issued without the signature of the clerk in the blank space at the end of the instrument. After it had been served the defendants' attorney entered a special appearance and moved to dismiss the action, and the plaintiff's attorney asked leave to amend by allowing the clerk to affix his signature *nunc pro tunc.* The court declined to allow the amendment for want of power and granted the motion to dismiss.

On appeal to the Supreme Court *Chief Justice Smith,* after discussing the question whether the action must necessarily be dismissed or abated, announced the following principle which was stated in one of the cited authorities: Any defect or omission of a formal character which would be waived or remedied by a general appearance or an answer upon the merits, may be treated as a matter which can be remedied by amendment. The failure of the clerk to sign the summons was held to be a mistake of this description.

In the *Henderson case* the summons was issued by the clerk in Mecklenburg on 4 January, 1879, and was addressed to the sheriff of that county. The seal was affixed, but the seal imparted no legal efficacy to the summons; it merely indicated its official character. The statute requiring the summons to be signed by the clerk "under the seal of his court" (Battle's Revisal, 159, sec. 73), was repealed by the act of 1876-'7. Pub. Laws, ch. 85, sec. 4. If the seal was evidence of the official character of the summons why should not the same significance be given to the clerk's signature under the jurat on the back of the summons? A seal, especially when not necessary, is not the only way by which the official character of process may be shown. This fact is pointed out in *Redmond v. Mullenax,* 113 N. C., 505: "Though the paper purporting to be a summons may be informal in some respects, or even defective in failing to contain all that, according to the requirements of the

statute, should appear in it, its informality and defects may be cured by amendment if there is evidence upon its face that it has emanated from the proper office and was intended to bring the defendants into court to answer a complaint of the plaintiff." The clause, "Unless there is something upon the face of the paper which stamps upon it unmistakenly an official character, it is not a defective summons, but no summons at all," was evidently intended to accentuate the insufficiency of the blank summons taken from the clerk's office by an agent of the plaintiff and filled out in the office of the plaintiff's attorney—the fact being that the summons was never issued or served. It had previously been decided that a writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar was a nullity. *Shepherd v. Lane,* 13 N. C., 148; *Gardner v. Lane,* 14 N. C., 53.

It has been held that process issued to another county without a seal is void (*Taylor v. Taylor,* 83 N. C., 116; *McArter v. Rhea,* 122 N. C., 614), but in *Calmes v. Lambert,* 153 N. C., 248, it was said that if these expressions are correct they are so only until the process is validated by amendment, and several of our decisions have sustained amendments of this character. *Clark v. Hellen,* 23 N. C., 421; *Vick v. Flournoy,* 147 N. C., 209. See, also, *Elramy v. Abeyounis,* 189 N. C., 278.

According to the foregoing principle the absence of the clerk's signature on the summons was a defect of a formal character which would have been waived by a general appearance and was therefore remediable by amendment. Judgment

Affirmed.

Z. M. L. JEFFREYS, J. T. JEFFREYS AND R. A. JEFFREYS, TRADING AS JEFFREYS AND SONS, AND RANSOM CREECH, v. BOSTON INSURANCE COMPANY AND CONTINENTAL GIN COMPANY.

(Filed 9 March, 1932.)

1. Trials F a: Pleadings I b—Where pleadings do not raise any determinative issues court may render judgment on the pleadings.

Only issues of fact arising upon the pleadings which are determinative of the rights of the parties must be submitted to the jury, C. S., 519, and where the only controverted fact has no bearing on the rights of the parties, judgment may be rendered on the pleadings upon the facts admitted.

2. Insurance N c—Mortgagee named in loss-payable clause held entitled to proceeds of policy as against seller retaining title.

The purchaser of a cotton gin under a title-retaining contract gave notes for the balance of the purchase price guaranteeing the seller against loss by fire. Thereafter, the purchaser took out a policy of fire insurance

on his property with a loss-payable clause in favor of his mortgagee as his interest might appear, and the gin was included in the property covered in the insurance policy. Upon loss by fire the insurance company paid the amount of the policy into court, and the controversy depended upon the respective rights of the mortgagee and the seller of the cotton gin: *Held*, although the seller had an insurable interest in the property destroyed, the purchaser had not taken out any insurance protecting this interest and had not made any agreement to do so, but had given only a personal guarantee against loss by fire, and the mortgagee named in the loss-payable clause of the policy was entitled to the proceeds thereof under the terms of the policy contract protecting his interest therein.

3. Same — In absence of agreement, only mortgagees named in loss-payable clause are entitled to proceeds of policy.

Both the mortgagor of property and his mortgagee have an insurable interest therein, and where there are several mortgagees and the mortgagor takes out a policy of insurance with a loss-payable clause to them as their interest might appear they are entitled to the proceeds of the policy in proportion to their debts if there are no priorities by registration, agreement, or otherwise, but where one of the mortgagees is not named in the loss-payable clause he is not entitled to any of the proceeds thereof and the mortgagees named in the policy are entitled to the exclusive benefit thereof, unless the mortgagor had agreed to take out a policy for his benefit, in which case the mortgagee would be entitled to an equitable lien on the proceeds of the policy, at least as against the mortgagor.

APPEAL by plaintiffs, Jeffreys and Sons, from *Cranmer, J.*, at August Term, 1931, of WAYNE. Modified and affirmed.

This is an action on a policy of insurance issued on 9 September, 1930, by which the defendant, Boston Insurance Company, insured the plaintiff, Ransom Creech, against loss or damage by fire on the property described in the policy. It is provided in the policy that the loss, if any, shall be payable to the plaintiffs, Jeffreys and Sons, as their interest may appear.

While the policy was in full force and effect, according to its terms, to wit: on 23 January, 1931, the property described therein was destroyed by fire. Both the plaintiffs, Jeffreys and Sons, and the defendant, Continental Gin Company, as creditors of the plaintiff, Ransom Creech, filed claims with defendant, Boston Insurance Company, for the amount of the loss. It was agreed by and between the plaintiffs and the defendants that this amount was $2,750. After the commencement of this action, this sum was paid into the office of the clerk of the Superior Court of Wayne County, by the defendant, Boston Insurance Company, in full settlement of all claims against said company under its policy of insurance. This action, therefore, involves only the conflicting claims of the plaintiffs, Jeffreys and Sons, and of the defendant,

Continental Gin Company, to said sum, now in the hands of said clerk. The plaintiff Ransom Creech, makes no claim to any part of said sum, in his own behalf.

The policy of insurance sued on in this action was issued to the plaintiff, Ransom Creech, as the owner of the property described therein. It contains a provision in words as follows:

"It is agreed that any loss or damage that may be ascertained and proven to be due the assured under this policy shall be payable to Jeffreys and Sons, as their interest may appear, subject, nevertheless, to all the conditions of the policy."

At the date of the issuance of said policy, the plaintiff, Ransom Creech, was indebted to the plaintiffs, Jeffreys and Sons, in a sum in excess of $3,000. This indebtedness was secured by a mortgage deed executed by the plaintiff, Ransom Creech, by which the said plaintiff conveyed to the said Jeffreys and Sons, the property described in the policy of insurance. This mortgage deed is dated 15 January, 1930, and was duly recorded in the office of the register of deeds of Wayne County. The indebtedness secured by said mortgage deed has not been paid. The amount of said indebtedness exceeds the amount of the loss covered by the policy.

The property described in the policy of insurance sued on in this action, consisted in part of certain gin machinery. This gin machinery was sold to the plaintiff, Ransom Creech, by the defendant, Continental Gin Company, on or about 21 August, 1929. In part payment of the purchase price for said gin machinery, the plaintiff, Ransom Creech, executed and delivered to the defendant, Continental Gin Company, two notes, which were duly recorded in the office of the register of deeds of Wayne County, prior to the registration of the mortgage deed from the plaintiff, Ransom Creech, to the plaintiff, Jeffreys and Sons. Each of said notes contained a provision in words as follows:

"It is expressly understood and agreed by and between the holder and the maker of this note that the title and ownership of said machinery, for which this note is given, shall remain in the said Continental Gin Company, or owner of this note, until this note and all other installment notes or renewals thereof, shall be paid in full.

"It is further understood that the maker of this note guarantees said Continental Gin Company against any damage or loss to said machinery by fire or other cause, and if said property is damaged or destroyed by fire or other cause, the maker of this note agrees to pay this note and will not claim any rebate or reduction on account of such loss."

At the date of the fire which destroyed the property covered by the policy of insurance, including the gin machinery which was sold to the

plaintiff, Ransom Creech, by the defendant, Continental Gin Company, the amount due on said notes was $1,094.40, with interest from 4 December, 1929. This amount has not been paid.

There is no provision in the policy that the loss, if any, or any part thereof, shall be payable to the defendant, Continental Gin Company, nor is there any allegation in the answer of the said defendant that the insured, Ransom Creech, covenanted or agreed to insure said machinery for the benefit of said defendant.

It is alleged in the complaint filed jointly by the plaintiffs, Jeffreys and Sons, and Ransom Creech, that the premium for the policy of insurance sued on in this action, was paid by the plaintiffs, Jeffreys and Sons. This allegation is specifically denied in the answer filed by the defendant, Continental Gin Company. This defendant alleges in its answer that if the premium was paid by the plaintiffs, Jeffreys and Sons, as alleged in the complaint, the amount thereof was charged by said plaintiffs to the plaintiff, Ransom Creech, and contends that for this reason, the premium was, in effect, paid by the said plaintiff.

The action was heard on the demurrer filed by the plaintiffs, Jeffreys and Sons, to the answer of the defendant, Continental Gin Company, on the ground that the facts stated therein are not sufficient to constitute a defense to the cause of action alleged in the complaint, and on the motion of said plaintiffs for judgment on the pleadings. This demurrer was overruled, and the motion denied. Thereupon, the defendant, Continental Gin Company, moved for judgment on the pleadings. This motion was allowed.

From judgment ordering and directing that the defendant, Continental Gin Company, be paid the sum of $1,094.40, with interest from 4 December, 1929, out of the sum of $2,750, now in the hands of the clerk of the Superior Court of Wayne County, and that the balance of said sum be paid to the plaintiffs, Jeffreys and Sons, the said plaintiffs appealed to the Supreme Court.

Kenneth C. Royall and Andrew C. McIntosh for plaintiff.
James J. Hatch for defendant.

CONNOR, J. The only allegation of fact in the complaint in this action, which is denied in the answer of the defendant, Continental Gin Company, is that the premium for the policy sued on was paid by the plaintiffs, Jeffreys and Sons. This allegation is not essential to the cause of action alleged in the complaint. The right of the plaintiffs, Jeffreys and Sons, to recover on said cause of action is not dependent on this allegation; it is founded on the "loss-payable" clause in the

policy. The issue raised by the denial in the answer is immaterial, and for the purpose of determining the rights of the parties to this action on the facts admitted in the pleadings may be disregarded. Only issues of fact which arise on the pleadings, and are determinative of the rights of the parties to the action, must be submitted to the jury. C. S., 519. *Miller v. Miller,* 89 N. C., 209.

It is well established as the law that a mortgagor and his mortgagee each has an insurable interest in the property conveyed by the mortgage. When a policy of insurance is procured by either a mortgagor or a mortgagee, insuring his own interest in the property, and in his own behalf alone, such insurance does not inure to the benefit of the other. When, however, the policy is procured by the mortgagor, for the benefit of the mortgagee, or the loss covered by the policy, if any, is expressly made payable to the mortgagee, as his interest may appear, the mortgagee is entitled to the proceeds of the policy to the extent of the amount of his debt secured by the mortgage. 26 C. J., 438. Thus in any event, on the admissions in the pleadings in the instant case, the plaintiffs, Jeffreys and Sons, are entitled to the sum of $2,750, now in the hands of the clerk of the Superior Court of Wayne County, as against the insured, Ransom Creech.

It is also well established as the law that where a policy of insurance, procured by a mortgagor, provides on its face that the loss, if any, shall be payable to two or more mortgagees, as their respective interests may appear, the loss covered by the policy is payable to the mortgagees in proportion to their debts secured by their mortgages, unless one of the mortgagees has a priority over the others, by reason of the registration laws or otherwise, or unless it is expressly provided in the policy that the loss shall be payable only to one of the mortgagees named in the policy. Where the policy provides that the loss shall be payable to one of several mortgagees, and there is no provision therein for the benefit of the other or others, the loss is payable only to the mortgagee provided for in the policy. 26 C. J., 442. In the absence of an express provision in the policy for the payment of the loss, or any part thereof, to a mortgagee, such mortgagee is not entitled to the loss or any part thereof, as against the mortgagor, or as against other mortgagees, unless there was an agreement on the part of the mortgagor to insure the mortgaged property for the benefit of the mortgagee who is not provided for in the policy. In the latter event, the loss is payable to the mortgagee, at least, as against the mortgagor. 26 C. J., 442.

In *Bank v. Bank,* 197 N. C., 68, 147 S. E., 691, it is said: "We understand the principle to be that as a rule a mortgagee has no right to the benefit of a policy taken by the mortgagor in the absence of an agree-

ment to that effect, unless the policy is assigned to him; but where the mortgagor is charged with the duty of taking out insurance for the benefit of the mortgagee, as between the parties to the contract, the mortgagee is entitled to an equitable lien on the proceeds of the policy obtained by the mortgagor." See C. S., 6420.

On the facts admitted in the pleadings in this action, the defendant, Continental Gin Company, has no right, title or interest in the sum of $2,750, now in the hands of the clerk of the Superior Court of Wayne County. There is no provision in the policy that the loss, if any, shall be payable to said defendant, nor is it alleged in the answer of said defendant, that the mortgagor, Ransom Creech, agreed to insure the gin machinery for the benefit of said defendant. The language contained in the notes cannot be construed as such an agreement.

There is error in the judgment ordering and directing that the amount of its debt be paid to the defendant, Continental Gin Company, out of the sum of $2,750, prior to the payment of said sum to the plaintiffs, Jeffreys and Sons. For this reason the judgment is

Modified and affirmed.

IN RE WILL OF H. L. ROWLAND.

(Filed 16 March, 1932.)

1. Wills D a—Probate in common form is ex parte proceeding and probate is conclusive until declared invalid in caveat proceedings.

Citation to those in interest is not necessary to the probate of a will in common form, the proceeding being *ex parte*, C. S., 4139 *et seq.*, and when probated the paper-writing is valid and operative as a will and may not be attacked collaterally, but any person interested in the estate or entitled under the will may institute caveat proceedings to declare the paper-writing invalid, C. S., 4158 *et seq.*, and where a paper-writing is offered for probate and is sufficient in form to constitute a will it is error for the clerk to refuse to admit it to probate on that ground.

2. Wills C d—Paper-writing in this case held sufficient in form to constitute a holographic will.

A paper-writing in the testator's handwriting, dispositive on its face, with the name of the testator inserted therein in his own handwriting followed by the words "this being my will" is sufficient in form to constitute a holographic will, C. S., 4131.

APPEAL by propounders from *Small, J.*, at November Term, 1931, of FRANKLIN.

IN RE WILL OF ROWLAND.

Proceedings to probate a paper-writing or script as the holographic will of H. L. Rowland, deceased.

The paper-writing offered for probate is without subscribing witnesses but it is in the handwriting of the deceased, and contains the following dispositive expressions:

"I do hrby give W A Rowlal on the North west forner oo sad land of H L Rowled this being my will . . . I do give to Fannie C. Rowlad the home place (describing it) . . . I do Will J S Rowlad the place he lives" (describing it).

The clerk declined to admit said paper-writing to probate as the last will and testament of H. L. Rowland, deceased, and this ruling was affirmed on appeal to the Superior Court on the ground that "after an examination of the said paper-writing and the proof offered and after hearing argument of counsel for both the propounders and the caveators or objectors to the probate of said will, being of the opinion that the said paper-writing offered for probate was not executed in accordance with the laws of North Carolina and is not otherwise sufficient in form to constitute and be the last will and testament of H. L. Rowland."

Propounders appeal, assigning errors.

Yarborough & Yarborough for propounders.
Thos. H. Ruffin and White & Malone for caveators.

STACY, C. J. The paper-writing in question was offered for probate in common form without citation to those in interest "to see proceedings." *Redmond v. Collins,* 15 N. C., 430, 27 Am. Dec., 208, and note. This is permissible under our practice, C. S., 4139 *et seq.,* and when thus probated in common form, even though the proceedings be *ex parte,* such record and probate is made conclusive as evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal, C. S., 4145, and it is not thereafter subject to collateral attack. *Mills v. Mills,* 195 N. C., 595, 143 S. E., 130; *Edwards v. White,* 180 N. C., 55, 103 S. E., 901; *Starnes v. Thompson,* 173 N. C., 466, 92 S. E., 259; *Moore v. Moore,* 198 N. C., 510.

It is further provided by statute, C. S., 4158 *et seq.,* that at the time of the application for probate of any will, and the probate thereof in common form, or at any time within seven years thereafter, with certain additional features in favor of persons under disability, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the Superior Court and enter a caveat to the probate of such will. *In re Little,* 187 N. C., 177, 121 S. E., 453. It is immaterial whether those appearing and protesting

call themselves interveners, objectors, or caveators. *Collins v. Collins*, 125 N. C., 98, 34 S. E., 195; *Randolph v. Hughes*, 89 N. C., 428; *Edwards v. Edwards*, 25 N. C., 82; *Redmond v. Collins, supra; Dickenson v. Stewart*, 5 N. C., 99. If in reality they are opposed to the probate of the will, they thereby place themselves in opposition to the propounders, and are entitled to the benefit of the statutes dealing with caveats. *In re Little, supra; Mills v. Mills, supra.*

Speaking to the subject in *In re Will of Chisman*, 175 N. C., 420, 95 S. E., 769, *Brown, J.*, delivering the opinion of the Court, said: "The probate of a will in common form is an *ex parte* proceeding, and no one interested is before the clerk except the propounders and witnesses. When an issue of *devisavit vel non* is raised by caveat, it is tried in the Superior Court in term by a jury. Upon such trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will *per testes* in solemn form."

Whether the paper-writing in question is the valid will of H. L. Rowland, deceased, we express no opinion, but there was error in holding, as a matter of law, that it is not sufficient in form to constitute a will. *In re Johnson*, 181 N. C., 303, 106 S. E., 841; *Alexander v. Johnston*, 171 N. C., 468, 88 S. E., 785. It is dispositive on its face, and the name of the alleged testator is inserted therein, in his own handwriting, followed by the words: "this being my will." C. S., 4131; *In re Westfeldt*, 188 N. C., 702, 125 S. E., 531; *In re Harrison*, 183 N. C., 457, 111 S. E., 867; *In re Bennett*, 180 N. C., 5, 103 S. E., 917.

Let the cause be remanded for further proceedings, not inconsistent herewith, and according to the usual course and practice in such cases.

Error.

PETE FELLOS v. WILLIAM ALLEN AND LESTER ALLEN, PARTNERS, TRADING UNDER THE NAME AND STYLE OF ALLEN BROTHERS.

(Filed 16 March, 1932.)

1. Judgments K b—Motion under C. S., 600, must be made within one year and movant show meritorious defense and excusable neglect, etc.

In order to set aside a judgment regularly entered, our statute, C. S., 600, requires that the motion be made within one year after notice and that the court find as a fact the existence of mistake, inadvertence, surprise or excusable neglect, to which the Supreme Court has added another condition precedent, that the judge must find that the moving party has a meritorious defense.

2. Appeal and Error J c—Finding of court upon sufficient evidence that movant did not have meritorious defense is conclusive on appeal.

Where upon a motion to set aside a judgment for surprise, excusable neglect, etc., the court finds as a fact upon supporting evidence that the movant has no meritorious defense, the finding is conclusive on appeal. As to whether excessive damages is a sufficient showing of a meritorious defense, *quære?*

3. Judgments K d—Motion to set aside judgment by default held properly refused, verification being in substantial compliance with law.

A verification of a complaint which is in substantial compliance with the law is not a sufficient ground for setting aside a judgment entered by default; in this case the plaintiff, when signing the complaint, took the oath with uplifted hand rather than upon the Bible.

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

The plaintiff instituted this action against the defendants, alleging that a truck owned by the defendants and driven by their agent, negligently struck the building or lunch room of the plaintiff, knocking in the front of said lunch room, damaging the stock of goods and merchandise therein and injuring the plaintiff. No answer was filed by the defendants, and thereafter an issue of negligence was submitted to the jury and the verdict awarded damages in the sum of $800. There was judgment upon the verdict and subsequently an execution levied thereon. When the execution was served the defendants made a motion to set aside the judgment for the reason that they had employed a reputable attorney who regularly practiced in the courts of Mecklenburg County and who agreed to represent said defendants; that they relied upon said attorney, and that the said attorney had failed to file an answer or to give them any notice of the trial. Several affidavits were offered by the defendants in support of the motion to set aside the judgment. In substance these affidavits allege that the damage done to the plaintiff did not exceed $20.00 or $25.00. The plaintiff, in reply, offered certain affidavits tending to show that the plaintiff had suffered damage in excess of the verdict of the jury.

The defendants further offered evidence tending to show that the complaint had not been properly verified for that the plaintiff had appeared before the deputy clerk of the Superior Court of Mecklenburg County and after signing the complaint, the plaintiff had taken the following oath: "You swear that the facts alleged in the complaint are true to the best of your knowledge and belief, so help you God," to which the plaintiff replied "I do," but that the plaintiff was not required to place his hand on the Bible or kiss the same after the oath was administered.

The trial judge heard the motion and found certain facts. Finding No. 10, which is the chief subject of attack, is as follows: "That the defendants offered no evidence tending to show a meritorious defense to the plaintiff's cause of action against the defendant for injury sustained, resulting from the negligence of defendants, and the court finds as a fact that the defendants have no such meritorious defense. There was evidence offered by the defendant that the verdict of the jury was much in excess of the injury and there was evidence offered by the plaintiff tending to show that the verdict of the jury was much less than the injury to plaintiff."

Hamilton C. Jones for plaintiff.
G. T. Carswell and Joe W. Ervin for defendants.

BROGDEN, J. The statutory conditions precedent warranting the setting aside of a judgment duly and regularly entered, are: first, the motion must be made "within one year after notice thereof"; second, the court must find as a fact, the existence of "mistake, inadvertence, surprise or excusable neglect." C. S., 600. The Supreme Court in various dicisions has added a third condition precedent to the statute, to wit: That the judge must find that the moving party had a meritorious defense. If no answer has been filed, the existence of a meritorious defense must necessarily appear from affidavit.

The judge finds expressly that the defendants have no meritorious defense. Such finding, when supported by evidence, is conclusive and not reviewable on appeal. *Crye v. Stoltz,* 193 N. C., 802, 138 S. E., 167. It must be observed that the judge declares "that the defendant offered no evidence tending to show a meritorious defense to the plaintiff's cause of action," but he further declares "there was evidence offered by the defendant that the verdict of the jury was much in excess of the injury." If the judge had found as a fact "that the verdict of the jury was much in excess of the injury," then the legal inquiry would have been: If the verdict is greatly in excess of the injury suffered, does such fact constitute a prima facie showing of a meritorious defense? However, it is obvious that, in the absence of such specific finding, no such legal question is presented. Hence the judgment must be affirmed.

The defendants attack the verification of the complaint upon the ground that the plaintiff, while signing the complaint, took an oath with uplifted hand rather than upon the Bible. This attack cannot be sustained. In the language of *Currie v. Mining Co.,* 157 N. C., 209, 72 S. E., 980, it sufficiently "appears that the plaintiff was sworn and by an officer authorized to administer oaths. It was not necessary that it

should be subscribed." Such verification was held to be a substantial compliance with the law. *Alford v. McCormac,* 90 N. C., 151.

So, in the case at bar, while the oath was not administered with strict formality, it cannot be said, as a matter of law, that the complaint was unverified.

Affirmed.

STATE v. RODMAN COX AND ELMER WHITLEY.

(Filed 16 March, 1932.)

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 Superior Court, C. S., 1417, the defendant may at the next succeeding criminal term of such Superior Court make a motion for a new trial for newly discovered evidence, and the judge of the Superior Court has the power to hear and determine the motion in his discretion.

2. Criminal Law L e—No appeal will lie from order of trial judge granting a new trial in his discretion.

A motion for a new trial for newly discovered evidence, made at the next succeeding term of criminal court after affirmance of the former conviction by the Supreme Court, is addressed to the discretion of the judge of the Superior Court and his order granting the motion is not reviewable, and an appeal therefrom by the State will be dismissed.

APPEAL by the State from *Sinclair, J.,* at November Term, 1931, of PITT. Dismissed.

This action was heard at November Term, 1931, of the Superior Court of Pitt County, on the motion of the defendants that the judgment and verdict therein at April Term, 1931, of said court, be set aside and that defendants be granted a new trial on the ground of newly discovered evidence. The motion was allowed.

From the order of the judge setting aside the judgment and verdict in the action at April Term, 1931, and granting the defendants a new trial, the State 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. The defendants in this action were tried at April Term, 1931, of the Superior Court of Pitt County, on an indictment returned by the grand jury at said term, in which the defendants were charged

with the crime of highway robbery. There was a verdict of guilty as to each defendant. From the judgment on the verdict that each defendant be confined in the State's prison for a term of not less than seven nor more than nine years, both defendants appealed to the Supreme Court, assigning errors at the trial. Their appeal was heard at Fall Term, 1931, of this Court. The assignments of error on said appeal were not sustained. The judgment was affirmed. See *S. v. Cox,* 201 N. C., 357, 160 S. E., 358.

The November Term, 1931, of the Superior Court of Pitt County, was the first term of said court for the trial of criminal actions pending therein, held after the judgment of this Court in defendants' appeal from the judgment of the Superior Court of Pitt County at April Term, 1931, was certified to said court, as provided by statute, C. S., 1417. At said term, the defendants, after notice to the solicitor for the State, moved that the judgment and verdict in the action at April Term, 1931, be set aside, and that defendants be granted a new trial, on the ground of newly discovered evidence. In support of their motion, the defendants filed numerous affidavits from which it appeared, as they contended, that since the trial of the action at April Term, 1931, the defendants had discovered new evidence which was not available to them at the date of the trial, and which, if submitted to a jury, would probably result in a verdict of not guilty as to each defendant. These affidavits, together with affidavits filed by the solicitor for the State, who opposed the motion of the defendants on the ground that it appeared from the affidavits filed by the defendants, that the new evidence which they had discovered was merely cumulative, and at most was only contradictory of the evidence offered by the State at the trial, were heard and duly considered by the judge presiding at said term. On his findings from all the affidavits offered at the hearing of the motion, with respect to the newly discovered evidence, the judge, in his discretion, allowed the defendants' motion, and in accordance therewith ordered that the judgment and verdict in the action at April Term, 1931, be set aside and vacated. It was further ordered by the judge that the defendants be granted a new trial of the issue raised by their pleas of not guilty to the indictment on which this action is founded.

It is conceded by the Attorney-General in the brief filed in behalf of the State on this appeal, that under the authority of *S. v. Casey,* 201 N. C., 620, 161 S. E., 81, the judge presiding at the November Term, 1931, of the Superior Court of Pitt County, had the power to hear and consider, and that it was, therefore, his duty, in his discretion, to allow or disallow, defendants' motion, at said term, for a new trial, on the ground of newly discovered evidence. In that case, it was held

that where the defendant in a criminal action has been convicted of a crime, capital or otherwise, in the Superior Court, and has appealed from the judgment of said court on such conviction to the Supreme Court, and the judgment of the Superior Court has been affirmed on such appeal, the judge presiding at the term of said Superior Court, next succeeding the affirmance of the judgment by the Supreme Court, at which criminal actions may be tried, has the power to hear and consider, and, in his discretion, to allow or disallow the defendants' motion for a new trial on the ground of newly discovered evidence. The only question discussed in the brief of the Attorney-General, and therefore, the only question presented for decision by this appeal, is whether the order of the judge in the instant case allowing the defendants' motion for a new trial, is subject to review by this Court, on the State's appeal from said order.

The law applicable to the decision of this question is well settled. In *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 863, it is said by *Stacy, C. J.,* that rulings of the Superior Court on matters addressed to the discretion of the court, which involve no questions of law or legal inference, are not subject to review on appeal to this Court. Numerous cases in which this principle has been applied are cited in the opinion in that case. The motion for a new trial on the ground of newly discovered evidence, whether made at the trial term, or at a subsequent term, of the court in cases where the motion may be made and allowed or disallowed at such term, are addressed to the discretion of the court. The order allowing or disallowing the motion is not subject to review by this Court; it is made in the discretion of the judge, and is conclusive, when made in a criminal action, on both the State and the defendant. *S. v. Branner,* 149 N. C., 559, 63 S. E., 169.

The order in the instant case is not appealable, and for that reason, this appeal is

Dismissed.

COMMISSIONER OF BANKS, EX REL. FARMERS AND MERCHANTS BANK, v. W. B. HARVEY AND HIS WIFE, NANNIE L. HARVEY.

(Filed 16 March, 1932.)

Banks and Banking H e—Action on note which is part of insolvent bank's assets must be brought in name of the Commissioner of Banks.

An action on a note payable to a bank since becoming insolvent and placed in the hands of the Commissioner of Banks must be brought in the name of the person holding the office of Commissioner of Banks as such officer, as otherwise confusion might arise on the officer's official

bond, and where the action is brought in the name of the office only, the judgment of the lower court overruling the defendant's demurrer will be reversed, and upon receipt of the certificate of reversal, C. S., 1417, the lower court may allow an amendment of the summons and complaint in accordance with the opinion, C. S., 515, 547.

APPEAL by defendant, Nannie L. Harvey, from *Devin, J.*, at November Term, 1931, of LENOIR. Reversed.

This is an action on a note executed by the defendant, W. B. Harvey, and endorsed before delivery, by the defendant, Nannie L. Harvey. The note is payable to the order of the Farmers and Merchants Bank of Kinston, N. C., and was due and payable on 19 June, 1931. No payments have been made on said note by either of the defendants. There is now due thereon the sum of $1,250, with interest from 19 June, 1931.

On 30 April, 1931, the Farmers and Merchants Bank was closed by order of the Commissioner of Banks of North Carolina. Its assets, including the note sued on in this action, are now in the hands of a liquidating agent appointed by the Commissioner of Banks, under statutory authority.

This action was begun on 24 August, 1931, by the Commissioner of Banks, on the relation of the Farmers and Merchants Bank.

The defendant, Nannie L. Harvey, demurred to the complaint on the ground that there is a defect of parties plaintiff, for that the Commissioner of Banks is not a party to the action, as appears from the complaint.

The action was heard on the issue of law raised by the demurrer. The demurrer was overruled.

From judgment overruling the demurrer, the defendant, Nannie L. Harvey, appealed to the Supreme Court.

Wallace & White and Assistant Attorney-General Seawell for plaintiff.
Rouse & Rouse for defendant.

CONNOR, J. The issue of law raised by the demurrer to the complaint in this action is whether the action on the note set out in the complaint can be maintained in the name of the "Commissioner of Banks, *Ex rel.* Farmers and Merchants Bank." It is contended by the defendant, Nannie L. Harvey, that on the facts alleged in the complaint, the action can be maintained only by the person now holding the office of Commissioner of Banks. This contention was not sustained by the judge of the Superior Court, who overruled the demurrer. In this there was error. The demurrer should have been sustained.

Chapter 243, Public Laws of North Carolina, 1931, is entitled, "An act to create the office of Commissioner of Banks, and to provide for the

maintenance of the Banking Department." It is provided therein that on or before 1 April, 1931, and quadrennially thereafter, the Governor, with the advice and consent of the Senate, shall appoint a Commissioner of Banks, who shall hold his office for a term of four years. It is further provided that the Commissioner of Banks, before entering upon the discharge of his duties, shall enter into bond, with some surety company authorized to do business in the State of North Carolina, as his surety, in the sum of not less than fifty thousand dollars, conditioned upon the faithful and honest discharge of all duties and obligations imposed upon him by statute.

Among the duties imposed by statute upon the Commissioner of Banks is that of taking possession of and liquidating insolvent banking corporations organized under the laws of this State. To that end, he is authorized by statute to take possession of all the assets of an insolvent banking corporation, and to collect the same, by suit or otherwise. Actions to collect notes which pass into his possession as assets of the corporation, must be brought by him, as Commissioner of Banks. Otherwise some question might arise as to the liability of the Commissioner of Banks under his official bond, for his defaults, if any, in the liquidation of an insolvent banking corporation.

The judgment is reversed. Upon the certification of this decision to the Superior Court of Lenoir County (C. S., 1417) the summons and complaint may be amended in accordance with this opinion. C. S., 515 and C. S., 547.

Reversed.

THE SCHOOL COMMITTEE OF RALEIGH TOWNSHIP, WAKE COUNTY, v. EACH AND ALL THE OWNERS OF TAXABLE PROPERTY WITHIN RALEIGH TOWNSHIP, WAKE COUNTY, NORTH CAROLINA, AND EACH AND ALL THE CITIZENS RESIDING IN RALEIGH TOWNSHIP, WAKE COUNTY, NORTH CAROLINA.

(Filed 16 March, 1932.)

Taxation A a—Where local school district is not administrative agency of the State it may not issue bonds without a vote.

Whether a local school district is an administrative agency of the State for the purpose of providing the constitutional six months term of school, Art. IX, or whether it is a local municipal corporation organized for the purpose of operating and maintaining public schools within the district is a determinative factor of its right to issue bonds for school purposes without a vote of the people, and where, in an action brought by the local district to declare a proposed bond issue to be valid, it does not appear from a construction of the statutes creating it that it was an administrative agency of the State, a judgment in its favor is erroneous.

CASHATT *v.* SEED CO.

APPEAL by defendants from *Harris, J.,* at Chambers in Raleigh, 5 March, 1932. From WAKE.

Proceeding under chap. 186, Public Laws 1931, to determine the validity of certain bonds proposed to be issued under authority of chap. 180, Public Laws 1931.

From a judgment for the plaintiff, the defendants appeal.

Caldwell & Raymond and Bunn & Arendell for plaintiff.
A. A. Aronson for answering defendants.
W. Y. Bickett for defendants appearing specially.

STACY, C. J. This is the same case heretofore considered at the present term, *ante,* 297, opinion filed 24 February, 1932. The only difference in the record previously considered and the one now before the Court consists of an amendment to the agreed statement of facts, setting out the statutes, under which it is contended that, by proper construction, the plaintiff operates and maintains the schools of Raleigh Township, Wake County, not as a local municipal corporation, organized expressly for that purpose, but as an administrative agency of the State so designated by the General Assembly in the discharge of the State's duty under Article IX of the Constitution. We do not so interpret the statutes. Compare *Glenn v. Commissioners,* 201 N. C., 233.

Having heretofore named Wake County as its agency for certain school purposes, *Owens v. Wake County,* 195 N. C., 132, 141 S. E., 546, it is not to be presumed, in the absence of definite designation, that the General Assembly intended to name another agency within the same territory. The parties agree that "the General Assembly has not, in express terms, designated the plaintiff as said administrative agency, and, if it has been so designated, it has been impliedly done."

This renders it unnecessary to consider again the procedural questions, debated on brief, and heretofore adverted to, if not decided.

Error.

W. H. CASHATT v. ASHEVILLE SEED COMPANY.

(Filed 16 March, 1932.)

Negligence D d—Instruction in this case held to be erroneous as submitting doctrine of comparative negligence.

Where the cause of action does not fall within the provisions of the Federal Employers' Liability Act or C. S., 3467, but is an action by an individual not an employee, to recover damages for a negligent injury, the doctrine of comparative negligence is not applicable, and an instruc-

tion for the jury to answer the issue as to contributory negligence in the negative if they found from the evidence that defendant's negligence was the proximate cause of the injury when compared with the negligence of the plaintiff is reversible error.

CIVIL ACTION, before *Stack, J.*, at August Term, 1931, of BUNCOMBE.

The plaintiff instituted this action against the defendant in the Buncombe County Court, alleging and offering evidence tending to show that, as he was attempting to cross the street, an agent of the defendant negligently struck him with an automobile, inflicting painful and serious injuries. Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The defendant filed exceptions and the matter was heard in the Superior Court upon said exceptions. The trial judge overruled the exceptions and affirmed the judgment of the county court. Whereupon the defendant appealed.

Hollowell & Hollowell for plaintiff.
Johnston & Horner for defendant.

BROGDEN, J. The judge of the county court charged the jury as follows: "The court charges you that the negligence of the plaintiff, if there was such, would not bar his recovery unless it directly and proximately contributed to his injury; his contribution to his own injury would not prevent recovery by him if there was negligence on the part of the defendant which when compared with that of the plaintiff was the proximate cause of the injury sustained."

After the jury had deliberated for sometime they returned for further instruction. The record shows the following: Another juror said to the court that he understood the court to say that if they should consider that the defendant was more negligent than the plaintiff, then they could take that into consideration in answering the second issue, whereupon the court instructed the jury in substance as follows: "The court instructed you on that point that even though you might find that the plaintiff himself was negligent, that if when you considered the negligence of the defendant and compared his negligence with the contributory negligence of the plaintiff you should still find that the negligence of the defendant was the proximate cause of the injury, then you would answer the second issue No."

These instructions embody the principle of comparative negligence. The first instruction was substantially in the language used in *Vann v. R. R.*, 182 N. C., 567, 109 S. E., 566. However, the declaration of law in the *Vann case* was clarified in *Moore v. Iron Works*, 183 N. C., 438, 111 S. E., 776. In the *Moore case, supra, Stacy, J.*, wrote: "As we

understand this excerpt, to which the defendant has excepted, it embodies and carries with it a statement of the principle of comparing the negligence of the plaintiff with that of the defendant. This doctrine is applicable with us, and then only for the purpose of mitigating the damages or as a partial defense, in cases arising under the Federal Employers' Liability Act and our own statute, C. S., 3467. *Williams v. Mfg. Co.*, 175 N. C., 226."

Hence the instructions complained of were erroneous and the defendant is entitled to a new trial.

Reversed.

MRS. LENA DEAN, ADMINISTRATRIX OF THE ESTATE OF J. C. DEAN, AND LENA DEAN, INDIVIDUALLY, v. W. G. DEAN.

(Filed 16 March, 1932.)

Fraud C c—Evidence of fraud in this case held insufficient to be submitted to the jury.

Where notes for the purchase price of lands are made payable to the grantor's son and not to the grantor, and after the grantor's death are found pledged as collateral for the son's note in a bank, and there is no evidence that the son was acting as the grantor's agent or that any confidential relationship existed between them or any other evidence in explanation: *Held*, the evidence of fraud is insufficient to be submitted to the jury in an action by the administrator of the grantor against the son to recover the value of the notes, and his motion as of nonsuit should have been granted.

CIVIL ACTION, before *Harding, J.*, at June Term, 1931, of BUNCOMBE.

J. C. Dean married and had two children, the defendant, W. G. Dean, and E. A. Dean. After the death of his first wife he married the plaintiff on 16 May, 1928. J. C. Dean owned a lot of land and sold the same to L. F. Gooley in an exchange of property. In the trade Gooley agreed to pay $1,860 in addition to the land which he received in the exchange. Gooley executed five notes, aggregating $1,860, payable to W. G. Dean. After the death of J. C. Dean the plaintiff qualified as his administratrix and brought a suit alleging that she was entitled to dower in various tracts of land, and also that the defendant, W. G. Dean, had wrongfully and fraudulently procured the notes of Gooley, amounting to $1,860. All matters in controversy were eliminated from the suit except the notes of $1,860.

The following issues were submitted to the jury:

1. "Did the defendant, W. G. Dean, fraudulently procure the execution of the purchase money notes for the Blue Ridge Avenue property

referred to in the complaint, from L. F. Gooley to himself instead of J. C. Dean, the grantor in the deed of J. C. Dean to L. F. Gooley, as alleged in the complaint?"

2. "Did the defendant, W. G. Dean, fraudulently hypothecate said notes with the Biltmore-Oteen Bank as collateral security for an indebtedness due said bank from the said W. G. Dean?"

3. "What damages, if any, is plaintiff entitled to recover of the defendant, W. G. Dean, by reason of the fraudulent acts of W. G. Dean?"

The jury answered the first issue "Yes," the second issue "Yes," and the third issue "$1,860."

From judgment upon the verdict the defendant appealed.

Galloway & Galloway for plaintiff.
Marcus Erwin for defendant, W. G. Dean.

BROGDEN, J. The defendant insists that there is no evidence of fraud, and consequently the motion for nonsuit should have been granted. All the pertinent evidence upon which fraud could be predicated, is contained in the following admission: "It is admitted that the five notes aggregating $1,860, were executed by L. F. Gooley to W. G. Dean as a part of the purchase price of Blue Ridge Avenue property described in deed from J. C. Dean to L. F. Gooley; that W. G. Dean endorsed said notes and deposited same in Biltmore-Oteen Bank as collateral security for said W. G. Dean note in said bank; that two of said notes have been paid, three have not been paid, and that said bank at this time holds said notes as collateral security for the unpaid part of the W. G. Dean note." There is no evidence tending to explain why said notes were made payable to W. G. Dean instead of J. C. Dean. There is no evidence that the son was acting as agent for his father, or that any confidential relationship whatever existed between father and son. In other words, the fact-status is substantially as follows: A father owns a piece of land and exchanges said land with a third party, receiving another parcel of land and notes aggregating $1,860. The notes are made payable to the son. Subsequently, the notes are found in a bank hypothecated as security for the indebtedness of the son.

This evidence scarcely rises to the dignity of a suspicion and does not disclose, upon the facts presented, the presence of fraud. The judgment of nonsuit should have been granted.

Reversed.

COMMISSIONER OF BANKS v. K. B. JOHNSON AND J. BEALE JOHNSON.

(Filed 16 March, 1932.)

1. Bills and Notes H b—Answer denying plaintiff's title to notes sued on raises issue of fact and judgment on pleadings is error.

Where the complaint in an action by the Commissioner of Banks to recover on certain notes alleges that the notes were among the assets of a bank since becoming insolvent and placed in the Commissioner's hands, an answer denying the allegation that the notes were among the assets of the bank when it became insolvent raises an issue of fact for the jury to determine, and a judgment for the plaintiff upon the pleadings is erroneous.

2. Bills and Notes H a—Possession of notes raises rebuttable presumption that plaintiff is entitled to recover thereon.

The possession by plaintiff of promissory notes sued on raises a presumption that he has the right to recover thereon, rebuttable by the defendant's evidence.

3. Banks and Banking H e—Action on note which is part of insolvent bank's assets must be brought in name of the Commissioner of Banks.

An action on a note which is among the assets of an insolvent bank placed in the hands of the Commissioner of Banks must be brought in the name of the officer occupying the position of Commissioner of Banks and not by the "Commissioner of Banks," but the defect may be cured by amendment.

APPEAL by K. B. Johnson, defendant, from *Cowper, Special Judge*, at January Term, 1932, of WAKE. Error.

A. J. Fletcher for appellant.
A. L. Purrington, Jr., for appellee.

ADAMS, J. The action was instituted in the name of the Commissioner of Banks to recover on two promissory notes alleged to have been executed and delivered by K. B. Johnson and J. Beale Johnson to the Raleigh Banking and Trust Company. It appears from the record that at the hearing no evidence was formally introduced. The plaintiff produced and exhibited the notes in open court, and at the request of the court the defendant filed a copy of a letter from the Fifth Third Union Trust Company, of Cincinnati, Ohio, to the defendant J. Beale Johnson, dated 22 September, 1930, stating that the company held the two notes on which the plaintiff brought suit and demanding payment five days before maturity.

Judgment was awarded the plaintiff on the ground that the answer filed by the appellant raises no issue of fact to be found by the jury.

The answer denies the allegation that at the time the Corporation Commission took possession of the Raleigh Banking and Trust Company the latter had the notes in controversy among its assets, or now has them, and puts in issue the plaintiff's title to the notes.

Assuming that the plaintiff's possession of the notes raises a presumption of his right to enforce payment the presumption is subject to rebuttal. *White v. Hines,* 182 N. C., 275. As the appellant's answer controverts the allegation of ownership, the plaintiff was not entitled to judgment on the pleadings.

Furthermore, the action must be prosecuted in the name of the officer who occupies the position of Commissioner of Banks and not by "Commissioner of Banks," as above entitled. *Commissioner of Banks v. Harvey, ante,* 380. This defect, however, may be cured by amendment.

Error.

MRS. JODIE PHIFER, ADMINISTRATRIX OF THE ESTATE OF H. T. PHIFER, v. W. J. BERRY AND JOHN C. BERRY.

(Filed 16 March, 1932.)

1. Pleadings D e—Demurrer admits facts properly alleged but not conclusions or inferences of law therefrom.

A demurrer to a complaint admits the facts therein properly alleged but not conclusions or inferences of law therefrom, and where the demurrer sets up the defense that the plaintiff had accepted an award under the Workmen's Compensation Act and was therefore barred from maintaining the action the plaintiff's right to maintain the action will be determined as a matter of law by a construction of the Compensation Act.

2. Master and Servant F a—Upon paying award the insurance carrier may prosecute action begun by employee against third person.

Although the administratrix of a deceased employee who has received compensation for the employee's death under the provisions of the Workmen's Compensation Act is thereby barred from prosecuting any other remedy for the injury, she may, pending the hearing before the Industrial Commission, institute an action against a third person whose negligent acts caused the death of the intestate, C. S., 160, and where the insurance carrier has paid the compensation later awarded, it is subrogated to the rights of the employer and may by the express terms of the Compensation Act maintain the action against such third person in the name of the administratrix, N. C. Code of 1931, sec. 8081(r), the right of action not abating by the insurance carrier's subrogation to the plaintiff's interest *pendente lite,* C. S., 446, 461, and where in such action it is alleged that

the action was being prosecuted by the insurance carrier for its benefit the defendant's demurrer entered on the ground that the action was barred by the award under the Compensation Act is properly overruled.

APPEAL by defendants from an order of *Oglesby, J.*, overruling their demurrer to the reply filed by the plaintiff. Heard in MECKLENBURG on 3 June, 1931.

On 9 February, 1930, H. T. Phifer, plaintiff's intestate, was driving a delivery truck of Foremost Dairy Products, Incorporated, on West Morehead Street in the city of Charlotte. At the intersection of Morehead and Mint streets a collision occurred between the truck and an automobile owned by the defendant W. J. Berry, a resident of Durham, and driven by his son, John C. Berry. In the collision the intestate suffered injuries which caused his death. The plaintiff qualified as administratrix of his estate and brought suit against the defendants, alleging that the death of her intestate resulted solely from the negligence of the defendants.

The defendants denied all the allegations of negligence, pleaded contributory negligence, and alleged: (a) that the plaintiff had sought compensation for the death of her husband under the terms of the Workmen's Compensation Act; (b) that the Industrial Commission had awarded her compensation which she had accepted; (c) that by the terms of the Compensation Act, section 11, her claim for compensation was an election of remedies and that she had no right to proceed at law against the defendants in the present action.

The plaintiff filed a reply to the answer in which she denied that she was barred by an election of remedies, and alleged:

(1) That soon after the death of her intestate she filed with the Industrial Commission a claim for compensation against his employer, Foremost Dairy Products, Incorporated, and against the Indemnity Insurance Company of North America, which had insured the employer's liability.

(2) That the employer and carrier denied liability and appealed to the Superior Court from an award made by the Industrial Commission.

(3) That while the matter was pending in the Superior Court the plaintiff instituted this action.

(4, 5) That the appeal to the Superior Court resulted in a judgment affirming the award and that the judgment was affirmed on appeal to the Supreme Court.

(6, 7) That by the terms of section 11, chapter 120, Public Laws of 1929 (North Carolina Workmen's Compensation Act), the Indemnity Insurance Company of North America became subrogated to the right of the plaintiff to prosecute this action for the use and benefit of itself

and of the plaintiff as their interests might appear; that this action is prosecuted by the Indemnity Insurance Company of North America as assignee of the rights of the plaintiff under said act for its own use and benefit, and for such use and benefit as the plaintiff may have therein under the terms of said act; and that the plaintiff as administratrix of the estate of H. T. Phifer has agreed to be bound by the prior rights of the Insurance Company in and to the proceeds of any recovery that may be had in this action.

The defendants' demurrer to the reply is as follows:

(1) It appears from the plaintiff's pleadings filed in this cause that the plaintiff's intestate was employed at the time of his death by Foremost Dairy Products, Incorporated; that the plaintiff as the administratrix of the deceased filed her claim for compensation under the North Carolina Workmen's Compensation Act; that an award of compensation was made to the plaintiff as a result of the death of her intestate as provided by the Workmen's Compensation Act; that after various appeals were prosecuted the award was affirmed by the Supreme Court; and that the award is being carried out by the employer against whom the same was filed, or by its insurer.

(2) That the North Carolina Workmen's Compensation Act, section 11 (N. C. Code, 1931, sec. 8081(r) provides that the acceptance of an award of compensation bars further proceedings in an action at law for damages, and that the acceptance of the award of compensation by the plaintiff bars further proceeding in this action.

(3) That the action of the plaintiff abates and she cannot proceed further with it upon and after the acceptance by her of the award of compensation under the Workmen's Compensation Act.

The demurrer was overruled. The defendants excepted and appealed.

D. B. Smith and J. F. Flowers for appellants.

J. Laurence Jones and Taliaferro & Clarkson for appellee.

ADAMS, J. In her reply the plaintiff alleged that after her husband's death she instituted a proceeding before the Industrial Commission against Foremost Dairy Products, Incorporated, her intestate's employer, and the Indemnity Insurance Company of North America, which had insured the employer, to recover compensation for the death of her intestate; that the respondents denied liability; that compensation was finally awarded pursuant to an opinion of the Supreme Court (*Dependents of Phifer v. Dairy,* 200 N. C., 65); that the insurer then admitted its liability and undertook to carry out and is now carrying out the terms of the award; that while the proceeding begun before the Indus-

trial Commission was pending on appeal and before it had been determined she began an action at law against the defendants in the Superior Court of Mecklenburg County; and that it is now prosecuted by the Indemnity Insurance Company of North America as constructive assignee of the plaintiff.

The demurrer admits the plaintiff's allegations of fact but not her inferences or conclusions of law. *Yarborough v. Park Commission,* 196 N. C., 284. It raises an issue of law which involves an interpretation of section 11 of the Workmen's Compensation Act. Pub. Laws 1929, ch. 120; N. C. Code, 1931, sec. 8081(r).

After providing that the rights and remedies therein granted shall exclude all other rights and remedies of an employee, his personal representative, parents, dependents, and next of kin, as against the employer at common law, section 11 proceeds as follows: "When such employee, his personal representative or other person may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this act, and prosecute the same to its final determination; but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy. . . . The acceptance of an award under this act against an employer for compensation for the injury or death of an employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death; and such employer shall be subrogated to any such right, and may enforce, in his own name or in the name of the injured employee or his personal representative the legal liability of such other party. If the injured employee, his personal representative or other person entitled so to do, has made a claim under this act against his employer, and has not proceeded against such other party, the employer may, in order to prevent the loss of his rights by the passage of time, institute such action prior to the making of an award hereunder. . . . When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer, and may enforce any such rights in its own name or in the name of the injured employee or his personal representative: *Provided, however,* nothing herein shall be construed as conferring upon insurance carriers any other or further rights than

those existing in the employer at the time of the injury to his employee, anything in the policy of insurance to the contrary notwithstanding."

The first provision restricts the employee, his personal representative, or other person to recovery by one of the alternate remedies. If he has a right to recover damages from any person other than the employer, he may institute an action at law before an award is made and may prosecute his suit to its final determination; but if he procures a judgment in the action at law he is barred of his remedy for an award under the Workmen's Compensation Law, and if he accepts an award he is barred of his remedy in the action at law. He may recover by one of the alternate remedies, but not by both. Though he may proceed concurrently against the employer and a third person, he cannot recover both compensation under the act and damages in an action at law. Honnold on Workmen's Compensation, 154, sec. 41; *Horsman v. Richmond, F. & P. R. Co.*, 157 S. E. (Va.), 158. But, as pointed out by *Connor, J.*, in *Brown v. R. R., ante,* 256, 264, this does not affect the right of the employer or of the insurance carrier, who has paid the award, to maintain an action against a third party who has wrongfully caused the injury for which compensation was given.

Section 11 provides that the acceptance of an award shall operate as an assignment to the employer of any right to recover damages which the injured employee or his representative may have; that the employer shall be subrogated to such right and may enforce in his own name or in the name of the employee or his personal representative the legal liability of the other party; and that an insurance carrier which has paid compensation for the employer shall be subrogated to the employer's rights and duties and may enforce such rights in its own name, or in the name of the injured employee or his personal representative. The compensation law assigns the injured person's right of action against a *tort-feasor* to the employer or to the employer's insurer and enables the assignee to maintain the action which the employee could have maintained had no such assignment been made. 2 Schneider's Workmen's Compensation, sec. 466. In such case the action is prosecuted, not in behalf of the injured employee, or of the persons designated as beneficiaries of the recovery under C. S., 160, but in behalf primarily of the employer or of the insurance carrier. *Brown v. R. R., supra.*

Here the Indemnity Insurance Company of North America is liable for the award and is undertaking to pay it. By the terms of the act the company is, therefore, the assignee of any right to recover damages which the employee or his personal representative had against the defendants, and is, moreover, subrogated to such right, subrogation being merely an application of equitable principles.

The Compensation Law provides that any amount collected by the employer in excess of the amount paid by him, or for which he is liable, shall be held for the benefit of the injured employee, or other person entitled thereto, less such amounts as are paid by the employer for reasonable expenses and attorney's fees when approved by the Industrial Commission. It is alleged in the reply that the present action is prosecuted by the Indemnity Insurance Company of North America as assignee of the rights of the plaintiff for its own use and benefit and for such use and benefit as the plaintiff may have under the law, and that the administratrix has agreed to be bound by the prior rights of the insurer in the recovery. The demurrer admits these allegations. Upon this admission we must assume, at least in the absence of allegation or proof to the contrary, that the insurer is prosecuting the action by virtue of the assignment of the employee's rights and its subrogation thereto, and that the action is properly constituted in court.

In *Horsman v. Richmond, F. & P. R. Co., supra,* the Supreme Court of Appeal of Virginia held that the plaintiff by accepting compensation under the Workmen's Compensation Act from his employer's insurer was "barred from instituting an action in his own name for recovery against the defendant"; and in *Williamson v. Wellman,* 158 S. E., 777, the same Court remarked that in *Horsman's case* the plaintiff amended the writ and endorsed thereon the names of the employer and the insurance carrier without their consent. In the latter case a similar endorsement was made with the knowledge and consent of the employer, and it was held that the action was for his sole benefit. The cause was remanded for proceedings to ascertain the sum to be paid.

As was said in *Williamson v. Wellman* an employee's acceptance of an award "is a complete bar to *his* proceeding with the alternative remedy." But the common-law rule that by the transfer *pendente lite* of the plaintiff's interest in the subject-matter the action necessarily abates, has been abrogated by statute. C. S., 446, 461; 47 C. J., 159, sec. 296. In case of a transfer of interest "the action shall be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action." C. S., 461. Under section 11 the subrogated party may enforce the legal liability of "any person other than such employer" in his own name or in the name of the injured employee or his personal representative.

Upon the allegations admitted by the demurrer we think the judgment should be

Affirmed.

TOM MURPHY v. FRANK MURPHY AND CAROLINA MINERAL COMPANY.

(Filed 16 March, 1932.)

Negligence A c—Where owner has not increased the hazard he is liable to licensee only for wilful or wanton negligence.

Where an employer owns a railroad track in connection with his mining operations, and an employee, after working hours, uses the track for his own pleasure by riding on a hand-car owned by the employees and used on the track under an implied gratuitous permission of the employer: *Held,* the employee is a licensee in such use of the track, and the employer is not liable for an injury to the employee in such circumstances where he has not increased the hazard or is not guilty of wilful or wanton negligence, and where in the employee's action there is no evidence tending to show facts constituting these elements a nonsuit should be entered.

CIVIL ACTION, before *Harwood, Special Judge,* at August Term, 1931, of YANCEY.

The defendant, Carolina Mineral Company, owned and operated a feldspar mine near the falls of Big Crabtree Creek, and also owns a line of railway about eight miles in length, over which road large quantities of ore or feldspar were transported. Certain employees of the corporate defendant owned what is referred to in the evidence as a spat. A spat is a gasoline hand-car about eight feet long and four or five feet wide. There are planks on each side of the car and persons riding, sit on these planks and rest their feet on a rest board over the side of the car. The top of the car is flat like a table. The evidence tended to show that for several years this gasoline flat car had been operated up and down the road on Sundays and various people rode thereon. The road bed had many sharp curves. No price was charged for riding the car. The evidence further tended to show that the plaintiff was employed by the defendant Mineral Company and worked until twelve o'clock Saturday. On Sunday morning the plaintiff went out to the road and found that the hand-car was being operated that day and several persons were riding thereon. The car was driven by the defendant, Frank Murphy. He signaled the car and it stopped and he boarded it. The narrative, as given by the plaintiff, is substantially as follows: "When sitting on this car your feet rested on a little platform or a little board across there. You sit on the car like you were sitting on the side of this table. This car was also used for hauling supplies to the mine. Several times I have seen Frank Murphy operating this car on Sundays. I have seen him operating three or four Sundays. He has been employed by the Carolina Mineral Company three or four years. Frank Murphy was

driving the car on the day I was injured. I got on the car about 200 yards up from highway No. 69. I had ridden on the car on Sundays prior to the time I was injured and on week days also. The road curved at the point where I was injured. The joint stuck out there in the curve of the road and there was a little elevation—not much. Frank Murphy was driving the car at a speed of fifteen or twenty miles an hour. On the day I was injured I think Frank Murphy was drunk. When we reached the curve the motor car gave a quick jerk and I fell off. There was nothing there for me to hold to. It was customary for employees to ride on Sunday if they wanted to. At the time of the quick jerk when the car threw me off it dragged me fifteen or twenty feet. The car ran on forty or fifty feet after I was thrown off. My leg was broken. I don't know who owned the car at the time—whether the Carolina Mineral Company or the employees. I was not starting back to work when I got on the car. I was not working for the Mineral Company at the time and had not worked for them since twelve o'clock the day before. I had drunk all there was in a pint bottle except a couple of drinks. I was not drunk enough not to know what was happening. I was not drunk that day. When I got on the car there was seven or eight or nine others including two girls named Lockie Tolley and Ethel Tolley. I sat down on the right-hand side of the car. I changed from the right side of the car to the left in that little meadow where they stopped to get the horses off the track. On the left side of the spat were the two Tolley girls. Lockie Tolley was in front on the left side before I changed sides. I got up and sat down beside Lockie Tolley on her left side and in front of her. I had never seen her before in my life nor spoken to her. I was comfortable on the right-hand side and had no reason to go over on the left-hand side. Two or three minutes after I got on the left-hand side I was thrown off. When I sat down by Lockie Tolley I was just talking and laughing and going on with her. Part of the time I was playing with her—pinching her. I was just playing with her. I was sitting right against her and pinched her arm. She did not shove me off the car. She just shoved me in play. It was while I was playing with Lockie Tolley that I got off the car. Nobody else fell off that car at that time except me. I was on the car that day for my own pleasure and convenience, and none of the men on the car were working for the company that day. That was on Sunday."

A brother-in-law of the plaintiff testified that he did not see any girl knock plaintiff off the car, and that at the place where plaintiff was hurt there was a joint in the track out of alignment.

The defendant offered Lockie Tolley as a witness, who testified that the plaintiff first sat down on the right-hand side of the car and then

came over and sat by her and attempted to hug her and take other liberties with her person, and that thereupon she "pushed him off the car." The defendant also offered the testimony of several persons who were riding on the car, to the effect that Lockie Tolley had pushed the plaintiff off the car or that they had heard her warn him about his familiarity.

The following issues were submitted to the jury:

1. "Was the plaintiff injured by the negligence of the defendant, Frank Murphy, as alleged in the complaint?"

2. "Was the plaintiff injured by the negligence of the defendant, Carolina Mineral Company, as alleged in the complaint?"

3. "Did the plaintiff, when he got upon the spat or hand-car on the track of the defendant, Carolina Mineral Company, assume the risk as alleged in the answer of the defendant, Carolina Mineral Company?"

4. "Did the plaintiff contribute to his injury by his own negligence, as alleged in the answer?"

5. "What damages, if any, is the plaintiff entitled to recover?"

The jury answered the first issue "No," the second issue "Yes," and third issue "No," the fourth issue "No," and the fifth issue "$1,500."

From judgment upon the verdict the Mineral Company appealed.

Charles Hutchins for plaintiff.

Watson & Fouts and P. W. Garland for defendants.

BROGDEN, J. The measure of duty owed by the Mineral Company to the plaintiff must be determined by establishing the status of the plaintiff at the time he fell or was pushed from the car. The plaintiff testified: "I was on the car that day for my own pleasure and convenience, and none of the men on the car were working for the company that day. That was on Sunday." This declaration classifies the plaintiff as a licensee upon the tracks of defendant. The duty that an owner of premises owes to a licensee was thus stated in *Peterson v. R. R.*, 143 N. C., 260, 55 S. E., 618: "A licensee who enters upon premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk and enjoys the license subject to its concomitant perils." To the same effect is the declaration in *Brigman v. Construction Co.*, 192 N. C., 791: "The general rule is that a trespasser or permissive or bare licensee upon the property of another cannot recover for defects, obstacles or pitfalls upon the premises, unless the injury shall result from wilful or wanton negligence." *Quantz v. R. R.*, 137 N. C., 136, 49 S. E., 79; *Jones v. R. R.*, 199 N. C., 1, 153 S. E., 637; *Gibbs v. R. R.*, 200 N. C., 49,

156 S. E., 138. Directly in point is the declaration of law in *Willis v. R. R.*, 122 N. C., 905, 29 S. E., 941, as follows: "The court properly told the jury that the plaintiff was not a passenger, but a mere licensee riding on the hand-car by permission, and that as such he took all the risks of that mode of travel (such as injury by the hand-car running off the track, and the like). But this did not give the defendant the privilege of killing or maiming him at sight by its gross negligence," etc.

The defendant did not own the hand-car upon which the plaintiff was riding. However, it permitted its tracks to be used by the owners of said car. Even assuming the existence of a prevailing custom that employees were permitted to use the tracks of defendant for operating a hand-car thereon, still there is no evidence that the corporate defendant committed any negligent act tending to increase the hazard to plaintiff while he was engaged in using its tracks for his own purpose. Hence, the principle announced in the *Brigman* and *Jones cases, supra*, does not apply. Consequently, the motions for nonsuit should have been granted.

Reversed.

STATE v. V. M. RAWLS.

(Filed 16 March, 1932.)

Partnership G a—In prosecution for appropriation of partnership funds fraudulent intent is essential element to be found by the jury.

N. C. Code of 1931, sec. 4274(a), relating to appropriation of partnership funds by one of the partners, provides that fraudulent intent to deprive his copartners of the use of the funds is an ingredient of the offense, and such fraudulent intent is an essential element of the crime and must be proved by the State, and in a prosecution under the statute an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence.

APPEAL by defendant from *Cranmer, J.*, and a jury, at January Term, 1932, of PITT. New trial.

The evidence tends to show that there was a partnership between the defendant Rawls and F. B. Hooker, to the effect that Rawls, the defendant, would furnish a truck and do the selling and that Hooker would furnish certain merchandise to be sold; that they would divide the expense of gas and oil and divide the profits and losses of the business equally. That they settled weekly. That in their business conducted by the defendant in Pitt County, he was short $227.48. That Rawls and Hooker had a conference, in which Rawls stated to Hooker that he had

been "crooked," and also stated to Williams, an employee of Hooker, that he had "played hell." That defendant went around with Hooker and Williams and indicated on the books of the partnership the amounts that had been paid and had not been accounted for by him to Hooker, and that Hooker had settled with him on the basis of this shortage of $227.48 and had paid him his part of the profits, and that these items are charged upon the books of the concern, when in truth they had been paid and the money retained by Rawls.

The court, after reciting the above evidence, charged the jury as follows: "So you have heard the evidence, gentlemen of the jury. The evidence of the State is uncontradicted, the defendant offering no evidence and not going on the stand himself. (I instruct you, gentlemen of the jury, that if you find beyond a reasonable doubt the evidence to be as the facts tend to show, to return a verdict of guilty.)" To the foregoing portion of the charge in brackets the defendant excepted and assigned error.

The jury returned a verdict of guilty against the defendant. The court below rendered judgment on the verdict. The defendant excepted, assigned error and appealed to the Supreme Court.

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

Shaw & Jones for defendant.

CLARKSON, J. The defendant is indicted under the following statute: "Any person engaged in a partnership business in the State of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to his own personal use with the fraudulent intent of depriving his copartners of the use thereof, shall be guilty of a misdemeanor. Any person or persons violating the provisions of this section, upon conviction, shall be punished as is now done in cases of misdemeanor." N. C. Code of 1931, Anno., C. S., 4274(a) (Michie), Public Laws 1921, chap. 127.

It will be noted that the statute under which defendant is indicted, makes one of the ingredients "with the fraudulent intent of depriving his copartner of the use thereof." This is not a common-law offense, but a statute of recent years, and the fraudulent intent is an essential element of the crime. The court below charged the jury: "I instruct you, gentlemen of the jury, that if you find beyond a reasonable doubt the evidence to be as the facts tend to show, to return a verdict of guilty." Defendant excepted and assigned error. We think the exception and assignment of error must be sustained.

The law is thus stated in *S. v. McDonald,* 133 N. C., at p. 684, citing authorities: "The rule of law, with some exceptions, which do not apply to our case is this: That when an act is forbidden by law to be done, the intent to do the act is the criminal intent and the law presumes the intent from the commission of the act; but when an act becomes criminal only by reason of the intent, unless the intent is proved the offense is not proved, and this intent must be found by the jury as a fact from the evidence. It is for them to infer it, and not for the court." *S. v. Morgan,* 136 N. C., at p. 630; *S. v. Falkner,* 182 N. C., at p. 795-6; *S. v. Lancaster, ante,* at p. 210.

The fraudulent intent in this case was a question of fact for determination by the jury and not an inference of law for the decision of the court. In *S. v. Estes,* 185 N. C., at p. 754, we find: "But where, as an inference of law the uncontradicted evidence, if accepted as true, establishes the defendant's guilt it is permissible for the court to instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. *S. v. Vines,* 93 N. C., 493; *S. v. Winchester,* 113 N. C., 642; *S. v. Riley, ibid.,* 648; *S. v. Woolard,* 119 N. C., 778."

Our conclusion is not at variance with the law as above stated. What the defendant said, as testified to by the State's witnesses, was strong evidence of fraudulent intent, but the intent was a question of fact not an inference of law. *S. v. Singleton,* 183 N. C., 738; *S. v. Arrowood,* 187 N. C., 715; *S. v. Horner,* 188 N. C., 472; *S. v. Hardy,* 189 N. C., 799; *S. v. Strickland,* 192 N. C., 253.

The testimony of the State's witnesses was to the effect that defendant did the act, but was it done with fraudulent intent as the statute condemns? This aspect should have been left to the jury under proper instructions.

In *S. v. Dowd,* 201 N. C., at p. 716, speaking to the subject: "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.' "

The learned and painstaking judge unintentionally, no doubt overlooked that phase where fraudulent intent was an ingredient of the offense.

In *S. v. Green,* 134 N. C., at p. 661, we find: "In the administration of the criminal law, it is wise to observe the 'landmarks,' and preserve the well-defined rights and duties of the court and jury." For the reasons given, there must be a

New trial.

MRS. MARY BELLE HEAVNER v. TOWN OF LINCOLNTON AND MARYLAND CASUALTY COMPANY.

(Filed 16 March, 1932.)

1. Master and Servant F g—Provision in Compensation Act for payment of awards is statutory modification of distribution statute.

The law regulating the distribution of personal property by descent is purely statutory, C. S., 137, and the Workmen's Compensation Act giving the award of compensation for an injury resulting in death to the wife of the employee exclusive of his mother (sec. 77) is also statutory and is valid, being a change made by a later statute of the provisions of a former statute which falls within the power of the Legislature to enact.

2. Master and Servant F a—Industrial Commission is administrative agency, and Compensation Act is constitutional.

While the Industrial Commission in the exercise of its statutory authority performs certain duties that are judicial in their nature it is primarily an administrative agency of the State in the administration of the Compensation Act and its judicial powers are but incidental thereto, and the administration of the powers conferred by the statute is not in contravention of Art. IV, secs. 2 and 12 of the Constitution of North Carolina, nor of any other part of our organic law, and objection that the act destroys the ancient right of trial by jury or violates the Due-Process Clause or is an unlawful discrimination among employees cannot be sustained.

CIVIL ACTION, before *Moore, J.*, at July Term, 1931, of LINCOLN.

Harry Heavner, while regularly employed by the town of Lincolnton, suffered an injury by accident, that arose out of and in the course of his employment, resulting in death. At the time of his death he left a wife, Lena Heavner, and his mother, Mrs. Mary Belle Heavner, who is the plaintiff in this action. The wife was wholly dependent upon her husband for support and the mother, who lived with the deceased, was partially dependent. The evidence tended to show that the mother, plaintiff in this action, owned a five-sixths undivided interest in a farm in Lincoln County, and that she received from the Jefferson Standard Life Insurance Company the sum of $2,865.00, constituting the proceeds of a policy of life insurance which the son carried upon his life, payable to the mother. The carrier applied to the Industrial Commission to determine who should receive the compensation under the provisions of the Workmen's Compensation Act. Thereupon a hearing was had before Commissioner Dorsett on December 10, 1930, and all parties appeared and were all represented by counsel. After hearing the evidence Commissioner Dorsett found as a conclusion of law that the widow, Lena Heavner, wife of the deceased, was entitled to receive the entire compen-

sation. From the award so made the mother of the deceased, plaintiff in this action, appealed to the full Commission. A time was set for the hearing by the full Commission and the plaintiff appeared through counsel and made a motion before the Commission to transfer the cause to the Superior Court of Lincoln County for that: (1) the Workmen's Compensation Act is unconstitutional and void; (2) the North Carolina Industrial Commission, as created, is unconstitutional and void, and, therefore, without proper authority to hear the facts and make an award. The full Commission denied the motion and proceeded to affirm the award decreeing the entire compensation to the widow, Lena Heavner, instead of to the mother, Mary Belle Heavner. Thereafter, the mother, plaintiff in this action, appealed to the Superior Court.

The cause was heard in the Superior Court and the trial judge decreed that the Compensation Act was constitutional and the Industrial Commission properly constituted, and thereupon sustained the award to the widow, from which judgment the plaintiff appealed.

W. H. Childs and W. A. Dennis for plaintiff.
David P. Dellinger and Burgess & Baker for defendant.

BROGDEN, J. The questions of law, as stated in the brief of the appellant, are as follows:

1. Is the North Carolina Workmen's Compensation Act a constitutional and valid enactment of law?

2. Is the North Carolina Industrial Commission, as created and established, a constitutional and legitimate tribunal with power and authority to hear and pass upon the facts and law in the above entitled cause?

At the outset the plaintiff asserts that under the statute of distribution, C. S., 137, subsection 3, she would be entitled to one-half of the proceeds arising from the death of her son unless the general statute of distribution is modified by the Compensation Act. The distribution of personal property among the next of kin of a deceased person is statutory, and the Compensation Act is statutory. Section 77 of said Compensation Act expressly provides that "all acts and parts of acts inconsistent with any provision of this act are hereby repealed." This repealing clause was never intended to abrogate C. S., 137, except insofar as the Compensation Act established a definite mode of distribution in cases falling within the provisions of the act. As the same legislative power that enacted C. S., 137 also enacted the compensation law, the contention of the plaintiff upon this aspect of the case cannot be sustained.

The constitutional attack upon the compensation law rests upon the following grounds: (a) that said Compensation Act destroys the ancient

right of trial by jury; (b) violates due process of law; (c) creates unlawful discrimination in that certain employees are not included within its provisions; (d) invades the freedom of contract for that the provisions of the act are compulsory; (e) creates a court in violation of Article IV, sections 2 and 12 of the Constitution of North Carolina.

The record discloses that the plaintiff voluntarily submitted to the jurisdiction of the Industrial Commission in the first instance and did not seek to overthrow the constitutionality of the act or the tribunal administering it, until after an adverse award. But assuming that the plaintiff, under such circumstances, can assail the constitutionality of the act or of the power of the Commission to hear and determine questions regularly and properly before it, nevertheless the constitutionality of the act and of the commission itself is now beyond question. This Court, in many decisions, has recognized the applicability of the act, and the power of the Commission to administer it, within the boundaries of the act. While it is technically true that this Court has not heretofore considered the constitutional questions involved in this appeal, it has approved expressly and unequivocally the liberal and beneficent provisions thereof. Indeed, all the major objections to the constitutionality of compensation acts have been considered by the Supreme Court of the United States and many other courts throughout the country. *Mountain Timber Co. v. Washington,* 243 U. S., 219, 61 L. Ed., 685; *Hawkins v. Bleakly,* 243 U. S., 210, 61 L. Ed., 678; *New York Central R. R. Co. v. White,* 243 U. S., 188, 61 L. Ed., 667; *Arizona Copper Co. v. Hammer,* 250 U. S., 400, 63 L. Ed., 1058; *Hagler v. Highway Commission,* 200 N. C., 733, 158 S. E., 383. The courts and textwriters have declared that compensation legislation falls within the exercise of the police power of sovereignty, and for this reason constitutional objections have not ordinarily prevailed.

This Court has never held that the Industrial Commission is a court in the strict sense of that term. Indeed, it has been expressly declared that the Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the Compensation Act, and, as an incident to such administration, it performs duties "which are judicial in their nature." *In re Hayes,* 200 N. C., 133, 156 S. E., 791. In disposing of the questions presented, it is deemed unnecessary to pyramid quotations from the authorities. All legitimate arguments, together with the authorities supporting the various aspects of constitutional inhibition, are contained and set forth at length in the cases determined by the Supreme Court of the United States, *supra.* The award to the widow is

Affirmed.

S. L. COATS AND WIFE, ESTHER COATS, v. THE RALEIGH SAVINGS BANK AND TRUST COMPANY, TRUSTEE, AND ATLANTIC JOINT STOCK LAND BANK.

(Filed 16 March, 1932.)

Mortgages C e—Mortgagee held not entitled to apply proceeds of fire insurance to payment of matured notes under mortgage provision.

Where according to the terms of the instrument the mortgagor is required to take out insurance on the property covered thereby and in case of destruction by fire to apply the proceeds to the notes secured by the mortgage under the regulations of the Federal Farm Loan Board or to rebuild under certain regulations: *Held*, there being no provision in the mortgage that the funds realized under the fire insurance policy could be applied to delinquent taxes and the regulations of the Farm Loan Board stipulating that it could be applied only to the unmatured principal, an order restraining the foreclosure upon the ground that the mortgagor had a right to apply it to the payment of delinquent taxes and to the matured notes is erroneous.

APPEAL by defendants from *Cranmer, J.*, at Chambers, 2 December, 1931. From JOHNSTON.

Langston, Allen & Taylor for appellants.
Charles U. Harris for appellee.

PER CURIAM. On 1 January, 1929, the plaintiffs borrowed from the Atlantic Joint Stock Land Bank of Raleigh $3,700 and executed their note, payable in semiannual installments of $160.07 each on 1 July and 1 January of each year. To secure the note they executed a deed of trust on land (which was duly registered) providing that the mortgagors should carry fire insurance on the buildings with loss payable to the Atlantic Joint Stock Land Bank of Raleigh and that they would pay the premiums; that they should pay all taxes, liens, judgments or assessments against the property, in default of which the mortgagee could make payment and add the amount of the payments to the secured debt; and that upon their failure to comply with their covenants, then at the option of the Land Bank the whole principal sum remaining unpaid should become due.

The plaintiffs made default in the payment of taxes, insurance premiums, and matured installments, and suffered a judgment to be docketed against them in the sum of $801.76.

The deed of trust contains this provision: "In case any insured buildings or improvements on said premises are destroyed or damaged by fire or wind storm the sum or sums from said insurance may at the

option of said parties of the first part be applied either to the payment of the note secured by this deed of trust, or, subject to regulations of the Federal Farm Loan Board and under the direction of the Atlantic Joint Stock Land Bank of Raleigh, its successors or assigns, to the reconstruction of the buildings or improvements so destroyed or damaged."

One of the buildings was burned, and insurance in the sum of $500 was collected. The plaintiffs having made default, the trustee advertised the land for sale under the terms of the deed of trust. The plaintiffs obtained a restraining order, contending that they had a right to apply the insurance money to the satisfaction of unpaid taxes and to the installment due 1 July, 1931. The restraining order was continued to the hearing and the defendants appealed.

The plaintiffs elected not to rebuild on the land. We find no provision in the deed of trust for the application of the insurance fund to the payment of past due taxes, and the farm loan regulations stipulate that if the money be applied on the indebtedness it shall be applied first on the unmatured principal. We are therefore of opinion that the plaintiffs are not entitled to have this fund applied as they contend. Judgment Reversed.

T. J. CAUDLE, SR., ADMINISTRATOR OF FOCH CAUDLE, DECEASED, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 23 March, 1932.)

1. Railroads D c—Demurrer in this case held properly overruled since defendant might be found liable on doctrine of last clear chance.

Where the complaint in an action to recover damages against a railroad company alleges that the plaintiff's intestate was twelve years old, and that, while attempting to cross the defendant's tracks at a path habitually used by the public, his attention was attracted by a rapidly moving freight train on one of the tracks, and that while watching the freight train he was struck by the defendant's engine on another track, and that the defendant failed to keep a proper lookout and failed to give any warning of the approach of the said engine: *Held*, a demurrer to the complaint was properly overruled, since the defendant would be liable on the doctrine of the last clear chance if the jury should answer that issue in his favor upon proper evidence.

2. Negligence C b—Twelve-year-old child is rebuttably presumed to be incapable of contributory negligence.

A twelve-year-old boy is prima facie presumed to be incapable of contributory negligence, but the presumption is rebuttable by proper evidence upon the trial.

CAUDLE *v.* R. R.

APPEAL by defendant from *Small, J.,* at October Term, 1931, of WAKE. Affirmed.

This is an action for actionable negligence brought by plaintiff, T. J. Caudle, Sr., as administrator of the estate of Foch Caudle, deceased, to recover damages for the negligent killing of the plaintiff's intestate by the defendant, Seaboard Air Line Railway Company. The complaint alleges that the plaintiff's intestate was a boy about twelve years of age whose health, habits, industry and training gave promise of a long life of usefulness and profit; that he was walking along a well-defined path which crosses the defendant's railroad track; that the path was situate a short distance north of a grade crossing; that the path had for many years prior thereto extended from State Highway Nos. 10 and 50 across the defendant's line of railroad; that the well-defined footpath had for many years been used by the public during the day and night; that the defendant's railroad track was straight for a considerable distance in each direction from said footpath; that for a distance of about 450 feet east of the said footpath the defendant's line of railroad was up-grade so that a train approaching said footpath from the east would coast down grade; that on 19 July, 1930, at about 3 o'clock p.m., the plaintiff's intestate started across the defendant's line of railroad along the footpath referred to, and when he reached the defendant's line of railroad his attention was attracted by a rapidly moving freight train, which at said time was traveling in an easterly direction on the Southern Railway Company's track which was within a few feet of the defendant's said track; that said freight train consisted of a large number of cars and was making considerable noise moving up-grade; that at the time referred to the plaintiff's intestate was facing in a westerly direction, and the plaintiff's intestate entered upon or very near the north rail of the Seaboard track, and was watching the rapidly moving Southern freight train, when the defendant negligently, carelessly and wrongfully ran and operated one of its locomotive engines along and upon said Seaboard track in a westerly direction and permitted same to coast down grade, and the operative in charge of said engine negligently and carelessly failed to keep a reasonable and proper lookout, and negligently and carelessly failed to give reasonable and timely notice of the approach of said locomotive engine to said point, when the defendant knew or, in the exercise of due care, should have known that the plaintiff's intestate's attention was attracted to said moving freight train and that he would not hear the approach of said Seaboard engine, and the defendant negligently and carelessly caused, allowed and permitted said locomotive engine to collide with the plaintiff's intestate, his mangled

body was carried for a distance of about 150 feet, and he died as a result of the injuries sustained at said time.

The specifications of negligence, founded on the above facts appear in the complaint, and it is alleged were the proximate cause of the plaintiff's intestate's death, for which damage is demanded—naming the amount.

The defendant demurred to the complaint on the following grounds: "The complaint filed herein does not state facts sufficient to constitute a cause of action, because; (a) It appears from said complaint that the defendant has breached no duty that it owed the plaintiff's intestate. (b) It appears that the plaintiff's intestate by his own negligence contributed to his injury."

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, W. L. Small, judge, at the Second October Term, 1931, of Wake Superior Court, upon a demurrer filed by the defendant, and being heard. It is ordered and adjudged that the demurrer be and it is hereby overruled. The defendant excepted, assigned error and appealed to the Supreme Court.

Clyde A. Douglass for plaintiff.
Murray Allen for defendant.

CLARKSON, J. We think there were sufficient facts alleged in the complaint to constitute actionable negligence, and the court below properly overruled the demurrer of defendant.

"If negligence on the part of the defendant is established and the jury should also find that the plaintiff was guilty of contributory negligence, on the ground that he was negligent in going into a dangerous position without being properly attentive to his own safety, the facts seem to require the submission of a third issue involving the question whether the defendant, in this instance, negligently failed to avail himself of the last clear chance of avoiding the injury. The authorities are to the effect that if the plaintiff is at the time rightfully upon the track or sufficiently near it to threaten his safety, and is negligent, and so brought into a position of peril, if the defendant company by taking a proper precaution and keeping a proper lookout could have discovered the peril in time to have averted the injury by the exercise of proper diligence, and negligently fails to do it, the defendant would still be responsible, though the plaintiff also may have been negligent in the first instance. *Lassiter's case, supra* (133 N. C., 244); *Reid's case,* 140 N. C., 146; *Balto. etc., Ry. Co. v. Cooney,* 87 Md., 261." *Ray v. R. R.,* 141 N. C., at pp. 87-8.

In *Redmon v. R. R.*, 195 N. C., at p. 766, we find the following: "The last clear chance doctrine is the duty imposed by the humanity of the law upon a party to exercise ordinary care in avoiding injury to another who has negligently placed himself in a situation of danger. The doctrine is said to have sprung from the celebrated case of *Davis v. Mann*, 10 M. & W., 546, decided in 1842, and commonly known as the hobbled ass case. An excerpt from that case is as follows: 'The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.'" *Deans v. R. R.*, 107 N. C., 686; *Casada v. Ford*, 189 N. C., 744; *Hudson v. R. R.*, 190 N. C., 116; *Hart v. R. R.*, 193 N. C., 317; *Buckner v. R. R.*, 194 N. C., 104; *Redmon v. R. R., supra*, at p. 769.

In *Russell v. R. R.*, 118 N. C., at p. 1108, it is said: "It is the duty of an engineer in charge of a moving train to give some signal of its approach to the crossing of a public highway over a railroad track or to a crossing which the public have been habitually permitted to use; and where he fails to do so, the railway company is deemed negligent and answerable for any injury due to such omission of duty." *Perry v. R. R.*, 180 N. C., 290; *Rigsbee v. R. R.*, 190 N. C., 231; *Earwood v. R. R.*, 192 N. C., 27; *Franklin v. R. R.*, 192 N. C., 717; *Finch v. R. R.*, 195 N. C., 190; *Moseley v. R. R.*, 197 N. C., at p. 634.

Prima facie presumption exists that an infant between ages of 7 and 14 is incapable of contributory negligence, but presumption may be overcome. Test in determining whether child is contributorily negligent is whether it acted as child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances. *Chitwood v. Chitwood*, 156 S. E., 179, 159 S. C., 100; *Hoggard v. R. R.*, 194 N. C., 256; *Brown v. R. R.*, 195 N. C., 701.

As the cause goes back for trial before a jury, we will not comment on the law applicable to the facts alleged in the complaint. We give the general principles of law arising on the facts as set forth in the complaint. The judgment below overruling the demurrer of defendant is

Affirmed.

S. H. BANKS ET AL. v. TENNESSEE MINERAL PRODUCTS CORPORATION AND H. C. SMITH AND WIFE, BERTIE SMITH.

(Filed 23 March, 1932.)

1. Minerals B b—Minerals may be conveyed separate from ground surface.

Mineral substances beneath the surface of the earth may be conveyed by deed distinct from the title to the surface itself.

2. Minerals C c—Held: owner of surface could not recover damages thereto caused by mining feldspar by usual method under facts of this case.

Where the grantor has acquired by deed the right to the feldspar beneath the surface of the ground with the right of ingress, egress and regress, together with the privileges necessary to the mining of the ore, he may not be held liable for damage to the surface of the ground in extracting the ore when the method used by him was the customary and approved method of mining this particular mineral, and his deed, by a proper construction, gave him the right to work the mine by the method used.

3. Same—Where plaintiff fails to show that fence was destroyed by defendant or with his procurement, etc., he may not recover therefor.

Where the plaintiff in his action to recover damages against the operator of a feldspar mine for the destruction of a fence upon the surface of the land owned by him, in order to recover therefor he must show that the fence was destroyed by the defendant or with his consent, knowledge or procurement.

4. Contracts B a—Practical construction of contract by parties before differences thereunder will be given weight in arriving at intent.

In construing a deed to the mineral rights in land the method of mining recognized by the original parties before differences between them may be received in evidence upon the question of the intent of the parties in this respect.

CIVIL ACTION, before *Harwood, Special Judge,* at August Term, 1931, of YANCEY.

Prior to 27 May, 1919, H. C. Smith was the owner in fee of certain lands in Burnsville Township, Yancey County. On said date Smith and wife, by warranty deed, conveyed said land to H. F. Harris. The deed contained the following reservation: "The mineral interests on and in all of the above described land south of the following line is hereby expressly excepted and does not pass under this deed . . . together with the right of ingress, regress and egress over and upon the lands hereby excepted with the necessary mining privileges for the operation of said mineral rights." On 14 July, 1919, Harris and wife conveyed the land to Jos. M. Robinson. Said deed contains the following clause:

"The mineral rights, interest and privileges described in the deed from H. B. Smith and Burt Smith to H. F. Harris, dated 27 May, 1919, and recorded in Book of Deeds No. 55, at page 164, Yancey County, and not conveyed, said lands as above described being sold subject to said mineral rights and privileges, reference to which deed is hereby made for description of said mineral rights and privileges retained and held by the said H. C. Smith and Burt Smith." In the warranty clause of said deed the grantor inserts a general covenant of warranty "subject only to the mineral rights hereinbefore referred to." On 6 September, 1919, Robinson conveyed the land to W. B. Banks. The Banks deed contains the following clause: "The mineral rights, interest and privileges described in deed from H. C. Smith and wife to H. F. Harris, dated 27 May, 1919, . . . are not conveyed, said lands as above described being sold subject to said mineral rights and privileges," etc. The warranty clause contains the following language: "Except the mineral rights noted above," etc. W. B. Banks died and the plaintiffs are his heirs at law.

The evidence tended to show that on 15 February, 1928, Smith and wife leased to their codefendant, Tennessee Mineral Products Corporation, the said land, and that said corporation went into possession of said land and mined feldspar thereon. Feldspar sometimes comes close to the surface and sometimes it is six to ten feet beneath the surface. It is mined by what is described as "pit mining"; that is to say, by digging horizontal holes or pits in the earth. Some of these pits were 100 feet wide and 200 feet deep. There was evidence tending to show that the father of plaintiffs had mined the land during his lifetime.

The cause of action alleged by plaintiffs was that the defendants had dug many pits or holes in the land and that the waste material, while placed upon the old dumps, had resulted in increasing the area of dumps and thus rendering the surface of the land less valuable. The testimony tended to show that six or seven acres of land was destroyed for agricultural purposes by reason of the mining operations, and that the plaintiffs had suffered material damage by reason of such operations. The plaintiffs contend that the defendants were required by law to take the mineral or feldspar without injuring the surface of the land, and that, therefore, it was the duty of the defendants to provide subjacent support for the surface. There was evidence that a short time prior to the entry of defendant, Tennessee Mineral Products Corporation, the plaintiffs had constructed a wire fence of about 2080 feet upon the land, and that this fence had been completely destroyed during the mining operations of defendant, Smith.

At the conclusion of the evidence for plaintiffs the trial judge sustained a motion for nonsuit as to all defendants and from judgment in accordance therewith, plaintiffs appealed.

Charles Hutchins for plaintiffs.
Watson & Fouts and C. D. Bailey for defendants.

BROGDEN, J. The plaintiffs own the surface of a tract of land and the defendants own the minerals or feldspar beneath the same. Hence the question of law presented is: What are the relative rights of the parties?

"That mineral substances beneath the surface in the earth may be conveyed by deed distinct from the right to the surface itself is now well settled." *Outlaw v. Gray,* 163 N. C., 325, 79 S. E., 676; *Hoilman v. Johnson,* 164 N. C., 268, 80 S. E., 249. This Court has not been called upon to consider many questions growing out of the mining industry, and hence no decision has been called to our attention indicating that the principle of sublateral or subjacent support has ever been adopted in this State, or that occasion had ever arisen to discuss the proposition. The general principle deduced from the decisions of states where the mining industry has flourished is that the owner of the surface has the right of subjacent support unless such right has been waived in specific terms or terms reasonably implying such waiver. 40 C. J., p. 1195, *et seq.; Hall v. Harvey Coal & Coke Co.,* 108 S. E., 491; *Continental Coal Co. v. Connellsville By-Products Coal Co.,* 138 S. E., 737; *Georgia Iron Ore Co. v. Jones,* 111 S. E., 372; *Cole v. Signal Knob Coal Co.,* 122 S. E., 268; *Goody Koontz v. White Star Mining Co.,* 119 S. E., 862; *Griffin v. Fairmont Coal Co.,* 53 S. E., 24. The various opinions in the *Griffin case, supra,* present every phase of the question together with the authorities supporting the various conclusions and deductions relating to the subject.

In the case at bar the final solution of the question involved must rest upon a construction of the deed in order to determine the intention of the parties to the conveyance. The deed held by the plaintiffs recites that "said land, as above described, being sold subject to said mineral rights and privileges," etc. The original deed from Smith to the grantor of the plaintiffs not only reserved the absolute ownership of the mineral or feldspar beneath the surface of the land and the right of ingress, egress and regress, but also "the necessary mining privileges for the operation of said mineral rights." A feldspar operation, as described in the evidence, is properly conducted by a method known as pit mining. It is not a process of tunneling beneath the surface for substantial distances, but apparently consists of digging horizontal holes in the

ground. Indeed, the evidence tends to show that upon the tract of land in question the feldspar was frequently found close to the surface. Hence the expression in the deed "operation of said mineral rights" must be construed in the light of accepted and prevailing methods of mining feldspar, and such operation does not involve the principle of subjacent support, provided, of course, that the mining operation is conducted in a careful and reasonable manner so as to prevent interference with the surface of the land except insofar as such interference may be necessary in the reasonable and careful prosecution of the mining operation. Indeed, the plaintiffs did not contemplate the application of the principle of subjacent support. One of the plaintiffs was asked the following question: "Do you think it would be practical to go in there and put a roof over the spar when the feldspar comes within a foot or two of the surface?" The witness answered: "No sir, I don't. I didn't do it when I mined and was interested in the property and the surface. I dug just the same as anybody else and what I wanted was to get the spar with the least expense." The practical construction placed upon a written instrument by the parties thereto before a controversy arises, is ordinarily given great weight by the courts in arriving at the true meaning and intent of the language employed in the contract. *Wearn v. R. R.*, 191 N. C., 575, 132 S. E., 576. Furthermore, the deed of plaintiffs for the surface expressly provides that such surface is held "subject to said mineral rights and privileges."

There was evidence that the plaintiffs had erected about 2,000 feet of wire upon the land and that said wire had been destroyed during the time the defendant Smith was conducting mining operations thereon, but there is no evidence that said wire was destroyed by Smith or with his knowledge, consent or procurement.

Upon the whole case, the Court is of the opinion that the judgment of nonsuit was properly entered.

Affirmed.

STATE v. JACK RICE.

(Filed 23 March, 1932.)

Criminal Law I f—Consolidation of actions after beginning of trial held prejudicial and reversible error in this case.

Upon the trial under an indictment charging the prisoner with murder of M. in which a conviction of first degree murder is not sought, it is reversible error to the defendant's prejudice for the trial court upon his own motion, after a substantial part of the evidence had been introduced

to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a deadly weapon upon D. with intent to kill, the prisoner being afforded no opportunity to pass upon the impartiality of the jury upon the assault charge or an opportunity to plead to the charge, C. S., 4622.

CRIMINAL ACTION, before *Stack, J.*, at August Term, 1931, of MADISON.

The defendant was indicted in two separate indictments. The first indictment charged him with the murder of McKinley Shelton, and the second charged an assault upon Delbert Shelton with a deadly weapon with intent to kill. Before the jury was empaneled the solicitor announced in open court that he would not ask for conviction for murder in the first degree upon the first bill of indictment but for murder in the second degree, or manslaughter, or not guilty as the evidence might warrant. The defendant was placed on trial on the first bill and pleaded not guilty. Whereupon a jury was selected and empaneled. Thereupon the State offered testimony. Near the conclusion of the testimony of the first witness for the State the trial judge made the following declaration from the bench: "I will consolidate these two bills to my own motion. Make this entry: The court consolidates the two bills and will try them at the same time." The defendant excepted to the order consolidating said bills of indictment.

The defendant was convicted of manslaughter, and also of assault with a deadly weapon with intent to kill. He was sentenced to the State's prison for a period of not less than ten nor more than fifteen years upon the murder indictment and for not less than seven nor more than ten years in the indictment charging assault with a deadly weapon. The latter judgment, however, was to be suspended if the defendant should pay the sum of $1,000, one-half to the school fund and the other half to the State's witness, Delbert Shelton.

From judgment pronounced, defendant appealed.

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

Guy V. Roberts, J. Coleman Ramsey and John H. McElroy for defendant.

BROGDEN, J. The defendant was charged with a capital felony. When the case was called for trial the solicitor announced that he would not press the charge for capital felony but would ask for a verdict for murder in the second degree or manslaughter. The defendant pleaded not guilty and a jury was sworn and empaneled. The State began to offer testimony and introduced a witness named Delbert Shelton, who

proceeded to testify as to the events resulting in the killing of McKinley Shelton by the defendant. After the first witness for the State had practically completed his direct examination the trial judge, of his own motion, brought into the case by consolidation another indictment charging the defendant with assault with a deadly weapon with intent to kill, committed by the defendant against Delbert Shelton, the State's witness. Hence the question of law arises: Did the trial judge have power to consolidate the indictments under the circumstances?

C. S., 4622, regulates the consolidation of criminal actions. This statute has been construed in many decisions of this Court. In *S. v. Combs,* 200 N. C., 671, 158 S. E., 252, it is written: "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others." *S. v. Lewis,* 185 N. C., 640, 116 S. E., 259; *S. v. Smith,* 201 N. C., 494; *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248. Moreover, it has been generally held that if separate offenses are charged in the same warrant or indictment, they are to be considered as separate counts. *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590.

Without debating the question as to whether the indictments could have properly been consolidated at the beginning of the trial, it is obvious that the consolidation thereof, pending the taking of testimony on the indictment for murder, was prejudicial to the defendant. He was afforded no opportunity to pass upon the impartiality of the jury upon the assault charge, nor had he been permitted to plead to such charge. These principles are fundamental and the failure to apply them in the case at bar entitles the defendant to a new trial. *S. v. Jackson,* 82 N. C., 565; *S. v. Cunningham,* 94 N. C., 824.

New trial.

GREENVILLE SUPPLY COMPANY ET AL. V. S. C. WHITEHURST, SR., ET AL.

(Filed 23 March, 1932.)

1. Corporations E d—In this case demurrer to complaint on surety agreement of stockholder is held properly sustained.

Where the complaint in an action by certain stockholders of a corporation against another stockholder alleges that the stockholders endorsed certain notes of the corporation and agreed to pay thereon a certain amount in proportion to the stock held by them, that the plaintiffs had

paid their proportionate amount and that the defendant had refused to pay his proportionate share: *Held*, a demurrer thereto on the ground that the complaint fails to state a cause of action is properly sustained, the creditors of the corporation not being parties to the action, and the equitable doctrines of specific performance and contribution not being applicable.

2. **Contracts F a—Held: stockholders could not recover on contract to contribute to common object, creditors not being parties.**

Although the promise of each of the parties to a contract to contribute to a common cause is sufficient consideration for the promises of the other parties thereto, where the contract is between the stockholders of a corporation on an agreement between them to pay certain amounts on the corporation's note endorsed by them, and the creditors of the corporation are not parties to the action, the principle is not germane.

3. **Specific Performances B a—Contract in this case held not enforceable specifically.**

Where a contract does not relate to the transfer of property, and damages for its breach would be sufficient compensation, and it does not come within any exceptions to the general rule, specific performance may not be maintained thereon.

4. **Contribution A a—Contribution is enforceable only where complaining sureties have made compulsory payment.**

Contribution is enforceable only where the complaining sureties have made compulsory payment, and where it is not alleged that the complaining sureties have paid any part of the obligation of another surety they are not entitled to contribution from him.

APPEAL by plaintiffs from *Moore, Special Judge,* at November Term, 1931, of PITT. Affirmed.

The Greenville Supply Company is a corporation in the hands of a receiver. All the other plaintiffs and the defendant S. C. Whitehurst, Sr., were stockholders and directors. The defendant L. J. Whitehurst was a stockholder, and he and the defendant S. C. Whitehurst, Jr., are sons of S. C. Whitehurst, Sr.

The plaintiffs allege that the directors managed the business of the company and, when it became necessary to promote its interests, endorsed papers given for its loans and obligations in consideration of an extra dividend of 2 per cent on the amount of their endorsements in proportion to the value of their stock; also that it was agreed that each director should be liable for his pro rata amount; that the individual plaintiffs and the defendant S. C. Whitehurst, Sr., endorsed the company's notes to several creditors in sums aggregating $98,908.56 and mutually agreed that they would pay thereon $50,000 in sums proportionate to the capital stock held by each of them; that the directors who are plaintiffs paid their respective amounts and that S. C. Whitehurst, Sr., failed to pay $9,966.78, the amount he agreed to pay; that the sums paid by the plain-

tiffs have been applied on the company's obligations and the amount due thereon would have been reduced to $45,885.30 had the defendant S. C. Whitehurst, Sr., paid his part; that his failure to comply with his agreement leaves the plaintiffs liable on the company's notes in the sum of $56,872 while, if he had complied, they would be liable for only $46,928; that the plaintiffs are entitled to an order compelling him to pay $9,966.78 and to secure the payment of his future liability.

The plaintiffs pray judgment that the defendant S. C. Whitehurst, Sr., be made to pay $9,966.78 for the benefit of the plaintiffs and that a receiver of his property be appointed.

The defendants answered the complaint and the plaintiffs replied to the answer. The reply is chiefly an enlargement of the allegations in the complaint; it does not contain a new or independent cause of action.

The defendants filed a written demurrer on the ground that the complaint does not state a cause of action. The demurrer was sustained and the plaintiffs excepted and appealed.

S. J. Everett for appellants.
Harding & Lee for appellees.

ADAMS, J. The demurrer admits the plaintiffs' allegations and by these allegations the nature of the action and the relation of the parties must be determined.

The Greenville Supply Company, a corporation, became indebted to various parties in the sum of $96,928.56. The individual plaintiffs and the defendant, S. C. Whitehurst, Sr., who were directors in the corporation, endorsed certain notes of the company under their mutual agreement that each endorser should be liable in proportion to the value of his stock. The endorsers agreed to raise $50,000, each to pay a specified sum. Whitehurst was to advance $9,966.78. He failed to do so, and the object of the action is to compel him to abide by his agreement.

The law will not enforce a voluntary promise made without a consideration, but when several persons mutually agree to contribute to a common object which they wish to accomplish the promise of each is a consideration for the promise of the others, and such promises may be enforced by the party for whose benefit they were made. *Baptist University v. Borden,* 132 N. C., 476; *Rousseau v. Call,* 169 N. C., 173. The appellants rely in part upon the principle stated in these cases, but it is not germane; none of the creditors is a party to the action and none is seeking to enforce the alleged agreement.

The suit is an action at law. It is not maintainable upon the equitable doctrine of specific performance for several reasons: (a) the plaintiffs

are not seeking the performance of a contract relating to the sale or transfer of personal property; (b) the recovery of damages in case of loss would be sufficient compensation; (c) the complaint does not bring the controversy within any of the exceptions to the general rule.

It is equally conclusive that the appellants cannot resort to the doctrine of contribution. Contribution is enforceable when the complaining surety has made compulsory payment. Bispham's Principles of Equity, sec. 330; *Hodges v. Armstrong,* 14 N. C., 253; *Lumber Co. v. Satchwell,* 148 N. C., 316. There is no allegation that the appellants have paid more than their proportionate part or any portion of the sum for which Whitehurst is liable. Indeed, there is no allegation that the creditors have brought suit, or that the principal debtor is insolvent, or that the sureties cannot recover against the principal any loss they may suffer by reason of their endorsement. In *Allen v. Wood,* 38 N. C., 386, it is said: "The equity of a plaintiff lies in the insolvency of the principals, where he is seeking contribution from a cosurety. *Williams v. Helme,* 16 N. C., 159; *Rainey v. Yarborough,* 37 N. C., 249; *Bell v. Jasper,* 37 N. C., 597; *Mayhew v. Crickett,* 2 Swans., 185; *Daring v. Winchelsea,* 1 Cox., 218. And the reason is obvious—the cosurety is bound to answer only in the place of his principal, and, if he is able, it is the duty of the surety, who has paid the debt to look to him; if he is not able, he then, and only then, has a right to seek his redress from his cosurety. In this case according to the answer, and there is nothing in the evidence to contradict it, the money was sent to him by Joshua to indemnify him, and when called on by the plaintiff he might well answer, go to the principal Wood or to the principal Ennis, they will pay you what you have advanced. They are able to do so." Judgment Affirmed.

A. O. NEWBERRY ET AL. v. MEADOWS FERTILIZER COMPANY ET AL.

(Filed 23 March, 1932.)

1. Pleadings D b—Demurrer in this case for misjoinder of parties and causes held properly overruled.

Where the complaint alleges a series of connected transactions constituting one general scheme, participated in by the defendants, resulting in damage to the plaintiff for which he is entitled to recover of the defendants jointly and severally, the defendants' demurrer for misjoinder of parties and causes is properly overruled.

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

Upon a petition for the removal of a cause from the State to the Federal Court on the ground of separable controversy the allegations of the complaint are controlling, and where the complaint alleges a joint tort committed by the defendants the petition is properly denied.

APPEALS by defendants from *Sinclair, J.*, at September Term, 1931, of CRAVEN. Affirmed in both appeals.

This action was heard on the demurrer of the defendant, Meadows Fertilizer Company, on the ground that it appears on the face of the complaint filed by the plaintiffs therein (1) that there is a defect of parties plaintiff; (2) that there is a defect of parties defendant; (3) that several causes of action have been improperly united in the complaint; and (4) that there is a misjoinder of parties and of causes of action. The demurrer was overruled.

The action was further heard on the appeal of the defendants, Davison Chemical Company and C. Wilbur Miller, from the order of the clerk of the Superior Court of Craven County, denying the petition of said defendants for the removal of the action from said Superior Court to the District Court of the United States for the Eastern District of North Carolina, for trial, on the ground of diversity of citizenship, and separability of causes of action alleged in the complaint against the resident defendant, Meadows Fertilizer Company, and the nonresident defendants, Davison Chemical Company and C. Wilbur Miller. The order of the clerk was affirmed and the petition of the defendants for the removal of the action was denied.

From judgment overruling the demurrer, and affirming the order of the clerk, the defendants, respectively, appealed to the Supreme Court.

F. S. Spruill, E. M. Green, W. B. R. Guion and R. E. Whitehurst for plaintiffs.

L. I. Moore and Kenneth C. Royall for defendants.

CONNOR, J. The judgment overruling the demurrer of the defendant, Meadows Fertilizer Company, to the complaint in this action, is affirmed on the authority of *Trust Co. v. Peirce*, 195 N. C., 717, 143 S. E., 524. Speaking of the complaint in that case, it is said: "A connected story is told, and a complete picture is painted of a series of transactions, forming one general scheme, and tending to a single end. This saves the pleading from the challenge of the demurrer." This principle is applicable to the allegations of the complaint in this action, and for this reason the demurrer was properly overruled. The allegations of the

complaint are sufficient to show a series of transactions, the result of a general scheme, participated in by the defendants, and resulting in damages which the plaintiffs are entitled to recover of the defendants, jointly and severally.

The judgment affirming the order of the clerk, and denying the petition of the defendants, Davison Chemical Company and C. Wilbur Miller, for the removal of the action from the State to the United States Court, for trial, is affirmed, on the authority of *Fenner v. Cedar Works*, 191 N. C., 207, 131 S. E., 625. In that case it is said: "It is established law that the complaint is the sole basis for determining the nature of the cause of action against the various defendants and that a joint tort action is not separable." The cause of action alleged in the complaint in this action against both the resident and nonresident defendants is joint and not separable. For this reason, the petition of the nonresident defendants was properly denied.

As we interpret the allegations of the complaint, the cause of action stated therein is a wrongful and unlawful conspiracy entered into by the defendants, resulting in damages which the plaintiffs are entitled to recover of the defendants. The complaint is not subject to demurrer, as contended by the defendant, Meadows Fertilizer Company, nor is the action, removable, as contended by the defendants, Davison Chemical Company and C. Wilbur Miller. The judgment is

Affirmed.

J. E. BEAMAN, TRADING AS J. E. BEAMAN CONSTRUCTION COMPANY, v. ELIZABETH CITY HOTEL CORPORATION; AND C. F. SHUMAN ROOFING COMPANY v. J. E. BEAMAN, TRADING AS J. E. BEAMAN CONSTRUCTION COMPANY, AND ELIZABETH CITY HOTEL CORPORATION.

(Filed 23 March, 1932.)

1. Laborers' and Materialmen's Liens A a—Installation of grilled screen in this case held a part of contract of construction.

Where the contract for the erection of a hotel building provides for the installation of a heavy screen, requiring factory fabrication, over a skylight, and the building is turned over to the owner without its installation, and thereafter the owner demands that it be installed under the original contract without extra compensation, and, by arbitration under the contract, the matter is settled in favor of the owner: *Held*, the installation of the screen did not constitute a new and independent contract but was installed under the original contract of construction.

2. Laborers' and Materialmen's Liens B a—Whether notice of claim of lien was filed within statutory time held for jury in this case.

Although the statutory time for filing a laborer's or materialman's lien will not be extended where labor is done or material furnished of a trivial nature after substantial completion of the work, where the contract for the erection of a hotel building specifies the installation of a heavy screen, requiring factory fabrication, over a sky-light, and the work under the contract is substantially completed, and the building turned over to the owner for occupancy, and thereafter, upon demand of the owner, the screen is installed by the contractor as a part of the original contract at a cost of $1,157 and a lien filed against the building within six months thereafter: *Held*, whether the work was completed when the building was turned over to the owner or when the screen was installed is for the jury under the evidence on the question of whether the claim was filed within the statutory time, C. S., 2470, and a peremptory instruction thereon is error.

CIVIL ACTION, before *Small, J.*, at Spring Term, 1932, of PASQUOTANK.

In 1926 the Elizabeth City Hotel Corporation owned a certain lot in Elizabeth City, known as the Virginia Dare Hotel property. On 20 October, 1926, the Hotel Corporation made a contract with Beaman Construction Company providing for the erection of a hotel building upon said lot according to the plans and specifications prepared by W. L. Stoddard, architect. It was provided that the building should be completed by 15 July, 1927, and that in the event of delay in the completion of the work, the contractor should pay $50.00 per day as liquidated damages. The contract price was $320,000, to which was added $65,000 in extras. In the performance of the work Beaman Construction Company, contractor, sublet certain work to D. Draddy and Company and all roofing and sheet metal work to Shuman Roofing Company.

The original contract and plans and specifications provided for the erection of "a heavy iron screen over the skylight of the arcade portion of the building, in dimensions about 19 by 63 feet, requiring factory fabrication." All work to be done by Shuman Roofing Company had been completed and paid for prior to 11 November, 1927, and said subcontractor "had left the job without the intention of returning." By 1 November, 1927, the construction work covered by the contract between Beaman and the Hotel Company, including extras, had been practically completed, and on said date the hotel, including arcade and garage, was turned over to defendant corporation for occupancy which continued from that date until the present time. On 23 February, 1928, Beaman, contractor, and Nash, representing the architect, and Robinson, representing the defendant, Hotel Corporation, met to check over the "few odds and ends of work uncompleted at the time of occupancy of the hotel aforesaid." The foreman and workmen of Beaman had left the work

prior to said date, and on said date Beaman left the job without the intention of returning. Subsequently, on 20 April, 1928, Beaman wrote the architect, saying: "The job has been finished and is a credit to all concerned. . . . The statute of limitations which would affect a lien, has almost expired." Thereafter, in May, 1928, a dispute arose between Beaman and the Hotel Company as to the construction of the wire screen over the skylight. In accordance with the terms of the contract, the dispute was referred to the architect, who ruled that the screen was required by the contract, and Beaman arranged with Shuman Roofing Company to install said screen. The work of the installation was completed in October, 1928, at a cost of $1,157.62.

In February, 1928, when Beaman and the architect and a representative of the Hotel Company met to check up the work, the Hotel Company owed Beaman a balance of $4,371.38 upon the contract price, and at said time the said Hotel Company executed to the Beaman Construction Company a note in the sum of $2,145 in part payment of said balance. It is admitted in the pleadings that on or about 30 March, 1929, Beaman duly filed in the office of the clerk of the Superior Court a notice and claim of lien, and these actions were instituted on 28 September, 1929.

The court submitted the following issues:

1. "In what sum, if any, is J. E. Beaman, trading as Beaman Construction Company, indebted to Shuman Roofing Company?"

2. "In what sum, if any, is J. E. Beaman, trading as Beaman Construction Company, indebted to D. Draddy, the intervener in the suit of Beaman Construction Company *v.* Elizabeth City Hotel Corporation?"

3. "In what sum, if any, is the Elizabeth City Hotel Corporation indebted to J. E. Beaman, trading as Beaman Construction Company?"

4. "When was the work contemplated by the contract between J. E. Beaman, trading as Beaman Construction Company, and the Elizabeth City Hotel Corporation completed?"

5. "In what sum, if any, is J. E. Beaman, trading as Beaman Construction Company, indebted to Elizabeth City Hotel Corporation on the set-off?"

The jury answered the first issue "$1,157.62 with interest from 2 October, 1928," the second issue "$1,000," the third issue "$4,371.38 with interest from 23 February, 1928," the fourth issue "during February, 1928," and the fifth issue "not any."

The trial judge charged the jury in effect that if they believed the evidence and found the facts to be as testified to by all the witnesses that they should answer the issues as above indicated.

Upon the verdict judgment was entered as follows: "That the payments upon the judgment hereinbefore declared in favor of J. E. Beaman, trading as Beaman Construction Company, against the Elizabeth City Hotel Corporation, whether made voluntarily or under execution, shall be paid into the hands of the clerk . . . , who shall pay over the same in equal parts to the said David Draddy and C. F. Shuman Roofing Company, until the judgments hereinbefore declared in their favor against the said J. E. Beaman, shall have been satisfied. It is further considered, decreed and adjudged that neither the C. F. Shuman Roofing Company, or David Draddy, or Beaman Construction Company is entitled to a lien against or upon the property of Elizabeth City Hotel Corporation or any part thereof, and same is hereby declared and adjudged to be free and clear of any and all liens or notice of liens, heretofore, filed, or otherwise sought to be established, for and on behalf of any or all of said parties."

From the judgment upon the verdict the plaintiffs appealed.

Thompson & Wilson for plaintiffs.
McMullan & McMullan for defendants.

BROGDEN, J. What is the legal test for determining the "final furnishing of materials," or "the completion of labor" for a building project?

C. S., 2470, provides in substance that ordinarily notice of lien upon real estate shall be filed "within six months after the completion of labor or the final furnishing of materials," etc. In the case at bar the Hotel Corporation, the owner of the real estate, contends that the plaintiffs are not entitled to a lien upon the property. This contention is based upon certain facts appearing in the record to the effect that the hotel building was completed on 1 November, 1927, and actually occupied on said date, and that subsequently on 23 February, 1928, the parties in interest met together, checked over the various items of the contract and pronounced the work complete. Furthermore, in recognition of such completion the contractor wrote a letter on 20 April, 1928, admitting that the job had been finished and was "a credit to all concerned." Hence when the notice of lien was filed by the plaintiffs on 30 March, 1929, more than twelve months had elapsed from the completion of the labor and furnishing of material for the structure, and that, therefore, the plaintiffs are not entitled to enforce a lien upon the property.

On the other hand, the plaintiffs assert that in May, 1928, the Hotel Corporation took the position that the contract had not been completed for the reason that a large wire screen specified in the contract had not

been installed, and demand was made upon the contractor to complete the contract according to the terms thereof. Pursuant to the provisions of the contract the dispute so arising between the owner and the contractor, was referred to the architect, who ruled with the owner that the construction of the screen was necessary for the completion of the work. Thereupon the contractor procured the coplaintiff, Shuman Roofing Company, to install said screen at a cost of $1,157.62, and that said work, not having been completed until October, 1928, a notice of lien filed on 30 March, 1929, was within the statutory period, and, therefore, enforceable against the property.

A preliminary question arises at the threshold, and that is: Did the installation of the wire screen constitute a new and independent contract, or was such work done under and by virtue of the original contract between the parties? The original contract provided for the installation of the wire screen. The owner of the premises demanded such installation without extra compensation to the contractor. In pursuance of the terms of the original contract, the dispute was submitted to the architect who decided in favor of the owner and demanded the installation of the work. Manifestly, therefore, the screen was installed pursuant to the terms and provisions of the original contract between the parties.

The legal inquiry involved has been discussed by various courts and textwriters. For example, the Supreme Court of Idaho in *Gem State Lumber Co. v. Witty et al.*, 217 Pac., 1027, wrote: "Ordinarily, furnishing an article or performing a service trivial in character is not sufficient to extend the time for claiming a lien or to revive an expired lien, where the article is furnished or the service rendered after a substantial completion of the contract, and the article is not expressly required by the terms thereof." In like manner the Connecticut Court in *Martin Tire & Rubber Co. v. Kelly Tire & Rubber Co.*, 122 Atlantic, 102, quotes with approval the following: "Where a service is performed or material furnished at the request of the owner, it will extend the time for claiming a lien or will revive an expired lien, as to a contract . . . substantially completed." 35 L. R. A. (N. S.), 904. The authorities upon the subject are assembled in *Breeding v. Melson*, 143 Atlantic, 23, 60 A. L. R., 1252. The Delaware Court in that case said: "There is no conflict between the authorities as to the proposition that the time for filing a claim in a mechanic's lien proceeding is computed from the date when the last item of work, labor or materials is done, performed or furnished, and that principle is, undoubtedly, correct. But the work performed and materials furnished must be required by the contract, and whatever is done must be done in good faith for the purpose of fully performing the obligations of such contract, and not for the mere

purpose of extending the time for filing lien proceedings. Therefore, the performance of labor or the furnishing of materials of a trivial character which are not expressly provided for by such contract and after it has been substantially performed will not ordinarily extend the time for filing a mechanic's lien; this is especially true if such performance has been considered and treated by the parties as final and complete."

It is to be noted that in the foregoing case the last item was dated 27 October, 1921, and amounted to ninety-eight cents. The next item thereafter in the account was dated 15 April, 1922, and amounted to $3.40. Upon the facts, the Court held that the submission of the issue to the jury was correct.

The pertinent decisions upon the subject tend to demonstrate that the courts throughout the country are disposed to look with favor upon extending the time for filing liens or reviving the right to file them when: (a) the material furnished or labor done is embraced within the original contract; (b) the owner assents or requires such additional labor or material; (c) the labor or material so furnished is not of a trivial nature, even after the substantial completion of the project. But if the project had been substantially completed, and the furnishing of subsequent labor or material is of a trivial nature, not within the terms of the original contract and not furnished in good faith but for the purpose of evading the applicability of the time limit, then in such event the contractor is not entitled to assert a lien upon the theory that such additional labor or material so furnished, extended the time or revived the right.

When the principles of law are applied to the facts of the case at bar, it is manifest that the trial judge could not determine as a matter of law or give a peremptory instruction to the jury to the effect that the building contemplated by the contract was completed "during February, 1928."

The installation of a wire screen for a skylight 19 by 63 feet, requiring factory fabrication and costing $1,157.62, cannot be said, as a matter of law, to constitute work or material of a trivial nature. There is no evidence of unreasonable delay in furnishing said material from May, 1928, until October, 1928. Hence the exceptions to the instructions given the jury are sustained.

Error.

ORANGE COUNTY v. W. H. WILSON AND WIFE, ET AL.

(Filed 23 March, 1932.)

1. Taxation H a—Tax certificates is presumptive evidence of regularity of proceedings.

It is the duty of the sheriff to collect all taxes on property that are due and unpaid and, when necessary, to sell the land for delinquent taxes after due advertisement, and to issue a certificate of purchase, which certificate is presumptive evidence of the regularity of all prior proceedings incident to the sale and purchase, and of the performance of all things essential to the validity of the proceedings. N. C. Code, 1931, secs. 7992, 8010, 8012, 8014, 8026, 8027.

2. Taxation H b—Suit in the nature of foreclosure is exclusive remedy on tax certificate.

The purchaser of a certificate at a sheriff's sale of lands for taxes is given a lien for the amount paid with interest and costs, etc., and is subrogated to the rights of the county for the taxes, and has the sole remedy of proceeding *in rem* by civil action to foreclose his certificate as nearly as may be as in case of foreclosure of a mortgage, and the purchaser at the sale in conformity with the statutory proceedings is entitled to a deed conveying the fee-simple title to the *locus in quo*. N. C., Code, 1931, secs. 8028, 8036.

3. Same—In proceedings to foreclose tax certificate only listed owners, their wives or husbands, must be served with summons.

In a suit to foreclose lands to enforce the lien acquired by a purchaser of a tax certificate the only parties upon whom service of summons is necessary are those in whose name the real estate is listed, and, in case they are married, upon their wives or husbands, and service on those otherwise interested may be had by publication as prescribed by the statute, N. C. Code, sec. 8037, and such publication is sufficient notice to constitute due process of law, the proceedings being *in rem* in which the State seeks, directly or by authorization, to sell land for taxes by the enforcement of the statutory lien.

4. Taxation H c—Cestui que trust may not set aside foreclosure of tax certificate on ground that he was not served with summons.

Where service of summons had been made on the listed owners of the property and service on others interested in the land has been made by publication as the statute provides in proceedings to foreclose a tax certificate, interveners who claim an interest in the land by virtue of being *cestuis que trustents* under a deed of trust may not set aside the sale on the ground that they had not been served with summons, personal service on them not being required by the statute, and it appearing that the trustees in their deed of trust had been personally served, and that they could have protected their rights by paying the taxes and thus acquiring a lien therefor superior to all other liens.

CLARKSON, J., concurs in result.

ORANGE COUNTY *v.* WILSON.

APPEAL by petitioners from *Daniels, J.*, at Chambers, on 17 October, 1931. From ORANGE.

Proceeding to foreclose a tax certificate issued by the sheriff in a sale for taxes due in 1928, at which the plaintiff became the purchaser of the land. The clerk ordered a foreclosure of the certificate, the land was sold, the commissioner reported the sale, and the clerk, after finding that the sale had been made in compliance with law, that the bid of the purchaser had not been raised, and that no exceptions had been filed, confirmed the sale and on 8 April, 1931, adjudged that upon payment of the purchase price the commissioner should execute and deliver a deed to the purchaser.

On 7 July, 1931, W. G. Pearson and Mechanics and Farmers Bank made a motion before the clerk to set aside the decree of confirmation and to order another sale of the property. The clerk denied the motion; the petitioners appealed; and Judge Daniels found the facts to be as follows:

1. That the above entitled action was instituted by the county of Orange to foreclose a tax certificate issued by the sheriff of said county at a tax sale held by him at which the said county was the purchaser of the lands mentioned and described in the complaint for the taxes due by the owner or owners for the year 1928.

2. That at the time of the commencement of this action the petitioners were *cestuis que trustents* and the holders of certain indebtedness duly of record in Orange County; that J. L. Pearson was the trustee of the petitioner, W. G. Pearson, and R. L. McDougald was the trustee of the petitioner, Mechanics and Farmers Bank; that the petitioner, W. G. Pearson, is a citizen and resident of Durham County, and the petitioner, Mechanics and Farmers Bank, is a corporation with its principal banking house in Durham city and county.

3. That the action was instituted and was governed by the tax laws in force at the time the action was instituted.

4. That the summons and complaint were duly issued on 28 October, 1930; that an order of publication was made by the clerk on 10 November, 1930, in pursuance of which the notice of service appearing in the record was published in the *Chapel Hill Weekly*, a newspaper published in Orange County, on 14th, 21st and 28th of November and the 5th of December, 1930; that an interlocutory judgment was granted on 9 February, 1931; that the report of sale was filed on 12 March, 1931; that a final decree was rendered on 6 April, 1931; that the commissioner's deed was executed on 23 April, 1931, and was filed for registration on 30 April, 1931, being recorded in Book of Deeds 92, at page 187, registry of Orange County. That the final account of the commissioner was filed on 17 June, 1931.

5. That C. P. Hinshaw, the commissioner, appointed by the clerk, duly advertised the sale of said property on 9 February, 1931, in the *Hillsboro Observer*, a newspaper published in Orange County and that said property was sold at public auction on 12 March, 1931, at which sale J. A. Giles became the last and highest bidder in the sum of $425. That the sale remained open for 20 days and was confirmed by the clerk, no increased bid or exceptions having been filed. That the surplus after the payment of taxes, costs and commissions, now in the hands of the clerk, is $131.75.

6. That the petition and motion herein were filed in the office of the clerk of the Superior Court of Orange County, on 7 July, 1931, and that no answer, demurrer, or other pleadings have ever been filed.

7. That the petitioners offered in open court to pay all taxes and costs due on said property and to reimburse the purchaser, J. A. Giles, for all expenditures and improvements made and had upon said property, if their motion was allowed.

Upon the foregoing facts the motion was denied and the order of the clerk was affirmed. The petitioner excepted and appealed.

R. McCants Andrews for appellants.
Graham & Sawyer for appellee.

ADAMS, J. The sheriff is required by statute to collect taxes which are due and unpaid and, when necessary, to sell the property of delinquent taxpayers. N. C. Code, 1931, sections 7992, 8010, 8012. The sale must be duly advertised and the sheriff must issue a certificate of purchase. Sections 8014, 8026. The certificate is presumptive evidence of the regularity of all prior proceedings incident to the sale and the purchase and of the due performance of all things essential to the validity of such proceedings. Section 8027. Under the present procedure the holder may foreclose his certificate by a civil action, this being "his sole right and only remedy." Section 8028. On the real estate purchased by him he is given a lien for the amount paid, together with interest, penalties, costs, and charges. Section. 8036. He is subrogated to the rights of the State, county, or municipal corporation for the taxes for which the real estate was sold and is entitled to a decree of sale for the satisfaction of the amount due him upon his certificate, or any other such certificate, and of the amount paid by him for taxes or assessments which were a lien on the property. In the foreclosure of a certificate the only necessary defendants are the person in whose name the real estate was listed for taxation and, if married, the wife or husband. These parties must be served with process as in civil actions. Other

persons claiming an interest are served by publication. The provision is in these words: "Notice, by posting at the courthouse door, shall be given to all other persons claiming any interest in the subject-matter of the action to appear, present and defend their claims. Said notice shall describe the nature of the action and shall require such persons to set up their claims in six months from the date of the final appearance of the general advertisement of such notice as required herein, otherwise they shall be forever barred and foreclosed of any and all interest or claims in/or to the property or the proceeds received from the sale thereof."

This section provides, in addition, that when the summons is returned after proper service upon the taxpayer and the taxpayer's wife or husband, the court shall proceed to judgment "without awaiting the six months allowed to other claimants"; also that the deed which shall be made to the purchaser as the statute provides shall convey the real estate to him in fee simple, free from any and all claims or interest of the taxpayer, the wife, the husband, or any other person.

The holder of the certificate has "the right of lien against all real estate therein described as in case of mortgage"; and the action for foreclosure is to be "governed as nearly as may be by the rules governing actions to foreclose a mortgage."

The appellants make these clauses (sec. 8037) the basis of a contention that the certificate was not legally foreclosed because the petitioners were not served with summons as parties defendant. Several objections may be urged to the maintenance of this position.

The statutes cited above are not in conflict with the State or Federal Constitution. *Orange County v. Jenkins*, 200 N. C., 202. The process of taxation does not demand the same kind of notice as is required in a suit at law; it is a proceeding *in rem* in which the State seeks directly or by authorization of others to sell land for taxes by the enforcement of a lien imposed by statute. A notice which permits interested parties to ascertain that the land is subjected to sale for unpaid taxes is due process whether the interested parties are within or without the jurisdiction. *Orange County v. Jenkins, supra; Leigh v. Green*, 193 U. S., 79, 48 L. Ed., 623. The statute designates those upon whom original process must be served and requires nothing more than constructive service upon all other persons who claim an interest in the subject-matter; and when these provisions are complied with the service is complete.

Besides, the trustees of the petitioners were parties defendant and were served with process. The petitioners occupied the position of trustors, or, in effect, mortgagees of the property. They were authorized to pay the taxes and thereby acquire another lien, which would have preference

over all other liens. Sec. 7981. Indeed, in *Wooten v. Sugg,* 114 N. C., 295, it was held that it is incumbent upon a mortgagee to see that the taxes on the mortgaged property are paid. This was not done by the petitioners or their trustees. They made no demand and asserted no claim within the time prescribed by law and in the words of the statute are barred and foreclosed of any and all interest in the property and in the proceeds of sale.

A tax is an enforced contribution of money assessed by authority of a sovereign State. It is a source of revenue, necessary to the maintenance of government, and collectible in the way and within the period provided by law. To require the sheriff, purchaser, or holder of a certificate to search the records of the courts to ascertain the names of all who have a lien or claim an interest in the subject-matter of the sale would amount to the imposition of a burden not within the scope or contemplation of the statutes regulating the sale of land for taxes. Judgment

Affirmed.

CLARKSON, J., concurs in result.

MRS. CLYDE R. TYSON, AND ALL OTHER CREDITORS OF R. L. SMITH AND W. H. SMITH WHO DESIRE TO MAKE THEMSELVES PARTIES THERETO, v. R. L. SMITH AND W. H. SMITH.

(Filed 23 March, 1932.)

Appeal and Error J e—Where appellant fails to show that his rights have been prejudiced the judgment will be affirmed.

Where upon appeal from an order or judgment relating to the priority of payment of liens and debts against property in a receiver's hands, the appellant fails to show a request for findings of fact upon which the order was entered or to show that he would be injured by the judgment excepted to, the judgment will be affirmed on appeal.

APPEAL by H. L. Hodges, claimant, from *Sinclair, J.,* at Snow Hill, N. C., on 16 December, 1931. From PITT. Affirmed.

This is an appeal by claimant, H. L. Hodges, from certain orders and decrees entered in the cause by his Honor, N. A. Sinclair, touching the disposition of certain funds which had come into the hands of the receivers, E. R. Dudley and W. L. Whedbee, by reason of the operation of the properties of R. L. Smith and W. H. Smith, above defendants, by the said receivers during the year 1931. The orders appealed from

by appellant affect the priority of payment of debts created by the receivership in the operation of the farms. Upon the petition of Mrs. Clyde P. Tyson, in the fall of 1929, a receiver, E. R. Dudley, and later a coreceiver, W. L. Whedbee, were appointed to take charge of the properties of R. L. Smith and W. H. Smith, and to hold same for the benefit of the creditors of R. L. Smith and W. H. Smith. It is conceded by this appellant, H. L. Hodges, that the proceedings were regular, and the receivers duly appointed.

In January, 1931, his Honor, Judge W. A. Devin, made an order allowing and authorizing the receivers, for the purpose of operating the farms for the year 1931, to borrow certain moneys and incur certain obligations. Pursuant to the said order, the receivers executed the deeds of trust and agricultural liens to H. D. Bateman, trustee and F. N. Bridgers, trustee, set forth in the record. During the months of June, July, August and September, 1931, the receivers purchased from H. L. Hodges farm supplies, such as provisions and other articles necessary for the operation of said farms, and promised to pay for same, that H. L. Hodges has not been paid for said supplies

At a hearing before his Honor, N. A. Sinclair, in Snow Hill, on 16 December, 1931, in this cause, upon the question of priorities in the payment of the indebtedness incurred by the receivers in the operation of the receivership properties for the year of 1931, appellant filed his petition; the appellant was present at said hearing, through his attorney, J. C. Lanier, and was heard by his Honor on the question of priorities as they affected H. L. Hodges.

In the record is the petition of the receivers to the court, to borrow certain sums of money and to obtain advances to cultivate the crops for 1931, and is set forth the liens to secure same; and the decree, in part, is as follows: "Shall have priority over all unsecured claims and judgments against the defendants, and with respect to said lands, shall be subordinate only to the liens outstanding at the commencement of this action, the lien for taxes." It appears in the records that "The claimant excepts to the said orders and decrees, for that the findings of facts are not supported by the law and the facts, and for that the priorities as fixed in said orders and decrees are contrary to law in such cases provided, and against equity principles and good conscience. The claimant failed to ask the court to find the facts with respect to the condition of the receivership, and no such fact was found and there is nothing in the record and no facts before Judge Sinclair, upon which he could have found that the claimant would be injured by the decrees excepted to." The claimant, H. L. Hodges, made exception and assignment of error and appealed to the Supreme Court.

Albion Dunn for receivers, appellees.
J. C. Lanier for H. L. Hodges, claimant.

PER CURIAM. In the judgment or order of Sinclair, J., at October Term, 1931, we find: "It appearing to the court that the receivers herein have devoted considerable time and labor to the management of said receivership, and that the details of said receivership and its proper management have required the exercise of extraordinary abilities, and that said receivers have been untiring in their labor and efforts to promote the interests of said receivership, and during 1930 and 1931, have raised and cultivated crops of considerable value upon said lands, and during the time when numerous persons engaged in like operations have lost money, the receivers have been able to pay the expenses of their farming operations and have been able to pay a small amount in reduction of the indebtedness of said estates; and, in addition thereto, have reduced the indebtedness of the defendants to two of their secured creditors in the sum of $5,052.35. (The order sets forth services rendered by receivers and their attorneys, and amount received by them and additional amount to be paid them.) . . . And it further appearing to the court that the receivers secured advances from H. L. Hodges to enable them to cultivate the 1931 crops and before permanent arrangements had been made for said advances the sum of $3,118.92 for which the said H. L. Hodges has no security. . . . And it appearing to the court that said recommendations are fair and reasonable and that the compensation, recommended, is a reasonable compensation for the said receivers and their attorneys, and that the said H. L. Hodges ought to be paid the amount so advanced by him to the receivers, and that said advances were necessary. . . . And it is adjudged and decreed that the aforesaid allowances are a proper and necessary expense of said receivership and have priority over the payment of any indebtedness created by said receivers. It is further ordered and adjudged that the receivers, after paying and satisfying the crop liens executed by them to H. D. Bateman and F. N. Bridgers, shall pay out of any moneys then in their hands the indebtedness due and owing to H. L. Hodges as above recited, and which indebtedness is adjudged to be a necessary expense of said receivership."

This judgment of Sinclair, J., at October Term, 1931, was not excepted to by H. L. Hodges, claimant. The order concludes "This matter is retained for further orders."

The judgment, or order, dated 16 December, 1931, of Sinclair, J., H. L. Hodges, claimant, excepted and assigned error as follows: "That his Honor, Judge Sinclair, erred in signing the order of record and

designated as Exhibit 'H,' in that the fixing of the priorities of payment therein is contrary to the law in such cases provided; and in that, although claimant H. L. Hodges filed his petition in due form, and was represented at the hearing, the said order omits any reference to claimant's claim, and excludes it, contrary to law and the facts appearing in the record."

The judgment, or order, that H. L. Hodges, claimant, excepted to and assigned error, did not refer to the order or judgment before set forth at October Term, 1931, but the order made by Sinclair, J., at Snow Hill, N. C., 16 December, 1931. This last order reiterates the allowances to the receivers made at October Term, 1931, of the Superior Court and after ordering certain sum to be paid on one of the unpaid liens which was one of the original liens approved by the court; orders the allowances made the receivers paid "from the balance then in their hands from the sale of crops, etc. . . . And from funds in the hands of the receivers derived from other sources than the sale of property covered," by the certain crop liens heretofore mentioned, the amounts due the attorneys for the receivers were ordered paid. Further: "And from the next moneys coming into the hands of the receivers from the sale of the property included in the deed of trust and agricultural lien to R. N. Bridgers, trustee, the receivers shall apply and pay so much thereof to the Farmers Cotton Oil Company as shall be necessary to pay in full the balance due the said Farmers Cotton Oil Company. And this matter is retained for further orders."

From these judgments, or orders, it appears that the court below ordered, at the October Term, 1931, of Superior Court: (1) The receiver's allowance, setting out the amounts, and attorneys for receivers to be paid out of the crops; (2) ordered the liens which were given under order of court to be paid; (3) set forth fact that claim of H. L. Hodges, for necessary farm supplies for the operation of the farms ought to be paid. The judgment, or order, of 16 December, 1931, modified the October Term order, and the attorneys' allowance is "from funds in the hands of the receivers derived from other sources than the sale" of the crops covered by the court liens of 1931.

The petition of H. L. Hodges sets forth that the supplies furnished by him up to 1 June, 1931, were paid by the receivers, but the receivers breached their agreement and did not pay for months of June, July, August and September, 1931, supply advances totaling $3,118.92. Hodges relied on the promise of the receivers, but has no lien. He is an unsecured creditor and in fact made no exception or assignment of error to the judgment at October Term, 1931.

So far as appears from the record, there is no request by Hodges for the findings of fact to either of the judgments of Sinclair, J., and in the statement of the case on appeal the following is agreed to by the parties to this controversy: "No facts before Judge Sinclair upon which he could have found that the claimant would be injured by the decree excepted to."

We see no reason in law to disturb the judgment, or order, of the court below. Of course, it goes without saying, that the receivers having contracted the debt with Hodges in good faith, should make every effort to see that it is paid. The judgment is

Affirmed.

HELEN BAKER v. THE TRAVELERS INSURANCE COMPANY.

(Filed 23 March, 1932.)

Insurance T c—Cancellation of insurance by employer is conclusive where there is no allegation or evidence that cancellation was illegal.

Where an employer's policy of group insurance specifies that it should end as to any employee upon the termination of the employment, or prior thereto upon cancellation by the employer, unless such termination of employment was caused by disability while the policy was in force, and it appears that the employer had terminated the insurance on such employee in accordance with the provisions of the policy: *Held*, in the absence of allegation or proof that the cancellation of the policy by the employer was wrongful or illegal such cancellation is presumed to have been lawful, and the beneficiary of the employee cannot recover thereon for the death of the employee after the policy had thus been canceled.

APPEAL by plaintiff from *Midyette, J.*, at October Term, 1931, of CUMBERLAND. Affirmed.

A. M. Moore and Herbert Lutterloh for plaintiff.
Dye & Clark for defendant.

PER CURIAM. On 28 May, 1927, the defendant issued to Tolar, Hart and Holt Mills a group life policy of insurance on the life of Troy Baker in the sum of $1,500, payable to Helen Baker, his wife, as beneficiary, if death should occur during the continuance of the policy while the employee was insured thereunder. The employment of Troy Baker with the Tolar, Hart and Holt Mills ended on 1 July, 1930, and he died on 28 November, 1930. The action was begun on 7 April, 1931.

The policy contains the following clauses:

"The insurance of any employee covered hereunder shall end when his employment with the employer shall end, or prior thereto when the employee shall notify the employer to make no further deductions from his pay to apply toward the premium for this insurance, except in a case where at the time of termination of employment the employee shall be wholly disabled and prevented by bodily injury or disease from engaging in any occupation of employment for wage or profit. In such case the insurance will remain in force as to such employee during the continuance of such disability for the period of three months from the date upon which the employee ceased to work, and thereafter during the continuance of such disability and *while this policy shall remain in force* until the employer shall notify the company to terminate the insurance as to such employee."

The plaintiff offered evidence tending to show that the insured was "wholly disabled" when his employment ceased. But under the contract the insurance was to be paid if the death of the insured occurred during the continuance of the policy. The plaintiff's evidence is that "the insurance on the life of Troy Baker was canceled 12 September, 1930." The death, therefore, did not occur "during the continuance of said policy." According to her evidence the plaintiff brought suit on a void policy. She argues that the cancellation was effected without authority; but she neither alleged in her complaint that the cancellation was wrongful or illegal nor suggested her purpose to attack it for illegality when she offered her evidence. In the absence of allegation or proof to this effect the cancellation is presumed to have been made lawfully. Judgment Affirmed.

BEAUFORT COUNTY, ASHE COUNTY, BERTIE COUNTY, CHOWAN COUNTY, IREDELL COUNTY, MARTIN COUNTY AND WASHINGTON COUNTY, v. NORTH CAROLINA STATE HIGHWAY COMMISSION, E. B. JEFFRESS, CHAIRMAN, T. L. BLAND, CHARLES A. CANNON, JAMES H. CLARK, JAMES L. McNAIR, W. W. NEAL, AND N. L. STEADMAN, MEMBERS OF THE NORTH CAROLINA STATE HIGHWAY COMMISSION, AND JOHN P. STEADMAN, TREASURER OF THE STATE OF NORTH CAROLINA.

(Filed 30 March, 1932.)

Counties E c—Counties held not entitled to allocation of funds raised on gasoline tax which were collected after July 1, 1931.

The provisions of chapter 40, Public Laws of 1929, that a one-cent per gallon tax on all gasoline sold within the State be levied and collected by the State Commissioner of Revenue and paid to the State Treasurer and separately kept and allocated to the "County Aid Road Fund" for

the expenses incurred by the several counties in keeping up their respective public roads, was expressly repealed by chapter 145, Public Laws of 1931, placing that duty and expense upon the State Highway Commission, with none of the provisions of the former statute operative after 1 July, 1931, and *Held*, none of the moneys collected from this source subsequent to 1 July, 1931, are available to the respective counties.

CLARKSON, J., dissenting.

APPEAL by defendants from *Sinclair, J.*, at January Term, 1932, of BEAUFORT. Reversed.

This is a controversy without action submitted to the court on a statement of facts agreed. C. S., 626.

The plaintiffs contend that by virtue of the provisions of chapter 40, Public Laws of North Carolina, 1929, each of the counties of this State is entitled to a certain percentage of the sums of money now in the hands of the defendant, John P. Steadman, Treasurer of the State of North Carolina, and subject to vouchers issued by the defendant, North Carolina State Highway Commission, which were collected and paid to said Treasurer by the Commissioner of Revenue of North Carolina, since 1 July, 1931, by reason of the tax levied under the laws of this State, of one cent per gallon on all motor fuels sold, distributed and/or used therein, prior to 1 July, 1931.

The plaintiffs further contend that by virtue of the provisions of said chapter 40, Public Laws of North Carolina, 1929, it is the duty of the State Highway Commission to issue and of the State Treasurer to pay vouchers for the percentages of said sums of money to which the plaintiffs are entitled, respectively.

The defendants contend that chapter 40, Public Laws of North Carolina, 1929, was repealed by chapter 145, Public Laws of North Carolina, 1931, and that by reason of such repeal, none of its provisions has been in force or effect since 1 July, 1931.

The defendants, therefore, contend that plaintiffs are not entitled to any part of the sums of money now in the hands of the State Treasurer, subject to vouchers issued by the State Highway Commission, which were collected and paid to the said Treasurer by the Commissioner of Revenue of North Carolina, after 1 July, 1931, by reason of the tax on motor fuels which were sold, distributed and/or used in this State, prior to said date.

It is agreed that the defendant, North Carolina State Highway Commission, has issued vouchers to the several counties of the State, including the plaintiffs, for all sums of money to which they were entitled under the provisions of chapter 40, Public Laws of 1929, which were collected and paid to the State Treasurer by the Commissioner of Reve-

nue of North Carolina, prior to 1 July, 1931. The only sums of money therefore, which are involved in this controversy are those which were collected and paid to the State Treasurer, after 1 July, 1931, by reason of the tax on motor fuels levied under the laws of this State.

It is further agreed that if the plaintiffs are entitled to the percentages of the sums of money involved in this controversy, as contended by them, then such sums as are due to the plaintiffs, respectively, shall be paid by the defendant, John P. Steadman, Treasurer of the State of North Carolina, on vouchers which shall be issued by the defendant, State Highway Commission, to the holders of certain bonds issued by the plaintiffs for road improvements, which are now outstanding.

The cause was heard on the facts agreed. It was adjudged, decreed and ordered by the court as follows:

"That the plaintiffs counties are entitled to receive the gasoline tax at the rate of one cent (1c) per gallon on such motor fuels as were sold, distributed and/or used in this State prior to 1 July, 1931, and on which said tax was not actually collected and received by the State Treasurer until or after 1 July, 1931, and that plaintiffs counties are entitled to have paid on bonds and interest heretofore issued by said counties for road improvements the following percentages of said fund, to wit:

Beaufort County	1.467%	of the total for the State.
Ashe County	.844%	of the total for the State.
Bertie County	1.190%	of the total for the State.
Chowan County	.378%	of the total for the State.
Iredell County	1.345%	of the total for the State.
Martin County	.875%	of the total for the State.
Washington County	.559%	of the total for the State.

And it is further ordered, adjudged and decreed that the said percentages of the said fund shall be paid over by the defendants to the holders of the bonds and coupons heretofore issued by the said counties for road improvements."

From this judgment, the defendants appealed to the Supreme Court.

Harry McMullan and MacLean & Rodman for Beaufort County.
T. C. Bowie and Ira T. Johnston for Ashe County.
M. B. Gillam for Bertie County.
W. D. Pruden for Chowan County.
John A. Scott for Iredell County.
Elbert S. Peel for Martin County.
Z. V. Norman and Carl L. Bailey for Washington County.

H. G. Connor, Jr., for Wilson County.
Attorney-General Brummitt for John P. Steadman, State Treasurer.
Charles Ross, General Counsel, for N. C. State Highway Commission.

CONNOR, J. Chapter 40, Public Laws of North Carolina, 1929, is entitled "An act to amend chapter 93 of the Public Laws of 1927, so as to levy an additional tax of one cent per gallon on gasoline and relieve the counties by aid from the State Highway Commission." This act became effective as to all its provisions, according to its terms, on 1 April, 1929. It continued in full force and effect until its repeal by chapter 145, Public Laws of 1931. By virtue of such repeal, none of its provisions has been in force and effect since 1 July, 1931. No tax on motor fuels sold, distributed and/or used in this State has been levied under its provisions since 1 April, 1931. All sums of money collected under its provisions, and allocated to the "County Aid Road Fund," created under the act, have been paid to the several counties of the State. The sums now in controversy were collected and paid to the State Treasurer, after 1 July, 1931, under the provisions of chapter 145, Public Laws, 1931, which became effective on 1 April, 1931.

Section 39 of chapter 145, Public Laws of 1931, contains the following provision:

"That all laws and clauses of laws in conflict with the provisions of this act to the extent of such conflict, and especially chapter 40, Public Laws of 1929, are hereby repealed; *Provided, however*, that sections three to six inclusive of said chapter 40, Public Laws of 1929, shall remain operative until 1 July, 1931."

As all the provisions of chapter 40, Public Laws of 1929, have been repealed, and none of said provisions were operative on or after 1 July, 1931, plaintiffs are not entitled to any sums of money now in the hands of the State Treasurer, subject to vouchers issued by the State Highway Commission which have been collected and paid to said Treasurer by the Commissioner of Revenue of North Carolina, since 1 July, 1931. The judgment is, therefore,

Reversed.

CLARKSON, J., dissenting: Judge Sinclair rendered judgment in the court below as follows: "That the plaintiffs counties are entitled to receive the gasoline tax at the rate of one cent (1c) per gallon on such motor fuels as were sold, distributed, and/or used in the State prior to 1 July, 1931, and on which the said tax was not actually collected and received by the State Treasurer until on or after 1 July, 1931, and that the plaintiffs counties are entitled to have paid on bonds and interest heretofore issued by said counties for road improvements the fol-

lowing percentages of the said fund, to wit: (naming same). And it is further ordered, adjudged and decreed that the said percentages of the said fund shall be paid over by the defendants to the holders of the bonds and coupons heretofore issued by the said counties for road improvements."

Public Laws 1931, chap. 145, was passed to relieve the 100 counties in the State from maintenance or upkeep of county roads. Under this act it was estimated some 45,000 miles of county roads were taken over by the State, which at that time had about 9,000 miles of hard-surfaced and dependable State roads. These county roads were taken over on 1 July, 1931.

Section 7, of said act, is as follows: "That from and after July first, one thousand nine hundred and thirty-one, the exclusive control and management and responsibility for all public roads in the several counties shall be vested in the State Highway Commission as hereinafter provided, and all county, district, and township highway or road commissioners, by whatever name designated, and whether created under public, public-local, or private acts, shall be abolished," etc.

To finance this new road system, section 24, subsection 5, in part, provides: "There is hereby levied and imposed a tax of six cents per gallon on all motor fuels sold, distributed, or used within this State," etc. This tax is collected by the Revenue Commissioner and is transferred to the State Treasurer. Section 24, subsection 6: "And the State Treasurer shall place the same to the credit of the 'State Highway Fund.'" Two cents of the six cents was set aside for the county road system, which was not to be less than $6,000,000, in any one year.

Public Laws 1931, *supra*, sec. 39: "That all laws and clauses of laws in conflict with the provisions of this act to the extent of such conflict, and especially chapter forty of the Public Laws of one thousand nine hundred and twenty-nine are hereby repealed: *Provided, however, that sections three and six inclusive of said chapter forty in the Public Laws of one thousand nine hundred and twenty-nine shall remain operative until July first, one thousand nine hundred and thirty-one,*" etc.

Section 40: "This act shall be in force and effect from and after the first day of April, one thousand nine hundred and thirty-one."

It will be noted that sections 3 to 6, inclusive, of chapter 40, Public Laws 1929, shall remain operative until 1 July, 1931. By chapter 40, acts of 1929, the General Assembly increased the gas tax imposed by chapter 93, acts of 1927, from *four* to *five* cents, for the purpose as stated in the caption of the act, "An act to amend chapter 93, acts of 1927, so as to levy an additional tax of one cent per gallon on gasoline, and relieve the counties by aid from the State Highway Commission."

By section 2 of this act, it is provided that "the additional revenue which shall be collected by the levy and imposition of the additional one cent per gallon . . . shall be *held, used and treated* by the State Highway Commission as *a separate and special fund*, to be known and designated as 'The County Aid Road Fund,' and shall be expended only in accordance with the provisions of this act." (Italics mine.)

Chapter 40, acts 1929, became effective on 1 April, 1929, and the additional revenue thereby created came into being. On each gallon of motor fuel sold, distributed or used in the State after 1 April, 1929, a tax of five cents per gallon, by provision of this law, was forthwith levied, and by operation of law, four cents of this amount became due the State Highway Commission for its own uses and purposes, and one cent thereof became due the State Highway Commission as trustee of the County Aid Road Fund. The date and the time of the sale, distribution or use of the gasoline, brought into being the tax, and not the date or time the money for such tax happened to be collected.

It will be seen that the contention of the State Highway Commission is to the effect: (1) That it is entitled to an additional one cent gasoline tax from 1 April, to 1 July, 1931, yet its responsibility to maintain the county roads did not begin until 1 July, 1931. (2) That the counties in the State from 1 April, to 1 July, 1931, had to maintain the county roads, but were not entitled to the one cent gasoline tax which was produced during that period.

The contention of the State Highway Commission is to the effect: That although *The County Aid Road Fund* was *produced* before 1 July (that is, the one cent per gallon on the gasoline which had been distributed for sale or use within the State prior to 1 July, 1931), yet so much of that fund which is collected after 1 July, 1931, is forfeited to the State Highway Commission, regardless of when it was produced. I think that the sections 3 and 6, inclusive, chapter 40, Public Laws 1929, which remained operative, cannot be so construed. Paying the State Highway Commission an additional sum of $627,774 for maintaining the county roads, when they were not maintaining them, and taking this amount from the counties which were maintaining them, would have been an injustice which the General Assembly would not have done. The counties are left with their road debts unpaid and their bonds in default, in part at least, caused by this position taken by the State Highway Commission. Such a wrong seems to me to be glaringly inconsistent with all the purposes of the 1931 General Assembly.

Plaintiffs contend that: In fixing their county budget, Beaufort County and other plaintiff counties estimated they would be entitled to receive the one cent gasoline tax, "The County Aid Road Fund," from

1 April, 1929, to 1 July, 1931, a period of two years and three months, and levied their taxes accordingly, as they were required to do by the County Fiscal Control Act of 1927. By the construction placed on the statute by the State Highway Commission, the counties get this revenue for only 2 years, to 1 April, 1931, the State Highway Commission getting the three months accrual of this tax. It was not intended that the Commission should get all the gasoline tax until they began to perform all the functions of maintaining the roads the counties had to maintain, to wit, on 1 July, 1931.

The act requires that this fund be kept by the State Treasurer to the credit of the "State Highway Fund." The tax produced prior to 1 July, though collected after 1 July, should be credited to the counties of the State under the "State Highway Fund," this is a matter of bookkeeping. This fund collected after, although produced prior to 1 July, 1931, had to be placed in the "State Highway Fund," and should be disbursed by it to the respective counties and not forfeited to the State Highway Commission.

I think in construing the statutes *in pari materia,* the reason, logic and justice of the matter is against the position taken by the State Highway Commission. The large intent of the statutes was to the effect that the counties of the State having the burden of maintaining the State roads to 1 July, 1931, should be entitled to the one cent gasoline tax produced before that time, although a part of same should be collected thereafter. I am borne out in this contention by the learned judge in the court below, also by four members of the last General Assembly who helped pass the act: Messrs. H. G. Connor, A. D. McLean, Ira T. Johnston and Zeb. V. Norman—all able lawyers.

The intention is manifest—"The letter killeth but the spirit giveth life." I think the judgment of the court below should have been affirmed.

STATE v. JOHN MITCHELL, W. T. LEE, STANLEY WINBORNE AND GEORGE P. PELL.

(Filed 30 March, 1932.)

1. Indictment A a—Person must answer to charge of crime only upon indictment presentment, or impeachment.

Under the Constitution, Declaration of Rights, section 12, no person is required to answer a criminal charge but by indictment, presentment or impeachment, and an indictment implies an indictment by grand jury as defined by common law unless changed by statute.

2. Indictment A b—Ordinarily must be found by grand jury of county wherein offense was committed.

Ordinarily indictment charging a criminal offense must be passed upon by the grand jury of the county wherein the offense charged was committed, and our statutes prescribing certain instances in which the grand jury of another county may pass upon an indictment will not be enlarged beyond the reasonable scope of their provisions. N. C. Code, 1931, secs. 4600, 4606.

3. Statutes B a—General rules for construction of statutes.

In construing a statute when there is substantial ground for doubt whether its terms were meant to apply to particular facts, the intention of the Legislature may generally be determined from a consideration of the purposes for which the act was passed, and also in proper instances, statutes are to be construed with reference to the common law in existence at the time of their enactment.

4. Abatement and Revival A c—Where plea in abatement to jurisdiction of court is sustained the case should be dismissed.

A plea in abatement on the ground that the grand jury was without authority to pass upon the bill of indictment because the offense charged was committed in another county challenges the jurisdiction of the court and where the plea is sustained the action should be dismissed, and where after sustaining the plea the court transfers the cause to the county in which the crime was alleged to have been committed, the latter court is without power to proceed further, and the defendant's plea in abatement therein made is properly sustained.

5. Indictment A b—Only grand jury of Wake County may find indictment for misfeasance of public duties performed in Raleigh.

The duties of the North Carolina Corporation Commission as a court of record and the duties of the Chief Bank Examiner appointed by it are performed in Raleigh, Wake County, N. C. Code, 1931, sec. 1023, C. S., 249, and an indictment charging the individual members of the Commission and the Chief Bank Examiner with malfeasance, nonfeasance or misfeasance in the performance of their duties relating to State banks should be laid by indictment to be passed upon by the grand jury of Wake County, and where the indictment is passed upon by the grand jury in another county the defendants' plea in abatement is properly sustained, and the case should be dismissed.

6. Common Law A a—Common law prevailing before adoption of the Constitution is in force in this State unless modified by statute.

The common law prevailing before the adoption of our Constitution and which was not destructive of, repugnant to, or inconsistent with the freedom and independence of the State and which has not become obsolete is in full force in this State, C. S., 970, unless it has been repealed, abrogated, or modified by statute, but those parts of the common law which are embedded in our Constitution are not subject to repeal or modification by statute.

APPEAL by State from *Small, J.*, at December Term, 1931, of WAKE. Affirmed.

On 15 December, 1931, a grand jury in Buncombe County found and returned into the Superior Court a bill of indictment charging the defendants in three counts with certain violations of the criminal law.

In the first count it is charged that John Mitchell, Chief State Bank Examiner, holding office under appointment by the Corporation Commission, and the other defendants, acting members of the Corporation Commission, charged with the special duty of prohibiting banks and banking institutions in the State from continuing to do business and receive deposits of money while they were in an unsafe and unsound condition, unlawfully and wilfully failed, neglected, and refused, and wilfully conspired together to fail, neglect, and refuse to perform their duty, and conspired to permit and allow banks and banking institutions in the State to remain open for receiving deposits of money and transacting business, knowing that such banks and banking institutions were unsafe, unsound, and insolvent.

In the second count it is charged that the defendants, while occupying the respective offices named in the first count, and while charged with the duty of requiring banks and banking institutions to comply with the laws of the State, with particular reference to carrying on and continuing their business in a safe, sound, and solvent condition and requiring such as were unsafe, unsound, or insolvent to suspend business or to place themselves in a safe, sound, and solvent condition, wilfully and fraudulently permitted and allowed the Central Bank and Trust Company, a banking institution with its principal place of business in Asheville to remain open for the purpose of receiving deposits of money from the general public and transacting other business, while it was in an unsafe, unsound, and insolvent condition, and permitted, allowed, and encouraged such bank to receive deposits of money while insolvent, to the great loss of depositors.

In substantially similar terms the third count charges the defendants with wilfully and fraudulently permitting and allowing the Biltmore-Oteen Bank, a banking institution at Biltmore, to remain open for the purpose of receiving deposits and transacting business while it was insolvent, and permitted, allowed, and encouraged it to receive deposits of money when it was insolvent.

The defendants filed a plea in abatement, each averring for himself "that he ought not to be compelled to answer the said indictment because he says that Buncombe County is not the proper venue for the prosecution and trial of the offense or offenses charged in the said bill of indictment, because if the offense or offenses charged in the bill of indictment were committed, the same were committed in the county of Wake, in that the said bill of indictment charges the said defendants and each

of them with neglect of official duties, and with misfeasance, malfeasance and nonfeasance in the performance of official duties, and in that the seat of office and place fixed by statute for the performance of official duties, on the part of the defendants who are members of the Corporation Commission of North Carolina, is and was at all times referred to in said indictment at Raleigh, in the said county of Wake, and any acts of omission or commission, if any, on the part of the said defendants in the performance of their official duties, as charged in said bill of indictment, were performed and committed in the said county of Wake, and not elsewhere; and in that the said other named defendant, to wit: John Mitchell, Chief State Bank Examiner, at the times referred to in the indictment had his office and place of business and headquarters for the performance of his official duties at Raleigh, in said county of Wake, in accordance with the condition of his appointment to such position, and such acts of omission or commission, if any, on the part of said defendant with respect to the matters charged in said bill of indictment, were performed and committed in the said county of Wake, and not elsewhere."

At November Term, 1931, of the Superior Court of Buncombe County, his Honor, Cameron F. MacRae, special judge, presiding, the plea in abatement was sustained, the action was transferred to the Superior Court of Wake County, and the defendants were required to appear at an ensuing term in Wake County, and answer the charges preferred in the indictment.

On 18 December, 1931, the defendants filed the following motion in the Superior Court of Wake County: "The defendants respectfully show to the court that it appears from the original records in this action certified to this Court from the Superior Court of Buncombe County, that a plea in abatement to the indictment found in the Superior Court of Buncombe County, was filed in that court on the ground that the supposed offenses charged in said bill of indictment, if committed at all, were committed in Wake County, and that the grand jury of Buncombe County was without jurisdiction in the premises, and that the defendants prayed that the indictment be abated. The defendants further show to the court that it appears from the order entered in the Superior Court of Buncombe County upon the hearing of said plea in abatement that the court found 'that if the defendants are guilty of the acts charged in the bill of indictment, the acts were committed in Wake County and not in Buncombe County. It is, therefore, ordered and adjudged by the court that the plea in abatement be and the same is sustained.' The defendants, therefore, respectfully show and represent to this honorable court and aver that the force and effect of the action of the judge of the

Superior Court of Buncombe County in sustaining the plea in abatement filed in that court to the indictment there found, was to render null and void said indictment, and the defendants pray and move this honorable court to so hold and adjudge."

On the day this motion was made the defendants filed a demurrer to the indictment on the ground that the allegations and counts therein charge no crime or misdemeanor indictable under the laws of this State.

At the December Term, 1931, of Wake County, Judge Small gave judgment that the indictment found in Buncombe County abate and be declared null and void, and that the demurrer be sustained and the defendants discharged.

The State excepted and appealed.

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

Biggs & Broughton for defendants.

ADAMS, J. The Corporation Commission is a statutory court of record with all the powers of a court of general jurisdiction as to all subjects embraced in the chapter under which it is constituted. It consists of three commissioners elected by the qualified voters of the State. Its regular sessions are held in the city of Raleigh and it is open at all times for the transaction of business. It has general control of specified corporations; it constitutes the board of State tax commissioners; and at the time set out in the indictment it had the supervision of such banking institutions as were subject to the laws of the State, with authority to make rules for the government of such institutions and to appoint a bank examiner to investigate their affairs. The business of the commission is transacted at the capital of the State, excepting such business as may be done in special sessions elsewhere held "when in the judgment of the commission the convenience of all parties is best subserved and expense is thereby saved." North Carolina Code, 1931, sec. 1023 *et seq.*; C. S., 249 *et seq.* At the hearing in Buncombe County the court adjudged that the acts for which the defendants were indicted related to their official duties, and found as a fact that these acts were done in Wake County and not in Buncombe. It was to this situation that the plea in abatement was primarily addressed. The plea raises the question whether a grand jury in Buncombe County had jurisdiction or power to indict the defendants for alleged misfeasance, malfeasance, or nonfeasance in the county of Wake.

The Declaration of Rights, sec. 12, declares, "No person shall be put to answer any criminal charge . . . but by indictment, presentment or impeachment"; and the word "indictment" has been construed to

mean indictment by a grand jury as defined by the common law. *S. v. Barker,* 107 N. C., 913. What, then, was the territorial jurisdiction of a grand jury under the law of England?

With respect to the question presented the common-law doctrine was clearly defined. "The grand jury," said Blackstone, "are sworn to inquire only for the body of the county, *pro corpore comitatus;* and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament." 4 Com., 303. No less direct is Hawkins's Pleas of the Crown: "But of whatsoever nature an offense indicted may be, whether local or transitory, as seditions, words, or battery, etc., it seems to be agreed, that if upon not guilty pleaded it shall appear, that it was committed in a county different from that in which the indictment was found, the defendant shall be acquitted." Ch. 25, sec. 51. "At common law, the venue should always be laid in the county where the offense is committed, although the charge is in its nature transitory, as seditions, words, or battery; and it does not lie on the prisoner to disprove the commission of the offense in the county in which it is laid, but it is an essential ingredient in the evidence on the part of the prosecutor, to prove that it was committed within it." 1 Chitty on Criminal Law, 177. The substance of this summary has been referred to in a number of our decisions. *S. v. Lytle,* 117 N. C., 799; *S. v. Carter,* 126 N. C., 1011; *S. v. Oliver,* 186 N. C., 329.

The orderly sequence of these propositions is the question whether this principle of the common law prevails in the courts of this State. Before the adoption of our Constitution it was declared that all such parts of the common law as were theretofore in use within the State and were not destructive of, repugnant to, or inconsistent with the freedom and independence of the State and its form of government and not otherwise provided for, abrogated, repealed, or become obsolete, were in full force within the State. This statute is now in effect. C. S., 970. It is generally conceded that so much of the common law as is in force by virtue of this provision is subject to legislative control and may therefore be modified or repealed. But there are parts of the common law which are not subject to modification or repeal by the Legislature because they are inbedded in the Constitution.

The exercise of such control as it affects an indictment found by the grand jury of a county in which the offense was not committed is exemplified in the North Carolina Criminal Code of 1931, sections 4600 and 4606(b). The former confers upon the Superior Court of any county which adjoins the county in which the crime of lynching shall be committed jurisdiction over the crime and over the offender to the same

extent as if the crime had been committed in the bounds of the adjoining county. This statute, enacted in 1893, was declared constitutional in *S. v. Lewis,* 142 N. C., 626. The latter section provides that when a judge of the Superior Court shall remove an indictment from one county to another under section 4606(a), if the indictment is defective the grand jury of the county to which the removal is made shall have jurisdiction to find another bill for the same offense. These are the only statutes which in express terms give the grand jury jurisdiction to find a bill outside the county in which the offense was committed.

There is another statute which provides that in the prosecution of all offenses it shall be taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place unless the defendant shall make denial by a plea in abatement setting forth the proper county. If upon issue joined the matter is found for the defendant he must be held to answer the offense in the county which he avers is the proper venue. The statute suggests its necessity "because the boundaries of many counties are either undetermined or unknown, by reason whereof high offenses go unpunished." In *S. v. Mitchell,* 83 N. C., 674, it is said in reference to this act: "The mischief intended to be remedied by it was the difficulty encountered by the courts in effecting the conviction of persons who had violated the criminal law of the State where the offense was committed near the boundaries of counties which were undetermined or unknown. And it often happened that, where the boundaries were established and known, it was uncertain from the proof whether the offense was committed on the one or the other side of the line, and, in consequence of the uncertainty and the doubt arising from it, offenders went 'unwhipt of justice.' This was the evil intended to be remedied. It had reference to the violation of the laws of this State committed near the boundaries of counties."

When there is substantial ground to doubt whether a statute was meant to apply to particular facts the intention of the Legislature may generally be determined from a consideration of the purpose for which the act was passed. Black on Interpretation of Laws, sec. 33. It is held, also, that as a rule statutes are to be construed with reference to the common law in existence at the time of their enactment. *Kearney v. Vann,* 154 N. C., 311.

Section 4606 was evidently intended to provide relief in difficulties originating in doubt entertained in good faith as to the county in which the offense was committed, and should not be construed to modify the common law beyond the reasonable scope of its manifest purpose.

The facts pleaded in abatement challenged the jurisdiction of the Superior Court of Buncombe County for the reason that the grand jury

there was without jurisdiction to indict the defendants for a breach of the criminal law averred to have been committed in the county of Wake. At common law the grand jury of the county in which the bill was found had no jurisdiction of the indictment, and we have no statute enacted by the General Assembly except as heretofore noted, "no act of parliament," conferring such jurisdiction. Whether such a statute, if enacted, would be sustained as an exercise of legislative power or declared invalid because in conflict with the organic law is a matter outside the scope of this discussion.

There was no error in sustaining the plea in abatement. The effect of the judgment is to terminate any further action or prosecution on the indictment found in Buncombe County and to discharge the defendants. *S. v. Carter, supra; S. v. Oliver, supra.*

It is not necessary to consider the demurrer. The judgment sustaining the plea, declaring the indictment void, and discharging the defendants is

Affirmed.

J. O. PLOTT COMPANY v. H. K. FERGUSON COMPANY, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, NICHOLS CONTRACTING COMPANY, M. W. LONDON AND E. N. SCRUGGS.

(Filed 30 March, 1932.)

Principal and Surety B a—Local statute providing that provisions of C. S., 2445, should be read into private construction bonds is invalid.

A local public law applicable to one county only which provides that where it is agreed that a contractor for private construction should give bond, the bond should be written with the same provisions for the protection of laborers and materialmen as are required in bonds for municipal construction under C. S., 2445, and that such provisions should be conclusively presumed to be written therein and should be given with a corporate surety licensed to do business in this State, is *Held* unconstitutional and void, it being in contravention of Art. I, secs. 7 and 31 of our State Constitution prohibiting exclusive emoluments or privileges except in consideration of public service and prohibiting monopolies, the statute failing to operate uniformly and equally in giving special privilege to the residents of the particular county and imposing heavier burdens on certain sureties. C. S., 2445 is constitutional being an exercise of the police power and applying equally to all governmental agencies of the State.

APPEAL by Fidelity and Deposit Company of Maryland, from *Stack, J.*, at September Term, 1931, of BUNCOMBE. Reversed.

The findings of fact and judgment of Guy Weaver, judge of the General County Court, of Buncombe County, N. C., is as follows:

"1. That on and about 27 October, 1928, the H. K. Ferguson Company, as general contractor, was engaged in the construction of the manufacturing plant of the American Enka Corporation, at Enka, in Buncombe County.

2. That the H. K. Ferguson Company and the Nichols Contracting Company entered into a contract wherein and whereby a part of the excavation construction work of the said plant of the Enka Corporation was sublet to Nichols Contracting Company.

3. That the Nichols Contracting Company engaged as subcontractors on part of the construction work so sublet to it, the defendant, M. W. London, operating and doing business under the firm name and style of M. W. London and Son.

4. That the plaintiff, J. O. Plott Company, furnished to M. W. London and Son certain goods, wares, merchandise and supplies which were used by them, their employees, horses and mules, in the excavation work of the said Enka Plant; and that there is a balance due and owing to the plaintiff on account thereof the sum of $651.50 and interest on said sum from 1 January, 1929.

5. That the H. K. Ferguson Company required and the Nichols Company furnished, a bond indemnifying the H. K. Ferguson Company against loss in connection with the work sublet by the said H. K. Ferguson Company to the Nichols Contracting Company and the defendant Fidelity and Deposit Company of Maryland executed said bond as surety.

6. That the General Assembly of North Carolina, at its session of 1927, passed a local or private act, relating to Buncombe County, designated 'chapter 613,' section 1 of which is in the following words: 'Section 1. That it shall not be deemed compulsory for the owner to require a construction contract bond of the contractor in the construction of private buildings or private projects, but should such owner require such bond of the contractor, and the contractor agree to and give the same, said bond shall contain a provision to save the owner harmless and must also contain the same provisions as required by law to be incorporated in contract or construction bonds as in the case of municipal or other public improvements relative to labor performed and material furnished, which conditions or provisions are conclusively presumed to be written into every such bond for all purposes, and said bond when so required and given shall be executed with some corporation licensed to do business in North Carolina, as surety thereon.' Which said statute was introduced in evidence.

7. That the plaintiff upon the foregoing facts moved for judgment against the defendant, M. W. London, and Fidelity and Deposit Company of Maryland.

8. The court being of opinion that the plaintiff was entitled to judgment against M. W. London, trading and doing business as M. W. London and Son, upon motion of J. H. Cathey, attorney for plaintiff, ordered and adjudged that the plaintiff have and recover of the defendant, M. W. London and Son, the sum of $651.50 with interest thereon from 1 January, 1929, until paid, and the costs of this action to be taxed by the clerk.

9. The court being of the further opinion that the bond aforesaid is one of indemnity in favor of the H. K. Ferguson Company, and it not appearing in the evidence that the H. K. Ferguson Company has suffered any loss on account of the work in connection with the contract between it and the Nichols Contracting Company, that the plaintiff cannot recover on that account, and it is thereupon adjudged that the plaintiff take nothing on that account against the defendant herein.

10. The court being of the further opinion that section 1, of chapter 613, of the Public-Local Laws of North Carolina, of the Legislative Session of 1927 (*applicable only to Buncombe County*), is invalid, for the reason that said statute unlawfully interferes with the freedom of contract guaranteed to all citizens alike under the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States, and is invalid in that it attempts to confer special privileges and likewise burdens upon property owners in Buncombe County, contrary to the provisions of section 7, Article I, of the Constitution of North Carolina.

It is thereupon, considered, ordered and adjudged, that the plaintiff take nothing by its said action against the defendant, the Fidelity and Deposit Company of Maryland."

The plaintiff excepted and assigned error to the court's refusal to enter judgment against the defendant, Fidelity and Deposit Company of Maryland, and appealed to the Superior Court of Buncombe County, N. C.

The judgment of the Superior Court is as follows:

"This cause coming on to be heard upon appeal to the Superior Court of Buncombe County, from the General County Court, before his Honor, A. M. Stack, judge presiding, the court sustained the findings of fact and the judgment of the court as set out in paragraphs numbered in said judgment: 1, 2, 3, 4, 5, 6, 7 and 8.

The court finds that the bond mentioned in the above entitled action is one of indemnity, in favor of the H. K. Ferguson Company, and that it does not appear in evidence that the H. K. Ferguson Company has suffered any loss on account of the work in connection with the contract between it and the Nichols Contracting Company, as set forth in para-

graph nine of the judgment of the General County Court; but the court is of the opinion that section 1, chapter 613 of the Public-Local Laws of North Carolina, of the Legislative Session of 1927, is a valid statute, and upon the execution and delivery of said bond of indemnity there was written into said bond by virtue of said statute the provision that the principal and surety, the Fidelity and Deposit Company of Maryland, contracted and pledged themselves to pay for all labor and materials entering into the work covered by the contract between said H. K. Ferguson Company and the Nichols Contracting Company, and the subcontract between the Nichols Contracting Company and M. W. London and Son, and that said section 1 of said chapter 613 of the Public-Local Laws of North Carolina, of the Legislative Session of 1927, is not invalid by reason of any unlawful interference with the freedom to contract guaranteed to all citizens alike under the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States, and is not invalid in that it attempts to confer special privileges and burdens upon property owners in Buncombe County contrary to the provisions of section 7, Article I, of the Constitution of North Carolina.

It is, therefore, considered, ordered and adjudged that to the extent herein set forth the judgment of the General County Court of Buncombe County be set aside, and that the plaintiff have and recover of the defendant, the Fidelity and Deposit Company of Maryland, the sum of six hundred and fifty-one and 50/100 ($651.50) dollars, with interest thereon from 1 January, 1929, until paid, and the costs of this action to be taxed by the clerk."

The defendant, the Fidelity and Deposit Company of Maryland, excepted, assigned error and appealed to the Supreme Court, "to the finding of the court below and the adjudication thereon that the bond of indemnity given by the defendant, the Fidelity and Deposit Company of Maryland, to the H. K. Ferguson Company, had written in it by force of law the provisions of section 1, chapter 613, of the Public-Local Laws of North Carolina of the Legislative Session of 1927."

John H. Cathey for plaintiff.

S. G. Bernard for defendant Fidelity and Deposit Company of Maryland.

CLARKSON, J. Is section 1 of chapter 613, Public-Local Laws 1927, constitutional? We think not. The judge of the General County Court of Buncombe County, N. C., decided the act was unconstitutional, on appeal the judge of the Superior Court held the act constitutional. The

caption of the act reads: "An act relating to private construction bonds in Buncombe County." The act is fully set out in finding of fact No. 6, *supra*.

C. S., 2445 and amendments, in part, are as follows: "Every county, city, town or other municipal corporation, which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work (when the contract price exceeds five hundred dollars) *to execute bond with one or more solvent sureties before beginning any work under said contract* (italics ours), payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done on and material and supplies furnished for the said work, under a contract or agreement made directly with the principal contractor or subcontractor. . . . Every bond given by any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section, shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given. Only one action or suit may be brought in the county in which the building, road or street is located, and not elsewhere. Laws 1913, chap. 150, sec. 2; 1915, chap. 191, sec. 1; 1923, chap. 100; 1927, chap. 151." N. C. Code of 1931, Anno. (Michie), p. 909.

It may be noted that the Buncombe County act is confined to "corporation licensed to do business in North Carolina, as surety thereon," the general State act "with one or more solvent sureties."

Under the above general State law, irrespective of the terms of the contract of indemnity, the laborers and materialmen on public buildings, etc., can sue on the contractor's bond to the extent of the penalty of the bond. The general statute is written in and becomes a part of the surety bond. *Electric Co. v. Deposit Co.*, 191 N. C., 653; *Supply Co. v. Plumbing Co.*, 195 N. C., 629.

We think this local or private Buncombe County act is in contravention of Art. I, sec. 7, of the N. C. Constitution: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service." And section 31: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."

Adams, J., for the Court, has well stated the purpose of this provision of the Constitution, Art. I, sec. 7, in *S. v. Fowler*, 193 N. C., at p. 292, as follows: "This provision, we think, is a guaranty that every valid enactment of a general law applicable to the whole State shall operate

uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions."

Under provisions of C. S., 3410, applying to all counties of the State, a violation of the prohibition law, upon conviction, is punishable in all counties of the State by fine or imprisonment, within the discretion of the trial judge, and a statute, applying only to five counties, making the punishment a fine only in certain instances, is in violation of our Constitution, and void. Const., Art. I, sec. 7. *S. v. Fowler, supra.*

Cooley's Const. Lim., Vol. 2 (8th ed.), at p. 813, says: "Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the Legislature designed to depart as little as possible from this fundamental maxim of government."

The passage of laws not of uniform operation, the granting of special privilege and the like are ordinarily contrary to our constitutional limitations. Equal protection of the law and the protection of equal laws are fundamental.

"The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. *Holden v. James*, 11 Mass., 396; *Davison v. Johonnot*, 7 Met., 388. . . . The general exemption laws cannot be verified for particular cases or localities. *Bull v. Conroe*, 13 Wis., 233, 244. The legislature, when forbidden to grant divorces, cannot pass special acts authorizing the courts to grant divorces in particular cases for causes not recognized in the general law." *Teft v. Teft*, 3 Mich., 67; *Simonds v. Simonds*, 103 Mass., 572; Cooley, *supra*, note at p. 809. Const. of N. C., Art. II, sec. 10; *Cooke v. Cooke*, 164 N. C., 272.

In 6 R. C. L., part sec. 437, at p. 441-2, the law is thus stated: "Due process of law and the equivalent phrase, law of the land, have frequently been defined to mean a general and public law operating equally on all persons in like circumstances, and not a partial or private law affecting the rights of a particular individual or class of individuals, in a way in which the same rights of other persons are not affected."

Cooley's Const. Lim., Vol. 1, note, under Powers Legislative Department May Exercise, p. 261: "Gambling cannot be made a crime everywhere except 'within the limits or enclosure of a regular race course.' *S. v. Walsh*, 136 Mo., 400, 37 S. W., 1112, 35 L. R. A., 231; see, also, *S. v. Elizabeth*, 56 N. J. L., 28 Atl., 51, 23 L. R. A., 525."

The above decisions in other jurisdictions are in accord with the well settled principle set forth in the *Fowler case, supra.* Our Court has frequently passed upon similar controversies.

In *Simonton v. Lanier,* 71 N. C., p. 503, it was contended that the charter of the Bank of Statesville was given the special privilege to lend money at a higher rate than the general State law. Referring to Article I, sections 7 and 31, *supra, Bynum, J.,* said: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government." *Power Co. v. Elizabeth City,* 188 N. C., at p. 288.

In *Staton v. R. R.,* 111 N. C., 278, it was held that the authority granted to a corporation by its charter to construct a railroad did not thereby confer upon it an immunity from liability for damages to others in respect of their adjacent lands, when, under the same circumstances, a private individual would be liable. It was declared by *Shepherd, C. J.,* that such immunity expressly granted by the Legislature, would be in conflict with the Magna Carta and the Constitution. *R. R. v. Alsbrook,* 110 N. C., 137; *Jenkins v. R. R.,* 110 N. C., 438.

It was said in *Rowland v. B. & L. Asso.,* 116 N. C., at p. 878, that "Laws must be consistent with each other and uniform in their bearing upon all the people of the State." In that case it was held that the Legislature was without authority under the provisions of the Constitution, to alter or change the general law fixing the rate of interest at 6 per cent, so as to allow building and loan associations, under the guise of "dues," "fees," etc., to charge more than the rate of interest allowed by law.

It was held in *Motley v. Warehouse,* 122 N. C., 347: A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional and void under Const., Art. I, sec. 7.

Prior to the amendment of 1923 to C. S., 2445, *supra,* the contrary rule prevailed that the contractor's bond for the erection of a public building, etc., did not create a liability on the surety to pay for the labor done and materials furnished for the erection of the buildings, etc., but only to indemnify the municipality against loss; there was no presumption that the bond incorporated this provision, and no liability to the surety was thereunder created. *McCausland v. Construction Co.,* 172 N. C., 708; *Brick Co. v. Gentry,* 191 N. C., 636; *Trust Co. v. Construction Co.,* 191 N. C., 664.

As was said in *Supply Co. v. Plumbing Co., supra,* at p. 635, the purpose of the 1923 amendment, *supra,* was to meet the decisions in previous cases "so as to protect the laborers and materialmen, where the bond does not make provisions to pay them."

But C. S., 2445, is a general act, limited to counties, cities, towns or other municipal corporations, the purpose being, as was stated in *Brick Co. v. Gentry, supra,* the exercise of a sound public policy. There is not, so far as we have been able to ascertain, any such statute applying to the construction contract bond of the contractor, in the construction of private buildings or private projects, but the General Assembly of North Carolina of 1927, passed a Local or Private Act, Public-Local Laws 1927, chap. 613, relating only to Buncombe County, which made C. S., 2445 and amendments, applicable to private buildings or private projects in Buncombe County, N. C., and applicable only to "some corporations licensed to do business in North Carolina as surety thereon."

It is now sought to prescribe a greater measure of liability of a corporation surety upon a bond of indemnity than that set forth in a private contract between the two parties, by virtue of the provisions of this local or private statute applicable only to Buncombe County, and it is contended that it is incorporated into this private contract of corporation suretyship to the same degree and to the same extent as if it were a *municipality contract.* We cannot so hold.

While it is true that the statute does not make it compulsory for citizens of Buncombe County to require corporation surety bonds from contractors, it does fix liability upon certain corporation sureties, when they do furnish bonds, for the payment of those who perform labor and furnish material used in the construction of private buildings and private projects, and those doing labor or furnishing material thereon, irrespective of the terms of the contract of indemnity. This extends to the citizens of Buncombe County a right and privilege not enjoyed by citizens of the other 99 counties in the State. It imposes upon certain corporation sureties an obligation not imposed in the other 99 counties of the State. Nor is the act applicable to municipal corporations, which "stand upon peculiar grounds from the fact that those corporations are agencies of government, and as such are subject to complete legislative control." Cooley's Constitutional Limitations (8th ed.), 802; *Broadfoot v. Fayetteville,* 121 N. C., 418.

As was said in *S. v. Fowler, supra,* at p. 292, this principle of uniformity, required by our own State Constitution and by the Fourteenth Amendment to the Federal Constitution, "does not interfere with the police power of the State, the object of which is to promote the health, peace, morals and good order of the people, to increase the industries of

the State, to develop its resources and to add to its wealth and prosperity." In *Gunter v. Sanford*, 186 N. C., at p. 455, we find: "A legislative enactment will not be construed as repugnant to the Constitution unless its invalidity is 'clear, complete and unmistakable,' or shown beyond a reasonable doubt."

Mindful of the above admonition, we have considered the matter with care, and we think that this Buncombe County Act is unconstitutional—a special privilege given to the residents of Buncombe County which is not enjoyed by the other 99 counties in the State. It imposes an obligation on certain corporation sureties not imposed in the other 99 counties of the State, and not imposed on individual sureties. For the reasons given, the judgment below is

Reversed.

R. C. PATRICK, TRUSTEE IN BANKRUPTCY OF PAUL C. BEATTY, BANKRUPT, v. VENNIE H. BEATTY, EXECUTRIX AND TRUSTEE OF THE LAST WILL AND TESTAMENT OF R. H. BEATTY, DECEASED, ET AL.

(Filed 30 March, 1932.)

1. Statutes B a—Where statute prescribes its application by clauses connected by disjunctive it applies to case falling in either clause.

Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive, the application of the statute is not limited to cases falling within both clauses, but it will apply to cases falling within either one of them.

2. Execution B c—Execution will not lie against interest of cestui que trust in property held by trustee in active trust.

The interest of a *cestui que trust* in real property held by a trustee as an active trust, requiring the trustee to perform certain duties in respect thereto until the happening of a certain event, and where the *cestui que trust* may not call for a conveyance of the legal title, is not subject to execution in this State. C. S., 677, subsecs. 3, 4.

3. Wills F c—In this case held: beneficiary took vested interest in lands devised which he could convey by deed.

Where a will devises all the testator's property to a trustee to be held by her until his youngest child should attain the age of twenty-one, and directs that the property should then be divided one-third to each of his two children in fee and one-third to his wife for life with remainder over to the children and another devisee: *Held*, the testator's children take a vested interest in the lands devised which they could convey by their deed under our rule that any interest in land may be conveyed including contingent interests and executory devises as distinguished from mere rights, expectancies or possibilities.

PATRICK *v.* BEATTY.

4. Bankruptcy C b—Held: beneficiary under will took vested interest in land which passed to his trustee in bankruptcy.

By the terms of the Bankruptcy Act the trustee in bankruptcy is vested with the title of the bankrupt to property which prior to the filing of the petition the bankrupt could have conveyed by any means or which might have been levied upon and sold under judicial process, and where, by the terms of a will, lands are devised to a trustee to be held as an active trust until the happening of a certain event and then divided among certain beneficiaries including the bankrupt: *Held*, although execution would not lie against the interest taken by the bankrupt under the will, the bankrupt acquired an interest thereunder which he could have conveyed, and under the terms of the statute the title to such interest passed to his trustee in bankruptcy, whether his interest was such as could have been conveyed being determined by the laws of this State.

APPEAL by plaintiff and by defendant Vennie H. Beatty, executrix and trustee, from *Schenck, J.*, at October Term, 1931, of GASTON.

Controversy without action on case agreed. C. S., 626.

R. H. Beatty died in 1928, leaving a will which has been duly admitted to probate in Gaston County. The will is as follows:

"North Carolina—Gaston County.

I, R. H. Beatty, of the county of Gaston and State of North Carolina, being of sound mind, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament.

Article One: I direct the payment of all my just debts and funeral expenses.

Article Two: I hereby give, devise and bequeath all the rest of my estate, real, personal or mixed, wheresoever situated, whereof I may be seized or possessed, or to which I may be in any manner entitled, or to which I may be interested at the time of my death, unto my executrix and trustee hereinafter named, and to her heirs and assigns forever.

In trust, nevertheless, as follows:

Article Three: I will and direct that my said executrix and trustee shall manage, control and rent my real estate to the best advantage paying all building and loan dues thereon, as well as all taxes and assessments thereon, and after the payment of said charges, I direct that the remaining moneys be deposited in the bank, and to be held until a division is made among the devisees as hereinafter provided.

Article Four: I will and direct that my mercantile business shall be continued by my said executrix and trustee, and that my family shall receive their support from said business, and that two-thirds of the annual yearly profits shall be used by my wife and son Jennings and one-third to my son Paul.

Article Five: It is my will and desire that upon the payment of my life insurance that one-tenth of the same shall be placed in a separate account in the bank on interest, and that when a division of my estate is made among my wife and children, that the said one-tenth of my insurance shall be donated to my church to be used by it in erecting a brick church as a memorial to me if it should see fit to accept the same upon the said condition; and I would like for my family to increase this fund from the inheritance if they see fit to do so.

Article Six: I will and direct that the remaining insurance money be deposited in the bank on interest, and there to remain until a division shall be made among my sons and my beloved wife.

Article Seven: When my son Jennings reaches twenty-one years of age, it is my will and desire, and I so direct that my estate be divided among my said sons and my beloved wife, the personal property to be equally divided among all; and to my sons Paul and Jennings and their heirs in fee simple I give and devise one-third each of my real property, and to my beloved wife I give and devise the remaining third during her natural life, and then one-third of her estate to my son Paul and his heirs in fee simple, one-third to my son Jennings and his heirs in fee simple and one-third to First Wesleyan Methodist Church, Gastonia, N. C., its successors and assigns in fee simple.

Article Eight: I hereby constitute and appoint my beloved wife, Vennie, my lawful executrix and trustee to all intents and purposes to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

In witness whereof, I the said R. H. Beatty, do hereunto set my hand and seal this 17 October, 1928. R. H. Beatty. (Seal.)"

Vennie Beatty is the duly qualified and acting executrix and trustee under the will. Jennings Beatty is a minor, 17 years of age, and Vennie Beatty is his guardian. Charles A. Ramsay, J. L. A. Rhyne, and B. M. Gibson are trustees of First Wesleyan Methodist Church of Gastonia. When the testator died Paul C. Beatty was a minor, 20 years of age, and was adjudicated a bankrupt on 2 January, 1931, by the United States District Court for the Western District of North Carolina, and was discharged as a bankrupt on 10 June, 1931, R. C. Patrick was appointed his trustee on 15 January, 1931. The testator died seized of real estate situated in Gastonia.

It was adjudged upon the agreed facts that the legal and equitable title to the devised land is vested in Vennie H. Beatty, trustee and execu-

trix; that neither the legal nor the equitable title nor the right of possession will vest in the beneficiaries until Jennings Beatty becomes twenty-one years of age; and that the plaintiff has neither the legal nor equitable title to the interest devised to Paul C. Beatty.

The plaintiff and Vennie H. Beatty excepted and appealed.

Paul E. Monroe and A. C. Jones for appellants.
W. H. Sanders for Paul C. Beatty, appellee.

ADAMS, J. The controversy between the parties originates in their diverse constructions of the second and seventh items of the will. The plaintiff says that upon the death of the devisor, the trustee, Vennie Beatty, acquired the title and the right of possession to a one-third undivided interest in the devised real property for the benefit of Paul C. Beatty; that Paul C. Beatty is the equitable owner; and that the plaintiff has succeeded to his title as his trustee in bankruptcy. Vennie Beatty takes substantially the same position but insists that the right of division and possession must await the majority of Jennings Beatty, while Jennings contends that he has a present right to call for a division of the property. The trustees of the First Wesleyan Methodist Church claim a present right to demand partition. Paul C. Beatty insists that the equitable title and right of possession do not vest in him until Jennings Beatty attains his majority and that his trustee in bankruptcy has no right or title to his interest.

The trustee of the estate of a bankrupt is vested by operation of law with the title of the bankrupt to . . . property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. 9 Remington on Bankruptcy, 852, sec. 70; 11 U. S. C. A., sec. 110. As the clause is disjunctive we may first inquire whether the bankrupt's interest in the devised land is subject to sale under such judicial process.

Prior to the act of 1812 no equity could be sold under execution. The first section of this act empowered the sheriff or other officer to whom an execution on a judgment was directed to sell lands and tenements and goods and chattels held in trust for the judgment debtor; the second section authorized the sale of the equity of redemption in "all lands, tenements, rents, or other hereditaments . . . pledged or mortgaged." Laws of North Carolina, 1812; 1 Rev. Sts., 266, secs. 4, 5. These provisions in modified form are now in effect. Not only equitable and legal rights of redemption in personal and real property pledged or mortgaged by the judgment debtor may be sold under execution, but real property or goods and chattels of which any person is seized or possessed in trust for him. C. S., 677, subsecs. 3, 4.

In the case before us the interest of the bankrupt is not an equitable or legal right of redemption; the question is whether the interest of the *cestui que trust* in the real property held by the trustee is subject to sale under execution.

In the second item of the will the testator devised to Vennie Beatty, his executrix and trustee, and to her heirs all his property except such as was necessary to pay his debts and funeral expenses. He directed the trustee to hold the property in trust: to manage, control, and rent the real estate; to pay taxes, assessments, and dues; and to deposit the remaining moneys in a bank to be held until a division of the property could be made. According to the direction in item seven the estate is to be divided when Jennings Beatty reaches the age of twenty-one years.

It was the purpose of the Statute of Uses, 27 Henry VIII, to transfer the use into possession by providing that whenever one person was seized of an estate for the use of another, the *cestui que use* should be deemed to be seized of the same estate in the land that he had in the use. Under these circumstances it was not necessary for him to appeal to the conscience of the feoffee or to resort to a court of chancery. But there were nonexecuted uses which could not be enforced in a court of law, and the courts of chancery, for the purpose of compelling performance, took jurisdiction of the uses which were not executed by the statute and developed the doctrine of trusts. *Tyndall v. Tyndall*, 186 N. C., 272. The statute executed such uses as were passive; not such as were active. If the feoffee to uses had any active duty to perform the use was active and was not executed by the statute. *Lummus v. Davidson*, 160 N. C., 487. So as to trusts, which are active or passive. The distinction between the two is stated in Perry on Trusts (7 ed.), sec. 18: "Trusts are divided into simple and special trusts. A simple trust is a simple conveyance of property to one upon trust for another, without further specifications or directions. In such case the law regulates the trust, and the *cestui que trust* has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as are necessary. A special trust is where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent, but he has active duties to perform, as when an estate is given to a person to sell, and from the proceeds to pay the debts of the settlor."

Lewin says that in simple or passive trusts the *cestui que trust* has *jus habendi*, or the right to be put into actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs, but if the trust is special or active the trustee is called upon to exert himself actively in the execution of the settler's intention. Lewin on Trusts, sec. 18.

The distinction is clearly marked in our decisions, as may be observed by reference to *McKenzie v. Sumner,* 114 N. C., 425, which presents the case of a passive trust and to *Cole v. Bank,* 186 N. C., 514, which deals with a trust that is active.

A *cestui que trust's* interest in real property held by a trustee as an active trust may not be sold in this State under judicial process. The question arose in *Harrison v. Battle,* 16 N. C., 537, in which the Court held that the trust described in the first section of the act of 1812 (C. S., 677, subsec. 4), "is a pure and unmixed one"—*i. e.,* a passive trust. This construction had previously been announced in *Brown v. Graves,* 11 N. C., 342 and *Gillis v. McKay,* 15 N. C., 172; and in the later case of *Battle v. Petway,* 27 N. C., 576, it was said: "Now, the act of 1812 did not mean to change the nature of trusts, the relation between the trustee and *cestui que trust,* or the rights of the latter against the former. The sole purpose of it was to render the interest of the *cestui que trust* liable at law, as it was before in equity, for the debts of the *cestui que trust* in certain cases, by transferring by a sale on execution against the *cestui que trust* the legal estate of the trustee, as well as the trust estate of the debtor. It is the necessary construction of such a provision, that it was not intended to embrace any such cases as those just adverted to, in which the trustee could not voluntarily convey to the debtor without incurring a breach of trust to other persons, with whose interests he is also charged. As was said in *Gillis v. McKay,* 15 N. C., 172, the principle is that the legal estate is not to be divested out of the trustee, unless it may be done without affecting any rightful purpose for which it was created; and, therefore, that if others had an equity in the same property, that is, in the debtor's particular share, the act did not operate on it."

The principle underlying the decisions is set forth in *Tally v. Reid,* 72 N. C., 336: "The act of 1812 provides that where A. holds land in trust for B., the interest of B. may be sold under an execution against him. And the purchase of such equity shall draw to it the legal estate which was in A. So that the purchaser got the whole title, legal and equitable. And the trustee A. had no more to do with it. It was just the same as if A., the trustee, had, by deed, passed the legal title to B., and then it had been sold under execution against B., which would of course have passed the whole title, the land itself. It also follows that if B's equity was such as that he had no right to call upon A. for the legal title, as if B. had to hold the legal title to perform some other trust, then B's equity could not be sold, because the sale of B's right could not draw to it the legal estate out of A., which B. himself had no right to call for. And so the sale could not pass both the legal and equitable

estate, the land itself, to the purchaser, as the statute required. And so, it had to be held, that while a pure simple trust could be sold under execution, yet a mixed trust could not be. For if the purchaser of a mixed trust sued the trustee for the legal title, the land itself, the trustee could defend by saying, I am obliged to hold the legal title in order to perform another trust."

The discussion is pursued and the doctrine is considered from various angles in subsequent decisions, including *Hinsdale v. Thornton*, 75 N. C., 382; *Love v. Smathers*, 82 N. C., 370; *Lummus v. Davidson, supra; Everett v. Raby*, 104 N. C., 480; *Gorrell v. Alspaugh*, 120 N. C., 362; *Rouse v. Rouse*, 167 N. C., 208; *Cole v. Bank, supra.*

In the pending case the trustee is charged with the performance of particular duties which remain obligatory until the younger brother attains the age of twenty-one years. The trust is active: the trustee must retain the title and control the real property in order to execute the trust imposed upon her under the will. *Rouse v. Rouse, supra.* It follows that the bankrupt's estate is not subject to sale under judicial process.

Since the property devised to the bankrupt was not subject to sale under execution, the remaining question is whether the bankrupt could by any means have transferred it before the adjudication. If the property could have been transferred it is immaterial whether or not it could have been levied upon and sold under judicial process. The alternative "or" shows a statutory declaration that there may be property which cannot be sold under judicial process and may yet be transferred for the benefit of creditors. *Fisher v. Cushman*, 103 Fed., 860; *Page v. Edmunds*, 187 U. S., 596, 47 L. Ed., 318. Whether the property is such as could have been transferred must be determined by the law of this State. *In re Berry*, 247 Fed., 700.

The quantity and character of the estate devised to the bankrupt is the criterion by which we may determine whether his interest could have been transferred by him. After vesting the trustee with the legal estate in the second item of the will, the devisor provided in the seventh item that the property should be partitioned at a fixed date and immediately made the following disposition of the land: "To my sons Paul and Jennings and their heirs in fee simple I give and devise one-third each of my real property, and to my beloved wife I give and devise the remaining third during her natural life, and then one-third of her estate to my son Paul and his heirs in fee simple, one-third to my son Jennings and his heirs in fee simple and one-third to First Wesleyan Methodist Church, Gastonia, N. C., its successors and assigns in fee simple." The effect of this clause, taken in connection with the second article, is to give to the widow and the two sons a vested interest in the

land. An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment. 40 Cyc., 1648.

As a rule any interest in land may be conveyed by deed. In some jurisdictions there are exceptions as to contingent interests; but with us contingent interests and executory devises, distinguishable from mere rights, expectancies, and possibilities, may be transferred. *Watson v. Smith*, 110 N. C., 6; *Kornegay v. Miller*, 137 N. C., 659; *Smith v. Moore*, 142 N. C., 277, 299. A *fortiori* may a vested interest in real estate be regarded as the subject-matter of a conveyance. "If the interest actually is a vested interest it passes to the trustee, as, for instance, vested remainders and inheritances, legacies and devises, if the death of the ancestor or testator occurs before the bankruptcy of the heir, legatee or devisee." 3 Remington on Bankruptcy, sec. 1201.

Under the terms of the will the bankrupt acquired a vested interest in an undivided one-third of the real estate with right of enjoyment at the period fixed for the partition of the property, and a vested remainder in a one-ninth undivided interest. *Power Co. v. Haywood*, 186 N. C., 313; *Witty v. Witty*, 184 N. C., 375. His interest could have been transferred and by virtue of the act passed to his trustee, subject to the terms of the second article in the will.

We have considered only such questions as are included in the exceptions to the judgment.

Error.

LILLIAN STACK v. A. M. STACK, JR., MARY M. STACK, E. B. STACK, IONE M. STACK, T. W. HUEY, ROSA G. HUEY, GILMER JOYCE, ALICE L. JOYCE, PATTIE LEE STACK, A. M. STACK, JR., AND E. B. STACK AS TESTAMENTARY GUARDIANS OF WARREN STACK AND FRANCES STACK; WARREN STACK, FRANCES STACK, W. S. BLAKENEY, EXECUTOR OF THE ESTATE OF J. E. STACK; W. S. BLAKENEY AND A. M. STACK, SR., AS TRUSTEES IN A CERTAIN DEED OF TRUST RECORDED IN BOOK OF DEEDS 69, PAGE 297, THE NORTH CAROLINA CORPORATION COMMISSION AS RECEIVER OF THE BANK OF UNION; JOHN MITCHELL AS CHIEF LIQUIDATING AGENT OF THE BANK OF UNION, AND W. M. YORK AS LIQUIDATING AGENT OF THE BANK OF UNION.

(Filed 30 March, 1932.)

1. Bills and Notes G a—In this case held: parol evidence was admissible to show agreement for mode of payment of notes.

Where a father conveys his lands to certain of his children who execute notes payable to a bank secured by a deed of trust on the lands in which the president of the bank is trustee, and the proceeds of the notes are used to reduce the father's indebtedness at the bank in order to bring it

within the amount the bank could loan to one individual, in an action on the notes: *Held*, parol evidence is admissible to show that at the time of the execution of the notes it was agreed that they should be paid out of the proceeds of the land, it appearing that the children were acting solely for the benefit of their father in the execution of the notes and that they received no consideration therefor and had no equitable interest in the lands, and that the whole transaction was in effect an indirect mortgage by the father negotiated by the president of the bank for the protection of the bank and the exclusive benefit of the father.

2. Dower A b—In this case held: husband died seized of beneficial interest in lands and widow was entitled to dower therein.

Where a father deeds lands to his children who in turn mortgage the property, and the proceeds of the mortgage are used to pay an individual debt of the father, and during his life he continues to manage and control the lands and after his death his executor does so, and it appears that the whole transaction was in effect an indirect mortgage on the property by the father and that the children received no consideration and acquired no beneficial interest in the lands: *Held*, the sole beneficial interest in the lands was in the father, and upon his death his widow is entitled to her dower rights in the lands. C. S., 4100.

3. Evidence J a—Where entire contract is not written the unwritten part may be shown by parol which does not contradict written part.

While parol evidence may not be received in evidence to add to, vary or contradict the written part of an instrument, where the entire contract is not reduced to writing the unwritten part may be shown by parol evidence if such evidence does not contradict the written terms of the agreement; in this case parol evidence of an agreement for a particular mode of payment of notes is held admissible as between the original parties.

APPEAL by defendant, Gurney P. Hood, Commissioner of Banks of the State of North Carolina, *ex rel.* the Bank of Union, from *Finley, J.*, and a jury, at August Term, 1931, of UNION. No error.

On 8 May, 1931, an order was signed substituting Gurney P. Hood, Commissioner of Banks for John Mitchell, Chief State Bank Examiner, and W. M. York as liquidating agent of the Bank of Union, as party defendant. Public Laws 1931, chap. 243, sections 3 and 4.

W. S. Blakeney was president of the Bank of Union, brother-in-law of J. E. Stack and executor of his will. J. E. Stack died 11 May, 1929, leaving plaintiff his widow and the following children, heirs at law: A. M. Stack, Jr., Rosa G. Huey, Alice L. Joyce, E. B. Stack, Warren Stack, Jr., and Frances Stack, the latter two being minors. Upon the evidence and the charge of the court, the jury answered the issues submitted to them, as follows:

"1. Was the deed by J. E. Stack and wife to E. B. Stack, Amos M. Stack, Jr., Alice Joyce and Rosa Huey, dated 8 June, 1927, conveying the Davis-Williams Store property, and the deed of trust by said gran-

tees to W. S. Blakeney, trustee, of the same date and on the same property, executed for the purpose of enabling J. E. Stack to secure a further loan from the said Bank of Union to enable said bank to get real estate security for such loan, as alleged in the pleadings? Answer: Yes.

2. If so, did E. B. Stack, Amos M. Stack, Jr., Alice Joyce and Rosa Huey, at the instance of the Bank of Union, through its president, take title to said property and execute the deed of trust thereon to W. S. Blakeney, trustee, for $21,240, as an accommodation to J. E. Stack, their father, and for the benefit of said bank, without any consideration or benefit to them, as alleged in the pleadings? Answer: Yes.

3. If so, was said conveyance in effect and in reality an indirect mortgage by J. E. Stack on his property to W. S. Blakeney, trustee, for the Bank of Union, and so intended by the parties and by the president of said bank, as alleged in the pleadings? Answer: Yes.

4. Were the deeds by J. E. Stack and wife to E. B. Stack, Amos M. Stack, Jr., and T. W. Huey, dated 8 September, 1927, conveying the two warehouses, the Five Points property and the two houses and lots on Crow Street, and the deed of trust by said grantees to W. S. Blakeney, trustee, dated 12 September, 1927, and on the same property, executed for the purpose of enabling J. E. Stack to obtain a further loan from the Bank of Union and to enable said bank to get real estate security for such loan, as alleged in the pleadings? Answer: Yes.

5. If so, did E. B. Stack, Amos M. Stack, Jr., and T. W. Huey, at the instance of the Bank of Union, through its president, take title to said property and execute the deed of trust thereon to W. S. Blakeney, trustee, for $20,000, as an accommodation to J. E. Stack and for the benefit of said bank, without any consideration or benefit to them, as alleged in the pleadings? Answer: Yes.

6. If so, was said conveyance in effect and in reality an indirect mortgage by J. E. Stack on his property to W. S. Blakeney, trustee for the Bank of Union, and at the instance of said bank, as alleged in the pleadings? Answer: Yes.

7. In what amount, if anything, are the defendants E. B. Stack, Amos M. Stack, Jr., and T. W. Huey indebted to the Bank of Union on account of the notes of 12 September, 1927, secured by deed of trust of that date? Answer: Nothing.

8. Was the deed of W. S. Blakeney and A. M. Stack, Sr., trustees for the estate of J. E. Stack, to E. B. Stack, Amos M. Stack, Jr., Alice Joyce and Rosa Huey, conveying the Davis-Williams property, and dated 26 February, 1930, for the purpose of raising money to apply on the debts of said estate of J. E. Stack, as alleged in the pleadings? Answer: Yes.

9. If so, were the deeds of trust given by said grantors to Thompson and Lohmann for $12,500, dated 12 March, 1930, and the deed of trust to W. S. Blakeney, trustee, for $19,520 and dated 15 March, 1930, executed in pursuance of such purpose for the accommodation of the estate of J. E. Stack and for the benefit of the Bank of Union, and without consideration or benefit to said grantors in said deed of trust, as alleged in the pleadings? Answer: Yes.

10. In what amount, if any, are the defendants, E. B. Stack, Amos M. Stack, Jr., T. W. Huey, Alice L. Joyce, Gilmer Joyce, Mary M. Stack, Rosa G. Huey and Ione M. Stack indebted to the Bank of Union on account of the notes dated 15 March, 1930, secured by deed of trust of same date? Answer: Nothing.

11. In what amount are the defendants, Amos M. Stack, Jr., E. B. Stack and T. W. Huey indebted to the Bank of Union on the note dated 27 December, 1929, and secured by deed of trust to J. F. Milliken, trustee, and chattel mortgage of that date? Answer: $7,268.57, with interest from 3 September, 1931."

Upon the coming in of the verdict, the defendant, Commissioner of Banks, moved that the same, except as to the last issue, be set aside and for a new trial on all issues except the last; motion denied and defendant, Commissioner of Banks, excepts and assigns error.

The following judgment was rendered by the court below:

"In the above entitled action, the jury having answered the issues in favor of the defendants, A. M. Stack, Jr., Mary M. Stack, E. B. Stack, Ione M. Stack, T. W. Huey, Rosa G. Huey, Gilmer Joyce, Alice L. Joyce, and in favor of the petitioner, Lillian Stack, as appears from the issues on file in this court:

Now, therefore, it is ordered, considered and adjudged by the court that the petitioner is entitled to dower in all the lands described in paragraph 6 of her petition in this cause; and it is further adjudged upon the verdict of the jury upon the issues submitted to them that in the allotment of her dower, and in fixing the valuation of the property that she is entitled to dower in, the jury is directed to take into consideration the value of all the lands described in paragraph 7 of the plaintiff's petition, but shall allot her dower out of the lands described in paragraph 6 of the petition;

And it further appearing to the court that the petitioner is entitled to dower in the rents derived from the aforesaid property since the executor ceased to pay her under the terms of the will of J. E. Stack, it is considered and adjudged by the court that Lillian Stack is entitled to one-third in value of the rents collected out of the property of J. E. Stack described in paragraph six and seven of the plaintiff's petition

from 4 April, 1930, until the allotment of her dower, less the sums of $50 paid to her on 6 September, 1930, and $50 paid to her on 2 October, 1930.

For the purpose of ascertaining the amount of said rents that would be due the petitioner, the clerk of this court will hear evidence and ascertain the amount that will be coming to her out of the rents of her said husband's estate since the executor ceased to pay her under the terms of the will of J. E. Stack, deceased; and W. S. Blakeney, executor and trustee for the estate of J. E. Stack, is hereby ordered and directed to pay to the petitioner the amount found to be due her by the clerk of this court.

It is further ordered, considered and adjudged that the Commissioner of Banks shall take nothing by his cross-action against the defendants T. W. Huey, Amos M. Stack, Jr., Alice L. Joyce, E. B. Stack, Mary N. Stack, Gilmer Joyce, Ione M. Stack, and Rosa G. Huey, except the Commissioner of Banks shall recover of Amos M. Stack, Jr., E. B. Stack and T. W. Huey the sum of $7,268.57, with interest thereon from 3 September, 1931, due by deed of trust and chattel mortgage as set out in the pleadings, and for the purpose of enforcing collection on the notes secured by the said deed of trust and chattel mortgage, J. F. Milliken is hereby appointed commissioner and trustee to make sale of such property and at such time as he may see proper and report the proceedings of such sale to this court.

It is further ordered and adjudged that the costs of this action be taxed by the clerk of this court to be paid by the defendant Commissioner of Banks. This 8 September, 1931.

T. B. FINLEY, *Judge Presiding.*"

To the signing of the foregoing judgment, the defendant Commissioner of Banks, excepts and assigns error.

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

E. Osborne Ayscue and Charles E. Hamilton for plaintiff.
John M. Redwine for certain heirs of J. E. Stack.
Vann & Milliken for Commissioner of Banks.

CLARKSON, J. The issues above outline and are determinative of the controversy.

At the close of plaintiff's evidence and at the close of all the evidence, the defendant Commissioner of Banks, made motions for judgment as in case of nonsuit. C. S., 567. The motions were overruled and in this we see no error.

We think that all the exceptions and assignments of error made by the defendant Commissioner of Banks can be considered under the one made above to the signing of the judgment in this action, and in this respect we can see no error on the record.

We think the main question of law involved in this controversy: In an action between the payee and maker of a note, is parol evidence admissible to establish an agreement between the maker and payee creating a particular mode of payment? We think so under the facts and circumstances of this case.

J. E. Stack was a director in the Bank of Union, and had been from the organization of the bank, some 27 years, until his death 11 May, 1929, during that period W. S. Blakeney, his brother-in-law, was the president of the bank. Stack was a large dealer in spot cotton, and had valuable real estate in the town of Monroe, N. C., but he had become deeply indebted to the bank, and on 8 June, 1927, owed said bank some $80,000. He was then an old man—some 75 years of age. At the time his real estate was more than sufficient to pay the indebtedness. He was over the limit allowed by law to be borrowed from the bank, and the bank examiner had notified the president, W. S. Blakeney, that Stack had to be held to the limit allowed by law and had to reduce his indebtedness.

It was contended by the heirs at law of J. E. Stack, who are involved in this controversy, and plaintiff, the widow of J. E. Stack, that the conveyances from J. E. Stack and herself of the lands in controversy in this action to the said heirs at law of J. E. Stack, and from them to W. S. Blakeney, trustee, was a makeshift or means of helping the Bank of Union, engineered by its president Blakeney, and they were merely a conduit. No consideration passed and no liability was to attach to the heirs at law of J. E. Stack, and the whole matter was arranged and fixed up by the president of the bank, Blakeney, for the purpose of complying with the law on account of the excess borrowed from the bank by J. E. Stack. It was an indirect mortgage from J. E. Stack to the Bank of Union, the heirs of J. E. Stack never acquired any beneficial interest in the lands. The heirs at law were to assume no liability, but the indebtedness to the bank was to be paid out of the land. The said heirs at law of J. E. Stack had nothing to do with drawing or recording the deeds to them or the conveyances from them to W. S. Blakeney, trustee, and others. They never saw the deeds to the lands, nor took possession or had any control of the lands; never contracted to buy the lands; received no rents or profits; paid no taxes on the lands. J. E. Stack, until his death, had custody and control of the lands and after his death Blakeney had control, and repairs were made to

the property by Blakeney. It was well understood by the parties to the entire transaction that the makers were not to be responsible, but it was J. E. Stack's debt and he was to remain liable therefor and he was the beneficial owner of the lands. His heirs at law were mere agents for a particular purpose. They held the legal title for the particular purpose, and J. E. Stack was the beneficial owner of the equity in the lands.

A. M. Stack testified, in part: "Mr. Blakeney asked we children to sign this deed and execute mortgages to the bank in order to reduce my father's indebtedness as well as help the bank, because he was being pressed by the bank examiners to reduce his notes. Q. Did Mr. Blakeney say anything relative to whether or not you would be bound by the execution of those notes? A. Yes, sir. Q. What did he say? A. He said that the property could be later transferred back to the estate; that it was just a method of using our names to get money for the Bank of Union and for my father's notes."

The proceeds were applied on J. E. Stack's indebtedness to the bank. A. M. Stack testified further: "Q. Mr. Stack, has anybody ever called on you to pay these notes or the interest on the note? Answer: No, sir; I have never received a statement from the Bank of Union that we owed any money on it. Q. Mr. Stack, did you get anything of value by reason of signing these notes? Answer: No, sir; I have never received or given anything of value."

Blakeney testified, in part: "The transaction was not made to deceive anybody; I was acting in a dual capacity—as executor and president of the bank and I thought my first duty was to the bank and I wanted to do the equitable thing all around, not only to the bank but to the heirs, give them a chance. . . . All the indebtedness of the said J. E. Stack to practically all the creditors except the Bank of Union has been paid with the exception of some small bills. . . . I did not tell the signers of these notes (said J. E. Stack's children) that they would not be held personally liable for the payment thereof. *I told them the property would stand between them and any other liability;* that I thought the property would be ample to take care of it and I did not tell them that they would not be personally liable."

A. M. Stack, Jr., testified, in part: "Q. Mr. Stack, Mr. Blakeney testified this morning that he told you it would stand between you and personal liability on the note? Answer: Yes, sir; he certainly did. Q. What else did he say to you? Answer: He said the property would stand for itself. Q. Did he tell you that at the time you executed both of these notes of 12 September? Answer: Yes, sir. Q. Did you communicate that to your brothers and the other defendants in this case? Answer: Yes, sir."

The above testimony of A. M. Stack, Jr., and like testimony of other witnesses, in regard to all the transactions, was objected to on the ground that "parol testimony cannot be admitted to contradict, add to or vary a written contract in the absence of fraud, ignorance, mistake or other available defense warranting a rescission or cancellation." *Miller v. Farmers Federation,* 192 N. C., at p. 146.

We think the testimony objected to competent (exceptions and assignments of error 1 to 191 inclusive) and the doctrine laid down in *Evans v. Freeman,* 142 N. C., at p. 64-5 applicable: "But this rule applies only when the entire contract has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written. . . . Numerous other cases have been decided by this Court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time."

In *Greene v. Bechtel,* 193 N. C., at p. 98, Stack, J., charged the jury, as follows, which was sustained by this Court: "When a contract is written, the law will not allow it to be altered, varied from that, or contradicted by parol evidence. When they put their contract in writing, that is the contract, but when a part of the contract is written and a part of it is in parol or verbal, and the verbal part does not alter, vary or contradict the written part, then the party claiming that parol agreement may show it by parol evidence."

In *Bank v. Winslow,* 193 N. C., at p. 473, the law is thus stated: "In Brown on Parol Evidence, sec. 117, it is held that 'parol evidence is admissible to show an agreed mode of payment, and discharge other than that specified in the bond.' And in *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, it was held that when a promissory note is given, payable in money, parol evidence may be received tending to establish as a part of the contract a contemporaneous agreement that a different method of payment should be accepted," citing numerous authorities.

In *Justice v. Coxe,* 198 N. C., at p. 265, it is said: "Parol evidence offered by defendant for the purpose of showing all the terms of the contract between plaintiff and defendant, with respect to the transaction of which the execution of the notes was only a part, was admissible and competent for that purpose. *Crown v. Jones,* 196 N. C., 208, 145 S. E., 5."

On this record in what is written and what is in parol we can see no "total inconsistency." *Garland v. Improvement Co.,* 184 N. C., 551; *Exum v. Lynch,* 188 N. C., 392 (in same case see, also, term "consideration" that is sufficient to support a promise). *Watson v. Spurrier,* 190 N. C., 726; *Miller v. Farmers Federation,* 192 N. C., 144; *Hite v. Aydlett,* 192 N. C., 166; *Fertilizer Co. v. Eason,* 194 N. C., 244; *Smith v. Trust Co.,* 195 N. C., 183; *Roebuck v. Carson,* 196 N. C., 672; 20 A. L. R., 479(n); *Hill v. Insurance Co.,* 200 N. C., 502.

The Parol Evidence Rule in North Carolina is learnedly discussed by James H. Chadbourn and Dean Charles T. McCormick, in N. C. Law Review, February, 1931, p. 151 *et seq.*

On the entire record we see no prejudicial or reversible error. From the view we take of the law there was no error in the admission or rejection of testimony or the charge of the court below to the jury. In the issues submitted perhaps the phraseology should have been more exact, but they were, from the evidence, understood and determinative of the controversy. We think the charge on the whole complied with C. S., 564.

From the findings of the jury J. E. Stack had an equitable estate in the lands. His widow, the plaintiff, is entitled to dower. C. S., 4100. After a thorough consideration of this action and the evidence, we can see no such repudiation as calls for criticism on the part of appellant. The indebtedness of J. E. Stack to the bank was neither that of his widow, now the plaintiff in this action, nor that of his children. The widow and certain of the children of age, under the facts and circumstances of this case, did what was requested of them by the husband and father, in an effort to aid the adjustment of honest obligations to the bank, which was beyond the law limit allowed to one individual, and from the jury finding done in accordance with the demand of the president of the bank, and through his efforts. The children to this action are making no claim to the lands, the whole matter was without consideration and an accommodation for their father, and the transactions were in effect indirect mortgages of J. E. Stack by certain of his children, for the purpose of adjusting honest debts. The bank will get the land subject to the widow's dower. A father would hardly put a personal burden of his debts on his children as it was contended by appellant. The jury did not so find. For the reasons given, we see no error in the judgment of the court below.

No error.

STATE v. J. J. McKAY.

(Filed 30 March, 1932.)

1. **Judgments K a—Consent judgment may not be set aside without consent of parties in absence of fraud, mistake, etc.**

A consent judgment is in effect a written contract between the parties litigant entered with the consent of the court, and the court may not thereafter set it aside without the consent of the parties in interest.

2. **Seduction B c—Subsequent marriage does not discharge judgment entered in criminal prosecution for seduction.**

A *nolo contendere* partakes of a confession of the offense charged in a criminal action, and where in a prosecution for seduction under promise of marriage the defendant enters a plea of *nolo contendere*, and a judgment is entered under agreement between the prosecutrix, the defendant, and the solicitor, which provides for the payment of a certain amount to the prosecutrix in monthly installments to be secured by bond, etc., and the defendant thereafter pays the amount agreed upon to the date of making a motion to discharge the bond on the ground that his subsequent marriage to the prosecutrix discharged the judgment: *Held*, marriage after verdict of guilty does not affect a judgment in a prosecution for seduction, and the defendant's motion should be overruled. C. S., 4339.

APPEAL by defendant from *Barnhill, J.*, at October Term, 1931, of BRUNSWICK. Affirmed.

The following judgment was rendered in the court below:

"The defendant, through his attorneys, made motion for discharge of bond and mortgage heretofore made in this cause, for that, he had complied with the judgment heretofore rendered, to wit, at April Term, 1929, except as hereinafter stated, in that the marriage hereinafter stated fully discharged all payments not made at the time of marriage, said judgment of April Term, 1929, being as follows, to wit:

'Defendant enters plea of *nolo contendere*, which said plea is accepted by the State. Prayer for judgment continued upon the defendant paying all costs of this action, including an allowance of $500, that is $250 each to A. M. Rice and Emmett H. Bellamy, attorneys representing the prosecutrix, within thirty days from date, and the sum of $300 to prosecutrix on this date, and the further sum of $1,200 in equal monthly installments of $50.00 on or before the 1st day of each and every month, beginning on 1 May, 1929, and continuing until the total sum of $1,200 is paid. Provided defendant may, at his option, pay the total amount of said allowance of $1,200 immediately to the clerk of the Superior Court.

'It is further ordered and provided that defendant shall give a justified bond in the sum of $2,500 for the faithful performance of these

conditions, no execution to be issued thereon within thirty days from date hereof. Bond of the defendant, with A. F. Jones as surety, in the sum of $2,500 given, approved and accepted. Upon the performance of each and every of these conditions the same shall be and is hereby accepted in full and complete satisfaction of all actions, or causes of action, civil or criminal, growing out of or connected with the charges of Gladys Freeman against the said J. J. McKay, and terminates all causes for civil and criminal actions against said J. J. McKay to date. In event said J. J. McKay shall elect to pay the above referred to $1,200 in equal monthly installments of $50.00, then a real estate mortgage to clerk Superior Court as trustee shall be given in addition to the above required bond to secure the payment of the same, said mortgage to be approved by the clerk of this Superior Court.

'Upon failure of the defendant to comply with all of the foregoing provisions and conditions, or either of, or any part of either, capias may issue upon motion of the solicitor.

'This 11 April, 1929, at the April Term.

W. C. HARRIS, *Judge Presiding.*'

This judgment consented to by the State, by the prosecutrix and by the defendant."

Upon the hearing of the motion there were present Woodus Kellum, solicitor, representing the State; Emmett H. Bellamy and David Sinclair, representing the prosecutrix, and Robert W. Davis and C. Ed Taylor, representing the defendant, and being heard, and the court being of the opinion that he was without legal power to grant relief against the terms of the bonds given in pursuance of the said consent judgment at the April Term, 1929, denied the motion, and upon request find the following agreed facts:

"1. That the foregoing judgment was had at the April Term, 1929, Brunswick County Superior Court.

2. That the defendant had complied in part with the judgment in the payment of all costs of the $500 to attorneys representing the prosecutrix; the $300 to the prosecutrix; and given bond in the sum of $2,500 for the faithful performance; had executed and recorded the mortgage, Book 48, page 436, on real estate upon his electing to pay the $1,200 to the prosecutrix in monthly installments, and had paid into the court for the prosecutrix the sum of $300 in six monthly installments of $50.00 each, leaving at time of marriage $900 still unpaid.

3. That, on 7 May, 1930, the defendant was married to the prosecutrix, since which time the two have lived together in Brunswick County as husband and wife, and are so living at the present time.

4. That for several months before said marriage and since the said marriage no payments were made to the court and no demand had been made by the prosecutrix and wife for any further payments.

5. That the said wife does not now demand immediate payments, but refuses to consent to cancel the judgment requiring payments, and resists the authority of the court to declare the judgment satisfied and canceled.

Whereupon, it is considered, adjudged and decreed that the said motion be denied. It is agreed that the judgment denying the motion and the foregoing findings of facts may be signed out of term and out of the district, and that the record in the original case, this signed judgment and these entries, shall constitute the case on appeal, with defendant's exceptions to be added, and that no further record of the case need be included in the record

M. V. BARNHILL, *Judge Presiding.*"

To the foregoing judgment the defendant, J. J. McKay excepted, assigned error and appealed to the Supreme Court.

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

Emmett H. Bellamy and David Sinclair for prosecutrix.

C. Ed Taylor and Robert W. Davis for defendant.

CLARKSON, J. The defendant excepted and assigned error to the foregoing judgment on the ground that the court below should have held that the marriage between the parties, on 7 May, 1930, discharged the consent judgment of 11 April, 1929. The exception and assignment of error cannot be sustained.

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 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."

Under the statute the defendant was tried on a regular bill of indictment charging seduction under promise of marriage, and entered a *nolo contendere* at April Term, 1929, of Brunswick Superior Court.

"*Nolo contendere*" is defined as follows: "I will not contest it. The name of a plea in a criminal action, having the same legal effect as a plea of guilty, so far as regards all proceedings on the indictment, and on which the defendant may be sentenced." Black's Law Dic. (2d ed.), p. 820.

The prosecutrix had the legal right to indict defendant under C. S., 4339, and also sue him in a civil action for tort. It is only necessary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under C. S., 4339, *supra,* that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose. *Hardin v. Davis,* 183 N. C., 46, 110 S. E., 602.

The record discloses that after the defendant had entered a plea of *nolo contendere,* practically a plea of guilty (1) prayer for judgment was continued upon the defendant paying all costs, etc. (2) "And the sum of $300 to prosecutrix on this date, and the further sum of $1,200 in equal monthly installments of $50.00 on or before the 1st day of each and every month, beginning on 1 May, 1929, and continuing until the total sum of $1,200 is paid. Provided defendant may, at his option, pay the total amount of said allowance of $1,200 immediately to the clerk of the Superior Court." The defendant complied in part with the judgment in the payment of all costs, the $500 to attorneys representing the prosecutrix; the $300 to the prosecutrix; had given bond in the sum of $2,500 for the faithful performance; had executed and recorded the mortgage, Book 49, page 436, on real estate upon his electing to pay the $1,200 to the prosecutrix in monthly installments, and had paid into the court for the prosecutrix the sum of $300 in six monthly installments of $50.00 each, leaving at time of marriage $900 still unpaid. From the judgment there was no appeal. It was a consent-compromise judgment.

On 7 May, 1930, over a year afterwards, defendant married the prosecutrix and they are living together as husband and wife. The defendant contends that the marriage canceled the consent judgment. We cannot so hold.

In *Bank v. Mitchell,* 191 N. C., at p. 193, speaking to the subject, citing numerous authorities, is the following: "It is well settled in this jurisdiction: If parties have the authority, a consent judgment cannot be changed, altered or set aside without the consent of the parties to it. The judgment, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement made between the parties

and a matter of record by the court, at their request. The judgment, being a contract, can only be set aside on the ground of fraud or mutual mistake." *Schofield v. Bacon,* 191 N. C., 253; *Ellis v. Ellis,* 193 N. C., 216; *Cox v. Drainage District,* 195 N. C., 264; *Cary v. Templeton,* 198 N. C., 604.

In *Board of Education v. Commissioners,* 192 N. C., at p. 279, citing numerous authorities, we find: "The law will not even inquire into the reason for making a decree, it being considered in truth the decree of the parties, though it be also the decree of the court, and their will stands as a sufficient reason for it."

The statute says "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 cost of the case* as a plea of *nolo contendere.*" Black's Law Dic., *supra,* at p. 958: "Prosecution: In criminal law. A criminal action; a proceeding instituted and carried on by the due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime," citing numerous authorities.

The statute clearly indicates that the marriage must be before the party is adjudged guilty for defendant to get the benefit of the statute. In the present case, defendant practically pleaded guilty and a consent judgment was entered. "This judgment consented to by the State, by the prosecutrix and by the defendant." The defendant contends: "That where the parties have reconciliation, and marry, and are living together as husband and wife, the reason no longer exists for the payment provided for in the judgment and secured by the bond and mortgage, and that the bond and mortgage should be canceled," citing *Smith v. King,* 107 N. C., middle of p. 276, and *Archbell v. Archbell,* 158 N. C., 408 *et seq.*

The above cases concern deeds of separation between husband and wife, not favored in law. The *Smith case, supra,* is cited in the *Archbell case.* The conduct of the wife in resuming the conjugal relations in that case, by returning and living with her husband and receiving support from him, rescinded and canceled the deed of separation. The wrong was committed in the present case and a judgment was solemnly entered into and consented to by all the parties before the marriage. Over a year afterwards the parties were married. The judgment cannot be set aside unless a civil action by defendant is instituted alleging and proving fraud or mistake, or the wife relents and consents to a cancellation. See *Myers v. Barnhardt, ante,* 49; *Peeler v. Peeler, ante,* 123. The judgment below is

Affirmed.

STATE v. K. BLENDON FERRELL.

(Filed 30 March, 1932.)

1. Homicide G a—Evidence in this case held sufficient to be submitted to the jury.

Where in a criminal prosecution the State's evidence tends to show that the defendant willingly entered into the fight with the deceased and killed him with a deadly weapon, a knife, the defendant's motion as of nonsuit is properly refused, and a verdict of manslaughter will be affirmed on appeal. C. S., 4643.

2. Criminal Law G c—Requested instructions as to weight of character evidence held properly refused in this case.

Where the defendant in a criminal action puts his character in evidence and testifies in his own behalf, testimony of his good character may be received in evidence both as bearing on his credibility as a witness and as substantive evidence on the issue of his guilt, but a request for an instruction that the "law presumes that a man of good character is not only less likely to commit a crime than a man of bad character, but also that a man of good character is more truthful and less likely to testify falsely under oath than a man whose character is not good" is *held* properly refused, the requested instruction going beyond that to which the defendant was entitled.

APPEAL by defendant from *Daniels, J.*, and a jury, at November Term, 1931, of DURHAM. No error.

The defendant was convicted of manslaughter and the judgment was that he be confined in the State's prison for a period of not less than two nor more than three years. The defendant 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.

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

McLendon & Hedrick for defendant.

CLARKSON, J. The defendant, at the close of the State's evidence and at the close of all the evidence made motions "to dismiss the action or for judgment of nonsuit." C. S., 4643. These motions were overruled by the court below and in this we can see no error.

It was in evidence that the defendant entered into the fight willingly with one James Quick, and cut him with a knife, which caused his death.

Robert Davis, a witness for the State, testified, in part: "When James Quick was giving Mr. Ferrell the cigarette he did not have the bricks

in his hand. Mr. Ferrell had something in his hands then. The next thing I knew Quick was coming in the house hollering. I went out there, and he come to the house and then to the back door, and he was bleeding like the water spigot was turned on. . . . He was cut from under his ear and clean around to his neck, right out to the tip end of his chin. Quick came running in the house hollering to me, and said 'Bob come here, I am cut to death.' When I come out of the door Mr. Ferrell was half way to the bridge coming this way. I saw James at the hospital about thirty-five or forty minutes after I put him in the truck or automobile. He was dead."

Ed Roberts, a witness for the State, testified, in part: "I saw Ferrell and James Quick at that time in the yard of Robert Davis. When I come along there, I heard some cursing, and looked and I saw that it was Mr. Ferrell, and I heard him say, 'God damn you I will cut you,' there was another white man out there and two colored fellows. They were all there together. At the time I heard Mr. Ferrell cursing, I did not notice whether he had anything in his hand or not. . . . I run to the front door, and I said what is the matter out here, and the children said a white man is cutting a darkey to pieces, and when I got down there they had taken him away."

L. B. Henderson, a witness for the State, testified, in part: "I know where Robert Davis lives, the house that this cutting took place in. As I passed Mr. Ferrell and Mr. Quick this afternoon, they were all arguing there in the street and yard, and I told Mr. Ferrell if I was he I would go away and keep out of trouble, and when I got away about as far as from here to the back end of the courtroom, I heard a man say that he was cut, and I looked back and saw him going up the steps on his knees and hands. I went down there. When I got back Mr. Ferrell was on his truck. He had started off to leave. When I passed they were arguing. I did not see any weapon. When I got back down there his neck was cut."

In *S. v. Miller,* 197 N. C., at p. 448, the following is stated: "When on a trial for homicide, a killing with a deadly weapon is admitted or established by the evidence, the law raises two—and only two—presumptions against the slayer: first, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Walker,* 193 N. C., 489; 137 S. E., 429; *S. v. Fowler,* 151 N. C., 731, 66 S. E., 567."

In *S. v. Parker,* 198 N. C., at p. 634, is the following: "True, he said she was trying to cut him; but he was the aggressor; he not only entered into the combat willingly; he provoked it. The homicide according to his testimony was certainly nothing less than manslaughter. *S. v. Bald-*

win, 152 N. C., 822; *S. v. Kennedy,* 169 N. C., 288; *S. v. Merrick,* 171 N. C., 788; *S. v. Evans,* 177 N. C., 564."

From a careful reading of the charge, we think the court below stated the law applicable to the facts, in fact read decisions of this Court on the law relative to the facts in this case.

The main contention of defendant is the refusal of the court below to give the following instruction: "The defendant, gentlemen of the jury, has offered his character in evidence, and you are to take this into consideration in reaching your verdict. You are to consider this not only in passing upon his guilt or innocence, but also in passing upon his credibility as a witness. The law presumes that a man of good character is not only less likely to commit a crime than a man with a bad character, but also that a man of good character is more truthful and less likely to testify falsely under oath than a man whose character is not good."

In *S. v. Whaley,* 191 N. C., at p. 391-2, we find: "Evidence of the defendant's good character is put in issue and when he also testifies in his own behalf, is competent (1) as bearing upon the credibility of his testimony and (2) as touching the question of his guilt or innocence. *S. v. Cloninger,* 149 N. C., 567. Speaking to the subject in *S. v. Moore,* 185 N. C., 637, *Hoke, J.,* said: 'It is fully recognized in this jurisdiction that in an indictment for crime, a defendant may offer evidence of his good character and have same considered as substantive testimony on the issue of his guilt or innocence. And where in such case a defendant has testified in his own behalf and evidence of his good character is received from him, it may be considered both as affecting the credibility of his testimony and as substantive evidence on the issue.'"

The defendant cites the above well settled law in support of his contention. But the prayer for instruction goes beyond the law above stated. It says: *"The law presumes that a man of good character is not only less likely to commit a crime than a man with a bad character, but also that a man of good character is more truthful and less likely to testify falsely under oath than a man whose character is not good."*

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." *S. v. Herring,* 201 N. C., at p. 549.

"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." *S. v. Herring, supra,* at p. 551.

We know of no such presumption as contended for in defendant's prayer, and the court below did not commit error in refusing to give it. On cross-examination the defendant testified, in part: "That was ten years ago that I was up in court for liquor. I am thirty-one years old. I was up there for violating the liquor law in 1922, and that is the time I went to the road, or something like that. . . . In 1924, in the recorder's court, I was up about some whiskey, and a colored fellow. I paid a fine of $300. . . . I think I was up in recorder's court in 1923, something like that. It was just an ordinary fight with George Tilley. I will not deny that I was up in recorder's court for a fight with my brother. I was charged with cutting a Negro and assaulting him. Q. What were you fighting about, and where did that take place? What were you given for that? A. Twelve months." We think the defendant has no cause to complain—the court below was merciful. From a careful review of the entire record, we find

No error.

L. BAKER v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD COMPANY.

(Filed 30 March, 1932.)

Railroads D b—Held: motion of nonsuit on ground that plaintiff was guilty of contributory negligence should have been overruled.

Where the evidence tends to show that the view of the defendant's tracks at a grade crossing in a city was obstructed on the left, as the plaintiff approached the crossing, by a curve and embankment, and that the plaintiff upon approaching the crossing looked to the right where the view was unobstructed for about 200 feet and did not see the defendant's engine, and then looked to the left, and that when he again looked to the right the wheels of his automobile were upon the rails of the first track and that he saw the defendant's train almost upon him approaching from the right on the second track, and that in attempting to speed

up and get across the crossing the plaintiff was struck and injured: *Held,* the plaintiff's act in giving more attention to the direction where the probability of danger was greatest and his attempt to get across the crossing in front of the train will not bar his recovery as a matter of law, and the defendant's motion as of nonsuit on the ground of contributory negligence should have been overruled, the question of contributory negligence being for the jury under the standard of reasonable prudence.

CIVIL ACTION, before *Warlick, J.,* at October Term, 1931, of GUILFORD.

The evidence tended to show that the tracks of defendant cross at grade, West Green Street, within the corporate limits of the city of High Point. At said crossing Green Street runs approximately north and south, and the tracks of the defendant run approximately in a northeasterly and southwesterly direction. An ordinance of the city of High Point imposed upon railroad companies operating within the city limits the duty of keeping all grade crossings "in a smooth, level, clean and perfectly safe condition at all times by paving same with wood, brick, concrete, or other suitable materials," etc.

On 27 April, 1929, at 6:30 o'clock in the morning the plaintiff was driving a Ford Sedan in a northerly direction on West Green Street and approached the crossing. He said: "As I approached the intersection I looked up and down the track. I looked to my right first, because that was an open view that way, and if I had looked the other way I could not have seen anything on account of that curve there on the track. So I looked to the right first. I didn't see any train or locomotive after I looked and couldn't see nothing coming on the right. I threw my eyes to the left, and there was a fellow there turned around, and I was pretty nearly on the track, and I threw my eyes to the right again where the engine was. I didn't see any train or locomotive after I looked, and couldn't see nothing coming on the right. There was no signal given of the approach of this engine or locomotive, no whistle was blown, no bell was ringing. There was no watchman at the crossing. . . . I was right on the first track before I saw the engine coming. The crossing was very rough, it had never been paved. . . . There was nothing but dirt there between the track and when a car goes over one railroad track there it will knock out a hole. . . . It was just in holes there where the cars and crossing had knocked it out. . . . The track was sticking up above the ground. In some places it was the full height of the irons. . . . It was not paved with wood, brick, concrete or other suitable material. . . . I think I was already on the first track when I saw the locomotive which was on the second track. I don't think I was going over six or eight miles an hour at the outside when I saw the locomotive. In an effort to get to a place of safety I just put on all the speed I could to get across. I didn't get across

. . . because the crossing was so rough and I had slowed down so that I couldn't get speed enough to get across before it got me. The locomotive struck my car on the back door and tore it all to pieces. . . . I was about 67 feet from the track when I threw my eyes to the right and could see no train coming, and then I threw my eyes to the left and kept looking to see if there was a train to my left, and when I got to where I could see that there was no train coming from the left, then I threw my eyes to the right again and the train was there. . . . The train that struck me was just an engine and tender. . . . There is a high embankment on the left between the crossing and the overhead bridge. There is a deep cut between the bridge and the crossing. When a person is 67 feet from the first track approaching from the south, the way I was going, you can see 216 feet to the right by the corner of the warehouse down the track. Before you can see to your left you are nearly on the tracks. Your car is nearly on the track when you can see yourself clear under the bridge because it curves back in a V-shape there. That high bank comes down in a sharp dip from between the railroad and the street."

There was evidence tending to show that the plaintiff discovered the locomotive and tender approaching from his right at about the time he reached the first track, and that he attempted to speed up his car and cross ahead of the locomotive which was on the second track.

The cause was heard in the municipal court of the city of High Point, and at the conclusion of plaintiff's evidence, there was judgment of nonsuit upon the ground "that plaintiff was guilty of contributory negligence, as a matter of law, said contributory negligence being a proximate cause of his injury." Thereupon the plaintiff appealed to the Superior Court and after hearing the exceptions the trial judge overruled the judgment of the municipal court of High Point and remanded the case for trial.

From judgment of the Superior Court the defendant appealed.

Frazier & Frazier and H. L. Koontz for plaintiff.
Lovelace & Kirkman for defendant.

BROGDEN, J. There was evidence tending to establish the negligence of defendant. However, if the plaintiff approached the crossing in the day time, and within a distance of 67 feet therefrom, had an unobstructed vision of the track for over 200 feet, and undertook to cross without looking and listening, he would not be entitled to recover. But the evidence tends to show that the crossing was obstructed by a curve and embankment to the left thereof as plaintiff approached. The testimony was: "Before you can see to your left you are nearly on the

track." Hence it cannot be said that plaintiff is barred of recovery as a matter of law because he gave more attention to the direction where the probability of danger was greatest. His conduct under all the circumstances must be tested by the standard of reasonable prudence. Upon this aspect of the case, the following declaration of the Court in *Lee v. R. R.*, 180 N. C., 413, 105 S. E., 15, is pertinent: "One who voluntarily goes on a railroad track, where the view is unobstructed, and fails to look and listen, cannot recover damages for an injury, which would have been avoided if he had done so. The duty to look and listen may be qualified by obstructions and other circumstances, and when these appear the question of contributory negligence is ordinarily for the jury. He is not required to look continuously when he has been misled by the failure of the company to give notice of the approach of its train, or where his attention is rightly directed elsewhere, and he cannot be expected to look in both directions at the same time."

There is evidence tending to show that after the plaintiff discovered the engine moving on the second track that he attempted, in disregard of his own safety, "to beat the engine to the crossing." These matters, however, must be submitted to a jury for its determination upon all the facts and circumstances.

Affirmed.

MRS. NANCY GOODWIN, WIDOW, AND ROBERTA GOODWIN, MINOR CHILD, DEPENDENTS OF D. D. GOODWIN, A DECEASED EMPLOYEE, v. JOHN H. BRIGHT, EMPLOYER, AND LUMBERMEN'S MUTUAL CASUALTY COMPANY, INSURANCE CARRIER.

(Filed 30 March, 1932.)

Master and Servant F b—Evidence held sufficient to sustain finding that death resulted from accident arising out of employment.

In order that the death of an employee may be compensable under the provisions of the Workmen's Compensation Act it is necessary that it should have resulted from an accident sustained not only in the course of the employment but also arising out of the employment or within the scope of the employee's duties under a reasonable consideration of the circumstances surrounding the death, and where the evidence tends to show that it was the duty of the deceased employee to arrive at the employer's planing mill in the early morning an hour before the other employees in order to fire the engine to run the machinery, and that the mill was at an isolated place where hoboes and others of like character frequently passed, and that the employee was killed and robbed by some unknown person, it is sufficient to support a finding by the Industrial Commission that the death resulted from an accident arising out of the employment and to sustain an award of compensation, and it will not be declared otherwise by the court as a matter of law.

APPEAL by the employer and his insurance carrier from *Devin, J.*, at February Term, 1932, of WAKE. Affirmed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was first heard by Commissioner Wilson, on 3 June, 1931, at Raleigh, N. C. At this hearing it was agreed by the parties to the proceeding that on 23 October, 1930, and for about two and one-half years prior to said date, D. D. Goodwin was employed by John H. Bright as the fireman at his planing mill, which was located at or near New Hill, in Wake County, North Carolina; and that both the said D. D. Goodwin, as employee, and the said John H. Bright, as employer, were bound by the provisions of the North Carolina Workmen's Compensation Act. The Lumbermen's Mutual Casualty Company was the insurance carrier of the employer, and for that reason was liable under the provisions of said act for the payment of compensation due by the employer to his employees for injuries resulting from accidents which arose out of and in the course of their employment.

It was further agreed by the parties to the proceeding that D. D. Goodwin, while engaged in the performance of his duties as an employee of John H. Bright, at his planing mill, between the hours of 5 and 7 a.m., on 23 October, 1930, was shot and killed by an unknown person, who robbed him of the money which he had on his person, and stole his automobile, which he had parked near the planing mill. As required by the terms of his employment, the deceased had gone to the planing mill, alone, about one hour and a half before the other employees were required to be there to begin the day's work, to get up steam in the boiler. At the time he was shot and killed, there was no other employee at the planing mill.

The evidence at the hearing showed that at the time the deceased employee was shot and killed he was in the boiler room and was engaged in the act of pulling shavings and other combustible matter from the fire under the boiler, with a rake. His body was found by a fellow-employee, who went to the planing mill at about 7 o'clock to begin his day's work. The deceased was shot through the heart; his money had been taken from his pocket; and his automobile was gone. A few days thereafter, the automobile was found in South Carolina and returned to the widow of the deceased.

There was no evidence tending to show that the person who shot and killed the deceased had stolen or attempted to steal any of the property of the employer at the planing mill. There was evidence that the deceased, whose home was about four miles from the planing mill, had

no personal enemies, and that he was a sober, peaceable and industrious man. It was his custom to leave his home at about 5 o'clock in the morning, before daylight, and drive to the planing mill, in his automobile. He was required by his employer to go to the planing mill about an hour and a half before the other employees to get up steam in the boiler.

The planing mill at which the deceased was at work when he was shot and killed is located between the main line tracks of the Seaboard Air Line Railway Company, and a hard-surfaced highway, designated as U. S. Highway No. 1, and N. C. State Highway No. 50. It was well known to the employer that many tramps, hitch-hikers and hoboes passed by the planing mill, traveling over the railroad tracks and the highway, both during the day and during the night. No night watchman was employed at the planing mill.

The claimants in this proceeding are the dependents of the deceased employee, under the provisions of the North Carolina Workmen's Compensation Act, and if the employer and his insurance carrier are liable for compensation on account of the death of the deceased employee, they are entitled thereto.

Commissioner Wilson found that the death of the deceased employee was the result of an accident which arose out of and in the course of his employment.

Upon the admissions made at the hearing and upon the facts found by him from the evidence, he awarded compensation to the dependents of the deceased employee. From his award, the employer and his insurance carrier appealed to the full Commission. Upon the hearing of this appeal, the findings of fact made by Commissioner Wilson were approved, and his award affirmed. The employer and his insurance carrier appealed to the Superior Court of Wake County. The award of the full Commission was affirmed on this appeal, and the employer and his insurance carrier appealed to the Supreme Court.

T. Lacy Williams for the dependents, appellees.

John W. Hinsdale for the employer and his insurance carrier, appellants.

CONNOR, J. An employee who has suffered an injury resulting from an accident which arose out of and in the course of his employment, is entitled to compensation, to be paid by his employer, when both the employee and the employer are bound by the provisions of the North Carolina Workmen's Compensation Act, N. C. Code of 1931, section 8081(h), chapter 120, Public Laws of North Carolina, 1929. The injury

is not compensable, however, unless it resulted from an accident, which arose not only in the course, but also out of the employment. In *Harden v. Furniture Company,* 199 N. C., 733, 155 S. E., 728, it is said: "As defined in the North Carolina Workmen's Compensation Act, the word 'death,' as a basis for a right to compensation, means death resulting from an injury; and 'injury' and 'personal injury' mean injury by accident arising out of and in the course of the employment, and do not include disease in any form unless it results naturally and unavoidably from the accident. Section 2(f) (j). The mere fact that the injury is the result of the wilful or criminal assault of a third person does not prevent the injury from being accidental. *Conrad v. Foundry Co.,* 198 N. C., 723, 153 S. E., 266."

In the instant case it is admitted that as shown by all the evidence the death of the deceased employee resulted from an accident which arose in the course of his employment. The question is, whether there was evidence at the hearing before Commissioner Wilson to sustain his finding that the accident which resulted in the death of the employee arose out of his employment. In *Harden v. Furniture Co., supra,* it is said: "While the phrase 'in the course of' refers to time, place, and circumstances, the words 'out of' relate to the origin, or cause of the accident." It is held in that case that if an employee has sustained an injury, the risk of which might have been contemplated by a reasonable person as incidental to the service when he entered the employment, the injury may be said to have arisen out of the employment; and it may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment.

This principle was applied by this Court in *West v. Fertilizer Co.,* 201 N. C., 556, in which the judgment of the Superior Court affirming an award made by the North Carolina Industrial Commission of compensation to the dependents of a deceased employee whose death was the result of injuries suffered while he was performing his duties as a night watchman, and caused by an assault made on him by an unknown person for the purpose of robbery, was affirmed. Here the deceased employee, as shown by all the evidence, was exposed by the terms of his employment to a hazard which might have been contemplated by a reasonable person as incidental to the service required of him by his employer. It cannot be held as a matter of law that there was no causal connection between the conditions under which he was required to work, and the accident which resulted in his fatal injury.

There was no error of law in the finding by the North Carolina Industrial Commission that the accident which resulted in the death of the employee arose not only in the course but also out of his employment. For this reason the judgment of the Superior Court affirming the award of the Commission is

Affirmed.

COMMISSIONER OF BANKS, EX REL. THE CITIZENS BANK OF FARMVILLE ET AL., v. T. C. TURNAGE ET AL.

(Filed 30 March, 1932.)

Assignment for Benefit of Creditors A a: Mortgages A a; H b—Deed in this case held deed of trust and not an assignment.

A conveyance by a debtor of his property to secure his creditors will not be construed as an assignment for the benefit of the creditors if the grantor is solvent and the deed is to secure debts to be contracted in the future, and a deed of trust to secure not only preëxisting debts but also debts to be contracted for advancements to enable grantor to operate his business of merchandising and farming, the grantors remaining in possession, is not an assignment for the benefit of creditors within the meaning of C. S., 1609, and it is not required that the trustee therein file an inventory of the property coming into his hands, C. S., 1610, and a preliminary order restraining the foreclosure of the deed of trust on the ground that the inventory had not been filed is properly dissolved.

APPEAL by plaintiffs from *Frizzelle, J.,* at February Term, 1932, of PITT. Affirmed.

This is an action to enjoin the sale of property, real and personal, under the power of sale contained in a deed of trust, dated 30 January, 1931, by which the defendants, T. C. Turnage, B. O. Turnage, and W. J. Turnage, as partners under the firm name of T. C. and W. J. Turnage Company, and as individuals, with the joinder of their wives, conveyed said property to the defendants, J. I. Morgan, R. W. Dudley and J. B. Dey, Jr., trustees, to secure the payment of certain debts recited therein, on the ground that said deed of trust is void, for the reason that it appears on its face that it is a deed of assignment for the benefit of creditors, and that defendants failed to file an inventory of the property conveyed by the said deed, as required by statute, and for other relief.

The action was heard pursuant to the provisions of a temporary restraining order issued therein.

The court was of opinion that the deed referred to in the complaint, a copy of which is attached thereto as Exhibit "A," is not a deed of assignment for the benefit of creditors, within the meaning of C. S.,

1609, but is a deed of trust, in the nature of a mortgage, and that for this reason the defendants were not required to file an inventory of the property conveyed thereby. C. S., 1610.

In accordance with this opinion, and the further opinion that the deed of trust is valid in all respects, the temporary restraining order was dissolved by the court, and the plaintiffs appealed to the Supreme Court.

R. T. Martin for plaintiffs.
Albion Dunn for defendants.

CONNOR, J. It appears from the recitals in the deed of trust referred to in the complaint, a copy of which is attached thereto, marked Exhibit "A," that said deed is not a voluntary deed of assignment for the benefit of creditors, within the meaning of C. S., 1609.

The purpose of the deed as appears upon its face, is to secure the payment not only of preëxisting debts, but also of debts to be contracted for advancements to enable the grantors to carry on their business as merchants and farmers during the year 1931.

It is expressly recited in the deed that the grantors are not insolvent, but have property, both real and personal, more than sufficient in value under normal financial conditions for the payment of all their debts. Owing, however, to the economic and financial conditions prevailing in Pitt County and elsewhere at the date of the deed, it was deemed to the best interest of both the grantors and of their creditors, that the payment of all existing debts should be extended to 1 January, 1932, and that grantors should procure advancements in money and supplies to enable them to carry on their business during the year 1931. These advancements are secured by the deed.

Upon default in the payment of the debts contracted for advancements, or upon default in the payment of the debts existing at the date of the deed, on or before 1 January, 1932, the trustees are empowered to sell the property, real and personal, conveyed by the deed, and out of the proceeds of said sale to pay, first, the debts contracted for advancements, and second, the debts existing at the date of the deed. In the meantime, the grantors remained in possession and control of all their property subject to the supervision of the creditors' committee, provided for in the creditors' agreement which appears in the record. Creditors whose claims amounted to more than 75 per cent of the total indebtedness of the grantors were parties to this agreement. The plaintiffs who are and were at the date of the deed creditors of the grantors are expressly secured by the deed of trust.

In *Cowan v. Dale,* 189 N. C., 684, 128 S. E., 155, it is said: "It has been held that where one who is insolvent makes a mortgage of practi-

cally all his property, to secure one or more preëxisting debts, the instrument will be considered an assignment, and the result will not be changed by the omission of a small part of his property; but to apply this doctrine, it is necessary to show that the grantor was insolvent, that the secured debts were preëxistent, and that there were other creditors."

The opinion of the trial court that the deed of trust in the instant case is not a deed of assignment for the benefit of creditors, is supported by the principle stated in the opinion of *Adams, J.*, in the above cited case. For this reason the failure of the trustees to file an inventory of the property which came into their hands under the deed, as required by C. S., 1610, did not render the deed void. The judgment dissolving the temporary restraining order is

Affirmed.

JESSE HARRIS v. G. C. KENNEDY.

(Filed 30 March, 1932.)

Compromise and Settlement A a—Acceptance of check purporting to be in full settlement of disputed account discharges the debt.

Where a statement is sent of a disputed account showing a balance due in a certain amount accompanied by a check therefor purporting to be in full settlement, the payee by accepting the check and receiving the money effects a settlement and is bound thereby in the absence of fraud, etc.

APPEAL by plaintiff from *Daniels, J.*, and a jury, at October Term, 1931, of ORANGE. No error.

On 11 October, 1930, the defendant, G. C. Kennedy, sent the plaintiff, Jesse Harris, a statement and a check for $33.30. The following is a copy of the statement and check:

"Hillsboro, N. C., R. 2, 11 October, 1930.

Mr. Jesse Harris, Rougemont, N. C.

In account with G. C. Kennedy.

Price of timber		$ 600.00
To check	$ 100.00	
To check	100.00	
To 15,591 ft. 4x4 oak at $20.00 per M. on the yard	311.82	
Sawed 9,147 ft. at $6 per M.	54.88	
Check to balance	33.30	
		$ 600.00

CHECK. No. 928.

Hillsboro, N. C., 11 October, 1930.

The Bank of Orange.

Pay to the order of Jesse Harris $33.30

Thirty-three and 30/100 dollars.

G. C. Kennedy.
By Mrs. G. C. K."

The check was endorsed by plaintiff and cashed by plaintiff at the Fidelity Bank of Durham, N. C., on 13 October, 1930, and paid by the Bank of Orange on 13 October, 1930.

The court below charged the jury as follows: "The court charges you that if you find from the evidence, and by the greater weight, that on 9 October, 1930, the plaintiff, through his counsel, demanded of the defendant a settlement of the account then existing between plaintiff and defendant, and that thereafter on 11 October, 1930, the defendant sent to the plaintiff a written statement of the account, showing a balance due by the defendant to the plaintiff of $33.30, and accompanying said statement sent a check payable to the plaintiff for the said sum of $33.30, and that the plaintiff received said check and statement, and cashed said check and received the money thereon, knowing that said check was sent to him by the defendant in full payment and settlement of the account as shown on said written statement furnished by the defendant, then, the court charges you that the acceptance of said check under such circumstances by said plaintiff would be in law a full settlement and payment of the account then existing between them, and a complete defense to this action, it would then be your duty to answer the issue 'Nothing.'" To the foregoing charge plaintiff excepted, assigned error and appealed to the Supreme Court.

The issue submitted to the jury and their answer thereto were as follows: "In what amount, if any, is the defendant indebted to the plaintiff? Answer: Nothing."

R. O. Everett for plaintiff.
Graham & Sawyer for defendant.

CLARKSON, J. We think the charge of the court below correct. There was a dispute between plaintiff and defendant. The letter from defendant to plaintiff set forth what he owed plaintiff and enclosed check for $33.30, and in the letter he stated "check to balance." Plaintiff cashed the check.

Hardware Co. v. Farmers Federation, 195 N. C., 702, is a case on "all fours," at p. 704 the law is stated as follows: "In *Ore Co. v. Powers,* 130 N. C., 152, 41 S. E., 6, the debtor sent a check to a creditor by letter which stated: 'We enclose you check for $3,210.46, which balances account with your good self.' This Court upon such fact declared the law to be: 'Having accepted the check with a statement in the letter that it was for balance in full and cashed the check, the plaintiff is bound thereby in the absence of evidence of fraud or other conduct on the part of the defendants to relieve the plaintiff from the effect of its acceptance of the check in full payment.' *Thomas v. Gwyn,* 131 N. C., 460, 42 S. E., 904; *Armstrong v. Lonon,* 149 N. C., 434, 63 S. E., 1011; *Aydlett v. Brown,* 153 N. C., 334, 69 S. E., 243." In the judgment of the court below we find

No error.

WILLIAM TURNER HINNANT v. ATLANTIC COAST LINE RAILROAD COMPANY AND ENOCH KING.

(Filed 6 April, 1932.)

1. Highways B k—Where negligence of driver is sole proximate cause of injury to guest, the guest may not recover of third person.

Although the negligence of the driver of an automobile will not ordinarily be imputed to a guest therein when the guest has no control over the car or driver, the guest may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident.

2. Negligence B c—Where only one inference can be drawn from facts admitted, question of proximate cause is for the court.

Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the facts admitted, only one inference can be drawn it is for the court to declare whether a given act or series of acts is the proximate cause of the injury in suit.

3. Negligence B c—Where negligence of third person could not have been reasonably foreseen it insulates prior negligent act.

Where the intervening act of a third person could not have been foreseen by the defendant in the exercise of due care, such intervening act breaks the sequence of events and insulates the prior negligence of the defendant, and in this case *held:* the allegations of the complaint permitted of but the one inference that the acts of a third person could not have been reasonably foreseen by the defendant, and the defendant's demurrer to the complaint in an action for damages should have been sustained.

4. Railroads D b—Held: acts of driver were not foreseeable and railroad's demurrer should have been sustained in action by guest.

Where, in an action against the driver of an automobile and a railroad company to recover damages received by the plaintiff in a collision at a grade crossing, the complaint alleges that the plaintiff was a guest in the automobile and that he had no control over the driver of the car, and that the accident was caused by the negligence of the railroad company in failing to give any warning of the approach of its train at an obstructed grade crossing, and the negligence of the driver of the car in failing to keep his car under control so that he could observe the law in regard to the speed limit at fifty feet of the crossing and the requirement that the driver should be able to stop the car before attempting to cross, C. S., 2621(46), under the conditions of the road at the time, and that the train came into view when the car was within 69 feet of the crossing but that the driver could not stop the car and that it hit the first or second box car after the engine, causing injury to the plaintiff: *Held*, upon the allegation of the complaint the negligence of the driver of the car could not have been reasonably foreseen by the engineer of the train and such negligence on the part of the driver was an intervening, proximate cause of the accident insulating the negligence of the railroad company as a matter of law, and the railroad company's demurrer should have been sustained.

CIVIL ACTION, before *Harris, J.*, at June Term, 1930, of NASH.

The plaintiff alleged that on 31 May, 1930, at about nine o'clock in the morning he was a guest, riding in an automobile owned and controlled by the defendant, Enoch King, and at the time was not engaged in a joint enterprise with said driver; that the car was traveling westwardly along the public highway and approaching a grade crossing of the defendant, Atlantic Coast Line Railroad Company. The track of the railroad at the point where the injury occurred runs northwardly and southwardly. It is alleged: "At this crossing the railroad track runs through a cut and the public road has been graded down through the cut across the railroad track so that the view of the railroad employees operating its trains and of persons passing along the public road approaching said track from the east, was obstructed by a bank of earth and shrubbery growing thereon, sufficiently high to make said crossing a blind crossing. The public road passes over the crest of a hill about 300 feet east of said railroad track and from the crest of said hill the road is an inclined plane to said railroad track, the hill being about 22½ feet higher than the track. . . . As the automobile approached the crest of the hill a large sign indicating that a railroad crossing was ahead, appeared on the north side of said road, which sign was erected between the crest of the hill and the railroad track high enough to be plainly visible. . . . As defendant, King, drove his automobile over the crest of the hill the crossing sign was even more plainly visible

between the automobile and the railroad track; and the track itself, as well as telegraph poles alongside of it, and the crossing sign on the other side, were plainly visible to the driver of the automobile. Plaintiff knew defendant, King, was a good and experienced driver and had no reason whatever to suppose that the said King did not see the crossing sign and the railroad track in front of him, or that said King would not take the precaution made necessary thereby. The automobile proceeded at the rate of 25 or 30 miles per hour over the crest of the hill towards the track and down the grade. There was nothing to indicate by sight or sound that a train was approaching the crossing on the railroad track until the automobile was 69 feet from the eastern rail of the track, when a ninety-one car freight train with a heavy locomotive belonging to the defendant railroad, going north, burst into view at the crossing, appearing suddenly to plaintiff and defendant King from behind the embankment to their left, without having blown any whistle or rung any bell, or given any other sign or warning of its approach, and going at high speed. The weather was wet, the public road was slick, . . . and the grade was steep, and defendant King was driving his automobile in a deep rut of wet clay, some 25 or 30 miles per hour, so that, although defendant King applied his brakes, he was unable to turn out of the rut or bring his automobile to a stop before the car collided with the first or second freight car behind the locomotive, in the defendant railroad's train. The defendant King, before the moment of the impact and for the purpose of saving himself from a position of peril, produced by the joint negligence of himself and the railroad company, released his brakes and jumped out of the automobile on the left-hand side thereof; and as soon as this plaintiff saw that defendant King had released his foot brake and had abandoned all effort to avoid the collision by jumping out of the car, then this plaintiff endeavored to leave the car on the right side thereof, but found the door locked and the lock out of order so that it could not be opened from the inside, and then endeavored to leave the car on the left side, and was leaving same when one of his pant legs caught on the emergency brake lever of the automobile, and his foot was caught between the said lever and door frame, at the instant he jumped from the car, so that plaintiff was pitched out head foremost on the ground with his foot caught up in the car just at the moment the front of the automobile hit the train, causing the automobile to swing around against the plaintiff and throw plaintiff under the train in such a way that plaintiff's left foot was crushed by the wheels of the train, and also his leg between the ankle and knee, and his head bruised externally and internally, and back and shoulder wrenched," etc. Plaintiff further alleged that his serious and permanent

injuries were due to the joint negligence of the railroad company in failing to give a signal at an obstructed crossing. He further alleged that the defendant King "did not keep careful lookout and negligently failed to observe the crossing signs and the presence of the railroad track at the foot of the hill, and continued driving his car down grade toward the track at such rate of speed that under the condition of the road at the time he was unable by applying his brakes to stop his car or turn it aside out of danger in the space of 69 feet; that due to his carelessness and negligence in failing to keep a proper lookout he was traveling at such a rate of speed that he was unable to bring the speed of his car down to 15 miles per hour when approaching within 50 feet of said grade crossing, notwithstanding that his view was obstructed within the meaning of C. S., 2621(46) and was unable to bring his automobile to a stop within 50 feet but not closer than 10 feet from said railroad track as required by law, said crossing being sign-posted, both of which violations of law were the necessary result of his prior negligence in not exercising the care required of an ordinarily prudent man in keeping a lookout along the road; that if plaintiff was not injured by the negligence of both defendants, they being joint *tort-feasors*, as alleged, then the plaintiff was injured by the negligence of either Atlantic Coast Line Railroad Company or Enoch King, and in that event plaintiff is in doubt as to the party defendant from whom he is entitled to redress."

The defendants filed demurrers to the complaint. The defendant, Enoch King, demurred to the complaint on the ground of misjoinder of parties defendant and causes of action, and that said causes of action against the defendant, King, and the Railroad Company were inconsistent and repugnant to each other. The defendant Railroad Company demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action against said defendant for that the allegations of the complaint establish that the plaintiff was injured solely and proximately by the negligence of the driver, Enoch King, and upon the further ground of misjoinder of parties and causes of action.

At the hearing the trial judge overruled both demurrers and both defendants appealed to the Supreme Court.

Battle & Winslow for plaintiff.

T. T. Thorne for defendant, Enoch King.

Thomas W. Davis and Spruill & Spruill for Atlantic Coast Line Railroad Company.

BROGDEN, J. What are the tests established by law in determining when the negligence of the driver of an automobile "is the sole, proxi-

mate cause" of an injury to a passenger therein resulting from the collision between the automobile and a train at a grade crossing?

This Court has held with unbroken uniformity that the negligence of the driver of an automobile is not ordinarily imputed to a passenger who neither owns the car nor has any control of the car or driver, and who is not engaged in a joint enterprise with the driver at the time of his injury. Nevertheless, if the negligence of the driver is the "sole, proximate cause" of the injury, the passenger is not entitled to recover. *Earwood v. R. R.*, 192 N. C., 27, 133 S. E., 180.

It is not deemed essential to elaborate the definition of proximate cause or to discuss the intricate learning developed by courts and text-writers in dealing with that elusive term. Courts generally are committed to the proposition that if the facts are admitted and so clear that "there can be no two opinions among men of fair minds," or that "only one inference may be drawn from them," it is the duty of the court to declare whether a given act or series of acts is the proximate cause of the injury. Otherwise the question must be submitted to a jury. *Harton v. Telephone Co.*, 141 N. C., 455, 54 S. E., 299; *Taylor v. Stewart*, 172 N. C., 203, 90 S. E., 134; *Lineberry v. R. R.*, 187 N. C., 786, 123 S. E., 1.

In the present case the facts are set out in the complaint and the demurrers admit them to be true. Hence the question to be determined is whether such facts produce the conclusion that the acts of the driver constituted "the sole proximate cause of the injury."

The usual tests heretofore recognized by this Court may be classified as follows: (1) The negligence of the driver must be such as to bar his recovery if he should sue for any injury sustained by him. *Pridgen v. Produce Co.*, 199 N. C., 560, 155 S. E., 247. In that case, *Connor, J.*, writes: "If the conduct of the driver of the automobile was not such negligence as would bar his recovery, it is manifest that such conduct was not negligence insulating the negligence of the defendant, and therefore relieving defendant of liability to the plaintiff in this action, because its negligence was not the proximate cause of her injuries."

(2) The negligence of the driver must be palpable and gross. *Herman v. R. R.*, 197 N. C., 718, 150 S. E., 361. In that case, *Stacy, C. J.*, says: "Even if the engineer or fireman did fail to ring the bell or sound the whistle, of which there is only negative testimony with positive evidence to the contrary, still the defendant had a right to operate the train over its track, and the negligence of the driver of the automobile is so palpable and gross, as shown by plaintiff's own witnesses, as to render his negligence the sole proximate cause of the injury."

(3) If the act of the driver is a new, independent, efficient and wrongful cause, intervening between the original wrongful act and the injury, then such act of such driver is deemed to be the proximate cause of the injury, upon the theory that the primary or original negligence was thereby insulated. *Craver v. Cotton Mills,* 196 N. C., 330, 145 S. E., 570. In that case, *Adams, J.,* declares the law to be: "While there may be more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence. This principle would apply if it should be granted that the defendant was negligent with respect to the light in the tower." To the same effect is the opinion of *Clarkson, J.,* in *Lineberry v. R. R.,* 187 N. C., 786, 123 S. E., 1: "It is well settled that where the facts are all admitted, and only one inference may be drawn from them, the court will declare whether the act was the proximate cause of the injury or not. In the instant case the facts are all admitted, and the independent cause intervening—Qualls' pushing Lineberry under the train—was the sole proximate cause of the injury."

(4) The new, independent, efficient intervening cause must begin to operate subsequent to the original act of negligence and continue to operate until the instant of injury. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act. That is to say, if the original wrongdoer could reasonably foresee the intervening act and resultant injury, then the sequence of events is not broken by a new and independent cause, and in such event the original wrongdoer remains liable. This idea was expressed by *Hoke, J.,* in *Harton v. Telephone Co.,* 141 N. C., 455, as follows: "It will be seen that the test laid down by all of these writers, by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury, shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected. If the intervening act was of that character, then the sequence of events put in motion by the primary wrong is not broken, and this may still be held the proximate cause of the injury. Numerous and well considered decisions by courts of the highest authority show that this is a correct statement of the doctrine."

The complaint paints the following picture: The driver of an automobile along a public road intersected by a railroad track, arrives at the crest of a hill 300 feet from the track. The hill is 22½ feet higher

than the track. His vision to the left is obstructed by shrubbery growing upon the right of way. There is a crossing sign plainly visible, and telegraph poles along the tracks give warning of the presence of a railroad. The road is wet and slippery. Notwithstanding, the driver does not slacken his speed or attempt to bring his car under control, but drives ahead at the rate of 25 or 30 miles an hour. A heavy freight train, more than a half mile long, drawn by a large locomotive traveling at high speed, is approaching the crossing, but gives no signal. When the driver of the automobile reaches a point 69 feet from the track the freight train "burst into view at the crossing." The law says to all drivers that, when they approach within 50 feet of an obstructed grade crossing, they must slow down to 15 miles an hour, but the voice of the law was unheeded. He attempted to stop the car, but he was operating it, under the circumstances, in such a manner that he could not control it, and thereupon he leaped from the car, leaving his passenger to his fate. The car plunges ahead and strikes the train at the first or second freight car behind the engine.

The allegations of the complaint, if supported by evidence, establish a cause of action against the defendant, King, and, therefore, the question is: Was his negligence a new, independent and efficient cause breaking the sequence of events produced by the failure of a railroad to give a signal, and insulating or isolating such negligence, thereby becoming the "sole proximate cause" of the injury? Applying the tests recognized by law, could the engineer of the train in failing to give the signal reasonably foresee that the driver of the automobile, hearing a signal or seeing the train on the crossing 69 feet away, would not have control of his car or operate it in violation of law at such a speed that it could not be stopped within 69 feet? The Court is of the opinion that the law did not impose upon the engineer the duty of foreseeing such negligent acts of the driver of the automobile. Foreseeability is not omniscience. "The law does not require omniscience." *Gant v. Gant,* 197 N. C., 164, 148 S. E., 34.

Hence the demurrer of the Railroad Company should have been sustained. The judgment overruling the demurrer of defendant, King, is sustained.

Having disposed of the appeal as indicated, it is deemed unnecessary to discuss other exceptions appearing in the record.

Appeal by railroad reversed.

Appeal by King affirmed.

IN THE MATTER OF APPEAL OF W. P. ROSE BUILDERS SUPPLY COMPANY; A. T. GRIFFIN MANUFACTURING COMPANY; GEORGE S. DEWEY, TRADING AS DEWEY BROTHERS; BROWN PAVING COMPANY, AND JAMES E. BRYAN.

(Filed 6 April, 1932.)

1. Municipal Corporations H a — Rules for construction of municipal ordinances.

In construing an ordinance the language used will be interpreted in the light of surrounding circumstances and the words employed will be given their ordinary meaning and significance, and in this case involving the interpretation of a clause in a zoning ordinance exempting from its operation buildings started within ninety days under permits previously granted, the word "started" is held to mean "commenced" or "begun."

2. Municipal Corporations H b—Whether property in this case came within exemption in zoning ordinance held question for jury.

Where a municipal zoning ordinance divides a city into zones and prescribes uniform regulations as to buildings in the respective zones, but provides that it shall not affect buildings for which permits had been issued prior to its enactment if work under such permits was started within ninety days after the operative date of the ordinance: *Held*, where a permit for a filling station is granted prior to the enactment of the ordinance and the owner, in good faith, before the expiration of the ninety days, places filling station equipment and supplies on the premises with the intention of operating the station in conformity with the authority previously given: *Held*, whether the filling station had been started as contemplated in the exemptive clause of the ordinance is a question for the jury, and it may not be decided as a matter of law, and the fact that the city board of adjustment was clothed with certain discretionary powers does not affect the owner's rights under the ordinance.

3. Same—Exemptions in zoning ordinances should be construed in favor of property owners.

Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner.

CIVIL ACTION, before *Cranmer, J.*, at August Mixed Term, 1931, of WAYNE.

The plaintiffs are the owners of a brick building on the corner of George and Walnut streets in the city of Goldsboro, which was constructed during the latter part of 1928 and the early part of 1929 as a Union Bus Station and cafeteria. This building became vacant in December, 1929. On 2 December, 1929, the owners of the building appeared before the board of aldermen of the city of Goldsboro and asked for a permit "to install two gas pumps in the present Union Bus Station." The minutes of the board show the following with respect to such

request: "After some discussion, upon motion of Alderman Waters, duly seconded, this location was exempted from the restricted district, and permit was granted, such installation to be in conformity with ordinances governing filling stations." On 21 July, 1930, the board of aldermen of the city of Goldsboro duly adopted a zoning ordinance, which became effective on 15 August, 1930. This ordinance divided the city into five zones, and the property of plaintiffs was included in zone 1. In this zone no building was to be constructed or used "for any industrial or manufacturing purposes except retail stores, tailor shops," etc. It was further provided that "no building or land in zone 1 shall be used for any trade or industry that is noxious or offensive by reason of emission of odor, dust, smoke, gas fumes, vibration or noise."

Section 14 of the zoning ordinance in part provides: "It is not intended by this ordinance to repeal, abrogate, annul or in any way to impair or interfere with any existing provisions of law or ordinance, or any rules, regulations or permits previously adopted or issued or which shall be adopted or issued pursuant to law relating to the use or construction of building or premises." Section 17 of said zoning ordinance provides: "Nothing herein contained shall require any change in the plans, construction, size or designated use of any building, structure or part thereof for which a building permit has been granted by the building inspector before this ordinance becomes effective and the construction of which from such plans shall have been started within 90 days after this ordinance becomes effective," etc.

The building inspector of the city of Goldsboro refused to grant to the plaintiffs a permit for the installation of gasoline pumps and other filling station equipment in said building. The city brought a suit to restrain the owners from completing the gasoline filling station, and from the judgment rendered both parties appealed to the Supreme Court. This cause is reported in 200 N. C., 405, 157 S. E., 58. Thereafter the matter was heard by the board of adjustment, which rendered its decision in June, 1931. Said board found the following facts: "(a) That prior to the adoption of the zoning ordinance of the city of Goldsboro the owners of said property applied to the board of aldermen of the city of Goldsboro for permission to install two gasoline tanks on the premises, and the board of aldermen of the city of Goldsboro voted favorably on this application; (b) that after the adoption of the zoning ordinance a city official advised the owners of said property that if the property owners should act upon this authority of the board within ninety days from the effective date of the zoning law that they would not have to apply for a building permit; (c) that the only attempt of the owners of the property to act under whatever authority was granted

by the board of aldermen, within 90 days from the effective date of the zoning law, was to place in the building on the premises goods to be sold out of a filling station and grease dispenser; (d) that a filling station cannot be operated in 'Zone 1 Business' of the city of Goldsboro unless it comes within the exceptions set forth in said ordinance, which do not apply to the premises in question."

Thereupon the board of adjustment voted three to two approving the refusal of the building inspector to grant a permit. The plaintiffs by *certiorari,* appealed from the order of the board of adjustment to the Superior Court. Many affidavits were filed, and after hearing the pleadings and affidavits, the trial judge, after considering the entire case, was "of the opinion that the decision of the board of adjustment is in all respects proper, and that each of the grounds of error set out in the petition for writ of *certiorari* should be disallowed and overruled."

From the foregoing judgment plaintiffs appealed.

Kenneth C. Royall and Andrew C. McIntosh for plaintiffs.

D. C. Humphrey, J. F. Thomson and Dickinson & Freeman for city of Goldsboro.

BROGDEN, J. The plaintiffs assert:

1. That the zoning ordinance is unconstitutional.

2. That the property owned by them is exempted from the operation of the ordinance.

The last utterance of this Court upon zoning ordinances is contained in *Elizabeth City v. Aydlett,* 201 N. C., 602. In this case the philosophy of zoning ordinances is expounded and applied. All the usual grounds of assault upon the zoning theory were discussed with abundant citation of supporting authority. Moreover, the opinion draws a clear line of demarcation between the principles of law applicable to the zoning ordinance of Goldsboro and those governing cases similar to *Clinton v. Oil Co.,* 193 N. C., 432, 137 S. E., 183; *MacRae v. Fayetteville,* 198 N. C., 51, 150 S. E., 628, and others of like import. It is deemed unnecessary to decide the constitutionality of the entire zoning ordinance upon the particular facts presented by this record, if, as a matter of fact, the property of plaintiffs is exempt from the operation of the ordinance by the terms thereof. Hence, the inquiry arises: Are the restrictions of the zoning ordinance applicable to the property of plaintiffs upon the facts disclosed?

On 2 December, 1929, before the zoning ordinance became effective, the board of aldermen of the city of Goldsboro excepted the property of plaintiffs from the restricted district and granted a permit to install

"two gas pumps in the present Union Bus Station." The zoning ordinance became effective on 15 August, 1930, and the plaintiffs had 90 days from said date, under section 17 of the ordinance, to act upon the permit theretofore granted by the city. On 11 November, three days before the expiration of the time limit, plaintiffs placed upon the premises "a grease dispenser and goods to be sold out of a filling station." It will be observed that section 17 of the ordinance uses the expression: "And the construction of which from such plans shall have been started within 90 days after this ordinance becomes effective." The plaintiffs contend that the placing of a grease dispenser and certain merchandise upon the premises constituted "construction . . . started." In other words, if plaintiffs had a permit to use the property for a certain purpose and placed upon the premises, in good faith, goods and equipment essential to such purpose, does such act bring them within the exemption of section 17 in the sense that the construction has started, or to compress the question in a smaller compass, when does construction start?

Manifestly, it serves no useful purpose to pick words to pieces and put them under a microscope in order to develop or disclose occult and peculiar meaning. The law is disposed to interpret language in the light of surrounding circumstances and to give to words their ordinary meaning and significance. The word "started" used in section 17, interpreted in its setting, is doubtless synonymous with commence or begin. In Words & Phrases, First Series, Vol. 2, it is said: "The commencement" of a building within the mechanic's lien law, is the doing of some act upon the ground on which the building is to be erected, and in pursuance of a design to erect, the result of which act would make known to a person viewing the premises, from observation alone, that the erection of a building on that land had been commenced. Work done in breaking the ground for a cellar is a commencement of a building, because it must have changed the appearance of the ground so as to show the purpose of the work.

Courts are divided upon the question as to whether the placing of material upon a building site is a commencement of the building. The Texas Court in *Terry et al. v. Texas Co.*, 228 Southwestern, 1019, held that the placing of timbers for the erection of a derrick and machinery, including boiler, on the ground where an oil well was to be drilled, complied with the provisions requiring a person "to commence to drill," a well within a certain period. The Iowa Court in *Graw v. Manning*, 7 N. W., 150, discussed the meaning of the word "started." The statute in question provided in substance that if a debtor "started to leave the state" his property exemption was restricted to wearing apparel. The Court in discussing the meaning of the word "started," said that it "does

2. Same—Evidence held insufficient to support finding that employer hired as many as five employees in the business.

Where, in a proceeding under the Workmen's Compensation Act to recover compensation for the death of a deceased employee, the evidence fails to show an election by the employer and employees to be bound by the act, and upon appeal to the Superior Court from an award by the Industrial Commission, the court finds from the evidence that the employer owned a planing mill and a wood or wagon shop, on adjoining land, one operated by steam and the other by electricity, but that they were operated as separate and distinct businesses, each with a distinct patronage, and without connection with each other, that the deceased employee was employed in the planing mill only, and that there were less than five employees regularly in service in the planing mill: *Held*, the evidence is insufficient to support the jurisdictional finding of the Industrial Commission that the employer had as many as five employees in the same business, and there is no error in the judgment of the Superior Court dismissing the proceeding on the ground that the Industrial Commission was without jurisdiction.

3. Master and Servant F i—Jurisdictional findings of fact by Industrial Commission are reviewable by Superior Court on appeal.

Where the Industrial Commission has jurisdiction of a proceeding for compensation under the Workmen's Compensation Act, its findings of fact supported by any sufficient evidence, with respect to whether an injured employee is entitled to compensation and, if so, the amount, are conclusive upon the parties and upon the Superior Court on appeal, but the findings of fact of the Industrial Commission upon which its jurisdiction is based are not conclusive on the Superior Court, and upon appeal to it the court has the power to approve, modify or set aside such findings in accordance with the findings of the court from all the evidence appearing in the record. N. C. Code, 8081(pp).

APPEAL by the dependent of the deceased employee from *Harris, J.*, at August Term, 1931, of FRANKLIN. Affirmed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was first heard by Commissioner Dorsett, on 24 January, 1930, at Louisburg, N. C.

At this hearing it was agreed by the parties to the proceeding that at the date of his death, to wit: 31 December, 1929, W. H. Aycock was an employee of George H. Cooper, at his planing mill in the town of Louisburg, N. C.; that the death of said employee was the result of an accident which arose out of and in the course of his employment; and that the claimant is the dependent of the deceased employee, as defined in the North Carolina Workmen's Compensation Act.

The employer, George H. Cooper, contended at said hearing that he was not bound by the provisions of the North Carolina Workmen's Com-

pensation Act, for the reason that he did not have in his employment, at the date of the death of his deceased employee, as many as five employees at his planing mill, and that he had not voluntarily elected to be bound by the provisions of said act. Upon these contentions, the said employer denied that the North Carolina Industrial Commission had jurisdiction of the proceeding, and contended that the same should be dismissed.

Commissioner Dorsett heard the evidence and on the facts found by him held that the Commission had jurisdiction of the proceeding, for the reason that the employer had in his employment in the business in which the deceased employee was employed at the date of his death, as many as five employees. He awarded compensation to the dependent of the deceased employee, and directed that the employer pay the same to her. The employer appealed to the full Commission. Upon the hearing of this appeal, the findings of fact and conclusions of law made by Commissioner Dorsett were approved, and his award affirmed. The employer appealed from the award of the full Commission to the Superior Court of Wake County. Upon the hearing of this appeal, the court found from the evidence certified to it by the Commission, and appearing in the record, that at the date of the death of his employee, W. H. Aycock, the employer, George H. Cooper, did not have in his employment, in the business in which his deceased employee was employed, as many as five persons, and on this finding of fact held that the North Carolina Industrial Commission did not have jurisdiction of this proceeding.

From judgment dismissing the proceeding, the dependent of the deceased employee appealed to the Supreme Court.

O. B. Moss and Edward F. Griffin for appellant.
Yarborough & Yarborough and Biggs & Broughton for appellee.

CONNOR, J. The North Carolina Workmen's Compensation Act, by its express provisions, does not apply to casual employees, farm laborers, or Federal Government employees in North Carolina; nor does it apply "to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, unless such employees and their employer voluntarily elect, in the manner hereinafter specified, to be bound by the act." N. C. Code of 1931, section 8081(u), (b). Section 14, chapter 120, Public Laws of North Carolina, 1929. In the absence of an election by both employer and employee to be bound by its provisions, the act applies only to employers, who have in their service, in the same business within this State, as many as five employees. In the instant case, there was no evidence tending to show

that the employer and his deceased employee had elected to be bound by the provisions of the act. The North Carolina Industrial Commission, therefore, had no jurisdiction of this proceeding for compensation to be paid by the employer to the dependent of his deceased employee, under the provisions of the act, unless the employer had regularly in his employment, at the date of the death of his employee, and in the business in which said employee was employed, as many as five employees.

The North Carolina Industrial Commission found from the evidence at the hearing before Commissioner Dorsett, as a jurisdictional fact, that at said time, the employer had as many as five employees in the same business as that in which the deceased employee was employed. On this finding, the Commission held that it had jurisdiction of the proceeding, and on the facts admitted, awarded compensation to the dependent of the deceased employee. At the hearing of the employer's appeal from the award of the full Commission, the Superior Court of Franklin County, found from the evidence that the employer did not at any time from the date at which the North Carolina Workmen's Compensation Act became effective to the date of the accidental injury which resulted in the death of the employee, have regularly in his employment at the planing mill, at which the deceased employee was employed, as many as five employees, but that he did have in his employment at the planing mill as many as four employees; that the employer had in his employment during said time at the wood or wagon shop owned and operated by him two and at times three employees; that the deceased employee was not employed to work and did not work at any time in the wood or wagon shop, but worked only at the planing mill. The planing mill at which the deceased employee was employed is located in a shed which adjoins the building in which the wood or wagon shop owned and operated by George H. Cooper, is located. The planing mill and the wood or wagon shop are both owned and operated by George H. Cooper, but are operated as separate and distinct businesses. The planing mill is operated by steam, while the wood or wagon shop is operated by electricity. Each business has a separate and distinct patronage. Neither is operated in any respect in connection with the other.

It is provided in the North Carolina Workmen's Compensation Act that the award with respect to compensation under the provisions of said act, by a member of the North Carolina Industrial Commission, if not reviewed in due time by the full Commission, or the award of the full Commission, upon such review, shall be conclusive and binding as to all questions of fact. Either party to a dispute which has become the

subject-matter of a proceeding before the North Carolina Industrial Commission, for compensation under the provisions of the North Carolina Workmen's Compensation Act, may appeal from the award of said Commission in said proceeding, to the Superior Court of the county in which the accident resulting in injury to the employee happened, or in which the employer resides or has his principal office, for errors of law under the same terms and conditions as govern appeals in ordinary civil actions. N. C. Code of 1931, section 8081 (pp); section 60, chapter 120, Public Laws of North Carolina 1929. The courts of this State, since the enactment of the North Carolina Workmen's Compensation Act, have uniformly applied this statutory provision with respect to questions of fact involved in a proceeding of which the North Carolina Industrial Commission had jurisdiction, and have held that in such proceedings, where there was evidence of sufficient probative force to support the findings of fact made by the Commission, notwithstanding there was evidence to the contrary, such findings of fact are conclusive and binding, not only on the parties to the proceeding, but also, where either party has appealed from the award of the Commission to the Superior Court, on said court. In such case, the Superior Court has power to review the award of the Commission only as to errors in matters of law appearing in the proceeding. *Cabe v. Parker-Graham-Sexton, Inc., ante,* 176, *Dependents of Pool, deceased, v. Sigmon, ante,* 172, *Williams v. Thompson,* 200 N. C., 463, *Moore v. State,* 200 N. C., 300, *Southern v. Cotton Mills,* 200 N. C., 165, *Rice v. Panel Company,* 199 N. C., 154.

In the instant case, we are of opinion that there was no evidence sufficient to support the findings of fact made by Commissioner Dorsett, and approved by the full Commission, upon which the Commission concluded that it had jurisdiction of this proceeding. To the contrary, all the evidence shows that George H. Cooper, the employer, did not have in his employment in the business in which his deceased employee was employed, at the time of his death, as many as five employees. For this reason, there was no error in the judgment of the Superior Court, dismissing the proceeding.

If, however, it be conceded that there was evidence tending to support the findings of fact on which the Commission concluded that it had jurisdiction of the proceeding, and also that there was evidence to the contrary, tending to support the findings of fact by the Superior Court on which the said court held that the Commission did not have jurisdiction of the proceeding, the question presented for decision by this appeal is, whether the findings of fact made by the Commission were conclusive and binding on the Superior Court, and therefore not subject

to review on the appeal to said court. This question, we think, manifestly, must be answered in the negative. The question has not heretofore been presented to this Court, and we, therefore, have no decision which may be cited as an authority, but both a proper construction of the language of the statute, and well-settled principles of law lead us to the conclusion that where the jurisdiction of the North Carolina Industrial Commission to hear and consider a claim for compensation under the provisions of the North Carolina Workmen's Compensation Act, is challenged by an employer, on the ground that he is not subject to the provisions of the act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. A contrary holding might present a serious question as to the validity of the statutory provision with respect to the effect of the findings of fact made by the Commission.

The law is well settled that where the North Carolina Industrial Commission has jurisdiction of a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act, its findings of fact with respect to whether or not an injured employee is entitled to compensation, and, if so, in what amount, are conclusive and binding not only on the parties to the proceeding, but also where either party has appealed from the award of the Commission to the Superior Court, on said court. Where, however, the jurisdiction of the Commission is challenged by the employer on the ground that he is not bound by the provisions of the North Carolina Workmen's Compensation Act, the findings of fact made by the Commission on which its jurisdiction is dependent, are not conclusive on the Superior Court. On an appeal to said court, the findings of fact made by the Commission may be approved, modified or set aside, in accordance with the findings of the court from all the evidence, appearing in the record. In the instant case, on its findings of fact, which are supported by the evidence, the Superior Court held that the Commission had no jurisdiction of the proceeding and therefore ordered and adjudged that the proceedings be dismissed. The judgment dismissing the proceeding is

Affirmed.

CLINTON COTTON MILLS, INCORPORATED, v. ROBERT GOLDBERG AND FRANK GOLDBERG, PARTNERS, TRADING AS AMERICAN METAL AND WASTE COMPANY.

(Filed 6 April, 1932.)

1. Sales D d—After refusal of shipment by purchaser the seller is not required to make further tender of performance.

Where the purchaser wrongfully refuses to receive shipment of goods under a written contract the seller is not bound to tender further performance if he is able, ready and willing to make delivery, and where the evidence is conflicting as to whether the refusal was wrongful, an issue of fact is raised for the determination of the jury.

2. Sales G c—Where purchaser wrongfully refuses to accept goods seller may resell on open market to mitigate damages.

Where the purchaser wrongfully refuses to accept a shipment of goods under a written contract, the seller, as agent for the purchaser, may, in good faith resell the goods on the open market at a fair sale and apply the proceeds to the payment of the contract price in diminution of his loss, and recover of the purchaser the difference between the contract price and the amount obtained from the sale on the open market when the latter is less than the former.

3. Same—Burden is on purchaser to prove that seller failed to use due diligence in resale of goods when relied on by him.

Where the purchaser of goods under a contract wrongfully refuses to accept them, and the seller resells the goods on the open market to diminish the damages, and the purchaser alleges that the seller failed to use due diligence to obtain a fair price for the goods in the resale: *Held*, the burden is on the purchaser to prove the seller's failure to use due diligence when relied on by him.

CIVIL ACTION, before *Harding, J.*, at March Term, 1931, of GASTON.

On 20 November, 1928, the plaintiff and the defendants entered into a written contract providing in substance that the plaintiff would sell and that the defendants would buy the entire production of cotton waste of plaintiff "over the year 1929 from 1 January, 1929, through 31 December, 1929." The quality of waste consisted of three grades specified in the contract as "motes, card-fly and white-dust-house." The shipments were to be made "monthly as accumulated with bill of lading attached." According to the terms of the contract, the plaintiff shipped to the defendants certain waste on 6 February, 1929, 2 April, 1929, 3 May, 1929, 31 May, 1929, 1 June, 1929, and 12 June, 1929. No objection was made by the defendants as to the quality or packing of the waste until the shipment of 12 June, 1929. On 21 June, 1929, the defendants notified the plaintiff as follows: "Regret to advise you shipment motes 12 June much lower in quality than before. We cannot use

at invoice price. Please wire disposition or indicate your idea of price adjustment." Here the controversy between the parties began. On 25 June, the plaintiff advised the defendants that the shipment of 12 June, was identically of the same quality as prior shipments, and on 27 June, the plaintiff further advised the defendants that it would not expect them to accept "the same kind of material over the balance of this year as per our contract with you." On 28 June, the defendant notified the plaintiff that by reason of the low quality of waste they would not accept the same and that the material was still in the car on siding and demurrage accruing daily. On 29 June, the plaintiff notified the defendants that the material furnished was in accordance with the contract and that it would expect the defendants to continue accepting shipments over the balance of the year. In the meantime the defendants requested the plaintiff to investigate the quality of material shipped, which the plaintiff refused, taking the position that all shipments were strictly in accordance with the contract. Thereafter, on 8 July, 1929, the defendants notified the plaintiff: "We will have to refuse any further shipments you make us unless you show a willingness to do what is right regarding the shipment of fly and motes in question." Thereafter, on 12 September, the plaintiff notified the defendants they had omitted and refused to give shipping instructions for further material and that as a result thereof that the plaintiff would sell "at the end of each month our products in the open market at the highest possible price, charging all loss to you."

The plaintiff contended and offered evidence tending to show that the output of the mill at contract price after breach by the defendants, would have amounted to $7,082.56, and that it had received therefor by sale in the open market $4,040.11, and that, therefore, it suffered damage in the sum of $3,042.45.

The defendants alleged and offered evidence tending to show that the plaintiff had breached the contract by undertaking to deliver inferior quality and by negligently packing and mixing the material, which resulted in a loss of $2,500, and they ask for recovery of said amount from the plaintiff.

The jury found that the defendants breached the contract and assessed damages in the sum of $3,042.45 with interest from 31 December, 1929. The fourth issue relating to the defendants' counterclaim was not answered.

From judgment upon the verdict in favor of plaintiff, the defendants appealed.

H. C. Jones, Brock Barkley and E. B. Benning for plaintiff.
Clyde R. Hoey and S. J. Durham for defendants.

BROGDEN, J. Evidence was offered by the plaintiff in support of its claim and tending to show full compliance with the contract on its part and breach of contract on the part of defendants. Likewise the defendants offered evidence tending to show a breach by the plaintiff, thus relieving the defendants from the duty of accepting the shipments. Therefore, in the last analysis the cause was reduced to an issue of fact.

The principles of law involved are plain and well settled. If a buyer of goods, without legal cause, refuses to accept the goods before the time for performance has expired, such refusal dispenses with the necessity for tender, if the seller is otherwise able, ready and willing to comply with the terms of the contract. *Wilson v. Cotton Mills,* 140 N. C., 52, 52 N. E., 250; *Ward v. Albertson,* 165 N. C., 218, 81 S. E., 168; *Bryant v. Lumber Co.,* 192 N. C., 607, 135 S. E., 531; *Wade v. Lutterloh,* 196 N. C., 116, 144 S. E., 694. The opinion of the Court in the *Wade case, supra,* quotes with approval the following pertinent proposition of law: "Renunciation by one party excuses the other from any further offer to perform, so that the failure of such other party to perform or to tender performance does not give to the party who was originally in default the right to treat the contract as discharged because of such nonperformance; and such failure does not show that the party who was originally not in default and who has omitted to perform further, or to tender performance, has consented to treat such contract as discharged so as to prevent him from enforcing it thereafter, at least by an action for damages or some similar appropriate remedy."

If the defendants, without legal cause, refused to accept further shipments, the plaintiff had the right to resell the material specified in the contract as agent of defendants and to recover from them the difference between the contract price and that obtained on the resale, if the resale was made within a reasonable time, fairly conducted, with full notice, and consummated in the exercise of utmost good faith. *Lamborn v. Hollingsworth,* 195 N. C., 350, 142 S. E., 19. The plaintiff offered evidence tending to show performance of this duty. However, the defendants contended that if plaintiff had exercised reasonable care and diligence in selling in the open market, the price obtained would have been equal to or in excess of that specified in the contract and consequently plaintiff would have suffered no damage. In this connection, the trial judge instructed the jury that the burden was on the defendants to show that the market value was more than the contract price.

The defendants assert that the court, by such instruction, imposed upon them a burden of proof not contemplated or permitted by law. Manifestly, it was the duty of the plaintiff to exercise reasonable diligence to diminish and minimize the loss resulting from the breach of

contract by undertaking to dispose of the waste for the best price obtainable, under all the circumstances. *Hassard-Short v. Hardison,* 114 N. C., 482, 19 S. E., 728; *Mills v. McRae,* 187 N. C., 707, 122 S. E., 762; *Construction Co. v. Wright,* 189 N. C., 456, 127 S. E., 580.

The pertinent principle of law was thus stated in the *Mills case, supra:* "It would seem to be more in accord with fairness to require the defaulting seller—the party charged with responsibility for breach of the contract—to prove that similar goods could have been readily procured in the market than to require the vendee to show that like goods could not be obtained in the market." That is to say, if the party in default asserts that the other party has failed to exercise reasonable diligence in diminishing and minimizing the loss, the burden is upon such defaulting party to establish his contention by proper evidence. Viewed in this light, the instruction complained of cannot be held for error.

No error.

COMMISSIONER OF BANKS, ON RELATION OF THE FARMERS BANK AND TRUST COMPANY OF FOREST CITY, v. FLORENCE MILLS, INCORPORATED.

(Filed 6 April, 1932.)

1. Banks and Banking H e—Exclusion of testimony in this case with respect to consideration for pledging of assets of bank held error.

Where in an action by the receiver of a bank to recover assets of the bank pledged with a depositor to secure the deposit, the receiver contends that the pledge was without consideration and void, and the depositor contends that the security was given in consideration of future or increased deposits, and the receipt therefor is ambiguous: *Held,* the exclusion of testimony of the active president of the bank as to a conversation with the active vice-president of the depositor tending to establish that the security was given in consideration of future or increased deposits is error, there being no testimony by other witnesses supplying the excluded testimony.

2. Trial E c—Charge in this case held insufficient to meet requirements of C. S., 564, and a new trial is awarded.

Where the trial court in his charge to the jury explains the law applicable and gives the contention of the parties, but fails to instruct the jury as to the application of the law to the substantial features of the case, the charge is insufficient to meet the requirements of C. S., 564, and a new trial will be awarded.

3. Banks and Banking H e—Commissioner of banks must sue in his individual name.

An action by the Commissioner of Banks to recover assets of the insolvent bank must be brought in his individual name, but his failure to do so may be cured by amendment.

APPEAL by defendant from *Sink, J.*, at August Term, 1931, of RUTHERFORD. New trial.

The plaintiff brought suit to recover certain collateral securities alleged to be the assets of the Farmers Bank and Trust Company of Forest City, which is now in the hands of the plaintiff as liquidating agent. The securities consist of two notes and approximately five hundred shares of stock in certain manufacturing companies. The plaintiff alleges in substance that while the bank was insolvent the officers of the bank fraudulently and without a valuable consideration deposited these securities with the defendant for the purpose of obtaining the defendant's patronage and deposits. Upon the pleadings the court formulated the issues which were answered as follows:

1. Was the Farmers Bank and Trust Company of Forest City, N. C., insolvent on 14 January, 1930, as alleged in the complaint? Answer: Yes.

2. Did the defendant on 14 January, 1930, obtain the securities described in the complaint without a valuable consideration, as alleged in the complaint? Answer: Yes.

3. Did the defendant on 14 January, 1930, unlawfully and fraudulently obtain the securities as described in the complaint from the Farmers Bank and Trust Company of Forest City, N. C., as alleged in the complaint? Answer: Yes.

Judgment was rendered for the plaintiff and the defendant appealed upon assigned error.

D. Z. Newton and B. T. Jones, Jr., for plaintiff.
Quinn, Hamrick & Harris for defendant.

ADAMS, J. In reference to the second issue his Honor stated the plaintiff's chief contention to be that the securities in question had been turned over to the defendant, not to secure future deposits, but to secure such as were in the bank at the time of the transfer, that the alleged agreement between the parties was not supported by a valuable consideration, and that the issue should be answered in the affirmative. He stated one of the defendant's contentions to be that a part of the consideration was a promise by the defendant to give the bank the benefit of future and additional deposits. Then follows this instruction: "If you shall find that to be a fact, the court instructs you that it would be your duty to answer the second issue No, because that would be a valuable consideration."

Throughout the trial the defendant insisted that the defendant's promise of increased deposits was really the controlling factor in the agreement and, indeed, the principal consideration. To establish its

contention the defendant introduced as a witness the active president of the bank and offered to show by him that he had a conversation with the active vice-president, and that the collateral was to be turned over to the defendant for the purpose of securing whatever deposits the defendant might make in the future as well as the deposit then in the bank. This evidence was excluded.

If the instruction given the jury on this point was correct, the evidence was improperly excluded. The appellee says that the receipt is the best evidence of the purpose for which the collateral was delivered; but the clause "any and all deposits made" is susceptible of more than one interpretation and is therefore subject to explanation. We find nothing in the testimony of the other witnesses which supplies the excluded evidence.

We are of opinion that the instruction on the third issue is not sufficiently definite. Fraud was thus defined: "As regards fraud, it is not essential that false assertions be made in express words, but fraud may be accomplished by encouraging and taking advantage of a delusion known to exist in the minds of others. In other words, fraud may be defined as any trick or artifice, whether perpetrated by means of false statements, concealment of material facts, or deceptive conduct, which is intended to and does create in the mind of another an erroneous impression concerning the subject-matter of a transaction, whereby the latter is induced to take action or forbear from action with reference to his property or a legal right of his which results to his disadvantage and which he would not have consented to had the impression in his mind been correct and in accordance with the real facts."

After setting out the contentions as to the facts the charge proceeds: "From all this testimony and under the definition of fraud as given to you by the court, the plaintiff says this transaction was fraudulently entered into, that is, that it was entered into for the purpose of depriving the other creditors and stockholders in the Farmers Bank and Trust Company of their lawful rights and for the purpose of giving unlawful preference to the defendant corporation. All of this the defendant denies, and contends and insists that there was no such intention on their part and that they actually did not do anything unlawful, but on the contrary that they were in the ordinary course of business trying to protect the interests of the corporation and the stockholders of the Florence Mills, Incorporated, and that all their transactions were bona fide and sincere, and not for the purpose of defrauding anybody, on the part of anybody, and that from all the evidence you should fail to find as the plaintiff contends by the greater weight of the evidence and you should answer it, No."

not mean the actual setting out on a journey, but means the commencement of the enterprise or undertaking; and one who had placed his wagon close to the house ready to be loaded with goods and a part of the goods were placed in boxes out of the house and the appearance in the house indicated a state of preparation for moving will be deemed to have 'started' to remove from the state."

So, in the present case, if the plaintiffs, in good faith, and in pursuance of a permit granted from the city of Goldsboro, had placed filling station equipment and supplies upon the premises with the intention of operating such station in full conformity with the authority previously granted, then it cannot be said, as a matter of law, that the construction had not started before the expiration of the time limit.

Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner. Furthermore, it is to be noted that filling stations *eo nomine* are not expressly excluded from zone 1.

While the board of adjustment is clothed with certain power and discretion in determining questions affecting the administration of zoning ordinances, nevertheless in the case at bar, the controversy involves the inquiry as to whether under the facts and circumstances the zoning ordinance precludes the plaintiffs from installing the gas pumps in accordance with the permit from the city.

The plaintiffs contend that prior to the effective date of the ordinance they had started or begun the installation of the gas pumps in good faith. The city denies such contention.

Thus, an issue of fact is produced for the determination of a jury.

Reversed.

MRS. TEMPIE AYCOCK, WIDOW AND DEPENDENT OF W. H. AYCOCK, A DECEASED EMPLOYEE, V. GEORGE H. COOPER.

(Filed 6 April, 1932.)

1. Master and Servant F a—Workmen's Compensation Act does not apply to business hiring less than five regular employees.

The North Carolina Workmen's Compensation Act provides that it shall not apply to employers and employees where there are less than five employees regularly employed in the business within this State unless the employer and employees shall elect to be bound by the act. N. C. Code of 1931, 8081(u).

The instruction is subject to the criticism set forth in *Watson v. Tanning Co.*, 190 N. C., 840, *Williams v. Coach Co.*, and other cases. The requirements of C. S., 564 are not met by a general statement of legal principles which bear upon the issues remotely but not with absolute directness. The trial court inadvertently disregarded an application of the law to the substantial features of the case, the instructions on the third issue consisting of a definition of fraud and the contentions of the parties.

It is suggested that the trial of the cause may be simplified by reference to the principles stated on both sides of the question in 51 A. L. R., 296.

We have recently held that the Commissioner of Banks must sue in his individual name and that the failure to do so may be cured by amendment.

New trial.

STATE v. J. D. FLEMING.

(Filed 6 April, 1932.)

1. **Homicide G b—Killing with deadly weapon raises presumptions of malice and that killing was unlawful.**

   Where upon the trial for a homicide the solicitor does not ask for a conviction of murder in the first degree but of murder in the second degree or manslaughter, and the defendant admits he killed the deceased with a pistol but contends that the deceased was attacking him with a knife, and that the killing was in self-defense, the killing with the deadly weapon raises the presumptions of malice and that the killing was unlawful, both of which presumptions the defendant must rebut by his evidence, and where he rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter.

2. **Criminal Law L c—Exclusion of testimony will not be held for reversible error where other evidence of same import is admitted.**

   Where, in a prosecution for homicide, the prisoner pleads self-defense, the exclusion of evidence, over his objection, tending to show the deceased had a grudge against him is not reversible error when other evidence to the same effect is admitted at the trial without objection.

3. **Criminal Law I g—Instruction in this case held to conform to C. S., 564, and was sufficiently full.**

   Where, in a prosecution for homicide, the court states the essential evidence in the case in a plain and concise manner, and explains the law arising thereon, the instruction meets the requirements of C. S., 564, and will not be held for error, there being no request by the defendant for special instructions.

STATE *v.* FLEMING.

4. Criminal Law L e—Court may fix maximum and minimum sentence within statutory allowance in his discretion which is not reviewable.

The question of the imposition of a sentence on the prisoner convicted of manslaughter within the maximum and minimum allowed by statute, C. S., 4201, is within the discretion of the trial court and is not reviewable on appeal.

APPEAL by the defendant from *Oglesby, J.*, at October Term, 1931, of SURRY. No error.

The defendant in this action was convicted of manslaughter.

It was adjudged by the court that he be confined in the State's prison for a term of not less than fifteen or more than twenty years.

The defendant appealed from the judgment to the Supreme Court, assigning errors at the trial.

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

Folger & Folger for defendant.

CONNOR, J. At the trial of this action, the defendant admitted that he killed the deceased with a deadly weapon, to wit, a pistol. He contended, however, that at the time he fired his pistol at the deceased, the deceased was assaulting him with a deadly weapon, to wit, a knife. He relied upon his plea of self-defense, and contended that for that reason he was not guilty of murder or of manslaughter, as charged in the indictment. There was evidence which strongly supported the contentions of the defendant, and to show that the homicide was excusable because committed by the defendant in self-defense; there was evidence to the contrary, which tended to contradict the testimony of the defendant, who testified as a witness in his own behalf, and to show that the homicide was at least manslaughter, if not murder in the second degree. The solicitor for the State announced at the trial that he did not contend that the homicide was murder in the first degree, but did contend that it was murder in the second degree or manslaughter. The evidence, both for the State and for the defendant, was submitted to the jury under a charge which appears in the statement of case on appeal certified to this Court.

Defendant's assignments of error based on his exceptions to the rulings of the trial judge with respect to the evidence cannot be sustained. The error, if any, in sustaining the objection of the State to the testimony of the defendant that the deceased had a "grudge" against him, was not prejudicial to the defendant, for the reason that abundant evidence to that effect was subsequently offered by the defendant, and admitted by the judge without objection by the State. There was no error in the

refusal of the judge to sustain the objection of defendant to the introduction of the shirt worn by the deceased at the time he was shot and killed by the defendant, as evidence tending to show the location on the person of the deceased of the fatal wound. The shirt was clearly competent as evidence for that purpose.

Assignments of error based upon defendant's exceptions to the charge of the court to the jury, duly noted in the record, and discussed in the brief filed in his behalf in this Court, cannot be sustained. The court properly instructed the jury as to the law with respect to the burden assumed by the defendant when he admitted that he killed the deceased with a deadly weapon, and relied upon his plea of self-defense for a verdict of not guilty. In *S. v. Fowler,* 151 N. C., 731, 66 S. E., 567, the defendant was convicted of manslaughter, notwithstanding there was evidence at the trial tending to sustain his plea of not guilty, because the homicide was committed in self-defense. In that case it is said: "An unlawful killing is manslaughter, and when there is the added element of malice it is murder in the second degree. When the defendant takes up the laboring oar, he must rebut both presumptions—the presumption that the killing was unlawful and the presumption that it was done with malice. If he stops when he has rebutted the presumption of malice, the presumption that the killing was unlawful still stands, and unless rebutted, the defendant is guilty of manslaughter. This is a fair deduction from the cases in this State." This statement of the law is quoted with approval in *S. v. Miller,* 185 N. C., 679, 116 S. E., 416. The principle is well settled in the law of this State.

The contention of the defendant that the judge in his charge to the jury failed to comply with the mandatory provisions of C. S., 564, cannot be sustained. The charge as set out in full in the statement of the case on appeal is in full compliance with the statute. The essential evidence offered at the trial is stated in a plain and correct manner, together with an explanation of the law arising thereon. This is all that is required by the statute. There were no requests by the defendant for special instructions, and no occasion for such requests, as the law involved in the case is simple and easily applied.

We find no error in the trial of the action. The judgment must be affirmed. The judgment prescribing a minimum and a maximum term for the imprisonment of the defendant as punishment for the crime of which he was convicted by the jury, is within the discretion of the judge. C. S., 4201. We cannot review the judgment in that respect. *S. v. Jones,* 181 N. C., 543, 106 S. E., 827; *S. v. Woodlief,* 172 N. C., 885, 90 S. E., 137.

No error.

JULIUS HAYES v. JUNE J. LANCASTER.

(Filed 6 April, 1932.)

Execution K d—Plaintiff suggesting fraud in defendant's affidavit of insolvency must sufficiently allege and prove fraud.

Where execution against the person of a defendant is made in accordance with the judgment against him, C. S., 673, after execution against his property is returned unsatisfied, and the defendant files a petition for his discharge as an insolvent under C. S., 1637 *et seq.*, and the plaintiff answers the petition for discharge and alleges that the defendant had concealed his property and fraudulently made the affidavit that he was without means: *Held*, the plaintiff must allege the fraud with sufficient fullness and certainty to indicate the charge the defendant must answer, and such allegations must be supported by sufficient evidence, and where the plaintiff has failed to do so a judgment dismissing the proceeding will be affirmed.

APPEAL by plaintiff from *Harwood, Special Judge,* at October Term, 1931, of DURHAM. Affirmed.

R. O. Everett, V. S. Bryant and John W. Hester for plaintiff.
Yarborough & Yarborough for defendant.

ADAMS, J. The plaintiff recovered a judgment against the defendant for $1,400 and had it docketed in the Superior Court. The judgment authorized an execution against the person of the defendant after the return of an execution against his property wholly or partly unsatisfied. C. S., 673. The officer found no property upon which to levy the execution and served the subsequent process against the person by arresting the defendant and accepting bail for his appearance in the Superior Court on the day fixed for the return of the execution. The defendant, giving due notice, filed a petition for his discharge as an insolvent under C. S., 1637 *et seq.,* and annexed thereto a statement of his property. The plaintiff filed an answer to the petition for discharge, and alleged that the defendant had concealed his property and had fraudulently made affidavit that he was without means. The plaintiff "suggested and alleged fraud on the part of the defendant in his statement." The cause was transferred to the civil issue docket and the trial judge held that the controversy was reduced to an issue relative to the defendant's fraudulent concealment of his property, and that the evidence was not sufficient to justify a finding of fraud. The proceeding was dismissed and the plaintiff appealed.

When the judgment debtor files his petition for discharge as an insolvent every creditor upon whom notice is served "may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases." C. S., 1641. The "sug-

gestion of fraud" imports the setting forth of particular allegations by which to establish the fraudulent transaction. *Edwards v. Sorrell,* 150 N. C., 712. Fraud must be alleged with sufficient fullness and certainty to indicate the charges the opposing party must answer and the charges must be supported by competent evidence. *Nash v. Hospital Co.,* 180 N. C., 59; *Waddell v. Aycock,* 195 N. C., 268. Something more than a suspicion of artifice and deception is necessary. We are of opinion that the allegations and the proof do not meet the requirements of the law.

Affirmed.

HATTIE SIMPSON ET AL. v. THOMAS G. JONES ET AL.

(Filed 6 April, 1932.)

Mortgages A a—Instruction as to whether papers constituted in effect a mortgage or deed held insufficient in this case.

Where there is evidence that a deed to lands and a contract to reconvey were executed at the same time, the question being as to whether the deed was in effect a mortgage to secure borrowed money, a directed instruction upon the issue in the grantee's favor is erroneous which is based upon the admissions of the parties but leaves out reference to the evidence tending to show that the effect of the transaction was a mortgage for the loan, and, also, as to the legal effect of the papers under the evidence introduced.

APPEAL by the plaintiffs from *Harwood, Special Judge,* at October, Term, 1931, of CASWELL. New trial.

Glidewell & Gwyn for plaintiffs.
M. C. Winstead for defendants.

ADAMS, J. The plaintiffs executed and delivered to the defendants a deed purporting to convey a tract of land containing forty acres and alleged that the deed was intended as a mortgage to secure the sum of $1,000 loaned them by the defendants. This conveyance was dated 16 April, 1929. Another paper purporting to have been executed on 25 April, 1929, was signed by the plaintiffs and the defendants, in which the plaintiffs contracted to convey to the defendants the land above described for the sum of $1,000, and the defendants agreed that upon receiving this sum at a designated time they would reconvey the property to the plaintiffs. There was evidence tending to show that the deed and the contract were executed and delivered at the same time. On the issue relating to the contract between the parties the trial court instructed the jury as follows: "If you find from the evidence that Hattie Simpson went to the defendants and asked a loan and further find from

the evidence that the defendants, after looking over it, said they would buy the farm and then in consequence of such negotiations between them they had the papers executed, the deed executed, and the contract to reconvey executed, if you should find the facts so to be from the evidence, you would answer the first issue, No." The issue was answered in the negative.

We think the plaintiffs' exception to the foregoing instruction should be sustained. The instruction amounts practically to a directed verdict. About all the elements contained in it as a basis for an answer to the issue were admitted by the parties and certain parts of the evidence bearing upon the intention of the parties were inadvertently omitted from the charge. Nor is there a satisfactory instruction as to the legal effect of the papers. For these reasons the plaintiffs are entitled to a new trial.

New trial.

STATE v. BENNIE GRIFFIN.

(Filed 6 April, 1932.)

Criminal Law L e—No appeal will lie from order of trial court refusing motion for new trial for newly discovered evidence.

A motion for a new trial for newly discovered evidence, made at the next succeeding term of criminal court after affirmance of the former conviction by the Supreme Court, is addressed to the discretion of the trial court, and his order refusing to grant the motion is not reviewable, and an appeal therefrom will be dismissed.

APPEAL by defendant from *Daniels, J.*, at December Term, 1931, of ORANGE. Dismissed.

The defendant in this action was tried at June Term, 1931, of the Superior Court of Orange County, on an indictment of murder. He was convicted of murder in the first degree, and appealed from the judgment on such conviction to the Supreme Court, assigning errors at the trial. The appeal was heard by the Supreme Court at its Fall Term, 1931. The assignments of error were not sustained. The judgment was affirmed. *S. v. Griffin,* 201 N. C., 541.

At the December Term, 1931, of the Superior Court of Orange County, which was the first term of said court held after the affirmance by the Supreme Court of the judgment at June Term, 1931, the defendant moved for a new trial in said court for newly discovered evidence.

The motion was heard (*S. v. Casey,* 201 N. C., 620) and denied. From the order denying his motion, the defendant appealed to the Supreme Court.

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

M. Hugh Thompson and C. J. Gates for defendant.

CONNOR, J. The order denying the motion of the defendant for a new trial on the ground of newly discovered evidence, heard in the Superior Court of Orange County at the term next succeeding the affirmance by this Court of the judgment of said Court at the trial term, is not subject to review on appeal to this Court. This appeal is, therefore, dismissed. *S. v. Cox, ante,* 378. The order was made by the judge of the Superior Court in the exercise of his judicial discretion. *S. v. Casey,* 201 N. C., 620. It involves no matter of law or legal inference. It is conclusive. *Goodman v. Goodman,* 201 N. C., 808, *S. v. Branner,* 149 N. C., 559.

Dismissed.

STATE v. T. H. SHIPMAN, J. S. SILVERSTEEN, J. H. PICKELSIMER, C. R. McNEELY, A. M. WHITE, S. R. OWEN, W. L. TALLEY AND RALPH FISHER.

(Filed 6 April, 1932.)

1. **Criminal Law I j—Upon motion of nonsuit all the evidence is to be considered in the light most favorable to the State.**

   Upon a motion as of nonsuit in a criminal action only the evidence favorable to the State will be considered, and it will be taken in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. C. S., 4643.

2. **Criminal Law G c—Defendant in criminal action may offer character evidence without being a witness in his own behalf.**

   The right of a defendant in a criminal action to offer evidence of his good character does not depend upon his being a witness for himself.

3. **Criminal Law I f—Consolidation of actions in this case held not error.**

   It is within the sound discretion of the trial court to unite in one action indictments against the officials of a bank and members of the board of county commissioners and its attorney on charges of misapplication of county funds and conspiracy to defraud the county by using county funds to aid the bank, the bank being insolvent.

4. **Jury B b—Order that jury be drawn from body of another county held in court's discretion.**

   The granting of the solicitor's motion that the jury be drawn from the body of another county held within court's discretion. C. S., 473 as amended by chapter 308, Public Laws of 1931.

5. Criminal Law G i—Expert may testify from examination of books as to solvency of bank on date in question.

Where the books of the bank are properly identified and introduced in evidence it is competent for an expert accountant, employed by the receiver, to testify from his examination of the books of the bank as to the solvency of the bank on the date in question and as to the amount of the county's deposit at the time, when relevant to the inquiry.

6. Criminal Law A c—Definition of "wilfully and corruptly" in instructions in this case held without error.

In a charge upon the trial of county officials for the misapplication of county funds under the provisions of C. S., 4270, the definition that "wilfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" is not erroneous under the circumstances of this case.

7. Conspiracy B a—Definition of criminal conspiracy.

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and does not require the accomplishment of the purpose in contemplation or any overt act in furtherance thereof.

8. Criminal Law G k—Acts and declarations of conspirator are competent against coconspirators.

Where upon a trial for conspiracy to defraud, the evidence is sufficient to establish the conspiracy *aliunde* the declarations of the parties thereto, everything said, written or done by any of the conspirators in the execution or furtherance of the common purpose to defraud and forming a part of the *res gestæ* is competent in evidence against them all if made or done before the accomplishment of the common design or before it is finally abandoned, and it is within the discretion of the trial judge to admit such evidence before proof of the fact of conspiracy, subject to be stricken out if the fact of conspiracy is not proven.

9. Conspiracy B b—Fact of conspiracy may be shown by circumstantial evidence.

The fact of conspiracy to defraud may be shown by circumstantial evidence; in the reception of such evidence upon the trial great latitude is allowed.

10. Banks and Banking I a—Definition of "insolvency" of bank.

Where the solvency of a bank is material on the trial of an indictment for misapplication of county funds and conspiracy to defraud the county, the meaning of the word "insolvent" is correctly defined as being that the bank could not meet its deposit liabilities as they became due in the regular course of its business, or that the actual cash market value of its assets was insufficient to pay its liabilities to depositors and creditors. C. S., 216(a).

11. Conspiracy B b: Counties B e—Evidence of conspiracy to defraud county and misapplication of county funds held sufficient.

Upon the trial under an indictment against certain officers of a bank and county commissioners and the county attorney for conspiracy and

misapplication of the county funds, there was evidence tending to show that the county had funds on deposit in the bank aggregating about half a million dollars and that a county note in a comparatively small amount was shortly to become due, and that pursuant to an agreement among the defendants to aid the bank, the county commissioners passed a resolution and published a statement that the county had to borrow money, and issued the county's note for $100,000, and that the bank purchased the note and sometime later sold it to a third party, and credited the county's account therewith, and that at the time the bank was insolvent, and that the bank and county officials, including the county attorney were heavy borrowers from the bank, is *held*, sufficient with other incriminating evidence, to sustain the charge of the indictment of conspiracy against the bank officials and the charge of conspiracy and misapplication of funds by the commissioners who participated with knowledge of the facts, but not as those who passed the resolution in good faith and without evidence fixing them with knowledge, the burden being upon the State to establish guilt beyond a reasonable doubt.

12. Criminal Law G d—Exclusion of testimony that defendant had given bank security to protect it from loss on overdraft held not error.

Where on the trial of a bank president for conspiracy to defraud a county by having the county issue its note and deposit the proceeds in the bank when the bank was insolvent, and evidence is properly admitted that the president was heavily indebted to the bank and had an overdraft in a large amount: *Held*, the exclusion of testimony that the president had given the receiver of the bank a deed of trust on property to secure the bank against loss on account of any sums he might owe the bank is not error.

13. Criminal Law G t—Foundation for admission of secondary evidence held sufficiently laid in this case.

On the trial of certain bank officials for conspiracy to defraud a county by having the county issue its notes under false representations that such was necessary to maintain the county schools and roads, and to deposit the proceeds of the notes in the bank when the bank was insolvent, a letter published in the local newspaper purporting to have been written and signed by the bank officials, stating that in the opinion of the writers it was necessary for the county to borrow the money, is *Held*, properly admitted in evidence against the bank officials by whom it was signed, the foundation of such secondary evidence having been sufficiently laid by testimony of the editor of the paper that he had satisfied himself that the letter was written by the bank officials and that he had made a diligent search for the original without finding it.

14. Criminal Law I g—Instructions in this case held sufficiently full and party desiring elaboration should have made request therefor.

Where the charge of the trial court in a criminal prosecution fully states the evidence in the case and the law arising thereon, a party desiring more particular elaboration on a specific point should tender a request for special instructions in apt time, and where this has not been done an exception to the charge will not be sustained on appeal.

CONNOR and BROGDEN, JJ., dissenting.

STATE *v.* SHIPMAN.

APPEAL by defendants from *Sink, J.*, at August Special Criminal Term, 1931, of TRANSYLVANIA. As to Shipman, Silversteen, Pickelsimer, McNeely and Fisher, No error. As to White, Owen and Talley, Reversed.

The defendants were tried under the following bills of indictment, viz.:

"State of North Carolina—Superior Court.
Transylvania County—Spring Term, A.D. 1931.

The jurors for the State upon their oaths do present, that T. H. Shipman, J. S. Silversteen, Ralph Fisher, J. H. Pickelsimer, C. R. McNeely, A. M. White, S. R. Owen and W. L. Talley, late of the county of Transylvania, on 13 September, A.D. 1930, in the county aforesaid, was the agent, consignee, clerk, employee and servant of one Transylvania County, and as such agent, consignee, clerk, employee and servant as aforesaid, was then and there entrusted by the said Transylvania County to receive cash, money, securities, notes and bonds for the said Transylvania County.

And that being so employed and entrusted as aforesaid, the said Shipman, Silversteen, Fisher, Pickelsimer, McNeely, White, Owen and Talley then and there did receive and take into his possession and have under his care for and on account of the said Transylvania County, certain property, to wit, cash, money, securities, notes and bonds of the value of one hundred thousand ($100,000) dollars.

And that afterwards, to wit, on the day and year aforesaid, in the county aforesaid, they, the said defendants above named (then and there being of age of 16 years and more and not an apprentice), knowingly, wilfully, fraudulently, corruptly, unlawfully and feloniously did embezzle and convert and feloniously misapply and did take, make away with and secrete with intent to embezzle and fraudulently misapply cash, money, securities, notes and bonds of the value of the said sum of one hundred thousand ($100,000) dollars so received by them as aforesaid and then and there belonging to the said county of Transylvania, with intent to defraud against the form of the statute in such cases made and provided and against the peace and dignity of the State.

J. WILL PLESS, JR., *Solicitor.*"

"The jurors for the State, upon their oaths, do present, that T. H. Shipman, being president of the Brevard Banking Company, a corporation organized and existing under the laws of the State of North Carolina, J. S. Silversteen, being chairman of the board of directors of said Brevard Banking Company, and J. H. Pickelsimer, C. R. McNeely,

A. M. White, S. R. Owen, and W. L. Talley, comprising the board of county commissioners of Transylvania County, North Carolina, and Ralph Fisher, attorney for the said board of county commissioners, at and in Transylvania County, on 13 September, 1930, with force and arms, unlawfully, wilfully, knowingly, designedly, fraudulently and feloniously did combine, conspire and confederate to and with each other by various false pretenses and false representations, to cheat and defraud Transylvania County, and to abstract, misapply, pervert, and misappropriate the money, funds, credits and securities of the said county in the sum of one hundred thousand ($100,000) dollars, by falsely and knowingly representing that the moneys, funds and revenues with which to pay certain obligations and indebtedness and operating expenses of said county, were exhausted and that it was necessary to sell a note of the said county for the sum of one hundred thousand ($100,000) dollars with which to pay the same, whereas, in truth and in fact the said Transylvania County then and there had on deposit and to its credit, in the said Brevard Banking Company, the sum of $575,929.64; the note of said Transylvania County being offered for sale and sold for the benefit of the said Brevard Banking Company, which said Brevard Banking Company was then and there insolvent or in imminent danger of insolvency and was unable to meet the usual requirements of its customers and depositors in the regular course of business; against the peace and dignity of the State. J. WILL PLESS, JR., *Solicitor.*"

The jury returned the following verdict as to the defendants, Shipman, Silversteen and Fisher: "Guilty upon the count of conspiracy with the recommendation of mercy, and not guilty as to misapplication; and as to each and every of the other defendants, guilty as to both counts with the recommendation for mercy."

The jury that convicted the defendants was a special venire from Haywood County, N. C., C. S., 473. Public Laws 1931, chap. 308. The court below sentenced defendants and also disbarred Ralph Fisher, an attorney at law, who was convicted. C. S., 205.

The following stipulation between the State and the defendants was entered into:

"For the purpose of avoiding unnecessary delay in the trial of this cause, it is agreed that at the time of the alleged offense and for six months preceding it,

First: That the Brevard Banking Company was a banking corporation duly organized and existing under the laws of the State of North Carolina, with its principal office in the town of Brevard, North Carolina, and was engaged in general commercial banking business.

Second: T. H. Shipman was the president of the Brevard Banking Company, and acted in that capacity until the date of its closing, 15 December, 1930.

Third: J. S. Silversteen was a director, stockholder and chairman of the board of directors and inactive vice-president of said Brevard Banking Company, and was such until the date of its closing, 15 December, 1930.

Fourth: That Brevard Banking Company was closed and was taken over under the direction of the Banking Department of the North Carolina Corporation Commission for the purpose of liquidation on 15 December, 1930.

Fifth: That W. W. Woodley, Jr., was duly appointed liquidating agent for the purpose of liquidating the said bank, and is at present still acting in that capacity.

Sixth: That J. H. Pickelsimer, C. R. McNeely, A. M. White, S. R. Owen and W. L. Talley, comprised the board of county commissioners of Transylvania County, having been elected in November, 1928, inducted into office on the first Monday in December, 1928, and acting in that capacity from that time until the expiration of their terms of office on 1 December, 1930.

Seventh: That J. H. Pickelsimer was the chairman of the board of county commissioners of Transylvania from December, 1928, until December, 1930.

Eighth: Ralph Fisher was county attorney for the board of county commissioners during its entire term of office.

Ninth: C. R. McNeely was county accountant filling the duties of accountant for Transylvania County, and remained such until 1 December, 1930."

The defendants 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.

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

Johnson, Smathers & Rollins, T. A. Uzzell, Jr., and Moore Bryson for defendant Thos. H. Shipman.

Merrimon, Adams & Adams and W. E. Breese for defendant Jos. S. Silversteen.

Lewis Hamlin and Jones & Ward for Ralph Fisher, J. H. Pickelsimer, C. R. McNeely, A. M. White, S. R. Owen and W. L. Talley.

CLARKSON, J. At the close of the State's evidence, the defendant made motions to dismiss the action or for judgment of nonsuit. C. S., 4643.

We think the motions should have been granted as to White, Owen and Talley. Was there sufficient evidence as to the guilt of the other defendants to have been submitted to the jury? We think so.

"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. . . . 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." *S. v. Lawrence,* 196 N. C., at p. 564; *S. v. Casey,* 201 N. C., at p. 203. The evidence in the present case was mostly circumstantial. The defendants introduced no evidence.

The court below instructed the jury: "The court instructs you now that the duty is upon the State to satisfy you beyond a reasonable doubt of the defendants' guilt, and it is the privilege of the defendants and each of them, to offer evidence or not to do so and the fact that they have not gone upon the stand is not to be considered to their prejudice and you will not so consider it as to them." C. S., 1799.

The right of the defendant to offer testimony of his good character does not depend upon his having been examined as a witness in his own behalf. *S. v. Hice,* 117 N. C., 782.

There was evidence, elicited from the State's witnesses, to the effect that the general reputation of the defendants was good. The defendants contend that there was error in the court below in consolidating the two bills of indictment, and in overruling their motion to quash which was made before pleading to the indictments and before the jury was drawn and empaneled. We cannot so hold. The bills of indictment are (1) Under C. S., (4268), 4270; embezzlement and misapplication; (2) for conspiracy. Both bills of indictment charge a felony. The crime of conspiracy at common law was a misdemeanor, it has been changed by statute in certain cases so as to make it a felony. *S. v. Ritter,* 199 N. C., 116. The different indictments are for felonies, and the offenses are so related that we think they can be consolidated. The first follows the language of the statute. *S. v. Leeper,* 146 N. C., 655. We cannot say that the second is bad for duplicity. *S. v. Burnett,* 142 N. C., at p. 580; *S. v. Lewis,* 185 N. C., 640; *S. v. Beal,* 199 N. C., 278, at p. 294. The matter of consolidating these bills of indictment was in the sound discretion of the court below. *S. v. Switzer,* 187 N. C., at p. 94; *S. v. Malpass,* 189 N. C., 349; *S. v. Beal,* 199 N. C., at p. 304; *S. v. Combs,* 200 N. C., at p. 674; *S. v. Smith,* 201 N. C., 494.

The defendants excepted and assigned errors (1) To the motion by the solicitor which was granted that a jury be drawn from a county other than Transylvania. (2) Upon entering the order that a jury be drawn from the body of the county and not from the jury box of Haywood County, N. C.

This case was tried at August Special Criminal Term, 1931, after the amendment to C. S., 473, by Public Laws 1931, chap. 308. We think C. S., 473 and the amendment gives the discretion to the court below.

The record discloses: "The State now offers to prove by the witness, Miss Laura Clayton, the several books of record of the Brevard Banking Company. The defendants admit that the same are the records of the Brevard Banking Company, but defendants reserve the right to object to the competency of said records."

The exceptions and assignments of error as to the admission of the documentary evidence and also as to the qualification of the State's witness, W. W. Woodley, Jr., a bank officer of 15 years experience, and as liquidating agent of the Brevard Banking Company, after examining and investigating thoroughly the records of the bank, the assets and liabilities of the bank, to express an expert opinion as to the solvency of the Brevard Banking Company, on 13 September, 1930, cannot be sustained. *S. v. Hightower,* 187 N. C., 300; *Loan Assn. v. Davis,* 192 N. C., at p. 112; *S. v. Combs, supra,* at p. 675; *S. v. Rhodes, ante,* 101; *S. v. Brewer, ante,* at p. 193; *S. v. Lancaster, ante,* 204; Wigmore on Evidence (2d ed.), sec. 1234.

The setting: (a) T. H. Shipman was president of the Brevard Banking Company, and J. S. Silversteen was chairman of the board of directors, inactive vice-president, a director and stockholder, and they were such until the closing of the bank on 15 December, 1930, under the supervision of the Banking Department of the North Carolina Corporation Commission. Both were deeply indebted to the bank. (b) J. H. Pickelsimer was the chairman and a member of the board of county commissioners of Transylvania County, N. C., from December, 1928, until 1 December, 1930. He was deeply indebted to the bank. Serving on the board with him during that period were the following members: A. M. White, S. R. Owen, W. T. Talley and C. R. McNeely. (c) C. R. McNeely, was a county commissioner and also county accountant, and was deeply indebted to the bank. (d) Ralph Fisher was county attorney. The bank books and entries were, we think, competently identified. *S. v. Brewer, supra.* The testimony of W. W. Woodley, Jr., expert, showing the total amount of money belonging to Transylvania County, N. C., in its various funds, tabulated from the Brevard Banking Company books, is competent. It was, in part, as follows: "1 July, 1930,

total is $632,940.42; 1 August, 1930, $624,473.90; 1 September, 1930, $627,296.13; 17 September, 1930, $602,249.81; 1 October, 1930, $512,337.38; 1 November, 1930, $518,178.68; 24 November, 1930, $567,283.28; 28 November, 1930, $472,887.14; 29 November, 1930, $579,187.86; 15 December, 1930, $561,145.86." The amount that was turned over to the new board of county commissioners on 1 December, 1930, by the outgoing board, which are herein named, was $580,464.28. It was in evidence that the Brevard Banking Company was insolvent when the $100,000 was borrowed by the board of county commissioners and turned over to the bank.

The charges on which the defendants were tried: (a) misapplication, (b) conspiracy. In the charge of the court below is the following:

First. "The State has . . . prosecuted the defendants upon a bill of indictment and charged them with the misapplication of the funds in a . . . bill of indictment. The section of the statute under which the State relies and contends that the defendants are guilty, reads as follows: 4270—'If any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise wilfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of felony (and wilfully and corruptly mean in bad faith and without regard of the rights of others and in the interest of such parties for whom the funds are held).'" To the foregoing charge in parentheses, defendants excepted. "And shall be fined and imprisoned in the State's prison in the discretion of the court. If any clerk of the Superior Court or any sheriff, treasurer, register of deeds or other public officer of any county or town of the State shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property, which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony."

Second: "Defendants are indicted upon one bill of indictment charging unlawful conspiracy, and at the outset the court wishes to define to you and explain to you what an unlawful or criminal conspiracy is. In *S. v. Ritter et al.*, 197 N. C., p. 113, in a case that this Court tried, the Supreme Court has given us the following clear and concise statement of a criminal conspiracy that the court now reads to you relative to

the bill charging criminal conspiracy: 'The gist of a criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means—and it is said that the crime is complete without any overt act having been done to carry out the agreement.' In other words, gentlemen, the consummation of the agreement without any overt act constitutes or may constitute the agreement: If two or more persons conspire to do a wrong, this conspiracy is an act 'rendering the transaction a crime,' without any step taken in pursuance of the conspiracy." Further speaking upon the same subject the Court says: "One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. 'Every one who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design.' . . . But to make the acts and declarations of one person those of another, or to allow them to operate against another or others, it must appear that there was a common interest or purpose between them and that said acts were done, or said declarations uttered, in furtherance of the common design, or in execution of the conspiracy."

The above is the well settled law on conspiracy in this jurisdiction. *S. v. Wrenn,* 198 N. C., 260; *S. v. Ritter,* 199 N. C., 116; *S. v. Beal,* 199 N. C., 278.

In Jones Commentaries on Evidence (2d ed.), part sec. 943, at pp. 1739-1740, the matter is stated: "Thus where several jointly attempt to accomplish a fraud, the declarations of one of them, made during the progress and the prosecution of the joint undertaking, or accompanying and explaining acts done in furtherance of it, are evidence against the others. When, in fact, a conspiracy of any kind is shown, the acts and declarations of each conspirator, in furtherance of the common object, are admissible against the others. The underlying principle of the rule has been well expressed as follows: 'When an unlawful conspiracy or combination is established, everything said, written, or done by either of the conspirators in the execution or furtherance of the common purpose is deemed to have been said, done, or written by every one of them, and may be proved against each and all of them.' But in such cases

it must first be proved, by other evidence, that a conspiracy existed at the time the declarations were made. Moreover, the mere declarations of one of the alleged conspirators are not competent for this purpose, unless they form a part of the *res gestæ*. Even if a conspiracy is shown aliunde, the declarations of one conspirator are not admissible against the others, if made after the common design is accomplished or abandoned." Greenleaf on Evidence, Vol. 1 (12th ed.), sec. 111, p. 126-7.

In Lockhart's N. C. Handbook of Evidence (2d ed.), sec. 152, at p. 152, citing numerous North Carolina decisions, is the following: "When a conspiracy is established, the declarations and admissions of any one of the conspirators, made while the conspiracy is in existence and in furtherance of the common design, are admissible against the other conspirators, but any declaration made after the conspiracy is consummated is evidence only against the person making it. In the discretion of the judge the declaration may be admitted before the conspiracy is established, subject to be stricken out if the State fails to establish the conspiracy." *S. v. Brady,* 107 N. C., 822; *Hamilton v. R. R.,* 200 N. C., at p. 556.

We do not think defendants can complain. There was evidence aliunde to establish prima facie, or proper to be laid before the jury, as to the conspiracy, and much of the evidence excluded by the court below was competent against all the defendants, at least on the second bill of indictment. The evidence was circumstantial, and "Great latitude is to be allowed in the reception of circumstantial evidence." 16 C. J., part sec. 1037, p. 545. *S. v. Ritter,* 199 N. C., at p. 120.

The verdict of the jury as to T. H. Shipman, J. S. Silversteen and Ralph Fisher, was "guilty upon the count of conspiracy with the recommendation of mercy, and not guilty as to misapplication." The evidence was mostly circumstantial, so we consider some of the circumstances against them sufficient to be submitted to the jury as to their guilt.

The charge and evidence in short against the convicted defendants: The charge that T. H. Shipman, as president of Brevard Banking Company, and J. S. Silversteen, chairman of the board of directors, on 13 September, 1930, and J. H. Pickelsimer, who was then chairman of the board of commissioners of Transylvania County, N. C., and its other members, the defendants, and Ralph Fisher, attorney for said board, "With force and arms, unlawfully, wilfully, knowingly, designedly, fraudulently and feloniously did combine, conspire and confederate to and with each other by various false pretenses and false representations, to cheat and defraud Transylvania County, and to abstract, misapply,

pervert and misappropriate the money, funds, credits and securities of the said county in the sum of one hundred thousand ($100,000) dollars, by falsely and knowingly representing that the moneys, funds and revenues with which to pay certain obligations and indebtedness and operating expenses of said county, were exhausted and that it was necessary to sell a note of the said county for the sum of one hundred thousand ($100,000) dollars with which to pay the same; whereas, in truth and in fact the said Transylvania County then and there had on deposit and to its credit, in the said Brevard Banking Company, the sum of $575,929.64; the note of said Transylvania County being offered for sale and sold for the benefit of the said Brevard Banking Company, which said Brevard Banking Company was then and there insolvent or in imminent danger of insolvency and was unable to meet the usual requirements of its customers and depositors in the regular course of business."

T. H. Shipman—charge conspiracy: The evidence (A) was to the effect that the Brevard Banking Company closed on 15 December, 1930, under the direction of the Banking Department of the North Carolina Corporation Commission. That on 13 September, 1930, the Brevard Banking Company, was insolvent. The witness for the State, W. W. Woodley, Jr., the expert, who so testified was cross-examined by defendants in a thorough manner and on this cross-examination he stated: "The opinion I have given is to the fact that this bank was insolvent is not purely a guess nor do I think that it is almost perfectly a guess." The defendant contends, on cross-examination, when asked what he based his opinion as to the insolvency of the bank on, said he meant by the use of that term "if the bank had closed that day it would not have been able to pay off all of its creditors." Defendant contends that this brings the witness' testimony under the condemnation set out in the case of *S. v. Hightower,* 187 N. C., 311, where the Court uses the expression "not being able to meet its depository liabilities, as they become due in the regular course of business."

N. C. Code of 1931 (Michie), C. S., 216(a), in part: "The term 'insolvency' means: (a) when a bank cannot meet its deposit liabilities as they become due in the regular course of business; (b) when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and creditors," etc. *S. v. Brewer, ante,* at pp. 189 and 194.

If defendant wanted the expert to elaborate as to insolvency under (b) above, he could have asked him to do so when again no prayer for instruction was requested. Every latitude was allowed defendants on cross-examination. This cannot be held as error. The expert witness had theretofore gone into the questions of insolvency thoroughly and

was then asked: "Q. With that information, following your consideration of the securities and assets of the Brevard Banking Company, and with your knowledge of the value of the various securities, I ask you if you have an opinion satisfactory to yourself as to the solvency of the Brevard Banking Company on 13 September, 1930? Answer: Yes. Q. What is that opinion? A. It was insolvent." In about 90 days the bank was closed as insolvent by the State authorities.

(B) It was contended by the State that Shipman was a large stockholder and deeply indebted to the bank of which he was president, liable directly as maker and indirectly as endorser. The expert, Woodley, testified that the liability of the defendant Shipman on notes as maker was $25,356.80, as endorser $3,159.14, overdrafts $21,703.81, making a total of $50,219.75. Some of the overdrafts were disputed. The expert, Woodley, testified: "He has disputed an item of $15,000. Some other items, some in transit items, charged to him and carried as assets items. They constitute all of this $21,000, all except $275. . . . Mr. Shipman tendered to me in person $5,000 worth of stock in the building and loan as an asset to be held by me against any indebtedness he might owe this bank. The stock was endorsed in blank. Q. Didn't he tender to you in person in the bank a deed of trust on 14 pieces of property in the sum of $15,000, to the end that you might hold it as liquidating agent of the bank to be applied on any indebtedness he might be due the bank? (Objection by the State, sustained, exception and assignment of error by defendant Shipman.)" We think the exception and assignment of error by defendant Shipman cannot be sustained. We think by analogy the following principle applies: "The fact that a party accused of embezzlement intended to restore the property embezzled, or even that the loss has been made good, does not constitute a defense to a criminal prosecution for the embezzlement." *S. v. Summers,* 141 N. C., at pp. 841-2. *S. v. Dunn,* 138 N. C., at p. 674. On 1 September, 1930, Transylvania County had on deposit in the Brevard Banking Company various funds amounting to $627,296.13. Total uncollected current year taxes were $184,998.43.

(C) During the fall of 1930, considerable sums of money were being withdrawn from the Brevard Banking Company, which were on deposit in the bank and the deposits were falling off.

The defendants, Shipman, president, and Silversteen, chairman of the board of directors and vice-president, were seen at the courthouse in conference with some of the defendants, members of the board of commissioners; and the defendants, Shipman and Silversteen, wrote a letter to the board, which was later published in the *Brevard News,* to the following effect:

"COUNTY TO SELL NOTE FOR $100,000, TO CARRY ON SCHOOLS AND ROAD WORK WHILE TAXES ARE BEING COLLECTED.

Gentlemen: It being apparent that the taxes due the county, or a large part of them, are still uncollected and it being necessary for the county commissioners of Transylvania County, N. C., to provide funds for schools and roads, it is our opinion that it is good business for the taxpayers of Transylvania County (as the rate of interest at the present time is cheaper than in several years) for the county commissioners to borrow against uncollected taxes in order to keep the schools and roads going. In borrowing this money as above referred to, it is not increasing the liabilities or indebtedness of the county of Transylvania or will increase or decrease the tax rate for the coming year.

Very truly yours, Jos. S. Silversteen, Thos. H. Shipman.

Brevard, N. C., 3 September."

Almost coincident with this letter, but dated 1 September, 1930, the defendant McNeely, a county commissioner and county accountant, addressed a communication to the board of commissioners, in which he states that it is necessary to borrow $100,000 for the purpose of paying appropriations made for the current fiscal year, in anticipation of taxes, and, thereupon submits certain tabulations and statements, in order that the statement might comply with the County Fiscal Control Act, Public Laws 1927, chap. 146. Then followed in regular order the various proceedings preliminary to the issue and sale of the $100,000 tax anticipation notes of Transylvania County. All of the defendants, county commissioners, signed the order for the issue of the tax anticipation notes, and the defendant McNeely separately, "in his capacity as county accountant and chief financial officer of Transylvania County." The notes were sold to the Bank of Brevard; Pickelsimer, McNeely, Owen, Talley and White, the county commissioners, signed the resolution which was attested by Ira D. Galloway, register of deeds and ex-officio clerk of the county commissioners. The evidence indicates that Shipman was in the county commissioners' room when the resolution was passed.

Record, in part, of the board of commissioners: "The board of county commissioners met in special advertised meeting on 12 September, 1930, for the purpose of selling notes for $100,000. The following members being present: J. H. Pickelsimer, chairman; C. R. McNeely, W. L. Talley, S. R. Owen and A. M. White. The following orders passed:

No bids, the board recessed until 10 o'clock Wednesday morning, 17 September, 1930.

The board of county commissioners met in a recess meeting on 17 September, 1930.

The following members being present: J. H. Pickelsimer, chairman; C. R. McNeely, W. L. Talley, A. M. White, S. R. Owen. The following orders were passed: On motion of W. L. Talley, seconded by A. M. White and carried, to fix interest rate on $100,000 at 5%. Approved. J. H. Pickelsimer, chairman board of county commissioners."

On 17 September, 1930, the Brevard Banking Company, by Thos. H. Shipman, president, made a written proposal to the commissioners: "For your $100,000 revenue anticipation notes dated 30 July, 1930, in denomination of $10,000 each, numbered one to ten, both inclusive, bearing interest from date thereof at the rate of five per centum per annum payable semiannually on 30 January and 30 July, and all the notes maturing on 30 July, A.D. 1931, both principal and semiannual interest payable at Chase National Bank in city of New York, N. Y.: We will pay one hundred thousand dollars ($100,000) and accrued interest to date of delivery." At the advertised meeting of the board, on 17 September, 1930, all the members being present, the board accepted the bid of the Brevard Banking Company and passed a sale resolution; yet the proceeds of the sale of the notes were not credited to the county by the Brevard Banking Company, until 29 November, 1930, nearly two and a half months later, the amount at that time including interest was $101,625. On 29 November, 1930, most of it was allocated to the several funds of the county. "The school fund on 28 November was $63,397.74; the school fund on 29 November, was $115,294.72; county road fund 28 November, $10,899.55; county road fund 29 November, $19,286.91. . . . Total balance as of 28 November is $472,887.14, and as of 29 November, $579,187.86."

The tax anticipation notes were sold on 17 September, 1930, to the Brevard Banking Company, yet it will be noted that at the time Shipman and Silversteen published the necessity on 3 September, 1930, for the sale of the tax anticipation notes, aggregating $100,000, *"to carry on schools and road work while taxes are being collected,"* there was in the bank on 1 September, $627,296.13 and on 17 September, $602,249.81 belonging to Transylvania County, allocated to schools $79,816.76 and roads $12,594.45. When actually paid for, on 28 November, 1930, the total on deposit in the Brevard Banking Company, was $472,887.14, of which sum there was allocated to the school fund and on hand $63,397.94, and on the road fund $10,899.55. Preceding the publication in the newspaper of the letter, dated 3 September, 1930, was the following "lead": "County sells note for one hundred thousand dollars to carry on the school and road work while taxes are being collected. Transylvania County is borrowing a hundred thousand dollars on a short-term note for the purpose of carrying on the schools, roads and other government expenses," etc.

The evidence shows that the chairman and the board of county commissioners borrowed on tax anticipation notes aggregating $100,000 from the Brevard Banking Company, through its president T. H. Shipman, J. S. Silversteen, chairman of the board of directors; that it was done "to carry on schools and road work, while taxes are being collected," and at the time a large sum of money, as above set forth, was in the Brevard Banking Company, already allocated for those particular purposes, and the bank at the time being insolvent. The evidence tends to show that the insolvency was known to Shipman and Silversteen.

We think there was competent evidence that said Shipman and Silversteen signed and published the above letter and it was their act. James F. Barrett, editor of the *Brevard News,* testified, unobjected to, in part: "I published in my paper of 3 September, a letter appearing on the first page, signed by Joseph S. Silversteen and Thomas H. Shipman and purporting to bear their signatures. I do not know whether I published it from the original delivered to my office or a copy. I satisfied myself that it was a letter of Mr. Shipman and Mr. Silversteen, or I would not have published it." He further testified that he had "made diligent search in the files and among my papers for it and have not found it. . . . The natural supposition is that it with other news copy was destroyed." He further testified that pieces of news copy are kept two or three weeks and unless there is some question "We burn it." The foundation was sufficiently laid for admission of secondary evidence. *Avery v. Stewart,* 134 N. C., 287; *Mahoney v. Osborne,* 189 N. C., 445; *Bank v. Brickhouse,* 193 N. C., 231; *Chair Co. v. Crawford,* 193 N. C., 531.

The record discloses, that, in the presence of the jury, there was some question between the solicitor and the attorney for defendants, in regard to prior notice having been given defendants by the solicitor, to produce the original of the letter purported to be signed by Silversteen and Shipman on 3 September, 1930, before set forth. The solicitor: "Don't you remember that I came into the auditor's room and handed you (Mr. Smathers) and Mr. Jones a notice and said 'Here is a notice I give you gentlemen to produce a letter?' " The court: "You had better serve those notices Mr. Solicitor." The notice was accepted by Mr. Smathers, the attorney for T. H. Shipman, but the record does not disclose what further was done about the matter. The court below said: "We will take this up next week and pass on it." From the record, nothing further seems to have been done about the matter. The original letter which the notice referred to was not introduced in evidence. Immediately following the record discloses that Ira Galloway, register of deeds and ex officio clerk of the board of county commissioners, testi-

fied, in part: "I know the handwriting of Mr. J. S. Silversteen and Mr. T. H. Shipman (in whose handwriting is that letter). The handwriting signed to the letter is that of Thos. H. Shipman and Jos. S. Silversteen. Q. Did you see this letter, the letter published in the newspaper? Answer: Yes." The letter above was then introduced in evidence. This evidence was admitted only against Shipman and Silversteen, to which they excepted and assigned error. From an inspection of the briefs of these parties, we think this exception and assignment of error is deemed abandoned. Rules of Practice, 200 N. C., p. 831(28). In fact, on cross-examination, the witness Galloway testified: "I saw the original of a letter that was signed by Mr. Shipman and Mr. Silversteen and stated the letter was published in the *Brevard News.*" *Willis v. New Bern,* 191 N. C., at p. 514. The witness Barrett testified: "I got the letter from several offices of the county." These letters seem from the record to have been scattered about. *S. v. Hollingsworth,* 191 N. C., 598, is not applicable.

We think the above evidence, and other facts and circumstances in evidence, sufficient to have been submitted to a jury on the charge of conspiracy, as set forth in the indictment as to T. H. Shipman. The evidence was circumstantial. The court charged, in reference to the defendants: "The State contends that, from all the circumstances that have been offered in evidence you should be satisfied, beyond a reasonable doubt, of the guilt of the defendants and each of them and on each count. Circumstantial evidence may be relied upon for conviction. The courts of North Carolina recognize it, and the court instructs you in regard to circumstantial evidence, the burden is on the State where the State relies on circumstantial evidence to satisfy you beyond a reasonable doubt that the chain of circumstances offered and every link therein points unerringly to the guilt of the defendants and each of them and precludes every reasonable hypothesis of innocence. The laws of North Carolina say where an act may be attributable to two or more motives, one lawful and the other unlawful, that the former must be accepted and not the latter. The defendants come before you with the presumption of innocence in their favor as the court has heretofore charged you, the burden being on the State to satisfy you of the guilt of the defendants, and must so satisfy you, beyond a reasonable doubt. The court instructs you with regard to the circumstances relied on by the State, that if you shall be satisfied beyond a reasonable doubt of the links of the chain of circumstances and if the chain entirely shall satisfy you in like manner of the guilt of the defendants, or any of them, then it would be your duty to return a verdict of guilty; and if the State has failed to satisfy you in like manner of the guilt of the defendants, or any of them, then it would be your duty to return a verdict of (not)

guilty; and if the State has failed to satisfy you in like manner of the guilt of the defendants, or any of them, then it would be your duty to return a verdict of not guilty." We think this charge borne out by the authorities in this jurisdiction. *S. v. Massey,* 86 N. C., 658; *S. v. Wilcox,* 132 N. C., 1120; *S. v. Melton,* 187 N. C., 481; *S. v. Lawrence,* 196 N. C., 562; *S. v. McLeod,* 198 N. C., at p. 653.

The court below charged as to presumption of innocence. *S. v. Herring,* 201 N. C., 543.

J. S. Silversteen—charge conspiracy: The evidence (A) He was director, stockholder, chairman of the board of directors and inactive vice-president of the Brevard Banking Company. Shipman and Silversteen were seen at the courthouse in consultation with members of the board of commissioners, and shortly thereafter two things followed: First, a letter by Shipman and Silversteen to the board of commissioners which, on account of the political effect of the act which they were apparently about to accomplish, was published in the newspaper as an apology for the act, and it may be noted by the officers of the bank and not the board of county commissioners. This letter itself appears to have been a false pretense, but it was acted upon. Immediately a proceeding was begun to sell $100,000 notes of the county, which the defendant McNeely, in his capacity as county accountant, declared to be necessary, and all of the defendant commissioners, signed the proceedings and all of the defendant commissioners the resolution to issue the $100,000.

(B) The $100,000 in notes was sold to the Bank of Brevard. The board of commissioners went out of office on 1 December, and on 15 December following, the bank promptly closed. It was in evidence that during the period of negotiations the bank was insolvent.

(C) Silversteen was a large stockholder in the bank and his liability to the bank as maker was $20,240, as endorser $3,750.

It was also in evidence that Silversteen, on 3 September, 1930, had a checking account of $2,392.23, and certificates of deposit aggregating $8,000 to $10,000.

J. M. Allison, a merchant and director of Brevard Banking Company, the day Ves Ashworth was buried (in August), was asked by Shipman and Silversteen to go to the courthouse with them, and he went. "Q. Who took part in the conversation there, Mr. Allison? Answer: Mr. Shipman or Silversteen, I believe Mr. Shipman told McNeely that Transylvania County had a note that would be due in a short time and he told him it would work a hardship on the people of Transylvania County to pay this note in that short a time, and asked him if he could not give an extension of time. This is all I remember. McNeely said he could not do anything himself, but to take it up with the other commissioners."

(D) At the time of the conversation, there was in the bank over $600,000 of the county's money, on 1 September, 1930, there was $624,473.90. There are other facts and circumstances in the evidence for the State against Silversteen. In *S. v. Prince,* 182 N. C., at p. 790, this Court said: "We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court, the last within that of the jury. . . . The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances." *S. v. Swinson,* 196 N. C., at p. 103. A verdict cannot rest upon a scintilla of evidence or on mere suspicion, guess, surmise, speculation or conjecture. We think the evidence against Silversteen was sufficient to have been submitted to a jury.

Ralph Fisher—charge conspiracy: The evidence (A) He was county attorney, a position of high trust. The State introduced a bill of the defendant, Ralph Fisher, against Transylvania County, dated 29 November, 1930, for balance due on abstracting and removing tax scrolls for the years 1922-23-24-25-26-27, for $4,460. Also a bill in favor of Ralph Fisher against Transylvania County for partial payment for services on tax suits for the years 1922 to 1927, inclusive, for $4,000. The State offered checks, one for $4,000 and one for $4,460, showing the bills had been paid.

On 29 November, 1930, the day one of the bills was dated, the $101,625—the $100,000 and interest—was allocated to the several county funds in the Brevard Banking Company, although the $100,000 in tax anticipation notes were sold by the commissioners to the bank on 17 September, 1930.

(B) A new board of county commissioners had been elected and were to take office on the first Monday in December, 1930. The evidence tended to show that the bills were incorrect in many particulars. This $8,460 was paid just before the board he was attorney for went out of office. When the bank closed 15 December, 1930, his deposit amounted to $313.05.

(C) Jerry Jerome, a witness for the State, testified, in part: "Mr. Fisher was in the office one morning and I asked him why he had borrowed the $100,000 and he said that he and Pickelsimer and McNeely went to the bank to withdraw $75,000 or $100,000 and Mr. Shipman called him back into the back part of the bank and told them if they withdrew that amount of money the bank would have to close its doors. At the beginning of the conversation I asked him why they borrowed the $100,000 and that is what he told me. Q. State if at any time during

the last fall, you saw Mr. Fisher with some money? Answer: I did not see any actual cash. Mr. Fisher and I had a conversation and he made a motion with his hand to his breast pocket, and said that was where he kept his money. Q. When was that, with reference to when the bank closed? Answer: Before the bank closed. Q. How long before? Answer: It was sometime after the Central Bank closed and before our bank closed. That was when he made the motion to the breast pocket—that was between the time the Central Bank closed and the time this bank closed. The Brevard Bank was open at the time. I had this conversation with Fisher after the bank closed. I judge he told me it was in September he went there. To the best of my recollection, it was before the 15th. . . . At the time of these conversations Mr. Fisher was making bitter remarks against Shipman and Silversteen and he said he would not do anything in the world to help the bank; that was what he said. He made this remark at the time that he referred to having been at the bank. It was all in one conversation."

(D) E. F. Moffett, witness for the State, testified, in part: "I heard a conversation between Ralph Fisher and Mr. N. A. Miller and others. Q. What did he, Fisher, say? Answer: Mr. Fisher made a remark that caused Mr. Miller to turn to him and say he ought to be careful how he talked. . . . Mr. Fisher said, 'You know that we sacrificed the Republican Party to hold the Brevard Banking Company up and when we did, you made an agreement with us that it was not to be used against us in the campaign and that was the first thing you used when you went out on the campaign.' That was all he said in reference to that. No note was mentioned at that time. This was after the bank closed. (Cross-examination.) No mention was made of the $100,000 note. We were talking about politics. We were talking of the political campaign, and Mr. Miller belonged to the opposite party from Mr. Fisher. They seemed to be serious. They were rather hot. I have known them to get mad over politics."

(E) R. H. Ramsey, a witness for the State, testified, in part: "I am a practicing attorney at Brevard, and am now mayor of Brevard. I had a conversation not directly with Fisher, but I was present and heard it. The first of it was here in the back of the courthouse. Mr. Breece was present and I think Mr. Kimsey was present also. This was sometime after the first indictment here was returned into court, the one they are being tried on now. Q. State what he said in reference to the note in the bank? Answer: Mr. Fisher accused Mr. Breece of being responsible for his indictment and Mr. Breece said 'You know I would not have indicted my own client.' Mr. Fisher said 'Well, you shoved him in to get me in.' And Mr. Breese said 'You know I would not have

my own client, Silversteen, indicted,' and Fisher said, 'Well you probably saw he was going to fall in and you pushed me in.' And the consequence of the conversation was they were asking his advice as county attorney, and he said 'Oh, hell, I am as guilty as they are, and if they are convicted I want to be convicted also.' I had another conversation with him the same morning in the judge's room. Mr. Kimsey, Mr. Breese and another gentleman I did not know. Mr. Kimsey or one of them said, 'We do not know what the one hundred thousand dollars indictment was brought on.' And he then proceeded to tell us the basis of the indictment. He said last fall, when he was passing, they called him into the bank, or asked him to come down, and he went down, and Mr. Shipman was present, and I can't be positive, but I think he said Mr. McNeely and Mr. Pickelsimer were present also. And they sat down and Mr. Shipman said 'You gentlemen have a note coming due,' and I think he said on 15 December, 'and we cannot pay that without taking the breeches off some of the best people in town'—I think Mr. Fisher said they called him out of bed, and he went down there. He said the note was for $75,000. When Mr. Shipman made that statement Mr. Fisher said that Mr. Shipman recommended that they borrow enough to meet that note, and Mr. Fisher said that he was not there to pass on the business end of it but on the political end, and that if they borrowed this, that they would hold it for threats politically, and that he would agree if they would sign a letter agreeing not to use that against them in the campaign, and that Mr. Silversteen was in the east; and that Shipman and Silversteen signed the letter, but that Mr. Breese did not sign and used it in the campaign. Q. What, if anything, did he say about what became of the one hundred thousand dollar note when issued? Answer: He said the note was issued and turned over to Silversteen and that he kept it about two months, and then towards the latter part of November they saw they had to do something and they went to the bank, and that the bank officials, without any authority, issued certificates of deposit to Mr. Couch for the hundred thousand dollar note and then deposited it as collateral in New York. . . . I have heard Mr. Fisher make the statement that he would not do anything at any time to aid that bank. I believe I have heard him make the statement that the indictment was the result of prejudice to try to down him here in the county as county attorney. I also heard him state that he would not do anything to aid Mr. Shipman or Mr. Silversteen, or the bank, but I do not know whether the statements were made in that conversation."

The court instructed the jury not to consider the above evidence against any one but the defendant Fisher.

(F) Liability of Fisher to the bank $2,320 as maker, $40.00 as endorser, total $2,360.

There are other facts and circumstances in the evidence for the State against Fisher. The three above named defendants, Shipman, Silversteen and Fisher, were convicted on the conspiracy charge. We think the evidence ample to go to the jury.

We now consider the exceptions and assignments of error to the charge, as heretofore set out, viz.: "And wilfully and corruptly mean in bad faith and without regard of the rights of others and in the interest of such parties for whom the funds are held." Also "Before you can find the defendants or either of them guilty, you should find from the evidence, beyond a reasonable doubt, that they acted in bad faith. There is no denial of the fact that the tax anticipation notes were issued. The State contends that the issuance of these tax anticipation notes were done in bad faith and in consequence of an unlawful conspiracy and that you should so find beyond a reasonable doubt that the funds derived therefrom were misapplied. In other words, that they were put in the bank, although to the credit of the county, that the county did not need the funds and that the borrowing and applying of the funds was in bad faith, and that you should return a verdict of guilty as to each defendant upon that count in the bill of indictment. . . . The State contends the funds borrowed on the tax anticipation notes were not deposited until two months thereafter, that if the tax anticipation note had been a necessity that the necessity for it had disappeared prior to the time the funds were available, and that the act of the commissioners in issuing the notes was done in bad faith, *fraudulently, wilfully and corruptly* in the effort and desire and consequence of an unlawful conspiracy to aid the Brevard Banking Company. . . . In the present case the State contends that the defendants, and each of them, and that you should so find, beyond a reasonable doubt, from the evidence, entered into an unlawful conspiracy, to wit, to issue tax anticipation notes in the sum of $100,000 against the interest and in bad faith—in bad faith and against the interest of the taxpayers of Transylvania County; and that you should further find, beyond a reasonable doubt, or to a moral certainty—you will remember what a reasonable doubt is as defined to you yesterday by the court—that the defendants, and each of them, committed the overt act which they had unlawfully conspired to do, and that you should so find, beyond a reasonable doubt; and should further find in like manner that the overt act was committed and the defendants (proceeds) applied in bad faith, not in the interest of the taxpayers of Transylvania County, *but corruptly and wilfully to the credit of the county in the Brevard Banking Company for the purpose of aiding said bank and not for the purpose of aiding the county or the taxpayers of the county.*" There was no exception to the latter part in

italics, nor was there any exception to the following portion of the charge: "I instruct you that the intent alleged and contended by the State to commit the acts and offenses alleged by the State is a necessary ingredient, and the burden is on the State to satisfy you beyond a reasonable doubt of that intent. The State contends from all the evidence you should be satisfied beyond a reasonable doubt of the felonious intent. The defendants contend that you should not be satisfied beyond a reasonable doubt that such acts as they did were done not in consequence of any conspiracy or agreement; and they further contend that even though you should find that it was not necessary to borrow the funds; that they did borrow, that you should not find beyond a reasonable doubt it was done in bad faith or that there was any intent to do wrong." If the defendants wanted the court below to elaborate, they could have requested this by prayers for instructions.

Taking the charge as a whole it is correct. The statute was read to the jury which held that the misapplication must be done *wilfully and corruptly*. The court, under the bill of indictment, correctly charged "The defendants are not chargeable . . . with an error of judgment or a mistake." *S. v. Powers,* 75 N. C., 281; *S. v. Norris,* 111 N. C., 652; *Staton v. Wimberly,* 122 N. C., 107; *S. v. Anderson,* 196 N. C., 771. See *S. v. Lattimore,* 201 N. C., 32.

In Black's Law Dictionary (2d ed.), p. 1228, citing authorities, *wilful* is defined: "Proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious. . . . In common parliance, 'wilful' is used in the sense of 'intentional,' as distinguished from 'accidental' or 'involuntary.' But language of a statute affixing a punishment to acts done wilfully may be restricted to such acts done with an unlawful intent." *S. v. Falkner,* 182 N. C., 793; *West v. West,* 199 N. C., 12.

"Corruption," Black, *supra,* at p. 277, citing authorities: "Illegality; a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." The word "corruptly" when used in a statute generally imports a wrongful design to acquire some pecuniary or other advantage. *Grebe v. State,* 112 Neb., 715, 201 N. W. Rep., at p. 144.

"Bad Faith," Black, *supra,* at p. 112, citing authorities: "The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some

interested or sinister motive." Bad faith and fraud are synonymous. *Hilgenburg v. Northrup,* 33 N. E., 786; 134 Ind., 92.

The defendants must have a felonious intent, the court below so charged. *S. v. Lancaster, ante,* 204.

All of the following defendants were found guilty of (1) misapplication (2) conspiracy. J. H. Pickelsimer, chairman of the board of county commissioners, C. R. McNeely, a county commissioner and also county accountant, A. M. White, S. R. Owen and W. L. Talley, county commissioners.

J. H. Pickelsimer—misapplication and conspiracy: Evidence (A) He was chairman of the board of county commissioners. From 1 August, to 15 December, 1930, when the bank closed the county of Transylvania had at all times over half a million dollars in the Brevard Banking Company, except 28 November, 1930, it was the lowest $472,887.86. On 29 November, it shows with the bond sale and interest $101,625, added and other amounts making $579,187.86.

(B) When the tax anticipation notes resolution for the sale was passed, Shipman, president of the bank, was in the commissioners' room with all the commissioners, and Pickelsimer, McNeely, Shipman and Silversteen were together in the county accountant's office a few days before the sale resolution of 1 September.

(C) He and the board had the letter of the two bankers, Shipman and Silversteen, which was afterwards published in the newspaper "To carry on schools and road work while taxes are being collected," and at the time in the bank there was over a half million dollars of the county's money, and large sums already allocated to schools and roads.

(D) After the tax anticipation notes sale was ordered for the $100,000 and purchased by the Brevard Banking Company, the bankers kept the notes and did not sell them until about two and a half months afterwards, when there were heavy withdrawals from the bank and a falling off of deposits, then on 29 November, 1930, credited the sale to the county.

(E) Ira Galloway, a witness for the State, testified, in part: "Q. Prior to the time that letter was written, had you seen the defendants Silversteen and Shipman in conference with any of the commissioners? Answer: Yes. Q. On the first time that you saw them there, where were they and who was present? Answer: Mr. Shipman and Mr. Silversteen were in Mr. McNeely's office with Mr. McNeely and Mr. Pickelsimer. I did not hear their conversation. Q. How long was that before this letter was written and published? Answer: I do not know just how long. Just a few days. I could not say just how many days it was. The best of my recollection is that Shipman was up there in the commissioners' room on 3 September, when the resolution was passed. There

were present at the meeting Mr. Pickelsimer, Mr. McNeely, Mr. Owen, and to the best of my recollection, Mr. Fisher was there at that meeting. Q. (By the solicitor): What was the discussion that day? Answer: They talked about this note issue, this hundred thousand dollar note and also passed a resolution in regard to it."

Liability of Pickelsimer to the Brevard Banking Company $12,000 as maker, endorser $6,575, overdraft $6.12, total $18,581.12. There are other facts and circumstances in the evidence for the State against Pickelsimer. We think the evidence was sufficient to be submitted to the jury.

C. R. McNeely—misapplication and conspiracy: Evidence (A) He was a county commissioner and also county accountant. Before the tax anticipation notes for $100,000 were issued, he knew of the amount in the Brevard Banking Company, belonging to the county as being over a half million dollars. He was in conference with Shipman, president of the bank and others. On 1 September, 1930, he addressed a letter to the board, signed by himself, and among other things, said: "It is necessary to borrow $100,000 for the purpose of paying appropriations made for the current fiscal year in anticipation of the collection of the taxes and other revenues of the current fiscal year. I, therefore, submit herein the statement and certificate required of me by section 4 of 'The County Finance Act,'" etc. All the members were present when the resolution was passed. "Whereupon the board, upon the motion of W. L. Talley and seconded by Mr. A. M. White, then adopted same without change or amendment by the following roll call vote," etc.

(B) All the commissioners voted "Aye," and all the commissioners signed the resolution. He saw the letter of the bankers, heretofore set forth, to the board, and which was published in the newspaper signed 3 September, 1930.

(C) He was present on 17 September, 1930, when the tax anticipation notes of $100,000 were sold to the Brevard Banking Company. He and all the commissioners signed the sale resolution.

(D) He knew, of all men in the transaction, the financial condition of the county. That was his special duty—county accountant. The bankers kept the $100,000 of bonds in denominations of $10,000 each for nearly two and a half months, and after heavy withdrawals from the bank and a falling off in deposits, sold same and deposited the proceeds of the notes and interest, $101,625, and they were allocated 29 November, 1930. At the time large sums of money had already been allocated for schools and roads and in the bank for those purposes.

(E) M. B. Bagwell, a witness for the State, testified, in part: That McNeely asked him "if he was on the grand jury and that McNeely said

he did not see why they found a bill against him and I replied they could not help it according to the law and evidence. Q. What else? Answer: I told him that I did not see how they could borrow a hundred thousand dollars with the money they had in the bank." The court instructed the jury that this evidence was admitted only as to defendant McNeely. The witness said McNeely told him that they had to do it to save the bank.

(F) H. N. Blake, a witness for the State, testified, in part: "I am acquainted with T. R. McNeely, one of the defendants. I had a conversation with him with reference to the note in question. I asked McNeely why he borrowed the money when he had it here in the bank to pay the note and he said well, he came home from Ves Ashworth's funeral one day and three of the bank officials, Mr. Shipman, Mr. Silversteen and Mr. Allison were at his room and that they had already got Mr. Pickelsimer there and that they wanted to borrow this money by this note instead of drawing it out of the bank because the bank was in a precarious position. Mr. McNeely said he objected to agreeing to sign that note and he thought it over and he thought if it was going to ruin Transylvania County for the bank to close, he thought it would be better to borrow the money and pay for it than to try to take it out of the bank." The court instructed the jury not to consider this evidence against any of the defendants except McNeely. The witness continued: "Q. What did he say, if anything, with reference to Mr. Shipman and Mr. Silversteen? Answer: He said that Mr. Shipman and Mr. Silversteen said that they would see that there was no blame attached to him in borrowing this money. That is as far as the election was concerned; that they borrowed the money before the election."

W. H. Grogan, a State's witness, testified to a conversation with McNeely, substantially as the above.

(G) John C. Tinsley, a witness for the State, had a conversation with C. R. McNeely, testified, in part: "I don't know as to that particular $100,000. We had a conversation right after the bank closed and found out they had $581,000 there to their credit and I asked them why they were borrowing money with all that credit in the bank and he said something similar to 'if they had called on them for the money they could not have paid it.' That is about all. I asked him why they were borrowing money with all that deposited in the bank. It was just curiosity of me. He said if they had called on them for the money they could not have paid it."

(H) The liability of McNeely to the Brevard Banking Company, as maker $5,115, as endorser $5,006.24, total $10,121.24. There are other

facts and circumstances in the evidence for the State against McNeely. We think the evidence was sufficient to be submitted to the jury.

A. M. White, S. R. Owen and W. L. Talley—charge misapplication and conspiracy against them as county commissioners: We see no sufficient evidence against A. M. White, S. R. Owen and W. L. Talley to have been submitted to the jury. We are now dealing with a criminal charge. It seems that certain motions were made by W. L. Talley and seconded by A. M. White, in regard to the issuance and sale of the tax anticipation notes. They could have relied on the statements of C. R. McNeely, county accountant. It was his duty to inform the board of county commissioners in reference to financial matters. The certificate from him to the board was headed: "Certificate of county accountant chief financial officer of Transylvania County, North Carolina. To the board of county commissioners, certifying financial data as a basis for issuance of revenue, anticipation notes." He signed the certificate and resolution "C. R. McNeely, county accountant, chief financial officer of Transylvania County, N. C."

It seems as if the settlement with the county attorney on 29 November, 1930, the motion was made by W. L. Talley and seconded by S. R. Owen. A. M. White had some 23 shares of stock in the bank: 3 shares dated 13 March, 1914; 5 shares dated 13 March, 1914; 3 shares dated 6 May, 1916; 2 shares dated 9 September, 1916; 10 shares dated 10 November, 1917.

The liability of Owens to the Brevard Banking Company, as maker was $600, endorser $1,923.10, total $2,523.10.

The liability of Talley as maker was $409, endorser $40.00, total $449.

The liability of White as maker was $3,133.33, as endorser $1,833.33, total $4,966.66.

There are other suspicious circumstances against these defendants, but we do not think the evidence sufficient to have been submitted to the jury. The fact that the evidence against these three defendants was not strong, no doubt was the reason the court below imposed the fine of $1,000 against each of them on the conspiracy charge and judgment was suspended on payment of the costs on the misapplication charge.

After a painstaking study of the record, we think defendants' many and numerous contentions and assignments of error are without merit. The court's remark on the redirect examination of Galloway, which defendants contended was an expression of opinion, under the circumstances, we do not think prejudicial. *S. v. Robertson,* 86 N. C., 629. The letters dated 16th and 17th of October, published in the *Brevard News,* from Pickelsimer to Shipman, and the purported reply of Ship-

man thereto, if introduced improperly against Shipman, is not so material as to be prejudicial, but we think they were properly proved. Many of the exceptions and assignments of error to the charge of the court below are to contentions. They cannot be sustained. The matter at the time should have been called to the attention of the court. *S. v. Sinodis*, 189 N. C., at p. 571. We do not think the court impinged on C. S., 564. *Davis v. Long*, 189 N. C., 129.

We cannot say that the judge's charge was abstract propositions of law without reference to the facts. As to what constituted conspiracy in the beginning of the charge, and fully set out in this opinion, was later set forth and made applicable to the facts. The court below narrowed the evidence, in its introduction as against the particular defendants, although some of it was competent against all after evidence of the conspiracy was shown aliunde. The evidence was restricted on the trial to the particular individual or individuals, the charge giving the different aspects of the law of conspiracy was not prejudicial, the matter was easily reconcilable and not in conflict. *May v. Grove*, 195 N. C., at p. 237. A foundation was laid, but the evidence restricted, this was favorable to defendants. "Here a foundation must first be laid, by proof, sufficient in the opinion of the judge, to establish, prima facie, the fact of conspiracy between the parties, or proper to be laid before the jury, as tending to establish such fact." 1 Greenleaf on Evidence, sec. 111, at p. 126.

It may be noted that none of the State's evidence was denied by the defendants. A serious charge of misapplication and conspiracy was made against them by the State and they made no denial except the plea of not guilty, and that the evidence was not sufficient to be submitted to the jury. The court below fully protected them under the statute—that not going on the stand should not create any presumption against them is not to be considered to their prejudice.

The gist of the matter can be detected in what Ramsey in his testimony said he heard Ralph Fisher, attorney for the board, say: "They called him into the bank, or asked him to come down, and he went down, and Mr. Shipman was present, and I can't be positive, but I think he said Mr. McNeely and Mr. Pickelsimer were present also. And they sat down and Mr. Shipman said 'You gentlemen have a note coming due,' I think he said on 15 December, 'and we cannot pay that without taking the breeches off some of the best people in town.'" In this remark, the taxpayers of the county were forgotten, and proved to be the victims.

At the time the bank closed, on 15 December, 1930, the liability of the main actors in the indictment, was as follows:

Shipman, president of the bank (part of overdraft disputed)	$50,219.75
Silversteen, vice-president of the bank	23,990.00
Pickelsimer, chairman of board of county commissioners	18,581.12
C. R. McNeely, county accountant and member board county commissioners	10,121.24
Ralph Fisher, county attorney	2,360.00
Total	$105,272.11

Shipman had an overdraft (which was disputed) of $21,703.81, and Pickelsimer had an overdraft of $6.12. Silversteen had on deposit $212.79, McNeely $358.06 and Fisher $313.05.

On deposit to the credit of Transylvania County was the sum of $561,145.86.

The court below charged the jury: "The court instructs you in analyzing the testimony and making up your minds about this case, you will remove from your minds every prejudice and bias, and relying only upon your oaths that you will sit together, hear the evidence, and render your verdict accordingly."

The jury are the triers of the facts and have found the defendants Shipman, Silversteen and Fisher guilty of conspiracy; and Pickelsimer and McNeely guilty of conspiracy and misapplication. In law, as to them, we see

No error.

As to White, Owen, and Talley, the motion to dismiss the action or for judgment of nonsuit should have been granted by the court below as to them. The judgment of the court below, as to them, is

Reversed.

CONNOR, J., dissenting. At the trial of this action in the Superior Court of Transylvania County, the defendants, T. H. Shipman, J. S. Silversteen, J. H. Pickelsimer, C. R. McNeely, Ralph Fisher, A. M. White, S. R. Owen and W. L. Talley, were each convicted of a criminal conspiracy, as charged in the indictment; the defendants other than T. H. Shipman and J. S. Silversteen, were also convicted of the criminal misapplication of funds belonging to Transylvania County. The jurors in their verdict recommended that mercy be extended to each of the defendants in the judgment of the court.

The judgment on the verdict that the defendants are guilty of a criminal conspiracy as charged in the indictment was (1) that the defendants, T. H. Shipman, J. H. Pickelsimer, C. R. McNeely and Ralph Fisher, each pay a fine of $5,000, and be confined in the State's prison

for a term of not less than two or more than five years; (2) that the defendant, J. S. Silversteen pay a fine of $5,000; and (3) that the defendants, A. M. White, S. R. Owen and W. L. Talley, each pay a fine of $1,000.

It was ordered by the court that judgment on the verdict that the defendants other than T. H. Shipman and J. S. Silversteen, are guilty of a criminal misapplication of funds belonging to Transylvania County, as charged in the indictment, be continued, and that the defendants pay the costs of the action, pro rata, as directed in the judgment.

From the judgment, the defendants appealed to this Court, assigning errors at the trial, for which they contend that the judgment should be reversed, or at least that they be granted a new trial. On this appeal, the assignments of error based on the exceptions of the defendants, A. M. White, S. R. Owen and W. L. Talley, to the refusal of the trial court to allow their motions for judgment as of nonsuit (C. S., 4643), are sustained. Under the provisions of the statute, a verdict of not guilty as to these defendants will be entered in the Superior Court of Transylvania County. This Court is of the opinion that the evidence at the trial was not sufficient to support a verdict of guilty as to the defendants, A. M. White, S. R. Owen and W. L. Talley, and therefore reverses the judgment as to these defendants. The judgment as to the other defendants is affirmed. I concur with *Brogden, J.*, that the evidence is not sufficient to sustain the verdict of guilty as to any of the defendants and that for this reason the judgment of the Superior Court should be reversed not only as to the defendants, A. M. White, S. R. Owen and W. L. Talley, but also as to the other defendants.

In my opinion, there was no evidence at the trial of this action in the Superior Court tending to show that the defendants, or any two or more of them entered into an agreement to do an unlawful act, or to do a lawful act for the purpose of accomplishing an unlawful end, or that any of the defendants misapplied any funds belonging to Transylvania County, as charged in the indictment.

BROGDEN, J., dissenting. The two paramount questions arising upon the evidence may be stated as follows:

1. Did the defendants Silversteen, Shipman and Fisher, participate in procuring the issuance of tax anticipation notes, aggregating $100,000?

2. Did they participate in procuring the issuance of said notes for the purpose of causing the proceeds thereof to be deposited in an insolvent bank of which Shipman and Silversteen were stockholders, directors and officers, thus defrauding Transylvania County?

The scene opens at a funeral and ends for some of the defendants at the penitentiary. On 26 August, 1930, Ves Ashworth was buried, and on the way from the funeral Shipman and Silversteen requested a witness for the State, named Allison, to go with them to the courthouse to see the defendant, McNeely, the county accountant and financial officer of said county. The words of the witness tell the story: "Shipman told McNeely that Transylvania County had a note that would be due in a short time and that it would work a hardship on the people of Transylvania County to pay this note in that short time, and asked him if he could not give an extension of time. That is all I remember. McNeely said he could not do anything himself but to take it up with the other commissioners. . . . There was nothing said about borrowing money." Six days thereafter, to wit, 1 September, 1930, McNeely, the county accountant, filed with the board of commissioners a certificate in accordance with section 4 of the County Finance Act. This certificate shows that on 28 July, 1930, the board of commissioners had appropriated under three divisions the sum of $124,821.32 for schools and $15,148.88 for roads for the current fiscal year expiring 30 June, 1931. The certificate further declared: "It is necessary to borrow $100,000 for the purpose of paying appropriations made for the current fiscal year in anticipation of the collection of taxes," etc.

There is no evidence that any of the other defendants knew of, approved, or procured the filing of this certificate.

On the same day, to wit, 1 September, 1930, the board of county commissioners duly adopted a resolution authorizing the borrowing of $100,000 in anticipation of the collection of taxes, said loan to be evidenced by ten promissory negotiable notes of the county in the sum of $10,000 each. It was further ordered that advertisement for bids be published in the *Brevard News,* the *Asheville Times* and the *Daily Bond Buyer,* published in New York City, notifying prospective purchasers that bids would be received by the board "until ten o'clock a.m. on 13 September, 1930."

There was evidence that Shipman and Fisher were present when the resolution was adopted, but there is no evidence that they advised, counseled or even approved the resolution at that time. Silversteen was not present, and the trial judge expressly excluded as to him all evidence showing who was present at the meeting.

Immediately upon the passage of the resolution and the advertisement for bids, a political war began to flame and roar. The election was coming on in November. The editor of the local newspaper said: "The Democratic political leaders were making political capital of it over the county. . . . The battle was hot and fast and furious."

Thereupon, three days after the resolution was adopted, to wit, on 3 September, 1930, the defendants, Shipman and Silversteen, wrote the letter appearing on page 65 of the record and set out in full in the opinion of the Court. The letter was addressed to the board of commissioners, and while the newspaper editor put a so-called "lead" at the top of the letter as published, this "lead" was no part thereof.

September 13, 1930, was the day set for receiving and opening the bids for the tax anticipation notes. The commissioners met, but no bids were there. An order was passed declaring: "It is desired to dispose of the said notes to meet the needs of appropriations made in anticipation of the collection of taxes," etc. And it was ordered that the meeting adjourn until Wednesday, 17 September, 1930, at ten o'clock a.m., "at which time the board will entertain bids for $100,000 revenue anticipation notes."

When the board met on 17 September, the Brevard Banking Company, through its president, Thomas H. Shipman, by a written proposal, dated 17 September, offered to purchase the notes at par, provided the "board will furnish the transcript of proceedings sufficient to evidence the legality of the notes to the full satisfaction of Clay, Dillon & Vanderwater, bond attorneys of New York City." The board, finding that "the bid of the Brevard Banking Company to be the highest and best bid," awarded the notes to said bank.

At this point, there is a break in the evidence. It does not appear what became of the notes. They were not in the bank. Whether the delay was due to inability to find a purchaser for them or that the bond attorneys in New York had not approved the issue is not disclosed. The liquidating agent, however, testified: "The bank did not get the money for those notes and the county did not get credit for them until 24 November." Nevertheless, on said date the county received credit for every penny of the money plus interest, and the proceeds were distributed to the various county funds.

The bank was closed on 15 December, 1930.

The foregoing is the chronological development of the transactions from inception to the closing of the bank.

A survey of the movement of events, as disclosed by the evidence, totally fails to connect the defendants, Silversteen, Shipman or Fisher with the issuance of the notes unless the letter of 3 September, 1930, is sufficient to identify them as conspirators if any conspiracy existed. The letter and the bare fact that Shipman and Silversteen were seen at the courthouse on one occasion on 26 August, and that Shipman and Fisher were present when the resolution was adopted, is the sum total of the evidence against them. All other evidence as to Silversteen was

expressly excluded by the court except testimony showing how much stock he owned in the bank, the amount of his deposits and the aggregate of his indebtedness. The fact that he was a depositor and stockholder in the bank did not have even an imaginary bearing upon the conspiracy, and the evidence in behalf of the State was directly, explicitly and unequivocally to the effect that all his notes were "good and perfectly solvent." Therefore, the only possible evidence competent against him and his codefendant Shipman was the letter of 3 September, 1930. Consequently, it is desirable to analyze that document in the light of the circumstances, and, of course, with due regard for the reasonable inferences and implications arising therefrom. The undisputed facts surrounding the letter may be summarized as follows: (1) The letter was written to the board of commissioners and not to a newspaper. How and from whom the newspaper editor received it is not disclosed. Nor does it appear that it was published with the knowledge, consent or approval of either Fisher, Shipman or Silversteen. (2) It was written three days after the notes were actually authorized by resolution duly adopted, and after the board of commissioners had adjourned. Manifestly, if a conspiracy was on foot in the adoption of the resolution, such conspiracy was a completed fact before the letter was written. (3) The authorization of the notes by the board had created a political war, and the transaction had subjected the members thereof to bitter criticism and attack. (4) At the time it was written there was no suggestion that the bank should purchase the notes. Neither did it appear that the bank desired or contemplated the purchase thereof. How could Shipman or Silversteen know or even surmise, notwithstanding wide publication for bids, that no bid would be received ten days thereafter?

In short, the letter, viewed in its setting, was no more than an expression of approval of the business judgment and discretion of a politically badgered governing authority.

But it is insisted that the letter was false to the knowledge of the writers. The falsity is based upon the fact that on 1 September, 1930, the county had in bank to the credit of various funds the sum of $627,296.13. Consequently, it is argued that there was no necessity for borrowing more money, particularly for schools and roads because the school fund had to its credit the sum of $72,230.71, and the road fund $13,410.23. Included in the total balance of $627,296.13 was $278,000 proceeds of a bond issue under chapter 436, Public-Local Laws of 1929, which specifically provided that the money should be deposited in the bank "and held as a separate fund to be used only for the purposes authorized by this act." Hence this fund must not be counted in deter-

mining the amount of available money for general county purposes. In addition, there were two tax anticipation notes of $75,000 each, payable on 15 September, and 15 December. Consequently, this sum of $150,000 should be deducted from the total balance in determining the amount available for general county purposes for the fiscal year. Furthermore, interest charges on various bond issues shown in the budget for the fiscal year was $87,000. Certain sinking funds were also included in the total, which, of course, should be deducted in arriving at available revenues. The result is, from a perusal of the evidence, that when the notes and bond interest items were paid that the county would have had slightly more than $100,000 available for all purposes for the entire fiscal year except such as might be realized from the collection of taxes. The fiscal year began on 1 July, and, therefore, on 1 September, only two months of the fiscal year had expired. The county accountant testified that in paying the $150,000 of notes the said sum would be drawn from the following funds in the bank: (a) general county, $2,000; (b) health and poor, $5,000; (c) road fund, $23,000; (d) debt service, $45,000; (e) school fund, $75,000. As the school fund on 1 September, had on deposit only $72,230.71, it is obvious that when the notes were paid in September and December that the entire school fund would be wiped out, leaving no funds available to operate the schools from 15 December to the end of the fiscal year, unless, of course, taxes could be collected or money borrowed.

Therefore, when Shipman and Silversteen stated in the letter to the county commissioners on 3 September, 1930, that it was "good business . . . to borrow against uncollected taxes in order to keep the schools and roads going," said statement is established as true by the evidence offered by the State, and yet Silversteen and Shipman and their descendants are marked with the burning brand of felony merely because they wrote a letter which contained no false statement or representation.

But for the sake of the argument, let it be assumed that Silversteen and Shipman and all the other defendants participated in procuring the issuance of the tax anticipation notes. The issuance of the notes worked no hurt to the county if the proceeds were deposited in the bank to the credit of the county, unless, of course, the bank was insolvent. Was the bank insolvent? The sole and only evidence of insolvency was the testimony of the liquidating agent. He testified that in his opinion the bank was insolvent, but continuing his testimony, he said: "I stated that in my opinion the Brevard Banking Company was insolvent on 17 September. By the use of that term I mean if the bank had closed that day, it would not have been able to pay off all of its creditors." In other words, every man is insolvent, who, upon leaving

his office at night, if all of his creditors met him at the door, could not pay them in full at that instant; or a bank would be insolvent if at the close of business on any particular day, all of its creditors should appear at the cashier's window, and it was unable to hand out in cash the full amount due every creditor. This conception of the solvency of a bank or of an individual is so weird that I do not pause to debate it. Obviously, the opinion evidence of insolvency was based upon a false and erroneous assumption, and such opinion is therefore no evidence at all, and upon objection, it was the duty of the judge to strike it from the record.

The evidence, in its entirety, produces certain clear cut, and indisputable conclusions:

(1) The board of county commissioners of Transylvania County, in strict accordance with law, and in the exercise of a judgment and discretion delegated by statute, authorized the issuance of ten negotiable, tax anticipation notes, aggregating one hundred thousand dollars.

Consequently the issuance of said notes was a lawful act.

(2) The sale of the notes to the Brevard Banking Company, was duly made to the only bidder, complying with the terms thereof and with the statute.

(3) The proceeds of the sale were duly received and deposited to the credit of various funds of the county, in a depository duly and regularly appointed and designated in accordance with law. Moreover, there is no evidence that said depository had not complied with chapter 146, section 19, of the Public Laws of 1927, and in pursuance thereof furnished bonds "in an amount sufficient to protect such deposits." Indeed, it affirmatively appears that at the time of the deposit the county held surety bonds and collateral in excess of three hundred and seventy thousand dollars to protect public funds.

(4) At the time the notes were issued the appropriation for schools for the fiscal year was $124,821.32, and there was available for general school purposes on hand the sum of $72,230.71. Tax anticipation notes aggregating $150,000 were falling due on 15 September and 15 December. In paying these notes it would have been necessary to withdraw seventy-five thousand dollars from the general school fund, theretofore allocated, and hence on 15 December the general school fund, unless supplemented by tax collections or borrowed money, would have been overdrawn.

(5) There is no evidence that any defendant received an atom or electron of benefit from the transaction, or that the county has lost or will lose a penny because of the issuance of notes.

(6) There is no competent evidence of the insolvency of the bank on the date of the passage of the note resolution, or if insolvent that any defendant knew of it.

The State attempts to show insolvency by certain declarations of Shipman to the effect that if the bank should be compelled to pay out seventy-five thousand dollars, it would work a hardship on the people of the county, because the bank would necessarily raise the fund by collecting from its debtors. Shipman described the situation in rather homely English when he said that enforced collections by the bank would "take the breeches off of some of the best people in town." This however, should not be imputed to him for conspiracy, for under economic conditions then and now prevailing, some of the best people in every community in the country have not only lost their breeches but their underclothing also, under the compulsion of paying debts to banks and other creditors.

In general terms a conspiracy is an agreement to do an unlawful act, or to do a lawful act in an unlawful way.

In the case at bar, the evidence conclusively established the fact that the issuance of the notes was a lawful act. Now, what unlawful means were employed?

The State contends that the unlawful purpose consisted in depositing the money in an insolvent bank. But the State failed to offer any competent evidence of insolvency, or that the county had suffered the loss of a penny. Where is the crime? Where is the proof of any crime?

The evidence for the State says that a bank in Transylvania County failed on 15 December, 1930, and that at the time the county had $561,145.80 on deposit therein. It says further, that the county commissioners on 17 September, had lawfully sold one hundred thousand dollars of tax anticipation notes, and that in accordance with law the proceeds thereof had been duly deposited in a lawful depository, which had given the bonds or security as required by statute for the protection of public funds. For this several of the defendants go to the penitentiary.

After a thorough study and analysis of the evidence, I cannot reach the conclusion held by the majority of my brethren. I can see no crime and no competent proof of any crime described in the bill of indictment.

H. E. KING v. D. H. POPE.

(Filed 6 April, 1932.)

1. Highways B f—Violation of safety statute is negligence per se and question of proximate cause is ordinarily for jury.

The violation of a statute enacted for the safety of those driving upon the highway is negligence *per se*, and when such violation is admitted or established the question of proximate cause is ordinarily for the jury. N. C. Code, 1931 (Michie), 2621(45), 2621(46), 2621(51), 2621(54), 2621(55).

2. Highways B k—Failure of guest to demand to be let out of car held not contributory negligence as a matter of law.

Where the evidence discloses that the plaintiff was a guest in the defendant's car on a trip to another city and that the defendant on the return trip was driving in a reckless manner in violation of the speed limit and driving on the wrong side of the road and in turning curves at a dangerous rate of speed, and that the plaintiff repeatedly remonstrated with the defendant's driving and that soon thereafter the car turned over while the defendant was attempting to take a curve at a dangerous rate of speed, causing injury to the plaintiff: *Held*, under the facts and circumstances of this case the plaintiff's failure to demand that the defendant stop the car and let him out was not contributory negligence as a matter of law, and the issue was properly submitted to the jury under instructions which were free from error, and *held further*, if the defendant's conduct was wilful and wanton the plea of contributory negligence could not avail him.

APPEAL by defendant from *Cranmer, J.*, and a jury, at August Term, 1931, of WAYNE. No error.

This is an action for actionable negligence, brought by plaintiff against the defendant alleging damage. The defendant denied negligence and set up the plea of contributory negligence.

The plaintiff (Horace E. King) is a mechanical engineer, about 61 years old, and lives in Goldsboro, N. C. L. S. Hadley is a merchant and lives in Wilson, N. C. D. H. (Dave) Pope lives in Raleigh, N. C. The plaintiff, King, and Hadley were going to Winston-Salem to attend the fair and a banquet to be given by Mr. Reynolds. They were invited by Pope to go in his 77 Chrysler sedan. They arrived in Winston-Salem on Tuesday night, 7 October, 1931, about dark, attended the banquet and the next day went to the fair, and left there that evening, Wednesday, 8 October, just before dark. Pope was at the wheel of the car, sitting beside him was Hadley and plaintiff was sitting on the back seat. Plaintiff describes the wreck as follows: "The first recollection I got of approaching Hillsboro was when the tires gave me first warning when

the car started to turn around. Before we got there he (Pope) was driving at a pretty good gait and I remonstrated with him, that I wouldn't take the curve around the corners so fast, that a Chrysler was notoriously light behind and at the next corner he said 'You see that takes as good as any car you ever saw,' and I said 'I haven't ever seen one but what would turn around behind when you take a corner fast, and I don't like to take them so fast, we have got plenty of time,' and at Burlington I got after him again, and he said 'Why don't you drive?' and I said 'I don't know anything about a Chrysler and don't know the road, and it is your car and it would be safer for you to drive than me, for I am off of my beat.' He was going around 60 the biggest part of the time, 55 or 60. The speed was plenty fast when that thing came around, when the tires squealed. The road was dry and when the tires started to hollering I looked up and saw the car was over the white line on the left-hand side of the road and was still going; it wasn't all of the car over, but half or more was on the wrong side of the curve, showing the car was going on the outer side of the curve and the tires were hollering, 'murder.' He probably might have come to the curve on his side of the road, I don't say anything about that because I didn't have anything to call my attention to look until I heard the tires and when I heard the tires the car was going that way and was still going and the car was over the white line; I don't know how it hit. When I waked up I was in the Durham Hospital."

Plaintiff described the serious and permanent injuries he sustained; before then he was in good condition, had no physical infirmities. "Hadn't taken a dose of medicine in 40 years and never sent for a doctor in my life for my own self." On cross-examination plaintiff testified, in part: "I cautioned him (Pope) about taking that car around the corner that he was going too fast; far as the reckless part of that is concerned I am not going to put that construction on it particularly. If I swore to that in my complaint, then I will swear to it now. He was driving that automobile in such manner that to any reasonable man the driving of it was reckless. There are places all along that road, filling stations and houses and villages and towns, but I don't think they would appeal to me to get out in the dark 40 miles away from my car, when I was riding with a man that was supposed to carry me back; I don't think you would have gotten out."

L. S. Hadley testified, in part: "I recall after we reached the edge of Hillsboro. Mr. Pope was driving the car; Mr. King was sitting behind him and I was on the front seat. We were driving pretty fast. I glanced at the speedometer a good many times, and it was from 55 to 60, maybe as high as 65 miles an hour. Mr. Pope was talking about

the race his horse won that day and was very enthusiastic about the horse and he turned his head two or three times to look at Mr. King and Mr. King said 'Keep your head to the front, I can hear you,' and I said something to Mr. Pope about driving so fast and gesticulating with his hand. I didn't know we struck the turn until the car began to turn over. When I saw I wasn't broken up I saw Mr. Pope. How he got out of the car I don't know, and finally I found Mr. King and began to shake him and he didn't answer, and finally he groaned, and the first thing he said was 'My legs are paralyzed,' and I straightened him out, and by that time a crowd got there, they raised the car up and pulled Mr. King out the door on the under side and I crawled through the top door and got out that way. Mr. Pope, when I got out, was sitting in somebody else's car just a few feet from where this car turned over. Somebody phoned for an ambulance and all three of us got in it and went to Durham to Watts Hospital. Mr. King was unconscious practically all the way and I thought possibly dead before he got there. . . . I remember him telling him (Pope) that a Chrysler was notorious for being light behind and not taking turns, and Mr. Pope says, 'This car takes turns as good as any car, you watch it at the next turn.' I don't know whether that was the last turn or not. I knew Mr. King well before this time. As well as I know anyone. His condition before this time was as near perfect as any man I know. He had the use of all limbs, muscles and all faculties and was an exceptionally strong, active man. I have seen him work at the mill and he had muscles like a blacksmith. I saw his arm today and there had been considerable shrinkage."

There was evidence by several physicians and nurses as to the nature and extent of the injuries and suffering of the plaintiff.

The defendant offered no evidence. The plaintiff was a guest in defendant's automobile, sitting in the back seat. All the evidence was to the effect that defendant "was sober, in full possession of his faculties, and an experienced driver, was operating his motor vehicle along a road, with which he was thoroughly familiar."

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. In what amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,500."

Judgment for plaintiff was rendered by the court below on the verdict. The defendant excepted to the judgment as signed, 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.

J. Faison Thomson for plaintiff.
Ruark & Ruark 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 court below overruled the motions and in this we can see no error.

All the evidence was to the effect that defendant had violated certain provisions of the Motor Vehicle Uniform Act, N. C. Code, 1931, Anno. (Michie), 2621(45), in reference to reckless driving; 2621(46) a and b, restrictions as to speed; 2621(51), driving on right side of highway, 2621(54), 2621(55).

The court below read to the jury the sections above of the Motor Vehicle Uniform Act, which were applicable to the facts in this case. The court defined "negligence," "proximate cause" and "contributory negligence," and gave the contentions on this issue as to negligence, and charged the jury: "If you find by the greater weight of the evidence that Mr. Pope was operating the car in violation of the laws enacted by the General Assembly for the safety of people, and that by reason of such violations of the law Mr. King was injured, and that such violation was the proximate cause of his injury, it will be your duty to answer the first issue 'Yes.' If you do not so find, it will be your duty to answer it 'No.' I have defined the term, negligence. The burden of the issue is upon the plaintiff, Mr. King, and if he has satisfied you by the greater weight of the evidence that the defendant, Mr. Pope, was negligent, and that Mr. Pope's negligence was the proximate cause, the real cause of his injuries, it would be your duty to answer the first issue 'Yes.' If you do not so find, or if upon an entire weighing and considering all the evidence you find it equally balanced it would be your duty to answer the issue 'No.' . . . The burden of the issue is upon the plaintiff, Mr. King, and if he has satisfied you by the greater weight of the evidence that the defendant, Mr. Pope, was negligent, and that Mr. Pope's negligence was the proximate cause, the real cause of his injuries, it would be your duty to answer the first issue 'Yes.' If you do not so find, or if upon an entire weighing and considering all the evidence you find it equally balanced it would be your duty to answer the issue 'No.'"

In *Godfrey v. Coach Co.*, 201 N. C., at p. 267, speaking to the subject, we find: "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."

The defendant made no exceptions to this part of the charge of the court below. The jury answered this issue that plaintiff was injured by the negligence of the defendant. The battle was over the second issue: "Did the plaintiff by his own negligence contribute to his injury?"

The defendant contends: "The court should have held plaintiff negligent as a matter of law in not demanding and insisting that the defendant stop the automobile and permit him, the plaintiff, to get out of the same." We cannot so hold. Under the facts and circumstances of this case, we think it was a question of fact for the jury to determine.

The court below charged the jury, in part, on this issue as follows: "I further instruct you that the law recognizes that contributory negligence may be due either to acts of omission or acts of commission; in other words, lack of diligence or want of due care on the part of the plaintiff may consist of doing the wrong thing at the time and place in question, or may consist of doing nothing when something should be done. The test is: Did the plaintiff exercise that degree of care which the ordinarily prudent man would exercise under similar circumstances, and was his failure to do so the proximate cause of his injury? Defendant Pope contends that his failure to exercise proper care was the cause of his injury and defendant Pope contends that it was an act of omission on his part; that he failed to do something that he should have done; that by his own testimony he told the jury Mr. Pope was operating the car recklessly, at a high and excessive rate of speed, and that he failed to have him stop the car and get out, and that by this act of omission he was negligent and that you should so find. Plaintiff contends that he remonstrated as best he could and that he was not the owner of the car and that he did the best he could. If the defendant Pope has satisfied you by the greater weight of the evidence that King was negligent, and that his negligence was the proximate cause of the injury it would be your duty to answer the second issue 'Yes,' but if you do not so find, and if upon weighing and considering all the evidence you find it equally balanced, you will answer it 'No.'" We think

the charge of the court below correct, and the question of contributory negligence was for the jury to decide—not the court.

In Huddy Automobile Law, Vol. 5-6, 9th ed. (1931), at p. 265, is the following: "The duty to remonstrate against excessive speed is not, however, absolute, but depends on the circumstances of the particular case, and usually presents a jury question," citing numerous authorities. At p. 267-8: "The circumstances may be such as to charge the occupant with negligence as a matter of law, where he unreasonably remains in the machine after adequate opportunity is offered for alighting, or at least, where he fails to insist on leaving the car. But this duty is not absolute, the question whether a failure to leave the vehicle is a want of ordinary care being dependent on the circumstances of the particular case."

In *Krause v. Hall* (1928), 195 Wisconsin, 565, 217 N. W. Rep., at p. 292, the following observations are made. "No case has been found, however, which attempts to define the amount of protestation necessary to relieve the guest of contributory negligence as a matter of law. When it is considered that the guest has no control over the automobile, and that it is not within his power to coerce the driver, it is apparent that all the guest may do is to indicate to the host his or her displeasure with reference to the manner in which the car is being driven. Under such circumstances, the considerate host will respect the feelings of his guest and modify his rate of speed, or other reckless conduct, to conform to the pleasure of his guest. Should the host persist in his reckless driving, the guest may ask to be let out of the car, but that he should do so under all circumstances has never been held his duty as a matter of law, so far as we are advised. Here the plaintiff did protest, not once, but several times. She did ask to be let out of the car, and it was for the jury to say whether her failure in this respect constituted a want of ordinary care on her part. The jury might well have believed that the ordinary person would have taken chances on remaining in the car rather than be let out on a highway many miles from home on a dark night. It seems fairly plain that in every respect the question of plaintiff's contributory negligence was for the jury, and that their finding with reference thereto cannot be disturbed." *Royer v. Saecker et al.* (1931), ... Wis., ..., 234 N. W. Rep., 742. *Curran v. Earle C. Anthony, Inc.* (Cal.), 247 Pac. Rep., 236; *Munson v. Rupker* (Ind.), 148 N. E., 169; *Heyde v. Patten* (Mo.), 39 S. W., 813.

In *Nettles v. Rea,* 200 N. C., at p. 45, is the following: "Conceding, without deciding, that plaintiff may have been negligent in entering defendant's car under the circumstances disclosed by the record, nevertheless there is evidence of wilful and wanton conduct on the part of the

defendant in persisting in his reckless driving over the protests of his guests which resulted in plaintiff's injury. This, if nothing else, saves the case from a nonsuit," citing authorities. *Bailey v. R. R.*, 149 N. C., 169; *Ballew v. R. R.*, 186 N. C., 704; *Braxton v. Matthews*, 199 N. C., 484.

"'But as stated in *Ballew v. R. R., supra,* the intent to inflict the injury may be constructive as well as actual. It is constructive where the wrongdoer's conduct is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of wilfulness and wantonness equivalent in spirit to actual intent.'" *Braxton's case, supra,* at p. 485.

If the defendant's conduct was wilful and wanton, the plea of contributory negligence could not avail him, and he would not, under such circumstances, be entitled to a nonsuit. In the judgment below we find

No error.

HAZEL BATSON v. CITY LAUNDRY COMPANY.

(Filed 13 April, 1932.)

Trial G a—After reserving rulings on motions of nonsuit court may not set aside verdict for insufficiency of evidence as a matter of law.

Where the defendant moves for judgment as of nonsuit at the close of the plaintiff's evidence and at the close of all the evidence, and the court reserves his rulings on the motions until after verdict, upon the rendition of a verdict in the plaintiff's favor the court is without authority to set aside the verdict for insufficiency of the evidence as a matter of law, and grant the motion for judgment as of nonsuit made at the close of all the evidence. C. S., 567.

APPEAL by plaintiff from *Barnhill, J.*, and a jury, at October Term, 1931, of NEW HANOVER. Error and remanded.

This is an action for actionable negligence brought by plaintiff against the defendant, a corporation, to recover damages, for the alleged negligence of the defendant in failing to use due care to provide her with a reasonably safe place to work. That the defendant failed in the exercise of due care to provide a stairway or steps leading to the second floor, where its work was carried on, to be kept in a reasonably safe condition, in consequence of which she sustained personal injuries. That such negligence of defendant was the proximate cause of her injury.

The defendant denied negligence and pleaded contributory negligence.

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

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

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

3. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: $12,250."

The following judgment was rendered by the court below: "This cause coming on to be heard at this, the October Term, 1931, of New Hanover County Superior Court, before Hon. M. V. Barnhill, judge presiding, and a jury, and being heard, at the conclusion of plaintiff's testimony the defendant moved to dismiss the action as of nonsuit, and the court reserved its ruling thereon. At the conclusion of all the testimony, the defendant renewed its motion to dismiss the action as of nonsuit, and the court reserved its ruling thereon, and pending its ruling upon said motion, submitted the case to the jury. The jury having rendered the verdict which appears of record, the court now, on motion of the defendant, sets the same aside as a matter of law, for that there is no sufficient evidence to support the same, and further for that it is of the opinion that the plaintiff upon her own testimony is guilty of contributory negligence. Having set the verdict aside, the court now, on motion of the defendant, upon consideration of the motion of nonsuit made at the conclusion of all the testimony, being of the opinion that the same should be allowed. Orders, considers and adjudges that this action be, and the same is hereby dismissed as of nonsuit."

To the foregoing judgment as rendered, plaintiff excepted, assigned error and appealed to the Supreme Court.

Herbert McClammy, Burney & McClelland and Rountree, Hackler & Rountree for plaintiff.

E. K. Bryan and L. Clayton Grant for defendant.

CLARKSON, J. We think the only material question for us to decide: Does the judge, by reservation of his right to rule, until after verdict, upon defendant's motions to dismiss the action or for judgment as in case of nonsuit (C. S., 567), then have the power to set aside the verdict *as a matter of law* for insufficiency of the evidence, and allow judgment for nonsuit and dismissal? We think not.

Under the former practice, upon demurrer to the evidence no further evidence could be introduced on either side, N. C. Prac. & Proc. (McIntosh), at p. 615.

In *Stith v. Lookabill,* 71 N. C., at p. 29, *Pearson, C. J.,* has this to say: "A motion to nonsuit the plaintiff, in the midst of a trial, on the

ground that his evidence does not make out a case; the counsel of defendant *stating that if his Honor should overrule the motion he had evidence to offer, showing title in himself.* By a demurrer to the evidence the defendant puts the case, which means the exitus issue, or end of the case, upon the sufficiency of the evidence. The judgment of the court decides the action one way or the other. By this novel practice the defendant has two chances to one, which is not 'fair play.' . . . We cannot tolerate this mode of trial. Code Civil Procedure dispenses with the formal mode of commencing actions and of pleading, but it does not dispense with the rules of conducting trials which have been heretofore established as essential to the fair administration of the law. After a jury is empaneled both sides should, in the words of *Lord Mansfield,* 'play out their cards'; so, in our case, Lookabill is not at liberty to hold back his defense and 'fish for' the opinion of the Court, upon the case made by the plaintiff by a motion to nonsuit." *S. v. Adams,* 115 N. C., 775; *Riley v. Stone,* 169 N. C., at p. 422; *Godfrey v. Coach Co.,* 200 N. C., 41.

Now we have the statutory regulation which is as follows: C. S., 567. "When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal to the Supreme Court. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant has the benefit of his exception on appeal to the Supreme Court. After the motion is refused he may waive his exception and introduce his evidence just as if he had not made the motion, and he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury has rendered its verdict, he has the benefit of the latter exception on appeal to the Supreme Court. (Rev., sec. 539; 1897, ch. 109; 1899, ch. 131; 1901, ch. 594.)" In regard to criminal actions, see C. S., 4643.

"In the trial of issues of fact in a civil action or special proceeding, when the plaintiff has rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed, the plaintiff may except and appeal; if the motion is refused, the defendant may except and go to the jury upon the evidence; and if there is a verdict and judgment against him, he may have the benefit of the exception on appeal. If the motion is refused, and the defendant introduces evidence, he waives his first exception, and he may renew his motion at the close of all the evidence; and if the motion is refused

he may except again, and if there is a verdict and judgment against him he may have the benefit of the last exception on appeal. This is the practice under the present statute, known as the 'Hinsdale Act,' and it is substantially a demurrer to the evidence without the common-law effect of necessarily ending the case." N. C. Prac. and Proc. in Civil Cases (McIntosh), chap. 15, sec. 565(2) at p. 612-13.

In *Nowell v. Basnight*, 185 N. C., at p. 148, we find: "If the first motion is overruled, the defendant may except and go to the jury; or except, introduce evidence and renew motion after all the evidence (citing authorities). Exception is waived if motion is not renewed" (citing authorities). In the above case the change of practice, under C. S., 567, is lucidly discussed by *Walker, J. Murphy v. Power Co.*, 196 N. C., at p. 494; *Lee v. Penland*, 200 N. C., at p. 341; *Debnam v. Rouse*, 201 N. C., 459.

In *Price v. Ins. Co.*, 200 N. C., at p. 428, speaking to the subject: "In the interpretation of the statute this Court has held that the trial judge has no power to grant the defendant's motion to dismiss the action for insufficient evidence as a matter of law after the verdict has been returned. *Godfrey v. Coach Co., ante*, 41. 'The judge has no power to extend the time by amending the statute so as to permit the motion to be made, . . . after verdict.' *Riley v. Stone*, 169 N. C., 421; (*Nowell v. Basnight*, 185 N. C., 143). After verdict he is remitted on this point, to the exercise of his discretion. *Lee v. Penland, ante*, 340. While a motion to dismiss for insufficient evidence must be disposed of before a verdict in the way the statute prescribes, a motion to set aside a verdict or judgment may be entertained for other errors of law committed during the trial, such, for example, as error in the admission or rejection of evidence or in the charge of the court to the jury." *Mewborn v. Smith*, 200 N. C., at p. 535.

In *Price v. Ins. Co.* (same case), 201 N. C., at p. 377, is the following: "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."

In *Goodman v. Goodman*, 201 N. C., p. 811, we find: "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 (citing authorities). 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.' " In the present action the court below could have set aside the verdict in its discretion, but this it did not do.

Following the decisions in *Price v. Ins. Co., supra; Godfrey v. Coach Co.*, 200 N. C., 41 (second appeal 201 N. C., 264), and *Lee v. Penland*, 200 N. C., 340, the judgment will be reversed and the cause remanded for further proceedings.

Error and remanded.

MRS. W. P. STARLING, WIDOW, AND LOUISE STARLING (AGE 15), IDA MAY STARLING (AGE 11), PAUL JONES STARLING (AGE 8) AND SAMMIE STARLING (AGE 6), CHILDREN, ALL DEPENDENTS OF W. P. STARLING, DECEASED, v. JOHN R. MORRIS, SHERIFF, AND/OR NEW HANOVER COUNTY, AND/OR ROYAL INDEMNITY COMPANY.

(Filed 13 April, 1932.)

Master and Servant F b—Evidence held insufficient to support finding that deceased was killed in accident arising out of employment.

Where the evidence in a proceeding under the Workmen's Compensation Act tends to show that the sheriff of a county duly deputized the deceased solely for the purpose of serving such process as should be delivered to him for that purpose and should receive as his compensation the fees allowed therefor by law, but that the deceased was not regularly employed as a regular deputy sheriff with authority to act generally for the sheriff, and that the deceased, with other deputies, attempted to apprehend the driver of a truck transporting intoxicating liquor, acting upon information by third persons, but without warrants and without personal knowledge that the driver of the truck was engaged in a violation of the law, and that his death was caused by being shot in the attempt to stop the driver of a mail truck: *Held*, the deceased was acting upon his own initiative and not in behalf of the sheriff, and the evidence is insufficient to support the finding of the Industrial Commission that the deceased was killed in an accident arising out of and in the course of his employment, and the judgment of the Superior Court vacating the award to his dependents is affirmed. As to whether such deputy sheriff was an employee within the meaning of the Compensation Act, N. C. Code, 8081(i), *quære?*

APPEAL by plaintiffs from *Barnhill, J.*, at January Term, 1932, of NEW HANOVER. Affirmed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act, upon the contentions of the claimants (1) that they are the dependents of W. P. Starling, deceased; (2) that at the date of his death the said W. P. Starling was an employee of John R. Morris, sheriff, and/or of New Hanover County; (3) that the death of the said W. P. Starling was the result of an accident which arose out of and in the course of his employment, and (4) that both the said employee and his said employers were bound by the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was first heard, at Wilmington, N. C., on 27 June, 1931, by Commissioner Dorsett, who found from the evidence the following facts:

"1. The parties to this cause are all bound by the provisions of the North Carolina Workmen's Compensation Act. Sheriff Morris, at the time of the injury by accident suffered by deputy sheriff W. P. Starling, had in his employ five persons. The county of New Hanover, by the statute, is bound by the provisions of the Compensation Act. The Royal Indemnity Company is the insurance carrier of the county of New Hanover.

2. On 15 March, 1931, W. P. Starling, while regularly employed by John R. Morris, sheriff of New Hanover County, suffered an injury by accident which arose out of and in the course of his employment, which resulted in his death.

3. W. P. Starling, deceased, was not, at the time of the accident and of his death, an employee of the county of New Hanover.

4. Sheriff John R. Morris, at the time of the accident suffered by W. P. Starling, had not complied with the provisions of the North Carolina Workmen's Compensation Act by purchasing compensation insurance or by becoming a self-insurer. He was an employer subject to the provisions of the North Carolina Workmen's Compensation Act, but without compensation insurance.

5. The average weekly wage of W. P. Starling at the time of the accident which resulted in his death was $30.00.

6. At the time of the accident and death of W. P. Starling, he had dependent upon him for support his wife and four minor children. The wife and minor children were wholly dependent upon the earnings of W. P. Starling, deceased, for their support."

In accordance with his conclusions of law based upon the foregoing facts found by him, Commissioner Dorsett, made an award as follows:

"It is directed that the defendant, sheriff John R. Morris, pay to Mrs. W. P. Starling, widow of W. P. Starling, deceased, for her use and the

use of her four minor children, compensation at the rate of $18.00 per week for a period not to exceed 350 weeks, nor the sum of $6,000. The defendant, John R. Morris, will also pay any hospital or medical bills incurred because of the accident."

From this award, John R. Morris appealed to the full Commission. Upon the hearing of said appeal, the findings of fact and conclusions of law made by Commissioner Dorsett were approved and adopted by the full Commission. The defendant, John R. Morris, appealed from the award of the Commission to the Superior Court of New Hanover County.

Upon the hearing of the appeal to the Superior Court, judgment was rendered as follows:

"This cause comes on to be heard before Hon. M. V. Barnhill, judge presiding, at this the January Special Term, 1932, of the Superior Court of New Hanover County, upon the appeal of the defendant, John R. Morris, from the award of the North Carolina Industrial Commission against the defendant Morris in behalf of the plaintiffs. Both plaintiffs and defendant are represented by counsel.

The cause being heard, upon an examination of the evidence, it appears therefrom that the deceased, W. P. Starling, was duly deputized by the defendant, John R. Morris, sheriff of New Hanover County, as a deputy under said sheriff; that the contract of employment did not contemplate the whole-time service of said deceased, but that he was to serve such process, criminal or civil, which might be delivered to him for that purpose by the sheriff, and was to receive as his compensation for such services such fees as arose out of the service of such process so delivered to him; that on the night of his death, he, together with certain other deputies, acting on unconfirmed information that some unknown party was bringing into New Hanover County a load of intoxicating liquor, went out in the direction that information caused them to believe such party was coming from; that none of the officers present had a warrant or other process for the arrest of the person for whom they were looking, or for any other person, and none of the officers present had personal knowledge that the person for whom they were looking was in the act of violating the prohibition law.

That the officers, including the deceased, stopped a United States mail truck for the purpose of discovering whether the driver thereof answered the description of the person for whom they were looking, the person for whom they were looking being a Negro, and the driver of the truck being a white person; that growing out of the stoppage of said truck the deceased was killed during an exchange of shots between the officers and the driver of the truck.

Upon the foregoing facts, which include the substance of all the evidence appearing in the record bearing upon the question as to whether the deceased came to his death from an accident connected with and growing out of his employment, the court is of opinion, and so holds, that there is no sufficient evidence in the record to support the finding of the Commission, being finding No. 2, as follows:

'On 15 March, 1931, W. P. Starling, while regularly employed by John R. Morris, sheriff of New Hanover County, suffered an injury by accident which arose out of and in the course of his employment which resulted in his death.'

It is therefore ordered, considered and adjudged that the award by the North Carolina Industrial Commission against the defendant, John R. Morris, and in behalf of the dependents of the deceased, W. P. Starling, be and the same is hereby reversed, set aside and vacated.

It is further ordered, considered and adjudged that the plaintiffs recover nothing and that the defendant, John R. Morris, go hence without day and recover his costs."

From this judgment, the plaintiffs appealed to the Supreme Court.

Kenneth C. Royall and Andrew C. McIntosh for plaintiffs.
Burney & McClelland for defendants.

CONNOR, J. We concur in the opinion of the judge presiding at the January Term, 1932, of the Superior Court of New Hanover County, that there is no sufficient evidence appearing in the record in this proceeding to support the finding of fact by the North Carolina Industrial Commission to the effect that at the time of the accident which resulted in his death, W. P. Starling was regularly employed by John R. Morris, sheriff of New Hanover County, as a deputy sheriff, and that while so employed he suffered an injury by accident which arose out of and in the course of his employment.

All the evidence shows that W. P. Starling was designated by the sheriff as a special deputy, soon after the sheriff qualified for the discharge of the duties of his office, with the understanding between him and the sheriff, that from time to time, at the option of the sheriff, he would be employed to serve process specially delivered to him by the sheriff for that purpose, and that he would receive the fees allowed by law for the service of such process. He received no salary or wages from the sheriff or from New Hanover County. W. P. Starling was not a regular deputy sheriff, employed by the sheriff, with authority to act generally for and in behalf of the sheriff, but only a special deputy subject to employment by the sheriff at such times and for such services as the sheriff might determine.

At the time of the accident which resulted in his death, W. P. Starling was not engaged in the service of any process specially delivered to him by the sheriff for that purpose, nor was he engaged in the performance of any duty required of him by the sheriff. He was acting solely on his own initiative, and not for or in behalf of the sheriff. He was undertaking with others to stop a truck on a State highway under the apprehension that the driver of the truck was transporting intoxicating liquor, in violation of the law. Neither he nor any one in his party had a warrant for the arrest of the driver of the truck, or of any other person, or for the seizure and search of the truck. No one in the party had personal knowledge that the driver of the truck was engaged in a violation of the law.

There is no error in the judgment setting aside and vacating the award in this proceeding by the North Carolina Industrial Commission. The judgment is affirmed.

In *Hanie v. Penland,* 194 N. C., 234, 139 S. E., 380, it was held by this Court that where a special deputy sheriff, while undertaking to arrest a person charged with the commission of a crime, by virtue of a warrant procured by the special deputy on his own initiative, shot and killed an innocent bystander, the sheriff was not liable in damages to the administratrix of the deceased person, for the reason that at the time he shot and killed the plaintiff's intestate, the deputy sheriff was not acting within the scope of his employment. He was acting entirely and exclusively as a volunteer. The principle on which that case was decided is applicable to and determinative of the question presented by this appeal.

The question as to whether the relation between the sheriff of a county in this State, and one who has been appointed by him as a deputy sheriff, is that of employer and employee, within the meaning of those words as used in the North Carolina Workmen's Compensation Act is not presented by this appeal. In view, however, of the definitions in the statute of the words, "employment," "employer" and "employee," as used therein, it may well be doubted that a deputy sheriff is an employee of the sheriff by whom he was appointed, within the meaning of those words as used in the act. See N. C. Code, section 8081(i); section 2, chapter 120, Public Laws, 1929. However that may be, there is no error in the judgment in this proceeding. It is

Affirmed.

G. F. BROWN AND HIS WIFE, ALICE BROWN, v. J. C. FEATHERSTONE AND HIS WIFE, MAGGIE E. FEATHERSTONE.

(Filed 13 April, 1932.)

1. **Cancellation and Rescission of Instruments A b—Evidence in this case held incompetent on issue of value in consideration of deed.**

In an action for the cancellation of certain deeds upon allegations that the execution of the deeds was procured by false and fraudulent representations as to the value of certain stock given by the grantee to the grantor in consideration of the deeds, evidence as to acts of the stockholders of the corporation relating to the sale of the corporate property are incompetent as evidence of the value of the stock at the time of the transfer when the meeting at which such action was taken by the stockholders was held many months after the transfer of the stock to the plaintiff.

2. **Appeal and Error J e — Exclusion of evidence, if error, held not prejudicial to appellant in view of answers to issues in this case.**

Where the answers of the jury to the issues submitted renders the exclusion of certain evidence offered by the appellant immaterial or not prejudicial to him, the exclusion of such evidence, if error, does not entitle the appellant to a new trial.

3. **Cancellation and Rescission of Instruments A b—Grantor should investigate value of consideration where he has opportunity therefor.**

Where, in an action for the cancellation of certain deeds on the ground that their execution was procured by false and fraudulent representations as to the value of stock given by the grantee to the grantor in consideration of the deeds, it appears that certain of the deeds were executed sametime after the execution of the first deeds, and that the stock in the same corporation was given in consideration in both transactions: *Held*, the grantor had ample opportunity between the dates of the transactions to investigate the value of the stock uninfluenced by the representations of the grantee, and the instructions of the trial court in accord with this principle will not be held for error.

4. **Cancellation and Rescission of Instruments B e—Where cancellation is decreed the judgment should put the parties in statu quo.**

The object of a judgment rendered in favor of the plaintiff in an action for the cancellation of certain deeds for fraud is to put the parties *in statu quo*, and where the consideration for the deed is certain stock in a corporation and the grantor tenders the return of the stock to the grantee with the amount of the dividends thereon since the transfer, and there is no evidence that the value of the stock had been decreased by any act of the grantor since the transfer, the judgment should order the cancellation of the deeds and the return of the stock, and a judgment ordering the cancellation of the deeds and ordering the grantor to pay the grantee the value of the stock at the date of the transfer is erroneous.

APPEAL by plaintiffs from *Barnhill, J.*, at January Term, 1932, of BLADEN. No error in the trial; judgment modified and affirmed.

This is an action for the cancellation of certain deeds executed by the plaintiffs, by which the plaintiffs conveyed to the defendants the lands described therein. The plaintiffs allege in their complaint that the execution of said deeds was procured by false and fraudulent representations, as alleged therein, made by the defendant, J. C. Featherstone, to the plaintiff, G. F. Brown. The allegations in the complaint with respect to the false and fraudulent representations were denied in the answer.

The consideration for the said deeds was the transfer by the defendant, J. C. Featherstone, to the plaintiff, G. F. Brown, of certain certificates for shares of stock of a corporation, which were owned by the said J. C. Featherstone.

There was evidence at the trial tending to show that the defendant, J. C. Featherstone, made the false and fraudulent representations with respect to the value of the shares of stock transferred by him to the plaintiff, G. F. Brown, as alleged in the complaint; there was evidence to the contrary. At the close of the evidence for the plaintiff, and again at the close of all the evidence, the plaintiffs, in open court, tendered to the defendants the certificates for the shares of stock transferred to the plaintiff, G. F. Brown, by the defendant, J. C. Featherstone, as the consideration for the deeds executed by the plaintiffs, together with the check for a dividend on said shares of stock, which plaintiff, G. F. Brown, had received, but which he had not collected. There was no evidence tending to show that the value of the shares of stock had been diminished since the transfer of the certificates therefor to the plaintiff, G. F. Brown, by reason of any act of said plaintiff.

The issues submitted to the jury without objection were answered as follows:

"1. Was the execution of the three deeds from the plaintiffs to the defendants, dated 10 February, 1930, recorded in Book 89, pages 160, 161 and 162, covering the 275 acres of land in Bladen County, procured by false and fraudulent representations as alleged? Answer: Yes.

2. What was the value of the 80 shares of stock transferred to the plaintiff on or about 10 February, 1930, for the said 275-acre tract of land, at the date of said transfer? Answer: $25.00 per share.

3. Was the execution of the deed from the plaintiffs to the defendants, dated 15 April, 1930, recorded in Book 89, page 222, for the Clarkton property, procured by false and fraudulent representations as alleged? Answer: No.

4. What was the value of the 40 shares of stock transferred by the defendant to the plaintiff, on or about 15 April, 1930, for the Clarkton property, at the date of said transfer? Answer: ....."

On the foregoing verdict, it was ordered, adjudged and decreed by the court "that the three deeds executed by G. F. Brown and wife, to J. C. Featherstone and wife, dated 10 February, 1930, recorded in Book 89, pages 160, 161 and 162 of the public records of Bladen County, be and they are hereby declared void and of no effect, and that the register of deeds of Bladen County be and he is hereby authorized to cancel the said deeds upon the record by reference to this judgment.

"It is further ordered, adjudged and decreed that the defendants have and recover of the plaintiffs, G. F. Brown and his wife, Alice Brown, the sum of $2,000, to be paid by the said G. F. Brown and wife within sixty days into the office of the clerk of the Superior Court of Bladen County, and that the said sum be and it is hereby declared a lien on the lands described in the deeds executed by the plaintiffs to the defendants on 10 February, 1930, and registered in the registry of Bladen County, in Book 89, pages 160, 161 and 162 and upon the failure of the plaintiffs to pay the said sum of money within the said period of sixty days, then and in that event, Walter H. Powell and H. H. Clark, who are hereby appointed commissioners for that purpose, shall sell the said lands at public auction, for cash, at the courthouse door in Elizabethtown, after posting notices of the time and place of sale at the courthouse door for thirty days immediately preceding the date of sale, and by publishing notice thereof once a week for four weeks immediately preceding the date of sale in some newspaper published in Bladen County, and out of the moneys arising from said sale, they shall pay the expenses of the same and the amount herein adjudged to be due to the defendants by the plaintiffs, and shall pay the surplus, if any, into court to be disbursed according to law.

"And the jury having answered the third issue 'No,' it is ordered and decreed that the defendants are the owners of the land described in the deed from G. F. Brown and wife to J. C. Featherstone and wife, dated 15 April, 1930, recorded in the registry of Bladen County, Book 89, page 222, and that the said deed dated 15 April, 1930, and recorded in Book 89, page 22, is hereby declared valid and in full effect and force.

It is further adjudged that the plaintiffs recover their costs to be taxed by the clerk."

From this judgment plaintiffs appealed to the Supreme Court, assigning errors in the trial, and in the judgment.

H. H. Clark and Butler & Butler for plaintiffs.

A. E. Woltz, H. L. Lyon and Powell & Lewis for defendants.

CONNOR, J. There was no error in the trial of this action. For this reason, the plaintiffs are not entitled to a new trial.

Defendants' objections to the introduction as evidence of letters received by the plaintiff, G. F. Brown, and written by officers of the corporation whose stock was transferred to said plaintiff by the defendant, J. C. Featherstone, of deeds executed by the corporation, conveying its property to another corporation, and of the minutes of a meeting of the stockholders of said corporation at which resolutions authorizing the board of directors to dispose of its property were adopted, were properly sustained by the trial judge. The stock was transferred to the plaintiffs on 10 February, and 15 April, 1930. The letters were written, the deeds executed, and the meeting of the stockholders held, many months after the dates of the transfers. The letters, deeds and resolutions were not competent as evidence tending to show the value of the stock at the dates of the transfers, but even if they were competent for that purpose, their exclusion was not prejudicial to plaintiffs. The contention of plaintiffs as to the value of the stock at the date of the transfer on or about 10 February, 1930, was sustained by the jury as appears from the answer to the second issue. Their contention as to the value of the stock transferred to the plaintiff, G. F. Brown, on or about 15 April, 1930, at the date of said transfer, became immaterial when the jury answered the third issue "No."

The instructions of the court to the jury as to the law applicable to the facts involved in the issues are in accord with authoritative decisions of this Court. Between the date of the first transfer of stock to the plaintiff, G. F. Brown, and the date of the second transfer, the plaintiffs had ample opportunity to form their own opinion, uninfluenced by representations made by the defendant, J. C. Featherstone, as to the value of the stock transferred on 15 April, 1930. This doubtless accounts for the negative answer of the jury to the third issue.

Plaintiffs' exception to the judgment is sustained. At the close of the evidence for the plaintiff, and again at the close of all the evidence, the plaintiffs, in open court, tendered to the defendants the certificates for the shares of stock which had been transferred to the plaintiff, G. F. Brown, by the defendant, J. C. Featherstone, as the consideration for the deed dated 10 February, 1930, together with the check which plaintiff had received for a dividend on said shares of stock, but which he had not collected. There was no evidence tending to show that the value of this stock had been diminished since its transfer to the plaintiff, by reason of any act of said plaintiff. In *Hodges v. Wilson,* 165 N. C., 323, 81 S. E., 340, it is said: "When the law cancels a deed or contract, it seeks to place the parties in *statu quo,* as nearly as can be done, for while the one party may have been wronged, its judgment is not punitive, and the wrong is considered adequately avenged if the *status quo* is fully re-

stored." In the instant case, the *status quo* of each party may be fully restored by decreeing that the plaintiffs shall deliver to the defendant, J. C. Featherstone, the certificate for 80 shares of the stock of the corporation, which the plaintiff, G. F. Brown, now holds. It was error to adjudge that the plaintiffs pay in cash to the defendants the sum of $2,000 and to decree that upon their failure to pay said sum, their lands should be sold by commissioners appointed for that purpose. The judgment modified in accordance with this opinion is affirmed.

No error in the trial.

Judgment modified and affirmed.

MRS. VIOLA M. PINER v. CHARLES RICHTER, JR., ADMINISTRATOR OF CHARLES RICHTER, DECEASED.

(Filed 13 April, 1932.)

1. Appeal and Error G b—Where exceptions are not discussed in briefs they are considered abandoned.

Exceptions taken upon the trial of an action which are not brought forward and discussed by the appellant in his brief on appeal is deemed to have been abandoned under Rule of Practice in the Supreme Court, 28.

2. Highways B m—Complaint in civil action need not allege speed at which car was traveling, C. S., 2621(46) not applying thereto.

In a civil action by an invitee or guest in an automobile to recover damages against the owner and driver thereof, allegations in the complaint that the car was driven negligently and at a reckless speed resulting in a collision with another car at a street intersection and that this was the proximate cause of the injury in suit is a sufficient allegation of actionable negligence to resist the defendant's demurrer to the complaint, the allegations being sufficient according to the common-law practice, and section 2621(46), requiring that the speed of the automobile must be alleged, applies to criminal actions only and not to civil actions for damages.

3. Highways B b—Instructions in this case as to right of way at street intersection held correct.

Where damages are sought for defendant's negligent driving at a street intersection and there is evidence tending to show that the defendant was approaching the intersection at an unlawful rate of speed and did not slow up before the happening of the collision with another car: *Held*, an instruction correctly charging the rule of the right of way if both cars approached the intersection simultaneously and the rule that if one of the cars was already in the intersection it was the duty of the driver of the other car to slow down and permit it to pass will not be held for error. C. S., 2621(60).

PINER *v.* RICHTER.

APPEAL by defendant from *Barnhill, J.*, at September Term, 1931, of NEW HANOVER. No error.

This is an action to recover damages resulting from personal injuries caused by the negligence of the defendant's intestate while driving an automobile in which plaintiff was riding as his guest.

The issues submitted to the jury were answered as follows:

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

2. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: $7,195.50."

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

L. Clayton Grant for plaintiff.

Carr, Poisson & James for defendant.

CONNOR, J. There was evidence at the trial of this action tending to show that defendant's intestate was negligent in the operation of his automobile, as alleged in the complaint, and that such negligence was the proximate cause of the injuries suffered by plaintiff, who was riding in the automobile with defendant's intestate as his guest. On his appeal to this Court, the defendant has not brought forward and discussed his exception to the refusal by the trial court to allow his motion at the close of all the evidence for judgment as of nonsuit. The assignment of error based on this exception, which was duly taken and noted at the trial, is deemed to have been abandoned. Rule 28, and annotations. 200 N. C., 831. It is needless, therefore, to set out the evidence at the trial of the action. It was sufficient to support the verdict.

The only assignments of error discussed in the defendant's brief filed in this Court, are those based (1) on his exception to the refusal of the trial judge to sustain his demurrer *ore tenus* to the complaint, and (2) on his exceptions to certain instructions of the judge in his charge to the jury. Neither of these assignments of error can be sustained. For this reason, the judgment is affirmed.

The allegations in the complaint in this action, constituting the cause of action on which the plaintiff seeks to recover of the defendant, are as follows:

"3. That on or about 1 June, 1930, the plaintiff and her husband, J. H. Piner, upon the request and at the invitation of Charles Richters or Richter, Sr., and his wife, Mrs. Wilhemenia Richters or Richter, got into the said Richters' or Richter's large touring car for the purpose of riding about in the vicinity of Wilmington on the afternoon of said day as the invited guests of said Richters.

4. That the said Charles Richters or Richter, deceased, controlled and operated the automobile in which the plaintiff and her husband rode as aforesaid; and was so doing when returning from a ride about the southern beaches of the county and State aforesaid, and while driving northwardly along the northern side of Third Street in the city of Wilmington and approaching the dangerous intersection of Cowan Street, negligently and carelessly failed, as it was his duty to do, to have his car under control and to drive with due regard to the rights of others and the use then being made of said street intersection, thereby negligently and needlessly running into an automobile operated by L. B. Murray and headed east, standing still near the center of said intersection, thereby causing the car in which plaintiff was riding to be overturned with great violence several times, and practically demolished, causing the plaintiff to be injured and undergo great suffering, loss of the use of her physical members, and impairment of her sight and hearing, and incur the expense hereinafter set out.

5. That this plaintiff on account of the negligence of the said Charles Richters or Richter, deceased, as herein set forth, received such grave injuries that she was immediately carried to a hospital where she was compelled to remain for a long period of time and undergo serious surgical operations for the setting of both her broken jaws, and the relief of her severely crushed face, all of which was very painful and expensive to the plaintiff."

After the jury had been sworn and empaneled, and after the pleadings had been read, the defendant interposed a demurrer *ore tenus* to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action, for that there is no negligence alleged in the complaint. The demurrer was overruled, and the defendant excepted.

In support of the assignment of error based on this exception, the defendant contends in this Court that by reason of the mandatory provisions of C. S., 4621(46), no cause of action is alleged in the complaint, for the reason that plaintiff has failed to specify in the complaint the speed at which defendant's intestate was driving his automobile at the time of its collision with the automobile standing in the street intersection. C. S., 2621(46) is a criminal statute and the provisions therein that "in every charge of violation of this section, the complaint, also the summons or notice to appear, shall specify the speed at which the defendant is alleged to have driven, also the speed which this section declares shall be prima facie lawful, at the time and place of such alleged violation," does not apply to the complaint in a civil action to recover damages resulting from the negligent operation of an automobile,

although the negligence alleged in the complaint is sufficient to show a violation of the statute. The General Assembly of this State has not undertaken to define by statute negligence in the operation of an automobile as the basis for the recovery in a civil action of damages resulting from personal injuries. The plaintiff in such action states a good cause of action when he alleges in his complaint, as the plaintiff in this action has done, facts sufficient to constitute actionable negligence under the general or common law. The rule of the "prudent man," without statutory modification or alteration, applies in this State to the driver of an automobile.

With respect to the mutual rights and duties of the drivers of the automobiles which collided at the intersection of Cowan and Third streets, as they approached said intersection, the judge in his charge instructed the jury as follows:

"With respect to that, gentlemen of the jury, if they approached the intersection, that is, Murray and Richter, Richter going north on Third Street, and Murray going south on Third Street, and turning to the left on Cowan Street, both automobiles approaching the intersection at approximately the same time, that is, if Richter was proceeding northwardly and Murray was proceeding easterly, turning to his left and going across the line of traffic, and you so find, then the court instructs you upon that finding that Murray owed the right of way to Richter; that is, that under those conditions, Richter had the right of way and the duty rested upon Murray to stop and permit him to pass." The defendant excepted to this instruction, and on his appeal to this Court, assigns same as error.

The judge further instructed the jury as follows:

"On the other hand, if Murray had gotten into the intersection ahead of Richter, and they did not approach the intersection at approximately the same time, so as to endanger both to proceed, and Murray had already gotten into the intersection, first, it was the duty of Richter to slow down and permit Murray to pass—if he, Murray, was already in the intersection." Defendant excepted to this instruction, and on his appeal to this Court, assigns same as error.

Neither assignment of error can be sustained. The instructions are in accord with the provisions of C. S., 2621(60). There was evidence tending to show that as defendant's intestate approached the intersection, he was driving at an unlawful speed, and did not slow up before striking the automobile driven by L. B. Murray, and standing in the intersection. There was ample space for defendant's intestate to pass the standing automobile in safety. There is

No error.

L. P. HATLEY v. CLAUDIA MAY HATLEY.

(Filed 13 April, 1932.)

Judgments K f—Where service by publication is based on fraudulent affidavit the judgment may be set aside by motion in the cause.

Where in an action for absolute divorce on the grounds of abandonment and separation for five years service of summons is returned "defendant not to be found," etc., and the plaintiff swears to an affidavit that the defendant cannot be found in the State after due diligence, and thereupon an order is given for service by publication, and upon the trial of the action a decree for absolute divorce is entered: *Held*, upon evidence showing that at the time of the issuance of summons and the swearing to the affidavit the plaintiff knew the whereabouts of the defendant in this State and that the affidavit was fraudulent, the defendant's motion in the original cause to set aside the judgment is properly granted, it appearing that the plaintiff had perpetrated a fraud on the court whereby it falsely appeared that the court had obtained jurisdiction.

CIVIL ACTION, before *Grady, J.*, at November Term, 1931, of NASH.

The facts found by the judge and upon which the judgment was based are as follows: The summons in this cause was issued and a duly verified complaint filed on 18 September, 1930; the cause of action alleged in said complaint being for divorce on the grounds of abandonment and separation for a period of five years.

The summons was returned by the sheriff: "Claudia May Hatley not to be found in Nash County. J. H. Griffin, sheriff of Nash County." Said return is not dated.

On 16 September, 1930, the plaintiff filed an affidavit in the clerk's office, stating under oath that said summons had been issued and returned as above stated, and further stating upon oath, "that the defendant therein cannot after due diligence be found within the State." Upon said affidavit, which is made a part of this finding of fact, the clerk entered the order on 18 September, 1930, directing that service of said summons be made by publication, and thereupon a notice of the pendency of the action was published in "*The Graphic*," a newspaper published in Nashville, N. C., as will appear by affidavit on file in the judgment roll.

Thereafter, at the November Term, 1930, said cause was heard before Cranmer, judge, and the jury found that there had been a separation of the parties for five years and that the plaintiff was the injured party.

In the complaint, verified by the plaintiff and filed 18 September, 1930, it is alleged that one child had been born to the marriage, "who is now living, namely, May Ella Hatley, 15 years of age, and said child is with its mother"; said mother being the defendant in this cause.

On 20 July, 1930, plaintiff wrote a postal card to the said May Ella Hatley and addressed the same to her at Tarboro, N. C., he knowing at the time that she was living with her mother, the defendant, Claudia May Hatley. Said card was put in evidence and is made a part of this finding of fact.

The court finds also that the plaintiff knew at the time of the issuance of the summons in this cause that his wife was living in Tarboro, N. C.; that he knew said facts at the time he made the affidavit in order to obtain the order of publication; and the court finds that said affidavit contained a false statement of fact which was known to the plaintiff; that the plaintiff has at all times known the residence and whereabouts of his wife, who has at all times lived within the State of North Carolina since the marriage; that he has been in correspondence with her or with said child, and has sent contributions to both of them from time to time, and that there has not been any abandonment and separation of the parties, which would justify a decree of divorce.

The court finds that this action in its inception and prosecution was a fraud upon the court and a fraud upon the defendant; and it is now ordered, adjudged and decreed that the verdict as copied in the Minute Docket, Vol. 20, page 420, and the judgment and decree of divorce as recorded in Judgment Docket, Vol. 31, page 44, of Nash County, be and the same are hereby set aside, canceled and declared null and void and the clerk of the Superior Court will enter a cancellation of the same upon the minutes of the court and judgment docket aforesaid.

Cooley & Bone for plaintiff.
No counsel, contra.

BROGDEN, J. In a suit for absolute divorce, when service of summons by publication is based upon a false and fraudulent affidavit, may the final judgment rendered in the cause be vacated by motion in the cause?

The trial judge was of the opinion that the judgment of absolute divorce could properly be vacated by motion in the cause. The Court concurs in such opinion. The question is expressly decided in *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315. The distinction as pointed out in the *Fowler case, supra,* is this: If a fraud be perpetrated on a party to an action, the final judgment must be attacked by an independent suit. Upon the other hand, if a fraud is perpetrated on the court whereby jurisdiction is apparently acquired where no jurisdiction actually exists, then such final judgment is a nullity and may be vacated by motion in the cause.

Affirmed.

W. E. HENDRIX v. HIGH POINT, THOMASVILLE AND DENTON RAILWAY COMPANY.

(Filed 13 April, 1932.)

Courts B a—Statute prescribing jurisdiction of municipal court held unconstitutional so far as it discriminated between litigants.

Where a statute gives a municipal court exclusive original jurisdiction of a certain class of cases if the plaintiff resides within the city limits or within one mile thereof, and provides that in the same class of cases the court should have concurrent jurisdiction with the Superior Court of the county, regardless of the residence of the plaintiff, if the defendant lives in any of the other counties of the State, with provision for removal if the defendant resides outside the city but within the county: *Held*, to the extent that the statute takes from the residents of the city the right to bring an action in the Superior Court, which right is enjoyed by other parties litigant, the act is void as granting a special privilege or entailing a discrimination, and where an action in which both parties are residents of the city is brought in the Superior Court, its judgment dismissing the action for want of jurisdiction is erroneous.

APPEAL by plaintiff from *Warlick, J.*, at October Term, 1931, of GUILFORD.

Civil action instituted in the Superior Court of Guilford County by plaintiff, a resident of High Point, High Point Township, N. C., to recover of the defendant, a common carrier by railroad with its principal office in the city of High Point, damages for personal injuries in the sum of $50,000, alleged to have been sustained by the plaintiff while in the employ of the defendant, as a result of the defendant's negligence.

Motion to dismiss for want of jurisdiction; motion allowed; plaintiff appeals, assigning error.

Wallace & Wall and Gold, York & McAnally for plaintiff.
Lovelace & Kirkman and Sapp & Sapp for defendant.

STACY, C. J. The municipal court of the city of High Point was established in 1913 as a special court for the trial of petty misdemeanors. Chap. 569, Public-Local Laws 1913. In 1927 it was given civil jurisdiction in certain cases with the right of appellate review by the Superior Court of Guilford County. Chap. 699, Public-Local Laws 1927; *Cecil v. Lumber Co.*, 197 N. C., 81, 147 S. E., 735; *Provision Co. v. Daves*, 190 N. C., 7, 128 S. E., 593.

The grant of civil jurisdiction to this Court is couched in the following language:

"Exclusive original jurisdiction in all civil actions, and divorce actions, matters and proceedings, including also all proceedings whatever, ancillary, provisional and remedial to civil actions founded on contract or tort, wherein the Superior Court of Guilford County now has exclusive original jurisdiction, excepting special proceedings, *quo warranto,* mandamus, caveat to wills, administrations, condemnation proceedings and street widening proceedings: *Provided,* the party plaintiff be a resident of the city of High Point or one mile thereof; and *Provided,* in addition to the jurisdiction above named and regardless of the place of residence of the plaintiff, said court shall have concurrent jurisdiction with the Superior Court of Guilford County in cases and actions wherein the defendant or defendants shall reside in any of the counties of the State of North Carolina or can be found therein or which have an officer or property in this State; and further *Provided,* that if the defendant cannot be found the same rules and regulations as to the service of summons by publication as are now provided in the Superior Courts, the clerk of the High Point municipal court having the same powers and duties therein as the clerk of the Superior Court; and further *Provided,* that in civil actions where any defendant or defendants reside outside High Point Township, but in the county of Guilford, upon written request of the defendant or his attorney, made before time for answering expires, said case shall be removed to the Superior Court of Guilford County for trial. Said court shall also have the same jurisdiction to try cases sent up on appeal from courts of justices of the peace as the Superior Court of Guilford County, and all appeals sent up from justices of the peace in High Point Township shall be sent to said court where they shall be tried *de novo,* and by a jury if demanded by either party." Chap. 699, Public-Local Laws 1927, as amended by chap. 702, Public-Local Laws 1927.

As the plaintiff is a resident of High Point and the defendant has its principal place of business there, the trial court was of the opinion, and so held, that, under the above allotment of power and jurisdiction, "The municipal court of the city of High Point" alone had original jurisdiction of the plaintiff's cause of action. Thus, the motion to dismiss for want of jurisdiction in the Superior Court of Guilford County was allowed. *Trust Co. v. Leggett,* 191 N. C., 362, 131 S. E., 752; *S. v. Collins,* 151 N. C., 648, 65 S. E., 617.

If this be the correct interpretation of chap. 699, Public-Local Laws, 1927, then, so far as litigants plaintiff, residing in the city of High Point or within one mile thereof, are concerned, the original jurisdiction of the Superior Court of Guilford County, with the few exceptions noted, is closed to them, while such jurisdiction is open to all other

parties plaintiff. This runs counter to the organic law whether such legislation be regarded as creating a special privilege or entailing a discrimination. *Plott v. Ferguson, ante,* 446; *S. v. Fowler,* 193 N. C., 290, 136 S. E., 709. It also offends against the Article on the Judiciary as interpreted in *Mott v. Commissioners,* 126 N. C., 866, 36 S. E., 330.

To the extent, therefore, that the act in question takes from the plaintiff the right (enjoyed by others) to bring his action in the Superior Court of Guilford County—and to this extent alone is the validity of the statute now assailed—the same must be declared inoperative and void. This conclusion further finds support in the case of *S. v. Doster,* 157 N. C., 634, 73 S. E., 111.

While unnecessary, perhaps it may not be amiss to add that our present position in no way conflicts with the decisions in *Jones v. Oil Co., ante,* 328, 162 S. E., 741, *S. v. Brown,* 159 N. C., 467, 74 S. E., 580, *S. v. Collins,* 151 N. C., 648, 65 S. E., 617, *S. v. Shine,* 149 N. C., 480, 62 S. E., 1080, *S. v. Baskerville,* 141 N. C., 811, 53 S. E., 742, *S. v. Lytle,* 138 N. C., 738, 51 S. E., 66.

Error.

STATE v. E. H. SMITH.

(Filed 13 April, 1932.)

1. Criminal Law L d—Where defendant does not discuss exceptions in brief they are deemed abandoned.

On appeal in a criminal action those exceptions which are not discussed by the defendant in his brief are deemed abandoned by him.

2. Criminal Law I d—Held: order that defendant be taken into custody during trial was within discretion of trial court.

Where, on the trial of a criminal action, the court finds as a fact that the action of the defendant in absenting himself impeded the trial, and orders the defendant into custody, and finds as a fact that the jury did not know of such order: *Held,* under the circumstances the order was within the legitimate power of the trial court and is not sufficient grounds for a new trial on appeal.

3. Embezzlement B d—Defendant's contentions were not germane to the issue and court's failure to instruct thereon was not error.

Where on a trial for embezzlement the decisive question is whether the defendant embezzled the county's funds after they were deposited in the bank, it will not be held for error that the court failed to instruct the jury that the funds must have been deposited with the intent to embezzle and that the funds were deposited in the defendant's name without his knowledge, the contentions of the defendant in this respect not being in issue.

4. Same—Instructions in this case held sufficiently full and defendant desiring elaboration should have made request therefor.

Where in a prosecution for embezzlement the trial court instructs the jury with respect to the principal items in dispute and sets forth the contentions of the defendant in regard thereto, his failure to give more specific instructions as to one item will not be held for error when it appears that the defendant was not prejudiced thereby, it being incumbent on the defendant to request special instructions if he desired instructions as to any subordinate feature of the evidence.

APPEAL by defendant from *Small, J.*, at January Special Term, 1932, of BRUNSWICK. No error.

The defendant was indicted for the embezzlement and misapplication of money, notes, bonds, checks, and vouchers, received and held in trust by him as an officer, agent, consignee, and employee of Brunswick County. The jury convicted him, returning a general verdict upon all the counts. Judgment was pronounced and he excepted and appealed, assigning error.

The county of Brunswick sold its bonds and notes in the total sum of $324,300. The defendant occupied the several positions of county attorney, acting treasurer of the county, attorney for the treasurer, and director and manager of the Hale Beach Development Company. Large sums of this money went into his hands and were deposited in several banks; some of it in his name, some in the name of "E. H. Smith, attorney," some in the name of "Brunswick County, E. H. Smith, attorney," and some in the name of "Hale Beach Development Company, E. H. Smith, attorney."

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

Parker & Lee for defendant.

ADAMS, J. There is abundant evidence of the defendant's embezzlement of funds that went into his hands while serving as an agent, employee, or servant of Brunswick County, but it is unnecessary to investigate the several instances of alleged misapplication. The appellant restricts his brief to the discussion of two questions and thereby abandons all other assignments of error. Rule 28.

Pending the hearing the court ordered the defendant into custody, and to this order the defendant first addresses his brief. No exception was taken when the order was made and none appears in the record.

The conduct of the defendant called for drastic action. His continued absence impeded the trial. The judge states that he made "every possible effort to assure the defendant of able counsel and a fair trial, but the

defendant did not seem to appreciate the effort or to respect the court." It does not appear that the jury knew anything of the order or of the commitment of the defendant; the finding of the court is to the contrary. Under the circumstances the order was within the exercise of legitimate power and affords no sufficient ground for a new trial.

It is contended that the court committed error in failing to charge the jury that the defendant deposited money in the Bank of Cherryville with intent to embezzle it; also in failing to explain the defendant's testimony that the funds were deposited in his name without his knowledge. These questions were not at issue; the decisive question was whether the defendant embezzled the money after it had been deposited in his name, and it was resolved in favor of the State.

We do not perceive that the defendant was prejudiced by the court's failure to give a more specific instruction in reference to the money returned by the defendant for the payment of school teachers. The controversy with respect to the principal items in dispute was set forth and the contentions were stated. If the defendant desired an instruction as to any particular item or any subordinate feature of the evidence he should have requested it by a prayer for instruction. *S. v. Merrick,* 171 N. C., 795; *S. v. O'Neal,* 187 N. C., 22.

Neither the motion for a new trial nor the motion in arrest of judgment can be sustained.

No error.

STATE v. BEATRICE SIMMERSON.

(Filed 13 April, 1932.)

Criminal Law L d—Appeal in this case is dismissed for insufficiency of the record.

Where a certified copy of the record proper has not been filed on appeal in a criminal action, the transcript containing only a statement of case on appeal accepted by the solicitor, which fails to contain the indictment or to show that the trial court had jurisdiction, the appeal will be dismissed, Rule 19, no motion for *certiorari* having been made and the Supreme Court not ordering the writ to issue in its discretion.

APPEAL by defendant from *Harwood, Special Judge,* at December Term, 1931, of FORSYTH. Appeal dismissed.

The defendant was tried and convicted in the Superior Court of Forsyth County of having intoxicating liquor in her possession, in violation of the statute. N. C. Code of 1931, section 3411(b).

From the judgment on such conviction, defendant appealed to the Supreme Court, assigning errors in the trial.

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

Wallace & Wall for defendant.

CONNOR, J. A certified copy of the record proper in this action has not been filed in this Court, as required by its rules. Rule 19. The transcript contains only a statement of the case on appeal prepared by counsel for the defendant, and accepted by the solicitor for the State. No indictment appears therein; nor does it appear that the defendant was tried and convicted on a warrant issued by an inferior court, and that she appealed from the judgment of such court to the Superior Court. There is nothing in the transcript which shows that the Superior Court of Forsyth County had jurisdiction of the action.

In *S. v. McDraughon,* 168 N. C., 131, 83 S. E., 181, it is said: "The presumption is that the judgment of the Superior Court is correct, and the burden is on the appellant to show error. As far back as *S. v. Butts,* 91 N. C., 524, the requisites of the transcript were pointed out, and in *S. v. Frizell,* 111 N. C., 725, the Court said: 'An appellant does not do his duty by simply taking an appeal and leaving it to the clerk to send up what he may deem necessary. It is the appellant's duty to see that the record is properly and sufficiently made up and transmitted.'"

There is no motion for *certiorari* in this appeal, and in the exercise of our discretion, we do not order that such writ issue in this case. The appeal is dismissed. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

MRS. W. E. CHAPPELL v. C. W. MOWERY ET AL.

(Filed 13 April, 1932.)

Highways A e—Judgment dissolving order restraining maintenance of imitation highway signs is affirmed in this case.

The erection of signs on a State highway in imitation of official highway signs in violation of chapter 148, section 56, Public Laws of 1927, is made a misdemeanor under section 58, and injunction is not the appropriate remedy for the enforcement of the statute, and in proceedings by a private person a judgment dissolving a temporary order restraining the maintenance of signs by a private owner alleged to be in violation of the statute will not be disturbed on appeal, it further appearing that the alleged signs were placed on private property and not upon the right of way of the highway.

APPEAL by plaintiff from *Cowper, Special Judge,* at January Special Term, 1932, of WAKE.

Civil action to restrain the defendants from maintaining at the intersection of Person and Edenton Streets in the city of Raleigh an imitation highway sign in violation of section 56, chapter 148, Public Laws, 1927, which provides in part as follows:

"No unauthorized person shall erect or maintain upon any highway any warning or direction sign, marker, signal or light in imitation of any official sign, marker, signal or light erected under the provisions of this act."

Section 58 of the same act also provides in part: "It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this act."

From a judgment dissolving the temporary restraining order and dismissing the action, the plaintiff appeals, assigning errors.

Thomas W. Ruffin for plaintiff.
Clyde A. Douglass for defendants.

STACY, C. J. It is not conceded that the sign in question is an imitation of any official sign, but, however this may be, it is admittedly located on private property and not upon the right of way of any highway. Furthermore, the violation of the provisions of the statute is made a misdemeanor (section 58), and the remedy selected, injunction, would seem to be inappropriate on the showing made by the plaintiff. *Loose-Wiles Biscuit Co. v. Sanford,* 200 N. C., 467, 157 S. E., 432; *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469; *Thompson v. Lumberton,* 182 N. C., 260, 108 S. E., 722.

The matter may have been *coram non judice.* The record is not altogether clear on this point. *Green v. Stadiem,* 197 N. C., 472, 149 S. E., 685; *Reid v. Reid,* 199 N. C., 740, 155 S. E., 719.

We have discovered no valid reason for a reversal of the judgment. Affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF AHOSKIE.

(Filed 13 April, 1932.)

1. Dedication A b — Evidence held insufficient to show dedication of land by the owner for public use.

In order to a dedication of private property to the public use there must be an intention on the part of the owner to dedicate, evidenced by an unequivocal overt act or verbal expression, and an acceptance by the town authorities arising in some appropriate manner, and where a railroad company has had lands conveyed to it for use as a depot, evidence

tending to show that the railroad company had so used the land without interruption, but had permitted the public to use a portion thereof as a street to the extent it did not interfere with its use as a depot, and there is no evidence of a grant or conveyance to the town, the evidence is insufficient either to show a dedication by the railroad or acceptance by the city for street purposes or to operate as an estoppel of the railroad company, and where the town has paved a part of the land for use as a street and has attempted to assess the railroad company as an abutting landowner, the railroad company is entitled to have the land condemned and compensation paid less the amount of the assessments against it.

2. Adverse Possession D b—Evidence disclosed only permissive use by public which is insufficient to establish prescriptive title.

Where a railroad company, in the use of its land as a depot, has allowed the public to use a part thereof as a street to the extent that such use did not interfere with its use as a depot, the use by the public is permissive, and the town may not claim an interest in the land by adverse user.

3. Municipal Corporations G d—Abutting owner may raise question of ownership of property in proceedings by city to levy assessments.

The ownership of the property is a prerequisite to the right of a city to levy assessments for public improvements under the statute against abutting owners, and the ownership of the property as affecting the validity of the assessment against an abutting owner may be raised in the assessment proceedings.

APPEAL by plaintiff from *Harris, J.*, and a jury, at October Term, 1931, of HERTFORD. Reversed.

On 29 May, 1890, Dr. Jesse H. Mitchell and others conveyed to Norfolk and Carolina Railway Company, a certain piece of land in the town of Ahoskie, containing one and a half acres. The deed was duly recorded on 26 June, 1890, in the register of deeds office for Hertford County, N. C. The plaintiff contends that it owns the said land described in said deed as successor in title. The deed recites: "That the said parties of the first part, in consideration of the benefit to them of the location by said company of a depot at Ahoskie, and also the reconveyance to them of the land that has been used by the said company for the purpose of a depot at Ahoskie, and for the further consideration of one dollar to them, the receipt of which is hereby confessed, have bargained, sold and conveyed, granted and given to the party of the second part, their successors and assigns, the following real estate (describing same). . . . To have and to hold the said granted land to the said Norfolk and Carolina Railway Company, its successors and assigns, as long as it shall be used for a depot."

The defendant, town of Ahoskie, claims part of the above described land as a street and has had it paved and has made assessment against

the plaintiff, same being a space approximately 421.4 feet on west side, 472.2 feet on east side, 43.5 feet wide. The plaintiff contends that it was its property.

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

"1. Has the town of Ahoskie acquired the title to the area covered by the paving in question by adverse possession as alleged? Answer: Yes.

2. Prior to the levying of the assessment in question had the area covered by said pavement been dedicated as a street? Answer: Yes.

3. Is the railroad estopped to deny that the area covered by pavement was a public street at the time said paving assessment was levied? Answer: Yes.

4. Is the area over which the pavement in question was laid a public street in the town of Ahoskie? Answer: Yes (by the court)."

The judgment of the court below is as follows: "This cause coming on to be heard and being heard by the court and a jury and the jury having answered the issues as follows (*setting forth* issues and their answers thereto). The last issue having been answered by the court as a matter of law upon the basis of the jury's verdict upon the first three issues; and at the beginning of the trial it having been admitted by the railroad company that the proceedings in which this assessment is attempted to be collected comply in form to the requirements of the statute, and that the computation of the assessment in the sum of $2,547.71 is correct in amount and follows the statutory method, and that the railroad company contests the assessment solely upon the ground set out in its statement of the facts on appeal to the Superior Court from paving assessments: It is now, therefore, on motion of W. W. Rogers, and Ehringhaus & Hall, attorneys for the town of Ahoskie, ordered, decreed and adjudged that the said town of Ahoskie recover against the said Atlantic Coast Line Railroad Company the sum of two thousand five hundred forty-seven and 71/100 dollars ($2,547.71), with interest on same from 22 September, 1925, as paving assessment, together with the costs of this action to be taxed by the clerk of this court. This recovery is declared a charge against the abutting property of the railroad."

The plaintiff excepted to the judgment as signed, 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.

F. S. Spruill, V. E. Phelps and MacLean & Rodman for plaintiff.

W. W. Rogers and Ehringhaus & Hall for defendant.

CLARKSON, J. Was there sufficient evidence to be submitted to the jury to sustain the issues above set forth? We think not. This case was here before: *R. R. v. Ahoskie,* 192 N. C., 258.

In *Efird v. Winston-Salem,* 199 N. C., at p. 37, is the following: "In *R. R. v. Ahoskie, supra,* there was a dispute of fact as to whether the land was a public street or the property of the railroad. The railroad submitted itself to the assessment procedure, protested to the work being done as the property belonged to it and not to the town of Ahoskie, and appealed under C. S., 2714, from the confirmation. The Court said, at p. 262: 'The conclusion of the whole matter, therefore, is whether or not this assessment was valid. If Railroad Street is a public street of the town of Ahoskie, then the town had the right to make a valid assessment against abutting owners. If it is not a public street, then no assessment under our statute could be properly made. This is a question of fact to be determined and established by competent evidence, and certainly, the validity of the assessment under our statutes can be challenged in the assessment proceedings.'"

C. S., 434, the statute of limitations applicable to railroads, etc., is thoroughly considered *In the Matter of Assessment Against R. R.,* 196 N. C., 756. See Public Laws 1931, chap. 222. In this case, on 14 October, 1925, Mayor L. C. Williams of Ahoskie, certified the appeal to the Superior Court from the assessment made in the proceedings. In that proceeding the testimony of John E. Vann, undisputed by Mayor L. C. Williams, is as follows: "In this discussion (before the governing body of the town of Ahoskie), I told them that we had a deed for it. I told them it is our property and you are using it and I am sure you do not want to use other folks' property without compensation, and the commissioners said 'We don't claim the property.' They had no deed, they did not say so in so many words but said 'It is yours,' and that is about all that I know that happened. I insisted on them signing a contract and they would not do so. That was some months before the present paving was laid. Q. Was that in 1923? A. Yes, I think it was in 1923. Mr. Williams thinks that was the time. I have talked with Mr. Williams several times."

"Proceedings re: Railroad Street Assessment for Street Improvements, and appeal by the Atlantic Coast Line Railroad Company. At said hearing appeared the Atlantic Coast Line Railroad Company and through its attorneys Messrs. John E. Vann and V. E. Phelps entered its protest, filed a written statement setting out their contentions and offered evidence in support of said contentions, which contentions briefly stated are: (1) That the A. C. L. Railroad Company has a deed for land covered by street against which its street assessment is charged.

(2) That town has acquired no lawful right to use said land for street purposes. (3) That street has only been used permissively. (4) That property cannot be taken without due process of law (U. S. Constitution, sec. 1, Art. XIV)."

We think the above contentions made by plaintiff correct. Under the evidence in this case, we do not think the town of Ahoskie acquired the said land of plaintiff railroad company by condemnation, grant, dedication or prescription. *Durham v. Wright,* 190 N. C., 568. There was no sufficient evidence of estoppel to have been submitted to the jury.

In *Gault v. Lake Waccamaw,* 200 N. C., at p. 599, we find: "The following observation is made in McQuillin's Municipal Corp., Vol. 4, 2d ed., part of sec. 1662 and 1663, pp. 471-2. 'Most of the streets, alleys, squares and parks in municipal corporations, have been acquired by a voluntary dedication thereof by the owner to the public. The law relating to dedication is therefore of much importance as a part of the law of municipal corporations. . . . The owner's offer, either express or implied, of appropriation of land or some interest or easement therein to public use, and acceptance thereof, either express or implied (when acceptance is required) constitute dedication. The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication.' *Green v. Miller,* 161 N. C., 24; *Elizabeth City v. Commander,* 176 N. C., 26; *Wittson v. Dowling,* 179 N. C., 542; *Irwin v. Charlotte,* 193 N. C., 109." *Wright v. Lake Waccamaw,* 200 N. C., 616.

In *Wright's case, supra,* at p. 618, is the following: "In case of a direct dedication of land to the public use there should ordinarily be some evidence of acceptance; for as declared in *S. v. Fisher,* 117 N. C., 733, 739, 'The owner of land cannot, by executing a deed to the public conveying a right of way to a highway, compel the authorities to assume the burden of repairing it unless the properly constituted agents of the county or town accept it.' But where dedication is relied upon as implied from adverse user or where adverse user is invoked under the doctrine of prescription there must be evidence not only that the way was used for the requisite period, but that the user was adverse. *Haggard v. Mitchell, supra* (180 N. C., 255); *Draper v. Conner,* 187 N. C., 18; *Weaver v. Pitts,* 191 N. C., 747. The burden of showing adverse user is upon the person who asserts it. *S. v. Fisher, supra.*"

It is conceded that the *locus in quo* has never been purchased by defendant from plaintiff.

In *Hast v. Piedmont, etc., R. Co.* (West Va.), 44 S. E., at p. 156, we find the following: "Now, the mere opening of this lot to the public use is not adequate to evince an irrevocable purpose to dedicate, for we

may attribute that use to a mere license, rather than an intent to dedicate. It is so common for railroad companies to let their lots lie open, that we attribute it to license—mere permissive use—not an intent to dedicate. Nor does the fact that the company purchased this lot with an intent to dedicate it bind the company, as it might change its notion. There is not such an unequivocal act as speaks unalterably an intention to dedicate. No writing is necessary to make a valid declaration of dedication."

In *Tise v. Whitaker,* 146 N. C., at p. 375-6: "It is well understood with us that the right to a public way cannot be acquired by adverse user, and by that alone, for any period short of twenty years. It is also established that, if there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms, or it may be implied from conduct on the part of the owner; and, while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized and have been applied with us in numerous and well-considered decisions. . . . If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose." *Land Co. v. Murphy,* 179 N. C., 133.

The questions here presented, was there sufficient evidence to be submitted to the jury (1) of the intention of the plaintiff railroad company to dedicate a part of the railroad depot property above set forth for a street and the acceptance thereof by the public; (2) was plaintiff railroad company estopped; (3) did the town of Ahoskie by adverse user for twenty years, acquire title to the property? We think not. In the first place, the property was originally acquired solely for depot purposes, and in the plaintiff's deed is the following in the *habendum* clause: "As long as it shall be used for a depot." In the second place, defendant does not contend that it has paid anything for the *locus in quo* or ever purchased or condemned same.

A. T. Summey, civil engineer, witness for the plaintiff, speaking in regard to the *locus in quo*, testified in part: "The open spaces about which I was asked around the depot and on the northerly and westerly sides thereof are necessary for teams and vehicles getting to and from the depot, in moving freight and for passengers alighting. Ample space was allowed for those purposes. From my observation the ground around the depot had been used for these purposes."

John E. Vann, witness for plaintiff, testified in part: "I am attorney of the A. C. L. Railroad Company, and I have been 25 years or more. I represented the railroad company at the meeting of the town board on 10 September, 1923, minutes of which have just been introduced, and presented the contract referred to therein. That was before the paving was done according to my recollection. I was frequently in contact with the town authorities as to the railroad's rights in the matter. I think I attended the hearing before the mayor and councilmen in 1925, at which this protest was filed. Mr. Williams, I think, was mayor. Both Mr. Phelps and I were there and signed the protest. . . . In 1892, or thereabouts, the area acquired by the railroad company was in the woods, and it used to be rabbit ground where the depot stands. The railroad company cleaned it up, and that included the area now in controversy and clear on down further east. When the ground was cleared and the building and other facilities erected the public began using it in going to and from the depot."

N. E. White, agent of plaintiff and a witness for plaintiff, testified in part: "The street paving started in 1925. I talked to Mayor Williams several times about it. Had a conversation with him about the execution of an agreement between the town and the railroad in connection with the street. I went to him about it several times. When the paper was not executed I told them not to proceed. I made the statement to Mayor Williams and to the contractor, Mr. Miller, but they went ahead anyway. I was acting under instructions of the railroad company in giving them that notice. . . . There are one or two fire hydrants over there which were put there prior to the street paving, according to my recollection, and the town water line was already there. The poles, wires and street lights were there."

In 1921 some gravel was put on the so-called Railroad Street. The ordinary improvements made by the town of Ahoskie in regard to fire hydrants, street lights, etc., and gravel put on so-called Railroad Street, in the depot locality, were those usual things due the public in general in a public place, and the sale of certain lots facing on depot property, under the facts and circumstances of this case with the other evidence of defendant, is not of such probative value to show an intentional dedi-

cation and acceptance, neither estoppel nor adverse user for twenty years. Plaintiff had title to the *locus in quo* duly recorded. Neighborly conduct either on the part of a person or corporation ought not to be so construed as to take their property, unless it has such probative force as to show adverse user for twenty years. Much of defendant's evidence is in the nature of omissions by plaintiff railroad company in not being unneighborly and chasing trespassers off its property. The fact that this was not done, cannot be held for acquiescence or adverse user on the part of defendants. This goes too far, and we cannot agree to this and other contentions of defendant.

We think certain incompetent evidence should have been excluded by the court below, and, with this evidence excluded, there was no sufficient evidence to be submitted to the jury of an adverse user by the public of the *locus in quo* for twenty years. We think the evidence indicative only of a permissive user. The land can and should be condemned in the present action for a street and the amount of street improvement assessment deducted from the amount of damage recovered by plaintiff, if any. *Efird v. Winston-Salem, supra.* For the reasons given, the judgment below is

Reversed.

STATE v. C. E. COLE.

(Filed 13 April, 1932.)

1. Indictment A a—Indictment must be sufficiently specific to inform accused of crime charged and to enable court to proceed to judgment.

The charge in the indictment must be sufficiently specific, both as to law and fact, to adequately inform the defendant of the offense with which he is charged and to enable him to be prepared on the trial and to enable the court to proceed to judgment upon conviction and to protect the defendant under another indictment for the same offense, and it may not be sufficient if the indictment follow the definition of the statute.

2. Indictment C a—Demurrer to indictment challenges its sufficiency to charge defendant with commission of crime.

The object of a demurrer to an indictment is to impeach it and forestall a prosecution on the ground that its charges do not constitute a breach of the criminal law, and in case the indictment does not adequately inform the defendant of the offense with which he is charged or is insufficient to enable the court to proceed to judgment, a demurrer thereto is good.

3. Banks and Banking I a—Indictment in this case for making false entries on bank books held insufficient.

The essential elements constituting a statutory offense must be sufficiently set out in the indictment whether the language of the indictment follows the statute or not, and in this respect the object of the statute may be relevant upon the question, and the intent and purpose of N. C. Code, 224(e), is to prevent the deception of the officers of the bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interests of the bank or deceived its officers.

4. Indictment A a—C. S., 4623, does not apply where indictment is fundamentally deficient.

The essential constituents of the offense charged must be stated in an indictment therefor, and C. S., 4623, prescribing that an indictment shall not be quashed for mere informality or refinement in charging the offense does not apply where the indictment is fundamentally deficient.

5. Indictment D b—Bill of particulars cannot supply essential requirements of indictment.

The provisions of our statute, C. S., 4613, enabling a defendant in a criminal action to call for a bill of particulars, cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense, and when the indictment is thus defective the trial court is without authority to permit an amendment.

CLARKSON, J., concurs in result.

APPEAL by State from *Barnhill, J.*, at February Term, 1932, of ROBESON.

The bill of indictment contains eight counts setting forth respectively the following charges:

1. That on 8 October, 1929, the defendant, being assistant cashier of the Bank of Pembroke, unlawfully, wilfully and feloniously made a false entry in the teller's book of said bank as follows, to wit, $3,182.06, against the form of the statute, etc.

2. That on the same day the defendant, being assistant cashier of said bank, unlawfully, wilfully and feloniously made a false entry in the teller's book of said bank as follows, to wit, $6,148.94, contrary to the form of the statute, etc.

3. That on the same day the defendant, being assistant cashier of said bank, did unlawfully, wilfully and feloniously make a false entry in the cash book of said bank as follows, to wit, $6,148.90, contrary to the form of the statute, etc.

4. That on the same day the defendant, being assistant cashier of said bank, unlawfully, wilfully and feloniously made a false entry in the

general ledger of said bank, as follows, to wit, $6,148.80, contrary to the form of the statute, etc.

5. That on 24 December, 1929, the defendant, being assistant cashier of said bank, unlawfully, wilfully and feloniously made a false entry in the teller's book of said bank as follows, to wit, $12,411.97, contrary to the form of the statute, etc.

6. That on 24 December, 1929, the defendant, being assistant cashier of said bank, did unlawfully, wilfully and feloniously make a false entry in the cash book in said bank as follows, to wit, $12,426.10, contrary to the form of the statute, etc.

7. That on 24 December, 1929, the defendant, being assistant cashier of said bank, unlawfully, wilfully and feloniously made a false entry in the general ledger of said bank as follows, to wit, $12,426.10, contrary to the form of the statute, etc.

8. That on 24 December, 1929, the defendant, being assistant cashier of said bank, unlawfully, wilfully and feloniously made a false entry in the teller's book of said bank as follows, to wit, $6,233.02, contrary to the form of the statute, etc.

The defendant demurred to the bill of indictment on the following grounds:

1. That the bill of indictment fails to state a crime.

2. That the bill of indictment fails to allege that the alleged false entries were entries among the transaction of the bank or that the said entries were material to the bank or affected its condition and fails to allege that the said entries were not immaterial to the condition or the operation of the bank.

3. That the said bill of indictment is not sufficient to support a verdict.

4. That the bill of indictment is not sufficient to protect the defendant against later indictment for the same alleged offense, if acquitted.

5. That the said bill of indictment, in respect to the allegations as to the alleged false entries, are so indefinite and uncertain as to make the same insufficient, and that the said bill fails to allege the kind or nature of the entries alleged to be false and fails to allege other facts and circumstances, or that the court upon inspection of the bill of indictment can determine that, if proved as alleged, the violation of the statute would be thoroughly constituted.

6. That it does not appear from the allegations in the said bill of indictment whether the false entries are credits or debits, whether they are material or whether they in any manner misrepresent the true financial condition of the bank, and the said bill of indictment fails to contain any allegations from an inspection of which the court could

determine that the allegations set out in said bill, if supported by evidence, would constitute a violation of the statute under which the defendant is indicted, to wit, C. S., 224(e).

The court being of opinion that the bill of indictment in order to be valid must contain allegations sufficient to disclose the materiality of the alleged false entries to such an extent as will enable the court to determine whether the alleged false entries, if knowingly and falsely made, would constitute an offense, sustained the demurrer.

The State excepted and appealed to the Supreme Court.

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

Varser, Lawrence, McIntyre & Henry for defendant.

ADAMS, J. The object of the demurrer is to impeach the indictment and to forestall a prosecution on the ground that the charges against the defendant do not constitute a breach of the criminal law, the specific contention being that the indictment does not adequately inform the defendant of any accusation against him or contain averments which would enable the court to proceed to judgment in case of conviction or to protect the defendant against subsequent prosecution for the same offense. *S. v. Edwards,* 190 N. C., 322.

At the session of 1927 the General Assembly repealed section 83, chapter 4, of the Public Laws of 1921 and substituted section 224(e) of the North Carolina Code of 1931. Public Laws 1927, chap. 47, sec. 16. The substituted section contains the following clause: "Whoever being an officer, employee, agent, or director of a bank . . . makes or permits to be made a false entry in a book, report, statement or record of such bank . . . shall be guilty of a felony."

The indictment purports to charge the defendant with a violation of this statute, the several counts varying only as to the books in which the entries were made and in a few instances as to the dates. It is charged in each count that the defendant, being assistant cashier of the bank, "did unlawfully, wilfully, and feloniously make a false entry" in a book of the bank. If the defendant were convicted upon this charge could judgment lawfully be pronounced? To justify a judgment the indictment must set forth a charge explicit enough to support itself; for if all the allegations may be true and yet constitute no offense the indictment is insufficient. *S. v. Eason,* 70 N. C., 88. It is likewise defective if, when drafted upon a statute, it omits words descriptive of any essential element of the offense charged. *S. v. Liles,* 78 N. C., 496; *S. v. Bagwell,* 107 N. C., 859; *S. v. Mooney,* 173 N. C., 798; *S. v. Bal-*

langee, 191 N. C., 700. As a rule it is enough to charge a statutory offense in the words of the statute, but this is not always true. It is sometimes necessary not only to pursue the technical language of the statute but to set forth the facts and circumstances which go to make up the offense. Clark's Criminal Procedure; *S. v. Mooney, supra.*

In all criminal prosecutions every man has the right to be informed of the accusation against him; and the accusation must be definite. "Every indictment is a compound of law and fact and must be so drawn that the court can, upon its inspection, be able to see the alleged crime." *S. v. Hathcock,* 29 N. C., 52. This is essential to a valid judgment. In explanation of the principle *Ruffin, C. J.,* used this significant language in *S. v. Stanton,* 23 N. C., 424: "Thus a statute may be so inaccurately penned that its language does not express the whole meaning the Legislature had; and by construction its sense is extended beyond its words. In such a case the indictment must contain such averments of other facts, not expressly mentioned in the statute, as will bring the case within the true meaning of the statute; that is, the indictment must contain such words as ought to have been used in the statute if the Legislature had correctly expressed therein their precise meaning. In *S. v. Johnson,* 12 N. C., 360, for example, it was held that, besides charging in the words of the act that the prisoner, being on board the vessel, concealed the slave therein, the indictment should have charged a connection between the prisoner and the vessel as that he was a mariner belonging to her; because that was the true construction of the act. So, where a statute uses a generic term, it may be necessary to state in the indictment the particular species in respect to which the crime is charged."

Similarly the principle was applied in the later case of *S. v. Farmer,* 104 N. C., 887. The statute there under consideration provided that any physician who should give, procure, or aid in procuring any false or fraudulent prescription for any spirituous, vinous, or malt liquors in violation of the act should be guilty of a misdemeanor. Public Laws 1887, chap. 215, sec. 4. The indictment averred that the defendant "unlawfully and wilfully did give to one G. H. a false and fraudulent prescription for spirituous liquors, the defendant being then and there a practicing physician," etc. The indictment was held to be defective, the Court saying: "The indictment should set out distinctly not only that the prescription was either false or fraudulent, but in what the falsehood or fraud consisted, as that the prescription was intended to convey and did convey the idea that in the opinion of the defendant the person to whom the prescription was given was sick and was in need of the liquors prescribed as a medicine, whereas, in fact and in truth, the said

person (prescribed for) was not sick and did not need the spirituous liquor as a medicine. The prescription must be shown to be false or fraudulent (either being sufficient), and the person indicted should know before he is compelled to plead whether he is to meet a charge of giving a false prescription, or whether he is accused of giving the prescription, knowing that it was false and intending to deceive or to evade the law."

These decisions exemplify the rule that an indictment may follow the language of the statute when the statute defines the offense and contains all that is essential to constitute the crime and to inform the accused of its nature; but if a particular clause in a statute does not set forth all the essential elements of the specified act intended to be punished, such elements must be charged in the bill. 31 C. J., 708, sec. 260; *S. v. Cherry,* 7 N. C., 7; *S. v. Moody,* 47 N. C., 335; *S. v. Whedbee,* 152 N. C., 770.

The indictment in the present case is open to criticism. Section 224(c) relates to the business of banking. The evil which the Legislature intended to remedy is the misapplication or embezzlement of funds, deceit, fraud, injury to the bank, and loss to its depositors and stockholders. We had occasion to construe the statute in *S. v. Lattimore,* 201 N. C., 32, in which it is said: "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."

This language must be construed in its relation to the indictment, which in that case set out the specific facts constituting the false entries. From these allegations the court was enabled to determine whether the entries charged in the bill were calculated to deceive the officers, impair the assets, injure the business, or result in loss. So, too, with respect to the indictment in *S. v. Hedgecock,* 185 N. C., 714.

The indictment in the present case contains no such averments. It is impossible for a court judicially to know whether the alleged false entries operated to the loss, injury, or prejudice of the bank, its customers, or its stockholders. Indeed, whether the false entries affected the bank in any respect is only a matter of inference or conjecture. The

extent of the entries is not suggested; whether great or small, nominal or serious is not intimated. As this Court held in *S. v. Farmer, supra,* the indictment in this case should have charged, not only that the defendant made a false entry in the books, but in what the falsity consisted. If the entry was false, in what respect was it false? If it did not state the truth, what is the truth?

The ground upon which the defendant assails the bill is fundamental; it is not an "informality or refinement" condemned by section 4623 of the Consolidated Statutes. By the many adjudications construing this section it has been definitely settled that the section neither supplies nor remedies the omission of any distinct averment of any fact or circumstance which is an essential constituent of the offense charged. *S. v. Gallimore,* 24 N. C., 372. In this case it was said: "The ground of these adjudications is that sufficient does not appear to the Court in the face of any indictment to induce them to proceed to judgment when, in the indictment, they do not see distinctly every fact and circumstance which makes up the crime. Call the defect in the indictment what you may—a defect of form or a defect of substance, a departure from good sense or only from the refinement of pleading—if by reason thereof there be this insufficiency in the indictment the court has no authority to render judgment. And if this settled exposition of the statute be departed from, we are left without a rule whereby to decide what defects are and what are not cured by it. But this defect ought not to be called an informality or refinement."

In the oft-cited case of *S. v. Moses,* 13 N. C., 452, it was remarked that the statute was designed to liberate the courts from the fetters of form, technicality, and refinement which do not concern the substance of the charge, and that sages of the law had called nice objections of this sort a disease of the law and a reproach to the bench. There the denounced "refinement" was a contention that the dimensions of a mortal wound must be described in an indictment for murder; and in *S. v. Noblett,* 47 N. C., 418, it was argued on behalf of the defendant that the judgment should be arrested because the word "blow" instead of "wound" was used in an indictment for murder. But in these and in other cases it has been held with uniformity that an indictment must contain an averment of the facts and circumstances which make up the crime.

The defect is not cured by the statute which enables the defendant to call for a bill of particulars. C. S., 4613. This section applies only when further information not required to be set out in the indictment is desirable. The "particulars" authorized are not a part of the indictment. *S. v. Beal,* 199 N. C., 278. A bill of particulars, therefore, will

not supply any matter which the indictment must contain. *S. v. Long,* 143 N. C., 670, overruled on another point in *S. v. Ray,* 151 N. C., 714. Such bill may be amended, but not an indictment. Whether "particulars" shall or shall not be ordered is a matter of judicial discretion, but without an indictment there can be no prosecution or conviction of this character. *S. v. Wadford,* 194 N. C., 336.

The Attorney-General confesses difficulty in sustaining the indictment "by satisfying argument or citation of authority"—this no doubt in recognition of the sentiment expressed by *Taylor, J.,* in *S. v. Owen,* 5 N. C., 458: "We cannot too strongly impress it on our minds that want of the requisite precision and certainty which may at one time postpone or ward off the punishment of the guilty may, at another, present itself as the last hope and only asylum of persecuted innocence." Judgment

Affirmed.

CLARKSON, J., concurs in result.

IDA SUTTON v. D. J. HERRIN AND F. M. DICKERSON, AS INDIVIDUALS, AND AS PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF WILMINGTON NAVAL STORES COMPANY.

(Filed 13 April, 1932.)

1. Trespass B d—Evidence held insufficient to show that defendant set out fire on lands without notice to adjoining landowners.

Where in an action to recover property damages alleged to have been caused by the act of the defendant or his employees or agents in intentionally setting out fire on his own land without giving notice to adjoining landowners as required by statute, N. C. Code of 1931, C. S., 4309, the evidence tends only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there is neither direct nor circumstantial evidence tending to show the fire had been started either by the defendant or his employees under his authority: *Held,* a judgment as of nonsuit was properly entered.

2. Appeal and Error J c—Where evidence is insufficient to go to jury exclusion of corroborative evidence will not be held for error.

Where the evidence is not sufficient to resist a judgment as of nonsuit in an action, the exclusion of corroborative evidence if error, will not be held for reversible error.

3. Trial D a—Evidence which raises mere suspicion or conjecture is insufficient to be submitted to the jury.

On a motion as of nonsuit the evidence which makes for the plaintiff's cause of action will 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, but where the evidence raises only a mere suspicion or conjecture of the issue to be proved it is insufficient to be submitted to the jury. C. S., 567.

APPEAL by plaintiff from *Barnhill, J.*, at October Term, 1931, of NEW HANOVER. Affirmed.

The plaintiff is the owner of two tracts of land, one 5 acres and the other 75 acres, in New Hanover County, N. C. The defendants were partners doing business under the firm name and style of Wilmington Naval Stores Company, and their business consisted largely of cultivating turpentine trees, extracting from the pine trees on land raw turpentine, and distilling it, making spirits of turpentine, resin and perhaps other by-products.

Defendants acquired certain rights from Claude Gore (Gore Estates) to cultivate the turpentine upon the land and certain rights in the trees. The land adjoined, or was near by, the lands and premises of plaintiff. Plaintiff contends that before setting fire to the woodsland, on which the turpentine trees were growing, it was the duty of defendants to notify plaintiff and to use due care to watch and extinguish the fire and to notify adjoining landowners or their agents. "That the plaintiff is informed, believes, and therefore, alleges that the defendants either of themselves or through their agents, servants or employees, wilfully, deliberately, designedly and negligently on or about 24 February, A.D. 1930, without notifying the adjoining landowners, and in violation of the statutes of North Carolina, in such case made and provided, set fire to the woods and undergrowth, grass and trash on the lands they were cultivating turpentine upon, upon which they had acquired the right to cultivate turpentine from Claude Gore. . . . And negligently and carelessly allowed, permitted and caused the fire so put out on the lands they were cultivating turpentine upon to spread from said land and burn over the plaintiff's land above described, destroying lots of timber, small trees, woods mold, dog-tongue and the undergrowth thereon and caused the said fire to also burn down the fences on the plaintiff's premises, the plaintiff's dwelling-house thereon and all outhouses and buildings, grape arbors and fruit trees and all personal property which the plaintiff had upon said premises, including such furniture and other articles of personal property thereon, to the plaintiff's great damage and injury in actual value in the sum of $10,000." Plaintiff prays for $10,000 actual and $2,500 punitive damages.

The defendants, in their answer say that they did not, nor did anyone else by their authority, express or implied, "intentionally set fire to the woodlands, brush, grass, or other materials," which caused the fire of which plaintiff complains in this action. That neither the defendants nor their employees negligently set out the fire complained of, nor was it set out intentionally.

The following judgment was rendered by the court below: "Plaintiff having introduced her testimony, at the close thereof, upon motion of Rountree, Hackler & Rountree, counsel for the defendants: It is hereby ordered, decreed and adjudged: That the plaintiff be nonsuited, and the defendants recover from the plaintiff and the sureties upon her bond the cost of the action to be taxed by the clerk," etc.

The plaintiff excepted to the judgment as signed, assigned errors and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

Bryan & Campbell, Newman & Sinclair and Alton A. Lennon for plaintiff.

Rountree, Hackler & Rountree for defendants.

CLARKSON, J. At the close of plaintiff's evidence the defendants made motion for judgment as in case of nonsuit. The court granted the motion and in this we can see no error.

C. S., 4309, N. C. Code, 1931 (Michie), in part is as follows: "If any person shall intentionally set fire to any grassland, brush land or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of land adjoining the land intended to be fired," etc.

This action is brought by the plaintiff to recover property damage, due to fire, which plaintiff alleges was negligently set out by the defendants, or their employees, or intentionally set out without giving notice to adjoining landowners, contrary to the statute, *supra,* and from which fire the plaintiff's property was damaged.

This statute is one of importance and has been frequently construed by this Court. The language is plain, but we think that the only material question involved in this action is: Was the evidence of the plaintiff of sufficient probative force to entitle plaintiff to have her case submitted to the jury on the issues arising on the pleadings? We think not.

The plaintiff is a widow. Her 8-room house and outhouses were destroyed by fire on 27 February, 1930. Also about 30 acres of her cleared land burned over. The Gore estate land, on which defendants were cultivating the turpentine trees adjoined her lands on the north and west. The fire started from the west. She testified, in part: "The

burning extended from my house out across on the north and on the west. I had a conversation with the defendant, Herrin. He said he did not put the fire out, that he had told his employees—that he had not had any fire out in three days, that he had told his employees on account of the dry weather not to put any fire in the woods. He said there was a hunter around through the woods. He said he had not put any fire out in three days, and he had warned his men not to do it on account of the dry weather. I never received any notice from Mr. Herrin or the Naval Stores Company they were going to put out a fire. . . . The house was not occupied at the time of the fire. It had been vacant from November, 1929."

J. E. Brantley, witness for plaintiff, testified, in part: "The fire that burned up Mrs. Sutton's house was set in the fork of the branch. (Mr. Hackler) Did you see it set? Answer: No, sir, but I saw where it was set. (The court) That is a conclusion. . . . Q. What did you find at that point? Answer: Well, I found horse tracks where a fellow got down and tied his horse and where he walked around there after the fire burned over. The tracks were in the fire-burned area. I went back to the most northerly part of the burning. I found the tracks in the most northerly part of the burning. There were turpentine trees there. Out on the ridge had been burned off clean for a week or ten days before, and where this fire was there were pine burs and stumps burning, and that was a mighty short distance from where I first saw the fire. I mean by a short distance not over one or two hundred yards. I trailed the horse further up the swamp and found the same performance in the meadow. I saw where it was burned out. It was a fresh fire. Saw a man's track and a horse's track. I had a conversation with Mr. Herrin immediately after the fire. He said he had no one in there but his woods rider. . . . The place where I saw the tracks was not a public road or path. From that point I traced the fire."

C. J. Hunt, testified, in part: "Court: Did you say he got off and fired up that place? Answer: I would not swear positively; all I know, a man tied his horse and walked over there. I did not see the horse, I saw the tracks, and at the place I saw the horse's tracks I saw man's tracks. I would not swear the man's tracks were large. They were large horse tracks, but I did not pay any attention to the other. Q. How far up in the woods above the marsh was the place where you say you saw the horse tracks? Answer: In a fresh burned place. I would term it a half mile from the center of the marsh. You could not go in there. That was mud. That was land that Mr. Herrin was cultivating turpentine on."

In 23 C. J., sec. 1795, at pp. 51-2, we find: "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." *S. v. Johnson,* 199 N. C., 429; *Denny v. Snow,* 199 N. C., at p. 774; *Shuford v. Scruggs,* 201 N. C., 685.

It is the settled rule 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.

There is no direct evidence that defendants or their agents or employees set out the fire on the Gore estate land, on which defendants were cultivating the turpentine trees. Nor do we think there was circumstantial evidence of any sufficient probative force. The plaintiff testified that the defendant Herrin "said there was a hunter around through the woods. He said he had not put any fire out in three days, and he had warned his men not to do it on account of the dry weather."

There was evidence as to the horse's tracks and man's tracks, but it is not clear whether they were made before or after the fire. Brantley testified: "I found horse tracks where a fellow got down and tied his horse and where he walked around there after the fire burned over. The tracks were in the fire-burned area."

Brantley testified that after the fire Herrin told him and Mrs. Sutton that "he had no one in there but his woods rider." Mrs. Sutton testified that Herrin told her that *"he had told his employees on account of the dry weather not to put any fire in the woods."*

In the present action there was no evidence sufficient to be submitted to a jury that defendants or their agents or employees were responsible for the origin of the fire. In fact, the evidence on the part of plaintiff was to the effect that defendant Herrin gave his employees positive instructions, on account of the dry weather, not to "put any fire in the woods."

The plaintiff contends that the other questions presented: (1) Was it competent for the plaintiff to prove that the defendant in cultivating its turpentine burned over the land so cultivated? (2) Was it competent to prove that defendants, over a period of years, from Christmas until spring, burned over the lands they were cultivating in turpentine?

Conceding, but not deciding, that the evidence objected to and for which error is assigned, was competent, at least as corroborative evidence, we think the probative force, with the other evidence of plaintiff, not sufficient to be submitted to a jury. These prior fires have no relation to the issue, who started this fire, or how was it started. It helps in no way to determine the responsibility for this particular fire.

In *McBee v. R. R.*, 171 N. C., at p. 112, this Court held that: "Mere proof of a foul right of way, without evidence that the fire was set out by a spark from a passing engine is insufficient to establish actionable negligence. It has been repeatedly held that in addition to the foul condition of the defendants' right of way, plaintiff *must prove that the fire was set out by the defendant in order to establish negligence.*" (Italics ours.)

In *Wilson v. Lumber Co.*, 194 N. C., 374, it is held: In order to recover damages to plaintiff's land against the defendant for the negligent setting out fire by the employee in taking up its tramway operated by steam locomotives, there must be evidence that will raise more than a conjecture that the fire that caused the damage was in some way attributable to the defendant.

In the present case there is no evidence connecting the defendants with the origin of this fire, and in the absence of such evidence, they cannot be held responsible, under C. S., 4309, which makes persons intentionally setting out fires, liable for injuries to adjoining landowners in the absence of notice. There must be some connection shown between the defendants and the origin of the fire. In fact, if the fire had been set out by an employee of defendants, according to plaintiff's testimony it was done against defendant Herrin's positive instructions. The judgment of the court below is

Affirmed.

C. W. BUNDY, RECEIVER OF THE TRIPLETT LUMBER COMPANY v. COMMERCIAL CREDIT COMPANY.

(Filed 13 April, 1932.)

1. States A a—Definition of "bad faith" held correct on issue of whether contract was executed in another state in bad faith to avoid usury laws.

In an action involving the question as to whether a contract was made in another state in bad faith to avoid the usury statute of North Carolina: *Held*, the definition of the words "bad faith" depends largely upon the facts of each particular case and is not capable of definite definition, and a charge in this case is not erroneous which substantially instructs

the jury that "bad faith" as used in the issue imports an intent to deceive the other party to the transaction and that the transaction was dishonestly conceived and consummated with knowledge of a fraudulent purpose to evade the usury laws of North Carolina.

2. Pledges A a—Essential elements of valid pledge of securities.

In order to a valid pledge of property the possession thereof must be given the pledgee, and if possession is returned to the pledgor it must be kept separate and distinct from other property and the pledgor must hold it as agent of the pledgee, and where the property consists of notes which are returned to the pledgor for collection, the proceeds must be kept separate, distinct and intact.

3. Pledges A d—Transaction in this case held to constitute a pledge of security giving pledgor lien and not requiring registration.

Where, under an agreement between a business concern and a credit company, the former sends notes made to it by its customers to the credit company, which immediately remits a certain per cent of their face value and returns the notes to the business concern for collection upon maturity, and the credit company requires that the proceeds from collection be kept separate and intact and sent to it for its check and approval and requires the business concern to "buy the notes back" if not paid within a certain time: *Held*, the transaction is in effect a pledge of security for borrowed money, and is not a chattel mortgage requiring registration as against creditors and third persons, C. S., 3311, and the pledgee has a lien on the notes in the hands of the business concern or its receiver, the latter's possession being as agent for the credit company, and the fact that the makers of the collateral notes were not notified of the collateral pledge is not important.

4. Costs A b—Costs in this action held correctly taxed against the plaintiff.

The cost in an action follows the judgment, and where the controversy between the parties narrows itself down to the issue of usury which is decided in the defendant's favor, an order taxing the cost against the plaintiff is correct. C. S., 1241, 1248.

CIVIL ACTION, before *Schenck, J.*, at Fall Term, 1931, of MECKLENBURG.

This cause was considered by the Court in a former appeal, reported in 200 N. C., 511, 157 S. E., 860. The facts are substantially the same and no extended restatement of them will be attempted upon this appeal.

The issues submitted were as follows:

1. "Was the contract between the Commercial Credit Company and the Triplett Lumber Company (Exhibit No. 1) lastly executed in the State of Maryland, as alleged in the answer?"

2. "If so, was said contract (Exhibit No. 1) executed by the defendant, Commercial Credit Company, in the State of Maryland in bad faith with the intent and purpose of evading the usury laws of North Carolina?"

3. "Did the defendant, Commercial Credit Company, knowingly take, receive, reserve, or charge the Triplett Lumber Company a greater rate of interest than 6 per cent per annum, as alleged in the amendment to the complaint?"

4. "What amount of penalty, if any, is the plaintiff, C. W. Bundy, receiver for the Triplett Lumber Company, entitled to recover of the defendant, Commercial Credit Company, for usurious interest paid?"

5. "What amount is the Triplett Lumber Company, indebted to the defendant, Commercial Credit Company?"

The jury answered the first issue "Yes," the second issue "No," and the fifth issue "$11,942.70."

Thereupon, judgment was entered decreeing (a) that the plaintiff, receiver, is the owner of the accounts in controversy "free and clear of any lien or claim of the defendant"; (b) that the defendant, Credit Company, is entitled to file an unsecured claim against the receiver for the sum of $11,942.70; (c) that the plaintiff is not entitled to recover anything of the defendant upon the allegations of usury; (d) that the costs be paid by the plaintiff.

From the judgment so rendered both parties appealed, assigning errors.

John M. Robinson and Hunter M. Jones for plaintiff.

Duane R. Dills, Jack J. Levinson, J. Laurence Jones and J. L. Delaney for defendant.

BROGDEN, J. The determinative questions presented by the record may be stated as follows:

1. Did the trial judge correctly instruct the jury upon the second issue?

2. Was the defendant, Credit Company, entitled to a lien upon the proceeds realized from the collection of accounts and evidences of indebtedness described in the exhibit?

3. Did the trial judge properly tax the costs?

The second issue is as follows: "Was said contract executed by the defendant, Commercial Credit Company, in the State of Maryland in bad faith with the intent and purpose of evading the usury laws of North Carolina?" Upon said issue the judge instructed the jury as follows: (1) "Now, gentlemen of the jury, you will note that the conjunction 'and' is used, and not the alternative 'or,' and the issue raises the query whether the action was in bad faith and with the intent to evade the usury laws of North Carolina." (2) "If upon consideration of all the evidence it has satisfied you, by its greater weight, that in so doing the Credit Company did act in bad faith and did act with the

intent and purpose of evading the usury laws of North Carolina, then, gentlemen of the jury, it will be your duty to answer the second issue 'Yes' as contended for by the plaintiff." (3) "In this connection the court repeats that the phrase 'in bad faith' imports that the transaction involved was dishonestly conceived and consummated with knowledge of a fraudulent design or deception. The term 'in bad faith' means to mislead and deceive, and before the plaintiff can successfully ask you to answer this issue 'Yes,' the plaintiff must satisfy you, by the greater weight of the evidence, that the defendant, Commercial Credit Company, had the intent to deceive the Triplett Lumber Company in the execution of the contract in Maryland, and also that the transaction was dishonestly conceived." (4) "The court charges you that the phrase 'in bad faith,' as used in this second issue, imports that the transaction involved was dishonestly conceived and consummated with knowledge of a fraudulent design or deception. The term 'bad faith' also means 'with intent to mislead or deceive another!'"

The attack made by the plaintiff upon the foregoing instructions is grounded upon the contention that bad faith was improperly defined. The general definition given in Black's Law Dictionary, second edition, is as follows: "The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." The Georgia Court in *Copeland v. Dunehoo,* 138 S. E., 267, said: "Counsel for the defendants say that 'bad faith involves fraud, deceit, duress, or some such act, and is a state of mind,' and with this we agree." There are several decisions in this State discussing good faith as affecting the jurisdiction of courts. See *Wiseman v. Witherow,* 90 N. C., 140; *Sloan v. R. R.,* 126 N. C., 487, 36 S. E., 21; *Thompson v. Express Co.,* 144 N. C., 389, 57 S. E., 18; *Wooten v. Drug Co.,* 169 N. C., 64, 85 S. E., 140. In the *Sloan case* the Court held that jurisdiction is not ousted "except when the sum demanded is so palpably in bad faith as to amount to a 'fraud on the jurisdiction.'" In the *Wooten case, supra,* the Court intimated that good faith not only meant an honest purpose, but that such purpose must appear from the allegations and surrounding facts.

Bad faith cannot be defined with mathematical precision. The ultimate definition of the term would depend upon the facts and circumstances of a given controversy. Certainly, it implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack.

The practical question developed by the evidence in this case is whether the Credit Company, impelled by a false and dishonest motive and not by a legitimate business purpose, undertook to have the contract executed in Maryland in order to evade the usury laws of North Carolina and thus oust the jurisdiction of her courts upon a claim of usury. The Court is of the opinion that the instructions were substantially in accordance with the correct principles approved by the authorities.

Upon the second question the plaintiff contends that the covering agreement or assignment contract was in the nature of a chattel mortgage and governed by C. S., 3311, requiring registration, and hence, as the instrument was not recorded, the defendant is entitled to no lien upon the proceeds of collection. The contract provided that the defendant, Credit Company, should purchase from the Lumber Company certain notes or accounts of customers of the Lumber Company. These accounts, notes and other evidences of indebtedness were to be forwarded to the defendant at Baltimore, Maryland, and if they were approved the defendant would immediately pay to the Lumber Company seventy-seven per cent of the face value of the papers. If the payment of the notes and accounts was more than sixty days in default, the Credit Company required the Lumber Company "to buy them back"; that is to say, the Lumber Company would guarantee the payment and either send a check to pay the same to the Credit Company or the amount would be deducted by the Credit Company from the proceeds of the next batch of notes sold, etc. The Credit Company sent the notes for collection to the Lumber Company and did not notify the original debtors that the accounts had been assigned, but the records of the Lumber Company showed at all times that every account or note purchased by the Credit Company had been assigned or sold. When the notes or accounts became due, the Credit Company sent them to the Lumber Company for collection, but when an account was collected by the Lumber Company the president of the Lumber Company said: "We always sent the identical remittance to them for their check. They required us to do that."

Hence the evidence raises the question as to whether the contract between the parties constituted a chattel mortgage or a pledge. If the instrument was in the nature of a chattel mortgage, then registration was required, and the judgment was correct. Upon the other hand, if the contract constituted a pledge of the notes, accounts and evidences of indebtedness as collateral security for a loan of money, then the registration law would not apply. The defendant insisted upon the former appeal, and now insists, that the transactions and course of dealing between the parties constituted an absolute sale of accounts and not a loan.

After a careful reëxamination of the entire evidence, the Court sees no reason for changing the opinion expressed in the former appeal that the transaction contemplated a loan of money. The defendant was not engaged in the lumber business, but was primarily engaged in the money business so far as the evidence in this case is concerned. The distinction between a pledge and a chattel mortgage was pointed out in *Doak v. Bank*, 28 N. C., 309, in the following language: "A mortgage of personal property in law differs from a pledge; the former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at most is a special property in the pledge, with the right of retainer, until the debt is paid. A mortgage is a pledge and more, for it is an absolute pledge, to become an absolute interest, if not redeemed in a certain time. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, to be a lien upon it."

Certain well defined tests of a pledge have been established by various decisions of this Court. They may be classified broadly as follows: (1) The pledged property must be actually delivered to the pledgee; (2) If the pledged property is returned to the pledgor, it must not be commingled or mixed with other property of the pledgor, but it must be understood that the pledgor holds it as agent for the pledgee; (3) If the pledged property consists of notes, accounts or other evidence of indebtedness, and the pledgee places such accounts or notes in the hands of the pledgor for collection, the funds arising from the collection of the pledged property must be kept separate, distinct and intact. *Rose v. Coble*, 61 N. C., 517; *Bizzell v. Roberts*, 156 N. C., 272, 72 S. E., 378; *Milling Co. v. Stevenson*, 161 N. C., 510, 77 S. E., 676. For example, in *Milling Co. v. Stevenson, supra*, where there was a pledge of certain merchandise, the Court held that the pledge was invalid "because there was no delivery of the pledged property to the bank to be held by it as security, for 'delivery is the essence of a pledge,' and because the goods were intermingled with other goods and had no identifying marks upon them by which they could be distinguished from other goods of like nature belonging to the Stevenson Company," etc. The last utterance upon the subject is contained in *Sneeden v. Nurnberger's Market*, 192 N. C., 439, 135 S. E., 328. The pledge in that case was defeated because the facts disclosed that the pledgee did not retain possession of the accounts, but permitted them to be generally and indiscriminately mixed and intermingled with the accounts and other business transactions of the pledgor.

In the case at bar the notes held by the pledgee were sent to the pledgor for collection. The identity of the property and the identity of the proceeds of collection was carefully safeguarded. Therefore, upon the second question of law, the court is of the opinion that the defendant had not lost its lien upon the proceeds of the collection, and that the judgment of the court denying to the defendant the right of lien was erroneous.

Upon the question of costs, the plaintiff was not entitled to recover costs upon the usury allegation. C. S., 1248. Costs are regulated by C. S., 1241 *et seq.* This Court held in *Patterson v. Ramsey*, 136 N. C., 561, 48 S. E., 811, that "in order to determine who should pay the costs, we must consider the general result and inquire as to who has, in the view of the law, succeeded in the action." The action was originally instituted to restrain the defendant from collecting certain accounts. The defendant filed an answer asserting a right to collect by virtue of a written contract. Thereupon the plaintiff sought to recover the penalty prescribed by law for usurious loans. As the case developed, the allegations of usury raised the real controversy and issue between the parties. The verdict of the jury has declared the defendant to be the winner in the contest, and, therefore, the costs follow the judgment, and the trial judge correctly taxed the costs against the plaintiff.

Plaintiff's appeal: No error.

Defendant's appeal: Error.

T. J. HORTON v. INTERSTATE TELEPHONE AND TELEGRAPH COMPANY.

(Filed 20 April, 1932.)

1. Telephone Companies A a—Local telephone exchange is subject to control and regulation by Corporation Commission.

A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay, and having facilities for knowing which of its customers make long distance calls and for collecting the tolls from them on its own responsibility, etc., is a public-service corporation and comes within the provisions of C. S., 1035(2) giving jurisdiction over it to the Corporation Commission, and such company may not discriminate among its subscribers as to the conditions upon which it will render service to them.

2. Telephone Companies A d — Rule of telephone company requiring guarantee deposit in certain cases held void under facts of this case.

Where a person applies to a local telephone company for service and pays the usual installation fee and complies with the general require-

ments of the company for the installation of such service, and the telephone company, after giving its receipt for the installation charges, demands that the applicant make a deposit in a certain amount as a guarantee for payment of future service, and it appears that the demand for such deposit was made under a rule of the management that the deposit should be required of those considered bad credit risks, and that the rule had never been authorized by the directors of the corporation, and was made without the knowledge or consent of the Corporation Commission, and that it had been enforced against only a few individuals out of the company's many subscribers: *Held*, the rule is an unlawful discrimination among its customers by a public-service corporation, and mandamus will lie to compel the company to install its service without the payment of such deposit.

APPEAL by defendant from *Daniels, J.*, at October-November Term, 1931, of DURHAM. Affirmed.

The judgment of the court below was as follows:

"This cause coming on to be heard and being heard before his Honor, F. A. Daniels, judge presiding, and being heard upon evidence offered in the form of written affidavits and parol testimony during the regular term of Superior Court of Durham County, North Carolina, beginning on 26 October, 1931, and it being agreed upon by counsel for both of the parties to this action that judgment might be entered at a subsequent time by his Honor, Judge F. A. Daniels, while out of the district; now, therefore, upon consideration of the evidence offered and the arguments of counsel, the court finds the following facts:

1. That the plaintiff is a citizen and resident of Durham County, North Carolina, and that the defendant is a corporation duly created, organized and existing under and by virtue of the laws of the State of North Carolina, with its principal office in the city of Durham, North Carolina.

2. That the defendant under the terms of its franchise from the city of Durham owns and operates a telephone company in Durham, North Carolina, and furnishes a telephone service to the public generally in the city of Durham, North Carolina; that the defendant only owns and conducts a local business in the city of Durham and does not own lines and other facilities for long distance telephone messages; and further that the defendant affords its subscribers and patrons long distance telephone facilities under the terms of an agreement which it has with the Southern Bell Telephone Company, and that under the terms of said agreement with the Southern Bell Telephone Company the defendant is obligated and liable for the payment of all long distance calls made by its subscribers. There is no evidence that defendant cannot, by agree-

ment with the Southern Bell Telephone Company, keep itself informed as to the number of long distance calls made by defendant's subscribers.

3. That the defendant requires the payment of a month's rent in advance from all its subscribers which only covers the local service charge and does not include any long distance telephone charges that might be incurred through the use of the long distance telephone service; and that the managers and superintendents of the company follow an established rule of requiring deposits from all persons who have bad credit ratings and/or who are considered financially irresponsible and that said regulation is an established custom of such officers of the company in the management and conduct of its business; and that said deposits range from $15.00 to $25.00, depending upon the nature of the business to be conducted by the applicant, the estimated probable number of long distance telephone calls and the use to be made of the telephone service by the applicant; that this rule has never been formally adopted at a meeting of the stockholders or board of directors of the company, and has never been published, but is an established rule that has been in effect by the management over a long period of time.

4. That T. J. Horton is now a subscriber to the telephone service of the defendant, having a telephone in his residence, and that on two different occasions the telephone service has been temporarily discontinued and on one occasion the telephone instrument removed from the home of said T. J. Horton on account of the failure and refusal of the plaintiff to pay for the telephone service in his home.

5. That in October, 1927, T. J. Horton was the president of Horton Electric Company, a corporation doing business in the city of Durham, North Carolina, and that at his request the telephone was installed in the place of business of the Horton Electric Company on 21 October, 1927, and permitted to remain there until 20 August, 1928, that during said time it became necessary to temporarily discontinue said telephone service three times and on 20 August, 1928, to remove the instrument from said place of business on account of the failure and refusal of the Horton Electric Company to pay for the service received, the amount of the indebtedness owed at that time being $21.05, of which amount local charges amounted to $10.50 and long distance tolls amounted to $10.55.

6. That on 13 October, 1931, the plaintiff made application for the installation of a business telephone to be installed at No. 121 Market Street in the city of Durham, North Carolina, and with his application made a deposit of $9.50 to cover installation charges and local rent for one month in advance; and that the defendant issued to plaintiff its receipt for the same in the following language:

'Account No. .....; Name T. J. Horton Company; Local .....; So. Bell .....; Granville .....; Miscellaneous; Total $9.50.

Paid: 13 October, 1931; Interstate Telephone and Telegraph Company.

The installing charge is not a deposit and will not be refunded. All telephone bills are due and payable monthly in advance, subject to discontinuance without further notice if not paid by the 10th.'

That on the next day the plaintiff was informed by V. O. Isenhour, an agent of the defendant, that the defendant held an unpaid bill of the Horton Electric Company, a corporation of which plaintiff had been president and which had ceased to do business, and that unless he paid the bill of $21.05 due by the said Electric Company he would be required to make a cash deposit of $25.00 before the telephone applied for would be installed; that the plaintiff was not liable for the payment of the said bill and declined to pay the same; that thereupon the defendant explained to the plaintiff that it did not know when the contract was made in 1927, that the Horton Electric Company was a corporation and offered to make the installation of said telephone if he would make the further deposit of $25.00 which the plaintiff declined to make: That the defendant did not refuse to install the telephone because the plaintiff refused to pay the $21.05 but because he would not make the deposit of $25.00 as required by the defendant.

7. That the defendant's officers and agents invoked its rule of requiring a deposit from applicants who have bad credit ratings and/or who are financially irresponsible for the reason that they considered the plaintiff to be financially irresponsible and of a bad credit rating; and that they offered to install a telephone and furnish telephone service to the plaintiff if he would make a deposit of $25.00 as a guarantee of payment for future service in the nature of long distance telephone calls and local service charges; that the plaintiff refused to make said deposit and demanded the installation of a telephone without said deposit.

8. That the plaintiff is indebted to C. H. Mattews Grocery Store and had been so indebted for a period of two years or more; that he is indebted to two clothing stores in the city of Durham, North Carolina, and has been so indebted for a period of two years or more; that he is indebted to a doctor in the city of Durham, North Carolina, for professional services rendered and has been so indebted for a period of two years or more; that there are two unpaid judgments docketed against Mrs. T. J. Horton for groceries used in the home of the plaintiff and for which payment has never been made; that on two different occasions the plaintiff gave worthless checks to Montgomery Ward and Company

and refused to pay the same until after they had been placed in the hands of an attorney for collection; that in four different cases during the year 1928 the plaintiff was indicted and convicted of giving worthless checks which had been drawn by the Horton Electric Company, a corporation, but which was under the management and direction of T. J. Horton personally, and which checks were drawn personally by the said T. J. Horton. That on one occasion the plaintiff vacated a residence after an ejectment proceeding had been instituted against him in the courts of Durham County and service of summons had been made upon him by a proper officer.

9. That the plaintiff does not own any real estate and only lists for taxes personal property valued between $250 and $300.

10. That the plaintiff is financially irresponsible and has a bad credit rating.

11. That the said custom or regulation of the company in requiring a deposit from all persons who have a bad credit rating and/or who are financially irresponsible is never enforced except when applicant is considered financially irresponsible and a bad credit risk. The defendant has about fifty-five hundred subscribers and a deposit of $25.00 has been required of only a few of this number—several individuals. The deposit of $25.00 is refunded when the contract under which it is made is terminated and all amounts due the defendant for its services are paid.

Wherefore, upon the foregoing finding of facts the court is of the opinion that the plaintiff upon payment of the rent in advance for one month and the cost of installing the phone is entitled, as a legal right, to have a phone installed in his place of business and his name published in the phone directory system; and it is therefore ordered, adjudged and decreed:

First: That the defendant, Interstate Telephone and Telegraph Company, be and is hereby directed to install for the use of the plaintiff at his place of business, 121 North Market Street, a telephone of the kind and quality ordinarily placed at the disposition of customers under similar circumstances, and to render him service in connection with the telephone so installed as is customarily rendered to subscribers of the telephone under like conditions.

Second: That the defendant, Interstate Telephone and Telegraph Company, be, and it is hereby further ordered and directed to place plaintiff's name, T. J. Horton Company, in its regular place in the telephone directory which is about to be published.

Third: That the defendant is taxed with the costs of the action."

Defendant excepted and assigned error to the judgment as signed and made other exceptions and assignments of error, and appealed to the Supreme Court. The material ones will be considered in the opinion.

J. E. Horton and R. O. Everett for plaintiff.
Basil M. Watkins for defendant.

CLARKSON, J. The defendant is a public service corporation. The present action is in its nature a mandamus to compel defendant to perform a duty which plaintiff alleges it owed him as a public service corporation and install a telephone in plaintiff's place of business and place the name *T. J. Horton Company* in defendant's telephone directory. A mandamus is a proper remedy in such cases when the facts warrant. *Godwin v. Telephone Co.*, 136 N. C., 259; *Telephone Co. v. Telephone Co.*, 159 N. C., 16; *Walls v. Strickland*, 174 N. C., 298; *Public Service Co. v. Power Co.*, 179 N. C., 18; *Public Service Co. v. Power Co.*, 180 N. C., 335; *R. R. v. Power Co.*, 180 N. C., 422.

In re Utilities Co., 179 N. C., at p. 159, we find: "The power of the Legislature, either directly or through appropriate governmental agencies, to establish reasonable regulations for public service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved with us in well considered decisions dealing directly with the question," citing numerous authorities.

The General Assembly of North Carolina has placed certain public service corporations and businesses within control of the Corporation Commission, C. S., 1035(2), as follows: "Telegraph and telephone companies and all other companies engaged in the transmission of messages; over persons and individuals owning and operating telegraph or telephone lines in North Carolina and who rent phones and wires to persons generally."

The Corporation Commission is given power to fix rates, etc., for public utilities, C. S., 1066(2), as follows: "The transmission and delivery of messages by any telegraph company, and for the rental of telephone and furnishing telephone communication by any telephone company or corporation."

On 13 October, 1931, "the plaintiff made application for the installation of a business telephone to be installed at No. 121 Market Street in the city of Durham, North Carolina, and with his application made a deposit of $9.50 to cover installation charges and local rent for one month in advance; and that the defendant issued to plaintiff its receipt for the same." The next day after this receipt was given the defendant refused to install the telephone unless a deposit of $25.00 in addition was made by plaintiff. The defendant contending that the Horton Electric Company, a corporation of which plaintiff had been president and which had ceased to do business sometime before, owed it $21.05. Plaintiff contended that he was not liable for the payment of the bill.

The court below found certain facts: "The managers and superintendents of the company follow an established rule of requiring deposits from all persons who have bad credit ratings and/or who are considered financially irresponsible and that said regulation is an established custom of such officers of the company in the management and conduct of its business; and that said deposits range from $15.00 to $25.00, depending upon the nature of the business to be conducted by the applicant, the estimated probable number of long distance telephone calls and the use to be made of the telephone service by the applicant; that this rule has never been formally adopted at a meeting of the stockholders or board of directors of the company, and has never been published, but is an established rule that has been in effect by the management over a long period of time. . . . That the defendant's officers and agents invoked its rule of requiring a deposit from applicants who have bad credit ratings and/or who are financially irresponsible for the reason that they considered the plaintiff to be financially irresponsible and of a bad credit rating; and that they offered to install a telephone and furnish telephone service to the plaintiff if he would make a deposit of $25.00 as a guarantee of payment for future service in the nature of long distance telephone calls and local service charges; that the plaintiff refused to make said deposit and demanded the installation of a telephone without said deposit. . . . That the said custom or regulation of the company in requiring a deposit from all persons who have a bad credit rating and/or who are financially irresponsible is never enforced except when applicant is considered financially irresponsible and a bad credit risk. The defendant has about fifty-five hundred subscribers and a deposit of $25.00 has been required of only a few of this number—several individuals. The deposit of $25.00 is refunded when the contract under which it is made is terminated and all amounts due the defendant for its services are paid."

In *Walls v. Strickland, supra,* at p. 300, this Court speaking to the subject, said: "In *Telegraph Co. v. Telephone Co.,* 61 Vt., 241, 5 L. R. A., 15 Am. St. Rep., 893; *S. c.,* 3 Am. Elec. Cases, at p. 435, it is said: 'A telephonic system is simply for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all.' That case cited many authorities, which are, indeed, uniform, that the telephone business, like all other services fixed with public use, must be operated without discrimination, affording (equal rights to all, special privileges to none). 'Telephones are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company,

as a common carrier, can rightfully refuse to perform its duty to the public,' is said in *Telephone Co. v. Telegraph Co.*, 66 Md., 299, at p. 414, 59 Am. Rep., 167, which is another very instructive and well-reasoned case upon the same subject. Telephone companies are placed by our Corporation Act on the same footing, as to public uses, as railroads and telegraphs.'"

In 37 Cyc. of Law and Proc., at p. 1654, we find: "A telegraph or telephone company cannot arbitrarily refuse to furnish service to a particular customer, if the service demanded be of a character which it holds itself out as prepared to furnish to the public generally, or to the public of the applicant's class. It cannot require an applicant for service to contract not to make use of the facilities offered by a rival company, or not to use a telephone to call messengers from another office, or refuse such services on the ground that the applicant had broken a previous agreement to this effect. It cannot refuse service to a person offering to pay therefor, or require as a condition of furnishing service that such person pay an old debt or settle a disputed claim growing out of a previous transaction, even though of the same kind." *O'Neal v. Citizens Pub. Service Co.*, 157 S. C., 320, 70 A. L. R., 887; *Woodley v. Telephone Co.*, 163 N. C., 284; *Cumberland Tel. etc. Co. v. Hobart*, 89 Miss., 252; see *Southwestern Tel. & Telephone Co. v. Danaher*, 238 U. S., 482.

The present action concerns an intrastate transaction. The facts disclose that "the *managers* and *superintendents* of the company follow an established rule," etc. "This rule has never been formally adopted at a meeting of the stockholders or board of directors of the company and has never been published," etc. Nor does it appear that this rule has ever been given approval by the Corporation Commission, or indeed that it has ever been brought to the attention of the Corporation Commission. Plaintiff paid the usual deposit of $9.50. This controversy involves the $25.00 additional deposit. It may be that the exigencies of the telephone business are such as to require, under certain circumstances, if reasonable and not arbitrary or discriminatory, such a regulation, but as to that the Corporation Commission, under the law perhaps would be the proper agency to determine that fact.

On the present record we think the court below correct in the judgment rendered.

Affirmed.

IN THE MATTER OF THE WILL OF MRS. EVA R. BEALE.

(Filed 20 April, 1932.)

1. Wills D h—Undue influence and fraud in the execution of a will may be shown by circumstantial evidence.

Where the validity of a will is attacked on the grounds of undue influence and fraud such grounds may be established by circumstantial evidence, and although the unnatural disposition of his property by the testator is not alone sufficient evidence of fraud and undue influence to be submitted to the jury, where there is other sufficient circumstantial evidence, it is a competent circumstance to be considered by the jury, the probative force being for them.

2. Same—Evidence of fraud and undue influence in execution of will held sufficient in this case to be submitted to the jury.

Where the testatrix, being married, devised all her property to her mother and brother to the exclusion of her husband and daughter, evidence tending to show that the brother employed a lawyer to draft the paper-writing, that she thought she was signing papers relating to paving assessments, that he claimed she had conveyed the property to him which she denied, and stated several times that she wanted her daughter to have her property at her death, that her husband, named as executor in the will, did not know of such instrument until after her death, and that the brother offered the will for probate without his knowledge: is *Held*, sufficient evidence to take the case to the jury on the issue of fraud and undue influence.

3. Trial E c—Held: instructions in this case were sufficiently full and complied with C. S., 564.

Where upon the trial of a caveat to a will the court states the evidence in the case in a plain and correct manner and explains the law arising thereon, the instruction is a sufficient compliance with C. S., 564, and a party desiring subordinate elaboration in the charge should tender a request for special instructions.

4. Wills D h—Failure of propounder and beneficiary, charged with fraud and undue influence, to testify is circumstance for the jury.

Where the propounder and beneficiary of a will is charged with fraud and undue influence in its procurement, the fact that he did not take the stand as a witness may be regarded by the jury as a "pregnant circumstance" in considering the issue.

APPEAL by T. J. Meeks, propounder, from *Warlick, J.*, and a jury, at August Term, 1931, of GUILFORD. No error.

On 27 December, 1927, Mrs. Eva R. Beale, died in Guilford County, N. C., on 15 February, 1930, T. J. Meeks presented to the clerk of the Superior Court for probate a purported will in words and figures as follows:

"State of North Carolina—Rockingham County.

I, Eva R. Beale, wife of D. E. Beale, of Reidsville, N. C., do hereby make, publish and declare this my last will and testament as follows:

Item one: I give and devise my undivided interest in the house and lot located on the north side of Wentworth Street in Reidsville, N. C., adjoining the lands of W. M. Whittemore on the east, Wentworth Street on the south; G. D. Williams on the west and for a further description see deed from A. R. Troxler duly registered to my mother for and during her natural life and her death to my brother, T. J. Meeks, in fee simple forever.

Item two: I give, devise and bequeath all other property to my daughter, Emma Irene.

I hereby constitute and appoint my husband, D. E. Beale, executor of this my last will and testament.

Witness my hand and seal this 24 May, 1924.

Eva R. Beale. (Seal.)

Signed by two witnesses. Mrs. D. E. Beale. (Seal.)"

T. J. Meeks was appointed administrator with the will annexed. D. E. Beale, the husband of Eva R. Beale, and their only child Emma Irene Beale, by her next friend, A. L. O'Shields, filed a caveat to said purported last will and testament, on the ground of fraud or undue influence.

The issue submitted to the jury and their answer thereto, is as follows: "Is the paper-writing offered for probate and every part thereof, the last will and testament of Eva R. Beale (Mrs. D. E. Beale)? Answer: No."

The following judgment was rendered in the court below: "This cause coming on to be heard upon the issue *devisavit vel non* before his Honor, Wilson Warlick, and being heard upon the issue raised by the caveat to said will, the same being as follows: (issue and answer set forth). It is therefore, considered, ordered, adjudged and decreed that the paper-writing offered for probate as the last will and testament of Eva R. Beale (Mrs. D. E. Beale) is not the last will and testament of Eva R. Beale (Mrs. D. E. Beale), and that the same is null, void and of no effect and that the said paper-writing be, and the same is hereby set aside and declared void. It is further ordered and adjudged that a copy of this judgment be certified by the clerk of the Superior Court of Guilford County to the clerk of the Superior Court of Rockingham County in which the real property mentioned in the will is located, and that the same be recorded in the office of the register of deeds of said county. It is further ordered that T. J. Meeks, *c. t. a.* file

his final account with the clerk of this court within 30 days, and that his said letters be revoked when same is filed. It is further considered, ordered and adjudged that the costs of this proceeding be paid out of the proceeds of the estate. WILSON WARLICK, *Judge Presiding.*"

The propounder T. J. Meeks excepted and assigned error to the judgment as signed and 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.

Sharp & Sharp for caveators.
Glidewell & Gwyn for propounder, T. J. Meeks.

CLARKSON, J. Did the court below commit error, in refusing the motion of propounder at the close of caveator's evidence, for a directed verdict, on the ground that the evidence was insufficient to be submitted to the jury as to fraud or undue influence? We think not. Proceeding to probate writing as will is not *inter partes,* but is a proceeding *in rem. In re Brown's Will,* 194 N. C., 583.

The evidence was to the effect that D. E. Beale was the husband of Eva R. Beale. They lived in Greensboro, N. C., and had one child, Emma Irene Beale, now about 13 years of age. They had been married about 14 years. D. E. Beale and Emma Irene Beale are the caveators to the alleged will. Eva R. Beale had a brother, T. J. Meeks, the propounder to the proposed will in controversy. The mother of Eva R. Beale lived in Reidsville, N. C., and Eva R. Beale and her brother, T. J. Meeks, each owned one-half undivided interest in a house and lot on Wentworth Street in Reidsville, in which their mother lived. This was practically all her earthly possessions. She sometimes worked in Reidsville, but died in her husband's home in Greensboro.

D. E. Beale, the husband, testified, in part: "She had been dead more than a year before I ever knew or heard tell of the thing 'will' in the county. You notified me there was a will. I am named as executor in the will. I was never requested to probate that will. I don't know anything about who qualified as executor or administrator with the will annexed."

T. J. Meeks presented the will for probate. It was in evidence that T. J. Meeks went with Eva R. Beale to the attorney's office. An inference can be drawn from the evidence that Meeks paid for drafting the alleged will. Meeks did not testify on the trial.

A. L. O'Shields, testified, in part: That Eva R. Beale boarded at his house about three months, with her little girl. "She was there at

my house about two weeks I think before she died. She stated there all along that she wanted her little girl to have what she had at her death. She had some heart attacks, some smothering attacks every once in a while, very often, and each time she would have those attacks she seemed to think she was going to die. She made this request, that she wanted her child to have what she had at her death. . . . She said her brother was there the day before and she stated he had told her that she had willed or deeded her property to him and she said she hadn't. Said she hadn't said anything about that or signed any kind of paper except some papers about street paving or repairs or something of that kind. I saw the brother when he was down there the day before. . . . I guess she made the statement about her property and this little girl five or six times."

Mrs. A. L. O'Shields, testified, in part: "I heard her say she wanted Emma, her daughter, to have what she had, and she told me she had a house and lot in Reidsville. She told me one time that her brother, Jeff, that she signed some papers she thought was improvements on the street, and said her brother Jeff told her afterwards that it was a deed, a deed for the house and lot to him. . . . She told me she thought she signed a paper about the street paving; she told me that he told her it was about the street paving. On other occasions I heard her say she wanted her little girl to have her property. . . . Mr. Beale came there every week and several times each week and looked after her while she was at our house; carried her laundry and brought it back. Mr. Beale paid part of her board while she was there."

It was contended by the caveators that T. J. Meeks used fraud and undue influence on his sister, Eva R. Beale, to will her interest in her real estate to him to the exclusion of her husband and child. This was denied by the propounder.

The evidence is circumstantial, but we think the numerous facts taken together are of sufficient probative force to have been submitted to the jury on the aspect of fraud or undue influence.

In Page on Wills (2d ed.), sec. 588, at pp. 975-6, we find: "If sufficient evidence is offered upon the issue of undue influence, the question of the existence of undue influence is one of fact, for the jury, under proper instructions. Circumstantial evidence, without any direct evidence, may be sufficient to take the case to the jury."

"As said in *In re Everett's Will,* 153 N. C., 85: 'Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inferences from circumstances must determine it!' It is 'generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its

existence.' It is 'said to be that degree of importunity which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act. It is closely allied to actual fraud; and, like the latter, when resorted to by an adroit and crafty person, its presence often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the more helpless and secluded the victim, the less plainly defined are the badges which usually denote it. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be looked for, the situation of the party taking benefits under the will towards the one who has executed it, and their antecedent relations to each other, together with all the surrounding circumstances, and the inferences legitimately deducible from them, furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud or undue influence has been resorted to and successfully employed. *Grove v. Spiker,* 72 Md., 300.' 18 A. and E. Anno. Cases, 412." *In re Mueller's Will,* 170 N. C., at pp. 29-30. *In re Stephens,* 189 N. C., 267.

Manly, J., in *Wright v. Howe,* 52 N. C., at p. 413 says: "It is a fraudulent influence overruling or controlling the mind of a person operated on." *McDonald v. McLendon,* 173 N. C., 172.

The very nature of fraud or undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.

"Provisions of a will may be considered, in connection with other circumstances, in determining whether or not undue influence was the cause of its execution. . . . Thus the fact that a will makes an unjust or unnatural disposition of testator's estate, may be considered. . . . But the fact that a will or deed makes an unnatural or unjust disposition of testator's or grantor's estate, is not alone sufficient to establish the fact of undue influence; it is only a circumstance to be considered in connection with other proof, and an apparently unnatural disposition of property may be explained and justified." 13 Ency. of Evidence, pp. 248-60. *In re Mrs. Hardee,* 187 N. C., 381; *In re Stephens, supra; In re Will of Casey,* 197 N. C., 347.

In re Shelton's Will, 143 N. C., at p. 221, is the following: "It seems to be generally held that the declarations of a testator are not competent upon the question of the interpretation of the contents of his will, but as to the admissibility of declarations made by the testator upon the question of the *factum* of the will the authorities are divided. This Court seems long since to have aligned itself with those favoring the admission of such evidence, and it has been so classified by other courts.

In *Tucker v. Whitehead,* 59 Miss., 594, the Supreme Court of that state says: 'There are few questions in the law upon which authorities are more hopelessly in conflict than upon the admissibility of declarations of a deceased testator in support or in rebuttal of a supposed *revocation* of a testamentary paper. It has engaged the attention and elicited the logic of the greatest jurists who have adorned the bench of this or any country. Against the admissibility of such evidence are to be found the names of Kent, Story, and Livingston, and in favor of it those of Walworth, Ruffin, Lumpkin, and Cooley. Certainly we can hope to add nothing to the strength of an argument on either side, which has already been exhausted by such men as these.' " *In re Bailey,* 180 N. C., 30.

The propounder in his brief, in reference to the charge of the court below, says: "The definitions of undue influence and fraud are free from criticism and are supported by the decisions of our Court. The contentions of the propounder and the caveators were set forth very elaborately. The judicial mandate as to how the jury should answer the issue in the event they found that the will was procured to be executed by undue influence or by fraud was properly given (assuming that there was evidence of course upon the question)."

But the propounder contends that the court below did not comply with C. S., 564, that the court did not "state in plain and correct manner the evidence given in the case and declare and explain the law arising thereon." On the record we cannot so hold. If propounder wanted a charge more in detail, setting forth the law applicable to the facts, proper prayers for instruction should have been requested.

The court below properly charged as to the burden of proof when on propounder and caveator, to which there was no exception. *In re Will of Rowland, ante,* 373.

It may be noted that T. J. Meeks was not a witness, although charged with fraud or undue influence on his sister. We think this may be regarded as a "pregnant circumstance." *Walker v. Walker,* 201 N. C., 183. There were other facts and circumstances. On the evidence it was a question of fact for the jury to determine.

It may not be amiss, in a case of this kind, to say that there can be no reflection on an attorney who draws a will. He does not always know the motive of the parties.

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

No error.

C. H. STEPHENSON AND WIFE, MINNIE DHUE STEPHENSON, v. DUKE UNIVERSITY.

(Filed 20 April, 1932.)

1. Appeal and Error F d—Only questions presented by appealing party will be considered by the Supreme Court.

Where, in an action by a father and mother to recover damages for the mutilation of the body of their dead child, the defendant's demurrer on the ground that the complaint was insufficient to state a cause of action is sustained as to the mother and overruled as to the father, and the defendant does not appeal from the judgment, in the Supreme Court it will be deemed that the defendant admitted that the action could be maintained by the father, and the question of his right to maintain the action will not be considered.

2. Parent and Child A e—Father has preferential right to maintain action for mutilation of dead body of minor child.

A father's relation to his minor child and the consequent duties imposed on him by law clothes him with a preferential right of action over the mother of the child to bring an action to recover damages for the mutilation of its dead body, and where an action therefor is brought by the father and mother jointly, a judgment sustaining the defendant's demurrer as to the mother will be sustained on appeal, and the provisions of N. C. Code of 1931, 137(6), entitling the father and mother to share equally in the estate of a deceased child does not affect this result.

APPEAL by plaintiffs from *Midyette, J.*, at January Term, 1932, of DURHAM.

The record contains the following concise statement of the case on appeal:

This is an action instituted in the Superior Court of Durham County to recover both compensatory and punitive damages against the defendant for the alleged wrongful and wilful mutilation of the dead body of the child of plaintiffs.

The action was originally instituted by C. H. Stephenson and entitled "C. H. Stephenson *v.* Duke University."

His Honor Judge Frizzelle at August Term, 1931, ordered that the *feme* plaintiff be made a party to this action, to which said order no objection or exception was made, and the plaintiffs were allowed thirty days from the date of said order to file a new and joint complaint herein, and defendant was allowed thirty days after the filing of said complaint to file answer or demurrer.

A new joint complaint was filed in the action, and defendant filed a demurrer to the new joint complaint, and the cause then came on again for hearing and was heard before his Honor, Garland E. Midyette,

judge presiding, at the January Civil Term, 1932, of said Durham County Superior Court. His Honor, Judge Midyette, entered a judgment "that the demurrer as to the said Minnie Dhue Stephenson be, and it is hereby sustained, but that the demurrer as to plaintiff C. H. Stephenson be, and it is hereby overruled."

To the judgment as entered the plaintiffs excepted and assigned the same as error and appealed to the Supreme Court.

The demurrer was interposed upon the following ground:

1. The *feme* plaintiff is not entitled to maintain any action alone or jointly with her coplaintiff on account of the matters and things set out in the complaint.

2. The complaint does not state a joint cause of action on behalf of the plaintiffs; if it states any cause, which is denied, it states two causes—one on behalf of each of the plaintiffs.

3. If the complaint states two causes of action, which is denied, the two causes have been improperly united.

4. If the complaint states a joint cause of action entitling the plaintiff to nominal damages, which is denied, it seeks to recover damages which are peculiarly personal to each plaintiff and not to the plaintiffs jointly.

The court sustained the demurrer as to *feme* plaintiff's alleged cause of action and overruled it as to the cause stated by C. H. Stephenson. The plaintiffs excepted and appealed.

William B. Guthrie and S. C. Brawley for plaintiffs.
Fuller, Reade & Fuller, and T. D. Bryson for defendant.

ADAMS, J. This action was brought to recover damages for the mutilation or autopsy of the dead body of a child. The plaintiffs were the child's parents. The court adjudged in effect that the father may maintain the action and that the complaint does not state a cause of action in behalf of the mother. The plaintiffs appealed; the defendant did not appeal. We therefore treat as conceded the defendant's satisfaction with the judgment and its acquiescence in the conclusion that the action may be prosecuted by the male plaintiff, and that as to him the complaint states a cause of action. The right to bury the dead is generally treated as a *quasi*-right of property. *Floyd v. R. R.*, 167 N. C., 55. If the father has a right of action we need discuss neither the divergent views expressed in regard to the right of property in the dead body of a human being nor the legal right of the proper person to prosecute a suit for its mutilation. In this State the right to maintain an action for such mutilation has been recognized for almost a third of a century. *Kyles v. R. R.*, 147 N. C., 394. The single question with which we are

now concerned is whether upon the allegations in the complaint the *feme* plaintiff, the mother of the deceased child, has a cause of action. To this question our investigation shall be restricted, because "it probably is not wise, if proper, to attempt to declare general rules beyond the case actually presented."

We have found few cases dealing with the precise question and in those examined there is apparent discrepancy of statement in reference to the right of parents to institute a joint action for the mutilation of the dead body of their child. In *Renihan v. Wright,* 9 L. R. A. (Ind.), 514, the Court sustained a joint action for the breach of a contract of bailment by which the undertakers and funeral directors agreed for a compensation jointly paid by the parents safely to keep the body of the deceased child until the time when the parents might be prepared for the interment. The question of a joint action seems not to have been raised in *Douglas v. Stokes,* 42 L. R. A. (Ky.), 386. It was said in *Coty v. Baughman,* 48 A. L. R. (S. D.), 205, that by virtue of a statute the duty of burial devolved alike upon the father and the mother. *Wright v. Beardsley,* 89 Pac. (Wash.), 172 was an action to recover damages for breach of a contract for the proper burial of a deceased child and a joint action was upheld on the ground that persons who are the lawful custodians of a deceased body may maintain an action for its desecration. These and other cases of like tenor are not decisive of the question before us.

There are others in which suits for mutilation brought by the father alone were upheld. In *Burney v. Children's Hospital,* 47 N. E. (Mass.), 401, the demurrer raised the question whether the father of a child, who was its natural guardian and who had intrusted the child to a hospital for treatment could maintain an action against the hospital for an autopsy performed without his consent. The Court held that the father as the natural guardian of the child was entitled to the possession of the body for burial and being entitled to its possession could maintain an action against one who unlawfully mutilated the remains. The Court of Appeals of Alabama has said: "The right of a father to care for, watch over, and bury the dead body of his minor child has always been recognized and protected by the law." *Birmingham Transfer & Traffic Co. v. Still,* 61 So., 611. Also in *Southern Life & Health Ins. Co. v. Morgan,* 105 So., 161: "It is without conflict in this case that plaintiff was the father of the deceased; that, if he (the deceased) had a wife living, the wife was not present and had nothing to do with the custody of the body. In the absence of the wife the father had the lawful custody of the body, and it was his duty to give it decent interment."

For want of a more complete statement of the facts we should hesitate to accept these decisions as controlling in the present case. We have cited them in contrast with those representing the opposing view as indicating diverging lines of thought.

Among our own decisions *Floyd v. R. R., supra,* is the nearest approach to the identical question presented by the appeal. There the mother, while the father was living, instituted an action against a railroad company for the negligent mutilation of the dead body of her son. The father, who was a nominal party, disavowed any right to recover damages in his own behalf. It was, therefore, regarded as her suit, and not his. The Court held that the mother could not maintain the action. The *ratio decidendi* was two-fold: (a) the father, being the natural guardian of his child, could by reason of his relationship and his legal obligations and responsibilities, maintain an action for an unauthorized autopsy; (b) the surviving father, if his child died intestate without wife or children, was entitled to all the personal property of the deceased child. Pub. Laws, 1911, chap. 172.

In reference to the first proposition the court observed that the father is primarily liable for the support, maintenance and education of his child as between himself and its mother; he is entitled to its services and earnings; the right of action for injury to the person of his child (quoting from 29 Cyc., 1637) belongs primarily to the father and rests upon the doctrine of compensation. One basis of the right of action was said to be the resulting loss of the services of the child, but it was stated as the better view that the right of action rests not only upon the father's right to services but also upon the duty of care and maintenance. If, inquired the court, the father is entitled to the preferential right to sue in the cited instances, why not where the body of the child, with whose decent burial he is charged, has been mutilated or disfigured after death? The opinion proceeds: "At common law it was the duty of the father to decently inter his child and to defray necessary expenses thereof if he possessed the means. Would it not seem to follow logically and naturally, as the night the day, that if he must attend to its decent burial, he is entitled to recover for any indignity to or defacement of the body by which the decent interment is prevented or rendered more difficult? We are unable to perceive why this is not so."

True, it is said *arguendo* that the right to bring suit goes to the next of kin; and the act of 1911, *supra,* is cited in support of the conclusion announced in *Floyd's case.* As a corollary from this part of the opinion the appellants insist that the mother, being entitled under the act of 1915 equally with the father to the estate of the deceased child, has equal right to maintain the action. Pub. Laws 1915, chap. 37; Code

of 1931, sec. 137(6). This result does not necessarily follow. A careful perusal of the opinion will indicate, we think, that the act of 1911 was referred to primarily in support of the proposition that the father's relation to the child imposed certain duties upon him which entailed the primary right of suit in his name in cases of this kind. This thought was probably in the mind of the Court, for it is said in the dissenting opinion that the statute of distributions had no application and that an action for the tort was not required to be brought by the next of kin. Our conclusion is that the father's relation to the child and the consequent duties imposed upon him by the law, some of which have been enumerated, are of such character as to clothe him with a preferential right of action and that the judgment should be affirmed. However acute the mother's suffering in comparison with that of the father, we are not now concerned with the doctrine of mental anguish beyond suggesting that the practical difficulty of assessing damages in a joint action of this nature is removed in the present case by our holding that upon the allegations in the complaint the father has the right of action. Questions possibly arising among the next of kin when there is no surviving father or mother must be solved when they are properly contested. Judgment

Affirmed.

GEORGE W. EDWARDS v. BERNICE E. TURNER AND HUSBAND, EDWIN D. TURNER, LINVILLE K. MARTIN AND I. E. CARLYLE, TRUSTEE.

(Filed 20 April, 1932.)

Pleadings E a—Amendment in this case held not to substantially change the cause alleged and pleadings were not inconsistent.

Where the purchaser of lands under a foreclosure sale of a mortgage brings ejectment against the mortgagors in possession who deny the validity of the mortgage under which the lands were sold, it is within the discretion of the trial court to permit the plaintiff to amend his complaint to allege that the defendants had given other mortgages on the same land and ask that if the mortgage under which he claims be declared void that he be subrogated to the liens of the prior mortgages and that the lands be sold to enforce the same, there being no substantial departure by the amendment from the cause originally alleged, and the pleadings not being inconsistent. C. S., 547, 507.

APPEAL from *Harding, J.*, at February Term, 1932, of FORSYTH. Affirmed.

This was a civil action in ejectment, instituted in the Forsyth County Court, before his Honor, Oscar O. Efird, judge presiding. From an

order signed by the judge of the Forsyth County Court overruling a motion, plea and a demurrer filed by the appellant, Bernice E. Turner, to the amended complaint, as appears of record, Bernice E. Turner appealed to the Superior Court for Forsyth County. The appeal was heard before his Honor, W. F. Harding, judge presiding at the February Term, 1932, who signed a judgment sustaining the judgment of the Forsyth County Court, as appears of record. Bernice E. Turner excepted to the judgment of the Superior Court, assigned error and appealed to the Supreme Court.

Parrish & Deal for plaintiff.
Peyton B. Abbott and Hastings & Booe for defendants.

CLARKSON, J. The plaintiff sued defendant Bernice E. Turner in ejectment. In answer she alleged that the note secured by deed in trust under which the land in controversy was sold and at which sale plaintiff purchased was a forgery; therefore the sale under same was inoperative and void. The plaintiff was allowed to amend and filed an amended complaint. *Robinson v. Willoughby*, 67 N. C., 84. In the amended complaint the plaintiff has not alleged two causes of action, but has only asked for alternative relief. The plaintiff's pleadings are not inconsistent. He alleges that the last deed of trust which was foreclosed was valid. The defendant denies this. The plaintiff then alleges that the three previous deeds of trust were valid. That is not in fact inconsistent with his first allegation. In other words, the plaintiff alleges that all four deeds of trust are valid. The defendant contends that none of them are. The plaintiff asks for alternative relief, depending on how the facts may be found.

The defendant, Bernice E. Turner, contends that the amended complaint is a departure. We cannot so hold.

C. S., 547, is as follows: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto."

In McIntosh, N. C. Prac. & Proc., part sec. 479, at pp. 510-11, is the following: "The plaintiff cannot in his reply set up a cause of action

different from that contained in his complaint. Such pleading is a departure, and is governed by the provision that the reply must not be inconsistent with the complaint."

McIntosh, *supra,* part sec. 487, at p. 516, says: "The statute permits an amendment in the discretion of the court, 'when the amendment does not change substantially the claim or defense.' This is found in connection with the amendment to make the pleading conform to the proof, but it has been applied generally to all amendments made under order of court. The pleadings of the parties fix the nature of the action, and it is not subject to arbitrary control, and the court has no authority to allow an amendment which makes a substantially new action, except by consent of the parties. 'This would not be to amend, in any proper sense, but to substitute a new action by order, for and in place of the pending one.' This is in the nature of departure in pleading, and it may arise by introducing new allegations, which change the nature of the action or new parties which have the same effect." (Quoting from *Clendenin v. Turner,* 96 N. C., 416, and citing other cases.) *Olmstead v. Raleigh,* 130 N. C., 243; *Parker v. Realty Co.,* 195 N. C., 644; *Gibbs v. Mills,* 198 N. C., 417; *Jones v. Vanstory,* 200 N. C., 582; *Lykes v. Grove,* 201 N. C., 254.

C. S., 507, in part, is as follows: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of (1) The same transaction, or transaction connected with the same subject of action," etc. *Shafer v. Bank,* 201 N. C., at p. 419.

The causes of action which plaintiffs rely on arise out of or are connected with the same subject of action—bottomed on the same indebtedness.

In *Wallace v. Benner,* 200 N. C., at p. 131, we find: "We think the principle applicable in this case is clearly set forth in Jones on Mortgages (8 ed., 1928), part sec. 1114, pp. 559-560: 'There is clearly no scope for the operation of the principle of equitable subrogation in a case of ordinary borrowing, where there is no fraud or misrepresentation, and the borrower creates in favor of the lender a new and valid security, although the funds are used in order to discharge a prior encumbrance. In such case, the lender is treated as a mere volunteer in the transaction. But the rule is settled that, where money is expressly advanced in order to extinguish a prior encumbrance, and is used for this purpose, with the just expectation on the part of the lender of obtaining a valid security, or where its payment is secured by a mortgage which for any reason is adjudged to be defective, the lender or mortgagee may be subrogated to the rights of the prior encumbrancer

whose claim he has satisfied, there being no intervening equity to prevent. It is of the essence of this doctrine that equity does not allow the encumbrance to become satisfied as to the advancer of the money for such purposes, but as to him keeps it alive, and as though it had been assigned to him as security for the money," etc.

In the amended complaint is the following prayer for judgment: "(1) That the defendants, Bernice E. Turner and her husband, Edwin D. Turner, be removed from the possession of the lands, and that the plaintiff be placed in possession thereof; that the costs of this action to be taxed against the defendants, Bernice E. Turner and Edwin D. Turner. (2) That if it be adjudged by the court that the note and deed of trust, of 23 April, 1929, are forgeries as to the defendant, Bernice E. Turner, the court adjudge that the plaintiff is subrogated to the rights that Linville K. Martin would have had under any and all of the three previous deeds of trust, and that the court decree that the plaintiff is entitled to a lien on said lands to secure him in the sum of $2,640, with interest thereon from 23 April, 1929, and that the court appoint a commissioner for the purpose of foreclosing same, and that the net amount resulting from said foreclosure be applied to the indebtedness of Bernice E. Turner, Edwin D. Turner and Linville K. Martin to the plaintiff in the sum of $2,640, with interest from 23 April, 1929. (3) That the court grant the plaintiff such other and further relief as may be just and proper." For the reasons given, the judgment of the court below is

Affirmed.

STATE v. PEARLIE WHITEHURST, J. O. MANNING AND DOC MOORE.

(Filed 20 April, 1932.)

1. Larceny A c—Physical presence at time of commission of the crime is not essential for conviction of larceny.

Physical presence at the scene of larceny is not absolutely essential to a conviction, and where a party actually procures the commission of the crime by others or aids or abets the commission thereof by them he is guilty as a principal.

2. Criminal Law L e—Instruction in this case held not prejudicial to the defendant.

In a prosecution of several defendants for the larceny of a cow the division of the proceeds from the sale of the cow is not an element of the crime, and on the question of the guilt of one of the defendants a charge of the court requiring that the jury should find that he received a part of the proceeds before convicting him, if erroneous because not supported by the evidence, is not prejudicial to the defendant.

3. Criminal Law I g—Error in statement of contentions should be brought to court's attention in apt time.

An inadvertence in the statement of the contentions of the State in a criminal prosecution must be brought to the trial court's attention in apt time.

CRIMINAL ACTION, before *Sinclair, J.*, at November Term, 1931, of PITT.

The defendants were indicted for stealing a cow of the value of $31.90. There was a second count for receiving. The defendant, Pearlie Whitehurst, pleaded guilty, and thereafter testified in behalf of the State. His testimony was to the effect that the defendant, Manning, went with him to Tarboro to engage some beef and that upon returning Manning told him to butcher a bull. On the night of the larceny the State's witness and Manning traveled in a truck belonging to Manning until they arrived at Manning's home. Manning got out "and sent Doc Moore" with the witness, Whitehurst, "to kill the beef down to the pasture which is two or three miles from the Manning farm." When the defendants, Moore and Whitehurst, arrived at the pasture they undertook to kill a bull, but the bull got away, and thereupon they killed a cow belonging to one Zeb Whitehurst. After butchering the cow they took the beef to Tarboro and sold it for $25.00. The defendant, Whitehurst, received $10.00 of the proceeds of the sale. Whitehurst further testified that he "did it because Oscar Manning asked him to do it." The evidence for the State further tended to show that at the time Moore and Whitehurst stole and butchered the cow that Manning was not present and was then at his home about three miles away. Manning denied that he had anything to do with the killing or that he knew anything about it. There was no competent evidence that Manning received any part of the proceeds of the beef. Moore and Manning were convicted of larceny by the jury, and thereupon Manning appealed from the judgment pronounced.

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

Julius Brown for Manning.

BROGDEN, J. Can a person be convicted of larceny who is not present when the crime is committed?

The judge charged the jury as follows:

"Now, gentlemen, the court charges you that if you find that Doc Moore and Whitehurst, or either of them, engaged the sale of that cow which was to be stolen and turned to beef, and you find that Manning

was a party to it and that he suggested it to the others, or either of them, and that in consequence of his suggestion and direction that they or either of them did steal the cow and butcher it and sell the beef and Manning knew it, that he was coöperating with them, participated in the entire enterprise with them and expected to get, and did get a part of the proceeds of the cow, I charge you that that would make him just as guilty of the larceny of the cow as if he had actually gone and butchered the cow and sold it himself. . . . It makes no difference whether he was present or not, because it would be what the law calls *particeps criminis*, he would be a party to the entire transaction, and all three would be guilty, if you find that all three were coöperating in pursuance of a common purpose in stealing this cow and butchering it for sale. . . . Now, gentlemen, if you are satisfied beyond a reasonable doubt that Moore and Manning, or either of them, entered into the agreement, upon an enterprise with Pearlie Whitehurst, he engaging the sale of this beef, to steal this cow and have it butchered and carry it off and sell it and did it, it would be your duty to return a verdict of guilty as to both, or either one of them, if you are so satisfied of their guilt beyond a reasonable doubt, if you are not so satisfied you would return a verdict of not guilty as to both, or such one of them as you may find not guilty, the burden being upon the State to satisfy you of the guilt of both beyond a reasonable doubt."

Discussing the crime of larceny in *S. v. Overcash*, 182 N. C., 889, 109 S. E., 626, *Hoke, J.*, said: "As to this offense, our decisions are to the effect that there can be no accessories, but all who aid, abet, advise or procure the crime are principals." *S. v. Stroud*, 95 N. C., 627; *S. v. Fox*, 94 N. C., 928. After adverting to the agreement by the parties the opinion concludes as follows: "The fact that this arrangement spoken of may have amounted to a conspiracy to steal does not render the evidence incompetent on the issue presented, as it clearly tends to show that appellants advised and procured the crime and would justify a conviction for the consummated offense."

Consequently physical presence at the scene of larceny is not deemed to be absolutely essential to conviction if it appears that the defendant actually "advised and procured the crime" or aided and abetted the commission thereof. There is no evidence that the defendant, Manning, received any part of the proceeds of the sale of the beef and he insists that the instruction of the trial judge to the jury containing the expression that the defendant got "a part of the proceeds of the cow" is error. However, even if it be conceded that this statement was error, it was error against the State rather than the defendant, because it imposed upon the State a heavier burden than it was required to bear, for

the reason that the defendant would be guilty if the jury found beyond a reasonable doubt that he aided, abetted, advised or procured the commission of the crime whether he shared in the proceeds thereof or not.

There is further exception to the fact that the trial judge stated that the State contended that the defendant, Manning, received $10.00 of the proceeds of the sale of the beef when there was no evidence to support such contention. But this Court has invariably held that an inadvertence in a statement of contentions must be called to the attention of the trial judge at the time. *S. v. Sinodis*, 189 N. C., 565, 127 S. E., 601; *S. v. Johnson*, 193 N. C., 701, 138 S. E., 19; *S. v. Geurakus*, 195 N. C., 642, 143 S. E., 208.

No error.

J. D. HARRIS v. L. C. BUIE AND GALEN HARRIS, BY HIS NEXT FRIEND, J. D. HARRIS, v. L. C. BUIE.

(Filed 20 April, 1932.)

1. Contracts F c—Under the allegations in this action for breach of contract the admission of evidence of reasonable worth of services was not error.

Where an employee of a dairy sues his employer upon the contract of employment and alleges that he was to be paid a fixed sum per month plus a division of the profits when the dairy was brought up to "A" grade, the admission of evidence as to the value of the services rendered will not be held for error, there not being such a variance between allegation and proof as to constitute prejudicial error to the defendant.

2. Trial D a—Where defendant does not move for judgment as of nonsuit he waives question of sufficiency of the evidence.

Where the defendant in a civil action does not comply with the provisions of C. S., 567, in making a motion for judgment as of nonsuit he waives the question of the sufficiency of the evidence.

APPEAL by defendant from *Finley, J.*, and a jury, at September Term, 1931, of RICHMOND. As to both appeals no error.

(1) This is an action brought by plaintiff, J. D. Harris, to recover of defendant, for breach of contract, the sum of $245 for services in connection with the defendant's "Sunny Slope Dairy," near the town of Red Springs, N. C.

The defendant in his answer denied any breach of contract or that he owed plaintiff anything, and says: "That the defendant paid the plaintiff much more than his services were really worth and paid him every cent that he obligated to pay him, and, therefore, the defendant does not owe the plaintiff any sum whatever."

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

"1. Did the plaintiff, J. D. Harris, enter a contract with the defendant, L. C. Buie, as alleged in the complaint? Answer: Yes.

2. If so, did the defendant break said contract? Answer: Yes.

3. What damages, if any, is the plaintiff entitled to receive? Answer: $162.50."

Judgment was rendered on the verdict for plaintiff and against the defendant.

(2) This is an action brought by plaintiff, Galen Harris, by his next friend, J. D. Harris, against defendant for breach of contract, to recover of defendant the sum of $300 for six months' services at $50.00 a month, in connection with defendant's dairy above referred to.

Defendant denied that he ever employed Galen Harris "to drive one of the defendant's milk trucks at a salary of $50.00 per month."

The issue submitted to the jury and their answer thereto were as follows: "What amount, if any, is the plaintiff, Galen Harris, entitled to receive of the defendant? Answer: $200."

Judgment was rendered on the verdict for plaintiff and against defendant. The defendant excepted and assigned errors as to the signing of both judgments, made other exceptions and assignments of error and appealed to the Supreme Court.

Fred W. Bynum for plaintiffs.

J. C. Sedberry for defendant.

CLARKSON, J. (First action.) At the close of plaintiff's, J. D. Harris, evidence, and at the close of all the evidence, defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

The plaintiff J. D. Harris testified, in part: "Mr. Buie paid me $40.00 per month but that was not the contract exactly. That was the contract until we reached the grade A standard. . . . The trade about my getting half of the profits was to start when I got the dairy up to A grade standard. I demanded my half of the profits the first month after it went up to grade A, but he said wait until we got a few more cows."

We do not think there is such a material variance between the allegations and proof that defendant can complain of. *Stokes v. Taylor,* 104 N. C., 394; *Dorsey v. Corbett,* 190 N. C., 783; *Brown v. Williams,* 196 N. C., 247.

When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract

and resort to an action for a *quantum meruit* on an implied assumpsit. *Dorsey's case, supra.*

(Second action.) The plaintiff, Galen Harris, testified, in part: "On 12 May I began driving Mr. Buie's milk truck. He fired Ben McBryde and told father and I that he wanted me to drive the truck for him and that he would pay me $50.00 per month, the same he had been paying McBryde. . . . I worked for him six months and he did not pay me anything. I am claiming $50.00 for the six months. Mr. Buie never complained to me about my work. He said I had done all right. I was not of age to work for him and ask for my pay. I left that to my father as he was handling the business transaction."

J. D. Harris testified, in part: "I have had the court appoint me as next friend of my son to bring this suit. . . . Mr. Buie got dissatisfied with one of his drivers and he asked me if I thought I could finish up and get ready for grade A and let him put Galen on a truck. I told him I thought I could and so we called Galen over and he asked Galen if he would be willing to drive the truck at $50.00 per month, the same he had been paying McBryde. My son went to work for him the next morning. He worked six months. I never got any money from him for Galen."

In this action Galen Harris, by his next friend, J. D. Harris, against L. C. Buie, at the close of plaintiff's evidence the defendant, Buie, did not move for judgment as in case of nonsuit in the court below, nor at the close of all the evidence, as he had a right to do under C. S., 567. By the failure of defendant to follow strictly C. S., 567, *supra*, the question of the insufficiency of evidence is waived. *Nowell v. Basnight*, 185 N. C., 142; *Penland v. Hospital*, 199 N. C., 314; *Batson v. Laundry Co., ante*, 560. For the reasons given, in the judgment of the court below we find

No error.

C. C. LEE AND WIFE, SIDNEY HESTER LEE, v. MERCHANTS BANK.

(Filed 20 April, 1932.)

Lost or Destroyed Instruments B a—Where instrument has been lost provisions therein for demand and return will not prevent a recovery.

The provisions of a certificate of deposit that it should be payable upon demand and return of the certificate will not prevent a recovery thereon against the bank where the certificate has been lost, the issuance and contents of the certificate not being in dispute, nor does the failure of the plaintiff to tender bond for the defendant's protection prevent such

recovery when the defendant has made no request therefor, and in this case the evidence of the loss of the instrument was sufficient to be submitted to the jury.

CIVIL ACTION, before *Devin, J.*, at September Term, 1931, of SAMPSON.

On 31 October, 1914, Mrs. C. C. Lee deposited in the Merchants Bank of Durham the sum of $500, and at the time of making the deposit received a certificate for said sum, duly signed by the cashier of said bank. Subsequently the plaintiff delivered said certificate of deposit to C. B. Green, clerk of the Superior Court of Durham County, in lieu of a guardian bond. The plaintiff filed a final account as guardian and requested the clerk to return said certificate to her, but did not receive it. C. B. Green died in July or August, 1916, and E. L. Tilley succeeded him as clerk of the Superior Court of Durham County. He testified that he saw the certificate of deposit at one time in the presence of Mr. Green, and that after Mr. Green's death he made an examination of all the papers in the office "where certificates of this kind would ordinarily be placed. I went through all the papers. I did not find this certificate. I made this examination immediately after Mr. Green's death. . . . We had two certified public accountants checking over things. They were going over the records to see what money he had and the securities he had in the office. This paper was not found among them." The old courthouse in Durham was torn down and a new courthouse erected. When the old building was dismantled the records in the clerk's office were moved to a location in the Geer Building pending the completion of the new structure.

James Stone, assistant clerk of the Superior Court of Durham County, who has held such office since January, 1922, testified: "I have searched the main office in every nook and corner in there, but we have a big vault that has an accumulation of papers, and it is not where papers of this kind would ordinarily be kept. I have not found the certificate of deposit." The witness further testified that he had searched in "dead vault where old records and things are dumped. The dead vault is about 30 feet square. It is a big file of old magistrates' reports for the past twenty years. . . . I found there an accumulation of Judge Green's old correspondence. I have looked through one or two boxes down there for this certificate. There are about twenty boxes there. . . . I did not find any active papers of any kind there. This would not be a proper place for active papers like a certificate of deposit or anything of value."

The issues were as follows:

1. "Did the plaintiff, as owner and holder of the certificate of deposit, present the said certificate of deposit for payment and demand payment under the terms and provisions thereof?"

2. "Was the certificate of deposit No. 1483, issued by the Merchants Bank of Durham (described in the answer), lost or destroyed while in the hands of the clerk of the Superior Court of Durham County, and cannot now, after due diligence, be found?

3. "What amount, if any, is the plaintiff, Mrs. C. C. Lee (now Mrs. Sidnia Perry), entitled to recover of the defendant?"

The jury answered the first issue "No," the second issue "Yes," and the third issue "$500 at four per cent interest."

From judgment upon the verdict, the defendant appealed.

Smith & McLeod and Faircloth & Fisher for plaintiffs.

McLendon & Hedrick, J. D. Johnson and Brawley & Gantt for defendant.

BROGDEN, J. The defendant resists recovery upon three theories:

1. There was no sufficient evidence of loss or destruction of the certificate of deposit.

2. Such certificate was payable upon demand and upon the return of the certificate, and there was no evidence of such return or demand.

3. There was no sufficient evidence of the loss of the instrument to be submitted to the jury.

The issuance and contents of the certificate were not in dispute. There was sufficient evidence of the loss of the instrument to be submitted to the jury. *Bank v. Brockett,* 174 N. C., 41, 93 S. E., 370.

The contentions of defendant with respect to presentment and indemnity have been decided adversely by this Court in *Wooten v. Bell,* 196 N. C., 654, 146 S. E., 705.

No error.

A. S. GRADY, RECEIVER OF FARMERS AND MERCHANTS BANK OF MOUNT OLIVE, v. S. L. WARREN ET AL.

(Filed 20 April, 1932.)

Pleadings E a—Where action is dismissed for misjoinder of parties and causes the court has no jurisdiction to allow amendment.

Where an action has been dismissed for misjoinder of parties and causes the action is not pending and the court has no power to allow a motion to amend the pleadings under the provisions of C. S., 515.

APPEAL by plaintiff from *Harris, J.,* at February Term, 1932, of WAYNE. Affirmed.

Teague & Dees, J. Faison Thomson and Kenneth C. Royall for appellant.

Langston, Allen & Taylor, Dickinson & Freeman and R. D. Johnson for appellees.

ADAMS, J. The plaintiff filed his complaint in an action entitled as above, to which the defendants demurred. For misjoinder of parties and causes of action Judge Cowper sustained the demurrer and dismissed the action. On appeal the judgment was affirmed, this Court observing that the act of 1931 amending C. S., 456 (Pub. Laws 1931, chap. 334, sec. 2), applies only when the plaintiff is in doubt as to the persons from whom he is entitled to redress on his cause of action. *Grady v. Warren,* 201 N. C., 693.

When the demurrer was sustained for misjoinder of parties and causes the action was dismissed. *Bank v. Angelo,* 193 N. C., 576; *Harrison v. Transit Co.,* 192 N. C., 545; *Robinson v. Williams,* 189 N. C., 256.

Within ten days after the receipt of the certificate of the Supreme Court the plaintiff moved on three days' notice for leave to amend the complaint by striking out all allegations relating to the Citizens Bank and by striking out the Citizens Bank as a party defendant. Judge Harris properly denied the motion as a matter of law.

The right to amend the complaint upon three days notice under C. S., 515, when a demurrer is sustained, has no application to cases in which the action has been dismissed for misjoinder of parties and causes. In such event the action is not pending and the court is without jurisdiction to allow the amendment. Judgment

Affirmed.

CLARENCE H. MACKAY AND EDWARD ARMSTRONG, AGENT, v. C. O. MEREDITH AND SOUTHERN REAL ESTATE COMPANY.

(Filed 20 April, 1932.)

Payment A c—Payment of amount of mortgage debt to clerk is not payment to the mortgagee, there being no statutory authority therefor.

Where in a suit to restrain the foreclosure of a mortgage a controversy arises between the mortgagor and the mortgagee as to the amount due thereunder, and the mortgagor deposits the amount claimed to be due by him with the clerk of the Superior Court and has notice to be served on the mortgagee that the amount would be paid to him upon surrender and cancellation of the note and mortgage, and the issue as to the amount of the debt is answered in favor of the mortgagor: *Held,* a judgment ordering the cancellation of the note and mortgage and permanently enjoining

the foreclosure of the instrument is erroneous, the payment to the clerk not being payment to the mortgagee, the clerk being the agent of the mortgagor and not the mortgagee and there being no statutory authority for such payment to the clerk.

APPEAL by defendant, C. O. Meredith, from *Warlick, J.*, at September Term, 1931, of GUILFORD. No error in the trial; error in the judgment.

This is an action for a permanent injunction, restraining the defendant, C. O. Meredith and his agent, Southern Real Estate Company, from selling the land described in the complaint under the power of sale contained in a mortgage executed by Jesse Cole and wife, under whom plaintiff claims title to said land.

The action arose out of a controversy between the parties as to the amount due on the note secured by the mortgage. The plaintiff contended that the amount due is $1,493.45, with interest from 6 October, 1930; the defendant contended that said amount is $1,531.71, with interest from 15 May, 1930. It is admitted in the pleadings that after the defendant had advertised the land for sale under the power of sale in the mortgage, to wit, on 6 October, 1930, the plaintiff deposited with M. W. Gant, clerk of the Superior Court of Guilford County, the sum of $1,493.45, and caused notice to be served on the defendant by the sheriff of said county that said amount would be paid to the defendant by said clerk of the Superior Court, upon the surrender of the note marked paid and of the mortgage duly canceled. This action was commenced on 9 October, 1930.

The only issue submitted to the jury at the trial of the action was answered as follows:

"What amount is due the defendant, C. O. Meredith, upon the mortgage deed of Jesse Cole and wife mentioned and described in the complaint? Answer: $1,493.45."

From judgment ordering and decreeing that the note and mortgage executed by Jesse Cole and wife to the defendant, C. O. Meredith, and described in the complaint, be marked satisfied and canceled, and that said defendant be restrained and enjoined permanently from exercising the power of sale contained in said mortgage, the defendant appealed to the Supreme Court.

H. R. Stanley for plaintiffs.
Hoyle & Harrison for defendants.

CONNOR, J. There was no error in the trial of this action. On the argument of the defendants' appeal in this Court, their counsel stated that defendants did not desire a new trial of the issue involving the

amount due on the note secured by the mortgage, but did contend that there was error in the judgment. This contention is sustained.

The admission in the pleadings that prior to the commencement of this action, plaintiff had deposited with M. W. Gant, clerk of the Superior Court of Guilford County, the amount which he contended was due on the note, and which the jury found was the amount due, does not support the contention of the plaintiffs that said amount was thereby paid. There is no statute in this State which authorizes a person who is a party to a controversy as to the amount of his debt to another, to pay the amount which he contends is due to a clerk of the Superior Court, and thereby discharge his debt. In the instant case, M. W. Gant received the amount paid to him by the plaintiff, as the agent of the plaintiff and not of the defendant. It is not alleged in the complaint nor was there evidence at the trial tending to show that the amount found by the jury to be due on the note was tendered to the defendant by the plaintiff or by M. W. Gant, prior to or during the pendency of the action. There is error in the judgment.

The action is remanded to the Superior Court of Guilford County, that judgment may be entered in said court, fixing the amount due on the note. It was error to enjoin and restrain the defendant, upon the admission in the pleadings, from selling the land described in the complaint under the power of sale contained in the mortgage from Jesse Cole and wife to the defendant.

No error in the trial.

Error in the judgment.

FRANK WELCH, JR., v. HUSKE HARDWARE HOUSE.

(Filed 20 April, 1932.)

Appeal and Error J b—Action of trial court in setting aside verdict in his discretion is not reviewable on appeal.

The action of the trial court in setting aside the verdict in his discretion as being against the weight of the evidence involves no question of law or legal inference and is not subject to review on appeal.

APPEAL by defendant from *Finley, J.*, at September Term, 1931, of MOORE.

Civil action by plaintiff, alleged landlord, to recover rent of alleged tenant.

The jury answered the issue of tenancy in favor of the defendant and against the plaintiff.

On motion of the plaintiff, the court, in its discretion, set aside the verdict as against the weight of the evidence. Defendant appeals, assigning errors.

U. L. Spence for plaintiff.
Cook & Cook for defendant.

STACY, C. J. The action of the trial court in setting aside the verdict as contrary to the weight of the evidence was a matter resting in his sound discretion, which involves no question of law or legal inference, and is not subject to review on appeal. *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686; *Goodman v. Goodman,* 201 N. C., 794, 161 S. E., 688.

Appeal dismissed.

IN THE MATTER OF L. J. PHIPPS, TRUSTEE.

(Filed 27 April, 1932.)

1. Execution D a—Attempted levy on personal property in this case held insufficient, and levy was void.

Where a mortgagor pays a certain sum in cash into the hands of the clerk of the Superior Court as a deposit for an advanced bid, for the resale of property sold under a mortgage, and the sheriff attempts to levy thereon under execution by demanding the sum of the clerk and making a notation upon the execution to the effect that he had levied upon the fund, and the clerk retains the fund and agrees to apply it to the judgment if it should subsequently be determined that the sheriff had a right to levy on the fund, and upon knowledge of the transaction the mortgagor claims the fund as his personal property exemption, and it appears that the sheriff neither touched nor saw any part of the funds in the clerk's hands: *Held,* there was no sufficient levy upon the funds by the sheriff, and the attempted levy was void.

2. Mortgages H o—In this case held: mortgagor paid amount necessary for resale into court and clerk should have ordered resale.

Where a mortgagor pays the sum necessary for an advance bid on property sold under a mortgage, and the sheriff attempts to levy thereon under an execution against the mortgagor, but it appears that the attempted levy was void, the mortgagor has the right to use the money as an advance bid and it is the duty of the clerk to order a resale, and a judgment that no advance bid had been made and ordering the trustee to make deed to the purchaser at the sale will be reversed.

CIVIL ACTION, before *Daniels, J.* From ORANGE.

The facts are contained in the judgment and, briefly stated, are as follows: The plaintiff is trustee in a deed of trust executed by W. G.

Fields and wife to secure the note therein described. Default having been made in the payment of the note, Phipps, trustee, duly sold the land and the Phillips Lumber Company became the highest bidder for same at the price of $4,200. Within ten days from the date of said sale W. G. Fields paid $210 in cash to the clerk of the Superior Court of Orange County as an advance bid, and the clerk ordered a resale. In accordance with the order, the land was resold on 14 September, 1931, and the Phillips Lumber Company again became the highest bidder for the price of $4,410.50. On 16 September the sheriff of Orange County, holding an execution duly issued in a cause entitled Phipps Lumber Co. *v.* W. G. Fields, read said execution to the clerk of the Superior Court and demanded the surrender of the $210 theretofore deposited with the said clerk by Fields as an advance bid on said land. The clerk, acting not voluntarily, but in deference to the power he thought vested in the sheriff under the execution, agreed to surrender the said $210, which was at that time in the locked safe of said clerk, and the said sheriff entered notation upon the execution as follows: "16 September, 1931. I have this day levied on the sum of $210 in cash in the hands of the clerk of the Superior Court of Orange County, held by the said clerk for W. G. Fields and have turned over the same to the court for appropriation to the judgment on this execution. W. T. Sloan, sheriff. By H. A. Hearne, D. S."

That at the time of said transaction there was present in addition to the clerk and the sheriff, the attorney for the Phillips Lumber Company, and in response to the request by the attorney that the clerk make an entry upon the judgment docket, the clerk refused to do so until an agreement was had, that in the event it should subsequently be determined that the sheriff had no right to take said money in this manner or that the said Fields had a right to said money as his personal property exemption, then the appropriation of the $210 to the judgment should be considered void. That thereupon and because of said agreement the clerk made the following entry on the judgment docket: "Paid into office on this judgment by G. A. Hearne, D. S., 16 September, 1931, $210 out of deposit of Fields levied on this day and collected from C. S. C."

That the said $210 when deposited by W. G. Fields was in currency and was placed by said clerk in the safe in his office where it has remained up to the present time, and that at the time of the transaction between the clerk and the sheriff there was no actual exchange of the money, but there was a mutual understanding that a levy was being made and that there was a transfer to the sheriff and a retransfer to the clerk to be appropriated upon the judgment.

That on the afternoon of 24 September, 1931, the same being the last day for filing an increase bid upon the said land, the said W. G. Fields tendered the clerk $10.52 and authorized and directed him to apply the same together with the $210 theretofore deposited as an increase bid upon said land. That the clerk thereupon advised the said Fields of the disposition theretofore made of the said deposit and such advice was the first notice the said Fields had of this transaction. That immediately the said Fields demanded his personal property exemption of the sheriff and designated his deposit of $210 as a part thereof, and this was the first demand made by Fields for his personal property exemption.

That thereafter, and upon the same afternoon, the said Fields tendered the said clerk the sum of $10.52 and authorized and directed him to apply the same together with the $210 deposit as an advance bid, and that the clerk accepted the same with the understanding and agreement that if the alleged levy upon the $210 was not a valid levy he would consider that a sufficient amount for an increase bid had been tendered and would order a resale.

Upon the foregoing facts, the court is of the opinion that no advance bid upon said land was made or tendered by the said W. G. Fields in accordance with the requirements of the statute. It is, therefore, adjudged that the said L. J. Phipps, trustee, upon payment of the purchase price be, and he is, hereby authorized and instructed to make and deliver to the Phillips Lumber Company, deed in fee simple for said land.

From the foregoing judgment Fields gives notice of appeal to the Supreme Court.

S. M. Gattis, Jr., and Graham & Sawyer for Fields.
J. A. Giles and R. T. Giles for Phipps, trustee.

BROGDEN, J. Did the sheriff make a valid levy upon the $210 currency in the hands of the clerk?

If the levy made by the sheriff was valid, the money in contemplation of the law, belonged to the judgment creditor instead of to Fields, and consequently the amount tendered by Fields as an advance bid was wholly insufficient for such purpose. Upon the other hand, if the levy was insufficient and invalid, the clerk still holds the money for Fields and is entitled to have the same used as an advance bid and thus procure a resale of the property. The term "levy" was first defined by *Pearson, J.*, in *Bland v. Whitfield,* 46 N. C., 122, as follows: "Levy, in its legal acceptation, means the act of appropriating—singling out certain prop-

erty of the debtor, for the satisfaction of an execution, and it is done by making an endorsement to that effect upon the execution." However, it has never been held in this jurisdiction that mere endorsement upon the execution is conclusive of a valid seizure of property. In the same case the Court also said: "In regard to land, it (levy) may be made in the office, although it may be ten miles distant, and the officer has never seen it. In regard to personal property, it is necessary for the officer to go to it, so as to have it in his power to take it into actual possession if he chooses. It is safest for him to do so, and carry it away, for then he can hold it against all persons, but it is not necessary for him to do it, or for him to touch the property; the levy is perfected by his making the endorsement upon the execution. He may leave the property in the possession of the debtor, and take a forthcoming bond; or he may leave it there without any bond, and the effect of the levy is to give him such an interest and possession in contemplation of law, as will enable him to bring trespass against any one who interferes with it, except another officer." Again, in *Long v. Hall,* 97 N. C., 286, the Court said: "A seizure is necessary, and if from the nature of the property (as is the case with the growing crop, but not of the cotton in the gin and crib), an actual seizure be impossible, some act as nearly equivalent to a seizure as practicable, must be substituted for it." *Perry v. Hardison,* 99 N. C., 21.

In further support of the idea expressed in earlier decisions, this Court declared in *Clifton v. Owens,* 170 N. C., 607, 87 S. E., 502, that in order to constitute a valid levy upon personal property the personalty must be taken into the sheriff's possession or placed under his control. The same idea was expressed in *Mann v. Allen,* 171 N. C., 219, 88 S. E., 235, to the effect that the term "levy" is properly held to mean—the taking of the property into the possession or under the control of the officer.

The principles announced by this Court are generally recognized. For example, in *Trainer v. Saunders,* 19 A. L. R., 861, it is written: "It is ordinarily the duty of the sheriff in executing his process either to take into his possession the article upon which he levies, or at least to have it in sight when he does so." The opinion quotes 2 Freeman, Executions, 823, as follows: "It is not enough that, having the property within his view, and where he can control it, he does profess to levy and to assume control of the property by virtue of the execution, and with the avowed purpose of holding the property to answer the exigencies of the writ."

Applying the principles established in the decisions and by text-writers, the Court is of the opinion that no valid levy was made upon

the money in the hands of the clerk. The sheriff, although the money was in the clerk's office in the safe, neither touched nor saw a dollar of the money. While a certain entry was made upon the judgment docket, the clerk expressly declined to surrender the control of the money to the sheriff except upon condition. For all practical purposes, the condition prescribed by the clerk was that the levy or surrender of possession should be approved by the court. In effect, the clerk said to the sheriff: "I will surrender the money and make an entry on the judgment docket, provided you can get an order of court declaring that the levy is valid, and that you have the power to take possession of the money." This was not sufficient to constitute a valid levy. Therefore, the money still belongs to Fields and is in the possession of the clerk for his benefit. Consequently he had the right to use the money as an advance bid upon the purchase price of the property, and it was the duty of the clerk to accept it as such when duly tendered and to order a resale of the property.

Reversed.

ALICE L. THOMAS v. DAVE DE MOSS.

(Filed 27 April, 1932.)

1. **Bills and Notes B c—Instrument negotiable in its origin continues negotiable until its discharge in absence of restrictive endorsement.**

A bond which is negotiable in its origin continues to be negotiable until it is discharged by payment or otherwise, unless there is a restrictive endorsement by a holder thereof. C. S., 3028.

2. **Same—Provisions in bond in this case held not to render it nonnegotiable.**

Where a bond is a negotiable instrument under the laws of this State, C. S., 2982, provisions therein that the bond should be payable to bearer, or if registered to the registered holder only, and provisions for an extension of time, upon application of the maker, in the discretion of trustee in the deed of trust securing it, does not change its negotiable character, since a holder in due course does not forfeit his rights against the maker by the registration of the bond in his option, and unless an extension is granted under the terms of the bond it is payable at a fixed time according to its tenor.

3. **Same—Provisions in deed of trust did not affect the amount due on bond secured thereby nor render the bond nonnegotiable.**

Where a bond secured by a deed of trust is in all respect negotiable, its negotiable character is not affected by provisions in the deed of trust incorporated in the bond by reference thereto that sums paid by the trustee or holder of the bond for taxes or insurance should be deemed

principal money and secured by the deed of trust, the provisions of the deed of trust stipulating only that such sums should be secured thereby but not added to the amount of the bond, and the bond is in a sum certain and is negotiable.

APPEAL by defendant from *Stack, J.*, at November Term, 1931, of ALAMANCE. Affirmed.

This is an action to recover on a bond executed by the defendant, and held by the plaintiff at the commencement of the action as a holder in due course.

At the trial of the action, after the bond sued on, with certificates endorsed thereon, and the deed of trust by which the bond was secured, had been introduced in evidence, the parties to the action, entered into a stipulation, which appears in the record, and is as follows:

"It is agreed by counsel for both sides that the determination of this controversy depends on whether or not the bond sued on is a negotiable instrument, and both parties agree to leave it to the court to declare whether or not it is a negotiable instrument. If the court shall hold that the bond is a negotiable instrument, then the plaintiff shall have judgment for the amount of the bond, to wit, $500, with interest. If in the court's opinion the bond is not a negotiable instrument, then the plaintiff shall take nothing by the action. Both sides reserve the right to appeal from the decision of the court."

The bond sued on is in words and figures as follows:

"UNITED STATES OF AMERICA
STATE OF NORTH CAROLINA

First Mortgage Six Per Cent Gold Bond
Secured by Improved Real Estate.

No. 1. $500.

Dave De Moss of the county of Alamance, State of North Carolina, for value received, hereby acknowledges himself indebted and promises to pay to the bearer hereof, or if this bond be registered, to the registered holder hereof, five hundred dollars in gold coin of the United States of America, or equivalent to the present standard of weight and fineness, on the 30th day of June, in the year 1929, at the office of Alamance Insurance and Real Estate Company, in the city of Burlington, State of North Carolina, or its successors under the deed of trust hereinafter mentioned, subject to the provisions hereinafter made for extension of time, upon the surrender of this bond, and to pay interest thereon at the rate of six per cent per annum from the 30th day of June, 1928, semiannually, at the office of the said Alamance Insurance and Real

Estate Company, in like gold coin on the 30th day of June and December of each year so long as this bond may be and remain in force.

Said Alamance Insurance and Real Estate Company, or its successors under said deed of trust, may in its or their discretion, extend the time for the payment of the principal hereof by extensions of not more than one year at a time for not more than fifteen years from the maturity date above written, unless the holder of this bond shall by notice in writing to said Alamance Insurance and Real Estate Company, or its successors, at least 60 days before the maturity date above written, or 60 days before the same day and month in any subsequent year, demand payment of this bond; and in the event of no application for extension, or of a refusal to grant extension or of such demand for payment, this bond shall become due and payable, if no extensions theretofore shall have been granted, upon the maturity date first above written, or if theretofore, extensions shall have been granted, then upon the expiration of the last granted period of extension.

This bond is one of a series of bonds numbered from 1 to 8, inclusive, aggregating $4,000, two of said bonds falling due the 30th day of June, 1929, respectively, all of which are equally secured,

First. By deed of trust, the same being a first mortgage on real property, recorded in the office of the register of deeds of Alamance County, North Carolina.

Second. By insurance of the buildings situated on said land for the benefit of the bondholders.

Third. By a guarantee of Alamance Insurance and Real Estate Company, which said guarantee is set forth on the back hereof.

All of which will appear by reference to the deed of trust bearing date of 30th day of June, 1929, executed by the maker of this bond, reference to which said deed of trust for the description of the property mortgaged, the nature and extent of the security and the terms and conditions upon which this bond is issued is hereby made, all with the same effect as if the provisions of the said deed of trust were herein fully set forth.

The principal of this bond may be registered in the name of the holder on the bond transfer books of Alamance Insurance and Real Estate Company, at the office of said company in the city of Burlington, North Carolina, and such registration shall be noted on this bond by the said Alamance Insurance and Real Estate Company, and thereupon this bond shall be transferred only upon such transfer books, and such transfer shall be similarly noted on this bond, but the same may be discharged from registry by transfer in like manner to bearer, and there-

upon negotiability by delivery shall be restored, but this bond may again, from time to time, be registered and transferred to bearer as before.

This bond shall not be obligatory for any purpose until it shall have been authenticated by a certificate endorsed hereon duly signed by Alamance Insurance and Real Estate Company, or its successor under said deed of trust.

In witness whereof, the maker of this bond has hereto set his hand and affixed his seal, this 30th day of June, 1928.

Dave De Moss. (Seal.)

Attest: J. G. Rogers."

Endorsed on said bond are certificates, duly executed, as follows:

"Alamance Insurance and Real Estate Company's Certificate.

Alamance Insurance and Real Estate Company does hereby certify that this bond is one of the bonds described in the within mentioned deed of trust.

Alamance Insurance and Real Estate Company,
By Chas. V. Sharpe, Secretary."

"Certificate of Registration.

Date of registration, 30 June, 1928; in whose name registered, Mrs. Alice L. Thomas; transfer agent, Annie D. Moser."

The deed of trust referred to in said bond, and executed by the maker, Dave De Moss, and his wife, Flossie De Moss, to the Alamance Insurance and Real Estate Company, as trustee, contains provisions to the following effect:

1st. That any sum or sums paid by the holders of the bonds secured by said deed of trust, or by the trustee as guarantor of said bonds, as taxes assessed on the property described in said deed of trust, shall be deemed principal money, secured by said deed of trust.

2nd. That any sum or sums paid by the holders of the bonds secured by said deed of trust, or by the trustee as guarantor of said bonds, as premiums for insurance on the buildings situated on the land described in said deed of trust, shall be deemed principal money secured by said deed of trust.

The court was of opinion that the bond sued on in this action was a negotiable instrument under the laws of this State, at the time it was sold and negotiated to the plaintiff by the original holder thereof, and

in accordance with this opinion, and pursuant to the stipulation of the parties appearing in the record, adjudged that plaintiff recover of the defendant the sum of $500, with interest and costs. The defendant excepted to the judgment and appealed to the Supreme Court.

J. Dolph Long for plaintiff.
Leo Carr for defendant.

CONNOR, J. At the date of its issue, the bond sued on in this action was in writing and signed by the maker; it contained an unconditional promise by the maker to pay a sum certain in money; it was payable at a fixed time; and it was payable to bearer. It was, therefore, under the law of this State (C. S., 2982), a negotiable instrument, both as to the maker and as to holders in due course, unless certain provisions appearing in its face, or incorporated therein by reference to the deed of trust by which it was secured, destroyed its negotiability, both as to the maker and as to holders. If the bond was a negotiable instrument in its origin, in the absence of a restrictive endorsement by a holder, it continued a negotiable instrument until it was discharged by payment or otherwise. C. S., 3028. *Johnson v. Lassiter,* 155 N. C., 47, 71 S. E., 25, *Wettlaufer v. Baxter,* 137 Ky., 362, 125 S. W. 741, 26 L. R. A. (N. S.), 804. In the last cited case it is said:

"When a paper is started on its journey into the commercial world, it should retain to the end the character given to it in the beginning, and written in its face. If it was intended to be a negotiable instrument, and was so written, it should continue to be one. If it was intended to be a nonnegotiable instrument, and was so written, it should so remain. Then every one who puts his name on it, as well as every one who discounts or purchases it, will need only to read it to know what it is, and what his rights and liabilities are."

The defendant contends that the bond sued on was not a negotiable instrument at the date of its issue, because it is provided on its face, (1) that the amount of the bond shall be payable to bearer, or if registered, to the registered holder only, and (2) that the time for its payment may be extended.

Neither of these contentions can be sustained. The right to have the bond registered is given to a holder of the bond for his protection, and may be exercised or not in his discretion, without affecting the liability of the maker. One who has acquired the bond as a holder in due course does not forfeit his rights as such holder against the maker by the registration, at his option, of the bond.

An extension of the time for the payment of the bond can be granted only upon the application of the maker, and then in the discretion of the trustee in the deed of trust by which the bond is secured, and with the consent of the holder of the bond. Unless such extension be granted, the bond is payable at a fixed time according to its tenor.

The defendant further contends that the bond was not a negotiable instrument because its amount is not a sum certain, by reason of the provisions in the deed of trust with respect to sums paid for taxes or insurance premiums, which are incorporated in the bond by reference to the deed of trust.

This contention cannot be sustained. Sums paid by the holders of the bonds or by the trustee for taxes or for insurance premiums, are not added to the amount due on the bond. It is provided only that such sums shall be deemed principal money and shall be secured by the deed of trust. The amount due on the bond, which is certain and not contingent, is not affected by the provisions in the deed of trust with respect to sums paid for taxes or for insurance premiums. There is no error in the judgment. It is

Affirmed.

SYLVESTER DUNLAP v. LONDON GUARANTY AND ACCIDENT COMPANY, V. H. IDOL, AND MRS. ROSE CARTER.

(Filed 27 April, 1932.)

1. Bill of Discovery C b—Affidavit for motion for inspection of writings must sufficiently describe papers and show their materiality.

C. S., 1823, supersedes the equitable bill of discovery and should be liberally construed, but the former practice is a material aid in the construction of the statute, and the fundamental requirements of the statute must be complied with, and the affidavit supporting the order must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry, and where the affidavit is insufficient the order based thereon is invalid.

2. Bill of Discovery C a—Motion for inspection of writings is addressed to discretion of trial court.

Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in his sound discretion.

3. Bill of Discovery C b—Affidavit in this case held insufficient to support order for inspection of writings.

Where an affidavit filed by a party as the basis for his motion for the inspection of writings states that the adverse party has in his possession certain papers pertinent and relative to the merits of the action, and asks for the inspection of certain reports between the adverse

party and his agent and certain correspondence between various persons, without any statement of facts showing that the papers were material or any allegation or proof that such papers existed or that their contents were known, and the writings are not sufficiently described to enable the court to determine their relevancy and materiality: *Held*, the affidavit fails to comply with the statutory requirements and the order of the court based thereon granting the motion is insufficient, and on appeal the order will be set aside.

APPEAL by defendants from *Warlick, J.*, at October Term, 1931, of STOKES. Error.

The plaintiff's suit is to recover damages for malicious abuse of process. He alleges that the London Guaranty and Accident Company was engaged in the business of insuring policyholders against liability for damages caused by accidents; that in 1928 the defendant Idol was its agent; that Mrs. Carter was the beneficiary of a policy issued by the defendant company; that a collision occurred between her car and a car operated by the plaintiff; that he demanded damages; that the defendants in order to forestall and defeat his recovery maliciously caused his arrest for a violation of the motor vehicle law; and that upon the trial he was acquitted of the charge.

On 16 October, 1931, the plaintiff notified the defendants that on the ensuing 25th inst. he would move for an order to allow the plaintiff before the trial to make an inspection and to take a copy of any books, papers, and documents in the possession or under the control of the defendants, containing evidence relating to the merits of the action.

The notice was based upon the following affidavit, which was made by the plaintiff's attorney:

1. That he is an attorney of record for the plaintiff and is a resident of Forsyth County.

2. That the plaintiff in the above entitled action is not now available to make this affidavit.

3. That this affiant is informed, advised and believes that the defendants in the above cause have in their possession certain paper-writings, books and documents containing evidence pertinent to and relative to the merits of the plaintiff's cause of action, of the contents of said books, papers, and documents this affiant does not have absolute knowledge.

4. That complaint and answer have been filed in this cause.

5. That due notice has been served on the parties defendant, as this affiant is informed and believes, which notices set out in full the papers necessary and pertinent to the plaintiff's cause of action. Copy of said notices being attached hereto and made a part of this affidavit.

When the motion was heard the judge made the following order:

The court finds as a fact that the following books, papers and records are necessary material and pertinent to the proper determination of the issues involved in said controversy, to wit, as provided in C. S., 1823-1824.

1. Report or copies of report of collision occurring on 26 October, 1928, between Mrs. Rose Carter and Sylvester Dunlap; original or copies of correspondence between Mr. V. H. Idol and Mrs. Rose Carter or between Mrs. Rose Carter and the London Guaranty and Accident Company, or between V. H. Idol and the London Guaranty and Accident Company, or the field representative of the London Guaranty and Accident Company, and said London Guaranty and Accident Company, and particularly a letter or letters from the field representative or agent of the London Guaranty and Accident Company, reporting and commenting on the outcome of the criminal trial of Sylvester Dunlap at the April Special Term of 1929, Superior Court of Rockingham County held at Wentworth, N. C., wherein Sylvester Dunlap was tried on the criminal charges of assault with a deadly weapon, to wit, an automobile, and reckless driving.

The court, in the exercise of its discretion, orders and directs the defendants to produce the above set out and enumerated books, papers, correspondence and documents on or before 9 o'clock a.m., 27 October, 1931, at Danbury, N. C., in the office of the clerk of the Superior Court, for the purpose of permitting the plaintiff or his counsel to inspect and take copies of all such books, papers, documents and correspondence as above described as may be necessary material and pertinent to the determination of the issues in the said cause.

This 26 October, 1931.

The defendants excepted and appealed.

J. M. Wells, Jr., A. C. Bernard and W. Reade Johnson for plaintiff.

Dalton & Pickens and Folger & Folger for London Guaranty and Accident Company.

Brown & Trotter and N. O. Petrie for V. H. Idol.

J. L. Roberts and N. O. Petrie for Mrs. Carter.

ADAMS, J. In the courts of common law the plaintiff was required to make out his case by the evidence of witnesses or the admissions of the defendant. The right to enforce discovery was a prerogative of the Court of Chancery. By the exercise of this right the court provided effectual means of ascertaining the truth with justice to the plaintiff and without wrong to the party examined. The plaintiff was entitled to the discovery of all facts material to his case, but the question of

materiality was largely determinable by the plaintiff's interrogatories and the statement in his bill. The defendant was required to discover the truth of the plaintiff's claim but not to answer questions he had a right to resist. He was required in like manner, when called upon by the plaintiff, to set forth a list of all documents in his possession from which discovery of the matters in controversy could be obtained; but the possession of the documents and their character as fit subjects of discovery were usually shown by the defendant's answer to the plaintiff's bill. It was customary to include in the bill an interrogatory asking whether the defendant had in his possession any documents relating to the matters alleged and, if he admitted the possession, to move that he produce them before the examiner at the hearing of the cause. If he did not admit the possession, production could not be enforced; for the admissions necessary to compel production were that the documents were in his possession or control and that they were of such a character as to constitute matters of discovery. In proper cases the plaintiff was entitled to production and inspection.

Section 1823 of the Consolidated Statutes was designed and intended to supersede the equitable bill of discovery, but the former practice affords material aid in the interpretation of the statute. *Bank v. McArthur,* 165 N. C., 374. The statute, being somewhat broader in its effect than the equitable bill of discovery, should be liberally construed; but it contains provisions which are fundamental. *Bank v. McArthur, supra; Ross v. Robinson,* 185 N. C., 548. If the requirements are not complied with, or if the order of the court goes beyond the powers contemplated and conferred by law, the order will be set aside. *Sheek v. Sain,* 127 N. C., 266; *Ross v. Robinson, supra.* The order of the court is usually based upon an affidavit and if the affidavit is insufficient the order is invalid. *Mica Co. v. Express Co.,* 182 N. C., 669. In *Evans v. R. R.,* 167 N. C., 415, the Court said: "As to whether a paper-writing comes within the description of the statute is a question of law. It would seem that the affidavit in this case is not a sufficient description of the paper to justify the court in ordering its production. 'A mere statement that an examination is material and necessary is not sufficient. This is nothing more than the statement of the applicant's opinion. The facts showing the materiality and necessity must be stated positively and not argumentatively or inferentially.' 14 Cyc., 346. Again, it is said that 'a party cannot obtain a roving commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case. He is entitled to production or inspection only when the same is material and necessary to establish his cause of action.' 14 Cyc., 370."

If the affidavit is sufficient to justify the order, whether the judge shall grant the order or decline it, is a matter within his discretion. *Bank v. Newton,* 165 N. C., 363; *Evans v. R. R., supra.*

The affidavit made by the plaintiff's attorney does not comply with the requirements of the law. The third paragraph refers to papers, books, and documents said to contain evidence pertinent and relevant to the merits of the plaintiff's cause of action, but the affiant is absolutely ignorant of their contents. How, then, can their relevancy be determined? Furthermore, no paper is described with sufficient accuracy to enable the court to say whether it has any relation to the plaintiff's action. The fifth paragraph refers to notices which "set out in full the papers necessary and pertinent to the plaintiff's cause of action"; but as suggested in *Evans v. R. R., supra,* this is nothing more than a statement of the affiant's opinion. In these notices the plaintiff calls for the production of reports, copies, and correspondence between various persons without proof or allegation that such papers exist or that their contents are known, and without the statement of any facts showing that they are material to the cause. It may be observed in addition that both the notices and the order of the court are alternative; certain papers *or* others are to be produced. Is the plaintiff, the defendant, or the court to be the judge of the alternative production?

The order of the court is insufficient or must therefore be set aside.

Error.

MRS. FANNIE HOOVER, ADMINISTRATRIX OF ESTATE OF A. S. HOOVER, DECEASED, v. GLOBE INDEMNITY COMPANY AND DR. O. L. MILLER.

(Filed 27 April, 1932.)

1. Master and Servant F a—Malpractice of physician furnished by employer or insurer is deemed a part of the injury to the employee.

The rights and remedies of an employee under the Workmen's Compensation Act exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin against the employer, N. C. Code, 8081(r), and malpractice of a physician or surgeon furnished by the employer or insurer to treat an injured employee is deemed part of the injury and is compensable as such, N. C. Code, 8081(hh).

2. Torts B b—Insurer furnishing physician for injured employee held not secondarily liable in action for malpractice of physician.

Where the personal representative of a deceased employee sues the insurance carrier for injuries alleged to have been caused by the malpractice of a physician furnished by the insurer to treat the employee

after his injury, and the physician is made a party defendant and the insurer in its cross-complaint contends that if the physician was negligent such negligence was primary and that the insurer was secondarily liable only and would be entitled to contribution: *Held*, the physician's demurrer to the cross-complaint of the insurer was properly sustained, the employer and insurer being primarily liable for such malpractice under the Compensation Act, and the physician and insurer not being joint *tort-feasors* within the meaning of C. S., 618.

APPEAL by Globe Indemnity Company from *Finley, J.*, at January Term, 1932, of GASTON.

P. W. Garland for appellant.
J. Laurence Jones for appellee.

ADAMS, J. In January, 1930, the plaintiff's intestate was injured while in the service of the Cramerton Mills, Incorporated, the employer and the employee being subject to the North Carolina Workmen's Compensation Law. The Globe Indemnity Company was the insurance carrier. On 3 January, 1931, the plaintiff brought suit against the carrier and filed a complaint in which she alleged: (a) that her intestate, after his injury, employed a skillful physician to attend and treat him; (b) that while her intestate was undergoing such treatment the carrier through fraud and duress assumed control of his case and undertook through its agents, who were licensed practitioners of medicine, scientifically to treat his ailment; (c) that her intestate was thereby compelled to accept improper and injurious treatment; (d) that the carrier was negligent; (e) that its negligent treatment was the proximate cause of the intestate's death; and (f) that she is entitled to damages.

On motion of the carrier the plaintiff furnished a bill of particulars, in which she alleged that Paul B. Clark as agent of the carrier had committed her intestate to the care and treatment of Dr. O. L. Miller, an employee of the carrier, and in which she purports to set out the physician's negligent treatment. At the next term of court Dr. Miller was made a party defendant. Having previously filed an answer, the carrier thereupon filed another paper entitled a cross-complaint, which was formulated as an answer to the complaint and to the bill of particulars and as a complaint against its codefendant, Dr. Miller. In the cross-complaint the carrier alleged that if Dr. Miller was negligent his negligence was primary; that any negligence on the part of the carrier would be secondary; and that the plaintiff should not be permitted to recover damages from the party liable secondarily until an execution against the other party had been returned unsatisfied. It is also alleged

that if both these parties were negligent they were joint *tort-feasors* and that the physician would be liable in contribution to the carrier. C. S., 618.

The defendant Miller demurred to the cross-complaint; the demurrer was sustained; and the carrier excepted and appealed.

There is no error in the judgment sustaining the demurrer. The plaintiff, the Cramerton Mills, Incorporated, and the Globe Indemnity Company were subject to the Workmen's Compensation Law. The rights and remedies therein granted to an employee shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, as against the employer at common law, or otherwise, on account of such injury, loss of service, or death. Workmen's Compensation Law, sec. 11; Code, 1931, sec. 8081(r). It is further provided that the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of the law, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated as such. Workmen's Compensation Law, sec. 11; Code, 1931, sec. 8081(hh). Injury or suffering sustained by an employee in consequence of the malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action under our statute; it is a constituent element of the employee's injury for which he is entitled to compensation. In such event the employer and the carrier are primarily liable and the question of secondary liability is eliminated. The subject is discussed and the question is decided in *Brown v. R. R., ante,* 256, in which it is said, also, that C. S., 618, applies only where the defendants or the persons sought to be made parties defendant are liable as joint *tort-feasors.* In the present case Dr. Miller and the carrier are manifestly not joint *tort-feasors* within the meaning of this section. The judgment is

Affirmed.

W. N. NORTHCUTT v. PEOPLES BONDED WAREHOUSE COMPANY.

(Filed 27 April, 1932.)

Warehousemen B a—Warehouse receipt held competent in action against warehouseman for failure to deliver upon demand.

Where, in an action against a warehouse company to recover the value of cotton stored therein by the plaintiff which the defendant had refused to give up on demand, there is evidence that a third person had a lien thereon and that the warehouse receipt was issued in the name of and

delivered to the lienor, the plaintiff contending that the receipt should have been issued in his name and delivered to the lienor for safe-keeping: *Held*, the exclusion of the warehouse receipt tendered in evidence by the defendant was error, the receipts being competent to show plaintiff's inability to obtain the cotton upon demand, chapter 168, Public Laws of 1919, and it would seem in the instant case that should the plaintiff recover the amount of damages should be reduced by the amount credited to his account by the lienor.

APPEAL by defendant from *Finley, J.*, at September Term, 1931, of ANSON.

Civil action tried upon the following issues:

"1. Did the plaintiff, W. N. Northcutt, on 11 and 12 November, 1920, and on 18 December, 1920, deliver to the defendant, Peoples Bonded Warehouse Company, 60 bales of cotton, referred to and described in paragraphs 3, 4 and 5 of the complaint, and aggregating in weight 30,623 pounds, to be by said defendant kept for him? Answer: Yes.

"2. Did the plaintiff on 18 January, 1923, make demand on the defendant for the delivery to him of the cotton so stored? Answer: Yes.

"3. Did the defendant fail, neglect and refuse to make delivery according to such demand? Answer: Yes.

"4. On 18 January, 1923, what was the market value of cotton of the kind, grade and quality delivered by plaintiff to defendant on 11 and 12 November, and 18 December, 1920, as alleged in the complaint? Answer: 26½ cents per pound.

"5. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,115.09."

It was in evidence that J. E. Moore and Company held a lien upon the sixty bales of cotton in question; that receipts for said cotton were issued in the name of and delivered to J. E. Moore and Company; that the same was sold in July, 1921, and the proceeds applied upon plaintiff's account with the said J. E. Moore and Company. The defendant offered in evidence the warehouse receipts covering the cotton in question, but upon objection these were excluded. Exception.

Judgment on the verdict, from which the defendant appeals, assigning errors.

T. D. Bryson and Marshall T. Spears for plaintiff.
Pruette & Caudle for defendant.

STACY, C. J. It is admitted that J. E. Moore and Company held a lien upon the cotton in question at the time of its delivery to the defendant. Receipts therefor were issued in the name of and delivered to the

lienor. Plaintiff says the agreement was, that the receipts were not to be issued in the name of the mortgagee, but in his name, and left with J. E. Moore for safe-keeping.

Under the provisions of chap. 168, Public Laws, 1919, "said receipt carries absolute title to the cotton," and the cotton which it represents is "deliverable only upon a physical presentation of the receipt." Thus, these receipts, admittedly not held by or issued to the plaintiff, were competent to show plaintiff's inability to obtain delivery of the cotton, upon demand without them, and knowledge on his part of this fact long before 18 January, 1923.

Moreover, while ratification or estoppel is not pleaded, having taken credit for the cotton on his account with J. E. Moore and Company, it would seem that plaintiff's damage, in the instant case, ought to be reduced, at least, by the amount of such credit.

New trial.

H. L. TAYLOR, TRUSTEE, G. H. ROBINSON AND TUCKER-KIRBY COMPANY, v. HOME INSURANCE COMPANY, AND J. J. MISENHEIMER.

(Filed 27 April, 1932.)

1. Insurance M e—Insurer held to have waived right to demand proof of loss.

Under the facts of this case and the theory of trial in the lower court the insurer is held to have waived its right to demand proof of loss by the insured.

2. Insurance E b—Act of mortgagor in taking out additional insurance does not ipso facto reduce prior insurance held by mortgagee.

The subsequent act of the owner and mortgagor in taking out additional insurance protecting his interest alone, done without the knowledge or consent of the mortgagee, does not, *ipso facto*, reduce proportionately the amount of prior insurance held by the mortgagee on the same property under a New York Standard Mortgage Clause.

3. Appeal and Error J e—New trial will not be granted where appellant could not benefit thereby.

A new trial will not be granted where the appellant could not be benefited thereby or the result of the judgment changed.

APPEAL by defendant Home Insurance Company, from *Warlick, J.*, at February Term, 1932, of UNION. Affirmed.

This is an action to recover of defendant Home Insurance Company, on a policy of insurance. In the court below by consent of plaintiffs and defendant Home Insurance Company, a jury trial was waived and

it was agreed that the court could find the facts, and from the facts so found, declare the law and enter judgment in accordance therewith. This the court did, and the judgment rendered is as follows: "Wherefore, in accordance with said findings of fact and conclusions of law, it is considered, ordered, adjudged and decreed by the court that the plaintiff, H. L. Taylor, trustee, recover of the defendant, the Home Insurance Company, the sum of $1,150, with interest thereon from 21 July, 1930, for the use and benefit of G. H. Robinson, and the sum of $1,000, with interest thereon from 21 January, 1930, for the use and benefit of Tucker-Kirby Company, and the costs of this action to be taxed by the clerk."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Vann & Milliken for plaintiffs.
John M. Robinson and Hunter M. Jones for defendant.

CLARKSON, J. The defendant, Home Insurance Company, prays the court to decide: (1) That the plaintiffs should be nonsuited for failure to prove due filing of proofs of loss. (2) If the plaintiffs should not be nonsuited, that the judgment should be modified by reducing the recovery to $1,200. We think the findings of fact in the court below, which were supported by the evidence, are such that the contentions above set forth by the defendant Home Insurance Company, cannot be sustained.

Defendant contends that plaintiff proved neither due filing of proof of loss nor waiver thereof. We think the theory on which the case was tried and the undisputed facts constitute a waiver of the filing of proofs of loss.

In *Mercantile Co. v. Insurance Co.*, 176 N. C., 545, the law is thus stated: "The defendant denied liability and refused to pay the loss. This is a waiver of the right to demand proof of loss and the denial of liability dispenses with the necessity of filing such proof. *Gerringer v. Insurance Co.*, 133 N. C., 407; *Parker v. Insurance Co.*, 143 N. C., 343; *Lowe v. Fidelity Co.*, 170 N. C., 446."

Does the subsequent act of an owner or mortgagor in taking out additional insurance without the knowledge or consent of the mortgagee to protect alone his interest in mortgaged property, *ipso facto*, reduce proportionately the amount of prior insurance held by a mortgagee or trustee of the same property under a New York Standard Mortgage Clause? We think not. *Bennett v. Provident Fire Insurance Co.*, 198 N. C., 174, 72 A. L. R., 275.

In *Booth v. Hairston,* 193 N. C., at p. 281, is the following: "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." The judgment of the court below is

Affirmed.

IN RE WILL OF S. EMILY BEARD.

(Filed 27 April, 1932.)

1. **Appeal and Error E c—Exceptions must be brought forward and specifically pointed out.**

   Exceptions must be brought forward and specifically pointed out, Rule 19, sec. 3.

2. **Appeal and Error F c—Only exceptive assignments of error will be considered.**

   Only exceptive assignments of error will be considered on appeal.

3. **Appeal and Error G b—Exceptions must be discussed in briefs.**

   Exceptions in the record not set out in appellant's brief, or in support of which no argument or reason is stated or authority cited, will be taken as abandoned. Rule 28.

4. **Appeal and Error K d—Motion to affirm allowed in this case.**

   Where the appellant has failed to properly present any exceptive assignments of error and the judgment is supported by the verdict, the appellee's motion to affirm the judgment will be allowed.

APPEAL by caveators from *Schenck, J.,* at September Term, 1931, of GASTON.

Issue of *devisavit vel non,* raised by a caveat to the will of S. Emily Beard. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

From a verdict and judgment establishing the paper-writing, and every part thereof, as the last will and testament of the testatrix, the caveators appeal.

A. C. Jones, Cherry & Hollowell and Bulwinkle & Dolley for propounders.

John G. Carpenter and Ernest R. Warren for caveators.

STACY, C. J. The assignments of error are presumably based upon exceptions in the record, though they are neither brought forward nor specifically pointed out. *Merritt v. Dick,* 169 N. C., 244, 85 S. E., 2.

This falls short of the requirements of Rule 19, sec. 3, of the Rules of Practice in the Supreme Court, 200 N. C., 824; *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175. Only exceptive assignments of error are considered on appeal. *Dixon v. Osborne,* 201 N. C., 489; *Sanders v. Sanders,* 201 N. C., 350, 160 S. E., 289; *S. v. Freeze,* 170 N. C., 710, 86 S. E., 1000. The Constitution, Art. IV, sec. 8, empowers the Supreme Court "to review on appeal any decision of the courts below, upon any matter of law or legal inference"; and this is to be presented in accordance with the mandatory rules of the Supreme Court. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. The Court has not only found it necessary to adopt rules of practice, but equally necessary to enforce them and to enforce them uniformly. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Byrd v. Southerland,* 186 N. C., 384, 119 S. E., 2.

Furthermore, "exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Rule 28; *Gray v. Cartwright,* 174 N. C., 49, 93 S. E., 432. The relation between appellants' brief and the record is discernible only after a voyage of discovery. *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992. For this, we are furnished no guides. *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735. The brief is without citation of authorities. *Porter v. Lumber Co.,* 164 N. C., 396, 80 S. E., 443. The appeal seems to be an adventure in postulation.

The judgment is supported by the verdict, hence the motion to affirm will be allowed. *Wheeler v. Cole,* 164 N. C., 378, 80 S. E., 241; *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713.

Affirmed.

J. LEAK SPENCER, JR., LAURA SPENCER MCCLENEGHAN AND HUSBAND, F. A. MCCLENEGHAN, AND OLIVE SHULL SPENCER v. LAURA DWELLE MCCLENEGHAN AND COMMERCIAL NATIONAL BANK OF CHARLOTTE, N. C., EXECUTOR AND TRUSTEE UNDER THE WILL OF J. LEAK SPENCER, DECEASED.

(Filed 27 April, 1932.)

1. Trusts E b—Trustee may apply to court for direction in executing trust.

Where a trustee under a will is in doubt as to the proper method of managing the trust estate, and the question is of present or imminent urgency, he may apply to the courts for aid and direction in the execution of the trust.

2. Parties B a—Persons not in esse held properly represented and judgment was binding as to all interests.

Where under the terms of a will the testator's wife and children are made the beneficiaries of a trust estate with limitation over to the children when the youngest shall attain the age of forty, or, if not living at the date specified, to their issue, and in a suit regarding the management of the trust estate the trustee and the testator's wife and children are parties and the one living grandchild is made a party defendant and is represented by a guardian *ad litem*, who also represents as a class the other grandchildren not *in esse: Held*, all parties having an interest in the estate are properly represented, and the judgment of the court is binding as to all interests. C. S., 1744.

3. Wills E h—Judgment directing trustee to accept contract tendered by principal beneficiary is affirmed under facts of this case.

Where a will creates a trust for the benefit of the testator's wife and directs that the trustee shall pay her during her life a certain sum per month out of the rents and profits, or if the rents and profits are insufficient therefor that he sell so much of the estate as is necessary to make such monthly payments, and directs that after her death the rents and profits be paid to his children equally until the youngest shall attain the age of forty, and then the estate to be equally divided between them, or if not living at that time, to their issue, and the rents and profits are not sufficient for the monthly payments, and in a suit thereunder all persons interested in the estate are made parties, and the contingent remaindermen not *in esse* are properly represented by a guardian *ad litem: Held*, the court has jurisdiction to pass upon the question of the acceptance by the trustee of a contract tendered by the widow in which she agrees to accept a monthly payment in a sum less than that stipulated in the will upon the payment of a certain sum in cash, and its judgment directing the trustee to accept the contract to preserve the corpus of the estate for the administration of the trust is affirmed on appeal.

APPEAL by defendants from *Cowper, Special Judge,* at December Special Term, 1931, of MECKLENBURG. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard at the December, 1931, Special Term of Mecklenburg Superior Court, before his Honor, G. V. Cowper, judge, and being heard upon the petition and the answer of the guardian *ad litem* of the infant respondent, Laura Dwelle McCleneghan, and the unborn children of Laura Spencer McCleneghan and J. Leak Spencer, Junior, and the answer of the Commercial National Bank of Charlotte, N. C., executor and trustee under the will of J. Leak Spencer, and upon the evidence introduced before the court in the cause, the following facts are found by the court:

(1) That J. Leak Spencer, late of the county of Mecklenburg, State of North Carolina, died on 4 July, 1930, leaving a last will and testament which has been duly admitted to probate in the Superior Court

of Mecklenburg County, which last will and testament names the Commercial National Bank of Charlotte, N. C., as executor and trustee, and the said Commercial National Bank of Charlotte, N. C., has duly qualified and is now acting executor and trustee under said will.

(2) That Olive Shull Spencer is the widow of J. Leak Spencer, deceased, and J. Leak Spencer, Jr., and Laura Spencer McCleneghan are the only children of said J. Leak Spencer, deceased.

(3) That the respondent Laura Dwelle McCleneghan is the only child now living of the petitioner, Laura Spencer McCleneghan, she being a minor of the age of five years, and that J. Leak Spencer, Jr., has no children at this time.

(4) That under the will of J. Leak Spencer, deceased, the entire estate of said J. Leak Spencer, deceased, was left to the said Commercial National Bank of Charlotte, N. C., executor and trustee, in trust, with the direction to said executor and trustee to pay over to Olive Shull Spencer, wife of J. Leak Spencer, deceased, during her life time, all of the income of said estate as received, with the proviso that in case said income, in any year be less than $500 per month the executor and trustee should sell such of the principal of the estate as might be necessary in order to pay said Olive Shull Spencer, in quarterly payments, sufficient amounts to bring her total receipts to $500 per month, with further direction to said executor and trustee, upon the death of said Olive Shull Spencer, to pay over to the children of said J. Leak Spencer, deceased, share and share alike, the income from said estate, as the same should be received, until the youngest of said children shall have reached the age of forty years, at which time said executor and trustee is directed to turn over to them, share and share alike, the corpus of said estate, with an additional proviso that should any of said children die leaving issue before the time specified under the will for a division of said estate, such issue shall represent the deceased child, both in receipt of the income and in the division of the corpus of the estate, as provided for in said will.

(5) That the said Laura Spencer McCleneghan may have other child or children hereafter born to her, and also the said J. Leak Spencer, Jr., may also hereafter have a child or children born to him who might be entitled to participate in the income or final division of the corpus of said estate.

(6) That the estate of J. Leak Spencer, deceased, consists principally of real estate in the city of Charlotte, and in stocks in industrial enterprises and corporations located in the city of Charlotte and in the county of Mecklenburg.

(7) That the value of said estate is approximately one hundred thirty thousand dollars.

(8) That the net income from said estate, since the death of said J. Leak Spencer, less the costs and expenses of collection, administration, taxes, etc., has been at the rate of $4,556.94 per year, which sum is insufficient to pay to the said Olive Shull Spencer the sum of $500 per month, as provided in said last will and testament, and it is not probable that the net income from said estate will at any time in the near future, if ever, be as much as six thousand dollars per year, or an amount sufficient to pay the said Olive Shull Spencer the sum of $500 per month, as provided in said will, and if the said sum of $500 per month should be paid to said Olive Shull Spencer, as provided in said will, it will be necessary from time to time to invade and sell a portion of the capital or corpus of said estate in order to make up for the deficiency in said income.

(9) That due to the nature of the assets belonging to said estate and to the financial conditions existing, a sale of any of the capital assets or corpus of said estate could not be made at a fair and reasonable value and if such sale should be required or made it would have to be at great sacrifices and loss to the estate.

(10) That the said Olive Shull Spencer, widow, is forty-five years of age, and under the mortuary tables set forth in section 1790 of the Consolidated Statutes of North Carolina, she has a reasonable expectancy of 24.5 years; that the said Olive Shull Spencer is in apparent good health and from her appearance, and from the evidence as to her physical condition, it is reasonable to suppose that she will live out said expectancy; that if she should live out said expectancy it would be necessary, in order for the executor and trustee to pay her the sum sufficient to make her income amount to $500 per month, as provided by said last will and testament, that the capital assets and corpus of said estate be invaded and sold to a large extent and that the capital assets and corpus of said estate would be thereby reduced in an amount not less than thirty thousand dollars.

(11) That the income from said estate, since the death of J. Leak Spencer, has been $7,956.95, of which sum $2,564.64 has been paid to Olive Shull Spencer and $5,392.30 is still held and retained by the said executor and trustee, all of which sum, less expenses and taxes in the approximate sum of one thousand two hundred dollars ($1,200), would be payable under the terms of said will to Olive Shull Spencer, and that the payment of said sum would leave a deficiency at the present time in the amount due her under the terms of said will, which would have to be realized from the corpus of said estate in the sum of $2,243.05.

(12) That the said Olive Shull Spencer has proposed and agreed that if she be paid the sum of fifteen thousand dollars ($15,000) in cash

at this time out of the accrued income and capital assets of said estate, and if the petitioner J. Leak Spencer, Jr., shall also be paid at this time the sum of two thousand dollars ($2,000), and if the said Laura Spencer McCleneghan shall have canceled and delivered to her at this time a certain deed of trust and note secured thereby in the sum of $4,500 with all accrued interest executed by said Laura Spencer McCleneghan and her husband, F. A. McCleneghan, and now held by said executor and trustee as a part of said estate, and if certain personal jewelry, consisting of a watch, a diamond stick pin, and a set of diamond cuff links, now held by said executor and trustee, be divided and delivered as follows, namely: The said watch to Olive Shull Spencer, the diamond stick pin to Laura Spencer McCleneghan, and the diamond cuff links to J. Leak Spencer, Jr., she will thereupon waive her right to have the corpus of said estate further invaded or sold in order to supplement any income which may be derived from said estate, and that she further agrees that she will thereafter, of the net income to be derived from said estate, less costs of collection, administration charges and taxes, accept three-fifths thereof, and the other two-fifths of said net income to be paid to Laura Spencer McCleneghan and J. Leak Spencer, Jr., or their legal representatives, or in case of their death, to the ultimate beneficiaries under said will, provided, however, if said three-fifths of the net income shall be insufficient to pay to the said Olive Shull Spencer $325 per month, the said Olive Shull Spencer shall nevertheless receive, as a minimum income, the said sum of $325 per month, the deficiency to be made up out of the other two fifths of said income, which said two-fifths thereof shall be reduced accordingly, but if thereafter the income from said estate shall be sufficient that three-fifths thereof shall amount to more than $325 per month, the said Olive Shull Spencer shall nevertheless receive only $325 per month until such time as the amount theretofore deducted from the two-fifths in order to make up the deficiency of her minimum income of $325 per month has been repaid to said Laura Spencer McCleneghan and J. Leak Spencer, Jr., or their legal representatives, or in case of their death to the ultimate beneficiaries, under said will, all of which will more fully appear from the contract entered into between Olive Shull Spencer and J. Leak Spencer, Jr., and Laura Spencer McCleneghan, copy of which is attached to the petition herein as Exhibit 'B.'

(13) That the jewelry referred to in the foregoing finding of fact, consisting of a watch, a diamond stick pin, and a set of diamond cuff links, are of little intrinsic value and a sale thereof by the executor would not materially increase the funds of said estate.

(14) That the said Olive Shull Spencer purchased from the executor and trustee certain furniture and personal property at an agreed price

of $400, which purchase price has not been paid; that the executor and trustee sold an automobile for $700 as the property of the estate of J. Leak Spencer, deceased, which said automobile the petitioner, Olive Shull Spencer, claims and contends was her own individual property and that she is entitled to recover and receive from said executor and trustee the amount realized from the sale thereof; that the said Olive Shull Spencer further agrees that if the debt due by her to the estate on account of the purchase price of said furniture be canceled and remitted, that she will remit and forego any claim or right which she may have to recover of said executor and trustee the $700 realized from the sale of said automobile.

(15) That a settlement of the controversy between the said Olive Shull Spencer and the Commercial National Bank of Charlotte, N. C., executor and trustee, upon the question of who is entitled to have the proceeds of the sale of said automobile would entail expense and loss to said estate, even if the estate should be declared the proper owner of said proceeds, in at least the amount of the indebtedness of said Olive Shull Spencer to said estate on account of the purchase price of said furniture.

And upon said facts, the court is of the opinion and finds as a fact in this cause, that it is for the best interest of the estate of J. Leak Spencer, deceased, and is in the interest of the estate of the minor child, Laura Dwelle McCleneghan, and any other child or children that may hereafter be born to Laura Spencer McCleneghan, and of any child or children that may hereafter be born to J. Leak Spencer, Jr., and also in the interest of all parties other than the said Olive Shull Spencer, who may now or hereafter be interested in said estate, or in the distribution of the income of the corpus thereof, that the proposition submitted by said Olive Shull Spencer and the terms and provisions of said contract, Exhibit 'B,' be accepted, ratified and approved, and carried into effect.

The court further finds as a fact that the parties to this proceeding are all properly before the court, the Commercial National Bank of Charlotte, N. C., executor and trustee, having filed answer and being represented in court by counsel, and the minor defendant, Laura Dwelle McCleneghan, having been duly served with process in accordance with the provisions of the statute as shown by the return of the sheriff of Mecklenburg County on said process, and H. E. Kiser having been duly appointed by the court as guardian *ad litem* to represent said Laura Dwelle McCleneghan, minor, and also to represent any other child or children that may be hereafter born to said Laura Spencer McCleneghan, and any child or children that may hereafter be born to J. Leak Spencer,

Jr., and who might, under the terms of said will be or become interested in the distribution of the income or corpus of said estate, and the said H. E. Kiser, guardian *ad litem* as aforesaid, having duly filed his answer in the cause representing said interest; it is now

Considered, ordered, adjudged and decreed by the court that the proposal of said Olive Shull Spencer and the said contract, Exhibit 'B,' be approved, ratified, and confirmed, and that the Commercial National Bank of Charlotte, N. C., executor and trustee, be authorized, empowered, and directed to pay over to the said Olive Shull Spencer, out of the corpus and accrued income of said estate in its hands, the said sum of fifteen thousand dollars ($15,000), and to pay over to said J. Leak Spencer, Jr., out of the corpus and accrued income of said estate, said sum of two thousand dollars ($2,000), and to cancel and deliver to said Laura Spencer McCleneghan the deed of trust and notes or bonds secured thereby in the sum of forty-five hundred dollars ($4,500) with all accrued interest, executed by said Laura Spencer McCleneghan and her husband, F. S. McCleneghan, and now held by said estate, and also to deliver to Olive Shull Spencer the watch belonging to said estate, and to Laura Spencer McCleneghan the diamond stick pin belonging to the estate, and to J. Leak Spencer, Jr., the diamond cuff links belonging to the estate, and also to cancel the indebtedness against Olive Shull Spencer on account of the purchase price of the furniture purchased by her from said estate, all of the same to be in lieu of any unpaid portion of the income of this estate up to 15 December, 1931, and in consideration of the abandonment and waiver by her of any claim to any part of the $700 received from sale of said automobile and of her right at any time hereafter to cause any part of the corpus of said estate to be invaded or sold in order to pay her any income or annuity, and thereafter to make distribution of the net income of said estate received from and after 15 December, 1931, in accordance with the terms of the proposal of said Olive Shull Spencer and of the said contract as set forth in finding of fact No. 12 of this judgment, and to carry out the terms and provisions of said will except as modified by this judgment.

It is further adjudged that the defendant, Commercial National Bank of Charlotte, N. C., executor and trustee, pay the costs of this action to be taxed by the clerk of this court. This 15 December, 1931.

G. V. COWPER, *Judge Presiding.*"

To the foregoing judgment the defendant Commercial National Bank of Charlotte, N. C., executor and trustee, under the will of J. Leak Spencer, deceased, excepts, assigns error and appeals to the Supreme Court.

T. C. Guthrie, Plummer Stewart and W. C. Davis for J. Leak Spencer, Jr., and Laura Spencer McCleneghan.

N. A. Townsend for Olive Shull Spencer.

John M. Robinson and Hunter M. Jones for appellants.

CLARKSON, J. The questions involved: Did the court have jurisdiction of the action and of the parties and subject-matter of the action? Did the court have jurisdiction and power to ratify and confirm the contract entered into by the petitioners, and to render the judgment appealed from? Does said judgment bind unborn contingent remaindermen and all persons having a vested or contingent interest, or having a possibility of interest under the will or in the estate of J. Leak Spencer, deceased? All the questions above set forth involved in this appeal must be answered in the affirmative.

In Lawrence on Equity Jurisprudence (1929), Vol. 1, part sec. 495, p. 569-70-71, the law is stated as follows: "A trustee finding himself embarrassed by uncertainty as to his duties or rights may under proper conditions apply to a court of equity for instructions and advice. Nothing is more common, and nothing is better settled, than the right, and in a proper case, the duty of a trustee to invoke the direction and aid of a court of equity in the execution of the trust. The power is exercised with great caution, as it may involve passing upon substantial rights of persons not within the jurisdiction. The question upon which advice is sought must be one of present, or at least imminent urgency. The relief is usually upon principles of *quia timet,* or interpleader, and involves a showing of conflicting claims or the probability thereof without any other satisfactory means of determining them in such manner as to protect the trustee. 'Moot' questions are not proper for submission. Trustees should not therefore be advised as to the management of funds which have not come into their hands, nor as to the proper method of exercising a discretion invested solely in them, nor in cases where the advice may be of no use, as where the instrument whose construction is sought is being contested for alleged invalidity, nor where the trust has terminated, nor to settle conflicting rights of beneficiaries on the termination of the trust. The trustee must be honestly in doubt as to his course of action."

The author, *supra,* cites as an authority *Bank v. Alexander,* 188 N. C., 667. In that case it is held, at p. 667 (headnote): "Our courts, in the exercise of their equitable power, have supervisory jurisdiction in the administration of trust estates, and the trustee, in cases of doubt arising in the course of his administration of the trusts imposed by the instrument, may resort to them for instruction. Where a will provides for

an income to the widow, and, among other things, for contingent interests to ulterior takers, minors, some of whom are not *in esse* appointing a trustee with power to carry out the provisions of the will, and all those who are to take upon contingency are not only represented by the trustee, but by class representation, and a guardian has been appointed and is acting for all minor interests, both *in esse* and otherwise: *Held,* the courts have jurisdiction to pass upon the question as to whether a contract made between the widow and another principal beneficiary, making her an increased allowance in consideration that she will not dissent from the will, will be in the best interest of all parties; and its action confirming the contract and preserving the corpus of the estate for the administration of the trust imposed will not be disturbed on appeal." *Ernul v. Ernul,* 191 N. C., 347; *Bank v. Edwards,* 193 N. C., 118; *Waddell v. Cigar Stores,* 195 N. C., 434; *Trust Co. v. Stevenson,* 196 N. C., 29; *Mountain Park Institute v. Lovill,* 198 N. C., 642; *Finley v. Finley,* 201 N. C., 1.

In *Williams v. Williams,* 68 N. E., 449, 204 Ill., 44, that Court said, at pp. 50-51: "The first question relates to the power of a court of chancery to authorize the settlement of a suit brought by a minor to set aside a will upon terms which, in the opinion of the court, are advantageous to the minor. . . . It is well settled that courts of chancery exercise a superintendence over infants and their property as a branch of their general jurisdiction. The protection of the rights of infants is one of the duties of courts of equity and those courts from the earliest period have been vested with a broad and comprehensive jurisdiction over the persons and property of infants. . . . (At p. 52.) It would seem to be reasonable that, upon a bill filed by an infant to contest a will, a court of chancery should have the power to compromise and settle the issues, and by its decree sustain the will, and establish peace between the parties. It cannot be that such a litigation must continue, probably to the disruption of the family, and perhaps to the bankruptcy of the estate, because some of the parties are not *sui juris.*" *Johns et al. v. Montgomery,* 106 N. E., 497, 265 Ill., 21. *Bennett's Guardian v. Cary's Executor,* 276 S. W., 818 (1925), 210 Ky., 725.

In *Springs v. Scott,* 132 N. C., at p. 564, it is held: "With regard to the act of 1903 (see N. C. Code, Anno., Michie, sec. 1744, and cases cited), the court has the power to order the sale of real estate limited to a tenant for life with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not *in esse,* when one of the class being first in remainder after the expiration of the life estate *in esse* and a party to the proceeding to represent the class, and that upon decree passed, and sale and title made pursuant thereto, the

purchaser acquires a perfect title as against all persons *in esse* or *in posse.*" *Trust Co. v. Nicholson,* 162 N. C., 257.

In *Waddell v. Cigar Stores, supra,* at p. 438, we find: "In *Ex Parte Dodd,* 62 N. C., 98, this Court held that if land be devised to a person for life with remainder in fee to his children a sale of the land cannot be ordered before the birth of a child, because there is no one *in esse* to represent its interest; but if there be a living child in whom the fee can vest a sale may be ordered, though all the children of their class may not yet have been born. See *Miller ex parte,* 90 N. C., 625; *Irvin v. Clark,* 98 N. C., 437; *Springs v. Scott,* 132 N. C., 548; *Lumber Co. v. Herrington,* 183 N. C., 85; *Bank v. Alexander,* 188 N. C., 667. But the rule formerly prevailing has been modified by legislation. C. S., 1744. *Pendleton v. Williams,* 175 N. C., 248; *Poole v. Thompson,* 183 N. C., 588." C. S., 1744. Remainders to uncertain persons; procedure for sale; proceeds secured. C. S., 1745. Sales of contingent remainders validated.

Without analyzing the facts in this controversy and the judgment of the court below, we think it was the proper one under the facts and circumstances of this case. We think those *in esse* or *in posse,* are properly represented in this proceeding; all parties who could possibly have any interest in the estate are parties to this action and the infant and all unborn children who might have any interest, are properly represented. From a careful examination of the facts, as found by the court below and the judgment rendered, we think a court of equity has jurisdiction in the matter. We think the judgment fair to all and not prejudicial to the parties who have either vested or contingent interests.

The policy of the law is to encourage settlement of family disputes like the present, so as to promote peace, good will and harmony among those connected by consanguinity or affinity. Equity favors amicable adjustments. In the present action, the contract that was made was a compromise over the provisions of the will, based on the present deflation in prices and an adjustment of other differences. The court below found the facts at length with care, and rendered judgment that it was to the best interest of all that "the terms and provisions of said contract . . . be accepted, ratified and approved and carried into effect." It was further found as a fact "that the parties to this proceeding are all properly before the court," etc.

Speaking to the subject, in *Carstarphen v. Carstarphen,* 193 N. C., 548, is the following: "A sound public policy looks to the speedy ending of litigation. Courts never encourage litigation, but look with favor on adjustment of differences, and this is especially true in family disputes." For the reasons given, the judgment of the court below is

Affirmed.

CHOWAN COUNTY, JULIEN WOOD, CHAIRMAN, W. T. SATTERFIELD, A. D. WARD, J. A. WEBB, AND W. H. WINBORNE, COUNTY COMMISSIONERS, G. W. GOODWIN, SHERIFF, AND GEORGE C. HOSKINS, COUNTY TREASURER, v. THE COMMISSIONER OF BANKS LIQUIDATING THE CITIZENS BANK.

(Filed 27 April, 1932.)

1. Taxation C c—Commissioner of Revenue is without power to cancel assessment of corporate excess of bank upon its later insolvency.

The statutory method by which the valuation of the corporate excess of a corporation is fixed for taxation, with the procedure for appeal by the corporation to the courts of the State, must be strictly followed, and where the State Board of Assessment has passed upon the statement of a bank and fixed the value of its corporate excess and later has reduced the assessment thereof, to which the bank makes no exception, the Commissioner of Revenue is without authority upon the subsequent failure and receivership of the bank to cancel the assessment fixed by the board, and the tax thereon may be recovered by the county. Public Laws of 1929, chap. 344, secs. 600, 603.

2. Same—Valuation of corporate excess is fixed as of first April and subsequent insolvency of corporation cannot affect regular assessment.

Under the provisions of chapter 344, Public Laws of 1929, secs. 600, 603, the valuation of the corporate excess of a corporation for the purpose of taxation by the counties is fixed as of 1 April, and taxes must be paid by the corporation upon the valuation then so fixed unless modified by the State Board of Assessment in accordance with the prescribed statutory procedure, and where the assessment of a banking corporation is regularly made by the State board from which no appeal is taken, the subsequent insolvency of the bank cannot affect the assessment made in accordance with the statutory procedure.

3. Banks and Banking H e—Liquidating agent of bank must be sued in his individual name and not in the name of his office.

In an action against the Commissioner of Banks he must be sued in his individual name as such and not in the name of his office, but a defect in this respect may be cured by amendment.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1931, of CHOWAN. Affirmed.

On 26 April, 1930, the Citizens Bank, located at Edenton, Chowan County, N. C., filed with the State Board of Assessment in compliance with section 600 of the Machinery Act of 1929 (chapter 344, Public Laws of 1929) its annual report for assessment and taxation as of 1 April, 1930, accompanied by a statement of its condition as of 1 April, 1930, and showing the value of said stock over and above the value of property listed locally to be $24,816.75. Thereupon the value of said

corporate excess of the stock was tentatively fixed by said board or by the Commissioner of Revenue at the amount shown by the report and the bank was notified accordingly.

The bank protested that this valuation was too high and the protest was acted upon at a meeting of the board on 10 June, 1930, and "after careful consideration" the board reduced the value and fixed it at $19,375 and so notified the bank on 12 June, 1930. No further protest was made nor any appeal taken by the bank from this decision and the State Board of Assessment in due course on 1 August, 1930, certified this final valuation to the register of deeds of Chowan County who placed it on the assessment roll of taxable property in the county for that year.

During July, 1930, final values of all taxable property listed in Chowan County as of 1 April, 1930, were fixed and determined by the county commissioners acting as the board of equalization and review and thereafter the commissioners levied county taxes for that year at the rate of $1.28 on the $100 of valuation, being $251.87 on the $19,375 valuation of the corporate excess of the stock of the Citizens Bank, as will appear by mathematical calculation.

The bank closed on 27 December, 1930, and was taken over for liquidation by the Corporation Commission and its successor, the defendant, Commissioner of Banks. County taxes had not been paid. On 11 February, 1931, the State Liquidating Agent, acting under the Corporation Commission or its successor, the defendant wrote to the Commissioner of Revenue asking that the valuation of the corporate excess of the capital stock of the bank as of 1 April, 1930, be canceled and on 17 February the Commissioner of Revenue, acting by his assistant and without action by the State Board in meeting, wrote to the county accountant requesting that the said valuation as previously determined and certified by the board be stricken out. All of this was done without notice to Chowan County or its officials.

The county officials refused to comply with the request. The liquidating agent, acting under the Commissioner of Banks, paid the taxes levied on the property listed locally without prejudice to the question of liability for the tax on the corporate excess. The county filed a claim for the tax on the corporate excess in accordance with the law relating to the liquidation of banks, which was rejected and this action was begun on said claim. N. C. Code (Anno.) of 1931 (C. S., 218(c), (10) and (11).

The court below rendered judgment for the county. The defendant excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

W. D. Pruden for plaintiffs.

Attorney-General Brummitt and Assistant Attorneys-General Seawell and Siler and W. S. Privott for defendant.

CLARKSON, J. The question involved: Under the circumstances of this case did the Commissioner of Revenue, after the assessment was regularly made and no appeal taken in accordance with the statute, have authority to strike out an assessment of the value of the "corporate excess" of the capital stock of the Citizens Bank, made by the State Board of Assessment and certified to Chowan County, and thereby prevent the collection of taxes levied thereon by the county? We think not.

Sections 600 and 603 of the Machinery Act of 1929 (Public Laws 1929, chap. 344), provide the method by which the State Board of Assessment shall assess the value of stock in banks and other corporations. Provision is made and time limit set in which the taxpayer may, if not satisfied, appeal to the Superior Court and then to the Supreme Court.

In the present case there was no appeal taken by the bank in accordance with the statute. On 1 August the excess $19,375 was certified to Chowan County, N. C.

Section 603(6) of the act, *supra,* is as follows: "The State Board of Assessment shall, on or before the first day of August of each year, certify to the register of deeds of the county in which such corporation, limited partnership or association has its principal office or place of business, the total value of the capital stock of such corporation, limited partnership or association as determined in this section; *and such corporation, limited partnership or association shall pay the county, township, city or town tax upon the valuation so certified.*" (Italics ours.)

In *Mfg. Co. v. Commissioners of Pender,* 196 N. C., at p. 748, citing numerous authorities, we find: "A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax cannot be heard by a judicial tribunal to assert its invalidity. Our State decisions to the extent they have dealt with the subject are in full approval of the principle, holding that a taxpayer must not only resort to the remedies that the Legislature has established, but that he must do so at the time and in the manner that the statutes and proper regulations provide." An appeal in the above case was taken to the Supreme Court of the United States, and in *Garysburg Manufacturing Company v. Board of Commissioners of Pender County,* 280 U. S., 52, is the following: "28 October, 1929. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the State court sought

hereto be reviewed was based on a non-Federal ground adequate to support it," citing authorities. *Blackmore v. Duplin County*, 201 N. C., 245; *Power Co. v. Burke County*, 201 N. C., 318; *Hooker v. Pitt County, ante*, 4.

The State Board of Assessment, "after careful consideration," fixed the value for taxation at $19,375.

In *R. R. v. Lenoir County*, 200 N. C., at p. 496, the following is stated: "We have held that while a board of county commissioners cannot with retroactive effect change a tax which it has purposely imposed in the way the law prescribes, it may correct an erroneous entry upon the minutes so that the record shall, in the language of the law, 'speak the truth' concerning the tax. *R. R. v. Reid*, 187 N. C., 320; *R. R. v. Forbes*, 188 N. C., 151; *R. R. v. Cherokee County*, 195 N. C., 756." *Oliver v. Highway Commission*, 194 N. C., 380; *R. R. v. Cherokee County*, 194 N. C., 781.

There was no erroneous entry in the present case. It is mandatory on the bank to pay the taxes on the shares of stock. Section 600(6) of the act, *supra*, is as follows: "The taxes assessed upon the shares of stock of any such banking associations, institutions or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer as well as such banking association, institution or trust company shall be liable for such taxes and in addition thereto for a sum equal to ten per cent thereof," etc.

Plaintiffs contend that the attempt by the defendant and the Commissioner of Revenue to strike out the valuation of the stock was not only unauthorized but expressly prohibited by statute. The contention is correct.

The plaintiffs contend: "Under the law all property must be listed, and its value assessed for taxation as of 1 April, of each year, and the taxpayer is charged with and required to pay taxes on its value as of that date, without regard to subsequent events. If a farmer lists a mule or a barn and has its value assessed as of 1 April he is not relieved of paying taxes thereon because the mule thereafter dies or the barn burns in December, and if a bank lists its shares of stock and has their value fixed by the proper authorities as of 1 April, there is no reason why it should be relieved of taxes when subsequent adverse conditions cause it to close its doors in December and render the stock worthless." We think this contention correct.

Chowan County Tax Accountant, received the following letter:

"17 February, 1931.

Mr. R. D. Dixon, Tax Accountant,
Edenton, N. C.

Dear sir: Referring to certificate of assessed value of shares of stock of banks as of 1 April, 1930. Will you kindly strike from said certificate the excess value of the Citizens Bank, Edenton, $19,375.

Yours very truly, A. J. Maxwell, Commissioner.
OST/MB. by Assistant Commissioner."

The defendant contends that the Commissioner of Revenue was authorized to strike from the tax books the *excess* value, and cites Machinery Act 1929, *supra,* Art. 2, part sec. 200: "The Commissioner of Revenue shall be the chairman of the said board and shall, in addition to presiding at the meetings of the board, exercise the functions, duties and powers of the board when not in session."

Part of section 202: "The State Board of Assessment shall exercise general and specific supervision of the systems of valuation and taxation throughout the State, including counties and municipalities, and in addition they shall be and constitute a State Board of Equalization and Review of valuation and taxation in this State."

The contentions cannot be sustained.

In *Caldwell County v. Doughton,* 195 N. C., 62, it is held that action by the State Board of Assessment on the complaint of a taxpayer made in May, 1927, changing values as of May, 1926, on which taxes had been levied for 1926 was unauthorized by statute. The Court saying: "We understand it not to have been the intention of the General Assembly to confer upon the State Board of Assessment original jurisdiction to hear and determine at all times indiscriminate complaints by individual taxpayers of the over valuation of their property."

We can find no power giving the Revenue Commissioner authority to wipe from the tax books this assessment, made regularly in accordance with law from which no appeal was taken. *Markham v. Carver,* 188 N. C., 615.

In *Commissioner of Banks v. Mills, ante,* at p. 512, is the following: "We have recently held that the Commissioner of Banks must sue in his individual name and that the failure to do so may be cured by amendment." In the present case he was not sued in his individual name and this must be cured by amendment. For the reasons given, the judgment of the court below is

Affirmed.

MOLLIE JERNIGAN v. NATIONAL UNION FIRE INSURANCE COMPANY, YORKSHIRE INSURANCE COMPANY AND METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 27 April, 1932.)

Insurance H a—Local agent of insurer may not cancel policy at its request without consent of insured.

The local agent of a fire insurance company has no authority to cancel a binding policy of fire insurance at the request of the insurer without the consent of the insured, and where he attempts to do so without the knowledge or consent of the insured, and issues another policy of the same kind in another company in its place, the cancellation is without effect and the original policy remains in force, and the insured may recover thereon for loss by fire sustained before knowledge of the agent's acts, there being no evidence of ratification by the insured.

CIVIL ACTION, before *Moore, Special Judge,* at Special Term, 1931, of HARNETT.

The facts as agreed upon by the parties are substantially as follows: On 3 October, 1928, the National Union Fire Insurance Company, through its agent, James Best, issued its fire insurance policy in standard form, insuring the dwelling of plaintiff in the sum of $2,000, and the furniture in said dwelling in the sum of $1,000. A New York Standard mortgage clause, payable to the Metropolitan Life Insurance Company, was attached to said policy, which was then forwarded to said company. On 2 December, 1930, the National Union Fire Insurance Company notified the local agent, James Best, that it desired to cancel said policy, and thereupon on the same day the said Best, who was also agent for the Yorkshire Insurance Company, issued a policy of insurance in the Yorkshire Company for the identical amount specified in the National Union policy. The Yorkshire policy was in standard form with a New York loss clause payable to the Metropolitan Life Insurance Company, and the agent, James Best, "promptly sent what is known as the daily report of the issuance of said policy to the Yorkshire Insurance Company, and it received said daily report prior to the fire, to wit, on 4 December, 1930, and made no objection to the issuance of the policy." The local agent thereupon, on the same day, to wit, 2 December, 1930, notified the National Union Company that its policy had been canceled. When the agent sent the Yorkshire policy to the life insurance company which held the mortgage upon the property of plaintiff, he requested said mortgagee to return the National Union policy and accept the Yorkshire policy in lieu thereof. On 8 December, 1930, the property of plaintiff was destroyed by fire, and at the time of the fire the mortgagee, Metropolitan Life Insurance Company, held in its pos-

session both policies of fire insurance, but it retained the Yorkshire policy and returned the National Union policy to the agent Best "without knowledge of the occurrence of the fire."

None of the transactions resulting in the substitution of insurance policies were known to the insured until after the destruction of the property by fire. No premium was returned to the plaintiff by the National Union, nor was she called upon by the Yorkshire to pay any premium for its policy.

After the fire, the local agent notified the Yorkshire Company of the loss, but did not notify the National Union of said loss. However, the National Union sent to the agent the sum of $38.14, which said company had collected as premium on its policy. After the fire the plaintiff said that she "was looking to the National Union Fire Insurance Company to whom she had paid her premium, to pay the loss and damage which she had sustained." Thereafter she was advised by counsel to institute an action against both companies "to the end that the court might declare the liability of the respective fire insurance companies to the plaintiff and her mortgagee . . . ; that the plaintiff disclaims any preference between the Yorkshire Insurance Company and the National Union Fire Insurance Company, but contends that the one or the other or both are liable to her, etc.

Upon the agreed facts the court was of the opinion that "James Best, local agent of the National Union Fire Insurance Company, and local agent of the Yorkshire Fire Insurance Company, had the right to cancel the policy issued by the National Union Fire Insurance Company and to substitute a like policy of the Yorkshire Insurance Company therefor without formally notifying the insured, provided said substitution could be made without injury to the insured; and the court being of the opinion that the policy of the Yorkshire Fire Insurance Company was legally issued and substituted for the policy of the National Union Fire Insurance Company, and that the policy of the Yorkshire Fire Insurance Company was in force on the date the plaintiff's property was destroyed by fire." Thereupon the court adjudged that the plaintiff was entitled to recover upon the Yorkshire policy.

From the judgment so entered the defendant, Yorkshire Insurance Company, appealed.

Clifford & Williams for plaintiff.
Smith & McLeod for National Union Fire Insurance Company.
Brooks, Parker, Smith & Wharton for Yorkshire Insurance Company.

BROGDEN, J. The questions of law presented by the record are as follows:

1. Was the National Union Fire Insurance policy duly canceled?

2. Did the plaintiff ratify the substitution or issuance of the Yorkshire policy in lieu of the National Union policy?

The first question must be answered in the negative.

The methods prescribed by law for the cancellation of fire insurance policies are discussed and applied in *Dawson v. Insurance Co.*, 192 N. C., 312, 135 S. E., 34. The plaintiff, for whose benefit the insurance was procured, knew nothing of the cancellation of the National Union policy, therefore, neither approved, waived nor ratified the cancellation. In the *Dawson case* the Court said: "No contract, valid in its inception, and unobjectionable in its terms, can be canceled, without the consent of all parties, who have acquired rights thereunder."

The power of a local insurance agent, without the knowledge or consent of the insured, to substitute one policy for another is discussed in the following cases: *Waterloo Lumber Co. v. Des Moines Ins. Co.*, 138 N. W., 504, (51 L. R. A. (N. S.), 539); *Niagara Fire Ins. Co. v. Raden*, 5 Southern, 876; *Grace v. Ins. Co.*, 109 U. S., 278; *City of New York Ins. Co. v. Jordan*, 284 Fed., 420; *Clark v. Ins. Co. North America*, 35 Atlantic, 1008; *Insurance Company of North America v. Burton*, 294 Pacific, 796; *Gulf Ins. Co. v. Landamore*, 22 Southwestern (2d), 978; *Johnson v. Ins. Co.*, 63 Northeastern, 610; *N. Pellagi & Co. v. Orient Ins. Co.*, 148 Atlantic, 869.

The *Clark case, supra,* is directly in point and states the principle involved as follows: "There was no contract between the plaintiff and the defendant company at the time the loss occurred. There was a subsisting contract between the plaintiff and the Commercial Union. The unauthorized attempt on the part of the agent of the defendant company to make such a contract by entering in his "daily report" the memorandum of such contract was not enough. The contract of insurance is to be tested by principles applicable to the making of contracts in general. The terms of the contract must have been agreed upon. This necessarily implies the action of two minds, of two contracting parties. If it is incomplete in any material particular, or the assent of either party is wanting, it is of no binding force."

The *Burton case, supra,* is also directly in point. The syllabus by the Court declares: "Where one applies to an agent authorized to issue policies and collects premiums for insurance in a stated sum, and the agent issued a policy therefor, delivered it and collected the premium, the contract was complete, and the agent on notice from insurer to cancel the policy could not, without insured's knowledge, place the risk with another insurer." The opinion of the Oklahoma Court in said case also said: "There is a well established rule that, where an owner constitutes the agent of a fire insurance company his agent to keep the

property insured with power to select the insurer or insurers, such agency carries with it the power to cancel a policy without notice to the insured and substitute therefor a policy in another company, as he may be the agent for the insured for such purpose, and as such may, for the insured, waive notice." And the opinion continues: "There being no evidence of express authority for the agent to cancel the first policy, and there being no sufficient evidence of direction by plaintiff to the agent to insure the property and keep it insured, and no evidence of a course of dealing or custom between the parties sufficient to justify a conclusion that the agent was authorized to act for the plaintiff to the extent of waiving notice of the cancellation of the first policy, we conclude that, no notice having been given to plaintiff as required by law and the terms of the policy, the first policy was not canceled before the fire occurred, and it was then too late."

The foregoing cases and many others of like tenor fully recognize the right of the insured, to ratify the action of the local agent in issuing the substituted policy, for the reason that both policies were obviously issued for his benefit. Nevertheless, in the case at bar, the insured stated that she "was looking to the National Union Fire Insurance Company to whom she had paid her premium to pay the loss and damage which she had sustained."

The result is that the National Union policy, not having been properly canceled, was in full force at the time of the fire, and the local agent, without the knowledge or consent of the plaintiff, had no authority to issue the Yorkshire policy. Moreover, as the insured has not ratified the issuance of the Yorkshire policy, she is entitled to recover upon the first policy issued. Consequently, the judgment is

Reversed.

STATE v. HEZZIE AVANT.

(Filed 4 May, 1932.)

1. Indictment A d—Requirement that names of witnesses be marked on indictment is directory and endorsement as true bill is not necessary.

The requirement of C. S., 2336 that the foreman should mark the names of witnesses examined by the grand jury on the bill of indictment is merely directory, and there is no statute requiring that the foreman endorse thereon whether or not it is found a true bill, the validity of the bill being determined by the court records and not by endorsement on the bill, and where a bill of indictment in a capital case has been

duly returned into open court by the grand jury or a majority of them as a true bill, C. S., 4611, and the court in its discretion, upon a later investigation, allows the foreman in open court, in the presence of a majority of the grand jury, to mark the names of the witnesses examined on the bill and to endorse it a true bill as directed by the grand jury, the defendant's motion to quash or in arrest of judgment is properly refused.

2. Jury A b—Persons summoned by sheriff in his discretion for special venire are subject to same challenges for cause as tales jurors.

Where a special venire has been ordered by the court for the trial of a capital felony, C. S., 2338, such venire, being selected by the sheriff in his discretion and not from the jury box, are subject to the same challenges for cause as tales jurors, C. S., 4635, and among such challenges for cause is that the proposed juror is not a freeholder.

3. Jury A d—Fact that wife owns real estate does not constitute proposed juror a freeholder when no children have been born to the marriage.

The ownership of property by the wife of a proposed juror selected by the sheriff in a special venire does not constitute him a freeholder within the intent of the statute when there have been no children born of the marriage, and where the defendant challenges such juror for cause on the ground that he was not a freeholder it is error for the trial court to refuse to allow the challenge, and where the defendant properly presents his exception thereto by exhausting his peremptory challenges and excepting to the court's refusal to allow the challenge for cause, a new trial will be awarded.

APPEAL by defendant from *Finley, J.*, at November Term, 1931, of SCOTLAND. New trial.

The defendant in this action was tried on an indictment for murder. He was convicted of murder in the first degree.

From judgment that he be punished with death by means of electrocution, as prescribed by statute, the defendant appealed to the Supreme Court.

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

Jennings G. King for defendant.

CONNOR, J. The defendant's contention, presented by his first assignment of error on his appeal to this Court, that the indictment in this action is not valid, cannot be sustained. This assignment of error is based on defendant's exception to the refusal of the trial judge to allow his motion to quash the indictment. The grounds for this motion were (1) that when returned into court by the grand jury, as provided by statute (C. S., 4611), the bill of indictment was not endorsed by the

foreman of the grand jury or otherwise as "a true bill"; and (2) that the names of the witnesses for the State who were sworn and examined before the grand jury were not marked thereon by its foreman, as provided by statute (C. S., 2336).

The judge found from his investigation, as appears in the record, that certain persons whose names are endorsed on the bill of indictment as witnesses for the State, were sworn and examined before the grand jury, and that the grand jury, after hearing and considering the testimony of these persons as evidence for the State, came into court, in a body, accompanied by its foreman, and returned the bill as "a true bill." This investigation was made by the judge in open court and in the presence of the grand jury. The judge thereupon permitted the foreman of the grand jury, in open court, and in the presence of the grand jury, to mark the names of the persons who had been sworn and examined before the grand jury as directed by the statute, and also permitted the foreman of the grand jury to endorse the bill of indictment, by signing his name thereon, showing by said endorsement that the grand jury had found the bill "a true bill." The indictment, with the endorsements thereon, when entered on the records of the court, was regular in all respects, and was in full compliance with statutory requirements, and with the practice in the courts of this State. Defendant's motion to quash the indictment was denied, and defendant excepted.

The foreman of the grand jury is authorized by statute in this State to administer oaths and affirmations to persons whose names are endorsed on a bill of indictment as witnesses for the State. He is required to mark on the bill the names of such persons as are sworn by him, and examined before the grand jury. C. S., 2336. In *S. v. Hollingsworth,* 100 N. C., 535, 6 S. E., 417, it is said: "The endorsements on the bill form no part of the indictment, and it has been held that the act of 1879 (now C. S., 2336), requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses sworn and examined before the grand jury, is merely directory, and a noncompliance therewith is no ground for quashing the indictment. *S. v. Hines,* 84 N. C., 810. It constitutes ground neither for a motion to quash, nor in arrest of judgment."

There is no statute in this State requiring that a bill of indictment, which has been duly considered and returned into court by a grand jury shall be endorsed by the foreman or otherwise, as "a true bill," or as "not a true bill." It is provided by statute (C. S., 4611), that grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for

the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body. No endorsement by the foreman or otherwise is essential to the validity of an indictment, which has been duly returned into court by the grand jury, and entered upon its records. The validity of the indictment is determined by the records of the court, and not by the endorsements, or the absence of endorsements on the bill. *S. v. Shemwell,* 180 N. C., 718, 104 S. E., 885, *S. v. Long,* 143 N. C., 670, 57 S. E., 349, *S. v. Sultan,* 142 N. C., 569, 54 S. E., 841. It should be noted that *S. v. McBroom,* 127 N. C., 528, 37 S. E., 193, in which it was held by a divided Court that the endorsement "a true bill" is essential to the validity of an indictment, was expressly overruled in *S. v. Sultan, supra.*

When a bill of indictment has been duly returned into open court, by the foreman of the grand jury, or in capital felonies, by the entire grand jury, or a majority of them, and by an inadvertence, the foreman of the grand jury has failed to mark the names of persons endorsed thereon as witnesses for the State, who have been sworn and examined before the grand jury, as directed by the statute, or has failed to endorse thereon the action of the grand jury with respect to whether the bill was found by the grand jury "a true bill," or "not a true bill," the judge may in the exercise of his discretion, permit the foreman to mark the names of the witnesses who have been sworn and examined before the grand jury, or to endorse the bill as directed by the grand jury, provided that where the bill charges a capital felony, the names should be marked, and the endorsement made in open court, and in the presence of the entire grand jury or a majority of them. In such case, the indictment is valid, and it is not error for the judge to refuse to allow a motion to quash the indictment, or in arrest of judgment, after a verdict, on these grounds.

The defendant's assignment of error based on his exception to the refusal of the judge to allow his peremptory challenge of the juror, N. A. Currie, must be sustained. By such refusal the defendant was deprived of a substantial legal right, and for this reason the defendant is entitled to a new trial.

When this action was called for trial, the defendant, who was charged in the indictment with a capital offense, in apt time, requested the judge to issue to the sheriff a special writ of *venire facias,* commanding him to summons seventy-five persons qualified to act as jurors in Scotland County, to appear and serve as jurors during the term of court at which the action was set for trial. This request was granted by the judge in the exercise of the discretion vested in him by statute. C. S., 2338. The persons summoned by the sheriff were not drawn from the

jury box, as authorized by statute, C. S., 2339, but were selected by the sheriff in the exercise of his discretion. For this reason, the persons who were summoned on the special venire, and who were tendered to the defendant as jurors for the trial of the action, were subject to the same challenges for cause as tales jurors, C. S., 4635. Among other challenges for cause, which the defendant was authorized by law to make to each of these jurors, was that the juror tendered to him was not a freeholder in Scotland County. *S. v. Levy,* 187 N. C., 581, 122 S. E., 386.

In the selection of the jurors for the trial of this action, Monroe McMillan, who was one of the special venire summoned by the sheriff, was tendered to the defendant as a juror. He was challenged by counsel for defendant on the ground that he was not a freeholder in Scotland County. In response to questions addressed to him by counsel for defendant, the juror stated that he did not own land in Scotland County, but that his wife, who was then living with him, did own land in said county. No children had been born to the marriage. Defendant's challenge to this juror for cause was not allowed by the judge and defendant excepted. The defendant then challenged the juror peremptorily. This challenge was allowed and the juror was excused.

Thereafter, the juror, N. A. Currie, who was also one of the special venire summoned by the sheriff, was tendered to the defendant as a juror. The defendant challenged this juror, but did not assign cause for his challenge. He challenged the juror peremptorily. This challenge was not allowed by the judge, and the juror was sworn and served as a juror at the trial. Prior to his challenge of this juror, the defendant had challenged twelve jurors, including the juror, Monroe McMillan, peremptorily. The judge held that defendant had exhausted his peremptory challenges, and for this reason disallowed the challenge to the juror, N. A. Currie. The defendant duly excepted to the refusal of the judge to allow his peremptory challenge of the juror, N. A. Currie, and on his appeal to this Court assigns such refusal as error. By this assignment of error, the defendant duly presents his contention that there was error in the refusal of the judge to allow his challenge of the juror, Monroe McMillan, on the ground that said juror was not a freeholder in Scotland County. *Oliphant v. R. R.,* 171 N. C., 303, 88 S. E., 425.

In *Hodgin v. R. R.,* 143 N. C., 93, 55 S. E., 413, it is said by *Brown, J.:* "One of the jurors was challenged by defendant upon the ground that he was not a freeholder. The challenge was allowed and plaintiff excepted. The juror owned no land, but his wife was seized of a fee and had children by her husband. While the Constitution, Art. X, sec. 6, has wrought very material and far-reaching changes as to the rights

and dominion of the wife over her separate property, it seems, nevertheless, to have been held by this Court that the husband still has what is termed an 'interest' in her land which constitutes him technically a freeholder." This holding, however, has been confined to a husband, whose wife has borne him children, and who is therefore a tenant by the curtesy initiate with respect to land owned by her. It has never been held by this Court that a husband is a freeholder, and therefore not subject to challenge when tendered as a talis juror, by virtue of his wife's ownership of land, when no children have been born of the marriage. We know of no principle of law which would sustain such holding by this Court. While we adhere to the decisions of this Court that a husband, whose wife owns land, and has borne him children, is a freeholder in the sense that he is thereby qualified to serve as a talis juror, we cannot hold, in the present state of the law, that he is a freeholder, by virtue of his wife's ownership of land, when no children have been born of his marriage.

For the error of the judge in refusing to allow defendant's peremptory challenge to the juror, N. A. Currie, we must hold that defendant is entitled to a

New trial.

J. F. SOMERSETTE, J. W. SOMERSETTE AND HERBERT A. MINTZ v. WALTER M. STANALAND.

(Filed 4 May, 1932.)

1. Trial D b—Directed verdict may be given in favor of party having burden of proof where all evidence and inferences are in his favor.

Where the evidence is conflicting the court may not direct a verdict in favor of the party having the burden of proof, but where the facts are admitted or established, and only one inference can be drawn therefrom, a directed verdict may be given.

2. Dedication A b—Evidence of dedication by owner and acceptance by the public held sufficient for directed verdict.

Where, in an action to restrain the defendant from obstructing a roadway across his lands, it is not controverted that the defendant's deed referred to an unregistered plat showing the roadway across the lands conveyed and that at the time of and before the execution of the defendant's deed the road was used by the public, an instruction directing an affirmative verdict upon the issues of dedication and acceptance of the road for a public use is not error, and the registration of the plat referred to in the deed is not necessary.

3. Estoppel A a—Where grantor is estopped by deed from denying dedication of public way his grantee is also estopped.

In a suit to restrain the grantee from obstructing a public road that had been platted and referred to in the deed, and which road has been used by the public prior to the execution of the deed, both the grantor and grantee is mutually estopped to deny that the road had been dedicated to the public use.

APPEAL by defendant from *Moore, Special Judge,* at September Term, 1931, of BRUNSWICK.

The plaintiff instituted this action against the defendant to procure a restraining order and a mandatory injunction to compel the removal of obstructions placed by the defendant in a public road. Upon pleadings filed issues were submitted to the jury and answered as follows:

1. Did the defendant, W. M. Stanaland, purchase lot No. 1, from A. G. Frink and wife, as alleged in the complaint? Answer: Yes.

2. Did the defendant, W. M. Stanaland, purchase lot No. 2, from J. R. Mintz, as alleged in the complaint? Answer: Yes.

3. Has that portion of lots Nos. 1 and 2, upon which the road in question is indicated in the map offered in evidence, been dedicated to the public for public use, and has the same been used by the public as a public road? Answer: Yes.

4. Did the defendant, W. M. Stanaland, wilfully and unlawfully obstruct that part of the public road through, upon and over lots Nos. 1 and 2, as alleged in the complaint? Answer: Yes.

The first two issues were answered by consent. In reference to the third and fourth, the court instructed the jury to answer them in the affirmative if they found the facts to be as the evidence tended to show.

The defendant claimed title to lots 1 and 2 under the following conveyances: A deed to the defendant executed by A. G. Frink on 25 February, 1928, and a deed to defendant executed by J. R. Mintz, his wife Edna Mintz, and his mother Mary E. Mintz, on 25 February, 1928. In the first deed lot No. 1 is described by metes and bounds, "containing 14/100 acres and known as lot No. 1, according to a plat in a survey made by A. J. Brown, 14 October, 1927." The description of lot No. 2 is by metes and bounds together with a similar reference to the survey made by A. J. Brown.

A. J. Brown testified that he made the survey on 14 October, 1927, and prepared the plat referred to in the deeds, and A. G. Frink testified that he had the plat and showed the defendant the road extending through lots 1 and 2 and that the defendant knew the road was there at the time he made the purchase. The defendant admitted in his testimony

that the road appeared on the plat at the time he bought the lots and that the public was using the road at that time and had used it prior thereto.

The plat made by Brown shows that the road referred to extended across a part of lots 1 and 2. The question was whether the road was private or whether it had been dedicated to public use.

Robert W. Davis for plaintiff.
C. Ed. Taylor for defendant.

ADAMS, J. If the evidence in a case is conflicting the trial judge cannot direct a verdict in favor of the party upon whom rests the burden of proof; but 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." *Reinhardt v. Ins. Co.*, 201 N. C., 785. In the present case the instruction complained of was not in conflict with this rule.

Brown's survey was made 14 October, 1927; his plat shows nine lots laid off and described by metes and bounds; and the road in question is represented as extending across a part of lots one and two and intersecting with the Grissett crossroad. The defendant received his deeds for these two lots on 25 February, 1928, with knowledge that the road had been located as described. He testified that at the time of his purchase the road appeared on the map. In fact, his deeds refer to the survey and the plat as a part of the description. He testified that the road was then used by the public and had been used for some time; and other witnesses said the road had been accepted by the board of county commissioners.

It is an established principle that if the owner of land lays it off into lots with intersecting alleys, streets, or highways, and conveys the lots by reference to the plat, he thereby dedicates such alleys, streets, and highways to the use of the purchasers and of the public, unless it appears that the mention of the alleys, streets, or highway was intended only for the purpose of description. *Conrad v. Land Co.*, 126 N. C., 776; *Bailliere v. Shingle Co.*, 150 N. C., 627, 636; *Green v. Miller*, 161 N. C., 25; *Wheeler v. Construction Co.*, 170 N. C., 427; *Elizabeth City v. Commander*, 176 N. C., 26. The principle may apply to a plat of ground outside, as well as to property within, a town or village; a dedication may be made of a country road or of a city street. 18 C. J., 48, sec. 25; *Green v. Miller, supra*. It is not necessary that a plat be registered in order to become a part of the description of the property conveyed. *Collins v. Land Co.*, 128 N. C., 563.

The defendant could have compelled the owners of the land who executed the deeds to abide by their dedication of the road. The owners

were estopped to deny the dedication. We may grant that so far as the general public is concerned acceptance is requisite to dedication. *Wittson v. Dowling,* 179 N. C., 542; *Irwin v. Charlotte,* 193 N. C., 109; *Gault v. Lake Waccamaw,* 200 N. C., 593; *Wright v. Lake Waccamaw, ibid.,* 616. But here the road had been accepted and used by the public before the defendant acquired his title. Estoppels are mutual, and under the facts disclosed by the evidence we are of opinion that the owners of the land and the defendant are estopped in equity to deny that the road in question was dedicated to the public use.

Upon an inspection of the several assignments of error we find no cause for disturbing the judgment.

No error.

STATE v. FANNY MYRICK.

(Filed 4 May, 1932.)

1. Criminal Law D b: F e—Magistrate has original jurisdiction of simple assault and on appeal from acquittal plea of former jeopardy is good.

A warrant of a justice of the peace charging the defendant with an assault upon the prosecuting witnesses by kicking, choking and rocking them, without inflicting serious injury, is only for a simple assault, and the magistrate has exclusive original jurisdiction thereof, and his judgment acquitting the defendant is final, Constitution, Art. IV, sec. 27; C. S., 1481, 4215, and the State may not appeal therefrom, C. S., 4649, and where, upon the defendant's appeal from the magistrate's order to give a peace bond, the magistrate requires the defendant to give bond for her appearance in the Superior Court, the defendant's plea of former jeopardy in the latter court is good, and where the defendant's plea has been overruled and she has been convicted of an assault with a deadly weapon, the judgment will be reversed on appeal.

2. Breach of the Peace B a—Statutory procedure must be observed in order to place defendant under a peace bond.

Where a justice of the peace has acquitted the defendant upon a warrant charging only a simple assault, he is without authority to put the defendant under a peace bond unless the statutory procedure relating thereto has been complied with.

3. Indictment A b—Magistrate can only bind over defendant charged with felony, and Superior Court may proceed only upon indictment.

A justice of the peace has no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and the Superior Court may proceed to trial only upon indictment duly found and returned, Art. I, sec. 12, the words in section 12 "except as hereinafter allowed" referring to the latter clause of section 13 relating to trial of petty misdemeanors

and not to an assault with a deadly weapon, and where, over the objection of the defendant, the Superior Court proceeds to trial on the magistrate's warrant without an indictment, and the defendant is convicted of an assault with a deadly weapon and sentenced to three months in jail, to be suspended upon the payment of a fine and costs, the judgment will be reversed on appeal, and where the defendant has been acquitted of a simple assault in the magistrate's court she should be discharged.

APPEAL by defendant from *Moore, J.*, at December Term, 1931, of BURKE. Reversed.

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

S. J. Ervin and S. J. Ervin, Jr., for defendant.

ADAMS, J. The defendant was prosecuted before a justice of the peace upon a warrant in which it was charged that she "did unlawfully and wilfully assault Clyde Stamey and Ned Stamey and Minnie Stamey and Margaret Stamey by kicking and choking and rocking them, contrary to the form of the statute and against the peace and dignity of the State." The magistrate adjudged the defendant not guilty of the offense charged in the warrant but ordered her to give a bond in the sum of $250 to keep the peace. Upon her giving notice of appeal from this order the magistrate required her to execute a justified bond in the same amount to secure her appearance at the ensuing term of the Superior Court.

At the December Term of 1931 her appeal came on for hearing and she was tried on the warrant upon which she had been adjudged not guilty. Before pleading she objected to being placed on trial for an assault upon the magistrate's warrant and excepted to any further proceeding. When her objection was overruled she entered two pleas—not guilty and former acquittal. She was then tried and convicted of an assault with a deadly weapon. "Whereupon, it was adjudged by the court that the defendant, Fanny Myrick, be confined in the common jail of Burke County for a term of three months. This judgment suspended upon the condition that the defendant pay a fine of twenty-five dollars and the costs at the February Term, 1932, of the Superior Court of Burke County. It was further ordered that the defendant give a bond with sureties in the sum of $250 to keep the peace."

The appellant's exceptions relate to the action of the court in trying the defendant on the magistrate's warrant for an assault with a deadly weapon, in imposing judgment upon her conviction of this offense, and in requiring the execution of a bond to keep the peace. The exceptions raise three questions: (a) whether the warrant charges an assault with

a deadly weapon; (b) whether the defendant could be tried and convicted upon such a charge without the return by the grand jury of a bill of indictment; and (c) whether the order that she give a bond with sureties is valid. No indictment was returned, and the defendant was tried, convicted, and sentenced upon the warrant issued by the justice of the peace.

The defendant contends that the warrant does not contain allegations sufficient to constitute an assault with a deadly weapon and the Attorney-General concedes the soundness of this position. *S. v. Moore,* 82 N. C., 660; *S. v. Russell,* 91 N. C., 624; *S. v. Cunningham,* 94 N. C., 824; *S. v. Porter,* 101 N. C., 713. There is no suggestion that serious injury was inflicted. *S. v. Earnest,* 98 N. C., 740.; *S. v. McLamb,* 188 N. C., 803. If the warrant charged a simple assault the justice of the peace had exclusive original jurisdiction and his acquittal of the defendant was final. Constitution, Art. IV, sec. 27; C. S., 1481, 1215. From his judgment the State had no right of appeal. C. S., 4649.

If the warrant charged an assault with a deadly weapon the State would be in no better plight. In Article I, section 12, the Constitution has the following declaration of rights: "No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment." And in section 13: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."

The phrase "except as hereinafter allowed" in section 12 refers to the latter clause of section thirteen. *S. v. Crook,* 91 N. C., 536. A crime not punishable by death or imprisonment in the State's prison is a misdemeanor; but in *S. v. Barker,* 107 N. C., 913, a petty misdemeanor is defined as one the punishment of which cannot exceed a fine of fifty dollars or imprisonment for thirty days. An assault with a deadly weapon is punishable by fine or imprisonment or both in the discretion of the court. If this offense had been charged the magistrate would have had no jurisdiction except to bind over and the Superior Court could proceed to trial only upon a bill of indictment duly found and returned. *S. v. McAden,* 162 N. C., 575. The defendant did not waive a bill by consent of her counsel upon entering a submission or plea of *nolo contendere,* as provided in section 4610 of the Consolidated Statutes.

It follows that in no view of the case can we sustain the judgment of imprisonment in the county jail for a term of three months. It is no less conclusive that the order requiring the defendant to give security

to keep the peace is without warrant of law. No written complaint was made on oath that the defendant had threatened to commit any offense against the person or property of another, no examination was had, and no peace warrant was issued. Indeed, there was a complete failure to observe the several statutes which are designed to preserve the public peace. *S. v. Cooley,* 78 N. C., 538; *S. v. Goram,* 83 N. C., 664.

The judgment of Superior Court is reversed both as to the warrant and as to the order to give security for the preservation of the peace. The defendant will be discharged.

Reversed.

UNION TRUST BANK v. F. C. WARD, J. W. WARD, J. Y. WALKER AND W. H. SHULL.

(Filed 4 May, 1932.)

States A a—Where contract is not usurious in state in which it is executed it will not be held usurious in action brought here.

A note for money borrowed from a bank in another state and executed and delivered there, bearing a rate of interest that was there legal, will not be held as usurious in an action brought in the courts of this State.

APPEAL by defendant, F. C. Ward, from *MacRae, Special Judge,* at November Term, 1931, of WATAUGA. No error.

Plaintiff is a banking corporation organized under the laws of the State of Tennessee, and doing business in said State. The defendant, F. C. Ward, is a citizen and resident of the State of Tennessee. His codefendants are citizens and residents of the State of North Carolina.

This is an action to recover on a note payable to plaintiff, and executed in the State of Tennessee by the defendant, F. C. Ward, as maker, and by his codefendants as endorsers before delivery. The note is dated 30 August, 1929 and was due on 30 June, 1930. This action was begun on 2 August, 1930.

There was judgment by default, for want of an answer, against the defendant endorsers. In his answer, the defendant, F. C. Ward, admitted the execution of the note and set up a counterclaim upon his allegation that plaintiff had charged and received interest on the money loaned to him by the plaintiff in excess of six per cent per annum, contrary to the laws of the State of Tennessee. Plaintiff admitted that it had charged and received interest on the money loaned to the defendant at the rate of eight per cent per annum, and alleged that at

the time the money was loaned to defendant, such rate of interest was lawful in the State of Tennessee. The note sued on in this action is for the balance due on a loan of money made by the plaintiff to the defendant in 1922.

The only issue submitted to the jury was answered as follows:

"Is the defendant indebted to the plaintiff? If so, in what sum? Answer: Yes, $1,100, with interest from 30 June, 1930."

From judgment that plaintiff recover of the defendants the sum of $1,100, with interest and costs, the defendant, F. C. Ward, appealed to the Supreme Court.

Bingham, Linney & Bingham for appellant.

PER CURIAM. The defendant's assignments of error based on his exceptions to the instruction of the court to the jury, as requested by plaintiff, and to the refusal of the court to instruct the jury as requested by defendant, cannot be sustained.

The evidence introduced by the defendant did not support the allegations in his answer upon which he relied for his counterclaim. At the date of the loan of money to the defendant by the plaintiff, it was lawful in the State of Tennessee to charge and receive interest at the rate of eight per centum per annum. Interest paid at this rate prior to the execution of the note sued on in this action was not usury. The judgment is affirmed.

No error.

STATE v. VICTOR CHURCH.

(Filed 4 May, 1932.)

1. Criminal Law G o—In this case held: there was error in respect to the admission of testimony relative to action of bloodhounds.

In this case *held*, error was committed in connection with the testimony relative to the action of bloodhounds. *S. v. McLeod*, 196 N. C., 542.

2. Arson C c—Evidence held insufficient to be submitted to jury in prosecution under C. S., 4242.

Where, in a prosecution under C. S., 4242 for wilfully and wantonly setting fire to or burning a store-house, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury, and on appeal the defendant's motion for judgment of nonsuit will be sustained. C. S., 4643.

STATE *v.* CHURCH.

APPEAL by defendant from *Moore, J.*, at December Term, 1931, of BURKE.

Criminal prosecution tried upon an indictment charging the defendant with wantonly and wilfully setting fire to or burning a store-house in Burke County, the property of one J. S. Hemphill, contrary to the provisions of C. S., 4242.

The only evidence relative to the origin of the fire is the following testimony of J. S. Hemphill:

"My home is about 50 to 75 yards from the store. I first learned that the store building was on fire when the light shined from the building into my room. The front part was on fire. I got up and got a bucket of water and threw it on the blaze thinking I could put it out. The fire was in the front part, the left front entering the door; it was outside. When I discovered the fire it was very small and I thought I could put it out with a bucket of water but when I threw water on the fire it flashed all over the front of the building and in a moment or two the glass burst and the flames went right inside. I threw water on the fire and it flashed on the building, about 3 feet from the porch on side of wall."

The State sought to connect the defendant with the burning by circumstantial evidence consisting of alleged similarity of tracks and purported trailing of bloodhounds.

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

"If you find beyond a reasonable doubt that these dogs tracked the man and I charge you that these dogs as qualified and testified to by witnesses were dogs of experience and training and could track persons and when put on the track of a human being they follow that track and that alone."

From an adverse verdict and judgment of not less than 20 nor more than 30 years in the State's prison at hard labor, the defendant appeals, assigning errors.

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

S. J. Ervin and S. J. Ervin, Jr., for defendant.

STACY, C. J. We agree with the learned counsel for the defendant that error was committed in connection with the testimony relative to the action of the bloodhounds (*S. v. McLeod,* 196 N. C., 542, 146 S. E., 409); and further that, upon the whole case, the evidence was not sufficient to be submitted to the jury on the charge of house-burning.

To show that the store was destroyed by fire, without establishing its felonious origin, or the identity of the defendant, or circumstances from which these facts might reasonably be inferred, falls short of proving the *corpus delicti* of the crime as charged in the bill of indictment. 7 R. C. L., 774. Hence, the motion for judgment of nonsuit should have been allowed. It will be sustained here as provided by C. S., 4643.

Reversed.

J. W. WALKER v. TOWN OF FAISON.

(Filed 11 May, 1932.)

Taxation A a—Cotton platform held not necessary municipal expense and town could not issue notes therefor without a vote of its electors.

A municipal platform for the loading, unloading and selling of cotton and for the storage of truck under certain conditions, but from which no truck is sold to consumers, is not a public market, a public market being generally defined as a place for the sale of products for human consumption, and such platform erected for the purpose of obtaining revenue for the town by the imposition of a fee for the sale of cotton therefrom is not a necessary municipal expense, Art. VII, sec. 7, and the town may not issue its notes for the purchase price of such platform without a vote of its electors.

CLARKSON, J., dissenting.

CIVIL ACTION, before *Devin, J.*, at December Term, 1931, of DUPLIN.

The evidence tended to show that on 22 March, 1929, defendant town purchased from the plaintiff a certain lot for the sum of $1,500, paying $100 in cash and executing three notes aggregating $1,400 for the balance of the purchase price. The purchase of the land and the execution of the notes and deed of trust securing same by the town was made in pursuance of a resolution adopted on 1 April, 1929. This resolution recites that the property was purchased "for the purpose of building a truck and cotton buyers platform." After the purchase of the land a platform was erected upon the property and used until a new board of aldermen came into power and the platform was apparently abandoned. The evidence tended to show that "this property was used by the town of Faison for a market place for the selling of cotton, and they charged the farmers revenue for selling from that platform. . . . It was my understanding that a charge was made for the use of this platform."

The mayor of the town testified: "The town of Faison built a platform on that lot for the purpose of a cotton platform, to buy and weigh cotton, and load and unload, except, I think to store truck on when it

got overloaded. . . . We used it for the purpose of buying cotton and truck and anything that came to market. It has not been used for anything except cotton purposes. . . . The town of Faison had a cotton weigher who operated under the supervision of the board of commissioners and the mayor of the town. All the cotton sold in Faison was to be weighed by this particular cotton weigher, and this place was designated as a place to weigh cotton and sell it, after the railroad company told them to get off their platform. This was the purpose for which the platform was placed there. . . . I understand that they charge a revenue at that place. The purpose of my board in buying it was for the convenience of the farmers and for the cotton buyers, and to get revenue for the town, too. It was our intention to get revenue for the town by charging a cent a package and five cents on a bale of cotton, and if we had remained in office, we would have gotten it." Another member of the board of aldermen testified: "The platform was built for the benefit of the farmers to dispose of their truck and cotton. There was no other place in the town of Faison available at that time for such a market. Since that time the present board has created a similar platform. I have sold cotton over it and paid a revenue of ten cents a bale. I have sold truck there. It is auctioneered off. . . . The surplus revenue goes to the town. . . . We were required to pay revenue if we sold a lot of cucumbers in town, whether they were auctioneered off or not, because that was where they expected to get their revenue." It further appeared on 27 October, 1929, that the board of aldermen passed a resolution "that the cotton buyers shall pay to the town three cents per bale for cotton hauled from cotton platform until the town has been reimbursed for expense of erecting, insurance, and lease of land."

The following issues were submitted to the jury:

1. "Are the notes sued on in this action valid and subsisting obligations of the town of Faison, as alleged in the complaint?"

2. "Is the defendant indebted to the plaintiff on account of the notes sued on in this action?"

The jury answered the first issue "Yes," and the second issue "$1,400 with interest."

From judgment upon the verdict the defendant appealed.

J. T. Gresham, Jr., and R. D. Johnson for plaintiff.

Beasley & Stevens and K. O. Burgwin for defendant.

BROGDEN, J. Can a city or town "contract any debt, pledge its faith, or loan its credit" for the purpose of acquiring a site for a cotton and truck platform?

The issue of the notes by the defendant in payment of the purchase price of the property was not submitted to a vote of the people and hence the validity of the indebtedness depends upon whether a cotton and truck platform is a "necessary municipal expense," within the purview of the North Carolina Constitution, Art. VII, sec. 7. The law is an expanding science designed to march with the advancing battalions of life and progress and to safeguard and interpret the changing needs of a commonwealth or community. Consequently it has been observed by the sages that the luxuries of one period oftentimes constitute the necessities of another. However, the latest interpretation of the term "necessary municipal expense" is found in *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25. In delivering the opinion, *Adams, J.,* wrote: "The cases declaring certain expenses to have been 'necessary' refer to some phase of municipal government. This Court, as far as we are advised, has given no decision to the contrary." Further expanding the idea, the Court says: "With the mere utility of the enterprise we are not concerned. Whether 'shipping, foreign and coastwise' would expand commerce is alien to the principle we are considering. The convenience, the benefit to be conferred upon a particular class, the insufficiency of present facilities, and a want of opportunity for commercial or industrial competition—these and similar premises are not factors that can control or even contribute to our solution of the present controversy. We are dealing exclusively with a question of law, with the legal formalities necessary to pledging the faith of the city by issuing bonds for the contemplated purpose; and as these formalities are mandatory they may not be disregarded or ignored."

The defendant insists that the proposed cotton and truck platform should be classified as a necessary municipal expense for the reason that such a structure and the proposed use thereof constitute a "market." The statutes duly enacted by the General Assembly and the decisions of this Court have established the proposition that municipal markets constitute a "necessary municipal expense," authorizing governing authorities to issue notes or bonds without popular vote for the acquisition and maintenance thereof. C. S., 2674, 2687, 2791 and 2794. *Smith v. New Bern* 70 N. C., 14; *Swinson v. Mount Olive,* 147 N. C., 611, 61 S. E., 569; *LeRoy v. Elizabeth City,* 166 N. C., 93, 81 S. E., 1072; *Angelo v. Winston-Salem,* 193 N. C., 207, 136 S. E., 489.

But is a cotton and truck platform a market as contemplated and defined by law? Apparently the term market was first defined by this Court in 1874 in the case of *Smith v. New Bern, supra.* The Court said: "Market, a public place appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are

sold." The definition so given has been widely quoted with approval. Various definitions may be found in 18 R. C. L., p. 367. The term is usually associated with the sale, inspection and supervision of food and food products designed for use by persons and extended by some courts to include food for domestic animals. Manifestly the underlying idea in the term is the sale of products intended and designed primarily for human consumption.

In the case at bar the evidence discloses that the purchase was made and the platform erected "to get revenue for the town, and for the purpose of a cotton platform to buy and weigh cotton and load and unload, . . . to store truck on when it got overloaded." There is no evidence that any citizen of the town bought any truck from the platform for the purpose of consumption. Obviously the purchase and operation of the platform was a commercial enterprise, promising a profit for the municipality, but upon the admitted facts, the enterprise did not constitute a necessary governmental expense of the defendant town, and the motions for nonsuit should have been allowed.

Reversed.

CLARKSON, J., dissenting.

MRS. ED HILL v. LEXINGTON COUNCIL No. 21 JR. O. U. A. M.

(Filed 11 May, 1932.)

Insurance K a—Acceptance of delinquent dues by executive secretary held waiver of constitutional and by-law provisions of benevolent order.

Where the executive secretary of a mutual benefit insurance order, who solely is authorized under the constitution of the order to receive all money for membership dues, and who is charged with the duty of reporting to the order those members in arrears and notifying such members of their standing, fails to give the required notice to a delinquent member, and thereafter accepts the payment of the delinquent member's dues with knowledge that the member was then *in extremis: Held*, the acceptance by the secretary of the delinquent dues is a waiver of the provisions in the constitution and by-laws of the order with respect to the forfeiture of benefits for the nonpayment of dues, the executive secretary being an executive officer of the defendant with broad and comprehensive powers.

CIVIL ACTION, before *Stack, J.*, at October Term, 1931, of DAVIDSON.

The evidence tended to show that Ed Hill was a grade B. member of Lexington Council No. 21 Jr. O. U. A. M. On 16 May, 1927, Ed Hill was taken to a hospital and operated on for appendicitis. He died

on 23 July, 1927. The evidence further tended to show that C. L. Leonard was the financial secretary of defendant Council and had held such position for thirteen years. The evidence further tended to show that on 22 July a brother of the deceased paid to said secretary the sum of $3.05 lodge dues, and that said secretary accepted the money and issued a receipt in full therefor. The secretary testified that the money was paid on 23 July, the day of the death of deceased. He said: "Mr. Roy Hill did not tell me he was dead when he paid me, but still seriously sick." Roy Hill testified that he told the secretary at the time of making the payment that his brother was not expected to live. Article 8, section 3, of the constitution of defendant provides: "A member of this council who is thirteen weeks or more in arrears for dues, forfeits all his rights and privileges, except that of being admitted into the council chamber during its sessions." Article 10, section 4, of said constitution provides: "Any brother who is thirteen weeks or more in arrears for weekly dues shall not be entitled to any sick benefits nor shall he, in case of death, be entitled to funeral benefits." Article 4, section 4, of the by-laws provides: "A member of this council, who is thirteen weeks or more in arrears for dues, forfeits all his rights and privileges except that of being admitted into the council chamber during its sessions," etc. Article 6, section 9, of the by-laws provides: "Any member suffering himself to become indebted to this council for thirteen weeks or more shall not be entitled to benefits until all arrearages are paid in full."

The jury found that the deceased, Ed Hill, was more than thirteen weeks in arrears in May, 1927, when he went to the hospital, and that he died on 23 July, 1927, and that at the time of his death the deceased was a member in good standing.

The verdict awarded $300 to the widow of the deceased.

From judgment upon the verdict the defendant appealed.

H. R. Kyser for plaintiff.

A. J. Newton and Phillips & Bower for defendant.

BROGDEN, J. Did the act of the financial secretary in accepting the payment of dues from a delinquent member, with notice that the member was in the hospital and seriously sick at the time, constitute a waiver of the by-laws and constitution of defendant council?

The constitution defines the duty of the financial secretary as follows: "It shall be the duty of the financial secretary to keep just and true accounts between the council and its members, receive all moneys due the council for dues, credit the amounts paid, and pay the same over

to the treasurer immediately, if present, taking his receipt for the same. He shall at the first meeting of the term make for the council a full report of all moneys received during the previous term; also a list of members in arrears and keep his books and papers at all times ready for inspection by the trustees. He shall perform such other duties as council or his office may require of him, and shall give such bond as may be provided in the by-laws." Article 8 of the by-laws provides in substance that when a member is thirteen weeks or over in arrears that notice shall issue to such member by the financial secretary that unless a sufficient amount of the arrearage is paid so as to reduce the arrearage to less than thirteen weeks that such member will be suspended. No such notice was given to the deceased and no action was taken by the lodge. Hence the deceased was a member of the lodge at the time of his death; although, of course, to be a member in good standing, it was necessary that his dues should not be more than thirteen weeks in arrears. Therefore, the sole question is whether the acceptance of the premium by the financial secretary and the receipt in full given by him with full knowledge that the deceased was then in the hospital and seriously ill constitutes a waiver of the by-laws. This Court has spoken upon the subject in *Clifton v. Ins. Co.*, 168 N. C., 499, 84 S. E., 817. *Brown, J.*, writing, said: "The insurer may waive such conditions, and the unqualified, unconditional receipt of a past-due premium is a waiver." It was held in the *Foscue case*, 196 N. C., 139, 144 S. E., 689, that a soliciting or collecting agent of an insurance company had no authority to waive the payment of premiums or to extend the time of payment, but the case at bar involves the authority of an executive officer of defendant. The powers committed by the lodge to the financial secretary are broad and comprehensive, constituting him the sole agent for the defendant for collecting premiums and giving receipts therefor. Consequently the instruction of the trial judge to the jury cannot be held for error.

The defendant relies upon *Page v. Junior Order*, 153 N. C., 404, 69 S. E., 414. It is to be noted, however, in that case that the lodge had duly established a rule to the effect "that the standing of a member in default shall not be restored by the payment of back dues during his sickness or disability." This rule so declared was an express limitation upon the power of the financial officer of the lodge to receive past due premiums. No such restriction appears in the by-laws of the present defendant. Hence the salutary principles announced in the *Page case* and the *Wilkie case*, 151 N. C., 527, 66 S. E., 579, do not apply. *Perry v. Ins. Co.*, 132 N. C., 283, 43 S. E., 837; *Foscue v. Ins. Co., supra.*

Affirmed.

STATE v. TOM LEFLER.

(Filed 11 May, 1932.)

1. **Assault B a—In prosecution for assault upon a female the indictment need not charge that defendant was over eighteen years of age.**

In a prosecution for an assault by a man or boy upon a female it is not necessary for the indictment to allege that the defendant was over eighteen years of age, the age of the defendant being a matter of defense, since the degrees of assault specified in the statute relate to the extent of the punishment and do not create separate offenses, and the age of the defendant is not an ingredient of the crime but an exception or proviso in regard to the degree of punishment.

2. **Assault B d—Jury must find that defendant was over eighteen in order for court to impose sentence for assault upon a female.**

Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that the defendant is over eighteen years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury, but where the jury returns a verdict of simple assault without a finding that the defendant was over eighteen years of age the verdict is insufficient to support a sentence for an assault upon a female by a man or boy over eighteen years of age, and on appeal therefrom a new trial will be awarded.

APPEAL by defendant from *Clement, J.*, at August Term, 1931, of DAVIE.

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

B. C. Brock for defendant.

ADAMS, J. The defendant was indicted for an assault and battery upon Dora Shoe, "she being a female, by throwing her body upon the bank of South Yadkin River and thereby seriously and permanently injuring the said Dora Shoe." He was convicted of a simple assault and was sentenced to imprisonment for a term of twelve months. The indictment, it may be conceded, sufficiently charges that the defendant is a "man or boy" and that the prosecutrix is a "female person." It was not necessary to aver that the "man or boy" at the time of the assault was "over eighteen years old"; the age of the assailant is a matter of defense. *S. v. Smith,* 157 N. C., 578; *S. v. Jones,* 181 N. C., 546. This does not imply, however, that the jury is not required to determine the defendant's age.

On 8 March, 1911, the General Assembly ratified an act amending section 3620 of the Revisal by adding the following clause: "Or to cases

of assault or assault and battery by any man or boy over eighteen years of age on any female person." Following is the whole section: "In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided,* that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person."

In *S. v. Smith, supra,* it is said: "The third proviso (the amendment of 1911) was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man or boy over eighteen years old upon a woman, but it merely excepted that case from the operation of the first proviso, by which the punishment for a simple assault was limited to a fine of $50 or imprisonment for thirty days. It related solely to the degree of punishment for an assault committed upon a woman by a man or by a boy over eighteen years of age. It was always a crime for a man or a boy over eighteen years of age to assault a woman, and the object of section 3620 was to provide that such an offense should be subject to the same punishment, at the discretion of the court, as any other assault, with or without intent to kill or injure or to commit a rape, and not to deprive the court of the discretion given by the first clause, in those cases where the assault was committed with a deadly weapon or with intent to kill or to commit a rape, or where it was upon a woman by a man or a boy over eighteen years of age." . . . "The Legislature did not mean to create separate and distinct criminal offenses, such as assault with deadly weapon, assault with serious damage, assault upon a woman when the man is over eighteen years of age, or any other kind of assault which is aggravated in its circumstances or of serious and lasting damage in its consequences. There is but one offense, the crime of assault, and the varying degrees of aggravation were mentioned only for the purpose of graduating the punishment."

Where an exception or a proviso in a statute is separable from the description of the offense charged and is not an ingredient of the offense it need not be charged in the indictment, for it is a matter of defense. *S. v. Smith, supra,* 583. For this reason the age of the man or boy need not be averred. As pointed out in the same case there is a presumption of his capacity—a presumption that he is over the age of eighteen; and in the absence of evidence *contra* the jury would be justi-

fied in reaching this conclusion. But the presumption is only evidence and even if there is no testimony in rebuttal it remains evidence for the consideration of the jury. *White v. Hines,* 182 N. C., 275, 288. It was upon this theory that the Court remarked in *S. v. Smith, supra,* "It is best, and certainly safe, that the court should require the jury under a special issue submitted to find the facts necessary to determine the grade of the punishment; . . . and if it is found that he (the man or boy) was over eighteen years of age at the time the offense was committed, he may be punished as for an aggravated assault, whether his age is stated in the indictment or not." In *S. v. Smith, supra,* the defendant was convicted of an assault and battery upon a woman, he being at the time of the assault over the age of eighteen years; and in *S. v. Jones, supra,* the proof clearly showed the defendant's age and on the trial no question was raised as to that fact.

In the present case the verdict was, "Guilty of simple assault." This may have signified an assault without the use of a deadly weapon or without the infliction of serious injury. To justify the sentence imposed the defendant must have been over the age of eighteen years, and as to this there is no finding by the jury. If he was over eighteen years of age the punishment would not be restricted to a fine of fifty dollars or imprisonment not exceeding thirty days, although a deadly weapon was not used and serious injury was not inflicted.

In the absence of a finding as to the defendant's age, we must award a

New trial.

STATE v. JAKE BOGER.

(Filed 11 May, 1932.)

Criminal Law I k—Upon defendant's motion for poll of jury each juror should be questioned separately, and court's refusal to do so is error.

The proper method of polling the jury is to ask each juror, individually, whether he assented to the verdict and still assents thereto, and only the judge or the clerk under his supervision may poll the jury, and where the defendant in a criminal action makes a motion in apt time to have the jury polled, and the court addresses the body of the jury and directs those who returned a verdict of guilty to stand up, but refuses to poll the jury individually, a new trial will be awarded on the defendant's exception under his constitutional right to be convicted only upon the unanimous verdict of a jury in open court. Art. I, sec. 13.

APPEAL by defendant from *Schenck, J.,* at November Term, 1931, of MECKLENBURG. New trial.

The defendant in this action was tried on an indictment for murder. He entered a plea of "not guilty," and at the trial relied upon his contention that he killed the deceased in self-defense.

When the jurors came into court, after the evidence had been submitted to them, under the charge of the judge, and announced that they were ready to return their verdict, the judge addressed them as follows: "Gentlemen of the jury, have you agreed upon your verdict?" One of the jurors replied: "We have." The judge then said: "What is your verdict?" The juror replied: "Guilty of manslaughter." The judge then addressed the jurors as follows: "Guilty of manslaughter, and so say you all, gentlemen?" The jurors thereupon nodded their heads, indicating an affirmative answer to the judge's inquiry. Counsel for the defendant then, before the verdict was entered in the records of the court, and before the jurors had retired from the jury box, requested the judge to poll the jurors. In response to this request, the judge addressed the jurors, who were then seated in the jury box, as follows: "All of you gentlemen of the jury who return a verdict of guilty of manslaughter, stand up." All of the jurors then and there stood up. Counsel for defendant again requested the judge to poll the jurors, man for man. The judge refused this request, and the defendant excepted to such refusal. The verdict of "guilty of manslaughter" was then accepted by the judge, and duly recorded as the verdict in this action.

From judgment that the defendant be confined in the State's prison for a term of not less than five or more than three years, the defendant appealed to the Supreme Court.

Attorney-General Brummitt, Assistant Attorney-General Seawell and Gertrude M. Upchurch for the State.

T. L. Kirkpatrick and J. M. Scarborough for the defendant.

CONNOR, J. The right of a defendant in a criminal action tried in a court of this State, to have the jurors polled by the judge or under his direction, when a request for such poll is made in apt time, after an adverse verdict has been returned by the jurors, was recognized by this Court in *S. v. Young,* 77 N. C., 498. In that case it was said: "We think a defendant on trial in a criminal case (and of course the solicitor for the State) has the right to have the jury polled, whether it be an oral or a sealed verdict. He has no right to say in what manner it shall be done, nor to propound any question, but simply to know that the verdict given by the foreman is the verdict of each juror, and we think it error in the court to deny it when demanded." The right is founded

on the constitutional guarantee that "no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court."

In *Lipscomb v. Cox*, 195 N. C., 502, 142 S. E., 779, it is said: "The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the 'unanimous verdict of a jury of good and lawful men in open court,' as prescribed by the Constitution, Art. I, sec. 13, for criminal cause." In the opinion in that case, *S. v. Young, supra,* is cited with approval by *Brogden, J.*

In the instant case, the defendant was denied his right to have the jurors polled by the judge or under his direction. The request of the judge that all the jurors who returned a verdict of guilty of manslaughter in this case, stand up, was not a compliance with the demand of the defendant, made in apt time, that the jurors be polled, man for man. The defendant was entitled as a matter of right to know whether each juror assented to the verdict announced by the juror who undertook to answer for the jury, and to that end he had the right to insist that a specific question be addressed to and answered by each juror in open court, as to whether he assented to said verdict. To poll the jury means to ascertain by questions addressed to the jurors, individually, whether each juror assented and still assents to the verdict tendered to the court. 16 C. J., p. 1098, sec. 2576. In this jurisdiction each party to an action, civil or criminal, has the right to have the jury polled, and a denial of this right, when demanded in apt time, is error. *Lipscomb v. Cox*, 195 N. C., 502, 142 S. E., 779, *In re Sugg's Will*, 194 N. C., 638, 140 S. E., 604. For error in denial of this right in the instant case, the defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA EX REL. MYRTLE LEONARD v. J. A. YORK, ADMINISTRATOR, ET AL.

(Filed 11 May, 1932.)

Guardian and Ward H a—Agreement for joint control of guardianship funds by guardian and surety will not be held void on demurrer.

Where the surety on a guardian's bond alleges an agreement for the joint control by the guardian and surety of the guardianship funds deposited in a bank, the agreement will not be held void upon a demurrer, it being assumed that the agreement comes within the purview of C. S., 6382(e).

LEONARD *v.* YORK.

APPEAL by Bank of Ramseur and the Page Trust Company from *McElroy, J.*, at December Term, 1931, of RANDOLPH.

Civil action to recover from the estate of a guardian, and the surety on guardian's bond, moneys alleged to have been received for ward and not properly disbursed.

The National Surety Company, surety on the guardian's bond, set up in its answer an agreement between it and the guardian whereby all funds belonging to the ward were to be deposited in the Bank of Ramseur subject to the joint control and joint check of the guardian and the surety's local representative; further that the said Bank of Ramseur knew of and assented to this arrangement; and that in violation of the trust, thus accepted by it, the bank permitted the guardian to withdraw his ward's moneys and use them as his own without the knowledge or consent or counter signature of the surety or its local representative. Wherefore the National Surety Company asked that the Bank of Ramseur and its successor, the Page Trust Company, be brought into this action as parties defendant, to the end that the said company might have judgment over for an amount equal to any recovery had by the ward against the surety. Summons was issued accordingly, following the service of which, a cross-action was set up based upon an alleged breach of the joint-control agreement above mentioned. To this, the Bank of Ramseur and the Page Trust Company demurred on the grounds of a misjoinder of causes and for that no valid cause of action had been stated against either or both of said defendants. Demurrer overruled, and the said demurrants appeal.

A. C. Davis for plaintiff.

Kenneth M. Brim and Ross Ashby for defendant, National Surety Company.

H. M. Robins for defendants, Bank of Ramseur and Page Trust Company.

STACY, C. J., after stating the case: It is the holding of a number of courts that a joint-control agreement between a guardian and the surety on his bond, like the one here alleged, is contrary to public policy and void, in the absence of legislative sanction or approval. *Re Estate and Guardianship of Wood,* 159 Cal., 466, 114 Pac., 992, 36 L. R. A. (N. S.), 252; *Fidelity & Deposit Co. v. Butler,* 130 Ga., 225, 60 S. E., 851, 16 L. R. A. (N. S.), where the English and American authorities are cited and reviewed. Without statutory authority, therefore, such arrangement, under these decisions, would render the guardian and his surety liable to the ward as guarantors of the property or funds so held. *Cowan v. Roberts,* 134 N. C., 415, 46 S. E., 979.

The doctrine of the cases is, that as the relation between a guardian and his ward is that of trustee and *cestui que trust,* the guardian may not relinquish control, in whole or in part, to a surety, or turn over to the surety, for its own protection, the very estate for which it is intended to furnish indemnity against loss, without becoming liable therefor as guarantor. *White v. Baugh,* 3 Clark & Fin., 44, 6 Eng. Reprint, 1354; 28 C. J., 1128. See, also, valuable article in 66 United States Law Review, 233.

We are not disposed to question the soundness of these decisions, where no legislative declaration of policy has been made, but it is observed that, in this jurisdiction, C. S., 6382(e), corporate sureties of fiduciaries are permitted, in certain instances at least, to require, for their protection, a deposit of a portion of the trust property, or that "no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such corporation, except by decree or order of court of competent jurisdiction." Thus, it would seem that in cases coming within the purview of this statute, and perforce to the extent thereof, joint-control agreements between fiduciaries and their sureties are sanctioned in this State by act of Assembly. *Pierce v. Pierce,* 197 N. C., 348, 148 S. E., 438. That the present agreement comes within the spirit of the act will be assumed on demurrer, at least the contrary will not be presumed. *S. v. Bank,* 193 N. C., 524, 137 S. E., 593.

We cannot say, therefore, that the demurrer was improvidently overruled.

Affirmed.

STATE v. PLATO EDNEY.

(Filed 11 May, 1932.)

1. 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 prisoner has appealed from a conviction in a capital case and has served his case on appeal which has been filed in the Supreme Court, but the case on appeal contains no assignments of error, has not been printed or mimeographed, and no briefs have been filed, the appeal will be dismissed on motion of the Attorney-General for failure of the prisoner to comply with the Rules of Court, after an examination of the record for error appearing on its face.

2. Criminal Law K c—Judgment in this case held sufficient to meet requirements of C. S., 4659.

It is required that the judge upon conviction in a capital case shall write his sentence which must be filed in the papers of the case and a certified copy thereof transmitted by the clerk to the warden of the State penitentiary, C. S., 4659, and the judgment in this case is held sufficient to meet the requirements of the statute, and is affirmed.

STATE *v.* EDNEY.

APPEAL by prisoner from *Sink, J.,* at October Term, 1931, of HENDERSON.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of Margie Hill Edney.

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.

No counsel for defendant.

STACY, C. J. At the October Term, 1931, Henderson Superior Court, the defendant herein, Plato Edney, was tried upon an indictment charging him with the murder of his wife, Margie Hill Edney, which resulted in a conviction and sentence of death. The prisoner gave notice of appeal to the Supreme Court, and was allowed 90 days from the adjournment of the trial term of court within which to make out and serve statement of case on appeal, and the solicitor was given 60 days thereafter to prepare and file exceptions or counter case.

Service of the prisoner's statement of case on appeal, which contains no assignments of error, was accepted by the solicitor 9 January, 1932, and the same was filed in this Court 4 May, 1932. Nothing more has been done. The record has not been printed or mimeographed, and no briefs have been filed. The case should have been ready for argument 3 May, 1932, at the call of the 18th District, the district to which it belongs. Rule 7, Rules of Practice, 200 N. C., 818; *Carroll v. Mfg. Co.,* 180 N. C., 660, 104 S. E., 528.

The prisoner having failed to prosecute his appeal, or to comply with the rules governing such procedure, the motion of the Attorney-General to affirm the judgment and dismiss the appeal must be allowed (*S. v. Massey,* 199 N. C., 601, 155 S. E., 255, *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881), but this we do only after an examination of the record in the case to see that no error appears on the face thereof, as the life of the prisoner is involved. *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926; *S. v. Ward,* 180 N. C., 693, 104 S. E., 531.

The judgment, while somewhat informal, as it makes no reference to the trial or the crime of which the prisoner was convicted, is, nevertheless, we apprehend, sufficient to meet the requirements of C. S., 4659. This statute provides that when a death sentence is pronounced against any person, convicted of a capital offense, it shall be the duty of the judge pronouncing such sentence to make the same in writing, which

shall be filed in the papers in the case against such convicted person and a certified copy thereof transmitted by the clerk of the Superior Court, in which such sentence is pronounced, to the warden of the State penitentiary as his authority for executing such death sentence. *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728.

Judgment affirmed. Appeal dismissed.

COLUMBUS OIL COMPANY v. W. M. MOORE AND JOHN W. MOORE, TRADING AS MOORE'S SERVICE STATION.

(Filed 11 May, 1932.)

Trial G d—It is error for the court to allow council to poll jury and to ask questions other than those relating to their assent to verdict.

It is the duty of the trial judge to receive the verdict of the jury duly returned into court and to grant a motion aptly made to poll the jury, but the jury must be polled by the judge himself or the clerk under his supervision, and the only questions that may be asked are whether each juror assented to the verdict and still assented thereto, and where an attorney has been allowed to poll the jury and to ask questions beyond the proper scope of such inquiry a motion for judgment according to the verdict which had been duly returned into court as a unanimous verdict should be allowed.

APPEAL by plaintiff from *Finley, J.,* at February Term, 1932, of MECKLENBURG. Reversed and remanded.

This is an action to recover the sum of $7,866.49, with interest from 11 March, 1929, due for gasoline, oil and merchandise sold and delivered by plaintiff to Moore's Service Station.

It is alleged in the complaint that at the dates of the sale and delivery of the gasoline, oil and merchandise by the plaintiff to Moore's Service Station, the defendants, W. M. Moore and John W. Moore were partners trading under the name of Moore's Service Station, and that under said partnership name they were operating a filling station in the city of Charlotte, N. C. This allegation is denied in the answer filed by the defendant, W. M. Moore. No answer was filed by the defendant, John W. Moore. Judgment by default final was rendered against the defendant, John W. Moore, for the sum of $7,866.49, with interest and costs. There was no exception to or appeal from this judgment.

At the trial, issues were submitted to the jury as follows:

"1. Was the defendant, W. M. Moore, a partner in the business operated as Moore's Service Station, as alleged in the complaint? Answer: .....

2. In what amount, if any, is the defendant, W. M. Moore, indebted to the plaintiff on the cause of action alleged in the complaint? Answer: ....."

The plaintiff introduced evidence at the trial tending to sustain the allegations in its complaint with respect to the partnership, and also with respect to the amount due by Moore's Service Station to the plaintiff. The defendant, W. M. Moore, introduced evidence tending to contradict the evidence introduced by the plaintiff with respect to the partnership, but introduced no evidence with respect to the amount due the plaintiff by Moore's Service Station. The evidence introduced by both plaintiff and defendant was submitted to the jury.

After the jurors had retired to the jury room and after they had deliberated for some time as to their verdict, they returned into court, and announced that they had agreed upon their verdict. They had answered the first issue "Yes," and the second issue, "$3,933.40." The foreman of the jury, in the presence of the other jurors, said to the court: "This is our verdict, your Honor. We intended to answer it for half of what the plaintiff sued for." In apt time, counsel for defendant moved that he be permitted to poll the jurors, under the supervision of the court, as to their verdict. The plaintiff objected, its objection was overruled and plaintiff excepted.

Counsel for defendant thereupon proceeded, subject to the exception of the plaintiff, to examine the jurors, individually, with respect to their answers to the issues. By this examination, counsel for defendant sought to show, and did show that certain of the jurors had agreed to answer the first issue, "Yes," upon the agreement of other jurors, that the second issue should be answered, "$3,933.40," or one-half of the amount sued for by the plaintiff. All of the jurors stated, in response to questions addressed to them by counsel for defendant, that they had assented in the jury room to the verdict tendered to the court by their foreman. One of the jurors stated that notwithstanding he had assented to the verdict, as tendered, he was of opinion that there was no partnership between the defendant, W. M. Moore, and John W. Moore, as alleged in the complaint, but had agreed that the first issue should be answered "Yes," upon the agreement of the other jurors that the second issue should be answered "$3,933.40." This juror said: "We all decided that if the verdict as we return it, was not permissible, if we could not answer the second issue '$3,933.40,' we would all vote to answer the issue the full amount sued for by the plaintiff. I agreed to the verdict because the others agreed to it, and not because I thought there was a partnership. I do not now think there was a partnership."

At the conclusion of the examination of the jurors by counsel for defendant, and before the jurors were discharged, defendant moved that the verdict be set aside, because it appeared from the poll of the jurors, that the verdict was not unanimous, and also because it appeared from its face that the verdict was a compromise verdict. This motion was allowed and plaintiff excepted.

From judgment setting aside the verdict returned into court by the jury, and ordering a new trial, the plaintiff appealed to the Supreme Court.

H. L. Taylor and T. L. Kirkpatrick for plaintiff.
Cansler & Cansler, H. C. Jones and M. C. Moysey for defendant.

CONNOR, J. In *Lipscomb v. Cox,* 195 N. C., 502, 142 S. E., 779, it is said: "The right of either party to poll the jury in both criminal and civil actions is firmly established by the decisions in this State. The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the 'unanimous verdict of a jury of good and lawful men in open court' as prescribed by the Constitution, Art. I, sec. 13, for criminal causes. One of the first cases dealing with the subject is *S. v. Young,* 77 N. C., 498. The Court held: 'When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them, and say: "So, say you all." At this time any juror can retract on the ground of conscientious scruples, mistake, fraud or otherwise, and his dissent would then be effectual.' It is held to the same effect in *In re Sugg's Will,* 194 N. C., 638, 140 S. E., 604: 'The right to poll the jury is recognized in order that it may be ascertained whether or not the verdict as tendered is the unanimous decision of the jurors. If it is found by such poll that one juror does not then assent to the verdict as tendered, such verdict cannot be accepted, for it is not as a matter of law the unanimous decision of the jury.' In *Trantham v. Furniture Co.,* 194 N. C., 615, 140 S. E., 300, the Court said: 'The verdict of a jury is sacred. It should represent the concurring judgment, reason and intelligence of the entire jury, free from outside influence from any source whatever.' The decisions of this State establish the principle that the verdict of a jury, to be effectual, must be free from outside influence of whatsoever kind or nature. *Wright v. Hemphill,* 81 N. C., 33, *Petty v. Rousseau,* 94 N. C., 362, *Mitchell v. Mitchell,* 122 N. C., 332, *Lumber Co. v. Lumber Co.,* 187 N. C., 417, *Alston v. Alston,* 189 N. C., 299."

In the instant case, the defendant had the right to have the jurors polled, for the purpose of ascertaining before the verdict tendered by them was accepted by the court and recorded, whether or not each juror assented thereto. The request for the poll was made in apt time. It was error, however, for the court to allow the motion of counsel for defendant that he be permitted to poll the jurors, under the supervision of the court. It has been the uniform practice in this State for the poll to be made by the judge or by the clerk, under the direction of the judge. This practice is in accord with the principle upon which the poll of the jurors is allowed. To permit counsel for either party to conduct the poll would violate the principle that no outside influence should be exerted upon jurors with respect to their verdict.

After the issue or issues in an action, civil or criminal, have been submitted to the jurors, and they have come into open court, and announced that they have agreed upon their verdict, either party to the action may request the judge to poll the jurors, or to have them polled by the clerk, with respect to the verdict tendered by them. When the request is made in apt time, it is the duty of the judge to comply therewith. The poll, however, must be conducted by the judge, or by the clerk, under his direction. It is error for the judge to permit counsel for either party to examine the jurors, collectively or individually, for the purpose of impeaching them or their verdict. Even when the judge or the clerk under his direction, conducts the poll, the only question addressed to the jurors should be substantially as follows: "Is this your verdict, and do you now assent thereto?" It would manifestly be improper for the judge or the clerk to attempt to impeach the jurors or their verdict by seeking to ascertain by an examination of each of the jurors the grounds upon which the jurors had agreed upon their verdict. Counsel for a party to the action cannot be permitted to do what neither the judge nor the clerk would be permitted to do.

It was error in the instant case for the judge to permit counsel for defendant to examine the jurors for the purpose of showing that their verdict was not unanimous, or that the verdict tendered by them was a compromise verdict. It was likewise error for the judge to decline as a matter of law to receive the verdict, upon facts found by him, from evidence elicited by such examination. For this error the judgment in this action is reversed, and the action is remanded that judgment may be entered on the verdict, in accordance with the motion of the plaintiff.

Reversed and remanded.

FRANK H. HOUCK AND FRANK C. PREVETTE, BY HIS NEXT FRIEND, B. L. PREVETTE v. THE CITY OF HICKORY.

(Filed 11 May, 1932.)

Municipal Corporations G a—Charter prohibition of second assessment within ten years held not affected by statute validating levies in general.

Where the charter of a city expressly provides that a second assessment of property for permanent improvements shall not be made within ten years from a prior assessment on the same property for that purpose: *Held*, a second assessment of a lot within ten years is void, and a later statute validating prior assessments and proceedings therefor but which does not repeal the charter restrictions or purport to authorize assessments does not affect this result, the later statute being an enabling statute affecting defects or omissions in procedure only.

APPEAL by defendant from *Moore, J.*, at September Term, 1931, of CATAWBA. Affirmed.

The admitted facts as set out in the judgment are as follows:

1. For a number of years prior to 1921 the plaintiffs were the owners in fee of a certain lot in the city of Hickory, a municipal corporation, situated at the northeast corner of the intersection of Twelfth Street and Seventh Avenue, having a frontage of 25 feet on the east side of Twelfth Street and 96 feet on the north side of Seventh Avenue, and occupied said lot with a building for merchandising purposes. In the year 1921, while they owned and occupied said lot, the city of Hickory permanently improved Twelfth Street by laying thereon a concrete asphalt top hard surface the full width of said street in front of said lot, assessed said lot one-third the cost of the permanent improvement so made along the frontage of said lot on Twelfth Street, as the charter of the defendant provided might be done, and said assessment was duly paid.

2. In or about the year 1925, the provisions of the charter of the city of Hickory under which it could assess one-third of the cost of permanent street improvements against the adjoining property were amended so as to increase such provisions to one-half of the cost thereof.

3. In the year 1928 the defendant permanently improved Seventh Avenue in said city by laying thereon a concrete hard surface the entire width of the street and the entire length of the lot herein above described on the south side, and attempted to assess against said lot one-half the cost of said permanent improvement on Seventh Avenue in the amount of $335.62, and demanded payment of the plaintiffs of the amount of said attempted assessment; whereupon, the plaintiffs brought this action.

The charter of the city of Hickory, Article 8, sec. 7, Private Laws of 1913, in force in 1921 and 1928, when the permanent improvement on Seventh Avenue was made, provides among other things as follows: "Where permanent street improvements shall be made the property bearing such assessments shall not be assessed again until after the expiration of ten years from the date of the last preceding assessment."

4. The plaintiffs brought this action on 5 December, 1930, and filed their complaint on the same day. An answer was filed thereto by the defendant and the case so stood when, on 14 February, 1931, the General Assembly of North Carolina passed an act entitled: "An act to prevent losses to general municipal taxpayers in Catawba County." Subsequently the defendant amended its answer and pleaded the said act as an estoppel and in bar of any recovery by the plaintiffs in this action, and it was agreed at the trial that unless said act was a bar to the plaintiffs' recovery, then that judgment should be rendered in favor of the plaintiffs. There was offered in evidence the summons to show its date and the date of filing the complaint, the charter of the city of Hickory, hereinbefore mentioned in the Private Laws of 1913, and a certified copy of the Private Laws of 1913, and a certified copy of the House Bill and Journals under which was enacted the act of 14 February, 1931, hereinbefore mentioned.

Upon the foregoing facts the court, being of opinion that said act of 14 February, 1931, is not a bar or an estoppel upon the plaintiffs to seek and have the relief which they are demanding in the present action, and being further of the opinion that the defendant could not legally assess the lot of the plaintiffs for the cost of any permanent improvement on said lot made within ten years after the permanent improvement on Twelfth Street, made in 1921, and finding as a fact that the improvements made in 1928 were within a period of seven years of said time, adjudged that the attempted assessment for the improvement on Seventh Avenue along said lot, in 1928, is unlawful, and, therefore, null and void.

It was further adjudged that the defendant, its officers and representatives, be perpetually enjoined and restrained from assessing or attempting to assess, collecting or attempting to collect any part of the cost of any permanent street improvement made in 1928 against any portion of the plaintiffs' lot at the northeast intersection of Twelfth Street and Seventh Avenue, in the city of Hickory.

The defendant excepted and appealed.

E. B. Cline and Theodore F. Cummings for plaintiffs.

Self, Bagby, Aiken & Patrick for defendant.

ADAMS, J. The record discloses an agreement by the parties that judgment should be awarded the plaintiffs unless the act of 1931 entitled "An act to prevent losses to general municipal taxpayers in Catawba County," is a bar to the plaintiffs' recovery. Whether the act constitutes such a bar is the question for decision.

The charter of the city of Hickory contains the following provision: "When permanent street improvements shall be made, the property bearing such assessments shall not be assessed again until after the expiration of ten years from the date of the last preceding assessment." This is a literal transcript of a clause embraced in the charter of the city of Charlotte, the scope and significance of which were explained and declared in *Flowers v. Charlotte,* 195 N. C., 599. In that case the question was whether an assessment for improvements on Sunnyside Avenue was void because made before the expiration of ten years from the date of the assessment for improvements on Louise Avenue. This Court held that the assessment was void without regard to the fact that the second assessment was made under the provisions of Article IX, ch. 56, of the Consolidated Statutes. We must abide by this decision unless its application is made ineffective by the cited act of 1931.

The assessment made by the city of Hickory in 1928 was void. The ten-year provision of the charter was then in force; it is now in force because it has never been repealed. The act of 1931 has no repealing clause; nor does it purport to authorize an assessment for the improvement of the streets of the city. It provides that all assessments previously levied on property for the improvement of streets and sidewalks, including all proceedings taken by the governing body prior to the assessments, shall be legalized and validated. Obviously it was enacted as an enabling statute, designed to cure defects or omissions in the procedure taken by the governing bodies of cities, towns, and villages in Catawba County, who have authority to improve the streets and to levy assessments upon adjoining property. It neither empowers the municipal authorities to levy an assessment nor is effective to restore vitality to an assessment that never had life.

The appeal presents the case of a law positively forbidding an assessment within a period of ten years from 1921 and of a subsequent statute purporting to legalize and validate the forbidden assessment, without repealing the prohibition or affirmatively authorizing a second assessment. In these circumstances the latter statute does not abrogate or nullify the former.

This position is not inconsistent with the decision in *Holton v. Mocksville,* 189 N. C., 144. There the assessment was levied although no petition had been filed as required by section 2706 of the Consolidated

Statutes. This section provides that every municipality shall have power, by resolution of its governing body upon petition made as provided, to cause local improvements to be made and to defray the expense by local assessment. Failure to file the petition was a fatal defect, but it was a defect of procedure remediable by legislation. An act of the General Assembly, ratified 23 February, 1923, authorized the commissioners of Mocksville to proceed with or without a petition. It did more than this. It expressly conferred upon the commissioners the power to levy special assessments for improvements then in progress or completed within two years prior to the ratification of the act and validated previous proceedings. There is a distinction, we think, between the pending case and *Holton v. Mocksville, supra.* In the former there is a direct prohibition against a second assessment within a stated period and an absence of subsequent authority to make the levy; in the latter not only is a second assessment authorized, but the remedial act was intended merely to cure a defect in procedure.

In our opinion the act of 1931 is not a bar to the plaintiff's recovery. *Judgment*

Affirmed.

IN RE ESTATE OF FRED STYERS.

(Filed 11 May, 1932.)

1. Clerks of Court C a—Duties of clerk in appointing or removing personal representatives are separate and distinct from general duties.

Although Art. IV, sec. 17, of the Constitution of 1868 relating to the probate jurisdiction of the clerks of the Superior Courts was stricken out of the Constitution of 1873, and the Constitution does not now prescribe the jurisdiction of clerks, the clerks now perform the duties formerly pertaining to the office of judges of probate, and such jurisdiction is exercised separate and distinct from their general duties as clerks. C. S., 1, 938(14).

2. Courts A c—On appeal from order of clerk appointing administrator Superior Court may reverse order but case should then be remanded.

The Superior Court has jurisdiction to hear an appeal from the order of the clerk appointing an administrator for the estate of a deceased, but where the clerk's order is reversed the Superior Court has no jurisdiction to appoint another administrator, and the case should be remanded to the clerk, and this result is not affected by the provisions of C. S., 637, conferring jurisdiction on the Superior Court to determine all matters in controversy upon appeal from the clerk in any civil action or special

proceeding, the appointment of an administrator being neither a civil action nor a special proceeding. *In re Estate of Wright*, 200 N. C., 620, distinguished upon principles of the equity jurisdiction of the Superior Courts.

APPEAL by Luther West from *Clement, J.*, at December Term, 1931, of DAVIE. Error.

Fred Styers died 28 May, 1931, leaving a widow, Viola Styers, and a son, Henry Ford Styers, who is about twelve years of age. The widow renounced her right to administer on the estate of her deceased husband and nominated Luther West for appointment. J. C. Styers on behalf of himself and his brothers and sisters protested the appointment of West on the following grounds: (1) Fred Styers was shot and killed by John Henry Hauser, who has been convicted of murder in the first degree; (2) the estate of Fred Styers has a cause of action for wrongful death against John Henry Hauser; (3) Viola Styers is a daughter of John Henry Hauser and upon his death will inherit a part of his estate; (4) her nominee, if appointed administrator, will be under her influence and will not bring suit for the wrongful death of the deceased; (5) her interests are adverse to those of her deceased husband's estate; (6) she is disqualified to act as personal representative of his estate and to nominate the appointee; (7) Luther West is a brother-in-law of Floyd Hauser, a son of John Henry Hauser, subject to his control, and disqualified to act.

The clerk appointed Luther West as administrator and the protestant excepted and appealed to the Superior Court. At the December Term the trial judge held that by reason of antagonistic interests Viola Styers is disqualified and should not be heard to nominate the appointee, and that Luther West for specified reasons is likewise incompetent. The judge thereupon appointed a third party of his own selection and authorized the appointee to give bond and enter upon the administration of the estate. Luther West excepted and appealed.

Jacob Stewart for appellant.
Elledge & Wells for appellee.

ADAMS, J. The appellant contests the power of the presiding judge, after reversing the order of the clerk, to retain jurisdiction and appoint the administrator. If this position is sustained the other exceptions may be disregarded.

The Constitution of 1868 contained the following section: "The clerks of the Superior Courts shall have jurisdiction of the probate of deeds, the granting of letters testamentary and of administration, the appoint-

ment of guardians, the apprenticing of orphans, to audit the accounts of executors, administrators and guardians, and of such other matters as shall be prescribed by law. All issues of fact joined before them shall be transferred to the Superior Courts for trial, and appeals shall lie to the Superior Courts from their judgments in all matters of law." Art. IV, sec. 17.

Pursuant to this constitutional provision the General Assembly enacted statutes prescribing the qualification and general duties of clerks of the Superior Courts while acting in the respective capacities of clerks and of judges of probate. Battle's Revisal: Code Civil Procedure, ch. 8; Probate Courts, ch. 90. These statutes were designed to indicate and to stress the distinction between the general duties and the special jurisdiction of a clerk of the Superior Court. In the performance of his general duties he kept a record of his official acts, issued process, and entered in the dockets of his office minutes of all proceedings. As a separate department of the court he exercised jurisdiction in matters of probate. On appeal from the clerk it became necessary to determine whether the appellate jurisdiction was derivative and it was held that the judge should decide the question presented and, if derivative and further action was necessary, should remand the case to the clerk. Accordingly it was said in *Pearce v. Lovinier,* 71 N. C., 248, that upon appeal from an order of the clerk appointing or removing an administrator the Superior Court had jurisdiction, not to make the appointment or removal, but merely to issue a procedendo requiring the clerk to appoint a suitable person to administer the estate.

The Convention of 1875 struck out section 17, Art. IV, of the Constitution of 1868 and substituted sections 16 and 17 of Art. IV of the present Constitution, which provide that clerks shall be elected by the qualified voters and shall hold their offices for four years. The clerks now have no jurisdiction prescribed by the Constitution and the office of judge of probate is abolished. Duties formerly pertaining to the judges of probate are now performed by the clerks of the Superior Court; but the distinction between their general duties and their special jurisdiction is maintained in cases decided after the Constitution was amended. *Brittain v. Mull,* 91 N. C., 498. Although the office of probate judge is abolished the clerk in appointing or removing a personal representative exercises functions separate and distinct from his duties as clerk, as certainly as if he were entitled judge of probate. *Edwards v. Cobb,* 95 N. C., 4.

Upon this theory the appellant contends that the judge had no power to appoint any person to administer the estate of the deceased, and that it was his duty after deciding the question presented for review to

remand the cause for further proceedings. The appellee insists that by virtue of C. S., 637 the judge had jurisdiction to proceed to final judgment. The section provides in effect that whenever a civil action or special proceeding begun before the clerk is for any reason sent to the Superior Court the judge shall have jurisdiction and may hear and determine all matters in controversy unless justice requires that it be remanded. It has been said that the judge was given jurisdiction "to prevent the anomaly of a cause brought before the clerk and regularly carried by appeal or transfer to the judge *of the same court* (the clerk being only the finger of the court) being dismissed to be begun again before the same judge." *In re Hybart's Estate,* 129 N. C., 130. The section has been held applicable also in proceedings for the partition of real property, for the sale of land to make assets, for the recovery of a legacy (C. S., 147), and for condemnation of land. *Foreman v. Hough,* 98 N. C., 386; *Ledbetter v. Pinner,* 120 N. C., 456; *York v. McCall,* 160 N. C., 276; *Perry v. Perry,* 179 N. C., 445; *Selma v. Nobles,* 183 N. C., 322. In terms it relates to "a civil action or special proceeding." The clerk of the Superior Court has jurisdiction within his county to grant letters of administration (C. S., sec. 1, sec. 938(14); but the mode of his appointment is neither a civil action nor a special proceeding. *Edwards v. Cobb, supra; In re Battle,* 158 N. C., 388. We are of opinion, therefore, that the judge had no jurisdiction to appoint an administrator of the Styers estate. The clerk's order was subject to review on appeal. *In re Battle, supra; In re Gulley,* 186 N. C., 78. But when the question thus presented was disposed of and the appointment of West was reversed the cause should have been remanded to the clerk for further proceedings.

The appellee cites *In re Estate of Wright,* 200 N. C., 620. In that case the action for the construction of the family agreement and for advice as to the management and settlement of the estate and the proceeding before the clerk for the removal of the executors were consolidated without objection. It was therefore held that the judge made no error in retaining jurisdiction and appointing a receiver with power to settle the estate according to the family agreement, the Court approving the following excerpt from *Fisher v. Trust Co.,* 138 N. C., 90: "The jurisdiction of courts of equity to entertain administration suits at the instance of creditors, devisees, and legatees has been uniformly recognized and frequently exercised." The facts there stated are entirely distinct from those in the case before us.

Error.

J. S. ALFORD v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 May, 1932.)

1. Master and Servant F a—No award had been made in this case and joinder of insurer as party plaintiff in employee's action was error.

An award under the Workmen's Compensation Act as contemplated by section 58 thereof is a present determination of a claim of an employee after a hearing, and the award must be in writing and be accompanied by a statement of the findings of fact and rulings of law and other matters pertinent to the question at issue, and must be filed in the record of the proceedings before the Industrial Commission, and an alleged agreement for compensation, between the insurer and an injured employee which agreement has not been passed upon by the Industrial Commission, is not an award under the act, and the insurer executing the agreement is not entitled to subrogation under section 11 of the act and may not intervene as a party plaintiff in the employee's action against a third person.

2. Appeal and Error J d—It will be assumed that court had facts before it sufficient to support its order for joinder of receiver as party.

Where the trial judge has allowed a motion to make the receivers of a defendant corporation a party defendant in an action for damages, it will be assumed, nothing to the contrary appearing, that there were facts before the court sufficient to justify his order, and *Held:* the joinder of the receivers was proper if they had been appointed subsequent to the institution of the action.

CIVIL ACTION, before *Small, J.,* at September Term, 1931, of FRANKLIN.

The plaintiff instituted this action against the defendant, alleging that he suffered a personal injury due to the negligent operation of certain box cars. An answer was filed denying the allegations of negligence, and thereafter the defendant filed a plea in abatement and motion to dismiss. In substance the plea in abatement alleges that the plaintiff at the time of his injury was an employee of W. H. Griffin Company, and that he and the employer had accepted the provisions of the Workmen's Compensation Act. In support of the plea the defendant offered in evidence an "agreement for compensation for disability, dated 31 May, 1930." This purported agreement was set forth upon a prepared form showing that the date of the injury was 18 March, 1930, and that the average weekly wages of the employee was $35.00 per week. It was further agreed that the employer should pay to the plaintiff employee a certain compensation therein specified. On the same day the sum of $148.50 was paid to the plaintiff.

The compensation agreement was duly filed with the Industrial Commission, but said Commission did not approve the same. When the

cause came on to be heard the Indemnity Insurance Company of North America appeared and filed a petition setting out that it was the insurer of the plaintiff, and that it had paid out the sum of $148.50 as compensation together with a medical bill of $20.00, and requesting that it be permitted to intervene as party plaintiff in the cause. The trial judge denied the plea in abatement, allowed the petition of the insurance carrier to become a party, and granted the motion of the plaintiff, making the receivers of the defendant parties to the action.

From the judgment so rendered the defendant appealed.

Yarborough & Yarborough, Cooley & Bone and Battle & Winslow for plaintiff and Indemnity Insurance Company of North America.

Murray Allen for defendant.

BROGDEN, J. Does the compensation agreement constitute an award within the meaning of section 11 of the Compensation Act?

This suit was instituted on 4 April, 1930, to recover damages for personal injury. Subsequently, to wit, on 31 May, 1930, a compensation agreement was filed with the Industrial Commission, but said Commission either failed or declined to approve the same. Section 11 of the Compensation Act permits an employee to recover damages for injury against "a third person or persons before an award is made under this act and prosecute the same to its final determination; but either an acceptance of an award hereunder, or the procurement of a judgment in an action at law shall be a bar to proceeding further with alternate remedy." The question then arises: What is an award as contemplated by the statute? Section 58 prescribes the legal essentials of an award. An award is conceived by the statute to be a present determination of the merits of the claim after a hearing of the parties and their witnesses. It must be "filed with the records of proceedings, and copy of the award shall immediately be sent to the parties in dispute." Consequently the award must be in writing and in controverted cases must be accompanied by "a statement of findings of fact, rulings of law and other matters pertinent to the questions at issue." Manifestly no award has been made to the plaintiff.

While the terms of the statute are plain, it is perhaps not amiss to note that courts in other jurisdictions have held that a compensation agreement filed but not approved does not constitute an award. See *Brown v. R. R., ante,* 256; *Bruce v. Stutz Motor Co.,* 148 N. E., 161; *American Mutual Life Ins. Co. v. Hamilton,* 135 S. E., 21.

By virtue of the express terms of the statute the right of the carrier does not arise until an award has been made. Hence the trial judge erred in permitting the carrier to become a party to the action.

It is contended that it was error to make the receivers of defendant parties to the suit. Apparently the suit was begun before receivers were appointed for the defendant. However, it is to be assumed in the absence of facts to the contrary that the judgment was supported by the facts before the court at the time. Moreover if the action was commenced before receivers were appointed, it was entirely proper that they should be made parties. *Black v. Power Co.*, 158 N. C., 468, 74 S. E., 468.

Modified and affirmed.

H. S. JONES ET AL. v. CITY OF HIGH POINT.

(Filed 18 May, 1932.)

1. Appeal and Error J e—Repeated asking of incompetent question held not prejudicial where answer was excluded and not made in hearing of jury.

Where witnesses have been repeatedly asked an incompetent question by counsel, but their answers have been excluded and it appears that the answers were not made in the hearing of the jury, an exception to the frequent repetition of the question will be overruled on appeal, it appearing that the appellant had not been prejudiced thereby.

2. Municipal Corporations E f—Exclusion of testimony of value of plaintiff's land without sewerage plant held not reversible error.

In an action against a city for damages caused the plaintiff's land by its sewage disposal plant, exclusion of evidence as to the value of the plaintiff's land without the plant will not be held for error, the proposed testimony being to the value of the land under conditions which did not exist, and the jury being specially instructed that the defendant had a right to erect and operate the plant at the location chosen.

3. Same—Instruction in this case clearly charged that plaintiff could recover only damages to land caused by odors from sewerage plant.

In an action against a city to recover damages caused by its sewage disposal plant an instruction that the jury might take into consideration the decreased market value of the plaintiff's land which was caused by the erection, maintenance and operation of the plant will be taken in connection with the explanatory instructions that the specific question was whether the plaintiff's land had been damaged by reason of odors emanating from the plant, and that the defendant had a right to erect and operate the plant at that site as a governmental function, and the charge will not be held for error and is not subject to the criticism that it is impossible to say upon what part of the charge the verdict was based.

APPEAL by defendant from *Warlick, J.*, at November Term, 1931, of GUILFORD. No error.

The plaintiffs brought suit to recover damages for injury to their property by the defendant's operation of a sewage disposal plant.

The following verdict was returned by the jury:

1. Are the plaintiffs the owners of the lands described in the complaint, as alleged in the complaint and the amendments thereto? Answer: Yes—by consent.

2. Have the plaintiffs' lands, as described in the complaint, been damaged by the installation and maintenance of the defendant's sewage disposal plant, as alleged in the complaint? Answer: Yes.

3. If so, what permanent damages, if any, are the plaintiffs entitled to recover? Answer: $3,500.

Judgment for the plaintiffs and appeal by the defendant upon assigned error.

Walser & Casey and Frazier & Frazier for plaintiffs.
Grover H. Jones and Sapp & Sapp for defendant.

ADAMS, J. We have scrutinized the defendant's exceptions and find that a minute review of them would result merely in a restatement of familiar principles. It is hardly necessary to do more than advert to some of the exceptions entered of record, but none has been overlooked.

H. S. Jones, one of the plaintiffs, was asked on the direct examination whether the premises in question had been infested with flies and mosquitoes subsequently to the construction of the plant. The defendant's objection was sustained. Thereafter the interrogatory was propounded to several other witnesses and in each instance the court made the same ruling. The defendant excepted to the frequent repetition of the question, but as the answer was recorded "not in the hearing of the jury" we are unable to see how the defense could have been prejudiced. These exceptions are therefore overruled.

The court excluded evidence tending to show the reasonable market value of the land without the plant and the defendant excepted on the ground that the answer would have shown that the witness based his estimate of the decreased value of the land solely on the fact that the plant had been built at its present site. We do not agree with the defendant in its interpretation of the proposed evidence. The gravamen of the complaint is the partial taking of the plaintiffs' property by the creation of a nuisance, and the jury was specially instructed that the defendant had the right to erect the plant and install the machinery. *Dayton v. Asheville,* 185 N. C., 12; *Sandlin v. Wilmington,* 185 N. C., 257. The mere circumstance that the witness was not permitted to express an opinion as to the value of the land under conditions which did

not exist is not an adequate reason for disturbing the judgment. The other exceptions to the evidence, we think, are without substantial merit and require no discussion.

The court gave the substance of the prayer for instruction which is the subject of the twenty-third exception; and the objection that the jury was permitted to attribute the decreased market value of the property to the erection, maintenance, and operation of the plant must be taken in connection with the explanatory instruction that the specific question was whether the premises were substantially affected by odors emanating from the plant in its operation. The charge on this point, we think, is not subject to the criticism that it is impossible to say upon what part of the charge the verdict was based. The judge told the jury in words that could not have been misunderstood that the defendant had the right to operate the plant as a governmental function and more than once directed attention to the immediate question whether odors emanating from the plant substantially decreased the market value of the land. We are unable to discover any sufficient reason for holding that upon return of the jury to the box the court's definition of a nuisance was detrimental to the defense. For these reasons exceptions 27-30 must be overruled. The others are formal.

No error.

NORTHERN MACHINE WORKS, INCORPORATED, v. JULIUS C. HUBBARD ET AL.

(Filed 18 May, 1932.)

Taxation H f—Tax sale of personal property without notice to registered mortgagee is void.

The requirements of our statute C. S., 7986 that the sheriff of the county give the mortgagee of personal property ten days notice of a sale of the mortgaged property for taxes under a levy is mandatory and not merely directory, and where no notice of the tax sale has been given the mortgagee of a duly registered mortgage, his right to the possession of the property is superior to that of the purchaser at the tax sale, but his possession is solely for the purpose of foreclosing the mortgage by sale of the property, and: *Semble*, the proceeds from the foreclosure sale should be applied to reimburse the purchaser at the tax sale for the amount of taxes paid by him before they are applied on the mortgage debt.

APPEAL by defendants from *Clement, J.*, at October Term, 1931, of WILKES. No error.

This is an action to recover possession of certain personal property described in the complaint, and in the possession of the defendant, Julius C. Hubbard, at the date of the commencement of this action.

The plaintiff claims title to the property under a conditional sales agreement or chattel mortgage executed by the defendant, Frank A. Carr, and duly recorded in the office of the register of deeds of Wilkes County, on 21 December, 1925. The debt secured by the conditional sales agreement or chattel mortgage has not been paid.

The defendant, Julius C. Hubbard, claims title to the property under a sale made thereof by the tax collector of the town of Wilkesboro, N. C., on 3 June, 1929, for the collection of the taxes levied thereon for the years 1926 and 1927. The property was listed for taxation during said years by the defendant, Frank A. Carr. None of the defendants other than the defendant, Julius C. Hubbard, claims title to the property in controversy.

There was evidence tending to show that prior to the date of sale, the tax collector of the town of Wilkesboro, N. C., levied on the property described in the complaint, and thereafter advertised the sale for twenty days by notices posted at the courthouse door in the town of Wilkesboro, and at three other public places. He did not advertise the sale in a newspaper, nor did he give the plaintiff, as mortgagee of the property, notice of the sale.

The court instructed the jury as follows: "The court instructs you, if you believe the evidence, that you will answer the issue 'Yes,' for the reason that according to the tax collector's testimony he did not give the plaintiff any notice, and the statute says he shall give a mortgagee notice of the sale ten days before the sale is made."

The issue submitted to the jury was answered as follows:

"Is the plaintiff entitled to the immediate possession of the personal property described in the complaint? Answer: Yes."

From judgment that plaintiff recover of the defendant the immediate possession of the property described in the complaint, and the costs of the action, the defendants appealed to the Supreme Court.

Jones & Brown and Ralph G. Bingham for plaintiff.
J. A. Rousseau for defendants.

CONNOR, J. The defendant, Julius C. Hubbard, contends that his title to the property described in the complaint is superior to the title of the plaintiff under the conditional sales agreement or chattel mortgage executed by Frank A. Carr, for the reason that he derives his title from a sale made of said property by the tax collector of the town of Wilkesboro, N. C., to enforce the lien acquired by a levy on said property

prior to 3 June, 1929, for the taxes assessed against Frank A. Carr for the years 1926 and 1927. This contention is presented by defendant's assignment of error based on his exception to the instruction of the court to the jury appearing in the statement of the case on appeal.

The contention cannot be sustained for the reason that the sale of the property made by the tax collector was void, at least as against the plaintiff, whose mortgage executed by Frank A. Carr was duly registered prior to the levy. The tax collector gave no notice to the plaintiff that he had levied on the property and would sell the same for the collection of the taxes assessed thereon. C. S., 7986. The requirement of the statute that a tax collector, who shall levy on personal property for the purpose of collecting the taxes due thereon, shall give due notice to the mortgagee of such property of the amount of such taxes at least ten days before the sale under the levy, in order that the mortgagee may have an opportunity to pay the amount of such taxes with the costs incident to the levy, and thus prevent the sale, is mandatory and not merely directory. *Chemical Co. v. Williamson,* 191 N. C., 484, 132 S. E., 146. There was no error in the instruction. The judgment is affirmed.

It may be well to note that the plaintiff is entitled to possession of the property described in the complaint only for the purpose of foreclosing its mortgage by the sale of said property. Whether in accounting for the proceeds of the sale, the plaintiff must pay to the defendant, Julius C. Hubbard, the amount of the taxes and costs paid by him, is not presented in this appeal. It would seem, however, that this amount should be first paid before any part of the proceeds can be applied as a payment on plaintiff's debt secured by the mortgage.

No error.

DAISY McDONALD PATTERSON, ADMINISTRATRIX OF G. L. PATTERSON, v. MRS. M. F. RITCHIE.

(Filed 18 May, 1932.)

Highways B h—Act of driver in swerving car to avoid collision with truck held not negligent.

Where the evidence tends only to show that the driver of an automobile in heavy traffic on a highway saw a truck coming towards him and upon the sudden necessity of avoiding a collision therewith, swerved the car, causing it to leave the hard surface and hit a post along the highway, resulting in the death of an invitee riding with him: *Held,* the act of the driver in so swerving the car will not be held for negligence, and

the injury was from an accident for which damages may not be recovered either against the driver or the owner of the car. The question as to whether the wife would be liable under the family-car doctrine for the use of the car by her husband in her absence and with her implied consent is not decided under the facts of this case.

APPEAL by defendant from *Schenck, J.*, at January Term, 1932, of CABARRUS. Reversed.

This is an action to recover damages for the death of plaintiff's intestate.

At the time he suffered the injuries from which he died, plaintiff's intestate was riding in an automobile owned by the defendant, and driven by her husband. Defendant was not riding in the automobile, and had no control over its operation. Plaintiff's intestate was riding in the automobile as the guest of defendant's husband, who was driving the automobile for his own pleasure. The members of defendant's family, including her husband, habitually used the automobile, with her consent, for their own pleasure or business.

In her complaint the plaintiff alleged that the death of her intestate was caused by the negligence of defendant's husband, the driver of the automobile in which her intestate was riding when he was killed. This allegation was denied in the answer of the defendant.

At the close of the evidence offered by the plaintiff, the defendant moved for judgment as of nonsuit. This motion was denied and defendant excepted. No evidence was offered by the defendant.

The issues submitted to the jury were answered as follows:

"1. Was the death of plaintiff's intestate, G. L. Patterson, caused by the negligence of the agent of the defendant, Mrs. M. F. Ritchie, as alleged in the complaint? Answer: Yes.

2. If so, what damage, if any, is the plaintiff, Mrs. Daisy McDonald Patterson, administratrix of G. L. Patterson, deceased, entitled to recover of the defendant, Mrs. M. F. Ritchie? Answer: $15,000."

From judgment that plaintiff recover of the defendant the sum of $15,000, with the costs of the action, the defendant appealed to the Supreme Court.

Hartsell & Hartsell for plaintiff.

Bogle & Bogle and Fuller, Reade & Fuller for defendant.

CONNOR, J. Conceding without deciding that the family-purpose doctrine adopted in this State with respect to the use of automobiles (*Grier v. Woodside,* 200 N. C., 759, 158 S. E., 491) is applicable in the instant case, we are of the opinion that the evidence offered by plaintiff

fails to show that the death of her intestate was caused by the negligence of defendant's husband, as alleged in the complaint. For this reason, there was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit made in apt time as provided by statute. C. S., 567.

All the evidence shows that defendant's husband, driving the automobile in which plaintiff's intestate was riding as his guest, on a State highway, in the midst of heavy traffic, was suddenly confronted by a situation, caused by the truck which was approaching him from the opposite direction, in which he was required to act quickly for the safety of himself and of his guest. Under the circumstances as shown by all the evidence, he was not negligent in swerving the automobile suddenly to his right, thus causing it to leave the hard surface and to run on the shoulder of the highway. The collision which occurred within a short distance of the automobile with the post which was standing beside the highway, was an accident, regrettable in its consequences not only to his guest but also to the driver. As the fatal injuries of his guest could not under the circumstances have been reasonably avoided, these injuries must be attributed to the unavoidable accident, and not to the negligence of defendant's husband. Neither the defendant nor her husband, upon the evidence appearing in the record, can be held liable to the plaintiff in this action. The judgment is

Reversed.

W. W. GUY v. C. A. GOULD ET AL.

(Filed 18 May, 1932.)

1. **Trial G b—A verdict will be liberally construed with a view of sustaining it.**

   A verdict will be liberally construed in connection with the pleadings, the evidence and the charge of the court with a view of sustaining it if this can be done by a reasonable interpretation.

2. **Landlord and Tenant G c—Recovery by lessor, lessee, and successive sublessees, each against his immediate lessee, held supported by verdict.**

   In this case there were several successive leases of real estate with the obligation resting on each lessee to pay a stipulated rental for a certain number of years, and a judgment was rendered that the original lessor recover the unpaid balance for the term against the original lessee, and that each of the lessees recover in turn from his sublessee: *Held*, the judgment was supported by the verdict and is affirmed on appeal.

GUY *v.* GOULD.

APPEAL by defendants from *Sink, J.,* at September Term, 1931, of MCDOWELL. No error.

This is an action to recover the balance due on the rent for the unexpired term of a lease executed by the plaintiff to the defendants, C. A. Gould, Marcus R. Field and Francis E. Field, for a lot of land situate in the village of Biltmore, N. C.

The lease is dated 13 August, 1923, and was for a term of eight years from its date. The rent at the rate of $250 per month was paid to 13 August, 1928. The defendants have failed to pay the rent which has accrued since said date. The amount now due is $9,000, less the sum of $40.00, which was collected by plaintiff as rent for the lot of land, after plaintiff took possession under the terms of the lease, upon the default of defendants in the payment of the rent.

Summons in this action was not served on the defendant, C. A. Gould, or on the defendant, Marcus R. Field. It was duly served on each of the other defendants, who filed answers to the complaint.

On 6 February, 1925, Marcus R. Field, as assignee of his colessees, executed a lease for the lot of land described in the lease from the plaintiff, to the defendant, T. A. Hair, and on 8 September, 1925, the defendant, T. A. Hair, executed a lease for said lot of land to the defendant, Pig and Whistle, Incorporated. Each of said sublessees agreed with his lessor to pay as rent for said lot of land the sum of $250 per month during the remainder of the term of the lease from the plaintiff to the defendant, C. A. Gould, Marcus R. Field and Francis E. Field. Neither of said sublessees have paid the rent which has accrued under their respective leases since 13 August, 1928.

Each of the answering defendants in his answer admitted the allegations of the complaint, and relied upon the counterclaim set up in his further answer. Neither defendant, however, offered evidence in support of his counterclaim.

At the close of all the evidence, the motions of the defendants, T. A. Hair and Pig and Whistle, Incorporated, for judgment as of nonsuit as against the plaintiff, and of the plaintiff for judgment as of nonsuit on the counterclaims set up in the further answers, were allowed.

The only issue submitted to the jury was answered as follows:

"In what amount, if any, are the defendants, or either of them, indebted to the plaintiff? Answer: $8,960, with interest as alleged in the complaint."

From judgment that plaintiff recover of the defendant, Francis E. Field, the sum of $8,960, with interest; that the defendant, Francis E. Field, recover of the defendant, T. A. Hair, the sum of $8,960, with interest, and that the defendant, T. A. Hair, recover of the defendant,

Pig and Whistle, Incorporated, the sum of $8,960, with interest, the defendants, Francis E. Field, T. A. Hair and Pig and Whistle, Incorporated, appealed to the Supreme Court.

J. Will Pless, Jr., and Winborne & Proctor for plaintiff.
Vonno L. Gudger for defendant, Francis E. Field.
Kitchin & Kitchin for defendant, T. A. Hair.

CONNOR, J. The judgment in this action is supported by the verdict, construed in the light of the admissions in the pleadings and of the undisputed facts shown by all the evidence.

It is well settled that a verdict should be liberally and favorably construed with a view of sustaining it, if possible, and in ascertaining its meaning resort may be had to the pleadings, the evidence and the charge of the court. McIntosh N. C. Prac. & Proc., p. 667, and cases cited in the note.

As construed in accordance with this rule, the verdict is sufficient to support the judgment. There was no error in the trial, and the judgment is affirmed.

No error.

SAM GREER, EMPLOYEE, v. SWANNANOA LAUNDRY, INCORPORATED, EMPLOYER, AND THE AMERICAN MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 18 May, 1932.)

Master and Servant F i—Findings of fact of Industrial Commission relative to award are conclusive when supported by evidence.

Where, in a hearing under the Workmen's Compensation Act, the hearing Commissioner denies compensation and finds upon conflicting evidence that the claimant's loss of an eye was not caused by an accident arising out of and in the course of his employment, but was the result of erysipelas which was not augmented by the employment, and on appeal to the full Commission this finding of fact is approved and the award affirmed, on further appeal to the Superior Court only matters of law involved in the award may be reviewed, and the findings of the Industrial Commission on conflicting evidence are conclusive, and it is error for the judge to reverse the finding and remand the case to the Industrial Commission, and on appeal to the Supreme Court the judgment of the Superior Court will be reversed.

APPEAL by defendants from *Sink, J.*, at January Term, 1932, of BUNCOMBE. Reversed.

This is a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act.

At the hearing before him at Asheville, N. C., on 14 September, 1931, Commissioner Dorsett found among other facts, which are not in controversy, the following:

"(2) The claimant did not suffer an injury by accident arising out of and in the course of his employment, resulting in the loss of an eye."

"(4) The claimant probably lost his eye as the result of erysipelas. The erysipelas was not caused or aggravated by an accident arising out of and in the course of his employment."

Upon these findings of fact, claimant was denied compensation, and an award to that effect was made by Commissioner Dorsett.

On a review of the award denying claimant compensation for the loss of his eye, the full Commission approved the findings of fact made by Commissioner Dorsett, and affirmed his award. From the award of the full Commission, the claimant appealed to the Superior Court of Buncombe County.

At the hearing of claimant's appeal in the Superior Court, the judge ordered that finding of facts No. 2, made by Commissioner Dorsett and approved by the full Commission, be reversed and stricken from the record. In lieu thereof, he ordered that the following be inserted in the record: "The claimant suffered an injury by accident arising out of and in the course of his employment, resulting in the loss of an eye."

The judge further ordered and adjudged "that finding of fact No. 4, is contrary to the greater weight of the evidence, and is, therefore, overruled."

From judgment remanding the proceedings to the North Carolina Industrial Commission, with direction that an award be entered in accordance with the judgment, the defendants appealed to the Supreme Court.

Jas. S. Howell and John B. Anderson for claimant.
Johnson, Smathers & Rollins for defendants.

CONNOR, J. It is provided in the North Carolina Workmen's Compensation Act that either party to a proceeding begun and prosecuted before the North Carolina Industrial Commission for compensation under the provisions of said act, may appeal from the decision of said Commission to the Superior Court of the county in which the accident happened, for errors of law under the same terms and conditions as govern appeals in ordinary civil actions. N. C. Code of 1931, sec. 8081(ppp), sec. 60,

chap. 120, Public Laws 1929. It is further provided in said act that an award made by the North Carolina Industrial Commission in a proceeding begun and prosecuted before said Commission for compensation shall be conclusive and binding as to all questions of fact. It has accordingly been held by this Court that only questions of law involved in an award made by the Commission in a proceeding of which the Commission has jurisdiction may be considered and passed upon by the judge of the Superior Court on an appeal to said court from an award made by the North Carolina Industrial Commission. *Aycock v. Cooper, ante,* 500, 163 S. E., 569, and cases cited in the opinion in that case.

In the instant case, it may be conceded that there was evidence tending to show that plaintiff suffered an injury by accident arising out of and in the course of his employment, resulting in the loss of an eye. However, there was also evidence tending to show that the loss of plaintiff's eye was not the result of an accident, but of a disease which was not caused or aggravated by an accident which arose out of or in the course of his employment. The conflicting evidence was considered by both Commissioner Dorsett and by the full Commission. The findings of fact made by Commissioner Dorsett and approved by the full Commission, were conclusive and binding on the judge of the Superior Court. Upon these findings of fact, there was no error in the award denying plaintiff compensation for the loss of his eye, under the provisions of the North Carolina Workmen's Compensation Act. The award should be affirmed. The judgment remanding the proceeding to the Industrial Commission is

Reversed.

D. S. ELIAS v. BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY ET AL.

(Filed 18 May, 1932.)

Injunctions H a—Where injunction is properly granted as to past matters and is modified as to future, damages may not be assessed against bond.

Where on appeal from the granting of a temporary injunction it is held that the injunction was properly granted except as to one matter dealing with future transactions, and in this respect it is modified, a motion by a party defendant therein to assess damages against the injunction bond is properly denied.

APPEAL by defendant, Advocate Printing Company, from *MacRae, Special Judge,* at April Term, 1932, of BUNCOMBE.

Motion by Advocate Printing Company to assess damages against injunction bond. Motion denied (1) on its merits (*Elias v. Commissioners,* 198 N. C., 733), and (2) for the further reason that it is not in writing (*Cotton Oil Co. v. Grimes,* 183 N. C., 97).

Movant appeals, assigning errors.

Jones & Ward for plaintiff.
Joseph W. Little for defendant Printing Company.

STACY, C. J. This case was considered at the Spring Term, 1930, and is reported in 198 N. C., 733. It was there held that the injunction was properly granted, save as to one provision dealing not with past transactions, but with future matters. Hence, the denial of the present motion was correct.

Affirmed.

R. L. STROWD v. J. R. WHITFIELD AND HIS WIFE, ADA WHITFIELD.

(Filed 18 May, 1932.)

1. Principal and Agent A b—Contract in this case held an option and did not create relationship of principal and agent.

A contract between an owner of land and a real estate company whereby the former agrees to sell certain land to the latter upon the payment of a certain sum within a specified time, with a further agreement that the real estate company might sell the land at public or private sale within the time specified upon the expenditure of a certain sum for improvements, and that the owner should receive a specified per cent realized from the sale over and above the sum named is *Held* an option on the land binding upon the owner upon receipt of the purchase price, and did not create an agency for the sale of the land.

2. Principal and Agent C b—Agent for sale of real estate does not have the power to rescind sale or cancel notes therefor.

Where, under an agreement with the owner, an agent has subdivided and sold certain land at public auction on certain terms of payment, and a purchaser at the sale has given notes secured by a mortgage payable to the owner, the agent has no authority to agree to rescind the sale and cancel the notes upon a conveyance of the property to the agent unless the owner consents to or ratifies the transaction, and when this has been done without the owner's knowledge he may successfully maintain an action on the notes against the purchaser at the sale to recover the deficiency after foreclosure of the mortgage according to its terms and the application of the proceeds of the sale to the notes.

STACY, C. J., dissenting.

CLARKSON, J., concurs in the dissent.

STROWD *v.* WHITFIELD.

APPEAL by defendants from *Daniels, J.,* at October Term, 1931, of ORANGE. Affirmed.

This is an action to recover the amount due on certain notes executed by the defendants, and payable to the plaintiff. The consideration for said notes was part of the purchase price for certain lots sold and conveyed to defendants by plaintiff. The notes were secured by a deed of trust executed by the defendants. Upon default in the payment of the notes, the lots conveyed by the deed of trust were sold by the trustee, and conveyed to the purchaser, in accordance with the power of sale contained in the deed of trust. The amount received by the trustee for said lots, less the costs and expenses of the sale, was applied as a payment on the notes, leaving a balance now due thereon of $1,126.53, with interest from 12 October, 1930. The plaintiff demands judgment that he recover of the defendants the said amount.

As their defense to plaintiff's recovery in this action, the defendants allege in their answer that pursuant to an agreement entered into at the time the notes sued on in this action were executed, by and between the defendants and the agent of the plaintiff by whom the lots were sold to the defendants, and after the execution of said notes, the contract between the plaintiff and the defendants for the sale of the lots was rescinded, and that the agent of the plaintiff, acting for him and in his behalf, agreed to cancel and surrender said notes to the defendants. The defendants prayed judgment that the notes now be canceled and surrendered, and that plaintiff recover nothing of the defendants in this action.

The allegations in the answer with respect to the agreement for the cancellation of the notes sued on, and the rescission of the contract for the sale of the lots, were denied by the plaintiff in his reply to the answer.

The action was referred to a referee for trial. The referee heard evidence offered by both plaintiff and defendants. Upon his findings of fact and conclusions of law, the referee recommended that judgment be entered in the action (1) that the notes sued on be canceled and surrendered by the plaintiff to the defendants, and (2) that plaintiff recover nothing of the defendants in this action. Both plaintiff and defendants filed exceptions to the report of the referee.

The report of the referee was heard on the exceptions filed thereto by the judge presiding at the October Term, 1931, of the Superior Court of Orange County, who affirmed the findings of fact made by the referee, and from the evidence found certain additional facts. Upon these facts, the judge reversed certain conclusions of law made by the referee, and

ordered and adjudged that plaintiff recover of the defendants the sum of $1,126.53, with interest thereon from 12 March, 1930, and the costs of the action.

The defendants appealed from the judgment to the Supreme Court.

R. T. Giles and J. A. Giles for plaintiff.
S. M. Gattis, Jr., for defendants.

CONNOR, J. The facts found by the referee, and affirmed by the judge, at the hearing of the exceptions to the report of the referee, are as follows:

"1. That on 22 April, 1925, and for some time prior thereto, the plaintiff was the owner in fee simple of a tract of land situated in Orange County, North Carolina, known as the "Strowd Place," a short distance from Chapel Hill. This property is traversed by Chapel Hill Boulevard, more generally known as North Carolina Highway No. 75.

2. That some time prior to 22 April, 1925, plaintiff entered into a written contract with the Chapel Hill Insurance and Realty Company, under the terms of which the Chapel Hill Insurance and Realty Company had said property surveyed and platted, a copy of said plat was introduced in evidence at the trial. This property was widely advertised for sale at public auction on 22 April, 1925, and the plaintiff knew about same and during the time said property was being cleared up, preparatory to sale, he went on the property and advised with the men at work, and instructed them what to leave undisturbed in the clearing process and in general exercised the right of ownership over said property.

3. That the property was duly offered for sale on 22 April, 1925, and that the Chapel Hill Insurance and Realty Company and Durham Auction Company were in charge of the sale. Before the bidding commenced the auctioneer announced that this would be a first-class development—that lights, water, streets and sewers would be installed, but these things have never been installed, and no improvements have been made on this property except such as have been made by the individual owners. The plaintiff attended the sale and at one time stopped the sale until certain matters were discussed between him and the selling agents.

4. That at said auction sale the defendants became the last and highest bidders for lots Nos. 16 to 23, inclusive, and executed a memorandum of sale, offered in evidence, which was to the effect that defendants had purchased the said lots from the plaintiff through Chapel Hill Insurance and Realty Company and Durham Auction Company, on the terms set out therein. The next day after the sale, the defendant,

J. R. Whitfield, went to the office of the Chapel Hill Insurance and Realty Company and talked with Mr. W. S. Roberson, president and general manager of the company, and advised Mr. Roberson that defendants did not want the lots as they were not of uniform width and were not as they were represented to be. Mr. Roberson stated to the defendant that he did not want the purchaser to become dissatisfied, and if defendants would take the property and execute the deed of trust and notes to secure the payment of the unpaid balance, the defendants would be given more land or their money back if they later became dissatisfied with the transaction. Relying upon this agreement, the defendants did execute the deed of trust and notes. The notes were payable to R. L. Strowd, and the deed of trust was executed to the Bank of Chapel Hill, trustee for R. L. Strowd. Said notes and deed of trust bear date of 22 April, 1925, but were actually executed after the conversation between defendant, J. R. Whitfield and Mr. Roberson. The deed of trust was introduced in evidence.

5. That the defendants later did become dissatisfied with their purchase and notified Mr. Roberson to that effect. Whereupon, Mr. Roberson had defendants to execute to Chapel Hill Insurance and Realty Company a deed for the property, and returned to defendants the cash payment which had been made by defendants, and promised that he would return to them the notes and deed of trust, which were executed when the lots were purchased.

6. That the notes and deed of trust which defendants executed were never canceled and returned to them, and nothing was ever paid on said notes. The trustee in the deed of trust duly advertised and offered for sale the property conveyed thereby, and sold the same on 1 March, 1930. The plaintiff, R. L. Strowd, became the last and highest bidder at said sale, in the sum of $200, and received a deed from the trustee for said property. From this sale there was a balance, after the payment of the cost and expenses of the same, of $185.47, which has been applied as a credit on the notes, leaving an unpaid balance due thereon of $1,126.53, with interest from 12 March, 1930."

In addition to the foregoing facts found by the referee, and approved by the judge, the judge found from the evidence the following facts:

"7. That during the auction sale an agreement was made between plaintiff and Chapel Hill Insurance and Realty Company whereby plaintiff agreed to accept from Chapel Hill Insurance and Realty Company the notes of purchasers as a part of the purchase price, and the said corporation guaranteed the payment of said notes.

8. That plaintiff had no actual notice of the agreement between Chapel Hill Insurance and Realty Company and defendants to rescind

the sale of the lots to defendants, that he was not present at the time of the execution and delivery of the notes, and that he had no notice of the subsequent conveyance of the lots by the defendants to the Chapel Hill Insurance and Realty Company.

9. That the notes sued on in this action, were delivered by Chapel Hill Insurance and Realty Company to plaintiff before their maturity."

The judge reversed certain conclusions of law made by the referee on the facts found by him, particularly the conclusion of law that the Chapel Hill Insurance and Realty Company was acting as agent of the plaintiffs in the sale of the lots to the defendants, and that the contract in writing between the plaintiff and the Chapel Hill Insurance and Realty Company was not an option, but a contract by the terms of which the Chapel Hill Insurance and Realty Company was the agent of the plaintiff, and as such agent was authorized to sell the lots owned by plaintiff. In this the defendants contend, on their appeal to this Court, that there was error. This contention cannot be sustained. The judgment is affirmed for two reasons:

1. The contract between plaintiff and the Chapel Hill Insurance and Realty Company, dated 3 March, 1925, appearing in the record, is an option, by which the plaintiff agreed to sell and convey the "Strowd Place," to the Chapel Hill Insurance and Realty Company, upon the payment to the plaintiff by said Company of the sum of $125,000, at any time within 45 days from the date of said contract. Plaintiff agreed further that at any time during the existence of the option, the Chapel Hill Insurance and Realty Company, might at its own cost and expense, endeavor to sell the said property at public or private sale, provided the said company should expend at least the sum of $1,000, in endeavoring to sell the said property. In consideration of this latter feature of the contract, it was agreed that "R. L. Strowd is to participate to the extent of twenty-five per cent in whatever excess the property sells for during the said period in excess of $125,000, plus the cost of development and sale, not to exceed $12,500." This contract cannot be construed as establishing the relation of principal and agent between the parties with respect to the land described therein. It is clearly an option unilateral in its obligation, and not binding on the Chapel Hill Insurance and Realty Company, until accepted by said company.

2. Conceding, however, that under the terms of the contract, or upon the facts found by the referee and approved by the judge, the Chapel Hill Insurance and Realty Company, was the agent, real or apparent, of the plaintiff, with authority to sell the lots purchased by the defendants, it does not follow that the agent, after the sale had been made and reported to his principal, was authorized to rescind the sale and to

take the title to the lots in itself from the defendants without notice to the plaintiff, who was then the holder of the notes. The authority of an agent to sell the property of his principal does not include the power, after the sale has been made, and reported to and confirmed by the principal, to rescind the sale, and cause the property to be conveyed to him by the purchaser. In the instant case, all the evidence shows that the defendants dealt with the Chapel Hill Insurance and Real Estate Company, both in the purchase of the lots, and in the rescission of the sale, as the owner of the lots, and not as the agent of the plaintiff. It is true that the lots were conveyed to defendants directly by the plaintiff, and the notes executed by defendants for the balance due on the purchase price were payable to the plaintiff. This was in accordance with the contract between the plaintiff and the Chapel Hill Insurance and Real Estate Company. However, when defendants demanded that the sale of the lots be rescinded, in accordance with their agreement with the Chapel Hill Insurance and Real Estate Company, at or before the delivery of the deed and notes, defendants, at the request of the Chapel Hill Insurance and Real Estate Company, conveyed the lots to the said company and not to the plaintiff. They made no demand on the plaintiff to rescind the sale, and not until after the foreclosure of the deed of trust, and the commencement of this action, did the defendants contend that the agreement to rescind the sale of the lots, at any time they became dissatisfied therewith, was made by the Chapel Hill Insurance and Real Estate Company as agent of the plaintiff. We find no error in this appeal. For this reason the judgment is

Affirmed.

STACY, C. J., dissenting: Civil action to recover deficiency judgment on notes given by highest bidder for lots at auction sale. The following memorandum was executed at the time of sale:

"This is to certify, that I have this day bought from R. L. Strowd through Chapel Hill Insurance and Realty Company and Durham Auction Company, lots Nos. 16 to 23, inc., Block No. 18, of the R. L. Strowd farm, on the eastern corporate limits of Chapel Hill, N. C., as shown on plat of said property made by Sidney Credle, surveyor, April, 1925, and also by Blair and Drane, engineers, 1 November, 1921, for which ..... agree to pay the sum of $205, one-tenth in cash, and the balance to be paid in nine equal annual installments, with interest on deferred payments at 6 per cent per annum, payable semi-annually, notes given for deferred payments to be secured by first mortgage on the lands purchased.

Witness my hand and seal, this 22 April, 1925.

Witness: J. L. F. J. R. Whitfield. (Seal.)"

The next day, in the office of the Chapel Hill Insurance and Realty Company, where, it had been announced, deeds would be delivered to the purchasers, J. R. Whitfield interposed an objection on the ground that the lots bid off by him were smaller in size than shown on map and were not as represented at sale; whereupon the manager of the Chapel Hill Insurance and Realty Company, who had the matter in charge, advised the said Whitfield to go ahead, make the cash payment, execute purchase-money notes and mortgage, or deed of trust, for balance, and if his contention turned out to be correct, or if he were not satisfied with the lots, they would be taken back. "I told him to go ahead and take the lots and that he and I would adjust the matter later. He says that I agreed to give him more land or money and I suppose I did agree to take the land back if he was not satisfied." Was not this, then, a conditional delivery of said notes and deed of trust? *Watson v. Spurrier,* 190 N. C., 726, 130 S. E., 624; *Overall Co. v. Hollister,* 186 N. C., 208, 119 S. E., 1; *Building Co. v. Sanders,* 185 N. C., 328, 117 S. E., 3; *White v. Fisheries Co.,* 183 N. C., 228, 111 S. E., 182; *Thomas v. Carteret,* 182 N. C., 374, 109 S. E., 384. If so, the plaintiff was fixed with notice of such delivery. The case should go back for a finding on this point.

The manager of the Chapel Hill Insurance and Realty Company, upon notice of dissatisfaction, returned the cash payment in accordance with the condition of sale, and took deed for the lots, but plaintiff insists upon a deficiency judgment after getting his lots back by foreclosure. A right costly experience for the defendants.

CLARKSON, J., concurs in dissent.

STATE v. JOHN H. HAUSER.

(Filed 18 May, 1932.)

Criminal Law G i—Opinion evidence in this case held to invade province of jury and its admission over defendant's objection was error.

Where, in a prosecution for murder in the first degree, the defendant pleads mental incapacity to premeditate or deliberate, and introduces supporting evidence, the question is for the jury to determine, and testimony to the effect that the defendant did have mental capacity to plan a murder and carry the plan into execution is an invasion of the province of the jury, and its admission over the prisoner's exception constitutes reversible error, evidence of this character being limited to the general mental capacity of the defendant. As to whether a witness who has not qualified as an expert may be permitted to give evidence of this character, *quære?*

STATE *v.* HAUSER.

APPEAL by defendant from *Clement, J.*, at August Term, 1931, of DAVIE.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one Fred S. Styers.

The prisoner is a farmer, 82 years of age, "feeble, decrepit and lame," living in Davie County. On 28 May, 1931, he shot and killed his son-in-law, Fred Styers, a strong and vigorous young man, 35 years of age. The prisoner's plea was that of self-defense, and mental incapacity to premeditate or plan a murder. He offered expert testimony tending to show that he was suffering with "senile dementia, chronic myocarditis, high-blood pressure, enlargement of the heart, hardening of the arteries, partial blindness and lameness," by reason of which, in the opinion of the witnesses, he was incapable of premeditation and deliberation.

In rebuttal, the State offered a number of lay witnesses who testified that in their opinion the prisoner could distinguish good from evil and that he knew the difference between right and wrong. *S. v. Terry*, 173 N. C., 761, 92 S. E., 154.

Then, the following questions were propounded to said witnesses, to which the prisoner in apt time objected:

"Q. Mr. Douthit, in your opinion did the accused have sufficient mental capacity to plan a murder and then carry it into execution? (Objection; overruled; exception.)

"A. Well, I think—yes, sir; he could make a plan ahead of time and go ahead and do it all right."

"Q. Mr. Graham, have you an opinion as to whether John Henry Hauser has the mental capacity to plan a murder and then commit it, execute the plan? (Objection; overruled; exception.)

"A. I think he had sufficient mind to plan a thing and then execute it."

"Q. Mr. Riddle, from your observation of Mr. Hauser prior to the homicide, have you an opinion satisfactory to yourself as to whether or not John Henry Hauser has sufficient mental capacity, that is to say, mind or reason to plan a murder and then execute it? (Objection; overruled; exception.)

"A. I think he did."

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.

A. T. Grant and Manly, Hendren & Womble for defendant.

STACY, C. J. The basis of the prisoner's objection to the testimony of the witnesses Douthit, Graham and Riddle is, that they are non-experts, and, therefore, incompetent to express an opinion on the mental condition of the accused. Authorities may be found for this position (8 R. C. L., 190), but our own decisions point in another direction. *Clary v. Clary,* 24 N. C., 78. That the evidence in general, pro and con, was competent on the question of alleged felonious intent, or premeditation and deliberation, is not controverted. 1 Wharton's Crim. Law, p. 85, sec. 64; Wharton on Homicide (3d ed.), p. 802-803, sec. 538-539; *S. v. Wilson,* 197 N. C., 547, 149 S. E., 845; *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. English,* 164 N. C., 497, 80 S. E., 72.

Without undertaking to review the cases, which deal with "expert knowledge in the hands of an inexpert," we think the opinion evidence of the witnesses Douthit, Graham and Riddle invaded the province of the jury, and, for this reason, should have been excluded. *Marks v. Cotton Mills,* 135 N. C., 287, 47 S. E., 432; *Stanley v. Lumber Co.,* 184 N. C., 302, 114 S. E., 385; *Marshall v. Tel. Co.,* 181 N. C., 292, 106 S. E., 818; *Kerner v. R. R.,* 170 N. C., 94, 86 S. E., 998.

Almost the identical question here presented arose in the case of *S. v. Journegan,* 185 N. C., 700, 117 S. E., 27, where the following questions were held to be incompetent: "In your opinion, do you think that Journegan has sense enough to operate a blockade still?" And further: "Do you think, on 12 December, 1922, Journegan had sufficient mental capacity to operate a still, and to know it was wrong to do it?" The defendant was charged with the unlawful manufacture of spirituous liquors and with operating a distillery. *Clark, C. J.,* delivering the opinion of the Court, said: "It would lead to strange results if the precedent were set in this case that a witness could testify whether in his opinion a man who committed forgery had 'sufficient mental capacity to do this and understand that it was wrong'; or whether a man guilty of homicide by the use of a deadly weapon had 'mental capacity to use a deadly weapon, and to know it was wrong to kill.' . . . There is no precedent in the books to ask as to the mental capacity to commit any particular crime."

Again, in *Tillett v. R. R.,* 118 N. C., 1031 (at p. 1042), 24 S. E., 111, *Avery J.,* speaking for the Court, said: "When, therefore, the witness was asked to state whether a car was coupled in a negligent manner, the question was calculated to elicit an opinion upon one of the very questions which the jury were empaneled to decide, and the objection to its competency, being in apt time, was properly sustained. *Smith v. Smith,* 117 N. C., 326; *Wolf v. Arthur,* 112 N. C., 691."

It has been held competent for a witness to give his opinion as to whether a person is a Negro (*Hopkins v. Bowers,* 111 N. C., 175, 16 S. E., 1), or whether his appearance indicates the presence of Negro blood in his veins (*Gilliland v. Board of Education,* 141 N. C., 482, 54 S. E., 413); also as to the mental state of a party (*McRae v. Malloy,* 93 N. C., 154; *Sherrill v. Tel. Co.,* 117 N. C., 352, 23 S. E., 277), but in the instant case the witnesses were asked to express their opinions upon the very question, or one of the questions, which the jury was empaneled to decide. "The general rule undoubtedly is that witnesses are restricted to proof of facts, within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine." 1 Rice on Evidence, 325, quoted with approval in *Cogdell v. R. R.,* 130 N. C., 314, 41 S. E., 541. There are, of course, exceptions to this general rule of evidence, but the present case falls within none of them. *Barnes v. R. R.,* 178 N. C., 264, 100 S. E., 519; *Britt v. R. R.,* 148 N. C., 37, 61 S. E., 601.

For the errors, as indicated, in admitting incompetent evidence, the prisoner is entitled to a new trial. It is so ordered.

New trial.

JOHN A. BAKER ET AL. v. MRS. E. S. CLAYTON.

(Filed 18 May, 1932.)

1. Appeal and Error E c: F c—Where appeal is taken from county court the entire record need not be sent up on further appeal to Supreme Court.

Appeals from a general county court falling within the provisions of C. S., 1608(cc) are allowed to the Superior Court, the jurisdiction of the Superior Court being appellate upon questions of law or legal inference, and on further appeal to the Supreme Court it is not desirable that the entire record in the Superior Court be sent up, but only such parts as relate to the questions to be reviewed with only material exceptions, properly stated, grouped and sufficiently compiled to enable the Court to understand them without searching through the record.

2. Appeal and Error C f—Rules regulating appeals are mandatory.

The Rules of the Supreme Court regulating appeals thereto are mandatory and the Court will uniformly enforce them.

3. Appeal and Error J d—Burden is on appellant to show error.

The burden of showing error is on the appellant, and when he has failed to overcome the presumption against error the judgment will be affirmed.

APPEAL by defendant from *Sink, J.,* at April Term, 1932, of BUNCOMBE.

Civil actions to recover damages for alleged negligent infliction of personal injuries, consolidated for purpose of trial, and tried in the General County Court of Buncombe County, March Term, 1932, heard on appeal to Buncombe Superior Court, April Term, 1932.

The record discloses that John A. Baker, his wife, Nettie A. Baker, and three of their minor children, Martha, Albert and Alice, were injured in an automobile collision with defendant's car on 30 August, 1931. Five separate suits were instituted in the General County Court by the plaintiffs, which were consolidated for purposes of trial. Nonsuits were entered in the cases of the two adult plaintiffs, and the issue of negligence, in the consolidated suits of the three minor children, was answered in favor of the defendant. A counterclaim was set up against Nettie A. Baker, owner of the car in which plaintiffs were riding, for damages to defendant and her car. On this counterclaim, the issue of negligence was answered "No," and that of contributory negligence "Yes." There was no appeal from the judgment denying recovery on the counterclaim.

On appeal to the Superior Court by plaintiffs, the nonsuit judgments in the cases of the two adult plaintiffs were reversed, and a new trial ordered in the suits of the three minor children for errors committed during the trial.

From these rulings, the defendant appeals.

Joseph W. Little for plaintiffs.
Johnson, Smathers & Rollins for defendant.

STACY, C. J. The General County Court of Buncombe County was established in 1929, pursuant to chapter 159, Public Laws 1929, which brought said county within the operation of the general statutes on the subject. *Jones v. Oil Co., ante,* 328.

It is provided by 3 C. S., 1608(cc) that appeals in civil actions may be taken from the General County Court to the Superior Court of the county in term time for errors assigned in matters of law "in the same manner as is now provided for appeals from the Superior Court to the Supreme Court"; and from the judgment of the Superior Court an appeal may be taken to the Supreme Court "as is now provided by law." This means that in hearing civil cases on appeal from the General County Court, the Superior Court sits as an appellate court, subject to review by the Supreme Court. *Cecil v. Lumber Co.,* 197 N. C., 81, 147 S. E., 735.

On appeal to this Court, it is neither essential nor desirable that the entire record in the Superior Court should be sent up, but only such

parts thereof as may be necessary to present the questions sought to be reviewed. Rule 19(1); *Hilton v. McDowell,* 87 N. C., 364. In other words, the record on appeal to the Superior Court from the judgment of the county court is not, and, except perhaps in rare instances, *e. g.,* nonsuit or demurrer, ought not to be made the record on appeal to the Supreme Court. *Smith v. Texas Co.,* 200 N. C., 39, 156 S. E., 160; *Davis v. Wallace,* 190 N. C., 543, 130 S. E., 176. The purpose of the "case on appeal" is to set forth clearly and succinctly the matters assigned as error. *Mfg. Co. v. Barrett,* 95 N. C., 36.

Objections, which, upon reflection, can readily be seen to have no substantial merit, should be omitted from appellant's assignments of error (*Thompson v. R. R.,* 147 N. C., 412, 61 S. E., 286), and only such rulings of the Superior Court as are challenged should be brought forward, in accordance with Rule 19(3), for consideration by the Supreme Court. *Porter v. Lumber Co.,* 164 N. C., 396, 80 S. E., 443. "In this way the scope of our inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of." *Byrd v. Southerland,* 186 N. C., 384, 119 S. E., 2.

We have held in a number of cases that the rules, governing appeals to this Court, are mandatory and not directory. *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126. These include the requirement that the exceptions and assignments of error shall be properly "grouped and stated." *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175; *Taylor v. Hayes,* 172 N. C., 663, 90 S. E., 801; *Register v. Power Co.,* 165 N. C., 234, 81 S. E., 326.

The following is the substance of what *Hoke, J.,* speaking for the Court, had to say on the subject in *Lee v. Baird,* 146 N. C., 361: The rules governing appeals have been adopted after extended and careful reflection, and because they were found necessary to a proper performance of the public business of the Court, not alone with reference to its reasonable dispatch, but in giving the Court a more accurate understanding of causes on appeal, thereby greatly aiding us to an intelligent consideration of the questions presented, and to a determination of controversies on their real merits. Furthermore, a proper compliance with the rules is fair and just to opposing counsel, giving them, as it does, an opportunity to know the positions they will be required to discuss, so that they may be better prepared to aid the Court in making true deliverance on the rights of the parties, the purpose which we all have most earnestly at heart. Counsel for appellant, in "grouping and stating" his exceptions and assignments of error, should give the matter careful consideration, to the end that the Court may have the benefit

of his mature judgment and fuller information as to the real questions involved in the controversy. "It is not our desire or purpose to be unreasonable or exacting in respect to this last suggestion. It is made, rather, with the view of impressing upon counsel our deep sense of the importance and value of their giving to the Court, in its decisions of these causes on appeal, the benefit of their reflection and careful preparation."

The Constitution, Art. IV, sec. 8, empowers the Supreme Court "to review on appeal any decision of the courts below, upon any matter of law or legal inference"; and the decision sought to be reviewed is to be presented in accordance with the mandatory rules of the Supreme Court. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. The Court has not only found it necessary to adopt rules of practice, but equally necessary to enforce them and to enforce them uniformly. *Pruitt v. Wood, supra.*

In the instant case, there are twelve assignments of error, all of the same tenor, of which the following may be taken as typical: "Assignment of error No. 6: The defendant assigns as error the ruling of his Honor, H. Hoyle Sink, in sustaining plaintiffs' exception 28, as appears by the record. (R. p. 127.)" Turning to page 127 of the record, we find the following in the judgment of the Superior Court: "Plaintiffs' exception 28 is sustained and the judge of the county court is overruled. Defendant excepts. This constitutes defendant's exception No. 6." But what is plaintiffs' exception 28 and where can it be found? This requires a voyage of discovery through the record. *In re Beard's Will, ante,* 661; *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992.

Speaking to the question as to how assignments of error should be made and what they should contain, *Hoke, J.*, delivering the opinion of the Court in *Thompson v. R. R.,* 147 N. C., 412, said: "If the exception be to a ruling of the court on a question of evidence, the testimony should be set out so its relevancy can be seen. And if the exception is to some other ruling of the court or some other matter occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that its bearing on the controversy could be perceived to some extent in reading the assignment itself." See, also, *Rawls v. Lupton, supra; Merritt v. Dick,* 169 N. C., 244, 85 S. E., 2; *Jones v. R. R.,* 153 N. C., 419, 69 S. E., 427; *McDowell v. Kent,* 153 N. C., 555, 69 S. E., 626; *Smith v. Mfg. Co.,* 151 N. C., 260; 65 S. E., 1009; C. S., 643, and annotations.

Notwithstanding the condition of the record, we have examined the defendant's assignments of error—the course pursued in *Taylor v. Hayes, supra*—and have discovered no valid reason for disturbing the judgment

of the Superior Court. The laboring oar, which appellant must take in order to overcome the presumption against error, has not been successfully handled. *Jackson v. Bell*, 201 N. C., 336, 159 S. E., 926; *Poindexter v. R. R.*, 201 N. C., 833, 160 S. E., 767; *Bailey v. McKay*, 198 N. C., 638, 152 S. E., 893.

Affirmed.

RALPH D. REED v. ELVIRA BLAIR ET AL.

(Filed 18 May, 1932.)

Descent and Distribution B b—Irregularity in divorce proceedings is not ground for declaring children by subsequent marriage illegitimate.

Where in an action for divorce on the grounds of adultery of the wife the trial has proceeded upon the issue of abandonment, C. S., 1659, and on the verdict of the jury on the latter grounds the marriage has been annulled, the judgment thus rendered is not void, and the wife's children by a later marriage will not be declared illegitimate and thus denied the right to inherit from their father. C. S., 279. In this case an amendment to the divorce proceedings *nunc pro tunc* was allowed by the trial judge.

APPEAL by plaintiff from *Sink, J.*, at February Term, 1932, of BUNCOMBE. Affirmed.

Marcus Erwin for plaintiff.
Fortune & Fortune for defendants.

PER CURIAM. By consent a trial by jury was waived and the judge found the facts. J. A. Reed and Ida Burrell were lawfully married, the plaintiff being their only child. Mrs. Reed died several years ago; J. A. Reed died on 30 September, 1931.

J. A. Reed and Elvira Blair were married in Asheville on 14 October, 1925. They had five children, two of whom were born before the marriage.

Elvira Blair, whose maiden name was Elvira Ingle, had previously intermarried with C. E. Blair. On 13 May, 1924, C. E. Blair brought suit against his wife for divorce on the ground of adultery and caused her to be personally served with summons. In response to the third issue the jury found that the defendant in that case had abandoned the plaintiff and that they had lived separate and apart for five successive years preceding the commencement of the action. The plaintiff was given an absolute divorce.

Judge Sink permitted an amendment to the complaint in the action for divorce *nunc pro tunc* so as to make the allegations and the issues conform and adjudged that Elvira Reed is the lawful widow of J. A. Reed, deceased, and that their children are entitled to share in the estate of their father, subject to the lawful rights of the widow.

The statute previously in force authorized an absolute divorce if there had been a separation between the husband and the wife and they had lived separate and apart for five successive years and the plaintiff had resided in the State for that period. C. S., 1919, sec. 1659, subsec. 4 and amendment. The issues in *Blair v. Blair* determined these questions—the marriage, the plaintiff's residence in the State for more than five years, the abandonment and the separation for the statutory period. *Ellis v. Ellis,* 190 N. C., 418. If it be conceded, as the plaintiff contends, that the amendment *nunc pro tunc* was improper, the judgment was not void. Irregularity is not sufficient cause for declaring the second marriage a nullity and the children illegitimate. C. S., 279.

The parties agree, if Elvira Reed is the lawful widow of J. A. Reed, that Cheesborough is the administrator of J. A. Reed's estate. Judgment Affirmed.

STATE ON RELATION OF LEE WATKINS AND R. T. HEATON v. A. M. SIMONDS AND NATIONAL SURETY COMPANY.

(Filed 15 June, 1932.)

1. Register of Deeds B b—Register of deeds is required to properly register and index all instruments properly filed for registration.

It is the duty of the register of deeds to register all instruments required or authorized to be registered and to keep full and complete alphabetical indexes of the names of the parties thereto, and no instrument is deemed registered until indexed as the statute requires, N. C. Code of 1931, secs. 3553, 3561, and the register of deeds and his bondsman are liable for loss sustained by reason of his negligent failure to perform his duties in this respect.

2. Register of Deeds B e—Register of deeds is liable for loss caused by failure to properly index mortgage filed for registration.

Where a mortgage on the wife's lands is indexed by the register of deeds only in the name of the husband, the mortgage is not properly indexed and is not superior to a subsequent deed to the lands executed by the husband and wife, and where the mortgagee suffers loss by reason of such improper registration he may recover therefor in an action against the register of deeds and the surety on his bond.

3. Mortgages B a—Instrument in this case held to constitute mortgage.

Where the wife signs an instrument given to secure endorsers on her husband's note, and the instrument recites that she signed it for the purpose of incumbering her equity of redemption, and the endorsers are therein given the power of selling the property if they should sustain "any loss or damage on account of signing the note," and the instrument is properly acknowledged by the wife and her private examination taken: *Held*, construing the instrument liberally with a view to effectuating the intent of the parties, it is a mortgage on the wife's equity of redemption in the property.

4. Indemnity B a: Payment C a—Held: endorsers paid note by executing their individual note and could recover on maker's indemnity contract.

Where the endorsers on a note discounted at a bank are given a collateral agreement to indemnify them against loss by reason of their endorsements, and the collateral agreement is secured by a mortgage on lands, and the endorsers have taken up the note with money borrowed from the bank exclusively on their own note and have received the original note from the bank: *Held*, the endorsers have suffered loss on account of their endorsements and may proceed to enforce the collateral indemnity agreement and the mortgage securing it.

5. Mortgages A c—Where mortgage is given to secure endorsers on note discounted by bank acknowledgment taken by bank official is valid.

Where a husband and wife execute a mortgage on the equity in her lands in order to secure endorsers on his note against loss and the note is discounted at a bank: *Held*, the contract to secure the endorsers against loss is a collateral agreement between the makers and endorsers to which the bank is not a party, and the wife's acknowledgment to the mortgage taken by an official of the bank is valid. N. C. Code of 1931, sec. 3301(a).

APPEAL by defendants from *Harding, J.*, at September-October Term, 1931, of CLAY. No error.

Plaintiffs brought suit on the official bond of the defendant Simonds, the register of deeds of Cherokee County, for his negligent failure to cross-index a paper-writing as a part of its registration.

L. L. Heaton borrowed from the Bank of Murphy the sum of $1,000 and to secure its payment executed his note for this amount on which the plaintiffs were endorsers. To indemnify the endorsers L. L. Heaton and Maud K. Heaton, his wife, executed a paper-writing, the material parts of which are as follows: "L. L. Heaton has assigned, transferred and made over to Lee Watkins and R. T. Heaton, and hereby assigns, transfers and makes over to them and their administrators and assigns, to secure and hold them harmless by reason of having signed said note, the following . . . also, the equity of $1,450 paid in cash of the town property in Murphy known as the Ricks house and lot, the legal

title to which is in Maud K. Heaton, wife of said L. L. Heaton, and who signed this instrument for the purpose of encumbering said equity, to the extent of same. In the event said Lee Watkins and R. T. Heaton, or either of them, sustains any loss or damage on account of signing the note above mentioned, or any renewal or renewals of the same, then and in that event they may sell the above mentioned property at the courthouse door in Murphy to the highest bidder at public outcry for cash."

The acknowledgment of this instrument with the privy examination of Mrs. Heaton, was taken before L. E. Bayless, a notary public, who was the cashier of the Bank of Murphy and a stockholder in the corporation.

The paper-writing was registered by the defendant Simonds who entered the name of L. L. Heaton on the index as the maker or grantor and the plaintiffs, Watkins and Heaton, as grantees, the date of registration being 23 April, 1924. On 26 September, 1924, L. L. Heaton and Maud K. Heaton, his wife, conveyed to Mattie A. Taylor for value all their interest in Maud K. Heaton's equity in the Ricks house and lot described in the paper-writing above set out. The deed to Mattie A. Taylor was registered 2 October, 1924. Sometime after its registration the defendant Simonds entered upon the index after the name of L. L. Heaton the two words "and Maud."

The plaintiffs allege that they paid the note of L. L. Heaton to the Bank of Murphy and are unable to subject Maud K. Heaton's equity to the payment of their claim against L. L. Heaton for the reason that Mattie A. Taylor acquired title before the name of Maud K. Heaton was entered on the index. The suit is prosecuted to recover damages for the register's negligent failure properly to register and cross-index the paper-writing above referred to. Upon the issues submitted there was a verdict for the plaintiffs and the defendants excepted and appealed.

D. H. Tillett and Hill & Gray for plaintiffs.

Moody & Moody, D. Witherspoon and W. C. Wakefield for A. M. Simonds.

J. E. Swain for National Surety Company.

ADAMS, J. It is the duty of the register of deeds to register all written instruments the registration of which is required or authorized, and to keep in his office full and complete alphabetical indexes of the names of the parties. No instrument is deemed to be registered until it is indexed as the statute provides. N. C. Code 1931, secs. 3553, 3561; *Fowle v. Ham,* 176 N. C., 12; *Heaton v. Heaton,* 196 N. C., 475; *Story*

v. Slade, 199 N. C., 596. If the register makes negligent default in the performance of this duty and pecuniary injury to the claimant is caused thereby the register and his official bond are liable for the resultant loss. *Daniel v. Grizzard,* 117 N. C., 106; *Manufacturing Co. v. Hester,* 177 N. C., 609. We have held that as to Maud K. Heaton the instrument signed by her and her husband was not properly registered and indexed and that Mattie A. Taylor was the owner of the real property therein described. *Heaton v. Heaton, supra.* So the immediate question is whether the plaintiffs have suffered pecuniary loss by reason of the register's negligent failure to index the name of one of the parties.

The defendants say that no loss has resulted to the plaintiffs because the instrument just referred to neither conveyed an interest nor created a lien upon the real property of Mrs. Heaton.

The writing purports to assign and transfer to the plaintiffs, as indemnity against loss by their endorsement of the note, certain personal property which is not in controversy and "the equity of $1,450 paid in cash for the town property in Murphy known as the Ricks house and lot, the legal title to which is in Maud K. Heaton, wife of said L. L. Heaton, and who signed this instrument for the purpose of encumbering said equity to the extent of the same." The plaintiffs are authorized to sell this property if either of them sustains any loss or damage "on account of signing the note."

What did the parties mean by "encumbering the equity"?

Mrs. Heaton executed the paper under seal, and the only mention of her name in the body of the writing is in the clause stating the purpose for which she affixed her signature—that is, to "encumber" her equity in the Ricks house and lot in order to indemnify the plaintiffs.

In a legal sense to encumber or incumber land is to make it subject to a charge, lien, or liability—to burden it with financial obligations, as debts or mortgages. An encumbrance is any right or interest in land which may subsist in a third person to the diminution of the value of the property. *Butterfield v. Butler,* 150 Pac. (Okla.), 1078; *Johnson v. Bridge,* 213 Pac. (Cal.), 512; *Hartford Fire Ins. Co. v. Jones,* 250 Pac. (Ariz.), 248, 251; *First Unitarian Society v. Citizens Savings & Trust Co.,* 142 N. W. (Iowa), 87; Black's Law Dictionary, 614; 20 C. J., 1250.

In searching for the intention of the parties to a written instrument this Court has adopted a liberal rule of construction to which technicalities and formal divisions must frequently give way. *Triplett v. Williams,* 149 N. C., 394; *Berry v. Cedar Works,* 184 N. C., 187. Tested by this rule the contract under consideration is not difficult of solution. The parties obviously intended, though their intention is inartificially

expressed, to create a lien or mortgage on Mrs. Heaton's equity in "the town property in Murphy"—the property here in litigation. Indeed, the contract in its relation to the clause in question has been referred to by this Court as a mortgage on her land (*Heaton v. Heaton, supra*); and this construction is fortified by the principle set forth in *Ely v. Norman,* 175 N. C., 294.

It is argued that the plaintiffs have not paid the note and have therefore incurred no loss. This position cannot be sustained. The plaintiffs testified that they borrowed money with which to pay the note they had endorsed; that they paid it in full, took it up, and executed their own note for the amount borrowed. The bank delivered to them the note of L. L. Heaton when it was paid. Moreover, they paid interest on the note, and by the terms of the contract their liability extended to "any renewal or renewals."

The execution of the contract was acknowledged before L. E. Bayless, a notary public, who was an officer and stockholder in the bank, and for this reason the defendants say the probate is defective and the registration void. They cite *Cowan v. Dale,* 189 N. C., 684 and *Bank v. Tolbert,* 192 N. C., 126.

The mortgage was not made to the bank; it was a part of the contract between the principal and the endorsers; the bank was not a party. We cannot, under these circumstances, particularly in view of section 3301(a), N. C. Code, 1931, hold the acknowledgment of the contract to be invalid.

No error.

MAY O. KELLEY v. JOHN F. CLARK AND COMPANY, CENTRAL BANK AND TRUST COMPANY AND GURNEY P. HOOD, COMMISSIONER OF BANKS FOR NORTH CAROLINA.

(Filed 15 June, 1932.)

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

The findings of fact by the trial court, when supported by evidence, are as conclusive as the verdict of a jury.

2. Payment C a—Where bank credits account of payee with amount of check on day before bank closes it operates as payment by drawer.

Where the trial court finds upon sufficient evidence that the plaintiff ordered the trust department of a bank to purchase certain stock for her and that the order was executed by a brokerage company at the instance of the bank, that upon notification to the bank of the execution of the order the bank sent the brokerage company a check for the full purchase price and notified it of the name of the purchaser, and immediately

charged the check to the plaintiff's account, that the brokerage company deposited the check in the same bank and that the bank credited the account of the brokerage company with the amount of the check before the end of the day's business and notified the company of the deposit, all in accordance with the regular course of dealing between the parties, and that the bank was insolvent and closed its doors the next day: *Held*, the money represented by the check passed from the plaintiff to the brokerage company and was subject to its orders until the closing of the bank, and the stock so purchased was the property of the plaintiff, and where the brokerage company has refused to deliver it and has resold it and retained the money from the resale, it is liable to the plaintiff for the amount of the loss sustained by her.

3. Appeal and Error J e—New trial will not be granted for harmless error.

Exceptions relating to matters which could not have prejudiced the appellant or change the result of the trial will not be sustained.

4. Appeal and Error J e—Where record does not set out answer to question, exception relating thereto will not be considered.

Where the answer to a question, the subject of an exception on appeal, is not set out in the record, the exception will not be considered.

5. Principal and Agent C b—Party dealing with agent is not affected by secret limitation of agent's apparent authority.

A party paying the local office of a company by check is not affected by the local office's lack of authority to cash the check when such limitation of authority was not known to him, and exception to the exclusion of evidence of secret limitations of the local office's authority will not be sustained.

APPEAL by John F. Clark and Company from *MacRae, Special Judge,* at April Term, 1932, of BUNCOMBE.

The plaintiff brought suit in the General County Court to recover $2,533.38 alleged to be the price of certain stocks purchased by her through the Central Bank and Trust Company from John F. Clark and Company and not delivered. The parties waived a trial by jury and the judge of the county court found certain facts, the material parts of which are as follows:

3. The Central Bank and Trust Company closed its doors and ceased business on 20 November, 1930, and was immediately taken charge of by the North Carolina Corporation Commission, which has been duly succeeded in said work by the Commissioner of Banks of North Carolina.

4. On or prior to 17 November, 1930, May O. Kelley ordered and directed the trust department of the Central Bank and Trust Company, with which she was doing business at said time, to purchase certain stocks described in the complaint. Said order was executed by said Central Bank and Trust Company through John F. Clark and Company, stock brokers, with local offices in Asheville, N. C., and with

membership on the New York Stock Exchange, and other exchanges, by purchasing said stocks on the New York Stock Exchange on 18 November, 1930. The Central Bank and Trust Company, through its bond department, was immediately notified of the execution of said order by said John F. Clark and Company, and of the amount of the purchase price. The purchase was duly confirmed by John F. Clark and Company who were thereupon notified by the Central Bank and Trust Company's bond department of the name of the purchaser on 18 November, 1930; and a check signed by the Central Bank and Trust Company's bond department, and drawn on said bank, covering the full amount of the purchase price of said stock was, on the forenoon of 19 November, sent by messenger with letter of confirmation, by the bond department of said Central Bank and Trust Company, to said John F. Clark and Company and the amount thereof was promptly charged to the account of the plaintiff, May O. Kelley, by said bank. John F. Clark and Company thereupon duly received and accepted said check sent it by the Central Bank and Trust Company in full payment for said stocks on 19 November, 1930, and on said date deposited same in the Haywood Street Branch of said Central Bank and Trust Company, where said John F. Clark and Company had been doing a banking business and keeping an account for a long time. Said check was, when deposited, endorsed by rubber stamp for deposit to credit of said Clark and Company and same was duly credited on said date to the account of said John F. Clark and Company sometime prior to 2 p.m. of said 19 November, 1930, and before the time for closing the doors of the bank for the day; all in accordance with the custom and practice of the said John F. Clark and Company and said bank in handling similar transactions.

5. The Central Bank and Trust Company, including its Haywood Street Branch, did not open its doors for business on 20 November, 1930, and was then and is now insolvent, and its affairs are being liquidated and wound up by the Commissioner of Banks of North Carolina, as aforesaid.

6. No official or employee of the Central Bank and Trust Company had any knowledge on 19 November, 1930, that the bank would not be open for business the next day.

7. John F. Clark and Company, and their main office in New York City, were duly notified by said Haywood Street Branch of the Central Bank and Trust Company of the deposit to their credit of said check covering the purchase price of said stock so purchased by May O. Kelley, and of the amount to their credit at the close of business on 19 November, 1930, by code telegram sent at 2:45 p.m. by said bank, 45

minutes after the closing hour of the bank for the day; all in accordance with the custom and practice of the parties and the instructions of John F. Clark and Company theretofore given said bank.

8. The entire transaction was conducted in full accordance with the practice and custom of John F. Clark and Company in dealing with the Central Bank and Trust Company.

9. A resale of the stocks purchased by John F. Clark and Company for the benefit of the plaintiff, was made on the New York Stock Exchange with the pretended permission or authority of the said Chief State Bank Examiner then in charge of the affairs of the Central Bank and Trust Company on or about 21 November, 1930, but without the knowledge, consent, authority, or permission of the plaintiff, or any agent of hers, and on the representations by an agent of defendant, John F. Clark and Company, that the check given for the purchase money of the said stocks had not cleared on 19 November, 1930, which representation was false in fact and in law.

10. On 21 November, 1930, and in ample time for said John F. Clark and Company to repurchase said stocks on said New York Stock Exchange before the hour for closing said exchange for the day, the said Chief State Bank Examiner having learned that said check given by the Central Bank and Trust Company in payment for said stocks had cleared and had actually been credited to the account of John F. Clark and Company on 19 November, 1930, contrary to the representations of said John F. Clark and Company in that respect, requested and directed said John F. Clark and Company to repurchase for the benefit of plaintiff the stocks so sold by them for the alleged reason that the check given for their original purchase had not cleared, as aforesaid, but said John F. Clark and Company wrongfully and unlawfully refused so to do and informed said Chief State Bank Examiner that the matter had passed out of the control of the local office, and that he would have to take it up with their New York office.

11. John F. Clark and Company did resell said stocks of May O. Kelley on the New York Stock Exchange under the circumstances and on the date mentioned in the complaint in this action, and thereupon did actually receive the proceeds of said sale and have wrongfully and unlawfully converted same to their own use, and now refuse to turn same over to plaintiff, or to return to her the original purchase money paid by her for said stocks, or to make settlement of any sort with said plaintiff.

12. The amount of said original purchase price paid by plaintiff through John F. Clark and Company for said stocks amounted to $2,533.38; and there is no evidence before the court showing or tending

to show the amount for which said stocks were resold by said John F. Clark and Company on the New York Stock Exchange after the purchase thereof by plaintiff, as aforesaid.

The county court gave the plaintiff a judgment against John F. Clark and Company for $2,533.38 with interest from 19 November, 1930, and costs. On appeal to the Superior Court the judgment was affirmed, and Clark and Company excepted and appealed to the Supreme Court, assigning error.

Bourne, Parker, Arledge & DuBose for plaintiff.
James S. Howell and Lipscombe & Lipscombe for defendants.

ADAMS, J. The exceptions taken by the appellants relate to the admission and exclusion of evidence and to the denial of their motion for nonsuit. In our opinion none of the exceptions should be sustained. The court's findings of fact, which are supported by the evidence, are as conclusive as the verdict of a jury; and according to these findings the plaintiff's order for the purchase of stocks was executed by John F. Clark and Company, who made the purchase on 18 November, 1930. The bond department was immediately notified and the bank sent to Clark and Company a check for the purchase price. The check was received and accepted by Clark and Company in payment on 19 November, 1930, and was credited on their account and charged to the account of the plaintiff. The money represented by the plaintiff's check thus passed from her to the brokers and was subject to their order until the bank closed its doors. If the local offices had no authority to cash checks the plaintiff, who had paid the price of the stocks, was not affected by the limitation of which she had no knowledge. The brokers, having failed to account to the plaintiff, are responsible for her loss. There was no error in denying the motion for nonsuit.

The admission and exclusion of evidence which are the subject of most of the exceptions afford no adequate cause for a new trial. The first five refer to conversations with employees in the local offices, the "clearing" of checks, or to some hypothetical or collateral matter which, we think, could not have been prejudicial to the defendants, and the seventh, eighth, and ninth, to matters which would not modify the contractual relation between the plaintiff and the defendants. The answer to the question referred to in the tenth exception is not set out, and the evidence excluded subject to the eleventh and twelfth exceptions purported to show a restriction imposed by the New York office upon the local offices in Asheville to which the plaintiff was not a party. Upon an examination of the record we find

No error.

STATE v. HOWARD AGNEW.

(Filed 15 June, 1932.)

1. **Assault B a—In order to conviction of assault the State must prove intent or criminal negligence proximately causing injury.**

Intent to inflict injury is an essential element of criminal assault, and in a prosecution therefor the State must prove such intent or criminal negligence equivalent in law to actual intent, and criminal negligence implies more than mere lack of due care, and where the State relies on the violation of a statute enacted for the public safety the State must prove the intentional or reckless violation of the statute and that such violation proximately caused the injury, and although intent may be presumed from the act, such presumption is not conclusive, and it is a question for the jury under proper instructions from the court.

2. **Same—State must prove intentional or reckless violation of traffic statute in order to convict auto driver of assault.**

The intentional violation of a statute designed to protect life, or the violation of such statute with a reckless disregard of consequences or heedless indifference to the safety and rights of others under circumstances from which death or bodily injury could have been reasonably foreseen as a probable result, is criminal negligence and when the proximate cause of injury, is sufficient to constitute criminal assault, but in a prosecution for assault growing out of an automobile accident an instruction that the defendant would be guilty if he violated a traffic statute, if such violation proximately caused injury to another, is erroneous, and a new trial will be awarded.

CRIMINAL ACTION, before *Schenck, J.*, at January Term, 1932, of CABARRUS.

A warrant from the police court of the city of Concord was issued for defendant, charging that on or about 10 August, said defendant "did wilfully, maliciously and unlawfully assault the said D. B. Huskey with a deadly weapon, to wit, an automobile." The defendant was convicted and appealed to the Superior Court. The evidence tended to show that Huskey, witness for the State, was traveling in an automobile on Depot Street eastwardly toward Valley Street, intending to turn to his left into Valley Street. The defendant was traveling Depot Street in a westwardly direction and the cars of the defendant and State's witness collided at or near the intersection of Valley Street. The evidence tended to show that the defendant approached the intersection at an unlawful rate of speed and in violation of the statute, and that as a result of the act of defendant the automobile of witness, Huskey, collided with that of defendant and Huskey was thrown out of his car, sustaining physical injuries of apparently a minor nature. The verdict of the jury

was "guilty of simple assault." The judgment of the court was that the defendant pay a fine of $15.00, from which judgment the defendant appealed.

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

Armfield, Sherrin & Barnhardt for defendant.

BROGDEN, J. The exceptions relied upon by the defendant are taken to the following instructions given by the trial judge to the jury:

(a) "Also, gentlemen of the jury, the court calls your attention to a principle of law that wherever a man violates any law, which law is enacted for the purpose of protecting other people from injury, or protecting property from injury, and, as a result of that violation of law, he injures another, he is guilty of a battery, and if the battery should produce death he would be guilty of at least manslaughter. In our State, gentlemen of the jury, we have a number of statutes enacted by the Legislature for the purpose of protecting the lives and limbs of those people who use the highways. These statutes are enacted to govern the use of automobiles upon the highway, spoken of frequently as the traffic regulations, and wherever one of these traffic regulations that are enacted for the purpose of protecting life or limb on the highways is violated, and, as a result of that violation, some one is injured, the person who violates the law is guilty of a battery, and if he kills some one in such violation, he is guilty of manslaughter."

(b) "Now, the court charges you as a matter of law that, if you do find, and find beyond a reasonable doubt, that Agnew did violate the traffic laws, and you further find, and find beyond a reasonable doubt, that that violation of the traffic law by Agnew was the proximate cause of the injury to Huskey, then it would be your duty to return a verdict of guilty."

The defendant asserts that the foregoing instructions were erroneous for the reason that they declare the rule of civil liability in an action for damages rather than the rule of criminal liability upon an indictment for assault or assault with a deadly weapon. The decided cases are to the effect that if admitted or proven facts constitute an assault or assault with a deadly weapon, the same state of facts constitutes the crime of manslaughter if death ensues as a proximate result. *S. v. Leary*, 88 N. C., 615; *S. v. Sudderth*, 184 N. C., 753, 114 S. E., 828. Also, it must be conceded that there is authority in this State supporting the instructions given to the jury by the trial judge. *S. v. Gash*, 177 N. C., 595, 99 S. E., 337. However, there are many decisions indicating that there is still a difference between civil and criminal liability for

injuries proximately caused by a violation of statutes designed and intended to protect and safeguard human life. For example, in *S. v. McIver,* 175 N. C., 761, 94 S. E., 682, the Court said: "The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to be submitted to a jury in a criminal prosecution if it is likely to produce death or great bodily harm, and in this case the defendant could reasonably anticipate meeting some one at the crossing, and to approach it at a rate of speed twice that allowed by the State statute and four times that allowed by the ordinance without reducing the speed and without signal is evidence of recklessness which justified submitting the question of guilt to the jury." Subsequently in *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669, the Court said: "The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with proper regard for human life. Again in *S. v. Palmer,* 197 N. C., 135, 147 S. E., 817, the Court approved the following instruction to the jury: "If you are satisfied beyond a reasonable doubt from the evidence that the defendant, Palmer, was guilty of culpable negligence as heretofore explained to you by the court, or criminal negligence, and that said criminal negligence was the proximate cause of the death of Meisenheimer, it would be your duty to convict the defendant." Pursuing the discussion in the opinion, it is declared: "It is, however, practically agreed, without regard to the distinction between offenses *malum prohibitum* or *malum in se* that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute is guilty of manslaughter at least, and, under some circumstances, of murder." The same idea was expressed in *S. v. Gray,* 180 N. C., 697, 104 S. E., 647, in these words: "He was very careful to distinguish between negligence occasioning damage out of which arises a civil action and that reckless disregard of human life which constitutes a crime," etc. See *S. v. Sudderth,* 184 N. C., 753, 114 S. E., 828; *S. v. Lutterloh,* 188 N. C., 412, 124 S. E. 752: *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155.

Manifestly, the question of law presented by the exceptions is: What must the State show in order to make out a prima facie case of assault or assault with a deadly weapon or manslaughter resulting from an automobile collision when the automobile is being operated by a defendant in violation of a statute designed and intended to protect and safeguard human life?

The common law concept of assault was expressed by *Gaston, J.,* in *S. v. Davis,* 23 N. C., 126, as follows: "An assault is an intentional

attempt, by violence, to do an injury to the person of another. It must be *intentional*--for, if it can be collected, notwithstanding appearances to the contrary, that there is not a present purpose to do an injury, there is no assault. . . . The intention as well as the act makes an assault." This definition was approved in *S. v. Hemphill,* 162 N. C., 632, 109 S. E., 834, where it is said: "There must be an intent to injure . . . though this intent may be inferred by the jury from the act, and when the act itself is unlawful, the intent is immaterial or will be presumed."

Obviously the intentional violation of a statute designed and intended to protect life is a criminal act within the contemplation of law, and upon indictment and conviction therefor, subjects the offending party to punishment for the wrong done thereby to society in general. In such event the State would make out a prima facie case by offering proof of such violation sufficient to convince the jury beyond a reasonable doubt. But if the State undertakes to establish a crime resulting in injury to a specific person, it must offer proof which convinces the jury beyond a reasonable doubt that there was an intent to inflict injury or that such injury was proximately caused by criminal negligence. In such event, criminal negligence imports a reckless disregard of consequences, or heedless indifference to the safety and rights of others and must be such that the guilty party could have reasonably foreseen that death or bodily injury would be the probable result thereof. That is to say, if the jury should find beyond a reasonable doubt that the defendant intentionally violated a statute, designed to protect life, and should further find beyond a reasonable doubt that such violation was the proximate cause of the injury or death, then the defendant would be guilty. Or if the jury should find beyond a reasonable doubt that the defendant violated such a statute and such violation evinced or disclosed a reckless disregard of consequences, or heedless indifference to the rights of others, and that the defendant could have reasonably foreseen that death or bodily injury would probably result therefrom, then such violation would constitute criminal negligence, and if the jury should further find beyond a reasonable doubt that such criminal negligence was the proximate cause of the injury or death, the defendant would be guilty.

In cases of the instant type, intent, or its equivalent, that is, reckless disregard of consequences or heedless indifference of the rights of others, is still a necessary element of criminal responsibility. While, of course, in such cases intent may be presumed from the act itself, notwithstanding such presumption is not conclusive or irrebuttable. The case must be submitted to the jury with proper instructions from the trial judge.

Therefore, in order to warrant conviction in cases of assault, assault with deadly weapon or manslaughter growing out of automobile collision, involving the breach of a statute, the State must offer proof of requisite degree that the injury was intentional or the proximate result of criminal negligence. The exceptions of the defendant to the instructions given are sustained.

New trial.

CITY OF ELIZABETH CITY ET AL. v. R. C. GREGORY, BESSIE GREGORY AND CARL GREGORY AND R. C. GREGORY AND BESSIE GREGORY v. CITY OF ELIZABETH CITY AND PUBLIC UTILITIES COMMISSION.

(Filed 15 June, 1932.)

1. Municipal Corporations I a—Held: owner of adjacent land had easement in street and could recover special damage caused by obstruction.

Where the owner of land subdivides a portion thereof into lots and plats the same showing streets thereon, and reserves an unsubdivided and unplatted portion, and the dedication of the streets to the public is accepted by the city, and one of the streets so dedicated constitutes the only reasonable access to the land reserved by the owner: *Held*, the use of the street is an easement belonging to and appurtenant to the property reserved by the owner, and upon the closing of such street to such reserved land the owner has suffered damage different, not only in degree but also in kind from that sustained by the public generally, and may recover the damages caused his land by reason of such wrongful obstruction of the street by the city or a third person.

2. Same—Admission of evidence as to damage sustained by wrongful obstruction of street held not error in this case.

Although the measure of damages recoverable by the owner of land having an easement over an adjacent street for the wrongful obstruction of the street is the difference in the fair market value before and after the wrongful obstruction, the admission of testimony that the plaintiff's land was damaged by one-half its value will not be held for reversible error, there being other evidence as to the value of the land and the court having correctly instructed the jury as to the measure of damages.

3. Evidence D f—Admission of testimony in explanation of impeaching question asked on cross-examination held not error.

Where the value of the plaintiff's land is in issue in an action and he has testified that the land was worth a certain amount, and on cross-examination he is asked if he did not know that the land had never been worth the price stated an exception to the admission of his testimony on redirect examination that the defendant had offered him the price stated for a portion of the land will not be sustained, the testimony being competent in its relation to the question asked on cross-examination.

ELIZABETH CITY *v.* GREGORY; GREGORY *v.* ELIZABETH CITY.

CIVIL ACTION, before *MacRae, Special Judge,* at October Term, 1931, of PASQUOTANK.

In the first case Elizabeth City filed a petition on 14 April, 1928, to condemn for public use the land described in the petition. It was alleged that Elizabeth City was a tenant in common of said lands and owned a one-half interest therein. The defendants filed an answer denying the ownership of any of said land by the city, and further alleged that the city had trespassed upon the lands of defendant and built a pipe line across their property, and prayed that damages therefor should be assessed. The issue of ownership was determined by a jury at the January Term, 1929, in favor of defendants. Thereupon judgment was entered decreeing that the defendants in the first case were the owners in fee of the property, and further, that the cause be remanded to the clerk to proceed with the condemnation thereof. Thereafter on 13 August, 1929, the plaintiffs in the second suit instituted an action against Elizabeth City and others, alleging that the defendant city had constructed a building across Wilson Street and thereby deprived the plaintiffs of access to property owned by them and for the use of which Wilson Street had been laid out and dedicated. Damages were sought by the plaintiffs in the sum of $5,000. The city filed an answer admitting that it had constructed a building across a portion of Wilson Street, but denied that the plaintiffs had any right to use same, and that if such right had ever existed, the plaintiffs were estopped to assert the same. At the June Term, 1931, both cases were consolidated and commissioners were appointed to assess the damages resulting from the condemnation of certain lots set out on the Skinner and Gregory plat; and also to assess the damages, if any, sustained by the Gregorys by virtue of the closing of Wilson Street by the city. The commissioners filed a report awarding certain items of damage, including an item of $300, for damage to the property of the Gregorys caused by "taking Wilson Street." Exceptions were duly filed by both parties and the cause was tried in the Superior Court at the October Term, 1931, upon the following issue: "What damage, if any, is the plaintiff, R. C. Gregory, entitled to recover of the defendant, city of Elizabeth City, by reason of the closing of Wilson Street?" The jury answered the issue "$1,000." Apparently, all other items were settled except the controversy as to the closing of Wilson Street. Judgment was pronounced upon the verdict, and the city appealed.

The evidence tended to show that the father of plaintiff, Gregory, owned a certain block of land lying north of the Norfolk and Southern Railroad Company. Many years ago a portion of this land was platted and subdivided into building lots. The plat was made in February,

1892. The plat showed certain streets known as Mill Street, Wilson Street and Gregory Street. The city in furnishing light, water, power and sewerage to its inhabitants constructed a building which covered and blocked Wilson Street. Wilson Street as shown on the plat extended to an unplatted and unsubdivided tract of land owned by the Gregorys.

The testimony of plaintiff was as follows: "The plant completely dams up Wilson Street and extends out on each side; it is not possible now to drive northwardly from Broad Street down Wilson Street to my tract of land; they have blocked it up and there is no other street or road by which I can now drive to my tract of land from Broad Street unless on somebody else's property. . . . The land was suitable for laying off in lots or suitable for farming purposes. . . . Part of this land was once part of a back field which my father cultivated and a part but not all of it was divided into lots. . . . My father opened Wilson Street and laid out Gregory Street at the same time. . . . It is not possible to drive from Broad Street down Gregory to my property because there are a couple of railroads there that have never been fixed, . . . and if you go down Mill Street, in order to get to my property, you would have to cross the property of somebody else." There was other testimony to the effect that "the Gregory property is completely shut off from access by the utility plant and by the swamp."

There was further evidence tending to show that the blocking of Wilson Street had damaged the Gregory property as much as $4,000.

John H. Hall and Thompson & Wilson for city of Elizabeth City.
McMullan & McMullan and M. B. Simpson for Gregory.

BROGDEN, J. In substance, the case is this: The owners of land subdivide a portion thereof into building lots and plat the same, showing streets thereon, reserving an unsubdivided and unplatted portion. The street in controversy, so platted, furnishes the only reasonable access to the unsubdivided and unplatted portion of the original tract.

The question of law is: If a third party obstructs said street with a permanent structure, is the landowner entitled to recover damages to his unsubdivided and unplatted land, resulting from such obstructions?

The city, recognizing the general principles of law governing the platting and subdivision of property which is intersected by streets and alleys shown on the plat, contends, however, that the dedication of such streets is restricted to lot owners or purchasers and cannot be extended to unplatted land outside the subdivided area. In arriving at a correct interpretation of the applicable principles of law, it must be observed that the ancestor of the plaintiff originally owned the entire

tract. He platted and subdivided a portion thereof and laid out streets, including Wilson Street, in order to furnish approach and access to his remaining lands. The evidence offered in favor of the landowner tends to show that Wilson Street afforded and furnished the only reasonable access to this tract or property outside of the platted area. Under these circumstances obviously, Wilson Street constituted an easement belonging to and appurtenant to the unplatted property. The identical question involved was first considered by this Court in *Grant v. Power Co.*, 196 N. C., 617, 146 S. E., 531. The Court said: "Whether or not, as a matter of law, upon these facts, plaintiff is entitled to recover in this action, is not presented for decision by this appeal. We, therefore, do not decide the question as to whether or not a landowner, who is dependent on a public road for access to his land, can maintain an action for damages, for the wrongful obstruction of the road, resulting in damages to his land. There are decisions of courts of other jurisdictions which seem to support recovery of damages in such cases. In 29 C. J., at pages 631 and 632, it is said that an action for damages against one who injures a public highway may be maintained by a private person, if he has sustained special damages, differing not merely in degree, but in kind from that suffered by the community at large, as where access to plaintiff's property is cut off. Many decisions are cited in support of the text." Thereafter, in *Colvin v. Power Co.*, 199 N. C., 353, 154 S. E., 678, the Court adopted the statement of the principle contained in 13 R. C. L., page 231, as follows: "It is generally held that one whose means of ingress to and egress from his property is completely cut off by an obstruction suffers a special injury, different from that suffered by the public at large, as, for example, where the obstructed way affords the only means of getting to market with the products of his adjoining farm. It is not material whether access is completely cut off from every point, or whether the obstruction merely cuts off the means of reaching particular places with which it is necessary or advantageous for the plaintiff to communicate." See, also, *Lamb v. Lamb*, 177 N. C., 150, 98 S. E., 307; *Gault v. Town of Lake Waccamaw*, 200 N. C., 593, 158 S. E., 104; *White v. Coghill*, 201 N. C., 421.

Certain exceptions were taken by the city to testimony relating to the measure of damages. For instance, a witness was permitted to state his opinion as to the value of the Gregory property. Another witness was permitted to state that in his opinion the property of Gregory was damaged one-half by the closing of the street. The trial judge gave to the jury the correct rule of damages, as he instructed the jury: "If you find the plaintiff is entitled to recover, he would be entitled to recover the difference between the reasonable market value of his

property before Wilson Street was obstructed and the reasonable market value of his property immediately after Wilson Street was obstructed." While the witnesses perhaps did not estimate this difference in dollars and cents and thus comply with the strict letter of the rule, it cannot be held for error that they estimated the difference upon a percentage basis. Plaintiff, Gregory, testified that portion of his land was worth for building lots $400 to $500 per acre, and was asked on cross-examination if he did not know "that there has never been a day when you could sell that property for any such figure as that." On redirect examination the attention of witness was called to the question so elicited on cross-examination, and he testified that the city had offered him that price for a certain portion of the property and he had accepted it. The defendant objected to the testimony, but obviously the evidence was elicited by the nature of the cross-examination, and the city has no just ground for complaint.

Affirmed.

STATE OF NORTH CAROLINA v. T. I. HUGHES, A. H. HUGHES AND WIFE, HESTER J. HUGHES, ZENA BATTLE AND HUSBAND, WILL BATTLE, J. C. HALL AND WIFE, GLADYS HALL, N. A. HALL, E. C. GIBSON, GEORGE W. BECK AND G. I. CALHOUN ET AL., RESPONDENTS.

(Filed 15 June, 1932.)

1. Eminent Domain D b—Park Commission is given express power to abandon condemnation proceedings instituted by it.

By the express provisions of chapter 48, section 25 of the act of 1927, the North Carolina Park Commission may abandon condemnation proceedings against an owner by filing a written election to do so before paying the award and by paying the costs, and the act is constitutional and valid, and where the State has so abandoned certain proceedings and has paid the costs and has not exercised any control or dominion over the land the owner has not suffered any pecuniary injury thereby.

2. Same: Judgments L b—Consent judgment in this case held not to estop Park Commission from abandoning condemnation proceedings.

The rights of the North Carolina Park Commission to elect to abandon proceedings to acquire title to lands for park purposes under the provisions of chapter 48, Public Laws of 1927, section 25 is not affected by a consent judgment entered in the proceedings when such judgment was not intended or contemplated as a final adjudication of the rights of the parties and expressly reserves the case for the purpose of determining the question of the title to the lands in question and the person or persons to whom the money should be paid.

CIVIL ACTION, before *Stack, J.*, at March Term, 1932, of SWAIN.

On 15 October, 1930, the North Carolina Park Commission instituted an action in the name of the State of North Carolina against various parties for the purpose of condemning for park purposes as contemplated in chapter 48 of Public Laws of 1927 various tracts of land. Several defendants were served by publication and the cause was returnable on 6 January, 1931. The Halls filed answer setting up claim to the property known as the Ravensford School property. Various other parties also filed answers. On 6 January, 1931, the clerk of the Superior Court of Swain County duly appointed commissioners to appraise the value of the property sought to be condemned. Subsequently the commissioners filed a report appraising values of school property as follows: Indian Creek School, $600; Toe String School, $500; Ravensford School, $6,650; Smokemont School, $2,500; Mingus Creek School, $500. The defendant, Fall, and wife filed exceptions to the report of the commissioners with respect to the valuation of the Ravensford School property as shown in the report of the commissioners. Judgment was entered on 19 March, 1931, by the clerk of the Superior Court of Swain County, ratifying and confirming the report of the commissioners and directing that the petitioner, State of North Carolina, "forthwith pay into the registry of this court the several sums of money for the several tracts and interests in tracts set out in the report of said commissioners," etc. And further, "that upon the payment into court by the petitioner of the amounts of money aforesaid, . . . the title to all and singular the lands, premises and real estate described in the petition and hereinafter more particularly described, shall, *eo instanti,* pass to and vest in the petitioner, the State of North Carolina, in fee simple, for the uses and purposes expressed and declared in said petition and in chapter 48, Public Laws of North Carolina, session of 1927."

No appeal was taken by any of the parties to the foregoing decree of the clerk.

Thereafter at July-August Term, 1931, of the Superior Court of Swain County a consent decree was entered by his Honor, W. F. Harding, judge presiding. This consent decree recites that J. C. Hall and wife, Gladys Hall, claimed title or interest in that portion of said lands known as the Ravensford School property, and that "it further appearing that said award by consent of all parties shall be modified as herein set out, it is now by consent of the petitioner and all other parties interested in said school property, ordered and decreed that said award be amended to read as follows: "We estimate, appraise and assess the compensation and damage for the land described in section 8 of the petition, being certain lands owned or claimed to be owned, by Swain County for school purposes, on the waters of Ocona Lufty River and

Indian Creek, on which school buildings are now situated, and known as the Indian Creek School, Toe String School, Ravensford School, Smokemont School and Mingus Creek School, as follows: Indian Creek School, the sum of $600; Toe String School, the sum of $500; Ravensford School, the sum of $6,650; Smokemont School, the sum of $2,500, and the Mingus School at the sum of $500.

It is further ordered that upon payment of the several amounts above set out to the clerk of this court that the title of said property and each of them shall vest in the State of North Carolina, for the purposes set out in the petition and in accordance with the decree heretofore rendered in this proceeding.

However, it appearing to the court that said J. C. Hall and wife, Gladys Hall, claim to be the owners of that portion of said land described in the petition as Ravensford School property, and have filed an answer in said proceedings, so claiming the same, it is further ordered that this cause be and the same is hereby expressly retained for the purpose of determining the question of title to said Ravensford School property, and the person or persons to whom the money shall be paid by the clerk, as compensation for said land.

This decree shall not otherwise affect the award of said commissioners."

At the March Term, 1932, the petitioner, State of North Carolina, presented to the court for signature an order to be signed by the judge, reciting that the petitioner, State of North Carolina, "does not desire to acquire and wishes to abandon the eighth tract described in the petition herein, which is the same as the Ravensford School tract, No. 74, duly described in special proceedings docket No. 4, at page 74. Upon such avowal by the State of its desire to abandon said proceedings as to said tract as made by its counsel, it is now here considered and adjudged by the court that all prior proceedings in so far as they relate to the Ravensford School tract, as described in paragraph 8 of said petition, . . . be discontinued and dismissed as to the said petitioner under provisions of said statute, it having elected not to acquire the same and abandon the proceedings in respect thereto under the provisions of said chapter 48 aforesaid, which lands are described as follows," etc.

The judge of the Superior Court refused to sign the order tendered by the petitioner on behalf of the State of North Carolina, and thereupon the petitioner excepted and appealed.

Attorney-General Brummitt and Assistant Attorney-General Seawell and A. Hall Johnston for petitioner, State of North Carolina.

Mark Squires, W. G. Hall and Moody & Moody for respondents.

BROGDEN, J. Can the State by virtue of chapter 48 of Public Laws of 1927 abandon a condemnation proceeding instituted to acquire land in accordance with said statute?

Section 25 of the Park Act provides in part: "The said commission shall at all times have the power and authority to cause the said proceedings to be dismissed as to any landowner or landowners or any particular tract or portion thereof described in the petition without prejudice to its rights as to other lands so described in said petition or the right to condemn the same: *Provided, however,* that no tract of land shall be condemned herein unless all of the known owners shown by the record or those claiming an interest therein shall be made parties thereto.

After the final judgment is rendered if, in the opinion of said commission, the award is so excessive as to make the acquisition of the title to said lands undesirable by the State of North Carolina, then the said commission shall be authorized to designate in writing filed in said proceedings its election not to acquire the title to such lands and not to pay the award therefor and such action on its part shall be without prejudice as to any other lands sought to be condemned therein, and in case the election is so made not to pay the award for any of said lands, then the petitioner shall pay to the defendant its costs incurred in said proceedings on account of the lands so rejected by the commission."

The practical effect of the statute is to authorize the State or Park Commission, the agency of the State, to abandon the condemnation of any particular parcel of land upon filing a written election so to do before the payment of the award and by paying the costs. The result achieved thereby is to leave the landowner in full possession of his land, and when the costs are paid he has suffered no pecuniary injury by reason of the institution of the proceeding. In the case at bar the State had not taken actual possession of the land and had not attempted to exercise any control or dominion thereof. It is not contended that chapter 48, Public Laws of 1927, is unconstitutional. Indeed, the constitutionality of the act has been expressly upheld by this Court in *Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563. Consequently a valid and constitutional act prescribed a method of statutory abandonment.

The defendants rely upon the consent judgment set out in the record. However, an examination of the decree discloses that it was not intended or contemplated as a final adjudication of all the rights of the parties, because it is expressly declared therein: "It is further ordered that this cause be, and the same is hereby expressly retained for the purpose of determining the question of title to said Ravensford School property, and

the person or persons to whom the money shall be paid by the clerk, as compensation for said land."

Manifestly, this consent judgment does not constitute an estoppel against the State. Therefore, the petitioner was entitled to the decree of abandonment, and the refusal of the trial judge to sign the same was error.

Reversed.

JAMES BELTON ADAMS, ADMINISTRATOR OF ESTATE OF JAMES BELTON ADAMS, JR., v. AMERICAN ENKA CORPORATION.

(Filed 15 June, 1932.)

1. Negligence A c—One entering lands of another solely for his own pleasure is a licensee and not invitee.

The general rule is that a person entering upon the premises of another solely for his own pleasure with the implied permission of the owner is a licensee and not an invitee, and where the owner of land constructs and maintains a lake thereon and does not prohibit the public from using the lake but derives no pecuniary benefit therefrom and exercises no control or supervision over the bathers therein, a member of the public so using the lake is a mere licensee, and the rule of liability of the operators of bathing resorts or beaches does not apply to such owner.

2. Same — Owner of lake permitting public to swim therein without compensation or control is not required to provide life guards.

A manufacturing corporation which constructs and maintains a lake for manufacturing purposes, and which permits and allows employees and the public generally to swim therein, without charge, compensation or control is not liable in damages for the drowning of a visitor while swimming in the lake in the absence of some negligent act on its part, and, the public using the lake being mere licensees, the corporation is not required to keep life guards or life-saving equipment at the lake, and the rule of liability of proprietors of bathing resorts is not applicable to it although it provided a diving board at the lake and covered the edge of the water with sand to form a kind of beach, and where an action against it to recover damages for the drowning of a member of the public is brought solely on the basis of its failure to provide life guards or life-saving equipment the action is properly nonsuited.

CIVIL ACTION, before *Sink, J.*, at March Term, 1932, of BUNCOMBE

The plaintiff is the administrator of his son, a young man approximately eighteen years of age, who was drowned on 30 June, 1931, while swimming in a lake constructed and owned by the defendant. The defendant operates a large rayon silk mill in Buncombe County, and in the due prosecution of its business it is necessary to have available large quantities of clear water. In order to supply the necessary volume the

defendant constructed a lake and laid out streets and roadways leading thereto. There was a club house erected near the lake and a spring board. Along the water's edge sand had been placed, creating a sort of beach. The defendant leased a piece of ground near the lake to a third party who conducted a soft drink stand, selling such articles as are usually found and sold in such places. After the lake was filled with water the employees of the defendant used the same for swimming purposes, and thereafter the public generally resorted to this lake for swimming and bathing.

There was evidence tending to show that from seventy-five to one hundred or one hundred and fifty people used the lake daily during the summer. Near the diving board the defendant had erected a large sign reading as follows: "Warning. Any one swimming here does so at his own risk." The sign was about six feet and two inches high and was placed about fourteen feet from the water.

The events preceding the death of plaintiff's intestate are substantially as follows: On 30 June, shortly after dinner, a young man called by telephone the brother of intestate to inquire if "he desired to go swimming." The deceased went along with his brother and two other young men named Lynn Peterson and Fred Bearden. They drove from Asheville to the lake of the defendant. The deceased went up in the woods and put on a pair of trunks and returned to a point near the diving board. He inquired of his brother how deep the water was there, and the brother informed him that it was "a good ways over his head." The deceased said: "All right, I am going across the opposite side." The brother remarked: "You see that rye field over there," and deceased answered "Yes," and then said: "Do you want me to get you a straw of that?" The brother replied "Yes, bring me back one." The deceased said "All right," and immediately struck out across the lake. He started about thirty feet from the diving pier. There were sixty-five or seventy-five people in the lake at the time. The evidence tended to show that the distance across the lake was about 392 feet. When the deceased reached a point about twenty yards from the opposite side of the lake suddenly he cried for help and began "fighting the water." The brother of the deceased said: "After my brother hollered for help, one fellow who had on a red and white bathing suit jumped off and swam out towards him after he hollered and went down. He had already gone down before anybody went out. We tried to find a boat, but there wasn't any to be seen except down at the boat house. Finally somebody got a boat and went out there. It was a flat boat. . . . One man started diving off to see if he could find him. I don't know who that was." The witness further testified that he did not see any life guards nor life-saving

equipment. The body of deceased was not recovered until five or six hours after he went down in the lake.

The evidence showed conclusively that the deceased was an alert, strong boy, who was considered a good athlete and who was acknowledged by all to be a good swimmer.

The evidence further disclosed that the defendant corporation charged no fee or compensation whatever for the privilege of swimming in the lake and sold no bathing suits or other equipment to people who desired to use the same, nor did the defendant attempt to exercise any direction or control over the swimmers in any particular whatever.

There was much evidence offered by both parties, but the determinative facts are substantially as above stated.

The action was originally instituted in the County Court of Buncombe County, and the verdict awarded plaintiff damages in the sum of $10,000. Thereupon an appeal was taken by the defendant to the Superior Court upon exception duly filed, and the trial judge sustained certain exceptions filed by the defendant, including the exceptions taken by the defendant to the failure of the judge of the county court to nonsuit the case. Thereupon it was ordered and adjudged in the Superior Court that the action be nonsuited and dismissed, from which judgment the plaintiff appealed to the Supreme Court.

Braxton Miller, Zeb F. Curtis and Campbell & Sample for plaintiff.

S. G. Bernard, Johnson, Smathers & Rollins and Moore Bryson for defendant.

BROGDEN, J. Is a manufacturing corporation which constructs and maintains a lake for manufacturing purposes, and which permits and allows employees and the public generally to swim therein, without charge, compensation or control, liable in damages for the drowning of a visitor while swimming in the lake?

The plaintiff insists that he is entitled to recover upon the theory that his intestate was invited to swim in the lake by virtue of the fact that a diving board had been prepared for the use of the public and a beach provided for swimmers. Consequently it is argued that the defendant under the circumstances, in the exercise of ordinary care, should have kept life guards and life-saving equipment. The general rule is thus expressed in 22 A. L. R., p. 636: "Proprietors of a bathing resort, in discharging the duty of ordinary care for the safety of patrons, may be obliged to keep someone on duty to supervise bathers and rescue any apparently in danger; and may also be held liable for negligence if, on information that a bather is missing, they are tardy in instituting

search." The various aspects of liability imposed by law upon the proprietors of bathing resorts are discussed in 22 A. L. R., 635; 38 A. L. R., 359; 53 A. L. R., 855.

The preliminary question is: Was the plaintiff an invitee or a licensee? This Court in *Jones v. R. R.*, 199 N. C., p. 1, 153 S. E., 637, said: "An invitee is one who goes upon the property of another by the express or implied invitation of the owner or the person in control. A license implies permission and is more than mere sufferance; an invitation implies solicitation, desire, or request." Moreover, invitation also implies mutual interest, benefit or advantage. Practically all of the authorities agree that if a person enters upon the premises of another solely and exclusively in pursuit of his own pleasure, or to gratify his own curiosity that he is a licensee. This idea was thus expressed in *Money v. Hotel Co.*, 174 N. C., 508, 93 S. E., 964: "When persons enter a hotel or inn, not as guests, but intent on pleasure or profit to be derived from intercourse with its inmates, they are there, not of right, but under an implied license that the landlord may revoke at any time." Recovery was denied in *Gibbs v. R. R.*, 200 N. C., 49, 156 S. E., 138, upon the ground that the plaintiff "had no business upon the premises of the railroad company, but sat down upon the platform to wait for trains to pass," and while sitting there was injured by a gang plank. See, also, *Murphy v. Murphy, ante,* p. 394.

There is no case in this State directly in point, but there are several decisions which by analogy and parity of reasoning, determine the merits of this controversy. For example, in *Brooks v. Mills Co.*, 182 N. C., 719, 110 S. E., 96, the defendant prepared a baseball diamond on its premises and purchased the usual equipment for the use of players and built a grandstand for the amusement and pleasure of its operatives. Admission fees were charged to all games, but the money so paid was used for purchasing balls, bats, gloves and other equipment, no part thereof being paid to the defendants. In denying recovery the Court said: "In fact, the evidence seems conclusively to show that the defendant prepared the ground, purchased playground fixtures, and erected a grandstand for the amusement and recreation of the operatives, but did not receive any pecuniary compensation, or pretend in any way to direct or supervise the game. The plaintiff, therefore, can derive no aid from the familiar principle that the owner or lessor of a place of amusement set apart and maintained for his pecuniary benefit is charged with the duty of exercising due care to see that the premises are reasonably safe for the purposes intended."

Discussing the liability of a defendant for the drowning of a boy while swimming upon its premises, in *Gurley v. Power Co.*, 172 N. C.,

690, 90 S. E., 943, the Court said: "We will not undertake to quote from these decisions. They all deal with the subject under discussion and hold that a pond or reservoir is not a dangerous instrumentality or an attractive nuisance. In almost every case the owner of the premises knew of the custom of boys entering thereon to bathe in the pool or pond, but was held not liable for any mishap. Bathing pools are nothing new or rare. They abound in almost every public park, gymnasium, and Y. M. C. A. building, as well as many country clubs. It is a well known and general custom for boys to swim in millponds and invade the lands of farmers to bathe in their marl pits. Who will contend that the mill owner and farmer are liable for death or injury of the bathers because of such ownership?" See, also, *Phillips v. Orr,* 152 N. C., 583, 67 S. E., 1064; *Briscoe v. Power Co.,* 148 N. C., 396, 62 S. E., 600.

There is no evidence that the deceased met his death by reason of any defect in the lake. Nor does the testimony disclose any reason for the fact that the young man suddenly cried for help, began fighting the water and went down. Whether he was seized with cramp or sickness is left in doubt. The sole basis for recovery consists in the contention that the defendant should have provided life guards at its own expense, and that if such life guards or life-saving equipment had been available, the life of deceased might have been saved thereby. This testimony creates a legal fog of such low visibility as to prevent the watchful and alert eye of the law from discovering liability for actionable negligence. Therefore, the judgment of nonsuit was properly entered.

Affirmed.

MABEL LALONDE v. SAMUEL A. HUBBARD AND SALLIE B. HUBBARD.

(Filed 15 June, 1932.)

1. Judgments K f—Consent judgment may not be collaterally attacked.

A consent judgment may not be collaterally attacked, the remedy in such case being by independent action to set the judgment aside, and where the judgment is collaterally attacked in an action involving the same cause of action covered by the consent judgment it is not error for the court to refuse to consider evidence tending to impeach the consent judgment.

2. Judgments C c—Consent judgment is binding on parties until set aside by consent or by judgment in independent action.

A consent judgment is binding on the parties thereto until modified or set aside by consent, or until vacated for fraud or mistake by judgment in an independent action.

3. Judgments L b—Consent judgment is a bar to subsequent action involving the same matters.

A consent judgment purporting to settle all matters in controversy in an action involving liability for damages sustained in a collision of two automobiles in which the defendant sets up a cross-action upon allegations of negligence on the part of the plaintiff, is a bar to an action by the defendant in the prior action against the plaintiff therein to recover for the identical negligence alleged in the cross-action.

4. Judgments C b—Fact that one of several attorneys of record of party did not sign consent judgment does not affect its validity.

Where the attorneys of record of both parties sign a consent judgment, and the defendant therein is advised that the consent judgment would be entered and does not make known to the court in person or by counsel any objection thereto, the fact that one of the defendant's attorneys of record did not sign the judgment does not affect its validity.

APPEAL by plaintiff from *Sink, J.*, at March Term, 1932, of BUNCOMBE. Affirmed.

This is an action to recover damages resulting from injuries caused by a collision on 23 March, 1930, at the intersection of two streets in the city of Asheville, N. C., between an automobile owned and driven by the plaintiff, and an automobile owned by the defendant, Sallie B. Hubbard, and, with her consent, driven by her minor daughter. The action was begun in the Superior Court of Buncombe County, on 27 October, 1927.

It is alleged in the complaint that the collision between the two automobiles was caused by the negligence of the driver of the automobile owned by the defendant, Sallie B. Hubbard. This allegation is denied in the answer of the defendants, who allege in their further answer, that the collision was caused by the negligence of the plaintiff, and that for this reason plaintiff is not entitled to recover in this action.

In addition to other defenses set up in their answer, the defendants plead in bar of plaintiff's recovery in this action a judgment by consent, entered in an action brought by the defendant herein, Sallie B. Hubbard, as plaintiff, against the plaintiff herein, as defendant, in the General County Court of Buncombe County, to recover damages resulting from injuries caused by the same collision as that out of which the cause of action alleged in the complaint in this action arose. The plaintiff herein, as defendant in that action, denied the allegations of negligence in the complaint therein, and in her answer set up a counterclaim founded upon the identical facts alleged in her complaint in this action as the cause of action on which she demands judgment against the defendants.

When this action was called for trial, it was agreed by the parties that the judge, without the intervention of a jury, and before the trial of the action on its merits, should hear the evidence pertinent to defendant's plea in bar, and determine the validity of said plea.

Pursuant to said agreement, the defendants offered in evidence the complaint, answer and judgment in the action entitled "Sallie B. Hubbard *v.* Mabel LaLonde," brought by the plaintiff in said action in the General County Court of Buncombe County. Both the complaint and the answer in said action were signed by attorneys for plaintiff and defendant, respectively, and were duly verified by the parties to the action. The judgment on its face purports to have been entered by consent, and is as follows:

JUDGMENT.

"State of North Carolina—County of Buncombe.
In the General County Court.

Sallie B. Hubbard, plaintiff, *v.* Mabel LaLonde, defendant.

This cause coming on to be heard, and being heard before his Honor, Guy Weaver, judge presiding over the General County Court, on 30 September, A.D. 1930, and it appearing to the court, that the defendant, Mabel LaLonde, has taken a voluntary nonsuit as to her counterclaim in this cause, and that all matters in controversy between the parties have been settled and adjusted:

It is therefore ordered and adjudged by consent of R. R. Williams, attorney for plaintiff, and Lee & Lee, attorneys for defendant, that the plaintiff take nothing by her action, and that the defendant pay the costs to be taxed by the clerk. GUY WEAVER, *Judge Presiding.*

We consent: R. R. Williams and Lee & Lee."

The complaint in said action was signed by R. R. Williams, attorney, and was duly verified by the plaintiff therein, Sallie B. Hubbard. The answer was signed by Lee & Lee, and Alfred S. Bernard, attorneys, and was duly verified by the defendant therein, Mabel LaLonde. The judgment does not show that Alfred S. Barnard, one of the attorneys who signed the answer, consented thereto. The pleadings in the action in the General County Court show that the cause of action alleged in the complaint, and the counterclaim alleged in the answer, are founded upon the identical facts alleged in the pleadings in this action.

The plaintiff in this action offered evidence tending to show that Lee & Lee, who consented to the judgment entered in the action in the

General County Court, as her attorneys, were not employed by her to defend said action, but were employed for that purpose by an insurance company, which had issued to plaintiff as the owner of the automobile involved in the collision, a policy of liability insurance; that said attorneys were employed by the insurance company to defend the action in behalf of plaintiff, the defendant in that action, pursuant to the provisions of its policy of insurance; that the plaintiff did not agree or consent to any settlement of any right or cause of action which she had against the plaintiff in said action, who is the defendant in this action; and that R. R. Williams, attorney for the defendant in this action, and Lee & Lee, attorneys for the insurance company in the action in the General County Court, knew when they caused the judgment to be entered in said action that plaintiff had not consented to said judgment.

The judge was of opinion that the evidence offered by the plaintiff to impeach the judgment by consent entered in the General County Court was incompetent, and for that reason declined to consider the said evidence. Upon his intimation that he would hold that the judgment of the General County Court, was a bar to plaintiff's recovery in this action, plaintiff submitted to a voluntary nonsuit, and appealed to the Supreme Court.

Alfred S. Barnard for plaintiff.
R. R. Williams for defendant.

CONNOR, J. In *Weaver v. Hampton,* 201 N. C., 798, 161 S. E., 480, it is said: "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 the parties thereto, except for fraud or mistake, and that in order to vacate such judgment, an independent action must be instituted, *Board of Education v. Commissioners,* 192 N. C., 274, 134 S. E., 852, *Morris v. Patterson,* 180 N. C., 484, 105 S. E., 25."

In that action a consent judgment relied on by the defendants as a bar to plaintiff's recovery was set up in the complaint, and attacked directly, for fraud. Defendant's demurrer to the complaint was overruled by the trial judge. On defendant's appeal to this Court, it was held that the demurrer was properly overruled. In this action the consent judgment relied on by defendant as a bar to plaintiff's recovery on the cause of action alleged in her complaint, was not set up in the

complaint for purposes of attack. No attack was made by plaintiff on the consent judgment by a reply to the new matter contained in the answer. At the trial, for the first time, plaintiff sought to impeach the judgment, collaterally. This she could not do. *Morris v. Patterson, supra.* There was no error in the refusal of the judge to consider the evidence offered by plaintiff at the trial of this action for the purpose of impeaching the consent judgment entered in the action in the General County Court. The consent judgment is binding on the parties to the action in which it was entered, until modified or set aside by consent, or until vacated for fraud or mistake by judgment in an independent action.

The judgment on its face is a bar to plaintiff's recovery in this action. It appears from the judgment that all matters in controversy between the parties to the action in the General County Court, had been settled and adjudged by consent. These matters, as shown by the pleadings, are identical with the matters involved in this action. Plaintiff's consent to the judgment is shown by the action of her attorneys of record, acting in her behalf. The fact that one of her attorneys of record did not sign the judgment does not affect its validity, as a consent judgment. Although she was advised that the judgment, purporting on its face to be with her consent, would be entered in the action, she did not make known to the court in person or by counsel any objection to the judgment on her part. For this reason *Hoel v. White,* 169 N. C., 640, 86 S. E., 569, has no application to the instant case.

There was no error in the intimation of the judge that he would hold as a matter of law that the consent judgment in the General County Court is a bar to plaintiff's recovery in this action.

Affirmed.

A. R. FARMER v. TOWN OF WILSON.

(Filed 15 June, 1932.)

1. Arbitration and Award E b—Award estops the parties as to all matters embraced in submission and determined by arbitrators.

In determining whether an arbitration and award estops the parties the award will be interpreted in the light of the submission, and the award will estop the parties as to all matters embraced in the submission which were determined by the arbitrators within the authorization therein contained.

2. Same—Award in this case determined all damages, past, present and future, sustained by ponding of water by defendant.

Where a city has raised the height of a dam for hydro-electric purposes and the question of damages sustained by reason of the resulting ponding of water is submitted to arbitration under an agreement that the arbitrators should assess such past, present and future damages as they might find were caused any of the landowners who were parties to the agreement, and the award made thereunder recites that "the raising of the dam has caused damage to certain properties" and that "we do award the parties listed below damages as follows": *Held*, the award includes all damages, past, present and future, and the contention of an owner that it failed to award future damages cannot be sustained, and the award is binding on him in the absence of fraud, mistake, duress, or other impeaching circumstances.

CIVIL ACTION, before *Barnhill, J.*, at November Term, 1931, of WILSON.

The pleadings and exhibits disclose substantially the following state of facts:

Prior to 1922 the town of Wilson purchased a mill site on Contentnea Creek about three miles from Wilson, and for the purpose of developing power with which to furnish light and other services to the town, erected a concrete dam across the creek and constructed a power plant. After the dam was erected the plaintiff and a number of other landowners owning property near the mill site and dam set up the contention that the construction of said dam had resulted in ponding more water upon their lands. The controversy grew, and finally the landowners, including the plaintiff, entered into a written agreement designated as "Exhibit A," reciting that the town had caused a dam to be erected across the creek at a point where an old dam had theretofore existed, and further, that as a result thereof "more water was ponded upon their land than the said town by reason of its ownership of said mill site had the prescriptive right to pond," and that the said parties desired that all matters in controversy between them in reference to the erection of said dam and ponding of said water be settled and adjusted as rapidly and as quickly as possible. It was agreed that three arbitrators named in the paper-writing "be, and they are hereby appointed a board or a jury who shall, after being duly qualified, visit said premises, make an inspection thereof, and hear such evidence as may be offered before them, cause such survey or surveys to be made as they shall determine, and ascertain if the said town in the erection and construction of said dam has so erected and constructed the same that more of the lands of said parties of the second part are flooded than were previously flooded, and, if so, what damage, if any, past, present and future, the said parties of the second part have or will severally

sustain, and they will make their report in writing, the decision of any two of said three to be as valid as if made by all three." It was further agreed in said Exhibit A: "And the parties hereto do severally covenant and agree between themselves and with each other that they will be bound by the determination of the above named three persons . . . without right of appeal to any court or courts, and for the faithful observance of this their obligation, all of said parties do hereby bind themselves, their successors, heirs and representatives."

In pursuance of the foregoing agreement the arbitrators made a report on 15 December, 1922. The pertinent part of this report is as follows: "The committee appointed now reports that they have examined the facts, heard certain evidence, viewed the lands and made certain surveys. We find as a matter of fact that the new dam built by the town of Wilson is higher than the old dam; that the raising of said dam has caused damage to certain property, and we do now award to the parties listed below damages as follows," etc. Various sums were listed in said report as damages to various property owners, ranging from $2,400 to nothing. The plaintiff and two other property owners were awarded "nothing."

On 17 April, 1930, plaintiff instituted an action for damages against the town of Wilson, alleging that on a certain day in 1928, and on certain days in 1929, his lands "were inundated and flooded by reason of raising of the dam by the defendant across Contentnea Creek . . . causing the plaintiff to lose all his crops on several occasions, depreciating and souring his land and causing water to back up on said land and stagnate there, making the land unhealthy to live upon." Plaintiff further alleged that the award of the arbitrators on 15 December, 1922, "was not pursuant to the terms of the agreement previously entered into, . . . but made a finding as to past damages alone, without any reference whatsoever to the present or future injuries which plaintiff among others, might sustain." The town of Wilson filed an answer setting up the submission agreement and the award as a bar to the right of plaintiff to recover.

At the hearing the trial judge was of the opinion that the plaintiff "was bound by the terms of said agreement and award, and was estopped from further prosecution of the action." Whereupon, it was adjudged that the plaintiff take nothing, from which judgment plaintiff appealed.

John D. Bellamy & Sons for plaintiff.
Connor & Hill for defendant.
S. E. Lucas of counsel.

BROGDEN, J. What are the legal tests for determining whether an arbitration and award estops the parties thereto?

All courts agree that the submission to an award is the foundation upon which the interpretation and validity of the arbitration and award is built. This prevailing idea was expressed by this Court in *Geiger v. Caldwell,* 184 N. C., 387, 114 S. E., 497, in these words: "Turning to the authorities, we find it settled that the submission furnishes the source and prescribes the limits of the arbitrators' authority, without regard to the form of the submission. The award, both in substance and in form, must conform to the submission, and the arbitrators are inflexibly limited to a decision of the particular matters referred to them. . . . A submission is in itself a contract, or agreement, or so far partakes of its nature as to be substantially within the principle applicable to contracts as 'the basis of the arbitration and award is the submission.'" *Millsaps v. Estes,* 137 N. C., 536, 50 S. E., 227; *Williams v. Mfg. Co.,* 153 N. C., 7, 68 S. E., 902; *Coe v. Loan Co.,* 197 N. C., 689, 150 S. E., 334; *Transportation Co. v. Stearns,* 195 N. C., 720, 143 S. E., 473. The submission agreement authorizes the arbitrators after hearing the evidence, making surveys and inspecting the premises, to award damages, if any, past, present and future. The plaintiff does not contend that the arbitrators exceeded their authority, but he constructs his case upon the following words in the report of the arbitrators: "that the raising of said dam has caused damage to certain properties." The words: "has caused damage" are interpreted by the plaintiff as a declaration that only past damages were considered or awarded, and therefore the right to future damages was preserved. It must be observed, however, that the words following the language relied upon by the plaintiff are as follows: "And we do award to the parties listed below damages as follows."

The award must be interpreted in the light of the submission, and when so interpreted there is nothing to indicate that the element of future or prospective damages was omitted or excluded.

Manifestly, the record discloses a valid submission, which in definite terms, authorized the arbitrators to hear, consider and award. The award does not exceed the power granted, or clearly exclude any material item in controversy. Nor is there any suggestion of fraud, mistake, duress, or other impeaching circumstance. Consequently the judgment is

Affirmed.

W. REUBEN RUDD v. AMERICAN FIDELITY AND CASUALTY COMPANY.

(Filed 15 June, 1932.)

1. **Appeal and Error J c—Reception of incompetent evidence to prove an admitted fact will not be held for reversible error.**

Where in an action against an insurance company the plaintiff alleges that the driver of an automobile covered by a policy of liability insurance issued by the defendant had negligently inflicted the injury in suit and that execution against the driver had been returned unsatisfied, and the insurance company admits the issuance of the policy and that it was in force at the time of the injury, and admits liability to the extent of the judgment if the policy covered the particular car the insured was driving at the time of the accident: *Held*, if incompetent evidence was received at the trial upon matters which the defendant had admitted the reception of such evidence will not be held for reversible error.

2. **Trial D c — Conflicting evidence held to have raised issue of fact determinative by the verdict of the jury.**

Where the identity of an automobile in a collision as the one covered by an accident indemnity policy is the determinative question involved at the trial, the issue is for the jury under conflicting evidence, and its verdict thereon is determinative.

3. **Appeal and Error J d—Appellant must show that alleged error was prejudicial.**

The appellant must show not only that error had been committed upon the trial in the lower court, but also that the alleged error was prejudicial.

4. **Insurance P b—Agent's testimony of renewal held competent in corroboration of plaintiff's contention that car was covered by the policy.**

The testimony of an insurance agent of the renewal of a policy of automobile liability insurance, of which he had personal knowledge, is held competent as corroborative evidence of the plaintiff's contention that the car causing the injury in suit was the car covered in the renewal policy.

APPEAL by defendant from *Warlick, J.*, at August-September Term, 1931, of GUILFORD.

On 24 December, 1928, a collision occurred on Highway No. 70, north of Greensboro, between a car driven by the plaintiff and one driven by R. L. Holmes. The plaintiff was injured. He brought suit against Holmes and recovered a judgment, but on appeal to this Court a new trial was granted. 198 N. C., 640. In the second trial the plaintiff again prevailed, and on appeal the judgment was affirmed. 199 N. C., 813. An execution was issued on this judgment and returned unsatisfied.

The American Fidelity and Casualty Company, defendant in this action, was the underwriter or insurance carrier of R. L. Holmes. Upon

return of the unsatisfied execution the plaintiff instituted the present action. The nature of the controversy may be seen by reference to the verdict, which is as follows:

1. Was the Packard automobile involved in the collision in which the plaintiff, W. Reuben Rudd, was injured, covered by the terms of a policy of insurance issued by the defendant, the American Fidelity and Casualty Company, and in full force and effect at the time of the collision? Answer: Yes.

2. If so, has there been any breach of the terms of the said policy of insurance by the said R. L. Holmes, which vitiated or invalidated the policy thereafter? Answer: No.

3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,500 principal, and $202.20 cost and interest, from 9 August, 1930, at 6% and cost of this action.

It was agreed by the parties that if the first two issues were answered in favor of the plaintiff the answer to the third issue should be as set out in the verdict. Judgment was awarded the plaintiff from which the defendant appealed upon assigned error.

H. R. Stanley for plaintiff.

John W. Hester and F. Glenn Henderson for defendant.

ADAMS, J. The plaintiff offered in evidence a paper, the service of which had been accepted, purporting to be a notice to the defendant to produce at the trial the original, or duplicate original, or standard form policy, of insurance, by which R. L. Holmes was insured against liability for personal injury sustained by third persons and property damage arising out of the use, operation, and maintenance of an automobile therein described — the policy having been delivered to Holmes on or before 24 December, 1928. In addition, the plaintiff offered secondary evidence of the contents of the policy which, it was claimed, had been lost or destroyed. The defendant's exceptions to the admission of this evidence are the ninth and thirteenth.

Primarily the defendant takes the position that the plaintiff has no rights superior to those of the assured, *Peeler v. Casualty Co.*, 197 N. C., 286; that the injury complained of must be within the terms of the policy; that it is incumbent upon the plaintiff to show that the parties intended to insure the particular automobile that caused the plaintiff's injury; and, further, that the defendant's liability is limited to the car named in the policy. All this may be granted. The evidence is that the injury was caused by Holmes's negligent operation of a Packard car. We must, therefore, turn to the specific objections which

are urged against the competency of evidence tending to show the contents of the policy of insurance.

It is first contended that the plaintiff must elect between two theories: that of a lost policy in the possession of the assured and that of a policy held adversely by the defendant. It is also contended that incompetent secondary evidence was admitted to prove the issuance of a policy by the defendant covering the liability established by the judgment in *Rudd v. Holmes, supra.*

Suppose we assume, certainly, without deciding, that technical error was committed: is the defendant prejudiced? We think not. In his complaint the plaintiff alleged that sometime prior to 25 December, 1928, the defendant issued its policy of insurance to one R. L. Holmes, and the defendant answered as follows:

"It is admitted that the defendant issued a policy of insurance to R. L. Holmes, of Reidsville, N. C., therein agreeing to insure the said R. L. Holmes against liability for bodily injuries and property damages arising out of the ownership, maintenance and use of a certain automobile therein described."

And the following admission was entered of record by the defendant's counsel: "It is admitted that the policy was outstanding on 24 December, 1928. I will admit this if your Honor please. I will make this admission. I admit that if the car involved in the action was covered by a policy issued by the defendant, said policy was issued on 20 March, 1928, and that the limit of said policy was in such sum as would have covered the judgment of the plaintiff in this action against R. L. Holmes."

The defendant insured Holmes against liability arising out of his operation of a car; the policy was issued on 20 March, 1928; its terms covered the plaintiff's judgment; it was outstanding when the injury occurred. All the essential elements of liability are admitted except the identity of the car and the assured's compliance with the terms of the policy. The matters embraced in the last two propositions are determined by the jury's answer to the first and second issues.

The nonidentity of the car by which the plaintiff was injured as the car described in the policy was the chief point of defense. The defendant's evidence tended to show that Holmes applied for a certificate of title to a Buick sedan on 28 September, 1926; that this was the only car registered in his name on 24 December, 1928, when the collision occurred; and that the Packard was purchased on 28 December, 1928. The plaintiff's evidence was to the effect that Holmes had one Packard sedan; that he called upon the defendant's agent before the collision to renew the policy for this car when it expired, that the agent renewed

it on 20 March, 1928; and that Holmes was driving this car at the time of the injury. The conflicting evidence was resolved in favor of the plaintiff as indicated by the answer to the first issue.

Under these circumstances we cannot say as a legal inference that the defendant was prejudiced by the admission of the evidence to which the ninth and thirteenth exceptions are addressed. An appellant must not only show error; he must show that the error was prejudicial. *Quelch v. Futch,* 175 N. C., 694; *In re Craven,* 169 N. C., 561; *Ferebee v. Berry,* 168 N. C., 281; *S. v. Smith,* 164 N. C., 475. The reception of incompetent evidence to prove an admitted fact is not cause for disturbing the result of a trial. *Brown v. McKee,* 108 N. C., 387; *Fisher v. Brown,* 135 N. C., 198; *Bag Co. v. Grocery Co.,* 171 N. C., 764; *Lumber Co. v. Elizabeth City,* 181 N. C., 442. The reversal of a judgment will not be ordered upon grounds which do not affect the merits of the cause. *Ball v. McCormack,* 172 N. C., 677.

We have given consideration to other exceptions taken by the defendant. To the reception of the contract of agency between the defendant and Lovelace we discover no valid objection. The testimony of Lovelace, the agent, concerning his renewal in March, 1929, of a policy formally issued to Holmes by the defendant was competent in corroboration of the plaintiff's contention that the Packard sedan was within the terms of the policy issued on 20 March, 1928. The material fact was his renewal of the policy and of this he had personal knowledge.

Upon a review of all the exceptions discussed in the defendant's brief we find

No error.

STATE v. NORD DONNELL AND LEROY LEE.

(Filed 15 June, 1932.)

1. Criminal Law I f: L e—Motion for severance is addressed to discretion of court and refusal of motion is not reviewable in absence of abuse.

Where two defendants are indicted jointly, a motion for severance for trial may be made, but the motion is addressed to the sound discretion of the trial court, and where no abuse of discretion appears on the record an exception to his refusal of the motion will not be sustained.

2. Criminal Law C a: L e—Parties present and aiding and abetting commission of felony are guilty as principals.

Where there is evidence that the two defendants charged with murder were present at the time of the commission of the crime and aided and abetted each other therein, an instruction that it was immaterial that the

indictment failed to charge conspiracy, but that if the jury should find beyond a reasonable doubt that prior to the time of the killing of the deceased the defendants entered into a conspiracy to rob him, and killed him while attempting to effectuate their unlawful purpose, that the defendants would be guilty, will not be held for reversible error, the defendants upon the evidence being equally guilty as principals without regard to the presence or absence of a conspiracy.

3. Homicide H c: Criminal Law I l—Failure to submit issue of murder in the second degree held not error in this case.

Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, C. S., 4200, and the failure of the trial court to submit the issue of guilt of murder in the second degree is not error.

4. Indictment C d—Difference in name in indictment and judgment held immaterial under doctrine of idem sonans.

Where the indictment charges the defendants with the murder of one R. B. "Andrews" and the judgment recites that they were convicted of the murder of one R. B. "Andrew," the names are patently *idem sonans* and the difference will not be held material.

APPEAL by Leroy Lee from *Shaw, Emergency Judge,* at December Term, 1931, of GUILFORD.

Criminal prosecution tried upon a joint bill of indictment charging Nord Donnell and Leroy Lee with the murder of one R. B. Andrews.

From an adverse verdict, and sentence of death entered thereon, the prisoner, Leroy Lee, appeals, assigning errors.

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

Hines & Boren and George H. Mitchell for defendant, Leroy Lee.

STACY, C. J. The record recites there was evidence tending to show that during the evening of 25 November, 1931, Nord Donnell and Leroy Lee, riding in the latter's car, went to the store of R. B. Andrews, a merchant at Sedalia, Guilford County, and one or the other shot and killed the said Andrews. It is admitted that both Donnell and Lee were present at the time of the homicide, and each testified the other did the shooting. Donnell said the murder was the result of a hold-up scheme. He confessed his part in the crime and has not appealed. *S. v. Whitehurst, ante,* 631. Lee testified there was no conspiracy or intention on his part to rob the deceased, and that Donnell alone was responsible for the killing. They both left immediately after the shooting, in Lee's car, and were arrested a day or two later. As we understand the record, though its preparation is somewhat unsatisfactory, a robbery was being perpetrated or attempted at the time of the shooting.

The prisoner's first exception is to the refusal of the court to grant his motion for a severance or separate trial. It was the rule at common law, which still obtains with us, that, when two or more persons are indicted jointly, a motion for severance may be made on the face of the bill (*S. v. Deaton,* 92 N. C., 788), but the granting or refusing of the motion is a matter which rests in the sound discretion of the trial court. *S. v. Southerland,* 178 N. C., 676, 100 S. E., 187; *S. v. Holder,* 153 N. C., 606, 69 S. E., 66; *S. v. Carrawan,* 142 N. C., 575, 54 S. E., 1002; *S. v. Barrett,* 142 N. C., 565, 54 S. E., 856; *S. v. Smith,* 24 N. C., 402. No abuse of discretion appears on the present record. The defendants were partners in crime and they have been tried together as his Honor thought was but meet. Note, 70 A. L. R., 1171; 16 C. J., 786. The exception is not sustained.

The following excerpt from the charge forms the basis of the prisoner's next exception or second assignment of error:

"Now there is no conspiracy expressly set out in the bill, and it is not necessary that it should have been alleged in the bill, but if the State has satisfied you beyond a reasonable doubt from the evidence that the two defendants Donnell and Lee, prior to the time of the alleged killing of R. B. Andrew, entered into a conspiracy to rob him, and pursuant to that conspiracy so entered into, and while in an attempt to carry out the unlawful purpose, to wit, the robbery of Mr. Andrew, one of them shot and killed him, the court instructs you, gentlemen of the jury, that both defendants would under those circumstances be guilty of murder in the first degree."

This instruction is free from reversible error. *S. v. Holder, supra.* Without regard to the existence or absence of a conspiracy, it is a settled principle of law, apparently applicable to the facts of the instant case, that where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127.

The third exception, and the one on which the defendant places his greatest reliance, is the failure of the court to submit to the jury the issue of murder in the second degree, under the principle that every view of the case, arising on the evidence, must be submitted to the jury. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187. That while it is conceded an unlawful killing with a deadly weapon raises a presumption of malice, sufficient to warrant a verdict of murder in the second degree, nothing else appearing, still it raises no greater presumption; and the defendant says the jury should have been told that unless the prosecution had fully satisfied them of a premeditated murder, executed in a

cool state of the blood, a verdict of murder in the second degree would be in order. *S. v. Benson,* 183 N. C., 795, 111 S. E., 869. The record is not altogether clear, but as we understand it, a robbery was being perpetrated or attempted at the time of the killing. This made the homicide murder in the first degree. *S. v. Logan,* 161 N. C., 235, 76 S. E., 1. It is provided by C. S., 4200 that a murder committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree. *S. v. Sterling,* 200 N. C., 18, 156 S. E., 96.

Speaking to the question in *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995, *Manning, J.,* delivering the opinion of the Court, said: "Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, and where there is no evidence and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt, or of 'not guilty.' If, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury. It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder." See, also, *S. v. Miller,* 197 N. C., 445, 149 S. E., 590.

It is observed that the defendants are charged in the indictment with the murder of one R. B. "Andrews," while the judgment recites they were convicted of murdering one R. B. "Andrew" as charged in the bill of indictment. The names are patently *idem sonans,* and the slight difference, evidently a typographical error either in the one or the other, is not regarded as material. *S. v. Drakeford,* 162 N. C., 667, 78 S. E., 308; *S. v. Collins,* 115 N. C., 716, 20 S. E., 452; *S. v. Lane,* 80 N. C., 407.

The remaining exceptions are equally untenable, and the case is free from reversible error. The verdict and judgment will be upheld.

No error.

J. A. BOLICH, JR. v. CITY OF WINSTON-SALEM ET AL.

(Filed 15 June, 1932.)

1. Taxation A a—Issuance of refunding bonds under provisions of Municipal Finance Act, as amended, need not be submitted to voters.

It is not necessary that an ordinance authorizing the issuance of refunding bonds should be submitted to the voters of the municipality issuing them when the bonds to be refunded are valid and enforceable obligations of the city which mature within one year from the date of the ordinance authorizing the refunding bonds, and the bonds to be refunded were issued prior to 1 July, 1931, N. C. Code of 1931, secs. 2937(2), 2938(2), and the city does not contract a debt within the meaning of Art. VII, sec. 7, by issuing such refunding bonds, and it is not necessary that the bonds to be refunded should have been issued solely for necessary expenses, it being sufficient if the bonds to be refunded are valid and enforceable obligations of the city.

2. Taxation A f—Governing body may fix interest rate on valid refunding bonds in its discretion within the statutory limitation.

It is not necessary that refunding bonds issued in accordance with the Municipal Finance Act, as amended, should not bear a greater rate of interest than the bonds to be refunded so long as the refunding bonds do not bear a greater rate of interest than the statutory limitation of six per cent, N. C. Code of 1931, sec. 2951, the rate of interest within the statutory limitation being within the discretion of the governing body of the city issuing them.

3. Same—Governing body may fix period of maturity of valid refunding bonds.

It is not required that the period for maturity of refunding bonds issued in accordance with the Municipal Finance Act, as amended, should not exceed the maximum statutory period for maturity of the bonds to be refunded, N. C. Code of 1931, sec. 2942(1b) the period for maturity of the refunding bonds being in the discretion of the governing body of the city issuing them.

4. Taxation A a—Where proposed refunding bonds will be valid, bond anticipation notes will be valid also.

Where refunding bonds proposed to be issued by a city are valid, bond anticipation notes proposed to be issued by it will also be valid, but the proceeds of the bonds and bond anticipation notes must be used exclusively to the payment of the bonds to be refunded thereby.

APPEAL by plaintiff from *Clement, J.*, at Chambers on 3 May, 1932. Affirmed.

This is an action by plaintiff, a resident and taxpayer of the city of Winston-Salem, N. C., for judgment that the defendants be restrained and enjoined from issuing and selling bonds of the city of Winston-Salem, in the aggregate amount of $900,000, and notes of said city in the

aggregate amount of $47,000, upon the allegation in the complaint that the issuance and sale of said bonds and notes will be unlawful.

The issuance and sale of the bonds which the defendants propose to issue and sell, were duly authorized by a bond ordinance passed by the board of aldermen of the city of Winston-Salem, a municipal corporation organized under the laws of this State, on 8 April, 1932, in accordance with the provisions of the Municipal Finance Act of this State. The bonds are to be issued and sold for the purpose of refunding bonds of the said city which were issued prior to 1 July, 1931, and which will mature, according to their tenor, within one year from 8 April, 1932. Among the bonds which are to be refunded are certain bonds of the city of Winston-Salem which were issued to raise money for expenses other than necessary expenses of the said city. These bonds, however, were authorized by statute, and were duly approved by a majority of the qualified voters of the city of Winston-Salem. They are valid obligations of said city. Const. of N. C., Art. VII, sec. 7. The bonds bear interest at rates less than six per cent, although by virtue of the statutes under which they were issued and sold, a rate of interest not in excess of six per cent was authorized. The refunding bonds which the defendants propose to issue and sell may bear interest at a rate not in excess of six per cent, as may be determined by the board of aldermen of the city of Winston-Salem, by resolution duly adopted by said board. The refunding bonds will mature not later than fifty years after 1 July, 1932. The maximum periods for the maturity of the bonds to be refunded, as fixed by statute, will expire before the maturity of the refunding bonds, as authorized by the bond ordinance passed by the board of aldermen of the city of Winston-Salem.

The issuance and sale of the notes which the defendants propose to issue and sell, were authorized by a resolution duly adopted by the board of aldermen of the city of Winston-Salem, on 8 April, 1932, in accordance with the provisions of the Municipal Finance Act of this State. The notes are to be issued and sold for money borrowed to pay bonds of the city of Winston-Salem which are included among the bonds to be refunded. These bonds amount to $47,000, and will mature on 1 May, 1932. The notes will be dated 27 April, 1932, and will be payable, with interest at six per cent, on 27 October, 1932. They are to be issued and sold in anticipation of the receipt by the city of Winston-Salem of the proceeds of the sale of the refunding bonds authorized by the bond ordinance passed by the board of aldermen of said city on 8 April, 1932.

Neither the refunding bonds, nor the bond anticipation notes, which the defendants propose to issue and sell, have been approved by a

majority of the qualified voters of the city of Winston-Salem. Neither the ordinance, authorizing the bonds, nor the resolution authorizing the notes, has been submitted to the voters of the said city.

On the foregoing facts alleged in his complaint, and admitted in the answer of the defendants, the plaintiff moved for judgment that the defendants be restrained and enjoined from issuing and selling both the said bonds and the said notes. The motion was denied.

From judgment denying his motion, and dismissing the action, the plaintiff appealed to the Supreme Court.

Nat S. Crews for plaintiff.
Parrish & Deal for defendants.

CONNOR, J. The Municipal Finance Act, 1921, as amended, expressly authorizes a municipal corporation organized under the laws of this State to issue its negotiable bonds for the purpose of refunding bonds of the corporation issued for debts contracted prior to 1 July, 1931, and maturing within one year from the date of the passage by its governing body of the bond ordinance authorizing the issuance of the refunding bonds, where the bonds to be refunded are valid and enforceable obligations of the corporation. N. C. Code of 1931, section 2937, subsection 2. It is expressly provided by the statute that the ordinance authorizing the issuance of refunding bonds need not be submitted to the voters of the municipality. N. C. Code of 1931, section 2938, subsection 2. This provision is not confined to bonds issued for debts contracted for necessary expenses; it is applicable to all bonds, including those which were issued for expenses other than necessary expenses of the municipality. A municipal corporation does not contract a debt, within the meaning of section 7 of Article VII of the Constitution of this State, when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. 44 C. J., 1132.

The bonds in the instant case will not be invalid because their issuance was without the approval of a majority of the qualified voters of the city of Winston-Salem. Nor will their validity be affected by the fact that when issued they may bear a rate of interest in excess of the rates which the bonds to be refunded bear, provided such rate does not exceed six per cent. N. C. Code of 1931, section 2951. The maximum rate of interest fixed by statute for the bonds to be refunded was six per cent. The fact that the bonds when issued, bore rates of interest less than six per cent, does not determine the rate at which the refunding bonds may be issued. The rate of interest which bonds issued by a

municipal corporation shall bear is fixed by the governing body of the corporation, in its discretion, within the statutory limitation. It is expressly provided by the statute that the period within which refunding bonds shall mature shall be determined by the governing body of the corporation. N. C. Code of 1931, section 2942, subsection 1(b). The maximum periods fixed by statute for the maturity of the bonds to be refunded is not determinative of the period for the maturity of refunding bonds. In the instant case the maximum period for the maturity of the refunding bonds which the defendants propose to issue and sell is fixed in the bond ordinance at 50 years after 1 July, 1932. If the bonds shall be so issued, this fact will not affect their validity.

As the refunding bonds which the defendants propose to issue and sell will be valid, it follows that the bond anticipation notes which they also propose to issue and sell, will be valid. N. C. Code of 1931, section 2934.

Of course, the proceeds of the sale of the refunding bonds and of the loan anticipation notes can be applied only to the payment of the bonds which are to be refunded. When this shall have been done, the indebtedness of the city of Winston-Salem, incurred by statutory authority and with the approval of a majority of the qualified voters of the city, will not have been increased. The taxpayers of the city will be relieved of the burden of taxation for the payment of the bonds which will mature within one year from 8 April, 1932, which, but for the issuance and sale of the refunding bonds, would necessarily be imposed upon them.

There is no error in the judgment denying plaintiff's motion for judgment on the pleadings, and dismissing the action. The judgment is

Affirmed.

J. A. BOLICH, JR., AND WIFE, ROSALIE F. BOLICH, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, NONA S. HANES AND THE BOLICH HOLDING CORPORATION.

(Filed 15 June, 1932.)

1. Mortgages H b — Mere allegations of general financial depression, scarcity of money, etc., held not sufficient to enjoin foreclosure.

Mere allegations of general financial depression, stagnation of the real estate market and scarcity of money for ordinary business transactions are not sufficient for a court of equity to enjoin the foreclosure of a deed of trust according to its tenor, the courts of equity usually exercising their power to enjoin foreclosure upon allegations of fraud, restraint, oppression, usury, mistake, etc.

2. Same—Court may order foreclosure of mortgage on property held in custodia legis.

Where a mortgagor has transferred his equity of redemption to a holding corporation, and thereafter the holding corporation becomes insolvent and is placed in the hands of a receiver, the property is in *custodia legis*, but a court of equity has the power, in its discretion, to order the land sold, it not being required to retain control of the property when it would be inequitable to do so, and an order vacating an injunction restraining the sale under the mortgage is equivalent to leave to proceed in the exercise of the power of sale contained therein.

CIVIL ACTION, before *Harding, J.*, at January Term, 1932, of FORSYTH.

On or about 11 March, 1930, J. A. Bolich and wife, being the owners of a certain lot of land in Winston-Salem, borrowed the sum of $160,000 from the defendant, Insurance Company, and as security therefor executed and delivered a deed of trust to the defendant, Wachovia Bank and Trust Company, trustee. Thereafter, on or about 20 November, 1930, Bolich and wife made a certain contract with W. M. Hanes and wife, Nona S. Hanes, in which they agreed "to pay, renew or handle in a manner satisfactory to both parties each and every encumbrance against said property as the same came due." Thereupon, Bolich and wife conveyed the property to a corporation known as the Bolich Holding Corporation. Default was made in the payment of the indebtedness and the holder of the note requested the trustee named in the deed of trust to sell the property, and same was duly advertised for sale on 20 November, 1931. A temporary restraining order was issued, answers were filed by the parties, a receiver was appointed for the Bolich Holding Corporation, and at the final hearing the trial judge continued the injunction to the hearing, but decreed a foreclosure of the deed of trust and appointed a commissioner to sell the land for the reason that "the court is of the opinion that the parties opposed to said motion and sale have not alleged any equity or reason why said motion should not be allowed," etc. The plaintiff prayed the court to restrain the sale upon the ground that "there was a condition of depression throughout the entire country in finance and real estate, and business conditions generally were unprecedentedly bad, which conditions continue to exist at the present time; . . . that on account of the scarcity of money and poor market conditions, it was impossible to obtain the fair market value of lands at a judicial foreclosure or other forced or involuntary sale of same. . . . That if the lands are sold . . . at a forced sale at the present time, they will not bring their fair market value, and will do irreparable damage both to the plaintiffs and to the creditors of the Bolich Holding Corporation; that a delay for a reasonable time in foreclosing the deed of trust will do the defendants no damage,

for the reason that the loan is more than adequately secured; . . . that there are many indications that in a short time business conditions will have improved to such an extent that money will be available and property can be sold even at a forced sale at approximately its market value." The second ground upon which the plaintiffs requested postponement of sale was that the defendant, Nona S. Hanes, had contracted to pay off the mortgage indebtedness, and that while she was solvent, had declined and refused to comply with her agreement.

From the judgment rendered the plaintiffs and the defendant, Nona S. Hanes and Bolich Holding Corporation appealed. Pending the appeal the trial judge restrained the commissioner from proceeding with the sale.

Parrish & Deal for plaintiffs.

Manly, Hendren & Womble for Prudential Insurance Company of America and Wachovia Bank and Trust Company, trustee.

BROGDEN, J. Does the depression or unprecedented scarcity of money for ordinary transactions or enforced stagnation of the real estate market constitute an equity sufficient to warrant a court in restraining the exercise of the power of sale in a deed of trust?

The power of a court of equity to restrain sales of real estate made in pursuance of the terms of a mortgage or deed of trust is undoubted, and the decisions of this Court disclose that the restraining power of equity in proper cases has been frequently exercised. However, the exercise of the beneficent powers of equity has usually been based upon allegations of fraud, restraint, oppression, usury, mistake or other facts disclosing unconscionable advantage. Unless such elements are alleged, the courts have refused to stay the exercise of the power of sale in a mortgage or deed of trust when all the necessary requisites of a valid sale have been observed and pursued. *Lumber Co. v. Conrades,* 195 N. C., 626, 143 S. E., 138. It does not appear that this Court has heretofore discussed the particular question involved in this appeal. However, there are some old cases in other jurisdictions directly in point. For example, in 1871, the Virginia Court considered the question in *Muller v. Bayly,* 62 Va., 521. The Court said: "Then, what other ground of equity is there in the bill? Only the allegations that the time is unpropitious for a sale or was when the bill was filed; that money was scarce, and that owing to the large amount of the cash payment required, the sale, if made as advertised by the trustee Bayly, would be attended with great if not irreparable loss and injury to the wife and her children. Certainly these allegations can afford no just

ground for enjoining the sale." To the same effect is the declaration in *Lipscomb v. N. Y. Life Ins. Co.*, 39 S. W., 465. The Court says: "However strongly our sympathies may be enlisted for the unfortunate victim of hard times, they cannot furnish a basis for equity jurisdiction; and such courts cannot and ought not to be made the instruments of speculation in the future values of property even for the benefit of the unfortunate." See, also, *Dunn v. McCoy*, 52 S. W., 21; *Muller's Admr. v. Stone*, 6 S. E., 223, 84 Va., 834; *Floore v. Morgan*, 175 S. W., 737, 41 C. J., 931, section 1353, 19 R. C. L., 618, section 434; Pomeroy, Vol. 4, p. 4041.

Perhaps no court is wise enough to declare with absolute finality that no economic or financial stringency or distress would warrant the intervention of equitable principles in restraining the power of sale in instruments securing debts, but certainly the mere allegations of general depression before the property has been sold and an unconscionable purchase price established, has not heretofore been deemed adequate to invoke equitable power.

It is contended that as the Bolich Holding Company has been placed in the hands of a receiver that the property is in *custodia legis*, and, therefore, subject to the control and discretion of the court. However, it has been decided in *Pelletier v. Lumber Co.*, 123 N. C., 596, 30 S. E., 855-1002, that even if property is in *custodia legis*, a court of equity has power to order a sale in its discretion for the reason "a court of equity is not required to retain possession of property when it would be inequitable to do so." Consequently the vacating of an injunction restraining the sale is equivalent to leave to proceed in the exercise of the power.

Affirmed.

BUNCOMBE COUNTY ET AL. v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND UNITED STATES GUARANTEE COMPANY.

(Filed 15 June, 1932.)

1. Banks and Banking H d—Claim against receiver of insolvent bank must be filed and refused before institution of action thereon.

The Commissioner of Banks is in the nature of a statutory receiver of an insolvent bank when he has taken over its assets for the purpose of liquidation, and it is required that a depositor or claimant against the bank's assets in his hands must file his claim with the Commissioner and afford him an opportunity to pass thereon before bringing suit, and where the complaint fails to allege the filing of the claim with the Commissioner and his refusal thereof, it fails to state a cause of action against him, and his demurrer to the complaint is properly sustained.

2. Removal of Causes C b—Complaint stated no cause of action against resident defendant and motion for removal of nonresident was properly allowed.

Where an action is brought against the resident Commissioner of Banks and a nonresident insurance company to recover the amount deposited by a county in a bank prior to its insolvency and to recover on the depository bond executed by the insurance company, and the complaint fails to state a cause of action against the Commissioner because of its failure to allege a filing of the claim with him and his refusal thereof, the Commissioner's demurrer is properly sustained, and the motion of the nonresident defendant for removal to the Federal Court is properly allowed.

APPEAL by plaintiffs from *Sink, J.*, at January Term, 1932, of BUNCOMBE. Affirmed.

This action was begun in the General County Court of Buncombe County, on 14 September, 1931. After the complaint was filed, and in apt time, the defendant, United States Guarantee Company, filed its petition in said court for the removal of the action from said General County Court of Buncombe County to the District Court of the United States for the Western District of North Carolina, for trial.

The action is to recover on a bond in the sum of $30,000. The bond is dated 21 June, 1930. It was executed by the Central Bank and Trust Company of Asheville, N. C., as principal, and the United States Guarantee Company, as surety, and is payable to Buncombe County. The condition of the bond is that the Central Bank and Trust Company "shall faithfully keep, account for, and pay on legal demand all moneys deposited with it by or on behalf of the said Buncombe County, and shall not suspend payment of any moneys so deposited."

It is alleged in the complaint that on 20 November, 1930, the Central Bank and Trust Company closed its doors, and suspended payment to its depositors; that on said day, the plaintiff, Buncombe County, had on deposit with said Central Bank and Trust Company, in the name of its treasurer, the sum of $2,991,402.62; and that since the closing of said Central Bank and Trust Company, the plaintiff, Buncombe County, has collected from certain securities held by it for its said deposit, the sum of $50,409.93, leaving the amount now due said plaintiff, on account of said deposit, the sum of $2,940,992.69.

Prior to the commencement of this action, the defendant, Gurney P. Hood, Commissioner of Banks of the State of North Carolina, took into his possession all the assets of the Central Bank and Trust Company, on hand at the date the said company closed its doors and ceased to do business. The said defendant is now engaged in the liquidation

of the Central Bank and Trust Company, as he is authorized and directed to do by chapter 113, Public Laws of North Carolina, 1927. It is not alleged in the complaint that prior to the commencement of this action, the plaintiffs presented their claim against the Central Bank and Trust Company, on account of said deposit, to the defendant, Gurney P. Hood, Commissioner of Banks, and that said defendant, after considering said claim, rejected it. The said defendant in his answer to the complaint admitted all the allegations therein, and in his further answer, in support of his prayer that the action be dismissed as to him, alleged that the action was improvidently begun by the plaintiffs, for that prior to its commencement, plaintiffs had not complied with the provisions of chapter 113, Public Laws of North Carolina, 1927. N. C. Code of 1931, sec. 218(c), subsections (10) and (11).

The plaintiff, Buncombe County, is a body politic, incorporated under the laws of the State of North Carolina, and as such it may sue and be sued; its coplaintiffs are the treasurer of Buncombe County, and the board of financial control of said county. All of the plaintiffs are citizens of the State of North Carolina.

The defendant, Gurney P. Hood, Commissioner of Banks, is a citizen of the State of North Carolina, and as such he may sue or be sued in his official capacity; his codefendant, United States Guarantee Company, is a corporation organized under the laws of the State of New York, and duly licensed to do business in the State of North Carolina. The said defendant is not, and never has been a citizen of the State of North Carolina.

The action was heard by the judge of the Superior Court of Buncombe County, on the appeal of the defendant, United States Guarantee Company, from the order of the judge of the General County Court of said county, denying its petition for the removal of the action from said County Court to the District Court of the United States for the Western District of North Carolina, for trial.

From judgment reversing the order of the judge of the General County Court, and ordering the removal of the action in accordance with the petition of the defendant, United States Guarantee Company, the plaintiffs appealed to the Supreme Court.

Jones & Ward and Clinton K. Hughes for plaintiffs.
John Izard and Harkins, Van Winkle & Walton for defendant.

CONNOR, J. Plaintiffs cannot maintain this action against the resident defendant, Gurney P. Hood, Commissioner of Banks, for the reason that it is not alleged in the complaint that prior to the commencement

of the action, plaintiffs presented their claim against the Central Bank and Trust Company, to said defendant, and that said defendant rejected said claim.

No action or suit to recover on a claim against an insolvent banking corporation, organized under the laws of this State, can be maintained against the Commissioner of Banks, where said Commissioner has taken into his possession the assets of such corporation, and is engaged in its liquidation, as he is authorized and directed to do by chapter 113, Public Laws of North Carolina, 1927 (N. C. Code of 1931, sec. 218(e), until such claim has first been presented to said Commissioner and rejected by him. The statutory provision to this effect is in accord with the decision of this Court in *Crutchfield v. Hunter,* 138 N. C., 54, 50 S. E., 557. In that case it was held that where a bank failed, and a receiver was appointed at the instance of a creditor in an action brought in behalf of himself and all other creditors, the plaintiff, a depositor of the insolvent bank, cannot maintain an action against the receiver to recover his deposit. Plaintiff's remedy was to file a petition in the original cause. The principle on which the appeal in that case was decided is approved in *Black v. Power Co.,* 158 N. C., 468, 74 S. E., 468. In that case it is said that the statute regulating the appointment of receivers of insolvent corporations, clearly contemplates the settlement of all questions involving claims against the corporation in one action, and that while the statute does not withdraw from a court of equity the power to permit a separate action to be prosecuted, this should not be done until the receiver has at least had the opportunity to pass on the claim. Where the Commissioner of Banks has taken into his possession the assets of an insolvent banking corporation, organized under the laws of this State, and is engaged in the liquidation of said corporation, under the provisions of chapter 113, Public Laws, 1927, his relationship to the corporation, and to its debtors and creditors, with respect to its assets, is that of a receiver. N. C. Code of 1931, sec. 218(e).

As no cause of action is alleged in the complaint on which the plaintiffs can recover jointly of the resident and of the nonresident defendant, the nonresident defendant has the right under the act of Congress, to remove the action from the State Court to the District Court of the United States for trial. *Simmons v. Ins. Co.,* 196 N. C., 667, 146 S. E., 569. There is no error in the judgment ordering the removal of the action in accordance with the petition of the defendant, United States Guarantee Company. The judgment is

Affirmed.

BUNCOMBE COUNTY ET AL. v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND THE SOUTHERN SURETY COMPANY OF NEW YORK.

(Filed 15 June, 1932.)

(For digest see *Buncombe County v. Hood, Comr. of Banks, ante*, 792.)

APPEAL by plaintiffs from *Sink, J.*, at January Term, 1932, of BUNCOMBE. Affirmed.

This action was begun in the General County Court of Buncombe County, on 14 September, 1931. After the complaint was filed, and in apt time, the defendant, the Southern Surety Company of New York, filed its petition in said court for the removal of the action from said General County Court to the District Court of the United States for the Western District of North Carolina, for trial.

The action was heard by the judge of the Superior Court of Buncombe County, on the appeal of the defendant, the Southern Surety Company of New York, from the order of the judge of the General County Court of said county, denying its petition for the removal of the action from said County Court to the District Court of the United States for the Western District of North Carolina, for trial.

From judgment reversing the order of the judge of the General County Court, and ordering the removal of the action in accordance with the petition of the defendant, the Southern Surety Company of New York, the plaintiffs appealed to the Supreme Court.

Jones & Ward and Clinton K. Hughes for plaintiffs.
No counsel for defendant.

CONNOR, J. The question presented by this appeal is identical with that presented by the appeal in *Buncombe County v. Hood, Commissioner of Banks, and United States Guarantee Company, ante*, 792. The judgment is

Affirmed.

A. E. BRADSHAW v. E. F. CONGER.

(Filed 15 June, 1932.)

1. Compromise and Settlement A a—Acceptance of check purporting to be in full settlement of disputed contract constitutes a full settlement.

Where a dispute arises between the parties to a contract and the party to be charged tenders a check purporting to be in full settlement thereof except for one enumerated item, the acceptance of the check constitutes

a full settlement of the matter except for the enumerated item, and whether a controversy had arisen before the tender of the check is an issue of fact for the jury, but where the testimony of the party denying such settlement is to the effect that such dispute has arisen prior to the tender of the check a directed verdict on the issue is not error, and the fact that the check later tendered in full settlement of the item excepted in the first was refused does not alter this result.

2. Appeal and Error F c—Only exceptive assignments of error will be considered.

Alleged error must be supported by an exception in the record or it will not be considered on appeal.

3. Appeal and Error J d—Appellant has burden of showing error.

Where the jury finds upon one issue that the defendant tendered the plaintiff the correct amount recoverable under a subsequent issue and fails to answer the subsequent issue, it will be assumed that the tender was properly made and is available to the plaintiff, and error will not be found on appeal, the burden of showing error being upon the appellant.

CIVIL ACTION, before *MacRae, Special Judge,* at Spring Term, 1932, of SWAIN.

The plaintiff alleged that he and the defendant entered into a written contract on or about 16 November, 1928, in which the defendant agreed to buy from plaintiff certain telephone and telegraph poles in such numbers and amounts "as the plaintiff might desire to manufacture and deliver to defendants at points and places mentioned in said contract," and subsequently entered into an oral contract to purchase pole timber on certain additional boundaries of land, and in the performance of said contract purchased teams and equipment, and built roads and bridges in order to convey the poles from the woods to the railroad sidings. The plaintiff further alleged that the defendant breached the contract in several particulars specified in the complaint, resulting in damages in the sum of $3,000.

The defendant, filing an answer, denied any and all breaches of contract upon his part, and alleged that the contract expired on 1 January, 1930, and that on 31 December, 1929, there was a full settlement between the parties, and that the defendant tendered to the plaintiff in full settlement a check in words and figures as follows, to wit: "E. F. Conger, Stanton, Virginia, No. 939, Lovingston, Va., 31 December, 1929. Pay to the order of A. E. Bradshaw $93.70, ninety-three and 70/100 dollars. For account in full except 40's not branded. To the First National Bank, Lovingston, Va. M. C. Roush, agent." That thereafter on 8 January, 1930, the said defendant tendered to the plaintiff a check in words and figures as follows: "E. F. Conger, Staunton.

Virginia. No. 954. Lovingston, Va., 8 January, 1930. Pay to the order of A. E. Bradshaw, $23.50, twenty-three and 50/100. In full payment of large 40'ft's. mentioned in last settlement. Settlement ck-939. To the First National Bank of Nelson County, Lovingston, Va. M. C. Roush, agent." The defendant further alleged that the plaintiff cashed the check dated 31 December, 1929.

The plaintiff offered evidence that he declined to accept the check for $23.50, dated 8 January, 1930, and returned the same to the defendant. The plaintiff testified: "The last poles I delivered was sometime during the fall of 1929, I couldn't say just what time. Along about that time the defendant had been very slow about taking my poles from the stations where I delivered them; they would not be taken up as often as a carload had been delivered to the station. . . . They ceased taking up the poles at all sometime during the fall of 1929; Mr. Roush (agent for defendant) and I talked about it all along, and he said he would take them. . . . Sometime about the middle of May, 1929, he told me they had lost the market for the large poles, . . . and on 12 June, in my presence, he told Will Woodard not to bring any more 45's and 50's on the skidway, that they couldn't take them. He never took any more of the 45's and 50's from the woods—he took all that were at the station. . . . He quit taking any sort of poles sometime during the fall; he said he would take them but he didn't do it. We talked about it every time I saw him and I would call him on the telephone."

A subcontractor of plaintiff testified: "Mr. Bradshaw and them got in a dispute towards fall of the year and the others were not taken out; I quit myself. I couldn't tell how many poles were left, I never went over and counted what was left on the ground. . . . It was sometime near August when I quit work." Another witness for plaintiff said that he had heard the plaintiff Bradshaw talking about the matter and testified: "I figured there was going to be a lawsuit, I heard him talk something about it, but I had nothing to do with it. . . . I had heard Mr. Bradshaw say it looked like he was going to have to law to get his rights. I heard Mr. Roush say he couldn't take up those heavy poles, and I figured there might be a lawsuit." The plaintiff, Bradshaw, was recalled and testified: "It was about the middle of May when Mr. Roush got careless about taking up my poles and the longer the worse. This was in 1929. . . . This check dated 31 December, for $93.70, is endorsed by me, and I received money for it." With reference to the check, a witness for plaintiff said: "The check for $93.70, dated 31 December, 1929, was given in settlement of cut

backs and on poles on the yard at Epps Spring. . . . This check was given when Mr. Bradshaw and I were present, but nothing was said about a settlement of the contract, it was these cut backs."

The following issues were submitted to the jury:

1. "Did the plaintiff and the defendant enter into the contract referred to in the complaint?"

2. "Did the plaintiff and the defendant make a final settlement of all matters referred to in said contract, except as to large 40's not branded on 31 December, 1929, as alleged in the answer?"

3. "Did the defendant thereafter tender to the plaintiff the correct amount for the large 40's referred to in the settlement of 31 December, as alleged in the answer?"

4. "Did the defendant breach the contract, as alleged in the complaint?"

5. "If so, what damages, if any, is the plaintiff entitled to recover?"

The jury answered the first issue "Yes," the second issue "Yes," the third issue "Yes," the fourth issue "No," and did not answer the fifth issue.

The trial judge charged the jury to answer the second issue "Yes." The court further charged the jury that in any event the plaintiff was entitled to recover $23.50.

From judgment upon the verdict the plaintiff appealed.

Alley & Alley and Edwards & Leatherwood for plaintiff.

Moody & Hall and Johnston & Horner for defendant.

BROGDEN, J. This Court, in *Walston v. Coppersmith,* 197 N. C., 407, 149 S. E., 381, said: "It is not controverted that a dispute had arisen between the parties before the delivery of the check. Obviously, if the check had been delivered under the circumstances with the notation thereon, nothing else appearing, the delivery, acceptance and cashing of said check would have undoubtedly constituted a settlement." Whether a dispute has arisen between the parties, before a check purporting to constitute a settlement in full, has been delivered by the party to be charged, constitutes an issue of fact for a jury. *Hardware Co. v. Farmers Federation,* 195 N. C., 702, 143 S. E., 471. In the case at bar there was one contract between the parties, and the testimony of plaintiff discloses that a dispute or controversy had arisen and existed between the parties long before the check was given. Hence the instruction of the trial judge was correct.

Complaint is made of the charge of the court upon the fourth issue, but the record discloses no exception to such instruction, and, therefore,

the same cannot be considered. The defendant pleaded no counterclaim, and the trial judge instructed the jury that in any event plaintiff is entitled to recover $23.50. But the jury in answer to the third issue found that the defendant "tendered" to the plaintiff the correct amount of money involved, and it must, therefore, be assumed that the tender was properly made and kept alive, and is now presently available. Moreover, the burden of showing error is upon the appellant.

No error.

C. C. WIMBISH, ADMINISTRATOR, CLAIMANT FOR CHARLES C. WIMBISH, JR., DECEASED EMPLOYEE, v. HOME DETECTIVE COMPANY, INCORPORATED, EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 15 June, 1932.)

Master and Servant F i—Findings of fact of Industrial Commission on conflicting evidence are conclusive on appeal.

In this case *Held:* the evidence as to whether the accident resulting in the death of an employee arose out of and in the course of his employment was conflicting, and the finding of the full Industrial Commission in a hearing before it that the accident did not arise out of and in the course of the employment is binding and conclusive on the courts upon appeal.

CIVIL ACTION, before *Warlick, J.,* at November Term, 1931, of GUILFORD.

This cause was first considered by the Industrial Commission and an award made by the hearing commissioner. Upon appeal to the full Commission the award was vacated for the reason that the full Commission found that the accident and death of claimant did not arise out of and in the course of the employment. Thereupon the plaintiff appealed to the Superior Court, and after considering the record the trial judge was of the opinion that the decision of the Industrial Commission should be affirmed.

The evidence may be summarized as follows: C. C. Wimbish, Jr., was employed by the defendant, Home Detective Company, to perform "clerical work in the office and going out on such missions as the manager of that company saw fit to send him on, covering such matters as the handling of collections, bad check items and conducting such investigations for this company as we found from time to time he was best suited to conduct." He interviewed clients, prospective as well as

present, discussing with them matters in general pertaining to the handling of accounts and bad check investigations. In the performance of his duties he used his own automobile, but the company paid for the gas and oil and repairs while used in its service.

On the night of 5 June the deceased telephoned a young lady in Greensboro with reference to a trip from Greensboro to Raleigh. The contents and meaning of the conversation can be more accurately disclosed by using the words of the witness: (Q.) "How did Mr. Wimbish know you wanted to attend the dances?" (A.) "Because we had spoken of it. I expressed a desire that I wished to go and that I wished I had a ride." (Q.) "He volunteered to take you?" (A.) "He did not know I was going until the night before. He called me up and said he was going and wanted to know if I would like to go, and I said 'Yes, I certainly would.'" (Q.) "Did he say he was going to the dance or just going to Raleigh?" (A.) "He didn't say." (Q.) "It is stated you were going to attend the finals or dances on this trip?" (A.) "I was." (Q.) "Where else were you going on this trip?" (A.) "I was going to return to Greensboro Saturday to attend the last day's exercises." (Q.) "Was he bringing you back to Greensboro?" (A.) "He was." (Q.) "Do you know whether or not Mr. C. C. Wimbish was going to that dance?" (A.) "I do not. I understood he might go if he could get a date." The dance was to take place in Raleigh at about nine o'clock on the night of 6 June. On the morning of 6 June the deceased was in the office of his employer in Greensboro prior to ten or eleven o'clock. The general manager of defendant corporation testified that when the deceased came to the office on the morning of 6 June that he had arranged an itinerary for the deceased which required him to visit certain parties in Clayton, Clinton, Durham and Raleigh, and that the deceased was directed by said manager to call upon various persons in these cities. The deceased and the young lady left Greensboro about 12:30 or quarter to one on 6 June. They stopped at Burlington in order for the young lady to communicate with her sister living at that point. Another stop was made in Hillsboro for food. Apparently no stop was made at Durham. A short distance beyond Durham the deceased in some way lost control of the car and it hit an embankment, and as a result the deceased was killed. In the pockets of the car there were certain papers relating to the business of the company, including contract blanks and office file. The suit case of deceased was also in the car, containing wearing apparel and toilet articles. In this suit case was a dress suit. The deceased had not spent a night away from home on business for the company. He always returned to Greensboro at night. The deceased met his death at about 4:30 in the afternoon of 6 June.

It also appeared from the evidence that Clayton, Benson and Clinton are beyond Raleigh.

From the judgment affirming the award of the Industrial Commission the plaintiff appealed.

H. R. Stanley for plaintiff.
W. C. Ginter and R. M. Robinson for defendant.

BROGDEN, J. Was the deceased at the time of his death on 6 June engaged in the course of employment of the defendant, or was he making the trip to Raleigh with a young lady in order to attend a dance in Raleigh that night?

The Industrial Commission found "that the accident and death of the claimant did not arise out of and in the course of the employment." "The findings of fact made by the North Carolina Industrial Commission, in a proceeding pending before the said Commission, are conclusive on an appeal from said Commission to the Superior Court, only when there was evidence before the Commission tending to show that the facts are as found by the Commission. Otherwise, the findings are not conclusive, and the Superior Court, on an appeal from the award of the Commission, has jurisdiction to review all the evidence for the purpose of determining whether as a matter of law there was any evidence tending to support the finding by the Commission." *Dependents of Poole v. Sigmon, ante,* 172. The last utterance by this Court upon the question involved appears in *Greer v. Laundry Co., ante,* 729. The Court said: "In the instant case, it may be conceded that there was evidence tending to show that plaintiff had suffered an injury by accident arising out of and in the course of his employment, resulting in the loss of an eye. However, there was also evidence tending to show that the loss of plaintiff's eye was not the result of an accident but of a disease which was not caused or aggravated by the accident which arose out of or in the course of his employment. The conflicting evidence was considered by both Commissioner Dorsett and by the full Commission. The findings of fact made by Commissioner Dorsett and approved by the full Commission were conclusive and binding on the judge of the Superior Court."

So, in the case at bar the evidence was conflicting and more than one inference could be drawn therefrom by a fair and impartial mind. Consequently the trial judge ruled correctly.

Affirmed.

E. C. GUY v. FIRST CAROLINAS JOINT STOCK LAND BANK OF COLUMBIA, AND GURNEY P. HOOD, COMMISSIONER OF BANKS.

(Filed 15 June, 1932.)

1. Deeds and Conveyances C f—Ouster, eviction or adverse claim are prerequisite to right of action on covenant of quiet enjoyment.

A grantee in a deed may not bring an action on the covenant of quiet enjoyment contained in the deed merely because he has discovered that the title to the mineral rights in the land had been reserved by his grantor's predecessors in title, an ouster, eviction or adverse claim being prerequisite to the right of action thereon.

2. Mortgages H b—Plaintiff held not entitled to injunctive relief against execution of power of sale in deed of trust in this case.

Where the grantee executes a deed of trust to secure the balance of the purchase price due his grantor, the grantee, in an action against the trustee, is not entitled to injunctive relief against the foreclosure of the deed of trust according to its terms merely upon allegations that his grantor's predecessor in title had reserved the mineral rights in the land, there being no allegations of ouster, eviction or adverse claim giving the grantee a right of action of the covenant of quiet enjoyment, or that the grantor was unable to respond in damages, or that there was no adequate remedy at law.

CIVIL ACTION, before *Moore, J.*, at March Term, 1932, of AVERY.

Plaintiff alleged that on or about 28 August, 1928, the First Carolinas Joint Stock Land Bank of Columbia, for a consideration of $5,000, executed and delivered a deed to him for approximately 546 acres of land, more or less, situated in Avery County, North Carolina. That said deed contained the following covenants: (a) "And the said First Carolinas Joint Stock Land Bank of Columbia does hereby bind itself and its successors to warrant and forever defend all and singular the said premises unto the said E. C. Guy, his heirs and assigns, against itself and its successors and all persons whomsoever lawfully claiming or to claim the same or any part thereof." (b) "All and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining." Plaintiff further alleged that on said date he executed and delivered a deed of trust upon said property to secure the balance of purchase money to the Raleigh Banking and Trust Company, trustee for the First Carolinas Joint Stock Land Bank of Columbia, and that as said trustee had become insolvent, the said defendant, Gurney P. Hood, Commissioner of Banks, has succeeded to all the rights and duties of said Raleigh Banking and Trust Company with relation to said deed of trust. Plaintiff further alleged that at the time he purchased the land he thought and assumed

that the land bank owned the minerals and mineral rights in and upon said tract of land, but that he subsequently discovered that the mineral rights and interest in and to said land had been expressly excepted and reserved by the predecessors in title of the First Carolinas Joint Stock Land Bank of Columbia. Plaintiff further alleged that defendant, Gurney P. Hood, had advertised the land for sale under and by virtue of power contained in the deed of trust. The defendant, Hood, filed an answer alleging that the plaintiff was in the exclusive and undisturbed possession of the land and all minerals and mineral rights upon the premises, and that he had never been disturbed in his use and full enjoyment thereof by any person. A temporary restraining order was issued in the cause and at the final hearing the trial judge "being of the opinion that the plaintiff is entitled to a continuance of the temporary restraining order heretofore issued in this cause until the final determination of this cause," continued the restraining order pending further orders of the court. The land bank has never been made a party to the cause.

From the judgment rendered the defendant Hood appealed.

J. W. Ragland for plaintiff.

Smith & Joyner, John H. Anderson, Jr., and Thomas, Lumpkin & Cain for defendant, Hood, Commissioner of Banks.

BROGDEN, J. The defendant demurred *ore tenus* on the ground that the complaint does not state a cause of action in that it fails to set out facts necessary to support an action for breach of covenant of quiet enjoyment. Consequently the question of law involved may be stated as follows: If a grantor conveys land or an interest therein, which he does not own at the time of the conveyance, can the grantee thereupon institute an action for damages upon the covenant of quiet enjoyment where there has been no ouster, eviction or adverse claim?

"The covenant of warranty and the covenant of quiet enjoyment are not strictly personal like the covenant of seizin, which is broken when the deed is delivered if the title is defective, but they are prospective in their operation and an ouster or eviction is necessary to constitute a breach." *Wiggins v. Pender,* 132 N. C., 628, 44 S. E., 362. To the same effect is the declaration in *Cover v. McAden,* 183 N. C., 641, 112 S. E., 817, as follows: "Ordinarily the mere existence of an outstanding paramount title to land will not authorize a recovery by the grantee in an action for breach of the covenant. There must be an eviction, actual or constructive, but not necessarily under legal process. . . . In other words, to warrant recovery there must be some hostile assertion of the adverse title, unless the superior title is in the State."

There is no allegation of ouster, eviction or adverse claim, nor is there allegation or supporting facts tending to show that the First Carolinas Joint Stock Land Bank is insolvent or that plaintiff has no adequate remedy at law. *Porter v. Armstrong,* 132 N. C., 66, 43 S. E., 542. Consequently the restraining order was improvidently granted, and the demurrer is sustained.

Reversed.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. S. B. BROCKWELL.

(Filed 15 June, 1932.)

Execution J a—Supplemental proceedings must be instituted within three years from issuance of execution.

Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings, C. S., 711, 712, 719, and chapter 24, Public Laws of 1927, does not affect this result, the later act having no repealing clause does not apply to supplemental proceedings but applies only to strike out the three-year limitation in C. S., 667 and to repeal C. S., 668.

CIVIL ACTION, before *Midyette, J.,* at January Term, 1932, of DURHAM.

The plaintiff instituted an action and recovered judgment against the defendant at the October Term, 1927, of the Superior Court of Durham County for the sum of $2,004.93, and was returned on 14 March, 1928, with the following notation: Served. Nothing found to satisfy the within execution." Thereafter on 16 January, 1932, the attorney for the plaintiff filed an affidavit reciting the judgment, the execution and the return thereof, and alleging that the defendant "has no known property that is liable to execution, but as affiant is informed and believes said defendant has property, choses in action and other things of value not exempt from execution and which he refuses to apply toward the satisfaction of said judgment." The affidavit further declares, upon information and belief, that the Standard Oil Company has property of defendant exceeding $10.00 in amount. Thereupon notice issued to the defendant, Brockwell, and to the agent of the Standard Oil Company to appear before the clerk of the Superior Court of Durham County on 27 January, 1932, to be examined and answer concerning the same. At the hearing before the clerk he dismissed the proceeding upon the ground that the clerk was "of the opinion that he had no authority to order any application of the funds in the hands of the Standard Oil Company to the payment of any judgment and denied the motion to that effect."

Thereupon plaintiff appealed to the Superior Court and the judge entered the following judgment: "And it appearing to the court that execution was issued on the original judgment against the defendant in the above entitled action on 27 January, 1928, and that same was returned unsatisfied, and that no execution had been issued on said judgment since 27 January, 1928, it is therefore considered, ordered and adjudged by the court that the order or judgment of the clerk of the Superior Court be, and the same is hereby in all respects affirmed, and said supplemental proceedings dismissed, and the plaintiff taxed with the costs."

To the foregoing judgment the plaintiff appealed.

R. O. Everett for plaintiff.
Brawley & Gantt for defendant.

BROGDEN, J. Can supplemental proceedings be instituted against a defendant when there has been no execution issued within three years from the institution of such supplementary proceedings?

The statutes involved constitute certain sections of Article 30 of the Consolidated Statutes, and have particular reference to C. S. sections 711, 712 and 719. A reading of the statutes discloses that a supplemental proceeding is based upon an execution. C. S., 711 deals with the problem after the execution has been returned, and C. S., 712 prescribes the procedure before the execution is returned. C. S., 719 relates to the examination of a third party and not primarily to the defendant in the execution. The distinction between these statutes is discussed and applied by McIntosh Practice & Procedure, section 747, pp. 865, *et seq.* C. S., 711, specifically requires that the supplemental proceedings against the defendant must be instituted "within three years from the time of issuing the execution." The supplemental proceedings in the case at bar was not instituted "within three years from the time of issuing the execution." While a third party under C. S., 719 may be examined without reference to the three-year limitation, notwithstanding, if the defendant himself is supplemented, the proceedings must be instituted "within three years of the issuing of execution."

The plaintiff contends that the day is saved for it by virtue of chapter 24, Public Laws of 1927, which strikes out the three-year limitation in C. S., 667 and repeals C. S., 668. However, the amending statute aforesaid does not purport to deal with supplementary proceedings, but operates directly upon the sections referred to in the act. Moreover, there is no repealing clause, and hence the application of the act must be confined to the express language thereof.

Affirmed.

CHARLES R. HARTS v. RANEY CHEVROLET COMPANY AND WALTER BENTON.

(Filed 15 June, 1932.)

Principal and Agent A b—Prospective purchaser driving car alone for demonstration is bailee and not agent of auto dealer.

Where the evidence discloses that an automobile dealer allowed a prospective purchaser to drive a car to show it to his wife, and that there was no agent or employee of the dealer in the car with the prospective purchaser, and that the dealer exercised no control over the car or driver, and there is no evidence that the prospective purchaser was an incompetent or careless driver or that the car was defective in any particular or that the approval of the wife was an essential element of the sale or that the prospective purchaser was contemplating buying the car for her: *Held*, a judgment as of nonsuit in an action against the dealer brought by a third person injured by the alleged negligence of the prospective purchaser while so driving the car is correctly entered, the prospective purchaser being a bailee and not an agent of the owner under such circumstances.

CIVIL ACTION, before *Barnhill, J.*, at December Term, 1931, of NEW HANOVER.

Plaintiff alleged and offered evidence tending to show that on or about 28 March, 1931, he sustained serious personal injury as a result of the negligent operation of an automobile by the defendant, Walter Benton. Benton, on the evening of the injury and prior thereto, had been to the place of business of defendant, Raney Chevrolet Company, for the purpose of buying a car. The agent for the company said: "Walter Benton came there and said he wanted to buy a car in the price range between $200 and $250, and I showed him several cars we had in that price range, and this particular Chevrolet coupe. After I started it up he seemed to be very favorably impressed with it and said he was going to buy a car that day, but would not like to buy it without showing it to his wife. With my consent, I told him he could take it and show it to his wife. I told him he could take it out himself and show it to his wife in the meantime. Showing cars is called demonstration. . . . I don't know whether we had any authority, we did it. When Benton requested that he take the car out I agreed. He said he was negotiating to buy it as the purchaser. I have been letting cars out that way, for the purpose of selling them, off and on ever since I have been working there. All the other salesmen do the same thing. The Chevrolet Company has around fifteen salesmen and demonstration is part of the purpose of selling them." The defendant, Benton, took the car out about 4:30, and the injury to plaintiff occurred later in the

evening while the car was in the exclusive possession and control of Benton, and before the return thereof to the Raney Chevrolet Company.

At the conclusion of plaintiff's evidence judgment of nonsuit was entered as to the Chevrolet Company and the trial continued as to the defendant, Benton. There was a verdict and judgment in favor of plaintiff against Benton. From the judgment of nonsuit plaintiff appealed.

John D. Bellamy & Sons for plaintiff.
Rountree, Hackler & Rountree for Chevrolet Company.

BROGDEN, J. Is an automobile dealer liable in damages for the conduct of a prospective purchaser, who, while driving the car in order to show it to his wife, negligently injures a third person?

At the outset of the inquiry, it is to be observed that there is no evidence that Benton, the prospective purchaser, was an incompetent or careless driver, or that the automobile was defective in any particular; neither does it appear that he was contemplating the purchase of a car for his wife, nor that her approval was an essential element of the sale. Moreover it appears that no agent or employee of defendant, Chevrolet Company, was present in the car or exercising any direction or control thereof or of the driver. The question has not been directly presented to this Court, but there is intimation in *Holton v. Indemnity Co.*, 196 N. C., 348, 145 S. E., 679, that a prospective purchaser, while driving the car of an automobile dealer for demonstration purposes, is a bailee and not an agent of the owner. The intimation so given is abundantly supported by the decisions in other jurisdictions. For example, the Illinois Court in *Mosby v. Kimball,* 178 N. E., 66, said:

"Defendant in error, has called our attention to no case, and we have been able to find none, in which the owner of an automobile has been held liable for the negligence of a prospective purchaser of the automobile or his representative when driving the car to find out how it runs, when not accompanied by the owner or his employee. On the other hand, it has been held in a number of cases that there is no liability on the part of the owner of an automobile for the negligence of the prospective purchaser or his representative under such circumstances." The Texas Court of Civil Appeals considered the question in *Bertrand v. Mutual Motor Co.,* 38 S. E. (2d), 417. The Court said: "A prospective purchaser cannot be the agent of the seller to demonstrate a car himself." The opinion quotes with approval the following principle from the Restatement of the Law of Agency by the American Law Institute: "The relation of agency is the consensual relation existing between two persons by virtue of which, one of them is to act for and in behalf

of the other and subject to his control." The Iowa Court in *Goodrich v. Musgrave Fence & Auto Co.*, 135 N. W., 58, held that "a person in possession of an automobile under an agreement to purchase, not subject to the seller's directions as to the use of the car, is not the seller's agent, although there is an agreement that he is to have a commission on sales made by him."

Other cases directly in point are *Cruse-Crawford Mfg. Co. v. Rucker*, 123 Southern, 897; *Flaherty v. Helfont*, 122 Atl., 180; *Marshall v. Fenton*, 142 Atl., 403. See, also, *Magee v. Hargrove Motor Co.*, 296 Pacific, 774.

The application of these principles to the facts leads to the conclusion that the ruling of the trial judge was correct.

Affirmed.

STATE v. CLYDE LIVINGSTON.

(Filed 15 June, 1932.)

Criminal Law G l—Confession in this case held involuntary and incompetent.

Only voluntary confessions are admissible in evidence, and a confession is voluntary only when it is in fact voluntarily made, and where after the arrest of the defendants and the measuring of their shoes and tracks at the scene of the crime they are told that "it would be lighter on them" to confess and that "it looks like you had about as well tell it," whereupon the defendants confess to the crime charged: *Held*, their confession was involuntary and its admission in evidence constitutes reversible error.

APPEAL by defendant, Clyde Livingston, from *Harwood, Special Judge*, at November Special Term, 1931, of WILKES.

Criminal prosecution tried upon indictment charging the defendant, and another, with breaking and entering the storehouse of one M. J. Parsons, other than burglariously, with intent to steal the goods and chattels of the said owner to the value of $25.00, etc., contrary to the provisions of C. S., 4235.

The defendants were arrested and after having had their shoes measured to ascertain whether they corresponded with the tracks at the store (*S. v. McLeod*, 198 N. C., 649), the township constable and Mr. Parsons told them that their shoes fitted the tracks, "it looks like you had about as well tell it," and "the chances were if they would tell they got it (the stolen property) it would be lighter on them." The boys talked together a little and then said: "We got some stuff." (Objection; overruled; exception.)

STATE *v.* LIVINGSTON.

From an adverse verdict and judgment of 18 months on the roads, the defendant, Clyde Livingston, appeals, assigning errors.

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

Trivette & Holshouser and Cranor & McElwee for defendant.

STACY, C. J. The confession of the defendants made under the inducement that the chances were "it would be lighter on them" if they would say they got the property, coupled with the remark of the officer, "it looks like you had about as well tell it," must be regarded as arising out of circumstances which render it involuntary, and, therefore, incompetent as evidence against appellant. *S. v. Myers, ante,* 351; *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603; *S. v. Jones,* 145 N. C., 466, 59 S. E., 353; *S. v. Horner,* 139 N. C., 603, 52 S. E., 136.

Almost the identical question here presented, certainly the same in principle, was decided in *S. v. Davis,* 125 N. C., 612, 34 S. E., 198, *S. v. Drake,* 82 N. C., 593, *S. v. Dildy,* 72 N. C., 325, *S. v. Whitfield,* 70 N. C., 356, *S. v. Matthews,* 66 N. C., 106, *S. v. Lawhorne,* 66 N. C., 638.

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, but a confession wrung from the mind by the flattery of hope, or by the torture of fear, comes in such questionable shape as to merit no consideration. *S. v. Patrick,* 48 N. C., 443.

Speaking to the subject in *S. v. Roberts,* 12 N. C., 259, *Henderson, J.,* said: "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are not. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

New trial.

CONLEY GREENE, ADMINISTRATOR, v. PRESS DISHMAN ET AL.

(Filed 15 June, 1932.)

Appeal and Error F c—Assignment of error should show the question sought to be presented without the necessity of searching through the record.

Assignments of error to rulings of the court on a question of evidence should set out the testimony, in substance at least, and assignments of error as to other rulings should set out the attendant facts and circumstances, so that the court may determine the question sought to be presented without searching through the record.

APPEAL by defendants from *MacRae, Special Judge,* at November Special Term, 1931, of WATAUGA.

Civil action to recover the value of certain personal property belonging to the estate of R. W. Guy, which, it is alleged, the defendants converted to their own use before the appointment of plaintiff as administrator of the estate of the deceased.

From a verdict and judgment in favor of the plaintiff, the defendants appeal.

Bingham, Linney & Bingham for plaintiff.
Trivette & Holshouser and W. R. Lovill for defendants.

STACY, C. J. The record contains ten assignments of error, of which the first and second may be taken as illustrative:

"1. That the court erred in sustaining the objection of plaintiff as shown by exception No. 1, Record page 8.

"2. That his Honor committed error as shown by exceptions 2 and 3, Record pages 8 and 9."

It was said in *Thompson v. R. R.,* 147 N. C., 412, 61 S. E., 286, that a proper assignment of error to the ruling of the court on a question of evidence requires the testimony to be set out, in substance at least, so its relevancy can be perceived. And as to other rulings, it is essential that the attendant facts and circumstances be stated so their bearing on the controversy can be seen, to some extent, by reading the assignments themselves. See, also, *Baker v. Clayton, ante,* 741, and *In re Beard's Will, ante,* 661.

"The Court will not accept a mere colorable compliance, such as entering the 'first exception is the first assignment of error,' etc. This would give no information whatever to the Court, for it would necessitate turning back to the record to see what the exception was. What the

Court desires, and, indeed, the least that any appellate court requires, is that the exceptions which are bona fide presented to the Court for a decision, as the points determinative of the appeal, shall be stated clearly and intelligently by the assignment of errors, and not by referring to the record, and therewith shall be set out so much of the evidence, or of the charge, or other matter or circumstance (as the case may be) as shall be necessary to present clearly the matter to be debated." *Rogers v. Jones,* 172 N. C., 156, 90 S. E., 117; *Myrose v. Swain,* 172 N. C., 223, 90 S. E., 118.

It will readily be perceived that the assignments of error in the instant case fall short of the requirements of the rule. *Lee v. Baird,* 146 N. C., 361, 59 S. E., 876. Nevertheless, we have examined them and find none of sufficient merit to upset the verdict.

The plaintiff consents that the judgment may be modified so as to separate the liabilities of the defendants, charging each with the value of his or her conversion. This will be done in the Superior Court.

No error.

THE AMERICAN AGRICULTURAL CHEMICAL COMPANY v. C. ROY GRIFFIN ET AL.

(Filed 15 June, 1932.)

Evidence J a: Frauds, Statute of A a—Parol evidence held admissible to show total failure of consideration for guaranty of payment.

Where the father signs the note of his son as a guarantor of payment in consideration of the payee's furnishing the son with fertilizer on open account, parol evidence of the total failure of the consideration in that the payee did not so furnish fertilizer is admissible as between the parties in an action against the father on the note.

APPEAL by defendant, C. Griffin, from *Grady, J.,* at October Term, 1931, of Edgecombe.

Civil action to recover from C. Roy Griffin, as maker, and Charles Griffin, as guarantor, on a promissory note of $2,600, tried upon the following issues:

"1. Did defendant, Roy Griffin, execute the note, referred to, and was the same endorsed by Charles Griffin, as alleged? Answer: Yes, by consent.

"2. Was the guarantee endorsement of Charles Griffin based solely upon the promise and agreement of the plaintiff's agent, W. L. Reason,

that the plaintiff company would sell fertilizer to C. Roy Griffin for 1929, on open account, as alleged by the defendants? Answer: No.

"3. If so, was there a breach of said contract on the part of the plaintiff, as alleged by defendants? Answer:.....

"4. In what amount, if anything, are defendants indebted to the plaintiff? Answer: $2,600 with interest from 1 January, 1929."

There was evidence to support affirmative answers to the 2d and 3d issues, but his Honor excluded it all and directed a verdict for the plaintiff. Objection; exception.

The defendant, Charles Griffin, appeals, assigning errors.

V. E. Fountain and H. C. Bourne for plaintiff.

M. S. Strickland, A. O. Dickens and Gilliam & Bond for defendant.

STACY, C. J. This is another instance of a father coming to the rescue of his son by promising to pay the latter's note if not paid at maturity. A guaranty of payment is an absolute promise to pay the debt at maturity if not paid by the principal debtor. *S. v. Bank,* 193 N. C., 524, 137 S. E., 593; *Cowan v. Roberts,* 134 N. C., 415, 46 S. E., 979. But as a consideration for the guaranty plaintiff agreed to furnish the son, on open account, fertilizer to make his crop for the year 1929. This was the *sine qua non* of the father's guaranty, and the plaintiff has failed to comply with its part of the agreement.

The note in suit is made payable to the American Agricultural Chemical Company, or order; and it is always open, as between the original parties to a contract, upon proper plea, to show a total failure of consideration. *Swift & Co. v. Aydlett,* 192 N. C., 330, 135 S. E., 141; *Pate v. Gaitley,* 183 N. C., 262, 111 S. E., 339.

The admission of this character of evidence is not at variance with the rule against changing, contradicting or adding to the terms of a written instrument by parol, nor is it prohibited by the statute of frauds. *Harper v. Harper,* 92 N. C., 300; 3 R. C. L., 139.

Want of consideration is one of the exceptions to the rule that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making or endorsing of a bill or note, is not competent to vary, qualify or contradict, add to or subtract from the absolute terms of a written instrument. 2 Parsons Notes and Bills, 501.

The rejected testimony of the defendant tending to establish the affirmative of the 2d and 3d issues was competent under the exception. *Carrington v. Waff,* 112 N. C., 115, 16 S. E., 1008.

New trial.

THE TALGE MAHOGANY COMPANY v. YEAGER MANUFACTURING COMPANY ET AL.

(Filed 15 June, 1932.)

Principal and Agent C b—Authorization of agent held ambiguous and his action thereon in good faith bound his principal.

Where the principal instructs his agent by telegram to sit in on a creditors' meeting and "plug for us," the words of the authorization are ambiguous, and where the agent and the debtor, in good faith interpret and act on it as authorization to the agent to execute in the principal's name a compromise agreement with other creditors whereby claims were settled on a percentage basis: *Held,* in the absence of repudiation of the agreement by the principal upon notification thereof, he may not contend that the agent exceeded his authority and that he was not bound by the agreement.

APPEAL by plaintiff from *Moore, J.,* at September Term, 1931, of CATAWBA.

Civil action to recover the sum of $1,922.51 evidenced by two promissory notes given by the defendant to the plaintiff.

On 22 April, 1930, defendant wired plaintiff, a nonresident corporation, as follows: "We desire to have consultation with some of our creditors Friday, 25 April, two p.m. Please wire us immediately whether you can attend this meeting."

On 24 April, plaintiff wired W. O. Carter, its salesman for this territory, as follows: "Yeager calls creditors meeting for tomorrow at two can you arrange to sit in and plug for us."

On 25 April, Carter replied: "Answering will attend Yeager creditors meeting and report."

Pursuant to above authorization, W. O. Carter attended creditors' meeting 25 April, 1930, and executed in the name of his principal, along with the representatives of ten other creditors, a compromise agreement to accept ⅓ in cash or ½ on terms, in full of their claims. This agreement is pleaded in reduction of plaintiff's right to recover on the notes in suit. The case turns on Carter's authority to bind the plaintiff.

The question of Carter's authority to sign the compromise agreement was submitted to the jury, who found in favor of such authority. Judgment was thereupon entered agreeably to the terms of said agreement. Plaintiff appeals, assigning errors.

Theodore F. Cummings and E. B. Cline for plaintiff.

Thomas P. Pruitt and W. A. Self for defendants.

STACY, C. J. The language of the agent's authorization, "to sit in and plug for us" at creditors' meeting, reasonably lends itself to the interpretation placed upon it in good faith by Carter and the defendant, and the jury was justified in taking the same view of it. 2 C. J., 559. *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857.

The expression "plug for us," to say the least, is ambiguous and equivocal, and the principle applies that a letter or telegram of instruction from a principal to an agent should be expressed in clear language, and if not expressed in "plain and unequivocal terms, but the language is fairly susceptible of different interpretations, and the agent in fact is misled and adopts and follows one, while the principal intends another, then the principal will be bound, and the agent will be exonerated." Story on Agency, sec. 74; *Winne v. Ins. Co.*, 91 N. Y., 185.

The telegram of authorization did not ask for a report of the meeting. However, a report was made in keeping with the agent's reply, and it is to be presumed that Carter informed the plaintiff of his execution of the compromise agreement. We have failed to find on the record any specific repudiation of Carter's action in this respect. Gordon J. Talge, a witness for plaintiff, does say that he expressed great surprise on 20 June, 1930, when Yeager informed him of Carter's signature to the agreement and that Carter made no reference to it in his report. It is also in evidence by John H. Talge, witness for plaintiff, that Carter had no authority to compromise plaintiff's claim. But no repudiation seems to have been made. The plaintiff cannot in justice defeat the compromise agreement by putting an interpretation upon its instructions at variance with that of its agent and the defendant, since the language clearly warrants the latters' interpretation. 21 R. C. L., 907.

No error.

ELBERTA REVIS v. HANNAH RAMSEY, ADMINISTRATRIX, ET AL.

(Filed 15 June, 1932.)

1. Appeal and Error A d—Appeal from granting of motion to amend is premature.

An appeal from the granting of a motion to amend is premature, the appellant having suffered no harm from the allowance of the motion.

2. Judgments L b—Doctrine of res judicata does not apply to incidental motions not affecting substantial rights.

The doctrine of *res judicata* does not apply to ordinary motions incidental to the progress of the trial but only to those involving substantial rights.

REVIS *v.* RAMSEY.

APPEAL by plaintiff from *Sink, J.*, at February Term, 1932, of MADISON.

Civil action to recover on a promissory note for $700, dated 22 February, 1916, due 1 December, 1916, under seal, and ostensibly signed by Caney Ramsey and Z. Ponder as makers.

The defendant, Z. Ponder, in his original answer, denied executing the note and pleaded the three, seven and ten-year statutes of limitations.

When the case was called for trial at the October Term, 1931, Stack, J., presiding, "the defendant, in open court, asked for permission to amend his answer so as to set up the statute of limitations and the court, in its discretion, denies the motion, and the defendant excepts."

There was a verdict, at said term, finding that plaintiff's claim was barred by the statute of limitations as to the defendant, Z. Ponder. This was set aside, in the discretion of the court, as contrary to the weight of the evidence. *Welch v. Hardware House, ante,* 641; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686; *Goodman v. Goodman,* 201 N. C., 794, 161 S. E., 688.

Thereafter, at the February Term, 1932, *Sink, J.*, presiding, the defendant, Z. Ponder, asked to be permitted to amend his answer and set up that he signed said note as surety only, and to plead the three-year statute of limitations, no payments having been made thereon within three years next preceding the filing of plaintiff's complaint. Motion allowed, and plaintiff appeals.

John A. Hendricks for plaintiff.

John H. McElroy and Carter & Carter for defendant Ponder.

STACY, C. J. The plaintiff contends that as the application of the defendant, Z. Ponder, to amend his answer so as to plead the statute of limitations was denied by Stack, J., at the October Term, 1931, Sink, J., was without authority at the February Term, 1932, to hear a renewal of the same motion and to allow it, upon the theory that the matter was then *res judicata* and no appeal lies from one Superior Court judge to another. *Wellons v. Lassiter,* 200 N. C., 474, 157 S. E., 434; *Phillips v. Ray,* 190 N. C., 152, 129 S. E., 177; *Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501; *May v. Lumber Co.,* 119 N. C., 96, 25 S. E., 721; *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130; *Roulhac v. Brown,* 87 N. C., 1; *S. v. Evans,* 74 N. C., 324.

The motion made at the February Term is different from the one lodged at the October Term. Compare *Jones v. Thorne,* 80 N. C., 72. The first was perhaps denied because it was thought the statute of limitations had already been pleaded. But however this may be, no harm

has come to the plaintiff from the ruling on the second motion, and his appeal is premature. *Trust Co. v. Whitehurst,* 201 N. C., 504.

The principle of *res judicata* does not extend to ordinary motions incidental to the progress of a cause, but only to those involving substantial rights. *Allison v. Whittier,* 101 N. C., 490, 8 S. E., 338; *Mabry v. Henry,* 83 N. C., 298.

Appeal dismissed.

JACOB THOMPSON v. K. B. JOHNSON.

(Filed 15 June, 1932.)

Bills and Notes H b—Complaint in action on note by payee or endorsee held not demurrable for failure to allege ownership.

The payee or endorsee of a negotiable instrument is prima facie the holder and owner, and entitled to sue thereon, and in an action by the payee, a demurrer on the ground that the complaint failed to allege that the plaintiff was the owner or holder of the note is properly overruled, it being for the defendant to show the contrary as a defense.

CIVIL ACTION, before *Cowper, Special Judge,* at January Special Term, 1932, of WAKE.

Plaintiff alleged that on 1 January, 1930, the defendant, K. B. Johnson, and J. Beal Johnson executed and delivered a promissory note for $5,000, payable to Jacob Thompson, and that as collateral to said note there was pledged and "delivered to the plaintiff" certain shares of stock, and that no part of the note had been paid. The defendant demurred to the complaint upon the ground that there was no allegation as to whom the note was delivered or that the plaintiff was the owner or holder of said note. The demurrer was overruled and the defendant excepted and appealed.

Calvert & Duncan for plaintiff.
A. J. Fletcher for defendant.

PER CURIAM. It is true that the complaint is little more than a skeleton, but the judgment overruling the demurrer is sustained upon the authority of *Deloatch v. Vinson,* 108 N. C., 148, 12 S. E., 895. The Court said: "The payee or endorser of a note is the prima facie owner and holder. The allegation that he is so is unnecessary, and if the defendant defends upon the ground that the plaintiff is not such owner, he should set up the facts showing title in someone else."

Affirmed.

ED PARKER AND JIM PARKER (AND MRS. MARTHA WHITFIELD, ADDITIONAL PARTY), v. H. W. WEBB AND J. C. WEBB, TRADING AS H. W. AND J. C. WEBB; AND W. T. SLOAN, SHERIFF.

(Filed 8 January, 1932.)

APPEAL by defendants H. W. and J. C. Webb, from *Daniels, J.* From ORANGE. Affirmed.

The court below rendered the following judgment: "This cause coming on to be heard before the undersigned judge upon the demurrer filed by the Fidelity and Deposit Company of Maryland, to the answer or cross-complaint of the defendants, H. W. and J. C. Webb, and the court being of the opinion that no cause of action is stated against the defendant, the Fidelity and Deposit Company of Maryland; It is, therefore, ordered that the demurrer be sustained and that the defendant, Fidelity and Deposit Company of Maryland, go without day and recover its costs. F. A. Daniels, judge presiding."

"To the foregoing judgment the plaintiffs and the defendants, H. W. and J. C. Webb, except, and give notice of appeal to the Supreme Court."

The only exception and assignment of error was to the judgment as rendered by the court below.

Graham & Sawyer for plaintiff.
S. M. Gattis, Jr., for defendants Webb.
S. Brown Shepherd for Fidelity & Deposit Company of Maryland.

PER CURIAM. An eminent and able judge in the court below sustained the demurrer, after hearing arguments of counsel on the questions of law involved.

The proviso in C. S., 1416, is as follows: "Provided that the justices shall not be required to write their opinion in full except in cases in which they deem it necessary." The filing of a written opinion in a case is discretionary with the Supreme Court. *Bradsher v. Cheek,* 112 N. C., 838; *S. v. Council,* 129 N. C., 511; *Parker v. R. R.,* 133 N. C., 335.

From a careful reading of the record and the briefs of the litigants, we think the judgment of the court below sustaining the demurrer correct. The judgment below is

Affirmed.

JOSEPH ROGEN v. HENRY LUFF.

(Filed 8 January, 1932.)

APPEAL by plaintiff from *McElroy, J.*, at Chambers in Troy, 10 October, 1931. From RANDOLPH.

Civil action by plaintiff, assignee of certain claims against the United Talc and Crayon Manufacturing Company, to recover of defendant on his stock subscription for stock in said corporation, it being alleged that same was issued for property grossly and fraudulently overvalued, etc. Service by publication and attachment. Motion to dissolve attachment allowed. Exception. Appeal.

J. A. Spence for plaintiff.
K. R. Hoyle and A. A. F. Seawell for defendant.

PER CURIAM. The presumption against error has not been overcome. The judgment will be affirmed without extended opinion. C. S., 1416.

Affirmed.

J. B. COLT AND COMPANY v. W. C. NORWOOD AND MRS. W. C. NORWOOD.

(Filed 8 January, 1932.)

Cancellation and Rescission of Instruments A b—Contract may not be set aside for promissory misrepresentations.

While a contract may ordinarily be set aside for fraud, misrepresentations of a promissory nature are not embraced in the rule.

APPEAL by defendants from *Stack, J.*, at May Term, 1931, of UNION. Affirmed.

Gillam Craig for plaintiff.
Vann & Milliken for defendants.

PER CURIAM. The parties entered into a written agreement by the terms of which the plaintiff sold and the defendants purchased a carbide lighting plant. The machinery and all the materials were delivered to the defendants who refused to pay the purchase price or to execute promissory notes according to their agreement. The plaintiff brought suit and the defendants pleaded fraud. The Superior Court rendered judgment for the plaintiff on the pleadings, and the defendants excepted and appealed.

In their answer the defendants set up alleged false representations made by the plaintiff's agent.

A contract if vitiated by fraud may ordinarily be attacked and set aside. But there may be representations which, though not correct, are not embraced in this rule; such, for example, as promissory statements which have reference to the future. We agree with his Honor in saying that the representations set forth in the answer of the defendants are in this class. The subject is discussed and controlling cases are cited in *Colt v. Conner,* 194 N. C., 344. Besides, the defendants "warranted" that they did not rely on the agent's representations.. Judgment

Affirmed.

BURNIE HOLLIFIELD, BY HIS NEXT FRIEND W. E. HOLLIFIELD, v. SOUTHERN RAILWAY COMPANY.

(Filed 8 January, 1932.)

APPEAL by defendant from *Sink, J.,* at July Term, 1931, of McDOWELL.

Pless & Pless for plaintiff.

R. C. Kelly and Erwin & Erwin for defendant.

PER CURIAM. This is an action to recover damages for personal injury. The plaintiff was in the act of crossing a track of the defendant in Biltmore and was struck by a coal car propelled or shunted by an engine. He alleged that his injuries are permanent. His complaint sets out the specific acts of negligence on which he relies, and the defendant, denying negligence on its part, pleaded contributory negligence on the part of the plaintiff. The defendant offered no evidence and at the conclusion of the plaintiff's evidence made a motion for nonsuit, which was refused. This motion presents the main point in controversy.

There is ample evidence of the defendant's negligence and of the plaintiff's contributory negligence. The various contentions of the parties were submitted to the jury upon proper issues and were determined in favor of the plaintiff. The exception to the court's failure to dismiss the action is overruled.

The exceptions to the admission of evidence are not of sufficient gravity to require a new trial.

No error.

J. F. SHEPHERD v. ROY MICHAEL AND BLACKWOOD LUMBER COMPANY.

(Filed 8 January, 1932.)

APPEAL by petitioner, Blackwood Lumber Company, from *Harding, J.*, at August Term, 1931, of MACON. Affirmed.

Edwards & Leatherwood for plaintiff.
Harkins, Van Winkle & Walton and Alley & Alley for petitioner.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the negligence of the Blackwood Lumber Company and Roy Michael, its foreman and superintendent. The Lumber Company filed a petition for removal to the District Court of the United States for the Western District of North Carolina on the ground of fraudulent misjoinder of parties defendant. The clerk denied the petition and on appeal to the Superior Court his order was affirmed. The petitioner excepted and appealed.

We affirm the judgment of the Superior Court on the authority of *Crisp v. Fibre Co.*, 193 N. C., 77, and *Givens v. Mfg. Co.*, 196 N. C., 377.

Affirmed.

STATE v. DICK DEAL.

(Filed 8 January, 1932.)

APPEAL by defendant from *Clement, J.*, and a jury, at June Term, 1931, of BURKE. No error.

The defendant was indicted for the homicide of Walter Simmons on 10 February, 1931, and was convicted of manslaughter.

The State contends that the evidence shows that deceased had been working on a house, quit work about 5:30 p.m., and got Carl Leonhardt to carry him in a car three and a half or four miles out from Morganton to a Mrs. Ida Brittain's, from whom he wished to collect a bill. When they arrived there were two girls on the porch, and Simmons (deceased) inquired for Mrs. Brittain. They then drove to the back yard, got out and went into the back porch and Simmons asked for Mrs. Brittain. Defendant came out of the hall toward Simmons, saying "Simmons, what the God damn hell do you want here?" Deceased replied that he did not know it was "any of your God damn business." Whereupon,

defendant said "I will show you whether it is any of my damn business or not," turned, went into a room at the left side of the hall, picked up something from a dresser or table, and came back with his hands behind him. Simmons grabbed defendant's hands, and some words followed, Leonhardt trying to prevent trouble. Deceased "let go" defendant's arm, and dropped his hand. While Leonhardt was holding deceased, defendant hit the latter with something, and witness saw a hammer fall from his hand. Defendant refused to help with deceased, when asked, saying, "Hell, no, damn him." From the effects of the wound Simmons died on 23 February, 1931, at Grace Hospital, Morganton, where he was taken for treatment.

The defendant contends: That he was living at and making his home with Mrs. Ida Brittain. He was seated by the fire reading, when the fire died down and he went out to get wood, or fuel. He was met by the deceased, and after considerable cursing they became engaged in a difficulty, and in the course of the fight or difficulty the deceased was killed by the prisoner with the use of a claw hammer. The prisoner admitted the use of this weapon and undertook to carry the burden of proving justifiable homicide. He admitted the killing, but pleaded that he was in his own home, at a place where he had a right to be; that he was murderously assaulted by the deceased, and that he retreated eight or ten feet before he dealt the death blow, his only defense was, and is, that he was justified in fighting in defense of his own home and his person.

The defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court.

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

R. L. Huffman and Hatcher & Berry for defendant.

PER CURIAM. At the close of the State's evidence and at the close of all the evidence, the defendant made motions to dismiss the action or for judgment of nonsuit. C. S., 4643. These motions were overruled by the court below, and in this we can see no error.

The exception and assignment of error as to the alleged expression of opinion by the court below, if error, we cannot see how it was prejudicial. The exceptions and assignments of error as to the charge cannot be sustained. The court below, from a careful reading of the charge, taking the same as a whole, gave the law applicable to the facts. Gave the contentions of both the State and defendant fairly and accurately. We see no new or novel principle of law involved in the case.

Evidence on the part of the State as to the general reputation of the State's witness, Carl Leonhardt, and defendant and his witness, Mrs. Ida Brittain, was as follows:

"Ernest Whisnant testified to the good character of Carl Leonhardt, and the bad character of Dick Deal and Mrs. Ida Brittain. Chief Duckworth testified to the good character of Carl Leonhardt, and the bad character of Dick Deal for liquor, and the general bad character of the defendant Dick Deal and Mrs. Ida Brittain. C. H. Ollis, police officer, testified to the general good character of the State's witness, Carl Leonhardt, and the general bad character of the defendant Dick Deal and Mrs. Ida Brittain."

It was mainly a question of fact to be determined by the jury and they have found for the State. In law we can find

No error.

D. J. LOHR, JR., BY HIS NEXT FRIEND, D. J. LOHR, v. CLIFTON ROTHROCK, BY HIS GUARDIAN AD LITEM, MRS. IDA ROTHROCK AND P. D. ROTHROCK.

(Filed 27 January, 1932.)

APPEAL by plaintiff from *Sink, J.*, at April Special Term, 1931, of DAVIDSON. Reversed.

This is an action for actionable negligence brought by plaintiff against defendant. The allegations of the complaint, in part, are as follows: "That on or about 11 October, 1929, the plaintiff was riding a bicycle upon Salem Street in the city of Thomasville, and was proceeding in a careful, prudent and lawful manner in a southern direction along said street, observing all rules and regulations and ordinances required; that the defendant, Clifton Rothrock, was operating the said Chevrolet coach of the defendant, P. D. Rothrock, as his agent, servant or employee, and with his consent, in a northern direction along said Salem Street; in a careless, reckless, negligent and unlawful manner; that as the plaintiff had entered into the intersection of East Guilford Street with the said Salem Street some few feet, the defendant, Clifton Rothrock, carelessly, negligently, recklessly and unlawfully ran into, struck and knocked the plaintiff from the said bicycle he was riding, and knocked the plaintiff and his bicycle back several feet and into the curb of East Guilford Street. That the said automobile was being operated by the defendant in a careless, reckless, negligent and unlawful manner in that: (a) The same was being operated at a rapid and unlawful

rate of speed, and in excess of that allowed by law; (b) in that a left-hand turn into West Guilford Street was being made without any signal or warning being given to the plaintiff; (c) in that the same was being operated without proper signaling device; (d) in that the same was being operated without being equipped with proper brakes; (e) in that the defendants failed and refused to keep to the right of the center of the street intersection as required by law: (f) in that the defendant failed and refused to yield to the plaintiff his right of way as provided by law; (g) in that the defendants failed and refused to use the last clear chance to avoid striking the plaintiff and bicycle upon which he was riding. All of which acts of carelessness and negligence on the part of the defendants were the sole, proximate and direct cause of the injury received by the plaintiff, and the damage done to the bicycle as hereinafter set out."

The defendants denied the material allegations of the complaint and that they were guilty of any negligence, and further allege that the automobile was operated by defendant Clifton Rothrock "in a careful and lawful manner and with due regard to the safety and rights of others." (a) That the same was being operated at a slow and lawful rate of speed, and not in excess of that allowed by law; (b) that the left-hand turn into West Guilford Street was being made by signal and warning to anyone who might be in the rear or in the front of the said defendant; (c) that at this particular time, the car was equipped with the proper signaling device; (d) that the time of the said accident the same was being operated and equipped with good and sufficient brake; (e) that the defendant kept to the right of the street intersection as was required of him by law; (f) that at the time of the said accident, the defendant, Clifton Rothrock, had already made a left-hand turn into West Guilford Street, and the front part of the car had entered into said West Guilford Street before the plaintiff came near the intersection." The defendant also set up the plea of contributory negligence.

H. R. Kyser for plaintiff.
Ford Myers and Phillips & Bower for defendants.

PER CURIAM. At the close of plaintiff's evidence the defendants made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The motion was granted and in this we think there was error.

We have read with care the evidence of plaintiff and think it sufficient to be submitted to a jury. We will not set it forth or discuss the law, as the case goes back to be heard before a jury. There must be a

New trial.

SUDIE MERRELL, ADMINISTRATRIX, v. SOUTHBOUND RAILWAY COMPANY.

(Filed 17 February, 1932.)

APPEAL by plaintiff from *Clement, J.*, at April Term, 1931, of FORSYTH.

Civil action to recover damages for an alleged wrongful death.

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

Wallace & Wall for plaintiff.

Parrish & Deal and Craige & Craige for defendant.

PER CURIAM. The case was properly nonsuited on authority of *Davis v. R. R.*, 187 N. C., 147, 120 S. E., 827, and *Exum v. R. R.*, 154 N. C., 408, 70 S. E., 845, as the facts bring it within the principles there announced.

It would serve no useful purpose to set out the evidence in detail, as the principal question presented is its sufficiency to carry the case to the jury, and we agree with the trial court that it is wanting in the requisite probative value to warrant a recovery for the plaintiff.

Affirmed.

LEM BROOKS ET AL. v. TOWN OF BREVARD.

(Filed 17 February, 1932.)

APPEAL by plaintiffs from *Sink, J.*, heard by consent at Chambers, Asheville, 26 August, 1931. From TRANSYLVANIA.

Civil action to restrain the defendant from enforcing a water ordinance.

From a judgment dissolving the temporary restraining order, the plaintiffs appeal, assigning errors.

D. L. English for plaintiffs.

Ralph H. Ramsey, Jr., and Merrimon, Adams & Adams for defendant.

PER CURIAM. It does not appear from the record that the plaintiffs are entitled to the injunction which they seek.

Affirmed.

EVA S. GOODE v. MAIDEN CHAIR COMPANY ET AL.

(Filed 17 February, 1932.)

APPEAL by defendant, R. B. Killian, from *Moore, J.*, at July Term, 1931, of LINCOLN.

Civil action to recover on a promissory note made by Maiden Chair Company and endorsed by R. B. Killian and others, instituted 28 March, 1930, and judgment by default, for the want of an answer, entered 12 May, 1930.

Thereafter, on 29 June, 1931, R. B. Killian lodged a motion to vacate the judgment on the ground that "no prosecution bond was executed at the time of the purported summons issued." Motion overruled, and movant appeals.

Kemp B. Nixon for plaintiff.

W. H. Childs and W. A. Dennis for defendant, Killian.

PER CURIAM. Affirmed on authority of *Brittain v. Howell*, 19 N. C., 107.

Affirmed.

CICERO GRUBB ET AL. v. D. O. CECIL.

(Filed 17 February, 1932.)

APPEAL by defendant from *Sink, J.*, at April Special Term, 1931, of DAVIDSON.

Civil action tried upon the following issues:

"1. Did the plaintiffs and the defendant enter into the contract as alleged in the complaint? Answer: Yes.

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

"3. If so, what damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: $500."

From a judgment on the verdict, the defendant appeals, assigning errors.

H. R. Kyser for plaintiffs.

Walser & Walser, Phillips & Bower and Walser & Casey for defendant.

PER CURIAM. The dispute was essentially one of fact, determinable alone by the jury. A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the decisions and principles applicable. The verdict and judgment will be upheld.

No error.

WILLARD GARDNER AND WIFE, LIZZIE GARDNER, v. YANCEY BUILDING AND LOAN ASSOCIATION.

(Filed 17 February, 1932.)

APPEAL by plaintiffs from *Harwood, Special Judge,* at August Term, 1931, of YANCEY.

Civil action to remove cloud from title.

The facts are these:

1. On 28 July, 1926, R. F. Gardner and wife conveyed to the plaintiffs, by warranty deed, a lot of land situate in the town of Burnsville, N. C. This deed was not registered until 25 May, 1927.

2. Thereafter, on 12 April, 1927, R. F. Gardner and wife gave the Yancey Building and Loan Association a deed of trust on a tract of land situate in the town of Burnsville, which included the lot previously sold to the plaintiffs. This deed of trust was duly registered 20 April, 1927.

3. Plaintiffs allege that the inclusion of their lot in the defendant's deed of trust was the result of inadvertence or mistake on the part of the grantors therein.

From a judgment of nonsuit entered at the close of plaintiffs' evidence, they appeal, assigning error.

Charles Hutchins for plaintiffs.

C. R. Hamrick and Watson & Fouts for defendant.

PER CURIAM. In the absence of an allegation of fraud or mutual mistake, it would seem that the case is controlled by the decision in *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494, upon which the judgment was entered, rather than on the principles announced in *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636, cited by the plaintiffs.

Affirmed.

BOGUE DEVELOPMENT CORPORATION, LARRY B. WEST AND G. V. COWPER, TRUSTEE, v. W. D. W. BISHOP.

(Filed 17 February, 1932.)

APPEAL by plaintiffs from *Frizelle, J.*, and a jury, at October Term, 1931, of BEAUFORT. No error.

The complaint alleges, in part: "That heretofore on ..... May, 1927, plaintiffs, Bogue Development Corporation and Larry B. West, constructed a garage for the defendant for his use and benefit and upon his contract and agreement to pay. That under the said contract and agreement there is due to the plaintiffs $374, with interest, demand of payment of which has been made and refused."

The defendant denied any indebtedness and in bar of recovery and as a defense to the action, set out new matters in the answer. The plaintiff replying to the new matters denied the material allegations.

The issue submitted to the jury and their answer thereto were as follows: "Is defendant indebted to plaintiff and if so in what amount? Answer: Nothing."

On the verdict of the jury the judgment of the court below was "that plaintiffs take nothing by their action," etc.

Ward & Grimes for plaintiffs.
MacLean & Rodman for defendant.

PER CURIAM. The evidence on the part of plaintiffs was to the effect that they built a stone, tile and stucco garage for defendant. The garage contained, besides a place to park the car, servant's quarters for them to sleep in. It had a bath and toilet, water works, shower and stool which were connected with the city sewer system. The servant's room is 10 by 12 and the garage is about 10 by 18 or 20. The contract price was $800 of which the sum of $426 had been paid, leaving a balance due of $374. That the garage was built according to contract and of fit, proper and suitable materials and in a workmanlike manner.

Plaintiffs' witness testified, unobjected to: "Mr. Bishop conveyed all this property back to the Bogue Development Corporation and of course the garage went with it as it was on the property."

The defendant's deposition was taken, and he testified, in part: "The agreed price for the garage, as best I can recall, was $800. The garage itself failed because of the faulty construction of the roof and the faulty construction of the drainage. In addition to that the building settled . . . and made it difficult both to open and close the doors

and windows throughout the building. Along with this, of course, was the great inconvenience caused by the delay of approximately two months in the completion of the garage. The garage as delivered to me was certainly not worth more than $500. I paid them $400 but after the defects developed, I refused to pay the balance."

The evidence of defendant in reference to the garage was to the effect that plaintiffs used in its construction inferior, defective, unfit and unsuitable materials and in that the plaintiffs did not construct the same in a workmanlike manner; that in consequence of the breach of the contract in the particulars alleged, the defendant received a building of much less the value than that contracted for and that the sum of $400 paid by the defendant is all the building as delivered to him was worth.

The evidence of plaintiffs supported their contention and that of defendant his contention. The jury decided for defendant, and we are bound by their finding, if there is no error in law.

We have read the charge of the court below with care and see no reversible or prejudicial error. The exceptions and assignments of error made by plaintiffs as to the admission of certain evidence on the part of the defendant cannot be sustained. On the record we find

No error.

E. N. SMITH v. ASTON PARK HOSPITAL, INCORPORATED.

(Filed 17 February, 1932.)

APPEAL by defendant from *Stack, J.*, at August Term, 1931, of BUNCOMBE.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff while a patient in the defendant hospital.

From a verdict and judgment for plaintiff, the defendant appeals, assigning errors.

J. E. Swain for plaintiff.
Harkins, Van Winkle & Walton for defendant.

PER CURIAM. Under the pleadings and the evidence adduced on the hearing, the case narrowed itself to issues of fact determinable alone by the jury. A careful perusal of the record leaves us with the impression that the trial was in substantial conformity to the principles of law applicable, and that no reversible error is manifest. Therefore, the verdict and judgment will be upheld.

No error.

S. L. EVANS v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 17 February, 1932.)

APPEAL by plaintiff from *Grady, J.*, at November Term, 1931, of EDGECOMBE. Affirmed.

J. P. Bunn for plaintiff.
Winston & Tucker and Jones & Brassfield for defendant.

PER CURIAM. The defendant issued a policy of insurance on the life of Willie Jenkins, naming Lucy Jenkins, his wife, as the beneficiary. The insured died and the defendant gave its check payable to Lucy Jenkins for the amount due on the policy and sent it to N. C. Wall, the defendant's agent. After the payee had endorsed the check Wall collected the whole amount and paid the plaintiff his bill for preparing the body for burial. Sometime afterwards an altercation occurred between Wall and the plaintiff in reference to a receipt for the amount paid. The plaintiff brought suit against the defendant alleging that he had been assaulted by its agent while he was acting within the scope of his authority. The defendant demurred and the trial court sustained the demurrer, being of opinion that, although it was alleged that the agent was acting within the scope of his authority the allegations of fact are inconsistent with and repugnant to this statement. In our opinion the judgment should be

Affirmed.

SANFORD SASH AND BLIND COMPANY, J. N. VANN AND COMPANY, INCORPORATED, DEWEY BROTHERS, AND L. M. JACKSON, v. C. B. MOONEY, BOARD OF TRUSTEES OF AHOSKIE GRADED SCHOOL DISTRICT AND AHOSKIE SCHOOL DISTRICT NO. 11, AND NATIONAL SURETY COMPANY.

(Filed 17 February, 1932.)

Appeal and Error J c—Findings of fact are conclusive on appeal.

The findings of fact of the trial court are conclusive on appeal when supported by evidence.

APPEAL by defendants, Ahoskie Graded School District and Ahoskie School District No. 11, from *Harris, J.*, at October Term, 1931, of HERTFORD. Affirmed.

The defendant C. B. Mooney, about 30 July, 1928, entered into a contract with the board of trustees of Ahoskie Graded School District to build, construct and erect a two-story brick and frame building to be known as the Ahoskie High School and Gymnasium in the town of Ahoskie, county of Hertford, State of North Carolina, according to plans and specifications prepared by Leslie N. Boney, architect. Mooney gave bond in the National Surety Company, defendant, in accordance with the law. C. S., 2445.

The plaintiffs, Sanford Sash and Blind Company, and other plaintiffs, interveners, contend that they should recover from the defendants the amounts due them, setting out the amounts due for materials furnished for construction and erection of the Ahoskie school building.

The defendants board of trustees of the school districts deny liability, and contend "That they kept in reserve more than 15 per cent and never paid over to said C. B. Mooney, the 15 per cent reserve under the contract until after the acceptance of the building."

The National Surety Company denies liability and contends that the total price including extras was "Seventy thousand eight hundred and seventy-six and 6/100 dollars ($70,876.06), and that the said board of trustees have actually paid out on the contract to the contractor all of said amount of said contract price, with the exception of one thousand six hundred and ninety-six and 84/100 dollars ($1,696.84), with the knowledge of unsettled claims for labor and material, and without the consent and approval of the said National Surety Company. . . . That the said board of trustees of Ahoskie Graded School District violated said contract in that they overpaid the contractor greatly in excess of the said 85 per cent and that they did not retain the said 15 per cent as required; and this defendant especially pleads the same in bar of recovery by the plaintiff."

The court below "finds as a fact that the defendant board of trustees of Ahoskie Graded School District breached their contract in that they overpaid the contractor in the sum of nineteen hundred sixty-two and 78/100 dollars ($1,962.78), and failed to retain 15 per cent as provided in said contract and paid the contractor the entire amount due upon the certificates of the architect, without making said retainage, and before final settlement was made with the contractor. . . . The court adjudges as a matter of law that said overpayment of nineteen hundred sixty-two and 78/100 dollars ($1,962.78), should be repaid by the said board of school trustees to National Surety Company as a reduction of its losses herein."

The court below rendered judgment for the amounts claimed by plaintiffs and the interveners and allowed a recovery for the labor and ma-

terials furnished against C. B. Mooney and the National Surety Company, and "It is further ordered and adjudged that the defendant board of trustees of Ahoskie Graded School District and Ahoskie School District No. 11, pay to the National Surety Company the sum of nineteen hundred and sixty-two and 78/100 dollars ($1,962.78), with interest thereon from 7 June, 1929."

The defendant board of trustees of the school districts excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

Thad. A. Eure and Williams & Williams for plaintiff.
W. D. Boone and Walter R. Johnson for defendant School District.
S. Brown Shepherd for National Surety Company.

PER CURIAM. The exception and assignment of error made by the board of trustees of the school districts cannot be sustained.

In a reference it is well settled that the findings of fact of the trial court are conclusive, except when there is no evidence to support them. In the present case there was evidence to support them. We think on the facts found the law of the case is set forth in *Crouse v. Stanley,* 199 N. C., 186. For the reasons given, the judgment of the court below is

Affirmed.

R. L. JUSTICE v. HUGH J. SLOAN ET AL.

(Filed 24 February, 1932.)

APPEAL by defendant, Jerry Liner, from *Harding, J.,* at September Term, 1931, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence and damages were submitted to the jury, which resulted in a verdict for the plaintiff, and from the judgment entered thereon, the defendant appeals, assigning as error the refusal of the court to nonsuit the case.

Morgan, Stamey & Ward and Jones & Ward for plaintiff.
Johnston & Horner and Alley & Alley for defendant, Jerry Liner.

PER CURIAM. The only question presented by the appeal is the sufficiency of the evidence to require its submission to the jury. The trial court ruled correctly on the motion to nonsuit. The verdict and judgment will be upheld.

No error.

STANDARD FERTILIZER COMPANY v. C. H. SUMMERELL.

(Filed 24 February, 1932.)

APPEAL by defendant from *Barnhill, J.*, at November Term, 1931, of MARTIN. No error.

This is an action to recover the balance due on two certain notes described in the complaint, to wit, the sum of $1,186.89 and interest, and the sum of $247.87 and interest. The notes sued on were executed by the defendant under his seal, and are payable to the plaintiff or its order. The said notes were due and payable on 1 November and 1 December, 1930, respectively. This action was begun on 18 February, 1931.

In his answer the defendant alleged that the consideration for the notes sued on was fertilizer sold to the defendant by the plaintiff; he alleges that the fertilizer delivered to him by the plaintiff was not the fertilizer which he purchased. He pleads in defense of plaintiff's recovery on the notes, want of consideration.

The issue submitted to the jury was answered as follows:

"Did the plaintiff fail to deliver to the defendant commercial fertilizer of the analysis guaranteed on the bag in accordance with the contract, as alleged? Answer: No."

From judgment that plaintiff recover of the defendant the sum of $1,186.89, with interest from 1 May, 1930, and the sum of $247.87, with interest from 12 January, 1931, and the costs of the action, the defendant appealed to the Supreme Court.

Coburn & Coburn for plaintiff.

B. A. Critcher and S. J. Everett for defendant.

PER CURIAM. On the admissions in the pleadings offered in evidence by the plaintiff, the court held that the burden of proof on the issue submitted to the jury, without objection, was on the defendant. In this there was no error. *Trust Co. v. Anagnos,* 196 N. C., 327, 145 S. E., 609. The evidence offered by the plaintiff in contradiction of the evidence offered by the defendant was properly admitted. *Swift & Co. v. Aydlett,* 192 N. C., 340, 135 S. E., 141. The evidence was submitted to the jury under instructions which are free from error. The defense relied on by the defendant was not sustained. There is no error in the judgment. It is affirmed.

No error.

CARRIE RAYNOR, ADMINISTRATRIX, v. RUNNYMEDE MILLS, INC.

(Filed 24 February, 1932.)

APPEAL by plaintiff from *Grady, J.*, at November Term, 1931, of EDGECOMBE.

Civil action to recover damages for an alleged wrongful death.

Plaintiff's intestate, Tom Raynor, foreman in defendant's mill, was killed by one Cad Harrell, an employee working under the deceased, while the two were on duty in the employ of the defendant.

The case was tried once before and nonsuited. On the present hearing, two defenses were interposed, first *res judicata,* and, second, nonliability under the plaintiff's showing.

From a judgment of nonsuit the plaintiff appeals, assigning errors.

V. E. Fountain and H. H. Philips for plaintiff.

Spruill & Spruill and George M. Fountain for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that the judgment of nonsuit is correct.

Affirmed.

BESSIE DAVIS, ADMINISTRATRIX OF J. H. DAVIS, v. D. C. DAVIS.

(Filed 24 February, 1932.)

APPEAL by plaintiff from *Moore, Special Judge,* at September Term, 1931, of HARNETT. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate.

At the close of the evidence for the plaintiff, the defendant moved for judgment as of nonsuit. The motion was allowed, and plaintiff duly excepted.

From judgment dismissing the action as of nonsuit, plaintiff appealed to the Supreme Court.

A. A. McDonald, F. H. Taylor and Hoyle & Hoyle for plaintiff.

Oates & Herring for defendant.

PER CURIAM. There was no evidence at the trial of this action tending to show that the defendant is liable for the death of plaintiff's intestate, as alleged in the complaint. For this reason, there is no error in the judgment dismissing the action as of nonsuit. C. S., 567. The judgment is

Affirmed.

MRS. R. G. ANDERSON ET AL. v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA.

(Filed 2 March, 1932.)

APPEAL by defendant from *Cranmer, J.*, at January Term, 1932, of PITT. Affirmed.

Blount & James for plaintiffs.
Charles P. Gaylor and F. G. James & Son for defendant.

PER CURIAM. This was a motion to set aside a judgment for excusable neglect. C. S., 600. His Honor denied the motion and upon the facts found we are of opinion that the judgment should be

Affirmed.

SANKY LOVEGROVE v. R. C. JOSEY, SR.

(Filed 2 March, 1932.)

APPEAL by plaintiff from *Moore, Special Judge,* at October Term, 1931, of HALIFAX.

Civil action to recover proceeds of share of cotton crop which plaintiff and defendant raised together in 1929.

The plaintiff recovered judgment for one-half the sum realized from a sale of the cotton, but he appeals, assigning as error the court's refusal to submit an issue on his allegation of fraudulent conversion on the part of the defendant.

E. L. Travis and Wade H. Dickens for plaintiff.
George C. Green for defendant.

PER CURIAM. The principle for which the plaintiff contends is clearly stated in *Doyle v. Bush,* 171 N. C., 10, 86 S. E., 165. But the evidence in the instant case is not sufficient to bring it within the doctrine therein announced. The defendant was to sell, at his discretion, and settle with the plaintiff, on the basis of the market price of cotton, on the day settlement was requested. This had been the practice between the parties for a number of years.

No error.

WM. H. LEWIS v. J. W. STOUT ET AL.

(Filed 9 March, 1932.)

APPEAL by defendants from *Cranmer, J.,* at November Term, 1931, of LEE.

Proceeding before the Industrial Commission for an award under the Workmen's Compensation Act. Award allowed from which the defendants appealed to the Superior Court where the findings and conclusions of the Commission were approved. From the judgment of the Superior Court, the defendants appeal.

Kenneth C. Royall and D. C. Humphrey for plaintiff.
H. C. Renegar and A. A. F. Seawell for defendants.

PER CURIAM. The record discloses no valid exceptive assignment of error.

Affirmed.

FEDERAL RESERVE BANK OF RICHMOND ET AL., v. L. C. MOSELEY ET AL.

(Filed 9 March, 1932.)

APPEAL by defendants from *Devin, J.,* at November Term, 1931, of LENOIR.

Civil action (1) to recover on two promissory notes, and (2) to set aside a deed alleged to have been executed by the defendants in fraud of the plaintiff's rights.

Demurrer interposed on the ground of misjoinder of parties and causes. Overruled; exception; appeal.

Wallace & White and Whitaker & Allen for plaintiffs.
Rouse & Rouse for defendants.

PER CURIAM. Affirmed on authority of *Carswell v. Talley,* 192 N. C., 37, 135 S. E., 181, *Robinson v. Williams,* 189 N. C., 256, 126 S. E., 621, *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465, *LeDuc v. Brandt,* 110 N. C., 289, 14 S. E., 778.

Affirmed.

TOWN OF GREENVILLE v. THE EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

(Filed 9 March, 1932.)

Insurance E b—Ambiguous policy will be construed in insured's favor.

Where a policy of insurance is ambiguous it will be construed in favor of the insured.

APPEAL by defendant from *Cranmer, J.,* at January Term, 1932, of PITT. Affirmed.

This action to recover on a policy of insurance was heard on defendant's demurrer to the complaint.

The issue of law presented by the demurrer involves the construction of the policy, the plaintiff contending that its loss as alleged in the complaint is covered by the policy, the defendant contending to the contrary.

The demurrer was overruled, with leave to the defendant to answer the complaint.

The defendant excepted and appealed to the Supreme Court.

J. C. Lanier for plaintiff.
Albion Dunn for defendant.

PER CURIAM. The court below was of opinion that the loss sustained by the plaintiff as alleged in the complaint, is covered by the policy of insurance issued by the defendant. For this reason, the demurrer was overruled. *Andrews v. R. R.,* 200 N. C., 483, 157 S. E., 431.

It must be conceded, we think, that there is doubt as to the meaning of the language used in the policy. Under the rule, however, as stated and applied in *Jolly v. Jefferson Standard Life Insurance Company,*

199 N. C., 269, 154 S. E., 400, the policy must be construed against the defendant, and in favor of the plaintiff. Applying this rule in the instant case, we concur in the opinion of the court below, and for that reason, the judgment is

Affirmed.

J. W. MOORE v. B. W. BOONE ET AL.

(Filed 9 March, 1932.)

APPEAL by defendant, T. H. Brown, from *Moore, Special Judge,* at December Term, 1931, of NASH.

Civil action to prevent waste, etc.

From a judgment for the plaintiff rendered on the "pleadings and the evidence introduced and admitted by the defendants," the defendant, T. H. Brown, appeals.

L. L. Davenport and Battle & Winslow for plaintiff.

Manning & Manning for defendant Brown.

PER CURIAM. A consideration of the record proper, to which we are limited in the absence of a statement of case on appeal, *In re Bank, ante,* 251; *Casualty Co. v. Green,* 200 N. C., 535, 157 S. E., 797, does not show that appellant has overcome the presumption against error. *Bailey v. McKay,* 198 N. C., 638, 152 S. E., 893. To prevail on appeal, he who alleges error must successfully handle the laboring oar. *Mangum v. Winstead, ante,* 252; *Frazier v. R. R., ante,* 11.

Affirmed.

D. J. EVERETT v. N. C. STATE FAIR ASSOCIATION, SELF-INSURER.

(Filed 16 March, 1932.)

No counsel for plaintiff.

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

PER CURIAM. The index to part of the record sent to this Court in the above action, says "Judgment on review by Judge W. A. Devin." The judgment of Judge Devin is not in the record. On authority of *Pruitt v. Wood,* 199 N. C., 788,

Appeal dismissed.

W. D. POOLE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 March, 1932.)

Master and Servant C b—Evidence of employer's negligence held insufficient.

In this case *held:* evidence of employer's negligence was insufficient to be submitted to the jury in action by foreman to recover for injuries sustained when workman moving heavy barrels under his direction stepped on his foot.

APPEAL by plaintiff from *Small, J.,* at October Term, 1931, of WAKE. Affirmed.

H. L. Swain for appellant.
Simms & Simms for appellee.

PER CURIAM. This is an action to recover damages for personal injury alleged to have been caused by the negligence of the defendant. The defendant's motion for nonsuit was granted and the plaintiff excepted and appealed.

The plaintiff, an employee of the defendant, was in charge of a labor gang working in the defendant's yard in Raleigh. The allegation of negligence is concise. In reference to it the plaintiff testified: "I was instructed to stay with my gang of laborers and direct their work. If I did not do so I was hollered at. None of my superiors were around there when I was hurt. On the day I was hurt in August, 1927, I had received orders from Mr. Lane to straighten up some barrels of paint lying on a platform. The paint was used to paint box cars. Both old cars and new cars. It was full of paint and weighed six or seven hundred pounds. I told the three Negro men to grab hold of the barrel and end it up. I told them to grab it up. While they were doing this it became overbalanced and Richard Hall, in jumping to catch it stepped on my left foot. I was around there telling the Negroes what to do, I was bossing them. I told the men to go there and set up the barrel. I was three or four feet from the barrel when my foot was stepped on. There were some other barrels back on the platform and I could not have gotten further back but could have gotten to either side out of the way. I could have seen the movement of Richard Hall if I had looked and he could have seen me if he had looked."

The judgment of nonsuit was correct. *Simpson v. R. R.,* 154 N. C., 51; *Lloyd v. R. R.,* 168 N. C., 646; *Potter v. R. R.,* 197 N. C., 17. Judgment

Affirmed.

STATE OF NORTH CAROLINA ON RELATION OF THE TRANSPORTATION ADVISORY COMMISSION v. J. W. CANADY ET AL.

(Filed 16 March, 1932.)

APPEAL by plaintiff from *Devin, J.*, at November Term, 1931, of ONSLOW.

Condemnation proceeding, instituted 6 December, 1929, to acquire lands within the right of way of the Intra-Coastal Waterway. The amount in dispute is about 12.34 acres, an oyster garden, located on Chadwick's Bay in Onslow County.

The case was tried upon the following issues:

"1. Are the defendants the owners in fee simple of the lands described in the petition? Answer: Yes.

"2. What was the market value of said lands at the time of the institution of this proceeding, to wit, December, 1929? Answer: $75.00 per acre. With interest."

Judgment on the verdict, from which the plaintiff appeals, assigning errors.

Nere E. Day, John D. Warlick and I. M. Bailey for plaintiff.
K. C. Sidbury and I. C. Wright for defendants.

PER CURIAM. The record supports the verdict, and while some of the exceptions are not altogether free from difficulty, on the whole, a careful consideration of them, viewed in the light of the evidence and the charge, leaves us with the impression that they should be resolved in favor of the validity of the trial.

No error.

MARY DAIL DIXON AND HER HUSBAND, J. W. DIXON, v. SEABOARD CITIZENS NATIONAL BANK, N. M. OSBORNE AND B. W. NEWCOMB.

(Filed 23 March, 1932.)

APPEAL by plaintiffs from *Small, J.*, at November Term, 1931, of WAKE. Affirmed.

This action was heard on the motion of the defendants that the sale of the lands described in the complaint, made by the commissioners appointed for that purpose, pursuant to a judgment, by consent, at February Term, 1930, of the Superior Court of Wake County, be confirmed.

From judgment confirming the sale and directing the commissioners to convey the lands to the purchasers, the plaintiff appealed to the Supreme Court.

Gulley & Gulley and D. R. Jackson for plaintiffs.
Joseph B. Cheshire, Jr., for defendants.

PER CURIAM. There is no error in the judgment confirming the sale of the lands described in the complaint. The exceptions of the plaintiffs were considered and overruled. The court found that the sale was fairly conducted in all respects and that the amount bid is a fair price for the lands. The sale was confirmed by the court in its discretion. The only assignment of error is based upon an exception to the judgment. It cannot be sustained. The judgment is

Affirmed.

STATE v. DUDLEY MOORE.

(Filed 13 April, 1932.)

Criminal Law L e—No appeal will lie from order of trial court refusing motion for new trial for newly discovered evidence.

A motion for a new trial for newly discovered evidence, made at the next succeeding term of criminal court after affirmance of the former conviction by the Supreme Court, is addressed to the discretion of the trial court, and his order refusing to grant the motion is not reviewable, and an appeal therefrom will be dismissed.

APPEAL by prisoner from *Warlick, J.*, at November Term, 1931, of DAVIDSON. Appeal dismissed.

Attorney-General Brummitt and Assistant Attorney-General Seawell for the State.
Price, Jones & Escoffery for prisoner.

PER CURIAM. At the August Term, 1931, of the Superior Court of Davidson County the prisoner was convicted of murder in the first degree and was sentenced to death by electrocution. On appeal to the Supreme Court the judgment was affirmed. *S. v. Moore,* 201 N. C., 618. At the next ensuing term of the Superior Court held for the trial of criminal actions the prisoner made a motion for a new trial on the ground of newly discovered evidence. After considering the affidavits

offered by the prisoner and the argument of counsel, the trial judge in the exercise of his discretion denied the motion. The prisoner excepted and appealed.

The question whether a new trial shall be granted for newly discovered evidence is addressed to the discretion of the court. *Goodman v. Goodman,* 201 N. C., 808; *S. v. Cox, ante,* 378; *S. v. Griffin, ante,* 517. The exercise of such discretion is not subject to review on appeal to this Court. *S. v. Branner,* 149 N. C., 559; *S. v. Griffin, supra.* This principle is settled and will be strictly enforced. The appeal is

Dismissed.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF JOHN ALLEN McDONALD, DECEASED.

(Filed 20 April, 1932.)

APPEAL by caveators from *Finley, J.,* at December Term, 1931, of MOORE.

Devisavit vel non. Judgment for propounder upon the following verdict:

1. Was the execution of the paper-writing purporting to be the last will and testament of John Allen McDonald procured by the undue influence of Jesse McKenzie, as alleged in the caveat? Answer: No.

2. Did John Allen McDonald at the time of the execution of said paper-writing, on 18 June, 1921, have sufficient mental capacity to execute the same? Answer: Yes.

3. Is the paper-writing propounded, and every part thereof the last will and testament of John Allen McDonald? Answer: Yes.

H. F. Seawell, Jr., and Fred W. Bynum for caveators.

U. L. Spence for propounder.

PER CURIAM. Upon inspection of the record we find that none of the assignments of error constitutes sufficient cause for disturbing the judgment. Neither of them calls for particular comment. The question put to the juror was the repetition of one he had previously answered; the judgment roll was competent as tending to show the feeling existing between the testator and the caveators; and except as provided in Rule 3, Superior Court, the judge's decision in reference to the right to open and conclude the argument is final and not reviewable. Rule 6; *In re Brown's Will,* 194 N. C., 583.

No error.

S. A. NATHAN AND HATTIE MAE NATHAN v. W. G. FIELDS AND C. C. EDWARDS.

(Filed 20 April, 1932.)

Appeal and Error J d—Where Court is evenly divided judgment will be affirmed.

Where on appeal the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment will be affirmed.

CIVIL ACTION, before *Daniels, J.*, at December Term, 1931, of ORANGE.

The plaintiffs recovered judgment against the defendants and thereafter in apt time the defendants made a motion to set aside the judgment upon the ground of excusable neglect.

The trial judge found the facts which are set out in the record, and upon such facts vacated the judgment, and the plaintiffs appealed.

Henry A. Whitfield for plaintiffs.
Brawley & Gantt for defendants.

PER CURIAM. *Stacy, C. J.*, took no part in the decision of this case, and the Court being evenly divided in opinion, the judgment is

Affirmed.

COMMISSIONER OF BANKS, ON RELATION OF THE UNITED BANK AND TRUST COMPANY, v. E. L. GAVIN AND HIS WIFE, MAMIE F. GAVIN.

(Filed 20 April, 1932.)

Abatement and Revival B b—Where judgment in pending action would not support plea of res judicata in second action plea in abatement is bad.

Where a judgment in a pending action would not support a plea of *res judicata* in a second action, and the two actions are not the same and the results sought are dissimilar, a plea in abatement in the second action on the ground that another action between the parties was then pending is properly overruled.

APPEAL by defendants from *Oglesby, J.*, at January Term, 1932, of GUILFORD. Affirmed.

This action was heard on the plea in abatement filed by the defendants on the ground that at the date of the commencement of the action another action between the same parties on the same cause of action was pending in the Superior Court of Lee County.

From judgment overruling the plea in abatement, and allowing defendants time to file answer or other pleadings, as they may be advised, defendants appealed to the Supreme Court.

Robert Moseley and R. R. King, Jr., for plaintiff.
D. B. Teague, S. Ray Byerly and K. R. Hoyle for defendants.

PER CURIAM. The judgment in this action is affirmed on the authority of *Brown v. Polk,* 201 N. C., 375, 160 S. E., 357, and decisions of this Court cited in the opinion in that case. A judgment in the action pending in the Superior Court of Lee County at the date of the commencement of this action would not support a plea of *res judicata* in this action. The causes of action alleged in the complaints in the two actions are not the same; and the results sought are dissimilar. This renders the plea in abatement bad.

The Commissioner of Banks by name should be made a party to this action. This may be done by amendment. *Commissioner of Banks v. Harvey, ante,* 380.

Affirmed.

VIRGIL L. SHIPES, BY HIS NEXT FRIEND, J. A. SHIPES, v. J. EDGAR POAG.

(Filed 27 April, 1932.)

Highways B o—Held: motion of nonsuit was properly granted in this action.

Where the evidence in an action by a chauffeur against his employer tends to show that the employer several times ordered the plaintiff to drive faster, and that the plaintiff attempted to take a curve at an excessive rate of speed, and ran through a barrier and down an embankment where the road on which he was driving ended and was cut through by a new road: *Held,* the defendant's motion as of nonsuit was properly granted. *Scott v. Telegraph Co.,* 198 N. C., 795.

APPEAL by plaintiff from *Moore, Special Judge,* at March Term, 1932, of MECKLENBURG.

G. A. Smith and William Milton Hood for appellant.
J. Laurence Jones for appellee.

PER CURIAM. This action was instituted to recover damages for personal injury alleged to have been sustained by the plaintiff through the negligence of the defendant. The plaintiff was 18 years of age. He and the defendant were in the defendant's car returning from Green-

ville, S. C., to Charlotte. It was night and the plaintiff was driving. He testified as follows: "After taking this road, he (the defendant) asked me how fast we were going. He could see the speedometer if he wished, but he always kept watching the road. I told him we were going thirty-five miles per hour. He said to speed it up, he was in a hurry. Then in a little bit he asked me again. I told him we were going forty miles an hour. He said to go faster, that he was in a hurry. Again he asked me. I told him between forty and forty-five miles per hour. At that moment we came to a curve in the road. I could see partly around the curve. I was not used to the car and slowed down. All at once a barrier across the road loomed up before me. I put on the brakes, and then we dove down an embankment where the road was cut off. It was the end of the road and a new road had been cut through and across the one on which we had been riding. The big car rolled and tumbled and I remember some one was pulling me out through the back window" . . . "Q. Was it a sharp curve? A. No. Q. Why did you say in your complaint it was? A. It was not a real sharp curve and I saw the curve as I came to it. I couldn't see all the way around it, but I could see almost around it. Q. You continued at the same speed? A. No, I dropped it down to thirty-five or forty. Q. You know the law in South Carolina was six miles around a curve? A. No, I didn't know anything about the South Carolina law. I was taking Mr. Poag's orders. He was in a hurry to get to Charlotte and wanted me to take all kinds of chances to get there. I had to do it in order to hold my job. If he says black is white you can't tell him it is not. Q. When you were coming around this curve what loomed up in front of you? A. There was no road to turn. I put the brakes on and when I did we went off over the embankment down in the new road. I was not used to the car and I do not know in what distance I could have stopped the car that night. There were sand and dirt there and when I put brakes on the wheels would slide. Q. Within what distance could you stop that car? A. I don't know. I could see a good piece in front of me and that was the first time I had driven Mr. Poag's car at night. Q. Could you see seventy-five yards ahead of you? A. I don't know, I never measured the distance. Q. You were running at such a speed going around this curve you couldn't stop the car? A. I couldn't stop the car."

At the close of the plaintiff's evidence the court dismissed the action as in case of nonsuit. The judgment is affirmed. *Scott v. Telegraph Co.*, 198 N. C., 795; *Davis v. Jeffreys*, 197 N. C., 712; *Lunsford v. Mfg. Co.*, 196 N. C., 510; *Weston v. R. R.*, 194 N. C., 210.

Affirmed.

WAKE COUNTY AND CITY OF RALEIGH v. MATT H. ALLEN AND WIFE, CHARLOTTE ALLEN, NATIONAL BANK OF SUFFOLK, V. C. EBERWINE AND TITLE GUARANTY INSURANCE COMPANY.

(Filed 27 April, 1932.)

APPEAL by defendants, National Bank of Suffolk, V. G. Eberwine and Title Guaranty Insurance Company, from *Harris, J.*, at Chambers, January, 1932. From WAKE.

Civil action to foreclose tax certificates against four lots in city of Raleigh for 1928 and 1929 city and county taxes.

Judgment for plaintiffs on agreed statement of facts, unquestioned by defendants, save as to the order in which said taxes should be prorated between the present owners of said lots.

The only assignment of error is to the judgment as signed.

No counsel appearing for plaintiffs.

Paul F. Smith for defendants, National Bank of Suffolk and V. G. Eberwine.

W. G. Mordecai for defendant, Title Guaranty Insurance Company.

PER CURIAM. The record contains no valid exceptive assignment of error.

Affirmed.

J. HERBERT BECK v. W. S. HALLIWELL.

(Filed 27 April, 1932.)

Frauds, Statute of A a—Statute does not apply to original promise to answer for debt of another.

The statute of frauds does not apply to the original promise to pay the debts of another.

APPEAL by defendant from *Finley, J.*, at December Term, 1931, of MOORE. No error.

From judgment on the verdict that plaintiff recover of the defendant the sum of $247.49, with interest and costs, the defendant appealed to the Supreme Court.

W. Duncan Matthews for plaintiff.

J. Vance Rowe for defendant.

PER CURIAM. There was evidence at the trial of this action tending to show that defendant is liable to the plaintiff as an original promisor for the purchase price of the goods delivered by plaintiff to the corporation in which defendant was a stockholder. "It is too well settled to require the citation of sustaining authorities that the statute of frauds does not apply to the original promises or undertakings, though the benefit accrues to another than the promisor." *Hospital Association v. Hobbs,* 153 N. C., 188, 69 S. E., 79.

Defendant's motion for judgment as of nonsuit was properly denied. The judgment is affirmed.

No error.

WILLIAM B. CAMPBELL v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND ROBERT STRANGE, LIQUIDATING AGENT OF THE HOME SAVINGS BANK.

(Filed 27 April, 1932.)

Appeal and Error J d—Where Court is evenly divided judgment will be affirmed.

Where on appeal the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment will be affirmed without becoming a precedent.

APPEAL by petitioner from *Barnhill, J.,* at October Term, 1931, of NEW HANOVER. Affirmed.

From judgment that the petitioner is not entitled to the relief prayed for in his petition, the petitioner appealed to the Supreme Court.

Bryan & Campbell for petitioner.
Woodus Kellum for respondent.

PER CURIAM. *Stacy, C. J.,* not sitting at the hearing of this appeal, and the Associate Justices being evenly divided in opinion as to whether there is error in the judgment, the judgment is affirmed. The decision does not become a precedent. *Nebel v. Nebel,* 201 N. C., 840, 161 S. E., 223.

Affirmed.

MRS. RAY CHAPPELL OVERTON, ADMINISTRATRIX, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 4 May, 1932.)

APPEAL by plaintiff from *MacRae, Special Judge,* at March Term, 1932, of ROWAN.

Civil action to recover damages for an alleged wrongful death, brought against the Southern Railway Company, a corporation chartered under the laws of the State of Virginia, and the city of Salisbury, a municipal corporation chartered under the laws of North Carolina.

Motion by nonresident defendant to remove cause to the District Court of the United States for the Middle District of North Carolina for trial. Motion allowed, and plaintiff appeals.

Hayden Clement for plaintiff.

Linn & Linn and R. C. Kelly for defendant Southern Railway Company.

PER CURIAM. The petition for removal, in addition to showing the presence of the requisite jurisdictional amount, asserts a right of removal on the grounds of diverse citizenship and fraudulent joinder of the resident defendant.

It appears that no valid cause of action is stated against the resident defendant, city of Salisbury, hence, under *Wright v. Utility Co.,* 198 N. C., 204, 151 S. E., 241, the motion to remove was properly allowed.

Affirmed.

T. W. FERGUSON ET AL. v. C. O. MCNEILL ET AL.

(Filed 11 May, 1932.)

APPEAL by defendants from an order of *Finley, J.,* made in Chambers in Wilkes County on 23 January, 1932, continuing a restraining order to the final hearing.

A. H. Casey, Trivette & Holshouser and W. H. McElwee for appellants.

Mark Squires and Charles G. Gilreath for appellees.

PER CURIAM. Upon an examination of the record in this cause we are of opinion that the judgment should be

Affirmed.

JOHN D. DORTON v. LIGGETT AND MYERS TOBACCO COMPANY.

(Filed 11 May, 1932.)

APPEAL by plaintiff from *Schenck, J.*, at January Term, 1932, of CABARRUS.

Motion to set aside judgment by default and inquiry, rendered by the clerk 20 April, 1931, which inquiry was executed at the August Term, 1931, Cabarrus Superior Court. Motion allowed, and plaintiff appeals.

Armfield, Sherrin & Barnhardt for plaintiff.
Walter D. Brown and Fuller, Reade & Fuller for defendant.

PER CURIAM. A majority of the Court being of opinion that the case is controlled by the decisions in *Meece v. Credit Co.*, 201 N. C., 139, 159 S. E., 17, and *Sutherland v. McLean*, 199 N. C., 345, 154 S. E., 662, the judgment stands

Affirmed.

G. C. WALSH ET AL. v. W. B. SOMERS ET AL.

(Filed 11 May, 1932.)

APPEAL by plaintiffs from *Clement, J.*, at Chambers, in Winston-Salem, 31 December, 1931. From WILKES.

Civil action to restrain the defendants from collecting special school taxes in what is known as Mount Pleasant School District, Wilkes County. The total amount of taxes involved is $145.40.

Upon the evidence adduced at the hearing, the judge dismissed the temporary restraining order and taxed the plaintiffs with the costs.

H. A. Cranor and J. H. Whicker for plaintiffs.
J. A. Rosseau and A. H. Casey for defendants.

PER CURIAM. A careful perusal of the record leaves us with the impression that no reversible error was committed on the hearing. *Hyatt v. DeHart*, 140 N. C., 270, 52 S. E., 781.

Affirmed.

COMMISSIONER OF BANKS OF NORTH CAROLINA v. N. B. C. CARRIER.

(Filed 11 May, 1932.)

1. Banks and Banking H a—Validity of stock assessment held not subject to attack on ground that purchase of stock was procured by fraud.

Where the Commissioner of Banks has levied an assessment against a stockholder in a bank in accordance with N. C. Code, 1931, sec. 218(c), the stockholder may not contest the validity of the levy upon appeal on the ground that the purchase of the stock was procured by the false and fraudulent representations of the officers of the bank, the stockholder having exercised the privileges and accepted the dividends from the stock for a long period and not having objected until after the insolvency of the bank and the levy of the assessment.

2. Banks and Banking H e—Commissioner of Banks must sue in his individual name.

An action by the Commissioner of Banks to enforce the statutory liability of a stockholder must be brought in his individual name, but his failure to do so may be cured by amendment.

APPEAL by defendant from *Sink, J.*, at December Term, 1931, of TRANSYLVANIA. Affirmed.

Ralph H. Ramsey, Jr., for appellant.
Pat Kimzey and J. Will Pless, Jr., for appellee.

PER CURIAM. On 17 July, 1928, the defendant purchased one hundred shares of the capital stock of the Brevard Banking Company, which closed its doors on 15 December, 1930, and is now in process of liquidation. Public Laws 1931, chaps. 243, 385. On 20 May, 1931, the Commissioner of Banks levied an assessment against the defendant equal to her stock liability. N. C. Code, 1931, sec. 218(c), subsec. 13. The defendant appealed, alleging that the purchase of her stock had been induced by the fraud of certain officers of the bank. Upon the pleadings and the facts the trial judge affirmed the levy of the assessment and dismissed the appeal. The judgment of the Superior Court sustaining the levy should be affirmed upon the principle stated in *Corporation Commission v. McLean, ante,* 77, and the cases therein cited. Whether the defendant may maintain an action for fraud against the officers of the bank we are not called upon to decide; but after receiving semiannual dividends for 1929 and 1930 and exercising the privileges and accepting the profits of a stockholder she is not entitled to have her purchase of stock canceled to the detriment of the depositors and credi-

tors of the bank. She should have acted with promptness and diligence.

We have held that actions such as this must be prosecuted in the individual name of the Commissioner of Banks and not under his official title. *Commissioner of Banks v. Harvey, ante,* 380; *Commissioner of Banks v. Johnson, ibid.,* 387; *Commissioner of Banks v. Mills, ibid.,* 509. This is a defect which may be cured by amendment. Judgment Affirmed.

EMMA DAVIS ET AL. v. ASBERRY MCDEVITT ET AL.

(Filed 18 May, 1932.)

APPEAL by defendants from *Stack, J.,* at October Term, 1931, of MADISON.

Civil action for trespass, converted into an action in ejectment upon defendants' plea of ownership, sole seizin and possession.

There was a verdict and judgment for plaintiffs, from which the defendants appeal, assigning errors.

Carl Stuart and Johnson, Smathers & Rollins for plaintiffs.
John A. Hendricks for defendants.

PER CURIAM. We have discovered no reversible error on the record. It is admitted that plaintiffs and defendants claim title from a common source. His Honor was of opinion that of the two titles shown, the plaintiffs had the better, and so instructed the jury. *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142. In this, we find

No error.

JOHN W. GARRISON v. SOUTHERN RAILWAY COMPANY.

(Filed 18 May, 1932.)

APPEAL by plaintiff from *Moore, J.,* at October Term, 1931, of BURKE.

Civil action to recover damages for alleged breach of contract in removing spur track running from defendant's main line to plaintiff's premises in the town of Morganton, brought under authority of *Parrott v. R. R.,* 165 N. C., 295, 81 S. E., 348.

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

Avery & Riddle and Mull & Patton for plaintiff.
Ervin & Ervin for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Clarkson, J.*, taking no part in the consideration or decision of the case, the judgment of the Superior Court stands affirmed in accordance with the general practice of appellate courts, without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840; *Durham v. Lloyd,* 200 N. C., 803, 157 S. E., 136.

Affirmed.

W. G. HARRISON, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 18 May, 1932.)

APPEAL by plaintiff from *Sink, J.*, at March Term, 1932, of BUNCOMBE.

Civil action to recover damages for an alleged wrongful death, instituted 6 November, 1931, against Southern Railway Company, a corporation chartered under the laws of Virginia, and J. W. McSherry, a citizen and resident of Buncombe County, N. C.

The corporate defendant, in apt time, filed its petition and bond for removal of the cause to the District Court of the United States for the Western District of North Carolina, for trial, on the ground of diverse citizenship, alleging in its petition that no summons had been served on J. W. McSherry, for that he was dead, having died some days prior to the issuance of said summons, and that the action was solely between plaintiff and the corporate defendant. The petition also shows the presence of the requisite jurisdictional amount. Motion by plaintiff to make administratrix of J. W. McSherry's estate party defendant denied, and motion to remove allowed. Plaintiff appeals.

Joseph W. Little for plaintiff.
R. C. Kelly and Jones & Ward for defendant, Southern Railway Company.

PER CURIAM. Affirmed on authority of *Huntley v. Express Co.,* 191 N. C., 696, 132 S. E., 786, and *Morgan v. Morgan,* 2 Wheat., 290, 4 Law Ed., 242.

Affirmed.

J. W. PALMER v. E. G. FINLEY.

(Filed 18 May, 1932.)

APPEAL by plaintiff from *Clement, J.*, at October Term, 1931, of WILKES. No error.

This is an action to recover the statutory penalty for usury charged and received by defendant on money loaned to the plaintiff. C. S., 2306.

On 10 July, 1925, the defendant loaned to the plaintiff the sum of $16,000. On said day, plaintiff executed and delivered to defendant his note for the amount of the loan, due and payable six months after date. As security for the payment of his note, plaintiff deposited with the Bank of North Wilkesboro certificates for 185 shares of the capital stock of the Meadows Mill Company, of the par value of $100 per share. The note was not paid at its maturity. On or about 5 January, 1927, plaintiff offered to transfer to defendant the certificates for the shares of stock in payment of his note. This offer was accepted by the defendant. The note was paid by the transfer of the stock. The amount of the note with lawful interest accrued thereon was less than the par value of the stock. The plaintiff contended that the difference between the amount due on the note and the par value of the stock was charged and received by defendant as a "bonus." This contention was denied by the defendant.

The first issue submitted to the jury was answered as follows:

"Did the defendant, E. G. Finley, at the time of the payment of the $16,000 note by the purchase of plaintiff's securities knowingly take, receive, reserve or charge a greater amount of interest than six per cent per annum either before or after the interest accrued? Answer: No."

From judgment that plaintiff take nothing by his action, and that defendant recover his costs, the plaintiff appealed to the Supreme Court.

Lawrence Wakefield, Mark Squires and Charles W. Bagby for plaintiff.

Burke & Burke and Julius A. Rousseau for defendant.

PER CURIAM. We find no error on the record in this appeal. Questions of fact involved in the issue were properly submitted to the jury. Their answer to the issue is conclusive. The judgment is affirmed.

No error.

EDITH FAISON v. C. L. EFIRD.

(Filed 18 May, 1932.)

APPEAL by plaintiff from *Barnhill, J.*, at December Term, 1931, of NEW HANOVER.

Civil action to recover damages for alleged negligent infliction of personal injuries. The plaintiff was walking on the public highway, about six miles from the city of Wilmington, when she was struck by defendant's automobile and injured.

The jury answered the issue of negligence in favor of the defendant. Thereupon, at the trial term and before entry of judgment, the plaintiff lodged a motion to set aside the verdict for misconduct of the jury in taking two toy automobiles into the jury room.

The following is the material part of the court's order:

"During the trial witnesses for the plaintiff and witnesses for the defendant used two toy automobiles to illustrate the manner in which they testified the wreck occurred, and counsel both for the plaintiff and the defendant used the same toy automobiles in illustrating their argument to the jury. After the jury had retired for deliberation, while returning from supper, one of the jurors took the two toy automobiles to the jury room. There the various jurors used the same to illustrate their understanding, pro and con, of the testimony of the respective witnesses, the deliberations finally resulting in the verdict which appears of record.

"Knowledge of the presence of the toy automobiles in the jury room was not called to the attention of the counsel for the plaintiff until after the verdict, and their motion was made in due time.

"Upon the hearing of the motion the court is of the opinion that the use of such toy automobiles merely aided the respective jurors in better presenting their various views as to the testimony of the respective witnesses, and was in no wise prejudicial to either party, and therefore denies the motion, and the plaintiff excepts. Motion to set aside the verdict in the discretion of the court is denied."

Plaintiff appeals, assigning errors.

Aaron Goldberg, Alton A. Lennon and Newman & Sinclair for plaintiff.

Rountree, Hackler & Rountree for defendant.

PER CURIAM. Affirmed on authority of *Bowman v. Howard,* 182 N. C., 662, 110 S. E., 98, and cases there cited. See, also, *Gooding v. Pope,* 194 N. C., 403, 140 S. E., 21.

Affirmed.

O. D. REVELL v. R. C. COLLINS.

(Filed 18 May, 1932.)

APPEAL by plaintiff from *Sink, J.*, at January Term, 1932, of BUNCOMBE. Affirmed.

Wells, Blackstock & Taylor for plaintiff.
George H. Wright for defendant.

PER CURIAM. The plaintiff instituted this action to restrain the sale of land for the collection of taxes, alleging that the taxes had been paid. He gave three checks in payment and the collector gave him tax receipts. Two of the checks, one for $1,500 and one for $1,200, were not paid. The receipts were canceled and in lieu thereof the tax collector issued and offered the plaintiff a receipt for payment of the proportionate part of the tax covered by the third check ($6,668.09) which was paid. The General County Court dissolved the restraining order upon the facts found and the judgment was affirmed on appeal to the Superior Court. The plaintiff contends that the act creating a board of financial control for Buncombe County (Public-Local Laws 1931, ch. 253) is unconstitutional; but we are of opinion that upon the facts found by the General County Court and affirmed on appeal the judgment should be

Affirmed.

JOHN A. BECHTEL v. CENTRAL BANK AND TRUST COMPANY ET AL.

(Filed 15 June, 1932.)

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

Where a sale sought to be restrained has taken place the plaintiff's appeal from the dissolution of a temporary restraining order will be dismissed.

APPEAL by plaintiff from *Harding, J.*, at September Term, 1931, of HAYWOOD.

Civil action to enjoin foreclosure of mortgage or deed of trust.

From a judgment dissolving a temporary restraining order, the plaintiff appealed to the Supreme Court, which appeal was dismissed for failure to comply with the rules. Thereafter, the property was sold

under the power of sale contained in the deed of trust; whereupon at the September Term, 1931, the action was dismissed. Plaintiff again appeals, assigning errors.

Joseph W. Little for plaintiff.
Heazel, Shuford & Hartshorn for defendants.

PER CURIAM. As the sale which the plaintiff seeks to enjoin has already taken place, there is nothing now to restrain, and the action was properly dismissed. *Rosseau v. Bullis,* 201 N. C., 12, 158 S. E., 553.

It is not worth while to moot an academic question.

Appeal dismissed.

JOHN A. BECHTEL v. D. J. WEAVER ET AL.

(Filed 15 June, 1932.)

APPEAL by plaintiff and defendants from *Harding, J.,* at September Term, 1931, of HAYWOOD.

Civil action to declare foreclosure of deed of trust void.

Plaintiff brought an action to enjoin foreclosure under deed of trust. Failing in that suit, and while it was still pending, he brings this action to declare the foreclosure void.

The defendants filed a plea in abatement and interposed a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. The plea in abatement was overruled, and the demurrer was sustained. Both sides appeal.

Joseph W. Little for plaintiff.
Heazel, Shuford & Hartshorn for defendants.

PER CURIAM. If it be conceded that the defendants' plea in abatement should have been sustained (*Brown v. Polk,* 201 N. C., 375, 160 S. E., 357), still the correct result has been reached in another way, and the judgment will not be disturbed. *Bank v. McCullers,* 201 N. C., 440; *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.

This disposition of the matter renders it unnecessary to consider defendants' appeal.

Affirmed.

H. G. GREER v. HOMER CRITCHER ET AL.

(Filed 15 June, 1932.)

APPEAL by defendant, C. M. Critcher, from *MacRae, Special Judge,* at November Special Term, 1931, of WATAUGA.

Civil action to recover damages for an alleged negligent injury caused by a collision between a car in which plaintiff was riding and defendant's car operated at the time by Homer Critcher, defendant's 16-year-old son. The scene of the injury was at the intersection of a side road with the Blowing Rock road just off Main Street in the town of Boone.

Upon motion, the action was dismissed as to the defendant, Homer Critcher, because of his infancy (*Morris Plan Co. v. Palmer,* 185 N. C., 109, 116 S. E., 261). From a verdict and judgment in favor of the plaintiff as against the defendant, C. M. Critcher, the said defendant appeals, assigning errors.

No counsel for plaintiff.
Trivette & Holshouser for defendant.

PER CURIAM. On controverted issues of fact, the jury has responded in favor of the plaintiff. The case seems to have been tried in substantial conformity to the principles of law applicable so far as appellant is concerned. We have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. Hence, the verdict and judgment will be upheld.

No error.

STATE OF NORTH CAROLINA v. J. G. STIKELEATHER ET AL.

(Filed 15 June, 1932.)

APPEAL by respondents, A. J. Franklin and others, from *MacRae, Special Judge,* at September-October Special Term, 1931, of SWAIN. No error.

This is a condemnation proceeding instituted by the State of North Carolina on behalf of the North Carolina Park Commission to acquire title to certain lands described in the petition, for park purposes, under and by virtue of chapter 48, Public Laws of North Carolina, 1927. The proceeding was instituted in order that conflicting claims of respondents

to lands described in the petition might be determined and that compensation for said lands might be paid by the State to the true owner or owners, and the State thus acquire a good title to said lands.

The issues raised by the pleadings were submitted to the jury, and on the verdict there was judgment that the respondent, Siler Meadows Mining and Lumber Company, is the owner of the land in controversy, and is entitled to compensation therefor, in accordance with its agreement with the State entered into prior to the commencement of the proceeding. The respondents, A. J. Franklin and others, appealed from the judgment to the Supreme Court.

Attorney-General Brummitt, Assistant Attorney-General Seawell and Johnston & Horner, Special Counsel for the State.

Alvin S. Kartus for J. G. Stikeleather and others.

Dan K. Moore and S. W. Black for Siler Meadows Mining and Lumber Company.

Bryson & Bryson for A. J. Franklin and others.

PER CURIAM. Each of the State grants under which the several groups of respondents claim title covers the lands in controversy. Grant No. 1738 was issued on 5 February, 1855, and was duly recorded. The respondent, Siler Meadows Mining and Lumber Company, claims under this grant, and offered evidence tending to connect its title to the lands in dispute with the grantee in said grant. Grant No. 3290 was issued on 3 May, 1872, and was duly recorded. The respondents, J. G. Stikeleather and others, claim under this grant, and offered evidence tending to connect its title to the lands in controversy with the grantee in said grant. Grant No. 164 was issued on 15 August, 1882, and was duly recorded. The respondents, A. J. Franklin and others, claim under this grant, and offered evidence tending to connect its title to the land in controversy with the grantee in said grant.

The title of the respondent, Siler Meadows Mining and Lumber Company, claiming under the grant first issued and recorded, is superior to the title of either of its corespondents, unless, as contended by the respondents, A. J. Franklin and others, claiming under a junior grant, they and those under whom they claim have acquired title by possession under color for seven years, adverse to both their corespondents.

As there was no evidence at the trial tending to show that appellants had acquired such title, there was no error in the trial. The judgment is affirmed.

No error.

MRS. NOLAR WILLIAMS v. OSAGE MANUFACTURING COMPANY.

(Filed 15 June, 1932.)

CIVIL ACTION, before *Finley, J.*, at January Term, 1932, of GASTON.

Plaintiff alleged that the defendant is a corporation operating a large industrial plant in Gaston County and owns certain tenement houses constructed for the use of its employees. It was further alleged that after dark on 5 January, 1931, the plaintiff visited the home of one Brown, who occupied one of the houses so owned and maintained by the defendant, and that as she attempted to enter the house the steps thereto "gave way, violently precipitating this plaintiff to the ground, inflicting injury as hereinafter alleged." It was further alleged that "the defendant licensed this plaintiff and the general public to use on or about 5 January, 1931, said steps," etc.

The defendant demurred *ore tenus* upon the ground that the complaint stated no cause of action. The demurrer was sustained and the plaintiff excepted and appealed.

J. L. Hamme for plaintiff.
S. J. Durham for defendant.

PER CURIAM. The demurrer was properly sustained upon authority of *Money v. Hotel Co.*, 174 N. C., 508, 93 S. E., 964, and *Tucker v. Yarn Mill Co.*, 194 N. C., 756, 140 S. E., 744.

Affirmed.

W. H. WRIGHT v. MUTUAL COTTON MILLS COMPANY.

(Filed 15 June, 1932.)

CIVIL ACTION, before *Schenck, J.*, at December Term, 1931, of GASTON.

The plaintiff alleged that defendant is the owner and operator of a cotton mill, and as an incident to said business, owns certain tenement houses for the use of its employees. That the plaintiff was an employee of the defendant and rented one of said houses for the use of himself and family, paying as rental the sum of sixty cents per week. It was further alleged that on or about the first day of January, 1930, the house burned, destroying the household furniture and other personal effects of plaintiff.

The evidence tended to show that the defendants furnished light for the houses owned by it, including that rented by the plaintiff. On the night before the fire one of the lights in the house would not burn. On the next day the plaintiff reported the matter to the agent of defendant, who promised to make the necessary repairs. This was about twelve o'clock in the day. The house burned about four o'clock in the afternoon of that day. A witness said: "The fire seemed to be burning through the roof in a streak two feet wide where the electric wire went in." The light that was out of repair was in the front room of the house.

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

J. L. Hamme for plaintiff.
Geo. B. Mason, for defendant.

PER CURIAM. The judgment of nonsuit is supported by *Tucker v. Yarn Mill Co.*, 194 N. C., 756, 140 S. E., 744; *Salter v. Gordon*, 200 N. C., 381, 157 S. E., 11; *Williams v. Osage Mfg. Co., ante*, 859.

Affirmed.

MARY WEBB v. S. V. TOMLINSON ET AL.

(Filed 15 June, 1932.)

APPEAL by defendants from *Moore, J.*, at March Special Term, 1932, of WILKES.

Proceedings under Workmen's Compensation Act by dependents of Charley Webb, deceased, a woodcutter, when he was injured, 26 February, 1930, from which injury he subsequently died.

The hearing Commissioner found that the deceased was employed by the defendants and that the injury arose out of and in the course of the employment. The defendants contend that the deceased was an independent contractor and not an employee.

On appeal to the full Commission the award of the hearing Commissioner was upheld. And on appeal to the Superior Court the award of the full Commission was affirmed.

Defendants appeal, alleging that there is no evidence to support the findings that deceased was an employee of the defendants.

No counsel for plaintiff.
Manly, Hendren & Womble for defendants.

PER CURIAM. The evidence on the mooted question as to whether the deceased was an employee or an independent contractor is susceptible of either interpretation. The findings of the Industrial Commission, therefore, are conclusive and binding as to all questions of fact. *Parrish v. Armour Co.*, 200 N. C., 654, 158 S. E., 188; *Rice v. Panel Co.*, 199 N. C., 154, 154 S. E., 69.

Affirmed.

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ABANDONMENT see Husband and Wife A.

ABATEMENT AND REVIVAL.

A Objections to Jurisdiction.

b Availability of Plea in Abatement to Raise Question

1. Where an action for a negligent personal injury is brought in a general county court and the defendants file a plea in abatement on the ground that the statute conferring jurisdiction of this class of cases on the court was unconstitutional and that the court was without jurisdiction of the particular action alleged: *Held*, the plea in abatement properly raised the question of the constitutionality of the statute and the jurisdiction of the general county court, but upon the overruling of the plea and appeal to the Superior Court it was not error for the Superior Court to allow the defendants time to file answer. *Jones v. Oil Co.*, 328.

c Effect of Plea and Subsequent Proceedings

1. A plea in abatement on the ground that the grand jury was without authority to pass upon the bill of indictment because the offense charged was committed in another county challenges the jurisdiction of the court and where the plea is sustained the action should be dismissed, and where after sustaining the plea the court transfers the cause to the county in which the crime was alleged to have been committed, the latter court is without power to proceed further, and the defendant's plea in abatement therein made is properly sustained. *S. v. Mitchell*, 439.

B Pending Action.

b Same Subject Matter

1. Where a judgment in a pending action would not support a plea of *res judicata* in a second action, and the two actions are not the same and the results sought are dissimilar, a plea in abatement in the second action on the ground that another action between the parties was then pending is properly overruled. *Comr. of Banks v. Gavin*, 843.

ABORTION.

B Prosecution and Punishment.

c Evidence

1. Upon the trial of a physician for procuring an abortion (C. S., 4226) testimony of a conversation between the physician and the woman as to an abortion about four months prior to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error. *S. v. Brown*, 221.

ACCORD AND SATISFACTION see Compromise and Settlement.

ACCOUNT, Action on, Election of remedies between action on account and on note securing it see Election of Remedies A d 1.

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ACTIONS (Causes which may be joined see Pleadings A a; Consolidation and severance of criminal actions see Criminal Law I f).

B Forms of Actions for Enforcement of Particular Rights or for Redress of Particular Wrongs.

e Actions under Declaratory Judgment Act

1. "The Uniform Declaratory Judgment Act," ch. 102, Public Laws of 1931, is a remedial statute and its provisions are to be liberally construed to effectuate its purpose of settling rights, status, and other legal relations, and an action instituted thereunder in accordance with its provisions to determine the mutual rights and liabilities of the parties in respect to covenants and restrictions in a deed relating to a drainage ditch or canal upon lands, upon facts admitted in the pleadings, is authorized by the act. *Walker v. Phelps*, 344.

2. A proceeding brought *ex parte*, with no contradicter present, to have the racial status of the petitioner determined and which is not brought for the purpose of determining the petitioner's matrimonial status or his legitimacy, or other legal purpose, presents a social matter rather than a legal controversy, and does not come within the scope of the "Uniform Declaratory Judgment Act," and the proceeding will be dismissed. Ch. 102, Public Laws of 1931. *In re Eubanks*, 357.

ADMISSIONS see Criminal Law G f.

ADVERSE POSSESSION.

D Acquisition of Prescriptive Rights by Municipal Corporations.

a Against Railroads

1. Where a railroad company, in the use of its land as a depot, has allowed the public to use a part thereof as a street to the extent that such use did not interfere with its use as a depot, the use by the public is permissive, and the town may not claim an interest in the land by adverse user. *R. R. v. Ahoskie*, 585.

ALIENATION see Husband and Wife E.

APPEAL AND ERROR (In criminal cases see Criminal Law L; appeals from Industrial Commission see Master and Servant F i).

A Nature and Grounds of Appellate Jurisdiction of Supreme Court.

b Motion for New Parties in Supreme Court

1. In this case the appellant died after the case was docketed and the motion of his executor that it be made a party was allowed under Rules of Practice in the Supreme Court, No. 37, the motion being made before the case was called for hearing in its regular order. *Myers v. Foreman*, 246.

d Final Judgment and Premature Appeals

1. An appeal from the granting of a motion to amend is premature, the appellant having suffered no harm from the allowance of the motion. *Revis v. Ramsey*, 815.

APPEAL AND ERROR A—*Continued.*

e Academic Questions

1. Where a sale sought to be restrained has taken place the plaintiff's appeal from the dissolution of a temporary restraining order will be dismissed. *Bechtel v. Trust Co.*, 855.

E Record.

a Necessary Parts of Record

1. Where the record on appeal fails to set out the summons or to indicate that the resident defendant had been served, and fails to show organization of court and that the court was properly held at the place and time prescribed by law, the appeal will be dismissed. *Frazier v. R. R.*, 11.

2. Where on appeal to the Supreme Court the only exceptions and assignments of error are to the judgment of the Superior Court overruling the plaintiff's exceptions and assignments of error relating to a part of the charge of the judge of the general county court on the issue of negligence, and the issues and answers thereto and the judgment of the county court do not appear of record, the appeal will be dismissed, the Supreme Court being unable to determine from the record whether the answer of the jury to the issue of contributory negligence rendered the alleged error immaterial. *Penland v. Tobacco Co.*, 58.

3. Appeal in this case dismissed for failure of record to set out judgment. *Everett v. Fair Association*, 838.

c Form and Requisites of Transcript

1. Exceptions must be brought forward and specifically pointed out, Rule 19, sec. 3. *In re Will of Beard*, 661.

2. Appeals from a general county court falling within the provisions of C. S., 1608(cc) are allowed to the Superior Court, the jurisdiction of the Superior Court being appellate upon questions of law or legal inference, and on further appeal to the Supreme Court it is not desirable that the entire record in the Superior Court be sent up, but only such parts as relate to the questions to be reviewed with only material exceptions, properly stated, grouped and sufficiently compiled to enable the Court to understand them without searching through the record. *Baker v. Clayton*, 741.

h Questions Presented for Review on Record

1. In this action brought against the officers of an insolvent bank by its stockholders and creditors alleging damages caused by the defendant's neglect in its management, a demand upon the receiver to bring the action and its refusal to do so does not clearly appear of record, but it appearing upon information of counsel that the case was not decided in the lower court on this point and that the demand and refusal had been made, the Supreme Court accordingly considers the case on appeal. *Gordon v. Pendleton*, 241.

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 considered an exception thereto. *In re Bank*, 251.

APPEAL AND ERROR A—*Continued.*

F Exceptions, Assignments of Error and Procedure Necessary to Right of Review.

a In General

1. The Rules of the Supreme Court regulating appeals thereto are mandatory and the Court will uniformly enforce them. *Baker v. Clayton*, 741.

b Form and Sufficiency of Exceptions and Assignments of Error

1. Exceptions should be brought forward, grouped, numbered, and sufficiently compiled to enable the Court to understand the questions sought to be presented without a search through the record. *In re Will of Beard*, 661; *Baker v. Clayton*, 741.

2. Only exceptive assignments of error will be considered on appeal. *In re Will of Beard*, 661; *Bradshaw v. Conger*, 797.

3. Assignments of error to rulings of the court on a question of evidence should set out the testimony, in substance at least, and assignments of error as to other rulings should set out the attendant facts and circumstances, so that the court may determine the question sought to be presented without searching through the record. *Green v. Dishman*, 811.

d Appeal

1. Where in an action by a bank against a depositor, the cashier, and the surety on the cashier's bond to recover the amount of an overdraft of the depositor's account caused by reason of the nonpayment of the depositor's draft against which he had been allowed to check, the bank alleges that the draft was immediately credited to the customer's account by reason of false and fraudulent representations made by the depositor in respect thereto, and the jury finds the issue of fraud in favor of the plaintiff, and judgment is entered thereon against the depositor and the surety, providing for execution against the person of the depositor in the event execution was returned unsatisfied, and only the surety appeals therefrom: *Held*, the Supreme Court cannot change the issues in so far as they affect the defendants who had not appealed, but their failure to appeal does not affect the rights of the appealing surety. *Bank v. Fairley*, 137.

2. Where a surety on the bond of a contractor in the erection of a school building appeals from the judgment of the Superior Court he cannot complain of a judgment in favor of another entered against the board which did not appeal. *Fidelity Co. v. Board of Education*, 354.

3. Where, in an action by a father and mother to recover damages for the mutilation of the body of their dead child, the defendant's demurrer on the ground that the complaint was insufficient to state a cause of action is sustained as to the mother and overruled as to the father, and the defendant does not appeal from the judgment, in the Supreme Court it will be deemed that the defendant admitted that the action could be maintained by the father, and the question of his right to maintain the action will not be considered. *Stephenson v. Duke University*, 624.

APPEAL AND ERROR—*Continued.*

G Briefs.

b Abandonment of Exceptions by Failure of to discuss in Briefs

1. Exceptions taken upon the trial of an action which are not brought forward and discussed by the appellant in his brief on appeal is deemed to have been abandoned under Rule of Practice in the Supreme Court, 28. *Piner v. Richter*, 573; *S. v. Smith*, 581; *In re Will of Beard*, 661.

J Review.

b Of Discretion of Court

1. Where the receiver of a corporation has paid under the order of the court certain sums to one of the creditors without objection by the plaintiff, the refusal of the trial court in his discretion to permit the plaintiff to later file exceptions to the orders under which the payments were made or let him set up a plea attacking the validity of the contract under which the claim was filed, is conclusive and not reviewable on appeal. *Killian v. Chair Co.*, 23.

2. Where a party files an affidavit and certificates of physicians stating that he is too ill to attend court, and there is no evidence in contradiction thereof, the trial court may well grant his motion for a continuance upon such terms as the court deems just to the parties, and upon appeal to the Supreme Court from his refusal to grant the motion a new trial may be granted when it appears that the moving party has been deprived of his right to be present at the trial or to have witnesses whose testimony is essential to his cause present. In this case the question is not decided, a new trial being awarded upon another ground. *Abernethy v. Trust Co.*, 46.

3. The granting or refusing of a motion of a party for a continuance of a cause rests in the sound discretion of the trial judge before whom it is heard, and the exercise thereof is not reviewable on appeal in the absence of gross abuse, and where it appears that the judge acted after a careful and unbiased investigation of the circumstances, his refusal to grant the motion will not be disturbed. *S. v. Rhodes*, 101.

4. An appeal from the refusal to grant a continuance, which involves no question of law or legal inference, will be dismissed. C. S., 560. *In re Bank*, 251.

5. The action of the trial court in setting aside the verdict in his discretion as being against the weight of the evidence involves no question of law or legal inference and is not subject to review on appeal. *Welch v. Hardware House*, 641.

c Of Findings of Fact

1. Judge's finding that parties consented to rendition of judgment out of term and county is conclusive. *Killian v. Chair Co.*, 23.

2. The findings of fact by the trial court are conclusive on appeal when supported by any competent evidence, but where the record does not contain evidence in support of a finding it will not be sustained on appeal. *Patrick v. Bryan*, 62.

APPEAL AND ERROR J c—*Continued.*

3. Where the trial court upon conflicting evidence finds as a fact that the summons in the action was in fact served on the defendant, the finding is conclusive, and where upon such finding the defendant's motion to set aside a judgment rendered therein by default under the provisions of C. S., 600, on the ground that service had not been made will be upheld. *Hooker v. Forbes*, 364.

4. Where upon a motion to set aside a judgment for surprise, excusable neglect, etc., the court finds as a fact upon supporting evidence that the movant has no meritorious defense, the finding is conclusive on appeal. *Fellos v. Allen*, 375.

5. The findings of fact by the trial court, when supported by evidence, are as conclusive as the verdict of a jury. *Kelley v. Clark Co.*, 750; *Sash Co. v. Mooney*, 830.

d Presumptions and Burden of Showing Error

1. On appeal the burden is on the appellant to overcome the presumption against error. *Frazier v. R. R.*, 11; *Mangum v. Winstead*, 252; *Baker v. Clayton*, 741; *Rogen v. Luff*, 819; *Moore v. Boone*, 838.

2. The appellant must show not only that error had been committed upon the trial in the lower court, but also that the alleged error was prejudicial. *Rudd v. Casualty Co.*, 779.

3. Where the trial judge has allowed a motion to make the receivers of a defendant corporation a party defendant in an action for damages, it will be assumed, nothing to the contrary appearing, that there were facts before the court sufficient to justify his order. *Alford v. R. R.*, 719.

4. Where the jury finds upon one issue that the defendant tendered the plaintiff the correct amount recoverable under a subsequent issue and fails to answer the subsequent issue, it will be assumed that the tender was properly made and is available to the plaintiff, and error will not be found on appeal, the burden of showing error being upon the appellant. *Bradshaw v. Conger*, 797.

5. Where on appeal the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment will be affirmed without becoming a precedent. *Nathan v. Fields*, 843; *Campbell v. Comr. of Banks*, 847; *Garrison v. R. R.*, 851.

e Harmless Error

1. A party to an action who objects to the admission of certain evidence may not maintain his exception on appeal when evidence substantially the same has later been introduced on the trial without objection. *Ingle v. Green*, 116.

2. The Supreme Court will not grant a new trial where the alleged error is not prejudicial to the appellant and there is no prospect of ultimate benefit to him if the judgment should be set aside. *Avery v. Guy*, 152; *Taylor v. Ins. Co.*, 659; *Kelley v. Clark Co.*, 750; *Bechtel v. Weaver*, 856.

APPEAL AND ERROR J *e—Continued.*

3. Where an exception is entered to the exclusion of certain testimony it must appear of record on appeal what the testimony, if permitted, would have been, or the exception will not be considered. *S. v. Brewer*, 187; *Kelley v. Clark Co.*, 750.

4. An order continuing a wife's motion for alimony *pendente lite* to the hearing without prejudice to either party is held not to be subject to appellate interference. *Newell v. Newell*, 255.

5. Where upon appeal from an order or judgment relating to the priority of payment of liens and debts against property in a receiver's hands, the appellant fails to show a request for findings of fact upon which the order was entered or to show that he would be injured by the judgment excepted to, the judgment will be affirmed on appeal. *Tyson v. Smith*, 428.

6. Where the answers of the jury to the issues submitted renders the exclusion of certain evidence offered by the appellant immaterial or not prejudicial to him, the exclusion of such evidence, if error, does not entitle the appellant to a new trial. *Brown v. Featherstone*, 569.

7. Where the evidence is not sufficient to resist a judgment as of nonsuit in an action, the exclusion of corroborative evidence if error, will not be held for reversible error. *Sutton v. Herrin*, 599.

8. Where witnesses have been repeatedly asked an incompetent question by counsel, but their answers have been excluded and it appears that the answers were not made in the hearing of the jury, an exception to the frequent repetition of the question will be overruled on appeal, it appearing that the appellant had not been prejudiced thereby. *Jones v. High Point*, 721.

9. Where in an action against an insurance company the plaintiff alleges that the driver of an automobile covered by a policy of liability insurance issued by the defendant had negligently inflicted the injury in suit and that execution against the driver had been returned unsatisfied, and the insurance company admits the issuance of the policy and that it was in force at the time of the injury, and admits liability to the extent of the judgment if the policy covered the particular car the insured was driving at the time of the accident: *Held*, if incompetent evidence was received at the trial upon matters which the defendant had admitted the reception of such evidence will not be held for reversible error. *Rudd v. Casualty Co.*, 779.

g Questions Necessary to Determination of Appeal

1. Where the Supreme Court on appeal reverses the judgment of the lower court overruling the defendant's motion as of nonsuit, other alleged errors in the trial of the action become immaterial and will not be considered on appeal. *Tart v. R. R.*, 52.

K Determination and Disposition of Cause.

d Affirmance

1. Where the appellant has failed to properly present any exceptive assignments of error and the judgment is supported by the verdict, the appellee's motion to affirm the judgment will be allowed. *In re Will of Beard*, 661.

APPEAL AND ERROR—*Continued.*

L Proceedings After Remand.

c Subsequent Appeals

1. Where upon a former appeal to the Supreme Court it is decided that the plaintiff's cause of action is not barred by a judgment as of nonsuit, formerly rendered in an action between the same parties, because the allegations and evidence in the second action were not substantially identical, upon a subsequent trial and appeal the decision of the court that the plaintiff was not barred by the judgment as of nonsuit is the law of the case, and the question will not again be considered. *Ingle v. Green*, 116.

ARBITRATION AND AWARD.

E Award as Defense to Subsequent Action.

b Effect and Conclusiveness of Award

1. In determining whether an arbitration and award estops the parties the award will be interpreted in the light of the submission, and the award will estop the parties as to all matters embraced in the submission which were determined by the arbitrators within the authorization therein contained. *Farmer v. Wilson*, 775.

2. Where a city has raised the height of a dam for hydro-electric purposes and the question of damages sustained by reason of the resulting ponding of water is submitted to arbitration under an agreement that the arbitrators should assess such past, present and future damages as they might find were caused any of the landowners who were parties to the agreement, and the award made thereunder recites that "the raising of the dam has caused damage to certain properties" and that "we do award the parties listed below damages as follows": *Held*, the award includes all damages, past, present and future, and the contention of an owner that it failed to award future damages cannot be sustained, and the award is binding on him in the absence of fraud, mistake, duress, or other impeaching circumstances. *Ibid.*

ARSON.

C Prosecution and Punishment.

a Indictment

1. Where in a prosecution under C. S., 4245 the indictment charges that the defendant burned his dwelling-house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged "for a fraudulent purpose, and the State alleges that the fraudulent purpose" was to collect the insurance money: *Held*, it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal, and the judgment will be upheld, refined technicalities of procedure having been almost entirely abolished. C. S., 4610, 4625. *S. v. Morrison*, 60.

c Evidence

1. Where, in a prosecution under C. S., 4242 for wilfully and wantonly setting fire to or burning a store-house, the evidence fails to establish the felonious origin of the fire or the identity of the defendant

ARSON C *c—Continued.*

as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury, and on appeal the defendant's motion for judgment of nonsuit will be sustained. C. S., 4643. *S. v. Church*, 692.

ASSAULT AND BATTERY (Jurisdiction of prosecutions for, see Criminal Law D b 1).

B Criminal Prosecutions.

a Elements and Degrees of Assault

1. In a prosecution for an assault by a man or boy upon a female it is not necessary for the indictment to allege that the defendant was over eighteen years of age, the age of the defendant being a matter of defense, since the degrees of assault specified in the statute relate to the extent of the punishment and do not create separate offenses, and the age of the defendant is not an ingredient of the crime but an exception or proviso in regard to the degree of punishment. *S. v. Lefler*, 700.

2. Intent to inflict injury is an essential element of criminal assault, and in a prosecution therefor the State must prove such intent or criminal negligence equivalent in law to actual intent, and criminal negligence implies more than mere lack of due care, and where the State relies on the violation of a statute enacted for the public safety the State must prove the intentional or reckless violation of the statute and that such violation proximately caused the injury, and although intent may be presumed from the act, such presumption is not conclusive, and it is a question for the jury under proper instructions from the court. *S. v. Agnew*, 755.

3. The intentional violation of a statute designed to protect life, or the violation of such statute with a reckless disregard of consequences or heedless indifference to the safety and rights of others under circumstances from which death or bodily injury could have been reasonably foreseen as a probable result, is criminal negligence and when the proximate cause of injury, is sufficient to constitute criminal assault, but in a prosecution for assault growing out of an automobile accident an instruction that the defendant would be guilty if he violated a traffic statute, if such violation proximately caused injury to another, is erroneous, and a new trial will be awarded. *Ibid.*

d Verdict and Sentence

1. Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that the defendant is over eighteen years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury, but where the jury returns a verdict of simple assault without a finding that the defendant was over eighteen years of age the verdict is insufficient to support a sentence for an assault upon a female by a man or boy over eighteen years of age, and on appeal therefrom a new trial will be awarded. *S. v. Lefler*, 700.

ASSIGNMENTS.

C Rights and Liabilities of Parties Upon Assignment.

c Rights of Assignee

1. *Held*, transferee of drafts for material used in highway could maintain action on contractor's bond. *Bank v. Surety Co.*, 148.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

A Nature and Essentials.

a Insolvency of Grantor and Security of Preëxisting Debts

1. A conveyance by a debtor of his property to secure his creditors will not be construed as an assignment for the benefit of the creditors if the grantor is solvent and the deed is to secure debts to be contracted in the future, and a deed of trust to secure not only preexisting debts but also debts to be contracted for advancements to enable grantor to operate his business of merchandising and farming, the grantors remaining in possession, is not an assignment for the benefit of creditors within the meaning of C. S., 1609, and it is not required that the trustee therein file an inventory of the property coming into his hands, C. S., 1610, and a preliminary order restraining the foreclosure of the deed of trust on the ground that the inventory had not been filed is properly dissolved. *Comr. of Banks v. Turnage*, 485.

ASSUMPSIT—May not be relied on where contract is alleged see Contracts F c.

AUTOMOBILES—Negligent driving of, see Highways B; assault with see Assault B a 2, 3; prospective purchaser driving car held bailee and not agent of dealer see Principal and Agent A b 2; license taxes for see Taxation B c 1.

AUTOPSY see Master and Servant F c 1.

BAILMENT—Prospective purchaser driving car held bailee and not agent of dealer see Principal and Agent A b 2.

BANKRUPTCY.

C Administration and Distribution of Bankrupt's Estate.

b Title and Rights of Trustee (As against grantee in unregistered deed see Deeds and Conveyances B c 1)

1. By the terms of the Bankruptcy Act the trustee in bankruptcy is vested with the title of the bankrupt to property which prior to the filing of the petition the bankrupt could have conveyed by any means or which might have been levied upon and sold under judicial process, and where, by the terms of a will, lands are devised to a trustee to be held as an active trust until the happening of a certain event and then divided among certain beneficiaries including the bankrupt: *Held*, although execution would not lie against the interest taken by the bankrupt under the will, the bankrupt acquired an interest thereunder which he could have conveyed, and under the terms of the statute the title to such interest passed to his trustee in bankruptcy, whether his interest was such as could have been conveyed being determined by the laws of this State. *Patrick v. Beatty*, 454.

BANKS AND BANKING.

C Functions and Dealings (Bond of cashier see Principal and Surety B d 1).

c Deposits (Recovery on lost certificate of deposit see Lost Instruments B a).

1. In order to constitute "a deposit for a specific purpose" as defined by law it is necessary that the parties intend at the time that the proceeds of the deposit shall remain segregated and not be used by the bank in its ordinary business or commingled with its general funds, that there be an agreement, express or implied, that the deposit shall not constitute a part of the general funds of the bank or be subject to its exclusive use or control, that the bank have notice or knowledge of the character of the deposit at the time it is made, and that the deposit must in fact swell the assets of the bank, and the mere tracing of the money into the common funds of the bank is not a sufficient identification or segregation of the deposit. *Parker v. Trust Co.*, 230.

2. Where a sum is deposited in a bank under an agreement that the bank hold the funds and distribute them in accordance with an award to be made between the interested parties by arbitration, and the bank receives the deposit and gives a receipt therefor stating that it had received the amount deposited in escrow under the agreement and that it would pay the sum to the interested parties in accordance therewith, and the deposit is credited to the bank's "escrow agreement account" in its trust department, and the bank becomes insolvent: *Held*, the deposit was delivered to the bank under an agreement that it be applied to a particular purpose, and the bank had sufficient knowledge and notice of the trust character of the deposit and the purpose to which the deposit was to be applied, and the deposit was "a deposit for a specific purpose," entitling the claimants to a preferred claim therefor against the assets of the bank in the receiver's hands. *Ibid.*

H Insolvency and Receivership of Banks.

a Statutory Liability of Stockholders.

1. The books of a bank establish, prima facie, who are stockholders therein, and those whose names appear thereon as stockholders are ordinarily liable, upon the bank's becoming insolvent, for the statutory liability imposed upon them, C. S., 219(a), and it is only when a person whose name appears on the books as a stockholder can show that he was not in fact the owner of the stock that he can escape the assessment on his stock made according to law. *Corporation Commission v. McLean*, 77.

2. The procedure for the enforcement of the statutory liability of stockholders in an insolvent bank is provided by statute, C. S., 218(c), subsec. 13, and where an appeal to the Superior Court is taken from an assessment made according to the statutory provisions, ordinarily the only issues of fact which may be raised in the Superior Court are whether the appellant was in fact a stockholder, and if so, the number of shares owned by him. *Ibid.*

3. Where upon appeal to the Superior Court from an assessment made according to law on stock in an insolvent bank, the appellants al-

BANKS AND BANKING H *a—Continued.*

leged that the stock was sold to them by two directors of the bank, made parties to the action by order of court, and that they were induced to buy the stock upon false and fraudulent representations made by the directors as to the financial condition of the bank, and pray that the sale of the stock be rescinded for the alleged fraud and that the sellers be assessed for the statutory liability: *Held*, judgment vacating the order making the directors, the sellers of the stock, parties, and dismissing the appeal of the owners of the stock is not error, it appearing that the stock had been owned by the appellants for more than a year and that they had received the dividends thereon, and no question of fact as to the ownership of the stock at the date of the assessment being raised by the pleadings. The remedy of the appellants for the alleged fraud being by independent action against the directors. *Ibid.*

4. Where the Commissioner of Banks has levied an assessment against a stockholder in a bank in accordance with N. C. Code, 1931, sec. 218(c), the stockholder may not contest the validity of the levy upon appeal on the ground that the purchase of the stock was procured by the false and fraudulent representations of the officers of the bank, the stockholder having exercised the privileges and accepted the dividends from the stock for a long period and not having objected until after the insolvency of the bank and the levy of the assessment. *Comr. of Banks v. Carrier*, 850.

b Liability of Officers for Wrongful Depletion of Assets

1. In this action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the statutory limit, C. S., 220(d), and in making loans to themselves or upon paper with their endorsement without sufficient security, C. S., 221(n): *Held*, the evidence is insufficient to be submitted to the jury, it appearing that no loss to the assets of the bank had been caused by the acts of the officials, and the judgment of the lower court dismissing the case as of nonsuit is sustained on appeal. *Gordon v. Pendleton*, 241.

d Claims, Priorities, and Distribution

1. Deposit in this case held to be for specific purpose and constituted a preferred claim against receiver. *Parker v. Trust Co.*, 230.

2. The order of preference in the distribution of an insolvent bank's assets is prescribed by statute, sec. 218(c), subsec. 14, N. C. Code of 1931, and where a depositor presents his check for payment over the counter of a bank which charges his account with the amount thereof and gives him a draft drawn on another bank which he deposits in a third bank, and the draft is returned unpaid: *Held*, upon the insolvency of the bank drawing the draft the depositor is not entitled to a preference in its assets, the transaction not coming within the provisions of the statute for a preference when a bank receives a check by "mail, express or otherwise . . . with request that remittance be made therefor," the words "or otherwise" being construed in connection with the other parts of the statute meaning any mode of transportation analogous to those specified in the statute, requiring "remitting" or "sending" the money to the payee of the check. *Morecock v. Hood, Comr. of Banks*, 321.

BANKS AND BANKING H *d—Continued.*

3. Where it is established by the jury that a bank, without the knowledge or consent of its depositor, took his bonds and sold them and credited the depositor with the amount in its savings department: *Held*, upon the bank's becoming insolvent the depositor is entitled to a preferred claim against the receiver to the extent of the value of the bonds as a special deposit, it appearing that the depositor had never ratified the act of the bank by drawing on the fund or otherwise. *Heckstall v. Bank*, 350.

4. Where in an action by the receiver of a bank to recover assets of the bank pledged with a depositor to secure the deposit, the receiver contends that the pledge was without consideration and void, and the depositor contends that the security was given in consideration of future or increased deposits, and the receipt therefor is ambiguous: *Held*, the exclusion of testimony of the active president of the bank as to a conversation with the active vice-president of the depositor tending to establish that the security was given in consideration of future or increased deposits is error, there being no testimony by other witnesses supplying the excluded testimony. *Comr. of Banks v. Mills*, 569.

5. In an action against the Commissioner of Banks he must be sued in his individual name as such and not in the name of his office, but a defect in this respect may be cured by amendment. *Chowan County v. Comr. of Banks*, 672.

6. The Commissioner of Banks is in the nature of a statutory receiver of an insolvent bank when he has taken over its assets for the purpose of liquidation, and it is required that a depositor or claimant against the bank's assets in his hands must file his claim with the Commissioner and afford him an opportunity to pass thereon before bringing suit, and where the complaint fails to allege the filing of the claim with the Commissioner and his refusal thereof, it fails to state a cause of action against him, and his demurrer to the complaint is properly sustained. *Buncombe County v. Comr. of Banks*, 792.

e Collection of Notes and Assets, Off-sets and Counterclaims

1. The maker of a note to a bank, thereafter becoming insolvent, who admits his liability thereon has the burden of showing payment or of establishing a counterclaim or other matters in avoidance set up against the insolvent bank in an action brought by the Commissioner of Banks on the note. *Comr. of Banks v. White*, 311.

2. The right to set off a claim against an insolvent bank against an amount due by the claimant to the bank is dependent on whether the bank was indebted to the claimant at the time of its receivership, and when the obligation of the bank was assigned to the claimant after the receivership there is no mutuality of obligation that would permit the allowance by the receiver of the off-set, nor can the right of subrogation be successfully maintained when the indebtedness assigned, evidenced by the receiver's certificate, arose after the date of the receivership. *Ibid.*

3. A surety company issued to a county a bond indemnifying it against loss for deposits in a certain bank, and the surety company was

BANKS AND BANKING H *e—Continued.*

likewise indemnified against loss by a bond of the directors of the bank. Later the bank became insolvent and went into a receiver's hands. The surety company paid the county the amount of the bond, which covered a part of the county deposits, and the county assigned to it the part of the deposit thus paid. The directors of the bank paid the surety company the amount of the bond on their contract to indemnify, and received an assignment from the surety company, which they proved and received the receiver's certificate therefor. One of the indemnifying directors owed the bank a note and sought to off-set this obligation with the receiver's certificate issued to him: *Held*, at the time of the insolvency of the bank there was no mutuality of indebtedness between the director and the bank, and the county would be entitled to payment in full of the remainder of its deposit before its indemnitor or its assignee would be entitled to payment on the assigned claim, and a judgment allowing the director the off-set on the assigned claim was erroneous. *Ibid.*

4. Where the complaint in an action by the Commissioner of Banks to recover on certain notes alleges that the notes were among the assets of a bank since becoming insolvent and placed in the Commissioner's hands, an answer denying the allegation that the notes were among the assets of the bank when it became insolvent raises an issue of fact for the jury to determine, and a judgment for the plaintiff upon the pleadings is erroneous. *Comr. of Banks v. Johnson*, 387.

5. An action on a note payable to a bank since becoming insolvent and placed in the hands of the Commissioner of Banks must be brought in the name of the person holding the office of Commissioner of Banks as such officer, as otherwise confusion might arise on the officer's official bond, and where the action is brought in the name of the office only, the judgment of the lower court overruling the defendant's demurrer will be reversed, and upon receipt of the certificate of reversal, C. S., 1417, the lower court may allow an amendment of the summons and complaint in accordance with the opinion, C. S., 515, 547. *Comr. of Banks v. Harvey*, 380.

6. An action by the Commissioner of Banks must be brought in the name of the officer occupying the position of Commissioner of Banks and not by the "Commissioner of Banks," but the defect may be cured by amendment. *Comr. of Banks v. Johnson*, 387; *Comr. of Banks v. Mills*, 509; *Comr. of Banks v. Gavin*, 843; *Comr. of Banks v. Carrier*, 850.

I Criminal Responsibility of Officers, Directors and Employees. (Admissibility of books of bank in actions against see Criminal Law G i, G s.)

a Definition of General Terms

1. Where the solvency of a bank is material on the trial of an indictment for misapplication of county funds and conspiracy to defraud the county, the meaning of the word "insolvent" is correctly defined as being that the bank could not meet its deposit liabilities as they became due in the regular course of its business, or that the actual cash market value of its assets was insufficient to pay its liabilities to depositors and creditors. C. S., 216(a). *S. v. Shipman*, 518.

BANKS AND BANKING I—*Continued.*

b Permitting Deposits to be Made When Bank is Insolvent

1. A bank is insolvent within the meaning of the statute making an officer criminally liable for permitting deposits to be received with knowledge of its insolvency, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors or other creditors, and *Held*, the charge of the court upon the evidence in the case was correct. *S. v. Brewer*, 187.

2. Upon the trial in this case of an officer of an insolvent bank for permitting deposits to be received after knowledge of its insolvency: *Held*, testimony of the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is held competent on appeal. *Ibid.*

3. On the trial of a bank official for permitting deposits to be taken by employees when he knew the bank to be insolvent, section 224(g), N. C. Code (Michie), a question asked a certified public accountant who had testified to the bank's insolvency as to whether he had considered reports made to the Corporation Commission covering a certain period is properly excluded as *res inter alios acta*. *Ibid.*

4. Where an officer of a bank is on trial under an indictment charging that he permitted deposits to be made in the bank when he knew it was insolvent, an instruction supported by the evidence is not erroneous that the jury must not convict upon an assumption of the defendant's guilt but that they must find beyond a reasonable doubt from the evidence that the defendant was guilty of the offense charged against him, or that he had actual knowledge of the insolvency as defined by the court, and that the opinion of bank auditors and examiners is not conclusive. *Ibid.*

c Misapplication and Embezzlement

1. Where on the trial of a bank president for conspiracy to defraud a county by having the county issue its note and deposit the proceeds in the bank when the bank was insolvent, and evidence is properly admitted that the president was heavily indebted to the bank and had an overdraft in a large amount: *Held*, the exclusion of testimony that the president had given the receiver of the bank a deed of trust on property to secure the bank against loss on account of any sums he might owe the bank is not error. *S. v. Shipman*, 518.

d False Entries on Books of Bank

1. The essential elements constituting a statutory offense must be sufficiently set out in the indictment whether the language of the indictment follows the statute or not, and in this respect the object of the statute may be relevant upon the question, and the intent and purpose of N. C. Code, 224(e), is to prevent the deception of the officers of the bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interest of the bank or deceived its officers. *S. v. Cole*, 592.

BATHING RESORTS—Where lake is not operated for profit rule of liability of proprietors of bathing resorts does not apply see Negligence A c 6.

BILL OF DISCOVERY.

C Inspection of Writings.

a Right thereto in General

1. Whether the trial court shall grant an order for the inspection of writings upon a sufficient affidavit rests in his sound discretion. *Dunlap v. Guaranty Co.*, 651.

b Affidavits, Procedure and Order

1. C. S., 1823, supersedes the equitable bill of discovery and should be liberally construed, but the former practice is a material aid in the construction of the statute, and the fundamental requirements of the statute must be complied with, and the affidavit supporting the order must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry, and where the affidavit is insufficient the order based thereon is invalid. *Dunlap v. Guaranty Co.*, 651.

2. Where an affidavit filed by a party as the basis for his motion for the inspection of writings states that the adverse party has in his possession certain papers pertinent and relative to the merits of the action, and asks for the inspection of certain reports between the adverse party and his agent and certain correspondence between various persons, without any statement of facts showing that the papers were material or any allegation or proof that such papers existed or that their contents were known, and the writings are not sufficiently described to enable the court to determine their relevancy and materiality: *Held*, the affidavit fails to comply with the statutory requirements and the order of the court based thereon granting the motion is insufficient, and on appeal the order will be set aside. *Ibid.*

BILL OF PARTICULARS see Indictment D.

BILLS AND NOTES.

A Requisites and Validity.

a Consideration

1. Where the creditor of a corporation accepts its notes endorsed by its stockholders and directors in settlement of the debt he extends the maturity of the debt and gives up his right to reduce the debt to judgment until after the maturity of the notes, and the endorsement of such notes by a stockholder and president of the corporation is supported by a legal consideration, and he is liable thereon although at the time of the endorsement he did not have sufficient mental capacity to make the endorsement, the payee having no notice of such mental incapacity. *Searcy v. Hammett*, 42.

e Mental Capacity

1. Where endorser does not have sufficient mental capacity to execute contract his endorsement is not binding on him unless he, individually, received consideration. *Searcy v. Hammett*, 42.

BILLS AND NOTES—*Continued.*

B Negotiability and Transfer.

c Instruments Negotiable

1. A bond which is negotiable in its origin continues to be negotiable until it is discharged by payment or otherwise, unless there is a restrictive endorsement by a holder thereof. C. S., 3028. *Thomas v. De Moss*, 646.

2. Where a bond is a negotiable instrument under the laws of this State, C. S., 2982, provisions therein that the bond should be payable to bearer, or if registered to the registered holder only, and provisions for an extension of time, upon application of the maker, in the discretion of trustee in the deed of trust securing it, does not change its negotiable character, since a holder in due course does not forfeit his rights against the maker by the registration of the bond in his option, and unless an extension is granted under the terms of the bond it is payable at a fixed time according to its tenor. *Ibid.*

3. Where a bond secured by a deed of trust is in all respects negotiable its negotiable character is not affected by provisions in the deed of trust incorporated in the bond by reference thereto that sums paid by the trustee or holder of the bond for taxes or insurance should be deemed principal money and secured by the deed of trust, the provisions of the deed of trust stipulating only that such sums should be secured thereby but not added to the amount of the bond, and the bond is in a sum certain and is negotiable. *Ibid.*

G Payment and Discharge. (Rights of sureties to contribution upon payment see Contribution A a.)

a Agreements for Payment from Particular Fund

1. Where a father conveys his lands to certain of his children who execute notes payable to a bank secured by a deed of trust on the lands in which the president of the bank is trustee, and the proceeds of the notes are used to reduce the father's indebtedness at the bank in order to bring it within the amount the bank could loan to one inidividual, in an action on the notes: *Held*, parol evidence is admissible to show that at the time of the execution of the notes it was agreed that they should be paid out of the proceeds of the land, it appearing that the children were acting solely for the benefit of their father in the execution of the notes and that they received no consideration therefor and had no equitable interest in the lands, and that the whole transaction was in effect an indirect mortgage by the father negotiated by the president of the bank for the protection of the bank and the exclusive benefit of the father. *Stack v. Stack*, 461.

c Payment to Collecting Agent

1. Evidence of payment to collecting agent held sufficient to be submitted to jury. *Acceptance Corp. v. Fletcher*, 170; *Edmundson v. Wooten*, 304.

BILLS AND NOTES—*Continued.*

H Actions on Notes (Election of remedies between action on account and on note given therefor see Election of Remedies A d 1).

a Presumptions and Burden of Proof

1. The possession by plaintiff of promissory notes sued on raises a presumption that he has the right to recover thereon, rebuttable by the defendant's evidence. *Comr. of Banks v. Johnson*, 387; *Thompson v. Johnson*, 817.

2. The burden is on the maker to prove failure of consideration when relied on by him in an action by the payee of the note. *Fertilizer Co. v. Summerell*, 833.

b Pleadings

1. The payee or endorsee of a negotiable instrument is prima facie the holder and owner, and entitled to sue thereon, and in an action by the payee, a demurrer on the ground that the complaint failed to allege that the plaintiff was the owner or holder of the note is properly overruled, it being for the defendant to show the contrary as a defense. *Thompson v. Johnson*, 817.

I Checks.

b Rights and Liabilities of Drawer, Payee, Bank of Deposit, and Banks in Course of Collection

1. A check is only conditional payment, but the payee must exercise due diligence in presenting it for payment, and where his failure to exercise such diligence causes loss he must suffer it, due diligence being determined in accordance with the facts and circumstances of each particular case, C. S., 3168, 2978, and where upon a motion to set aside a judgment for surprise and excusable neglect, C. S., 600, it appears that the movant's neglect was excusable, and that his defense was that the plaintiff's agent went to the drawee bank to cash the defendant's check, saw there was a run on the bank, and stood in line in front of the paying teller's window from 10:30 a.m. to 1:00 p.m. without getting the check cashed, that the bank did not close until 2:00 p.m., and it is found as a fact that others standing in line behind the plaintiff's agent, and who remained in line, cashed their checks: *Held*, an order denying the defendant's motion to set aside the judgment on the ground that the defendant had not showed a meritorious defense is error. *Chevrolet Co. v. Ingle*, 159.

2. Where the trial court finds upon sufficient evidence that the plaintiff ordered the trust department of a bank to purchase certain stock for her and that the order was executed by a brokerage company at the instance of the bank, that upon notification to the bank of the execution of the order the bank sent the brokerage company a check for the full purchase price and notified it of the name of the purchaser, and immediately charged the check to the plaintiff's account, that the brokerage company deposited the check in the same bank and that the bank credited the account of the brokerage company with the amount of the check before the end of the day's business and notified the company of the deposit, all in accordance with the regular course of dealing between the parties, and that the bank was insolvent and closed its doors the

BILLS AND NOTES I *b—Continued.*

next day: *Held*, the money represented by the check passed from the plaintiff to the brokerage company and was subject to its orders until the closing of the bank, and the stock so purchased was the property of the plaintiff, and where the brokerage company has refused to deliver it and has resold it and retained the money from the resale, it is liable to the plaintiff for the amount of the loss sustained by her. *Kelley v. Clark Co.*, 750.

BLOODHOUNDS see Criminal Law G o.

BONDS—Negotiability of see Bills and Notes B c; Taxation see Taxation; Rights against bonds executed under suspended sentence see Criminal Law K a 1, 2.

BOUNDARIES see Deeds and Conveyances D.

BREACH OF THE PEACE.

B Peace Bonds.

a Procedure

1. Where a justice of the peace has acquitted the defendant upon a warrant charging only a simple assault, he is without authority to put the defendant under a peace bond unless the statutory procedure relating thereto has been complied with. *S. v. Myrick*, 688.

BROKERS.

A Creation and Incidents of the Relationship.

c Powers and Authority of Brokers

1. Where, under an agreement with the owner, an agent has subdivided and sold certain land at public auction on certain terms of payment, and a purchaser at the sale has given notes secured by a mortgage payable to the owner, the agent has no authority to agree to rescind the sale and cancel the notes upon a conveyance of the property to the agent unless the owner consents to or ratifies the transaction, and when this has been done without the owner's knowledge he may successfully maintain an action on the notes against the purchaser at the sale to recover the deficiency after foreclosure of the mortgage according to its terms and the application of the proceeds of the sale to the notes. *Strowd v. Whitfield*, 732.

D Right to Compensation.

b Upon Securing Purchaser: Arbitrary Refusal of Principal to Sell

1. Where the plaintiff and defendant have entered into a written contract for the division of profits from the sale of land owned by the defendant if the plaintiff should procure a purchaser at a reasonable price, the reasonableness of the price is not one to be arbitrarily determined by the defendant, and where there is evidence tending to show that the plaintiff had procured a purchaser ready, able and willing to pay a reasonable price, the reasonableness of the price offered is to be determined by the jury under proper instructions from the court, and the plaintiff may recover his commissions if the defendant arbitrarily refused to accept the offers procured. *Ingle v. Green*, 116.

BROKERS—*Continued.*

E Actions for Commissions.

d Evidence

1. In an action on a contract providing for a division of profits from the sale of land owned by the defendant if the plaintiff should procure a purchaser at a satisfactory price within a certain time, testimony of proposed purchasers procured by the plaintiff that they were ready, able and willing to perform their offer of purchase within the time specified is competent upon the question of the defendant's arbitrariness in refusing to sell. *Ingle v. Green*, 116.

2. Where it is material upon the trial as to whether a purchaser of lands procured by the plaintiff under his contract with the defendant, offered a reasonable price for the *locus in quo*, it is competent for a witness having experience and observation to testify to the value of the land at the time of the offer to buy, the probative force of the testimony being for the jury. *Ibid.*

BUILDING AND LOAN ASSOCIATIONS.

D Insolvency and Receivers.

a Rights and Liabilities of Borrowing Stockholders

1. Where in an action by a receiver of a building and loan association the issue is raised as to whether the defendant had made payments in monthly installments on the amount borrowed from the association or whether the payments were installments on stock purchased by him: *Held*, the issue should be submitted to the jury, and if it should find that the defendant was a shareholder he is not entitled to have the amounts paid by him on his stock credited to his indebtedness to the association. *Penn v. King*, 174.

BURDEN OF PROOF see Evidence C, Criminal Law G a.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

A Right of Action and Defenses.

b For Fraud

1. Where, in an action for the cancellation of certain deeds on the ground that their execution was procured by false and fraudulent representations as to the value of stock given by the grantee to the grantor in consideration of the deeds, it appears that certain of the deeds were executed sometime after the execution of the first deeds, and that the stock in the same corporation was given in consideration in both transactions: *Held*, the grantor had ample opportunity between the dates of the transactions to investigate the value of the stock uninfluenced by the representations of the grantee, and the instructions of the trial court in accord with this principle will not be held for error. *Brown v. Featherstone*, 569.

2. While a contract may ordinarily be set aside for fraud, misrepresentations of a promissory nature are not embraced in the rule. *Colt Co. v. Norwood*, 819.

B Proceedings and Relief.

d Evidence

1. In an action for the cancellation of certain deeds upon allegations that the execution of the deeds was procured by false and fraudu-

CANCELLATION AND RESCISSION OF INSTRUMENTS B *d—Continued.*

lent representations as to the value of certain stock given by the grantee to the grantor in consideration of the deeds, evidence as to acts of the stockholders of the corporation relating to the sale of the corporate property are incompetent as evidence of the value of the stock at the time of the transfer when the meeting at which such action was taken by the stockholders was held many months after the transfer of the stock to the plaintiff. *Brown v. Featherstone*, 569.

e Rights and Status of Parties Upon Cancellation of Instrument

1. The object of a judgment rendered in favor of the plaintiff in an action for the cancellation of certain deeds for fraud is to put the parties *in statu quo*, and where the consideration for the deed is certain stock in a corporation and the grantor tenders the return of the stock to the grantee with the amount of the dividends thereon since the transfer, and there is no evidence that the value of the stock had been decreased by any act of the grantor since the transfer, the judgment should order the cancellation of the deeds and the return of the stock, and a judgment ordering the cancellation of the deeds and ordering the grantor to pay the grantee the value of the stock at the date of the transfer is erroneous. *Brown v. Featherstone*, 569.

CHARACTER EVIDENCE see Criminal Law G c.

CHATTEL MORTGAGES (Conditional Sales see Conditional Sales; contract held pledge and not chattel mortgage see Pledges A d 1; right of mortgagee upon sale of property for taxes see Taxation H f).

B Lien and Priority.

a As Against Other Liens and Claims

1. Where the purchaser of an automobile signs a title-retaining contract to secure the balance of the purchase price, and, prior to making the down payment and the delivery of the car, executes a chattel mortgage thereon to a third person to secure money borrowed, and the chattel mortgage is registered prior to the registration of the title-retaining contract: *Held*, the lien of the chattel mortgage is superior to that of the title-retaining contract. C. S., 3311, 3312. *Jordan v. Wetmur*, 279.

CHECKS see Bills and Notes I.

CITIES AND TOWNS see Municipal Corporations.

CLERKS OF COURT.

C Jurisdiction and Powers (Clerk has no authority to receive payment of mortgage for mortgagee see Mortgages G a).

a In General

1. Although Art. IV, sec. 17, of the Constitution of 1868 relating to the probate jurisdiction of the clerks of the Superior Courts was stricken out of the Constitution of 1873, and the Constitution does not now prescribe the jurisdiction of clerks, the clerks now perform the duties formerly pertaining to the office of judges of probate, and such jurisdiction is exercised separate and distinct from their general duties as clerks. C. S., 1, 938(14). *In re Estate of Styers*, 715.

COMMON LAW.

A Present Force and Effect.

a In General

1. The common law prevailing before the adoption of our Constitution and which was not destructive of, repugnant to, or inconsistent with the freedom and independence of the State and which has not become obsolete is in full force in this State, C. S., 970, unless it has been repealed, abrogated, or modified by statute, but those parts of the common law which are embedded in our Constitution are not subject to repeal or modification by statute. *S. v. Mitchell*, 439.

COMPENSATION ACT see Master and Servant F.

COMPROMISE AND SETTLEMENT.

A Transactions Operating as Compromise and Settlement.

a Acceptance of Check Stating for Full Payment or Settlement

1. Where a statement is sent of a disputed account showing a balance due in a certain amount accompanied by a check therefor purporting to be in full settlement, the payee by accepting the check and receiving the money effects a settlement and is bound thereby in the absence of fraud, etc. *Harris v. Kennedy*, 487.

2. Where a dispute arises between the parties to a contract and the party to be charged tenders a check purporting to be in full settlement thereof except for one enumerated item, the acceptance of the check constitutes a full settlement of the matter except for the enumerated item, and whether a controversy had arisen before the tender of the check is an issue of fact for the jury, but where the testimony of the party denying such settlement is to the effect that such dispute has arisen prior to the tender of the check a directed verdict on the issue is not error, and the fact that the check later tendered in full settlement of the item excepted in the first was refused does not alter this result. *Bradshaw v. Conger*, 796.

CONDITIONAL SALES see Sales I.

CONFESSIONS see Criminal Law G 1.

CONSOLIDATED STATUTES AND N. C. CODE (Michie). (For convenience in annotating. Construction and operation of statutes see Statutes.)

C. S. (OR CODE).

SEC.

1, 938(14). Duties of clerk in appointing and removing administrators are separate from general duties. *In re Estate of Styers*, 715.

74, 80. Where personalty is insufficient to pay debts of estate realty may be sold under order of court, and heirs at law take realty subject to the debts. *Avery v. Guy*, 152.

137. Provision in Compensation Act for payment of awards is statutory modification of distribution statute. *Heavner v. Lincolnton*, 400.

137(6). Does not affect father's preferential right to maintain action for mutilation of dead body of child. *Stephenson v. Duke University*, 624.

C. S. (OR CODE)—*Continued.*

SEC.

160. Only personal representative may bring action for wrongful death. *Brown v. R. R.*, 256. Personal representative may institute action for death of employee pending award. *Phifer v. Berry*, 388.

216(a). Definition of "insolvency" of bank held correct. *S. v. Shipman*, 518.

218(c). Depositor presenting check over counter and obtaining draft on another bank held not entitled to preference. *Morecock v. Hood*, 321. Ordinarily only issue of fact that may be raised on appeal from statutory assessment of bank stock is the issue of ownership. *Corporation Commission v. McLean*, 77.

219(a). Owner of stock is liable for statutory assessment and books of bank are prima facie evidence of ownership. *Corporation Commission v. McLean*, 77.

220(d), 221(n). Evidence in this case *held* insufficient to sustain action against officers for wrongful depletion of assets. *Gordon v. Pendleton*, 241.

224(e). Indictment in this case for making false entries held insufficient. *S. v. Cole*, 592.

224(g). Admissibility of evidence in prosecution under this section. *S. v. Brewer*, 187.

279. Irregularity in divorce proceedings is not ground for declaring children by subsequent marriage illegitimate. *Reed v. Blair*, 745.

446, 461. Action by personal representative of deceased employee against third person does not abate where insurance carrier is subrogated to administrator's right of action pending litigation. *Phifer v. Berry*, 388.

473. Order that jury be drawn from body of another county rests in discretion of court. *S. v. Shipman*, 518.

476, 547. Negligent failure of clerk to sign summons held formal defect remedial by amendment. *Hooker v. Forbes*, 364.

511(4, 5). Defect of parties may be taken advantage of by demurrer when defect appears on face of complaint and is material. *Sims v. Dalton*, 249.

515. Plaintiff given right to move to amend after demurrer is sustained in Supreme Court. *McKeel v. Latham*, 319. Where action is dismissed for misjoinder of parties and causes the court has no jurisdiction to allow amendment. *Grady v. Warren*, 638.

515, 547. Upon receipt of certificate of reversal of judgment overruling demurrer lower court may allow amendment. *Comr. of Banks v. Harvey*, 380.

519. Only determinative issues of fact arising from pleadings and evidence must be submitted to the jury. *Jeffreys v. Ins. Co.*, 368.

542. Allegation that libelous matter was sent through the mails on post card is insufficient allegation of publication. *McKeel v. Latham*, 319.

C. S. (OR CODE)—*Continued.*

SEC.

547, 507. Amendment in this case did not substantially change cause alleged and pleadings were not inconsistent. *Edwards v. Turner*, 628.

560. Motion for continuance is addressed to discretion of court. *In re Bank*, 251.

564. Where charge fails to state evidence of party relative to material point a new trial will be awarded. *Myers v. Foreman*, 246. Where the court fails to instruct the jury as to application of law to the substantial features of the case a new trial will be awarded. *Comr. of Banks v. Mills*, 509. Charge stating facts in clear and concise manner and explaining law arising thereon meets requirements of the statute. *S. v. Fleming*, 512; *In re Will of Beale*, 618. In action to set aside deed on ground that private examination of wife had not been taken, instruction that the statute should be abolished and that a woman would not do anything she did not want to do held prohibited expression of opinion by court. *Abernethy v. Trust Co.*, 46.

567. On motion of nonsuit all evidence is to be considered in light most favorable to plaintiff. *Pearson v. Sales Co.*, 14; *Almond v. Oceola Mills, Inc.*, 97. And only evidence favorable to plaintiff will be considered. *Smith v. Granite Co.*, 305. Evidence which raises mere suspicion or conjecture is insufficient. *Sutton v. Herrin*, 599. Where defendant does not make motions for nonsuit in accordance with statutory provisions he waives question of sufficiency of evidence. *Harris v. Buie*, 634. After reserving ruling on motion of nonsuit court may not set aside verdict for insufficiency of evidence as a matter of law. *Batson v. Laundry*, 560.

600. Motion to set aside must be made within one year and movant must show meritorious defense, and court's finding upon conflicting evidence that movant had failed to show meritorious defense is conclusive. *Fellos v. Allen*, 375. Refusal of motion to set aside judgment for surprise, etc., held proper. *Anderson v. Ins. Co.*, 835. Motion to set aside for failure of service properly refused where court finds as fact upon supporting evidence that summons had been served. *Hooker v. Forbes*, 364. Upon evidence that payee failed to use due diligence in presenting check finding that drawer did not have meritorious defense held error. *Chevrolet Co. v. Ingle*, 158. Wife's neglect to file answer upon assurance of husband that he would do so held excusable in joint action against them. *Bank v. Turner*, 162.

637. On appeal from order of clerk appointing administrator Superior Court may reverse order but should then remand the case. *In re Estate of Styers*, 715.

673, 1637. Plaintiff suggesting fraud in defendant's affidavit of insolvency must sufficiently allege and prove fraud. *Hayes v. Lancaster*, 515.

677(3, 4). Execution will not lie against interest of *cestui que trust* in property held by trustee in active trust. *Patrick v. Beatty*, 454.

C. S. (OR CODE)—*Continued.*

SEC.

711, 712, 719, 667, 668. Supplemental proceedings must be instituted within three years from issuance of execution. *Harvester Co. v. Brockwell*, 805.

896. Tender of amount due does not vary rule that where plaintiff is entitled to recover any amount nonsuit may not be entered. *Penn v. King*, 174.

970. Common law prevailing before adoption of the Constitution is in force in this State unless modified by statute. *S. v. Mitchell*, 440.

1023, 249. Indictment against State Bank Examiner and members of Corporation Commission must be found by Wake grand jury. *S. v. Mitchell*, 440.

1035(2). Local telephone exchange is subject to control and regulation of *Corporation Commission*, 610.

1241, 1248. Costs follow judgment and were correctly taxed against plaintiff in this case. *Bundy v. Credit Co.*, 604.

1416. Judgment may be affirmed without extended opinion. *Rogen v. Luff*, 819.

1417. After affirmance of judgment by Supreme Court the Superior Court has jurisdiction to hear motion for new trial. *S. v. Cox*, 378. Upon receipt of certificate of reversal of judgment overruling demurrer the lower court may allow amendment. *Comr. of Banks v. Harvey*, 380.

1481, 4215. Magistrate has exclusive jurisdiction of simple assault. *S. v. Myrick*, 688.

1608. Legislature may create courts inferior to Superior Courts if provision is made for appeal to Superior Courts. *Jones v. Oil Co.*, 328.

1608(cc). Jurisdiction of Superior Court on appeals from general county court is appellate. *Baker v. Clayton*, 741.

1609, 1610. Instrument in this case was deed of trust and not assignment for benefit of creditors and filing of an inventory by trustee was not necessary. *Comr. of Banks v. Turnage*, 485.

1654. Heirs at law take only undevised inheritance of which ancestor was seized at time of death. *Gosney v. McCullers*, 326.

1744. Persons not *in esse*, properly represented, are concluded by judgment relating to contingent interests. *Spencer v. McCleneghan*, 662.

1823. Affidavit for inspection of writings must sufficiently describe papers and show their materiality. *Dunlap v. Guaranty Co.*, 651.

2241, 5039(3). Writ of habeas corpus for custody of minor child held governed by C. S., 2241, and respondent's motion for removal to juvenile court was properly refused. *In re TenHoopen*, 223.

2336. Requirement that names of witnesses be marked on indictment is directory. *S. v. Avant*, 680.

2338, 4635. Persons summoned by sheriff in his discretion for special venire are subject to same challenges for cause as tales jurors. *S. v. Avant*, 680.

C. S. (OR CODE)—*Continued.*

SEC.

2438. Notice to owner before payment by him is necessary to lien for material furnished. *Brown v. Hotel Corp.*, 82.

2445. Local statute providing that provisions of this act should be read into bonds for private construction held invalid. *Plott v. Ferguson*, 446. Provision that action on bond should be brought within reasonable time held valid. *Horne-Wilson Co. v. Surety Co.*, 73.

2470. Whether notice of claim of lien was filed within statutory time held for jury upon evidence that later work was done under original contract. *Beaman v. Hotel Corp.*, 418.

2621(45, 46, 51, 54, 55). Violation of safety statute is negligence *per se*. *King v. Pope*, 554.

2621(46). Driver's failure to keep car under control so that he could observe statute held contributory negligence barring recovery against railroad. *Hinnant v. R. R.*, 489.

2621(46). Does not apply to civil suit for damages. *Piner v. Richter*, 573.

2621(60). Instruction in this case as to right of way at street intersection held correct. *Piner v. Richter*, 573.

2707. Assessment for widening street under contract with Highway Commission without petition of majority of owners held invalid. *Sechriest v. Thomasville*, 108.

2937(2), 2938(2). Issuance of refunding bonds under provisions of the statutes need not be submitted to voters. *Bolich v. Winston-Salem*, 786.

2942(1b). Governing body of town may fix maturity of refunding bonds. *Bolich v. Winston-Salem*, 786.

2982. Provisions in bond in this case held not to render it nonnegotiable. *Thomas v. De Moss*, 646.

3028. Instrument negotiable in its origin continues negotiable until its discharge in absence of restrictive endorsement. *Thomas v. De Moss*, 646.

3168, 2978. Check must be presented for payment within reasonable time. *Chevrolet Co. v. Ingle*, 158.

3301(a). Where mortgage is given to secure endorsers on mortgagor's separate note to bank, acknowledgment by bank official is valid. *Watkins v. Simonds*, 746.

3309. Unregistered deed, good as between the parties, is valid as against creditors of heirs at law of the grantor. *Gosney v. McCullers*, 326.

3309. Where grantor conveys land by registered deed creating easement in land reserved by grantor, his grantee is entitled to the easement unaffected by an unregistered contract to convey the reserved land executed prior to the deed. *Walker v. Phelps*, 344.

3311. Transaction in this case held to constitute pledge and registration was not necessary. *Bundy v. Credit Co.*, 604.

C. S. (OR CODE)—*Continued.*

SEC.

3311, 3312. Prior registered chattel mortgage has priority of lien over subsequently registered conditional sales contract. *Jordan v. Wetmur*, 279.

3312. Subsequent purchaser acquired property free from lien of unregistered conditional sales contract. *Brown v. Hotel Corp.*, 82.

3411(b). Mere possession of whiskey at time of accident will not bar recovery under Compensation Act. *Jackson v. Creamery*, 196.

3553, 3561. Register of deeds is required to properly register all instruments properly filed for registration and is liable for negligent failure to properly index mortgage. *Watkins v. Simonds*, 746.

3846. Statute applies only when width of street and regular highway are the same. *Sechriest v. Thomasville*, 108.

3846(v). *Held*, in this action the complaint sufficiently alleged that the required notice had been given surety. *Bank v. Surety Co.*, 148.

4100. In this case husband died seized of beneficial interest in lands and widow was entitled to dower therein. *Stack v. Stack*, 462.

4131. Paper-writing in this case held sufficient in form to constitute a holographic will. *In re Will of Rowland*, 373.

4139, 4158. Probate in common form is *ex parte* and conclusive until attacked by caveat proceedings. *In re Will of Rowland*, 373.

4166. Lapsed legacy is thrown into residuary clause and does not go to next of kin. *Stevenson v. Trust Co.*, 92.

4200. Where all evidence shows that crime was first degree murder failure to instruct as to less degrees is not error. *S. v. Myers*, 351; *S. v. Donnell*, 782.

4201. Court may fix maximum and minimum sentence within statutory limits in his discretion. *S. v. Fleming*, 512.

4226. Testimony of conversation relative to abortion prior to time in controversy held incompetent. *S. v. Brown*, 220.

4242. Evidence held insufficient to be submitted to jury in prosecution under this section. *S. v. Church*, 692.

4245. Indictment need not specify any particular fraudulent purpose for burning dwelling-house. *S. v. Morrison*, 60.

4250. Recent possession of stolen property raises no presumption of guilt of receiving stolen property knowing it to have been stolen. *S. v. Best*, 9.

4270. Definition of "wilfully and corruptly" in instruction in this case held correct. *S. v. Shipman*, 518.

4274(a). In prosecution under the statute fraudulent intent is essential element and must be found by jury. *S. v. Rawls*, 397.

4276. Essential element of fraudulent intent may be inferred from circumstances. *S. v. Lancaster*, 204.

4309. Evidence held insufficient to show that defendant set out fire on lands without notice to adjoining landowners. *Sutton v. Herrin*, 599.

C. S. (OR CODE)—*Continued.*

SEC.

4339. Subsequent marriage does not discharge judgment entered in prosecution for seduction. *S. v. McKay*, 470.

4600, 4606. Indictment must be found, ordinarily, by grand jury of county wherein offense was committed. *S. v. Mitchell*, 440.

4610, 4625. Refined technicalities have been abolished. *S. v. Morrison*, 60.

4611. Where bill is properly returned into court endorsement thereon as true bill is not necessary. *S. v. Avant*, 680.

4613. Bill of particulars cannot supply essential requirements of indictment. *S. v. Cole*, 592.

4622. Consolidation of action after beginning of trial held prejudicial and reversible error. *S. v. Rice*, 411.

4623. Does not apply where indictment is fundamentally deficient. *S. v. Cole*, 592.

4643. Upon motion of nonsuit all evidence is to be considered in light most favorable to State. *S. v. Shipman*, 518.

4649. State may not appeal from judgment of magistrate acquitting defendant of simple assault. *S. v. Myrick*, 688.

4659. Judgment in this case held sufficient to meet requirements of the statutes. *S. v. Edney*, 706.

6382(e). Agreement for joint control of guardianship funds by guardian and surety will be presumed to come within the provisions of the act. *Leonard v. York*, 704.

7986. Tax sale of personal property without notice to registered mortgagee is void. *Machine Works v. Hubbard*, 723.

7992, 8010, 8014, 8026, 8027. Tax certificate is presumptive evidence of regularity of proceedings. *Orange County v. Wilson*, 424.

8028, 8036. Suit in nature of foreclosure is exclusive remedy on tax certificate. *Orange County v. Wilson*, 424.

8037. In proceedings to foreclose tax certificate only listed owners, their wives or husbands, must be served with summons. *Orange County v. Wilson*, 424.

8081(r). Liability of employer under Compensation Act is exclusive and he may not be held liable as joint *tort-feasor*. *Brown v. R. R.*, 256; *Hoover v. Indemnity Co.*, 655. Insurance carrier paying award may maintain action against third person. *Phifer v. Berry*, 388.

8081(u). Compensation Act does not apply to business employing less than five regular workers. *Aycock v. Cooper*, 500. Where jurisdictional findings of Industrial Commission are not supported by evidence Superior Court should set aside award. *Dependents of Poole v. Sigmon*, 172.

8081(hh). Malpractice of physician employed by insurer is part of injury and is compensable as such. *Hoover v. Indemnity Co.*, 655.

8081(pp). Jurisdictional findings of fact are reviewable on appeal. *Aycock v. Cooper*, 500.

CONSPIRACY.

B Criminal Conspiracy.

a Elements of the Crime

1. A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and does not require the accomplishment of the purpose in contemplation or any overt act in furtherance thereof. *S. v. Shipman*, 518.

b Evidence (Competency of acts or declarations of coconspirators see Criminal Law G k)

1. The fact of conspiracy to defraud may be shown by circumstantial evidence; in the reception of such evidence upon the trial great latitude is allowed. *S. v. Shipman*, 518.

2. Evidence of conspiracy to defraud county and misapplication of county funds held sufficient. *Ibid.*

CONSTITUTION.

ART.

I, secs. 7 and 31. Local statute providing that provisions of C. S., 2445, be read into bonds for private construction held unconstitutional as creating special privilege and giving exclusive emoluments. *Plott v. Ferguson*, 446.

I, sec. 12. Person must answer charge of crime only upon indictment, presentment or impeachment, and indictment implies an indictment by grand jury as defined by common law. *S. v. Mitchell*, 439. Superior Court may proceed only upon indictment where magistrate binds defendant over. *S. v. Myrick*, 688.

I, sec. 13. Defendant may be convicted only upon unanimous verdict, and defendant's motion for poll of jury entitles him to have each juror separately questioned as to his assent. *S. v. Boger*, 702.

I, sec. 35. Where judgment is suspended provided defendant execute bond to secure payment of certain sums to prosecutrix, the judgment is not void, but if bond is executed in exchange for prisoner's freedom it would be invalid. *Myers v. Barnhardt*, 40.

IV, sec. 2. Legislature may create courts inferior to Superior Courts if provision is made for appeal to Superior Courts. *Jones v. Oil Co.*, 328.

IV, secs. 2 and 12. Industrial Commission is administrative agency, and Compensation Act is constitutional. *Heavner v. Lincolnton*, 400.

IV, sec. 8. On appeal in criminal action Supreme Court is limited to matters of law or legal inference. *S. v. Brewer*, 188.

IV, sec. 17. Duties of clerk in appointing or removing administrators are separate from general duties. *In re Estate of Styers*, 715.

VII, sec. 7. Refunding bonds issued in accordance with Municipal Finance Act need not be submitted to voters. *Bolich v. Winston-Salem*, 786. Cotton platform held not necessary municipal expense and town could not issue bonds therefor without a vote of its electors. *Walker v. Faison*, 694.

CONSTITUTION—*Continued.*

ART.

IX. Whether local unit is administrative agency of State is determinative factor of its right to issue bonds without vote. *School Committee v. Taxpayers*, 297, 382.

CONSTITUTIONAL LAW—Constitutionality of Compensation Act see Master and Servant F a 1; constitutional requirements in establishment of courts inferior to Superior Courts see Courts B a; constitutional requirements in taxation see Taxation A; police powers see Municipal Corporations H; imprisonment for debt see Criminal Law K b 1, 2; exclusive emoluments and monopolies see Principal and Surety A b 1; necessity for indictment or presentment see Indictment A; Due Process see Taxation H b 2.

CONTRACTS (Sales see Sales; specific performance see Specific Performance; Cancellation of, see Cancellation of Instruments; brokerage contracts see Brokers; contracts of executors or administrators see Executors and Administrators C c).

B Construction and Operation.

a General Rules

1. The entire written contract will be construed as to its related terms and expressions so as to effectuate the intent of the parties. *Ingle v. Green*, 116.

2. In construing a deed to the mineral rights in land the method of mining recognized by the original parties before differences between them may be received in evidence upon the question of the intent of the parties in this respect. *Banks v. Mineral Corp.*, 408.

c As to Whether Contract is Entire or Divisible

1. Where the contract for the erection of a hotel building provides for the installation of a heavy screen, requiring factory fabrication, over a skylight, and the building is turned over to the owner without its installation and thereafter the owner demands that it be installed under the original contract without extra compensation, and, by arbitration under the contract, the matter is settled in favor of the owner: *Held*, the installation of the screen did not constitute a new and independent contract but was installed under the original contract of construction. *Beaman v. Hotel Corp.*, 418.

F Actions on Contracts.

a Parties

1. Although the promise of each of the parties to a contract to contribute to a common cause is sufficient consideration for the promises of the other parties thereto, where the contract is between the stockholders of a corporation on an agreement between them to pay certain amounts on the corporation's note endorsed by them, and the creditors of the corporation are not parties to the action, the principle is not germane. *Supply Co. v. Whitehurst*, 413.

CONTRACTS F—*Continued.*

c Pleadings, Evidence and Variance

1. Where an employee of a dairy sues his employer upon the contract of employment and alleges that he was to be paid a fixed sum per month plus a division of the profits when the dairy was brought up to "A" grade, the admission of evidence as to the value of the services rendered will not be held for error, there not being such a variance between allegation and proof as to constitute prejudicial error to the defendant. *Harris v. Buie*, 634.

CONTRIBUTION (Between *tort-feasors* see Torts B b; indemnity contracts see Indemnity).

A Right to Enforce Contribution.

a Payment of Obligation of Person Equally Liable

1. Contribution is enforceable only where the complaining sureties have made compulsory payment, and where it is not alleged that the complaining sureties have paid any part of the obligation of another surety they are not entitled to contribution from him. *Supply Co. v. Whitehurst*, 813.

CONTROVERSY WITHOUT ACTION.

C Operation and Effect.

a In General

1. Where a defendant agrees that the court should render judgment according to an agreed statement of facts submitted to it he thereby waives all defenses set out in the answer theretofore filed. *Guaranty Co. v. Hill*, 238.

CONVICTS—Liability of employers of, for injuries to see Master and Servant C a 1, 2.

CORPORATION COMMISSION (Indictment of members see Indictment A b 2).

A Jurisdiction and Powers.

d In Regard to Telephone Companies

1. Local telephone exchange is subject to control and regulation by Corporation Commission. *Horton v. Telephone Co.*, 610.

CORPORATIONS (Assessment of corporate excess see Taxation C c; insolvent banking corporations see Banks and Banking H; building and loan associations see Building and Loan Associations).

C Directors and Officers.

c Duties and Liabilities

1. The directors and managing officers of a corporation are not liable in damages for mere errors of judgment or slight omissions in the performance of their duties, but they are liable in proper cases for loss or depletion of the corporation's assets due to their wilful or negligent failure to exercise reasonable diligence in the performance of their official duties, they being regarded as in the nature of trustees and being required to exercise that degree of care that a man of ordinary prudence would reasonably use in the conduct of his personal business under the circumstances, and

CORPORATIONS C *c—Continued.*

upon a breach of this legal duty the corporation may sue in case of solvency, and when insolvent, the receiver may do so. *Gordon v. Pendleton*, 241.

2. The directors of a corporation are neither guarantors of the solvency of the corporation nor insurers of the honesty or integrity of its officers or agents, nor are they required to personally supervise all the details of its business transactions, but they are regarded as trustees or *quasi*-trustees of the corporate property and are liable for such loss as is caused by their wilful or negligent failure to perform their duties, under the rule of that degree of care that would be exercised by an ordinarily prudent man under the circumstances in the transaction of his personal business. *Minnis v. Sharpe*, 300.

3. Where, in an action against the directors of a corporation, the plaintiff's evidence tends to show that he had executed a mortgage on his property to the corporation and had repaid the greater part of the loan, and that thereafter the general manager of the corporation had informed him that it was necessary to refinance the loan and had induced him to execute another mortgage on the same property, but had failed to cancel the notes secured by the original mortgage, which the plaintiff was forced to pay, that the directors had left the corporate management exclusively in the hands of its general manager and that like transactions had been made by the general manager continuously over a period of years: *Held*, while ordinarily the directors would not be charged with notice of single or disconnected acts of mismanagement, it was for the jury to find, under the evidence, whether the mismanagement or fraud of the general manager had been so continuously and persistently practiced as to impute knowledge thereof to the directors and fix them with liability for the loss sustained by the plaintiff. *Ibid.*

E Stockholders.

d Assumption of Personal Liability for Corporate Debt

1. Where the complaint in an action by certain stockholders of a corporation against another stockholder alleges that the stockholders endorsed certain notes of the corporation and agreed to pay thereon a certain amount in proportion to the stock held by them, that the plaintiffs had paid their proportionate amount and that the defendant had refused to pay his proportionate share: *Held*, a demurrer thereto on the ground that the complaint fails to state a cause of action is properly sustained, the creditors of the corporation not being parties to the action, and the equitable doctrines of specific performance and contribution not being applicable. *Supply Co. v. Whitehurst*, 413.

COSTS.

A Persons Entitled to Recover Costs.

b Successful Party

1. The cost in an action follows the judgment, and where the controversy between the parties narrows itself down to the issue of

COSTS A *b—Continued.*

usury which is decided in the defendant's favor, an order taxing the cost against the plaintiff is correct. C. S., 1241, 1248. *Bundy v. Credit Co.*, 604.

C Taxing of Costs.

a Final Determination of Cause

1. An order continuing a receivership involved in an action and taxing the defendants with all costs accruing is held premature as to the taxing of future costs and to that extent the judgment is modified on appeal. *Pasquotank County v. Surety Co.*, 284.

COUNTIES (Embezzlement by county officers see Embezzlement A a 2, B c 2; sheriffs see Sheriffs).

E Fiscal Management, Allocation and Sources of Revenue (Taxation see Taxation).

c Allocation of Funds from the State

1. The provisions of chapter 40, Public Laws of 1929, that a one-cent per gallon tax on all gasoline sold within the State be levied and collected by the State Commissioner of Revenue and paid to the State Treasurer and separately kept and allocated to the "County Aid Road Fund" for the expenses incurred by the several counties in keeping up their respective public roads, was expressly repealed by chapter 145, Public Laws of 1931, placing that duty and expense upon the State Highway Commission, with none of the provisions of the former statute operative after 1 July, 1931, and *Held*, none of the moneys collected from this source subsequent to 1 July, 1931, are available to the respective counties. *Beaufort County v. Highway Commission*, 433.

COURTS (Supreme Court see Appeal and Error; removal of causes to Federal Courts see Removal of Causes).

A Superior Courts.

a Original Jurisdiction (Of trusts see Trusts E a 1)

1. Where the father of a minor child brings a writ of *habeas corpus* in the Superior Court for the custody of the child, the respondent being the maternal grandmother of the child in whose care the child was left by its mother, the writ is governed by the provisions of C. S., 2241 and the Superior Court has original jurisdiction, and the respondent's motion to transfer the hearing from the Superior Court to the juvenile court is properly overruled. C. S., 5039(3). *In re TenHoopen*, 223.

c Jurisdiction on Appeals from Clerk

1. The Superior Court has jurisdiction to hear an appeal from the order of the clerk appointing an administrator for the estate of a deceased, but where the clerk's order is reversed the Superior Court has no jurisdiction to appoint another administrator, and the case should be remanded to the clerk, and this result is not affected by the provisions of C. S., 637, conferring jurisdiction on the Superior Court to determine all matters in controversy upon appeal from the clerk in any civil action or special proceeding, the appointment of an administrator being neither a civil action nor a special

COURTS A *c—Continued.*

proceeding. *In re Estate of Wright*, 200 N. C., 620, distinguished upon principles of the equity jurisdiction of the Superior Courts. *In re Estate of Styers*, 715.

B Courts of Record Inferior to Superior Courts.

a Creation and Validity

1. The Superior Court is a court established by the Constitution, Art. IV, sec. 2, and while the General Assembly has no power to destroy or limit its constitutional jurisdiction, it may, under the provisions of the Constitution, create county courts of concurrent or partly concurrent jurisdiction if provision is made for appeal to the Superior Court, subject to review by the Supreme Court upon further appeal, there being no conflict with other provisions of the Constitution, Art. IV, sec. 12, and in this action for a negligent personal injury brought in a general county court the constitutionality of the statute, conferring jurisdiction of this class of actions upon it with provision for appeal to the Superior Court, is upheld, and the defendants' plea in abatement on the ground that the court did not have jurisdiction was properly overruled. Chap. 27, N. C. Code of 1931. *Jones v. Oil Co.*, 328.

2. Where a statute gives a municipal court exclusive original jurisdiction of a certain class of cases if the plaintiff resides within the city limits or within one mile thereof, and provides that in the same class of cases the court should have concurrent jurisdiction with the Superior Court of the county, regardless of the residence of the plaintiff, if the defendant lives in any of the other counties of the State, with provision for removal if the defendant resides outside the city but within the county: *Held*, to the extent that the statute takes from the residents of the city the right to bring an action in the Superior Court, which right is enjoyed by other parties litigant, the act is void as granting a special privilege or entailing a discrimination, and where an action in which both parties are residents of the city is brought in the Superior Court, its judgment dismissing the action for want of jurisdiction is erroneous. *Hendrix v. R. R.*, 579.

b Jurisdiction

1. Where an action for a negligent personal injury is brought in a general county court, and the defendants file a plea in abatement on the ground that the statute giving the general county court jurisdiction of this class of actions was unconstitutional and that the court was without jurisdiction of the particular action alleged: *Held*, the county court may determine the question of its jurisdiction in its inherent powers. *Jones v. Oil Co.*, 328.

COVENANTS see Deeds and Conveyances C f, C g.

CRIMINAL LAW (Particular crimes see Particular Titles of Crimes).

A Nature and Elements of Crimes in General.

c Intent in General (In prosecution for embezzlement see Embezzlement A a)

1. Definition of "wilfully and corruptly" in instructions in this case held without error. *S. v. Shipman*, 518.

CRIMINAL LAW A *c—Continued.*

2. Although criminal negligence is equivalent in law to actual intent, criminal negligence implies more than mere want of due care, and where the violation of a statute enacted for the safety of the general public is relied on by the State the State must prove that such violation was intentional or that the statute was violated with a reckless or wanton disregard for the safety of others under circumstances from which death or bodily harm could have been reasonably foreseen. *S. v. Agnew*, 755.

C Parties and Offenses.

a Principals

1. Party aiding and abetting commission of larceny is guilty as principal although not present physically at the time of the commission of the crime. *S. v. Whitehurst*, 631.

2. Parties present and aiding and abetting commission of felony are guilty as principals. *S. v. Donnell*, 782.

D Jurisdiction.

b Degree of Crime

1. A warrant of a justice of the peace charging the defendant with an assault upon the prosecuting witnesses by kicking, choking and rocking them, without inflicting serious injury, is only for a simple assault, and the magistrate has exclusive original jurisdiction thereof, and his judgment acquitting the defendant is final, Constitution, Art. IV, sec. 27; C. S., 1481, 4215, and the State may not appeal therefrom, C. S., 4649, and where, upon the defendant's appeal from the magistrate's order to give a peace bond, the magistrate requires the defendant to give bond for her appearance in the Superior Court, the defendant's plea of former jeopardy in the latter court is good, and where the defendant's plea has been overruled and she has been convicted of an assault with a deadly weapon, the judgment will be reversed on appeal. *S. v. Myrick*, 688.

F Former Jeopardy.

c Mistrials and New Trials

1. Where the defendants, under indictment charging them with breaking and entering a store with intent to commit larceny, with larceny, and with receiving stolen property, are found guilty on the last count and on appeal their request for a new trial is granted: *Held*, although there are some technical differences between a *venire de novo* and a new trial they both have the same result, and upon the subsequent trial the defendants' objection to a trial upon a new indictment containing substantially the same charges as the original and their plea of former acquittal as to the first two counts cannot be sustained, the granting of a new trial upon the defendants' request carrying with it a new trial upon all the counts in the indictment. *S. v. Beal*, 266.

d Termination of Former Action

1. Magistrate has exclusive jurisdiction of simple assault and State may not appeal from his judgment of acquittal, and where appeal has been taken to the Superior Court the defendant's plea of former jeopardy should be sustained. *S. v. Myrick*, 688.

CRIMINAL LAW—*Continued.*

G Evidence (Competency in prosecutions for particular crimes see Particular Titles of Crimes).

a Presumptions and Burden of Proof (see, also, Receiving Stolen Goods, Homicide G b)

1. Where the defendant in a criminal prosecution for embezzlement does not take the stand, an exception to the statement of the contentions of the State that the defendant did not deny the alleged shortage when accused of it at the time it was discovered will not be held for error as violating the defendant's right that no presumption against him should be raised from his failure to testify, and if the charge was a misstatement of the contentions it should have been called to the trial court's attention in apt time. *S. v. Lancaster*, 204.

c Character Evidence

1. Where the defendant in a criminal action puts his character in evidence and testifies in his own behalf, testimony of his good character may be received in evidence both as bearing on his credibility as a witness and as substantive evidence on the issue of his guilt, but a request for an instruction that the "law presumes that a man of good character is not only less likely to commit a crime than a man of bad character, but also that a man of good character is more truthful and less likely to testify falsely under oath than a man whose character is not good" is *held* properly refused, the requested instruction going beyond that to which the defendant was entitled. *S. v. Ferrell*, 475.

2. The right of a defendant in a criminal action to offer evidence of his good character does not depend upon his being a witness for himself. *S. v. Shipman*, 518.

f Admissions

1. Where several defendants are on trial for the same offenses in one action, the admission in evidence of testimony of admissions of one of the defendants will not be held for error upon objection of the other defendants where it appears that the trial court carefully instructed the jury to consider the admissions only on the question of the guilt of the defendant making them. *S. v. Deal*, 266.

i Expert Testimony

1. The entries on the books and records of a banking corporation when the books are relevant to the inquiry on the trial of one of its officers for embezzlement, etc., are not self-explanatory, and parol evidence is admissible in explanation thereof by witnesses introduced at the trial who are competent to testify, subject to direct and cross-examination. *S. v. Rhodes*, 101.

2. Upon the trial of a bank official under the provisions of section 224(g), N. C. Code (Michie), for permitting deposits to be taken by employees when he knew the bank to be insolvent, testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral,

CRIMINAL LAW G *i—Continued.*

that the bank was insolvent at the time in question is not objectionable and an exception thereto by the defendant will not be sustained on appeal. *S. v. Brewer*, 187.

3. Whether witness is an expert is question for the court. *Ibid.*

4. On the trial of a sheriff for embezzlement it is competent for a witness who has been qualified and found by the court to be an expert in such matters, to testify from his examination of the books and records identified as the public records of the sheriff's office, and likewise those in the office of the county auditor, that there was a shortage in the sheriff's accounts and as to the amount appearing to have been collected and not reported or accounted for by the sheriff, it being a matter of cross-examination of the defendant as to explanation of specific items appearing in the books and accounts from the books introduced in evidence. *S. v. Lancaster*, 204.

5. Where the books of the bank are properly identified and introduced in evidence it is competent for an expert accountant, employed by the receiver, to testify from his examination of the books of the bank as to the solvency of the bank on the date in question and as to the amount of the county's deposit at the time, when relevant to the inquiry. *S. v. Shipman*, 518.

6. Where, in a prosecution for murder in the first degree, the defendant pleads mental incapacity to premeditate or deliberate, and introduces supporting evidence, the question is for the jury to determine, and testimony to the effect that the defendant did have mental capacity to plan a murder and carry the plan into execution is an invasion of the province of the jury, and its admission over the prisoner's exception constitutes reversible error, evidence of this character being limited to the general mental capacity of the defendant. As to whether a witness who has not qualified as an expert may be permitted to give evidence of this character, *quœre? S. v. Hauser*, 738.

k Competency of Acts or Declarations of Coconspirators

1. Where upon a trial for conspiracy to defraud, the evidence is sufficient to establish the conspiracy *aliunde* the declarations of the parties thereto, everything said, written or done by any of the conspirators in the execution or furtherance of the common purpose to defraud and forming a part of the *res gestæ* is competent in evidence against them all if made or done before the accomplishment of the common design or before it is finally abandoned, and it is within the discretion of the trial judge to admit such evidence before proof of the fact of conspiracy, subject to be stricken out if the fact of conspiracy is not proven. *S. v. Shipman*, 518.

l Confessions

1. The prisoner, held for murder, at first denied guilt and stated that at the time the crime was committed he was riding in an automobile with two other men. Upon a search of his home by an officer certain articles connected with the crime were discovered, whereupon the prisoner told the officers where the pistol with

CRIMINAL LAW G *l—Continued.*

which the crime had been committed could be found and confessed to the murder of the deceased. The officer to whom the prisoner confessed testified that he neither threatened the prisoner nor offered him any hope of reward but that he told the prisoner he had better tell the names of the two men with whom he said he was riding at the time of the crime so that they might be apprehended, and the prisoner's brother suggested that "he had better go on and tell the truth": *Held*, the statements, under the circumstances, were not an inducement for the prisoner to confess, and the admission of the confession in evidence was not error. *S. v. Myers*, 351.

2. Only voluntary confessions are admissible in evidence, and a confession is voluntary only when it is in fact voluntarily made, and where after the arrest of the defendants and the measuring of their shoes and tracks at the scene of the crime they are told that "it would be lighter on them" to confess and that "it looks like you had about as well tell it," whereupon the defendants confess to the crime charged: *Held*, their confession was involuntary and its admission in evidence constitutes reversible error. *S. v. Livingston*, 809.

o Action of Bloodhounds

1. In this case *held*, error was committed in connection with the testimony relative to the action of bloodhounds. *S. v. McLeod*, 196 N. C., 542. *S. v. Church*, 692.

s Documentary Evidence

1. Where the president and former cashier of a closed bank is tried for embezzlement, misappropriation of the bank's funds, false entries on its books and records, the testimony of an expert accountant employed to make an examination thereof that he found the books and records in the bank's vault upon opening it with keys furnished by the bank's cashier and bookkeeper, is sufficient evidence of their identification as the books and records of the bank, and they are properly admitted in evidence. *S. v. Rhodes*, 101.

2. A bank operating under authority of a State statute is subject to public supervision, and its rights, powers and privileges are prescribed by law, and in the exercise thereof it is presumed to keep a correct record of its transactions, and proof of the identity of the books raises the presumption that the records and entries they contain were made by accredited clerks or agents of the corporation, and in a prosecution for embezzlement, etc., it is not required of the State to produce all the employees as witnesses to the entries thereon, the entries covering a long period of time. *Ibid.*

t Best and Secondary Evidence

1. On the trial of certain bank officials for conspiracy to defraud a county by having the county issue its notes under false representations that such was necessary to maintain the county schools and roads, and to deposit the proceeds of the notes in the bank when the bank was insolvent, a letter published in the local newspaper purporting to have been written and signed by the bank officials, stating that in the opinion of the writers it was necessary for the county to borrow the money, is *Held*, properly admitted in evidence

CRIMINAL LAW G *t—Continued.*

against the bank officials by whom it was signed, the foundation of such secondary evidence having been sufficiently laid by testimony of the editor of the paper that he had satisfied himself that the letter was written by the bank officials and that he had made a diligent search for the original without finding it. *S. v. Shipman*, 518.

I Trial (Of particular prosecutions see Particular Titles of Crime).

d Custody of Defendant

1. Where, on the trial of a criminal action, the court finds as a fact that the action of the defendant in absenting himself impeded the trial, and orders the defendant into custody, and finds as a fact that the jury did not know of such order: *Held*, under the circumstances the order was within the legitimate power of the trial court and is not sufficient grounds for a new trial on appeal. *S. v. Smith*, 581.

f Consolidation and Severance of Criminal Actions

1. Upon the trial under an indictment charging the prisoner with murder of M. in which a conviction of first degree murder is not sought, it is reversible error to the defendant's prejudice for the trial court upon his own motion, after a substantial part of the evidence had been introduced to consolidate the action with another action under a separate indictment charging the prisoner with an assault with a deadly weapon upon D. with intent to kill, the prisoner being afforded no opportunity to pass upon the impartiality of the jury upon the assault charge or an opportunity to plead to the charge, C. S., 4622. *S. v. Rice*, 411.

2. It is within the sound discretion of the trial court to unite in one action indictments against the officials of a bank and members of the board of county commissioners and its attorney on charges of misapplication of county funds and conspiracy to defraud the county by using county funds to aid the bank, the bank being insolvent. *S. v. Shipman*, 518.

3. Where two defendants are indicted jointly, a motion for severance for trial may be made, but the motion is addressed to the sound discretion of the trial court, and where no abuse of discretion appears on the record an exception to his refusal of the motion will not be sustained. *S. v. Donnell*, 782.

g Instructions

1. An inadvertence in the statement of the contentions of the State in a criminal prosecution must be brought to the trial court's attention in apt time. *S. v. Brewer*, 187; *S. v. Whitehurst*, 631.

2. Where, in a prosecution for homicide, the court states the essential evidence in the case in a plain and concise manner, and explains the law arising thereon, the instruction meets the requirements of C. S., 564, and will not be held for error, there being no request by the defendant for special instructions. *S. v. Fleming*, 512.

3. Where the charge of the trial court in a criminal prosecution fully states the evidence in the case and the law arising thereon, a party desiring more particular elaboration on a specific point should

CRIMINAL LAW I *g—Continued.*

tender a request for special instructions in apt time, and where this has not been done an exception to the charge will not be sustained on appeal. *S. v. Shipman*, 518; *S. v. Smith*, 581.

j Nonsuit

1. Upon a motion as of nonsuit in a criminal action only the evidence favorable to the State will be considered, and it will be taken in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. C. S., 4643. *S. v. Shipman*, 518.

k Verdict, Polling Jury

1. The proper method of polling the jury is to ask each juror, individually, whether he assented to the verdict and still assents thereto, and only the judge or the clerk under his supervision may poll the jury, and where the defendant in a criminal action makes a motion in apt time to have the jury polled, and the court addresses the body of the jury and directs those who returned a verdict of guilty to stand up, but refuses to poll the jury individually, a new trial will be awarded on the defendant's exception under his constitutional right to be convicted only upon the unanimous verdict of a jury in open court. Art. I, sec. 13. *S. v. Boger*, 702.

l Submission of Question of Guilt of Lesser Degree of Crime Charged

1. Where all evidence shows that crime was first degree murder failure to instruct as to less degrees is not error. *S. v. Myers*, 351; *S. v. Donnell*, 782.

J Mistrial, New Trial, and Arrest of Judgment.

f Jurisdiction of Superior Court to Hear Motions for New Trial

1. Where the Supreme Court has affirmed the judgment on an appeal in a criminal case and the judgment has been certified to the Superior Court, C. S., 1417, the defendant may at the next succeeding criminal term of such Superior Court make a motion for a new trial for newly discovered evidence, and the judge of the Superior Court has the power to hear and determine the motion in his discretion. *S. v. Cox*, 378.

K Judgment and Sentence.

b Continued and Suspended Judgments and Executions

1. The practice of suspending judgments or staying executions in criminal prosecutions upon terms that are reasonable and just is established as a part of our permissible procedure, and while the court may direct that the defendant be released from custody upon the condition that the defendant execute a bond securing the payment of a certain sum to the prosecutrix injured by his criminal negligence, the payment of the sum specified may not be enforced by the execution of the prison sentence on account of the constitutional provision against imprisonment for debt, but the judgment is not void, it not being alternative or conditional. *Myers v. Barnhardt*, 49.

2. Where in a criminal prosecution judgment is entered sentencing the prisoner to jail for a specified period with the provision that he be released from custody upon condition that he file a bond securing the payment of a certain sum in monthly installments to the

CRIMINAL LAW K *b—Continued.*

prosecutrix injured by his criminal negligence, with a further understanding that the prosecutrix should take a nonsuit in a civil action for damages then pending: *Held,* in a civil action by the prosecutrix on the bond, the granting of the defendant's motion as of nonsuit is error, the bond being founded upon a valid judgment, and is binding if the condition is lawful and the consideration is proper, but it should be determined whether the bond was given as a ransom for the defendant's freedom, in which case it could not be enforced. Art. I, sec. 35. *Ibid.*

e Requisites of Judgments in Capital Cases

1. It is required that the judge upon conviction in a capital case shall write his sentence which must be filed in the papers of the case and a certified copy thereof transmitted by the clerk to the warden of the State penitentiary, C. S., 4659, and the judgment in this case is held sufficient to meet the requirements of the statute, and is affirmed. *S. v. Edney,* 706.

L Appeal in Criminal Cases.

a Prosecution of Appeals Under Rules in General

1. Where the prisoner has appealed from a conviction in a capital case and has served his case on appeal which has been filed in the Supreme Court, but the case on appeal contains no assignments of error, has not been printed or mimeographed, and no briefs have been filed, the appeal will be dismissed on motion of the Attorney-General for failure of the prisoner to comply with the Rules of Court, after an examination of the record for error appearing on its face. *S. v. Edney,* 706.

d Record and Briefs

1. On appeal in a criminal action those exceptions which are not discussed by the defendant in his brief are deemed abandoned by him. *S. v. Smith,* 581.

2. Where a certified copy of the record proper has not been filed on appeal in a criminal action, the transcript containing only a statement of case on appeal accepted by the solicitor, which fails to contain the indictment or to show that the trial court had jurisdiction, the appeal will be dismissed, Rule 19, no motion for *certiorari* having been made and the Supreme Court not ordering the writ to issue in its discretion. *S. v. Simmerson,* 583.

e Review

1. Motion for continuance is addressed to discretion of trial court and his refusal is not ordinarily reviewable. *S. v. Rhodes,* 101.

2. The adjudication by the Superior Court that a witness is an expert will not be disturbed in the Supreme Court on appeal when there is competent evidence to support his finding. *S. v. Brewer,* 187.

3. It must appear what excluded testimony would have been in order for exception to be considered on appeal. *Ibid.*

4. The Supreme Court on appeal in a criminal action against an officer of an insolvent bank for permitting deposits to have been received with knowledge of the bank's insolvency can review only matters of law or legal inference. Art. IV, sec. 8. *Ibid.*

CRIMINAL LAW L *e—Continued.*

5. A motion for a new trial for newly discovered evidence, made at the next succeeding term of criminal court after affirmance of the former conviction by the Supreme Court, is addressed to the discretion of the judge of the Superior Court and his order granting or refusing the motion is not reviewable, and an appeal therefrom by the State will be dismissed. *S. v. Cox*, 378; *S. v. Griffin*, 517; *S. v. Moore*, 841.

6. Where, in a prosecution for homicide, the prisoner pleads self-defense, the exclusion of evidence, over his objection, tending to show the deceased had a grudge against him is not reversible error when other evidence to the same effect is admitted at the trial without objection. *S. v. Fleming*, 512.

7. The question of the imposition of a sentence on the prisoner convicted of manslaughter within the maximum and minimum allowed by statute, C. S., 4201, is within the discretion of the trial court and is not reviewable on appeal. *Ibid.*

8. In a prosecution of several defendants for the larceny of a cow the division of the proceeds from the sale of the cow is not an element of the crime, and on the question of the guilt of one of the defendants a charge of the court requiring that the jury should find that he received a part of the proceeds before convicting him, if erroneous because not supported by the evidence, is not prejudicial to the defendant. *S. v. Whitehurst*, 631.

9. Motion for severance is addressed to discretion of court and refusal of motion is not reviewable in absence of abuse. *S. v. Donnell*, 782.

10. Where there is evidence that the two defendants charged with murder were present at the time of the commission of the crime and aided and abetted each other therein, an instruction that it was immaterial that the indictment failed to charge conspiracy, but that if the jury should find beyond a reasonable doubt that prior to the time of the killing of the deceased the defendants entered into a conspiracy to rob him, and killed him while attempting to effectuate their unlawful purpose, that the defendants would be guilty, will not be held for reversible error, the defendants upon the evidence being equally guilty as principals without regard to the presence or absence of a conspiracy. *Ibid.*

DEAD BODIES (Right to autopsy in compensation proceedings see Master and Servant F c 1).

B Mutilation.

a Parties Entitled to Bring Action

1. A father's relation to his minor child and the consequent duties imposed on him by law clothes him with a preferential right of action over the mother of the child to bring an action to recover damages for the mutilation of its dead body, and where an action therefor is brought by the father and mother jointly, a judgment sustaining the defendant's demurrer as to the mother will be sustained on appeal, and the provisions of N. C. Code of 1931, 137(6), entitling the father and mother to share equally in the estate of a deceased child does not affect this result. *Stephenson v. Duke University*, 624.

DEATH.

A Evidence and Proof of Death.

a Presumption of Death After Seven Years Absence

1. The presumption of death after seven years absence without being heard from by those who might be expected to hear from the absent person if he were living does not raise any presumption of death at any particular time, but that the absent person is dead after the expiration of seven years where there is no other evidence. *Stevenson v. Trust Co.*, 92.

B Actions for Wrongful Death.

c Parties, Process, and Pleadings

1. The right to maintain an action for the wrongful death of a deceased rests exclusively upon our statute, C. S., 160, which requires that the action must be brought within one year from the date of the death by the personal representative of the deceased, and that the recovery thereunder should not be liable for the debts of the deceased but should be distributed to his heirs at law as provided therein. *Brown v. R. R.*, 256.

DECLARATIONS AGAINST INTEREST see Evidence G.

DECLARATORY JUDGMENT ACT see Actions B e.

DEDICATION.

A Nature and Requisites.

b Offer and Acceptance

1. In order to a dedication of private property to the public use there must be an intention on the part of the owner to dedicate, evidenced by an unequivocal overt act or verbal expression, and an acceptance by the town authorities arising in some appropriate manner, and where a railroad company has had lands conveyed to it for use as a depot, evidence tending to show that the railroad company had so used the land without interruption, but had permitted the public to use a portion thereof as a street to the extent it did not interfere with its use as a depot, and there is no evidence of a grant or conveyance to the town, the evidence is insufficient either to show a dedication by the railroad or acceptance by the city for street purposes or to operate as an estoppel of the railroad company, and where the town has paved a part of the land for use as a street and has attempted to assess the railroad company as an abutting landowner, the railroad company is entitled to have the land condemned and compensation paid less the amount of the assessments against it. *R. R. v. Ahoskie*, 585.

2. Where, in an action to restrain the defendant from obstructing a roadway across his lands, it is not controverted that the defendant's deed referred to an unregistered plat showing the roadway across the lands conveyed and that at the time of and before the execution of the defendant's deed the road was used by the public, an instruction directing an affirmative verdict upon the issues of dedication and acceptance of the road for a public use is not error, and the registration of the plat referred to in the deed is not necessary. *Somersette v. Stanaland*, 685.

DEEDS AND CONVEYANCES (Cancellation of, see Cancellation of Instruments; instruments operating as mortgages and not deeds see Mortgages B a 2; fraudulent conveyances see Fraudulent Conveyances; conveyance of mineral rights see Minerals).

B Recording and Registration (Of mortgages see Mortgages C c).

c Rights of Parties and Creditors Under Unregistered Deed

1. Only creditors of the donor, bargainor, or lessor, and purchasers for value are protected against an unregistered deed, contract to convey, or lease of land for more than three years, C. S., 3309, and such protection does not extend to the creditors of an heir at law of a grantor in a deed which has not been registered, the heirs at law of a deceased taking only the undevised inheritance of which the ancestor was seized at the time of his death, C. S., 1654. *Gosney v. McCullers*, 326.

C Construction and Operation.

c Estates and Interests Created

1. Construing a deed in consideration of natural love and affection to the grantor's grandson by name "for life with remainder to his bodily heirs by ....., if any, otherwise to M.": *Held*, the grantee acquired a fee-simple title under the rule in *Shelley's case*, and the limitation over to M. was defeated by the grantee's having living children, the condition not stipulating that the limitation over should take effect upon the death of the grantee without bodily heirs him surviving. *Glenn v. Ashby*, 244.

f Conditions and Covenants

1. Where the owner of a tract of land lying upon both sides of a drainage canal sells the land lying upon one side of the canal by deed containing stipulations relating to the grantee's right to use and maintain the canal, and requiring the owner of the other land not conveyed by the grantor to contribute to the expense of maintaining the canal in accordance with provisions therefor in the deed: *Held*, the stipulations are covenants running with the land and create a right in the nature of an easement with respect to the land not conveyed by the grantor in the deed, which are binding upon the grantor and all persons claiming under him subsequent to its registration, and where the grantor prior to the execution of the deed has executed a contract to sell the land not conveyed by the deed to another, which contract also contains stipulations relating to the drainage canal, but the contract to convey is registered subsequent to the registration of the deed, the grantee in the deed is not affected by the contract, C. S., 3309, and the person claiming title under the unregistered contract holds such title subject to the easements created in the deed. *Walker v. Phelps*, 344.

2. A grantee in a deed may not bring an action on the covenant of quiet enjoyment contained in the deed merely because he has discovered that the title to the mineral rights in the land had been reserved by his grantor's predecessors in title, an ouster, eviction or adverse claim being prerequisite to the right of action thereon. *Guy v. Bank*, 803.

DEEDS AND CONVEYANCES C—*Continued.*

g Restrictions

1. Where a subdivision is sold into lots by deeds with covenants restricting the use of the land exclusively to dwellings, and the purchasers and their grantees, in reliance on these restrictions and in conformity therewith, build residences of the class designated with the belief and understanding that the restrictions would increase the value of the lots so purchased: *Held*, the plan is a general scheme and each purchaser under the restrictive covenants and warranties in his deed may restrain the building of a store for business purposes by an owner of a lot in the development, and the disregard of the restrictions in a very few instances to so slight an extent as not to materially affect the value of the other lots, under the facts of this case, will not vary the result. *Franklin v. Realty Co.*, 212.

2. Where lands are plotted into lots and sold with covenants restricting the buildings thereon to residences of a certain class and the purchasers have practically complied with the restrictive covenants in the deeds, the fact that business buildings were erected before these lots were so sold and conveyed on contiguous or adjoining blocks of the city will not alone be sufficient to show that business had extended to the lots with the restrictions and that therefore the restrictions should not equitably be enforced as to the owners of lots which had not yet been built on. *Ibid.*

3. Where lots in a development are sold and conveyed on a general plan restricting the class of buildings therein to residences, which restrictions have been practically observed, a purchaser of a lot in the development may not successfully contend that the general plan is varied by a further clause in the deed permitting a variation upon the mutual consent of the original grantor and subsequent purchasers under the provisions of the original deed in the development when no such variation has been made, as no harm has been suffered on account of this clause. *Ibid.*

D Boundaries.

e Burden of Proof, Issues and Verdict

1. In a special proceeding to establish the dividing line between adjoining landowners the burden of proving the true boundary is on the plaintiff, and where the trial judge inadvertently places the burden of the proof on both parties at the same time a new trial will be awarded, the rule as to the burden of proof constituting a substantial right. *Boone v. Collins*, 12.

DEMURRER see Pleadings D.

DESCENT AND DISTRIBUTION.

B Persons Entitled to Distribution and Their Respective Shares.

a Children in General

1. Where in an action for divorce on the grounds of adultery of the wife the trial has proceeded upon the issue of abandonment, C. S., 1659, and on the verdict of the jury on the latter grounds the marriage has been annulled, the judgment thus rendered is not void, and the wife's children by a later marriage will not be declared

DESCENT AND DISTRIBUTION B *a—Continued.*

illegitimate and thus denied the right to inherit from their father. C. S., 279. In this case an amendment to the divorce proceedings *nunc pro tunc* was allowed by the trial judge. *Reed v. Blair*, 745.

C Rights and Liabilities of Heirs.

a Debts of Intestate and Encumbrances on Property

1. Where the personal estate of an intestate is insufficient to pay the debts of the estate, including the costs of administration, the administrator may apply to the Superior Court for an order to sell real estate of the intestate to make assets, C. S., 74, the heirs of the deceased being necessary parties to the proceedings, C. S., 80, the heirs at law taking the land subject to the payment of the debts of the estate where the personalty is insufficient therefor. *Avery v. Guy*, 152.

DISCOVERY see Bill of Discovery.

DIVORCE—Setting aside decree where service by publication was obtained by fraud see Judgments K c 2.

DOWER.

A Nature, Rights and Incidents.

b Land or Interest to Which Dower Attaches

1. Where a father deeds lands to his children who in turn mortgage the property, and the proceeds of the mortgage are used to pay an individual debt of the father, and during his life he continues to manage and control the lands and after his death his executor does so, and it appears that the whole transaction was in effect an indirect mortgage on the property by the father and that the children received no consideration and acquired no beneficial interest in the lands: *Held*, the sole beneficial interest in the lands was in the father, and upon his death his widow is entitled to her dower rights in the lands. C. S., 4100. *Stack v. Stack*, 461.

EASEMENTS—In public highway see Highways D c 1; in streets see Municipal Corporations I a; creation of, by dedication see Dedication, by deed see Deeds and Conveyances C f 1.

ELECTION OF REMEDIES.

A In General.

d Between Original Contract and Later Security

1. Where in an action against a husband and wife the plaintiff elects to sue on a note given by the husband for the wife's debt due on open account with the plaintiff, the plaintiff is estopped by its election to maintain the action against the wife on the open account, it not being in a position upon judgment on the note to put the parties in *statu quo*, and its evidence that in taking the husband's note it did not intend to release the wife from her obligation is properly excluded, and a judgment as of nonsuit in favor of the wife is properly allowed. *Supply Co. v. Davis*, 56.

EMBEZZLEMENT (By partners see Partnership G a).

A Elements of the Crime.

a Intent

1. While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, C. S., 4276, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable. *S. v. Lancaster*, 204.

2. In a charge upon the trial of county officials for the misapplication of county funds under the provisions of C. S., 4270, the definition that "wilfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" is not erroneous under the circumstances of this case. *S. v. Shipman*, 518.

B Prosecution and Punishment.

c Evidence

1. Upon the trial of the sheriff of a county for embezzlement of the county's funds it is competent for witnesses to testify that the sheriff, when the amount of the alleged shortage was revealed to him, stated that it was more than he had thought, and that, upon time to make good being given him from time to time, he had repeatedly given his promise to make a full accounting. *S. v. Lancaster*, 204.

2. Upon the trial under an indictment against certain officers of a bank and county commissioners and the county attorney for conspiracy and misapplication of the county funds, there was evidence tending to show that the county had funds on deposit in the bank aggregating about half a million dollars and that a county note in a comparatively small amount was shortly to become due, and that pursuant to an agreement among the defendants to aid the bank, the county commissioners passed a resolution and published a statement that the county had to borrow money, and issued the county's note for $100,000, and that the bank purchased the note and sometime later sold it to a third party, and credited the county's account therewith, and that at the time the bank was insolvent, and that the bank and county officials, including the county attorney were heavy borrowers from the bank, is *held*, sufficient with other incriminating evidence, to sustain the charge of the indictment of conspiracy against the bank officials and the charge of conspiracy and misapplication of funds by the commissioners who participated with knowledge of the facts, but not as those who passed the resolution in good faith and without evidence fixing them with knowledge, the burden being upon the State to establish guilt beyond a reasonable doubt. *S. v. Shipman*, 518.

d Instructions

1. Where on a trial for embezzlement the decisive question is whether the defendant embezzled the county's funds after they were deposited in the bank, it will not be held for error that the court

EMBEZZLEMENT B *d—Continued.*

failed to instruct the jury that the funds must have been deposited with the intent to embezzle and that the funds were deposited in the defendant's name without his knowledge, the contentions of the defendant in this respect not being in issue. *S. v. Smith*, 581.

2. Where in a prosecution for embezzlement the trial court instructs the jury with respect to the principal items in dispute and sets forth the contentions of the defendant in regard thereto, his failure to give more specific instructions as to one item will not be held for error when it appears that the defendant was not prejudiced thereby, it being incumbent on the defendant to request special instructions if he desired instructions as to any subordinate feature of the evidence. *Ibid.*

EMINENT DOMAIN (City must condemn land sought to be used as street before levying assessments for improvements see Municipal Corporations G c 1).

D Proceedings to Take Land and Assess Compensation.

e Abandonment of Proceedings

1. By the express provisions of chapter 48, section 25 of the act of 1927, the North Carolina Park Commission may abandon condemnation proceedings against an owner by filing a written election to do so before paying the award and by paying the costs, and the act is constitutional and valid, and where the State has so abandoned certain proceedings and has paid the costs and has not exercised any control or dominion over the land the owner has not suffered any pecuniary injury thereby. *S. v. Hughes*, 763.

2. Consent judgment in this case held not to estop Park Commission from abandoning condemnation proceedings. *Ibid.*

EMPLOYER AND EMPLOYEE see Master and Servant.

ESTOPPEL (By award see Arbitration and Award E b).

A By Deed.

a Creation and Operation in General

1. In a suit to restrain the grantee from obstructing a public road that had been platted and referred to in the deed, and which road has been used by the public prior to the execution of the deed, both the grantor and grantee is mutually estopped to deny that the road had been dedicated to the public use. *Somersette v. Stanaland*, 686.

B By Judgment.

b Matters Concluded (Operation of judgments as bar to subsequent action see Judgments L b)

1. The rights of the North Carolina Park Commission to elect to abandon proceedings to acquire title to lands for park purposes under the provisions of chapter 48, Public Laws of 1927, section 25 is not affected by a consent judgment entered in the proceedings when such judgment was not intended or contemplated as a final adjudication of the rights of the parties and expressly reserves the case for the purpose of determining the question of the title to the lands in question and the person or persons to whom the money should be paid. *S. v. Hughes*, 763.

EVIDENCE (In criminal cases see Criminal Law G; in particular actions see Particular Titles of Actions; reception of evidence see Trial B).

C Burden of Proof (In particular actions or proceedings see Specific Heads).

a General Rules

1. Instruction held erroneous as placing burden of proof on the issue on both parties at the same time. *In re Will of Stallcup*, 6; *Boone v. Collins*, 12.

2. Rules governing the burden of proof constitute a substantial right. *Boone v. Collins*, 12.

c Interveners

1. The burden is on an intervener to establish his claim or title. *Jordan v. Wetmur*, 279.

D Relevancy, Materiality and Competency in General.

a Res Gestæ

1. In order for a declaration to be admissible as a part of the *res gestæ* it is necessary that the act itself should be admissible apart from the declaration that accompanies it, that the declaration should be uttered simultaneously, or almost simultaneously, with the occurrence of the act, and that it should be in explanation of the act. *Staley v. Park*, 155.

2. Where the plaintiff is injured by falling down a flight of stairs leading to the "ladies rest room" in an amusement park and brings action against the owner thereof alleging that the stairs were not in a reasonably safe condition, a deposition of the plaintiff to the effect that the one who had given her permission to use the stairs had said after the accident that he was sorry and that they had intended to fix the stairs, is improperly admitted in evidence as a part of the *res gestæ*, the act of giving permission not being such an act, exercised simultaneously with the injury, as the term *res gestæ* implies, and the declaration being made after the injury and the plaintiff failing to establish that it was made within the time necessary to constitute a part of the *res gestæ*, and it not being of a subsisting fact but an expression of a preëxisting state of mind. *Ibid.*

d Testimony of Telephone Conversations

1. Where a witness is allowd to testify over objection to the substance of an alleged telephone conversation with an unknown person for the purpose of showing the contents of the conversation which alone gave it pertinency and rendered it hurtful, the testimony is incompetent as hearsay, and its admission constitutes reversible error. *Powers v. Commercial Service Co.*, 13.

f Impeaching and Corroborative Testimony

1. The testimony of an insurance agent of the renewal of a policy of automobile liability insurance, of which he had personal knowledge, is held competent as corroborative evidence of the plaintiff's contention that the car causing the injury in suit was the car covered in the renewal policy. *Rudd v. Casualty Co.*, 779.

EVIDENCE D—*Continued.*

h Similar Facts and Transactions

1. Where an employee is injured by the falling of a comb in a cotton mill machine, alleged to have fallen because of a defect therein, evidence that the comb had so fallen while the machinery was being operated by other employees immediately thereafter is competent where there is evidence that no change had taken place, the probative force of the evidence being for the jury. *Almond v. Oceola Mills*, 97.

G Declarations Against Interest.

a In General

1. The power to make declarations against the interest of a company cannot be inferred as incidental to the duties of a general agent in charge of the current dealings of the business, and where declarations of a "person in charge" of the business are sought to be introduced in evidence and there is no evidence of the scope of the agent's authority, the admission of the evidence against the company as a declaration against its interest is reversible error, the burden being upon the plaintiff to establish the competency of this evidence. *Staley v. Park*, 155.

I Documentary Evidence.

b Accounts, Ledgers, Records and Private Writings

1. In an action by the wife against her father-in-law for alienating from her the affections of her husband: *Held*, a letter from the plaintiff's attorney to the defendant listing the wrongs alleged to have been committed by him is *ex parte* and self-serving and incompetent as evidence upon the trial. *Hankins v. Hankins*, 358.

J Parol Evidence.

a Admissibility in General

1. While parol evidence may not be received in evidence to add to, vary or contradict the written part of an instrument, where the entire contract is not reduced to writing the unwritten part may be shown by parol evidence if such evidence does not contradict the written terms of the agreement; in this case parol evidence of an agreement for a particular mode of payment of notes is held admissible as between the original parties. *Stack v. Stack*, 461.

2. Parol evidence held admissible to show total failure of consideration for guaranty of payment. *Chemical Co. v. Greene*, 812.

EXECUTION.

A Levy.

b Control or Possession of Officer

1. Where a mortgagor pays a certain sum in cash into the hands of the clerk of the Superior Court as a deposit for an advanced bid, for the resale of property sold under a mortgage, and the sheriff attempts to levy thereon under execution by demanding the sum of the clerk and making a notation upon the execution to the effect that he had levied upon the fund, and the clerk retains the fund and agrees to apply it to the judgment if it should subsequently

EXECUTION A *b—Continued.*

be determined that the sheriff had a right to levy on the fund, and upon knowledge of the transaction the mortgagor claims the fund as his personal property exemption, and it appears that the sheriff neither touched nor saw any part of the funds in the clerk's hands: *Held*, there was no sufficient levy upon the funds by the sheriff, and the attempted levy was void. *In re Phipps*, 642.

B Property Subject to Execution.

c Trust Estates

1. The interest of a *cestui que trust* in real property held by a trustee as an active trust, requiring the trustee to perform certain duties in respect thereto until the happening of a certain event, and where the *cestui que trust* may not call for a conveyance of the legal title, is not subject to execution in this State. C. S., 677, subsecs. 3, 4. *Patrick v. Beatty*, 454.

J Supplemental Proceedings.

a Right to Institute Proceedings

1. Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings, C. S., 711, 712, 719, and chapter 24, Public Laws of 1927, does not affect this result, the later act having no repleaing clause does not apply to supplemental proceedings but applies only to strike out the three-year limitation in C. S., 667 and to repeal C. S., 668. *Harvester Co. v. Brockwell*, 805.

K Execution Against the Person.

d Discharge by Insolvent's Oath

1. Where execution against the person of a defendant is made in accordance with the judgment against him, C. S., 673, after execution against his property is returned unsatisfied, and the defendant files a petition for his discharge as an insolvent under C. S., 1637 *et seq.*, and the plaintiff answers the petition for discharge and alleges that the defendant had concealed his property and fraudulently made the affidavit that he was without means: *Held*, the plaintiff must allege the fraud with sufficient fullness and certainty to indicate the charge the defendant must answer, and such allegations must be supported by sufficient evidence, and where the plaintiff has failed to do so a judgment dismissing the proceedings will be affirmed. *Hayes v. Lancaster*, 515.

EXECUTORS AND ADMINISTRATORS (Power to appoint administrators see Clerks of Court C a, Courts A c; executor may be made a party in Supreme Court see Appeal and Error A b 1).

C Control and Management of Estate.

c Business and Contracts of Executors and Administrators and their Agents

1. Where the executors and trustees of an estate appoint the manager of certain concerns of the deceased to continue to act in that capacity after the death of the deceased, and thereafter the manager executes certain notes the proceeds of which are used ex-

EXECUTORS AND ADMINISTRATORS C *c—Continued.*

clusively for the payment of debts contracted by the deceased before his death and to keep up the property of the deceased under his management, the executors and trustees are thereafter estopped to deny either that the acts of the manager in executing the notes were not within the scope of the employment or that they were ignorant of the fact that the relation which had existed between the deceased and manager prior to the deceased's death was that of principal and agent and not that of partners. *Bank v. Grove*, 144.

2. Where the general manager of certain concerns of the deceased borrows money on notes from a bank shortly after the death of the deceased and the proceeds thereof are used for the exclusive benefit of the deceased's estate, the personal representatives of the deceased are liable to the bank therefor in their representative capacity, although at the time of paying one of the notes they were unaware that the relationship between the general manager and the deceased was that of principal and agent, the estate having received the benefits of the unauthorized acts of the agent and the executors making no offer of restoration, they may not repudiate the acts of the agent to the injury of the other party, and having the power to make the contracts they also had the power to ratify them. *Ibid.*

f Suits to Collect Debts or Claims Due to Estate

1. Where, after the death of the intestate a lumber company cuts some timber from lands beyond the boundaries described in their timber deed from the intestate, and a settlement is made therefor with the administrator of the estate in accordance with an award made by appraisers appointed by the court by agreement of counsel, and it appears that the personalty of the intestate was not sufficient to pay all debts of the estate, and that the heirs at law of the intestate, through their guardian, are parties plaintiff and that they are entitled to payment from the administrator, after the debts of the estate are paid, of any surplus: *Held*, a judgment as of nonsuit in an action brought by the guardian of the heirs at law to set aside the award as not being binding on her will not be disturbed on appeal, no harm having resulted to the minor heirs at law, and the judgment not being prejudicial as to them, the right of action therefor being outstanding in the administrator for the benefit of the estate and heirs. *Avery v. Guy*, 152.

D Allowance and Payment of Claims.

g Rights and Remedies of Creditors

1. The personal representative of a deceased is a necessary party to a suit to recover assets of the estate, and where the holder of one of several bonds secured by a mortgage on the deceased's home place brings action against the beneficiary under the deceased's will to declare the legacy a trust fund for the payment of the bond, and it appears that the bequest is insufficient to pay all the bonds and that the executor and other bondholders have not been made parties, the defendant's demurrer is properly sustained. *Sims v. Dalton*, 249.

EXECUTORS AND ADMINISTRATORS—*Continued.*

F Sales Under Order of Court.

a When Sale is Necessary

1. Where personalty is insufficient to pay debts of estate, realty may be sold under order of court. *Avery v. Guy*, 152.

EXPERT TESTIMONY see Criminal Law G i.

FEDERAL COURTS see Removal of Causes.

FORMER JEOPARDY see Criminal Law F.

FRAUD (Cancellation of instruments for, see Cancellation of Instruments A b).

A Elements and Essentials of Right of Action.

b Deception

1. All prior negotiations are merged in the written instrument in the absence of fraud, mistake or other maintainable equity, and the law presumes that the parties to a contract have deliberately chosen words fit and suitable to express their meaning and intent, and where a contract for the exchange of real property between the parties is reduced to writing and the complaining party has read it and deliberated several days before executing it: *Held*, he may not recover against the other party damages caused by his ignorance of the difference between the legal liability of taking property subject to a mortgage and assuming to pay a mortgage debt thereon, and where the evidence tends only to show a mistake based upon such ignorance a motion as of nonsuit should be allowed. *Pierce v. Bierman*, 275.

C Actions for Fraud.

c Evidence

1. Where notes for the purchase price of lands are made payable to the grantor's son and not to the grantor, and after the grantor's death are found pledged as collateral for the son's note in a bank, and there is no evidence that the son was acting as the grantor's agent or that any confidential relationship existed between them or any other evidence in explanation: *Held*, the evidence of fraud is insufficient to be submitted to the jury in an action by the administrator of the grantor against the son to recover the value of the notes, and his motion as of nonsuit should have been granted. *Dean v. Dean*, 385.

FRAUDS, STATUTE OF.

A Promise to Answer for Debt or Default of Another.

a Applicability and Defense

1. Where the father signs the note of his son as a guarantor of payment in consideration of the payee's furnishing the son with fertilizer on open account, parol evidence of the total failure of the consideration in that the payee did not so furnish fertilizer is admissible as between the parties in an action against the father on the note. *Chemical Co. v. Griffin*, 812.

2. The statute of frauds does not apply to the original promise to pay the debts of another. *Beck v. Halliwell*, 846.

FRAUDULENT CONVEYANCES (Rights of creditors against grantee in unregistered deed see Deeds and Conveyances B c).

C Actions to Set Aside.

c Sufficiency of Evidence and Nonsuit

1. In order to set aside a deed to lands from parents to their son it is required that there be a fraudulent intent on the part of the parents and a knowledge of fraud by the son, and where all the evidence tends to show that the son surrendered notes delivered to him by his father for money owed him, and made a cash payment, which, together, constituted a full consideration for the lands at the time of the transaction, and that the land conveyed had been conveyed to the mother by the father in consideration of her relinquishing her right of dower in his other lands for the benefit of his creditors, and that at the time of the transaction the father had property then more than sufficient to satisfy all his debts, and that none of the parties had any fraudulent intent or knowledge of any fraud: *Held*, an instruction directing a verdict if the jury found the facts to be in accordance with the evidence is not prejudicial. *Bank v. Finch*, 291.

GIFTS.

A *Inter Vivos.*

a Requisites and Validity

1. Choses in action may now be the subjects of valid gifts and their delivery by the donor is sufficient if the donor's surrender of the property is complete and his dominion and control of it relinquished, but delivery may be actual, constructive, or symbolic, and no absolute rule as to the sufficiency of delivery, applicable to all cases, may be laid down. *Taylor v. Coburn*, 324.

b Transactions Operating as Gifts

1. Where an administrator of a deceased is sued for the amount of an insurance policy paid into his hands by the insurer, the plaintiffs claiming that the policy had been given them by the deceased with instructions to pay the premiums thereon as they matured which they had done, and it appears that the deceased had deposited the policy with the insurer to secure money borrowed thereon: *Held*, the administrator's motion as of nonsuit was properly refused, since an insurance policy may be given away by parol and its actual delivery is not indispensable to the gift, and the provisions of the policy relative to assignment are for the benefit of the insurer whose rights are not involved, the amount of the policy having been already paid, and the court properly submitted the question of the sufficiency of the delivery to the jury under instructions which are free from error. *Taylor v. Coburn*, 324.

GRAND JURY see Indictment A b, A d.

GUARDIAN AND WARD.

C Custody and Care of Ward's Person and Estate.

b Control and Management of Estate in General

1. Where the surety on a guardian's bond alleges an agreement for the joint control by the guardian and surety of the guardianship funds

GUARDIAN AND WARD C *b—Continued.*

deposited in a bank, the agreement will not be held void upon a demurrer, it being assumed that the agreement comes within the purview of C. S., 6382(e). *Leonard v. York*, 704.

HABEAS CORPUS—Jurisdiction of proceedings see Courts A a 1; for custody of minor child see Parent and Child A c 3.

HIGHWAYS (Bonds of contractors see Principal and Surety B b 3, 4, 5).

A State Highway Commission.

a Width of Highway, Maintenance, Signs, etc. (Widening highway through city see Municipal Corporations G b 1)

1. The erection of signs on a State highway in imitation of official highway signs in violation of chapter 148, section 56, Public Laws of 1927, is made a misdemeanor under section 58, and injunction is not the appropriate remedy for the enforcement of the statute, and in proceedings by a private person a judgment dissolving a temporary order restraining the maintenance of signs by a private owner alleged to be in violation of the statute will not be disturbed on appeal, it further appearing that the alleged signs were placed on private property and not upon the right of way of the highway. *Chappell v. Mowery*, 584.

B Use of Highway and Law of the Road.

b Intersections and Speed at Intersections

1. Where damages are sought for defendant's negligent driving at a street intersection and there is evidence tending to show that the defendant was approaching the intersection at an unlawful rate of speed and did not slow up before the happening of the collision with another car: *Held*, an instruction correctly charging the rule of the right of way if both cars approached the intersection simultaneously and the rule that if one of the cars was already in the intersection it was the duty of the driver of the other car to slow down and permit it to pass will not be held for error. C. S., 2621(60). *Piner v. Richter*, 573.

g Negligence in Driving in General

1. Where the evidence tends only to show that the driver of an automobile in heavy traffic on a highway saw a truck coming towards him and upon the sudden necessity of avoiding a collision therewith, swerved the car, causing it to leave the hard surface and hit a post along the highway, resulting in the death of an invitee riding with him: *Held*, the act of the driver in so swerving the car will not be held for negligence, and the injury was from an accident for which damages may not be recovered either against the driver or the owner of the car. *Patterson v. Ritchie*, 725.

h Violation of Traffic Regulations in General

1. The violation of a statute enacted for the safety of those driving upon the highway is negligence *per se*, and when such violation is admitted or established the question of proximate cause is ordinarily for the jury. N. C. Code, 1931 (Michie), 2621(45), 2621(46), 2621(51), 2621(54), 2621(55). *King v. Pope*, 554.

HIGHWAYS B—*Continued.*

i Contributory Negligence (Of guest see hereunder k)

1. Where the evidence discloses that the plaintiff, a fourteen-year-old boy, was attacked by a dog while attempting to cross a hard-surfaced highway, and that the boy, while kicking at the dog, retreated towards the middle of the highway, which was straight for more than a hundred yards, and that the boy did not see the defendant's automobile approaching and was struck by it while in the middle of the highway: *Held*, the question of contributory negligence should be submitted to the jury, and the granting of the defendant's motion as of nonsuit is error, and *held further*, the evidence is sufficient to warrant the submission of the issue of the last clear chance. *Dotson v. Early*, 8.

k Guests and Passengers

1. Where a gratuitous passenger or guest in an automobile has no ownership or control over the car and is not engaged in a joint enterprise with the driver or other occupants, negligence of the driver of the car will not be imputed to the guest, and he may recover against a third person for a negligent injury if the negligence of the driver is not the sole proximate cause of the injury. *Nash v. R. R.*, 30.

2. Where the doctrine of being engaged in a joint enterprise is relied on by the defendant sued for negligently inflicting a personal injury in the driving of an automobile wherein the plaintiff was an invitee, it must be shown by the defendant that he and the plaintiff had such control over the car as to be substantially in joint possession of it. *Chanock v. Refrigerating Co.*, 105.

3. Although the negligence of the driver of an automobile will not ordinarily be imputed to a guest therein when the guest has no control over the car or driver, the guest may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident. *Hinnant v. R. R.*, 489.

4. Where the evidence discloses that the plaintiff was a guest in the defendant's car on a trip to another city and that the defendant on the return trip was driving in a reckless manner in violation of the speed limit and driving on the wrong side of the road and in turning curves at a dangerous rate of speed, and that the plaintiff repeatedly remonstrated with the defendant's driving and that soon thereafter the car turned over while the defendant was attempting to take a curve at a dangerous rate of speed, causing injury to the plaintiff: *Held*, under the facts and circumstances of this case the plaintiff's failure to demand that the defendant stop the car and let him out was not contributory negligence as a matter of law, and the issue was properly submitted to the jury under instructions which were free from error, and *held further*, if the defendant's conduct was wilful and wanton the plea of contributory negligence could not avail him. *King v. Pope*, 554.

m Pleadings in Action for Damages

1. In a civil action by an invitee or guest in an automobile to recover damages against the owner and driver thereof, allegations in the

HIGHWAYS B *m—Continued.*

complaint that the car was driven negligently and at a reckless speed resulting in a collision with another car at a street intersection and that this was the proximate cause of the injury in suit is a sufficient allegation of actionable negligence to resist the defendant's demurrer to the complaint, the allegations being sufficient according to the common-law practice, and section 2621(46), requiring that the speed of the automobile must be alleged, applies to criminal actions only and not to civil actions for damages. *Piner v. Richter*, 573.

o *Sufficiency of Evidence and Nonsuit*

1. Where, in an action to recover damages for the negligent killing of the plaintiff's intestate, there is evidence only that the intestate was killed while riding a bicycle at or near a street intersection by being struck by an auto-truck driven by the defendant: *Held*, the defendant's motion for judgment as of nonsuit should be allowed, the mere fact of the collision raising no presumption of negligence, and there being no evidence to support the allegations of the complaint as to the negligent driving of the defendant. *Swainey v. Tea Co.*, 272.

D Rights of Persons in Highway Location.

c *Rights of Landowners in Contiguous Highways After Abandonment by Highway Commission*

1. Where there is evidence that the road in controversy had been used by the public for about fifty years as a main highway between two cities, that it had been worked and kept up for that period and had been macadamized for about nine years, all at public expense, and that thereafter the State Highway Commission discontinued such road as a part of the State highway system under the plenary power given to it by statute, and built a permanent hard-surfaced road in close proximity thereto in order to straighten and improve the highway: *Held*, the abutting owners along the abandoned road have an easement therein for ingress and egress although the original owner may still retain the fee subject to the easement, and the road abandoned as a part of the highway system may not be closed by the owner of the land through which it lies to such abutting owners without their consent. *Davis v. Alexander*, 130.

2. Where a highway has been used by the public for over fifty years and has been kept up and macadamized at public expense, and thereafter this section of the road is abandoned by the State Highway Commission as a part of the highway system of the State: *Held*, an abutting owner is entitled to a permanent injunction restraining the owner of the fee in the land through which the section of abandoned road lies from taking possession of the abandoned road and closing it to the destruction of the abutting owner's right of easement thereover, and where the road has been closed by the owner of the fee a mandatory injunction may be issued commanding that the road be reopened. *Ibid.*

HOMICIDE.

B Murder.

a Murder in the First Degree (Expert testimony as to mental capacity see Criminal Law G i 6)

1. Where upon a trial for murder all the evidence and inferences therefrom unquestionably tend to show that the deceased was killed by one lying in wait and for the purpose of robbery, with evidence tending to establish that the defendant had perpetrated the crime, and there is no evidence in mitigation of the offense, the evidence establishes the crime of murder in the first degree, C. S., 4200, and an instruction to the jury either to convict the defendant of murder in the first degree, if the evidence so satisfied them beyond a reasonable doubt, or to acquit the defendant is not error. *S. v. Myers*, 351.

2. Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, C. S., 4200, and the failure of the trial court to submit the issue of guilt of murder in the second degree is not error. *S. v. Donnell*, 782.

G Evidence.

a Weight and Sufficiency

1. Where in a criminal prosecution the State's evidence tends to show that the defendant willingly entered into the fight with the deceased and killed him with a deadly weapon, a knife, the defendant's motion as of nonsuit is properly refused, and a verdict of manslaughter will be affirmed on appeal. C. S., 4643. *S. v. Ferrell*, 475.

b Presumptions and Burden of Proof

1. Where upon the trial for a homicide the solicitor does not ask for a conviction of murder in the first degree but of murder in the second degree or manslaughter, and the defendant admits he killed the deceased with a pistol but contends that the deceased was attacking him with a knife, and that the killing was in self-defense, the killing with the deadly weapon raises the presumptions of malice and that the killing was unlawful, both of which presumptions the defendant must rebut by his evidence, and where he rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. *S. v. Fleming*, 512.

HOSPITALS.

C Private Hospitals.

a Liability to Patients

1. A hospital which undertakes to furnish only the facilities for an operation or for the treatment of a patient is not responsible for the negligence of a physician chosen by the injured person or by a third person for him, and where, in an action against a hospital for damages caused by the negligence of a physician, there is no allegation that the physician was employed by the hospital or

HOSPITALS C *a—Continued.*

treated the patient as agent of the hospital, the action is properly dismissed as to the hospital, there being no cause of action stated against it. *Gosnell v. R. R.*, 234.

2. Where an injury to a patient is not attributable to any negligence of the attending nurse the owner or lessee of the hospital employing the nurse cannot be held liable on the doctrine of *respondeat superior*. *Byrd v. Hospital*, 337.

D Nurses.

b Liability to Patients

1. Nurses in a hospital in the discharge of their duties must obey and diligently execute the orders of the physician or surgeon in charge of the patient, and they will not be held liable for injury resulting to the patient from executing such orders unless such orders are so obviously negligent as to lead any reasonably prudent person to anticipate that substantial injury would result to the patient therefrom. *Byrd v. Hospital*, 337.

2. Where a family physician diagnoses the condition of his patient and prescribes that she be removed to a private hospital and given treatment in an electric heat cabinet, an appliance approved and in general use, and is present with the nurse attending the patient and sees and approves of the way the body of the patient is prepared for the treatment and directs that the patient remain in the cabinet a certain length of time, and injury results to the patient from being burned: *Held*, the injury must have resulted from one of three causes, and if it resulted from the peculiar susceptibility of the patient to heat due to her condition it resulted from an error in diagnosis by the physician, or if it resulted from the length of time the patient was kept in the cabinet, the length of time was expressly prescribed by the physician, or if it resulted from improper preparation of the body of the patient for the treatment, the physician was present and knew what preparations had been made, and under the circumstances the treatment of the nurse was the treatment of the physician, and the nurse cannot be held liable for the injury, it not being apparent that substantial injury would result from the execution of the physician's orders. *Ibid.*

HUSBAND AND WIFE (Neglect of wife to file complaint held excusable when husband had promised to do so for her see Judgments K b 1).

A Abandonment.

c Defenses

1. The false representations of the prosecutrix that she was pregnant before the marriage is no defense in a criminal action against the husband for wilful abandonment. *S. v. Gibson*, 108.

C Separation and Maintenance.

c Deeds of Separation and Bonds Securing their Performance

1. In construing a bond given to insure the faithful performance of a deed of separation, executed in accordance with a judgment of the court, the intent of the parties must be arrived at by taking into

HUSBAND AND WIFE C *c—Continued.*

consideration all the paper-writings relating to the controversy, the condition of the parties and the purpose of the bond, the family relationships and the circumstances existing at the time of its execution. *Peeler v. Peeler*, 124.

2. Where in an action by a wife against her husband a judgment has been entered requiring the defendant to pay the plaintiff a certain sum each month for a stated period, and in accordance with the judgment a deed of separation is executed to carry into effect the provisions of the judgment, the deed of separation providing that a bond should be executed which should be responsible "for each and every payment until the conditions of the judgment have been fully complied with," and a bond in accordance therewith is executed in a certain penal sum, and is conditioned upon the principal's performance of the provisions of the judgment: *Held*, by interpretation of all the relative papers the penalty of the bond is not the limit of liability thereon, it being collateral to the purpose of the bond and inserted merely for security, and a judgment that the surety should be discharged upon payment into court of the penal sum of the bond is erroneous. *Ibid.*

E Alienation.

a Elements and Essentials of Right of Action

1. In an action by a wife to recover damages for the alienation of the affections of her husband she must establish by proper evidence that she and her husband were happily married and that genuine love and affection existed between them, that such love and affection was alienated, and that the wrongful and malicious acts of the defendant brought about such alienation. *Hankins v. Hankins*, 358.

b Evidence

1. Where, in an action by a wife against her father-in-law to recover damages for the alienation of the husband's affections, the evidence tends to show that the married couple came to live with the husband's father on account of their strained financial circumstances: *Held*, evidence that the defendant's house was in disrepair and that the food, which was served to all alike, was not good, that the defendant opposed the church and held views of contempt for the marriage ceremony is incompetent, and the judgment of the Superior Court granting a new trial in the county court upon exceptions based upon the admission of such evidence will be affirmed. *Hankins v. Hankins*, 358.

2. In an action by the wife against her father-in-law to recover damages for the alleged alienation of the affections of the husband evidence of the relationship between the parties is competent and constitutes a proper and vital subject of inquiry, but evidence of the number of parties the plaintiff had in her own house, or of the amount of money the defendant gave his daughters, or of the provision of the defendant to have his body cremated is incompetent and does not come under the rule, such evidence being wholly foreign to the issue and not being of declaration tending to show bias, animus or hostility to the plaintiff or her marriage. *Ibid.*

IDEM SONANS see Indictment B c.

INDEMNITY.

B Rights and Liabilities of Parties.

a Suffering of Loss by Those Indemnified and their Rights on Indemnity Contract (Right of sureties to contribution from other securities see Contribution A a 1)

1. Where a sheriff in his application for a surety bond obligates himself among other things to indemnify the surety against loss arising from the execution of the bond, and in an action against the surety in the Federal Court in another State a judgment is rendered against it on the bond for an alleged assault by the sheriff's deputies on offenders against the laws of this State whom the deputies arrested there and brought back here: *Held*, the surety has suffered loss by reason of the execution of the bond and may recover the amount of such loss against the sheriff on his agreement to indemnify, the action being on the contract of indemnity executed here and not on the judgment rendered in the other state, and the principle that courts of one state will not take jurisdiction of an action brought on the bond of an officer of another state has no application to the present action. *Guaranty Co. v. Hill*, 238.

2. Where the endorsers on a note discounted at a bank are given a collateral agreement to indemnify them against loss by reason of their endorsements, and the collateral agreement is secured by a mortgage on lands, and the endorsers have taken up the note with money borrowed from the bank exclusively on their own note and have received the original note from the bank: *Held*, the endorsers have suffered loss on account of their endorsements and may proceed to enforce the collateral indemnity agreement and the mortgage securing it. *Watkins v. Simonds*, 746.

b Subrogation to Rights of Party Indemnified

1. Where a surety company has paid the amount of a bond indemnifying a county against loss of deposits in a bank, and the bond covers a part of the amount of the county's deposit, and the county assigns to the surety company the amount so paid: *Held*, in order for the surety company or its assignee to be entitled to payment on the assigned claim it must be shown that the county had received payment of the full amount of the balance of its deposit. *Comr. of Banks v. White*, 311.

INDICTMENT AND PRESENTMENT (For arson see Arson C a, for assault see Assault and Battery B a 1).

A Necessity for and Formal Requisites of Indictment or Presentment.

a In General

1. Under the Constitution, Declaration of Rights, section 12, no person is required to answer a criminal charge but by indictment, presentment or impeachment, and an indictment implies an indictment by grand jury as defined by common law unless changed by statute. *S. v. Mitchell*, 439.

2. A justice of the peace has no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and the Superior

INDICTMENT AND PRESENTMENT A *a—Continued.*

Court may proceed to trial only upon indictment duly found and returned, Art. I, sec. 12, the words in section 12 "except as hereinafter allowed" referring to the latter clause of section 13 relating to trial of petty misdemeanors and not to an assault with a deadly weapon, and where, over the objection of the defendant, the Superior Court proceeds to trial on the magistrate's warrant without an indictment, and the defendant is convicted of an assault with a deadly weapon and sentenced to three months in jail, to be suspended upon the payment of a fine and costs, the judgment will be reversed on appeal, and where the defendant has been acquitted of a simple assault in the magistrate's court she should be discharged. *S. v. Myrick*, 688.

b Jurisdiction of and Finding by Properly Constituted Grand Jury

1. Ordinarily indictment charging a criminal offense must be passed upon by the grand jury of the county wherein the offense charged was committed, and our statutes prescribing certain instances in which the grand jury of another county may pass upon an indictment will not be enlarged beyond the reasonable scope of their provisions. N. C. Code, 1931, secs. 4600, 4606. *S. v. Mitchell*, 439.
2. The duties of the North Carolina Corporation Commission as a court of record and the duties of the Chief Bank Examiner appointed by it are performed in Raleigh, Wake County, N. C. Code, 1931, sec. 1023, C. S., 249, and an indictment charging the individual members of the Commission and the Chief Bank Examiner with malfeasance, nonfeasance or misfeasance in the performance of their duties relating to State banks should be laid by indictment to be passed upon by the grand jury of Wake County, and where the indictment is passed upon by the grand jury in another county the defendants' plea in abatement is properly sustained, and the case should be dismissed. *Ibid.*

d Return of Indictment by Grand Jury

1. The requirement of C. S., 2336 that the foreman should mark the names of witnesses examined by the grand jury on the bill of indictment is merely directory, and there is no statute requiring that the foreman endorse thereon whether or not it is found a true bill, the validity of the bill being determined by the court records and not by endorsement on the bill, and where a bill of indictment in a capital case has been duly returned into open court by the grand jury or a majority of them as a true bill, C. S., 4611, and the court in its discretion, upon a later investigation, allows the foreman in open court, in the presence of a majority of the grand jury, to mark the names of the witnesses examined on the bill and to endorse it a true bill as directed by the grand jury, the defendant's motion to quash or in arrest of judgment is properly refused. *S. v. Avant*, 680.

B Form and sufficiency of Indictment.

b Charge of Crime

1. The charge in the indictment must be sufficiently specific, both as to law and fact, to adequately inform the defendant of the offense with which he is charged and to enable him to be prepared on the trial

INDICTMENT AND PRESENTMENT B *b—Continued.*

and to enable the court to proceed to judgment upon conviction and to protect the defendant under another indictment for the same offense, and it may not be sufficient if the indictment follow the definition of the statute. *S. v. Cole*, 592.

2. The essential constituents of the offense charged must be stated in an indictment therefor, and C. S., 4623, prescribing that an indictment shall not be quashed for mere informality or refinement in charging the offense does not apply where the indictment is fundamentally deficient. *Ibid.*

c Idem Sonans

1. Where the indictment charges the defendants with the murder of one R. B. "Andrews" and the judgment recites that they were convicted of the murder of one R. B. "Andrew," the names are patently *idem sonans* and the difference will not be held material. *S. v. Donnell*, 782.

C Motion to Quash or Dismiss and Demurrer to Indictment.

a Grounds for and Effect of Demurrer in General

1. The object of a demurrer to an indictment is to impeach it and forestall a prosecution on the ground that its charges do not constitute a breach of the criminal law, and in case the indictment does not adequately inform the defendant of the offense with which he is charged or is insufficient to enable the court to proceed to judgment, a demurrer thereto is good. *S. v. Cole*, 592.

D Amendment and Bill of Particulars.

a Scope and Nature of Amendment

1. The provisions of our statute, C. S., 4613, enabling a defendant in a criminal action to call for a bill of particulars, cannot supply a deficiency in an indictment when the language of the indictment fails to adequately charge the essential concomitants of the offense, and when the indictment is thus defective the trial court is without authority to permit an amendment. *S. v. Cole*, 592.

INDUSTRIAL COMMISSION see Master and Servant F.

INFANTS—Setting aside judgment by, see Judgments K c; Parent and Child see Parent and Child.

INJUNCTIONS (Enjoining collection of taxes see Taxation E *b*, enjoining foreclosure see Mortgages H b; enjoining obstruction of highway see Highways D c 2).

A Nature and Form of Relief.

b Parties Entitled to Relief

1. Private person held not entitled to injunctive relief against private owner to prevent maintenance of imitation highway signs on his property in violation of highway ordinance making the act a misdemeanor. *Chappell v. Mowery*, 584.

H Liabilities on Injunction Bonds.

a In General

1. Where on appeal from the granting of a temporary injunction it is held that the injunction was properly granted except as to

INJUNCTIONS H *a—Continued.*

one matter dealing with future transactions, and in this respect it is modified, a motion by a party defendant therein to assess damages against the injunction bond is properly denied. *Elias v. Comrs. of Buncombe*, 731.

INSANE PERSONS.

F Contracts.

a Validity and Effect

1. Where, at the time of the endorsement, an endorser does not have sufficient mental capacity to endorse the note, and the endorsement is without consideration to the endorser, the endorser is not liable thereon although the payee of the note is without notice of such mental incapacity, but the endorser is liable if he received consideration. *Searcy v. Hammett*, 42.

INSPECTION OF WRITINGS see Bill of Discovery C.

INSTRUCTIONS see Trial E.

INSURANCE (Surety bonds see Principal and Surety).

D Insurable Interest.

b In Life of Another

1. Except where there are ties of blood or marriage it must appear that a person would be damaged by the death of another in some way which can be measured by rule of law in order for him to have an insurable interest in the life of the other, and where the evidence discloses that the beneficiary in a policy of accident insurance applied for the policy and paid all premiums, that there was no contractual relationship between the beneficiary and the insured and that there were no ties of blood or marriage between them, the insurance contract is a mere wagering contract and is void at its inception, and a motion as of nonsuit should be granted in an action by the beneficiary thereon. *Slade v. Ins. Co.*, 315.

E The Contract in General.

b General Rules for Construction

1. Where a policy of insurance is ambiguous it will be construed in favor of the insured. *Greenville v. Assurance Corp.*, 837.

H Cancellation, Surrender and Abandonment.

a Cancellation by Insurer or Agent

1. The local agent of a fire insurance company has no authority to cancel a binding policy of fire insurance at the request of the insurer without the consent of the insured and issue another policy of the same kind in another company in its place, and when he attempts to do so without the knowledge or consent of the insured the cancellation is without effect and the original policy remains in force, and the insured may recover thereon for loss by fire sustained before knowledge of the agent's acts, there being no evidence of ratification by the insured. *Jernigan v. Ins. Co.*, 677.

c Cancellation of Group Insurance by Employer

1. Where an employer's policy of group insurance specifies that it should end as to any employee upon the termination of the employment,

INSURANCE H *c—Continued.*

or prior thereto upon cancellation by the employer, unless such termination of employment was caused by disability while the policy was in force, and it appears that the employer had terminated the insurance on such employee in accordance with the provisions of the policy: *Held*, in the absence of allegation or proof that the cancellation of the policy by the employer was wrongful or illegal such cancellation is presumed to have been lawful, and the beneficiary of the employee cannot recover thereon for the death of the employee after the policy had thus been canceled. *Baker v. Ins. Co.*, 432.

J Forfeiture of Policy or Insurance for Breach of Covenant or Condition.

e Additional Insurance or Encumbrancing Property

1. The subsequent act of the owner and mortgagor in taking out additional insurance protecting his interest alone, done without the knowledge or consent of the mortgagee, does not, *ipso facto*, reduce proportionately the amount of prior insurance held by the mortgagee on the same property under a New York Standard Mortgage Clause. *Taylor v. Ins. Co.*, 659.

K Estoppel, Waiver, or Agreements Affecting Right to Declare Forfeiture of Policy.

b Acceptance or Retention of Premiums

1. Where the executive secretary of a mutual benefit insurance order, who solely is authorized under the constitution of the order to receive all money for membership dues, and who is charged with the duty of reporting to the order those members in arrears and notifying such members of their standing, fails to give the required notice to a delinquent member, and thereafter accepts the payment of the delinquent member's dues with knowledge that the member was then *in extremis: Held*, the acceptance by the secretary of the delinquent dues is a waiver of the provisions in the constitution and by-laws of the order with respect to the forfeiture of benefits for the nonpayment of dues, the executive secretary being an executive officer of the defendant with broad and comprehensive powers. *Hill v. Lexington Council*, 697.

M Proof of Death or Loss.

e Waiver of Proof

1. Under the facts of this case and the theory of trial in the lower court the insurer is held to have waived its right to demand proof of loss by the insured. *Taylor v. Ins. Co.*, 659.

N Persons Entitled to Proceeds.

a Life Insurance

1. Donee of policy held entitled to proceeds as against insured's administrator. *Taylor v. Coburn*, 324.

c. Under Loss Payable Clauses

1. The purchaser of a cotton gin under a title-retaining contract gave notes for the balance of the purchase price guaranteeing the seller against loss by fire. Thereafter, the purchaser took out a policy of fire insurance on his property with a loss-payable clause in favor

INSURANCE N *c—Continued.*

of the mortgagee as his interest might appear, and the gin was included in the property covered in the insurance policy. Upon loss by fire the insurance company paid the amount of the policy into court, and the controversy depended upon the respective rights of the mortgagee and the seller of the cotton gin: *Held*, although the seller had an insurable interest in the property destroyed, the purchaser had not taken out any insurance protecting this interest and had not made any agreement to do so, but had given only a personal guarantee against loss by fire, and the mortgagee named in the loss-payable clause of the policy was entitled to the proceeds thereof under the terms of the policy contract protecting his interest therein. *Jeffreys v. Ins., Co.*, 368.

2. Both the mortgagor of property and his mortgagee have an insurable interest therein, and where there are several mortgagees and the mortgagor takes out a policy of insurance with a loss-payable clause to them as their interest might appear they are entitled to the proceeds of the policy in proportion to their debts if there are no priorities by registration, agreement, or otherwise, but where one of the mortgagees is not named in the loss-payable clause he is not entitled to any of the proceeds thereof and the mortgagees named in the policy are entitled to the exclusive benefit thereof, unless the mortgagor had agreed to take out a policy for his benefit, in which case the mortgagee would be entitled to an equitable lien on the proceeds of the policy, at least as against the mortgagor. *Ibid.*

3. Mortgagee held not entitled to apply proceeds of fire insurance to payment of matured notes under mortgage provision. *Coats v. Bank*, 403.

INTOXICATING LIQUOR—Mere possession will not prevent award of compensation see Master and Servant F b 3.

INVITEES—Liability of lessee for injuries to, resulting from condition of building see Negligence A c 2.

ISSUES see Trial F.

JOINT ENTERPRISE see Brokers.

JUDGES—Court may hear motion to amend after motion had been refused by another judge at prior term. *Revis v. Ramsey*, 815.

JUDGMENTS (Execution on, see Execution; judgment on pleadings see Pleadings I b).

E Consent Judgments.

b Requisites and Validity

1. Where the attorneys of record of both parties sign a consent judgment, and the defendant therein is advised that the consent judgment would be entered and does not make known to the court in person or by counsel any objection thereto, the fact that one of the defendant's attorneys of record did not sign the judgment does not affect its validity. *LaLonde v. Hubbard*, 771.

JUDGMENTS E—*Continued.*

c Operation and Effect

1. A consent judgment is in effect a written contract between the parties litigant entered with the consent of the court, and the court may not thereafter set it aside without the consent of the parties in interest. *S. v. McKay*, 470.

2. A consent judgment is binding on the parties thereto until modified or set aside by consent, or until vacated for fraud or mistake by judgment in an independent action. *LaLonde v. Hubbard*, 771.

F On Trial of Issues.

e Conditional or Alternative Judgments

1. Where a party to an action consents to the abandonment of a right he has therein set up, and this is done and the judgment accordingly rendered, the judgment is not objectionable as being a conditional judgment when it is final and requires no future act to be done or condition to be performed by any of the parties. *Killian v. Chair Co.*, 23.

G Rendition, Entry, Recording and Docketing.

b Time and Place of Rendition

1. Ordinarily a judgment cannot be entered by a Superior Court judge out of term and out of the district wherein the cause is pending when not falling within certain exceptions where the judgment may be entered *nunc pro tunc*, but this rule does not apply when the parties to the action appear at the time of the rendition of the judgment and consent that the judge consider the matter and enter the judgment. *Killian v. Chair Co.*, 23.

2. While it is the better practice for the consent that judgment be rendered out of term or out of the county in which the action was pending to be put in writing, it is not essential that this be done, and where the judgment excepted to states as a fact that such consent was in fact given, it is conclusive upon the parties in the absence of collusion or fraud. *Ibid.*

K Attack and Setting Aside.

b Surprise, Excusable Neglect, etc.

1. Where a husband and wife living together are sued on a joint cause of action, and the wife, relying on the assurances of her husband that he would employ counsel and cause an answer to be filed in her behalf, neglects to file an answer within the time prescribed, and a judgment by default is entered against her, and immediately upon notice of the judgment she employs counsel and moves to set aside the judgment for surprise and excusable neglect, C. S., 600: *Held*, the neglect of the wife is excusable, and upon a proper showing of a meritorious defense, her motion is properly allowed, the provisions of the Martin Act, C. S., 2507, not affecting the relation of husband and wife or the rights and duties arising therefrom. *Bank v. Turner*, 162, 165, 166.

2. In order to set aside a judgment regularly entered, our statute, C. S., 600, requires that the motion be made within one year after notice and that the court find as a fact the existence of

JUDGMENTS K *b—Continued.*

mistake, inadvertence, surprise or excusable neglect, to which the Supreme Court has added another condition precedent, that the judge must find that the moving party has a meritorious defense. *Fellos v. Allen*, 375.

3. As to whether excessive damages is a sufficient showing of a meritorious defense, *quære? Ibid.*

c For Fraud

1. Where the father of a minor child injured in an automobile accident reaches a compromise agreement with the attorney of the insurance company carrying indemnity insurance on the car causing the accident, and to effectuate the compromise agreement, the attorney for the insurance company has a next friend appointed for the minor and brings a friendly action, reducing the compromise agreement to judgment, and thereafter the father and mother of the minor have another next friend appointed and seek to have the judgment set aside as being contrary to the course and practice of the courts and for fraud: *Held*, before ordering the judgment set aside the trial court should find whether the driver of the car was negligent, which was denied by the defendant, whether the plaintiff was guilty of contributory negligence, and should find whether the compromise judgment was just and fair and whether the rights of the minor were prejudiced, and where the court has failed to find these necessary facts the case will be remanded. *Patrick v. Bryan*, 62.

2. Where in an action for absolute divorce on the grounds of abandonment and separation for five years service of summons is returned "defendant not to be found," etc., and the plaintiff swears to an affidavit that the defendant cannot be found in the State after due diligence, and thereupon an order is given for service by publication, and upon the trial of the action a decree for absolute divorce is entered: *Held*, upon evidence showing that at the time of the issuance of summons and the swearing to the affidavit the plaintiff knew the whereabouts of the defendant in this State and that the affidavit was fraudulent, the defendant's motion in the original cause to set aside the judgment is properly granted, it appearing that the plaintiff had perpetrated a fraud on the court whereby it falsely appeared that the court had obtained jurisdiction. *Hatley v. Hatley*, 577.

d Attack for Irregularities

1. A verification of a complaint which is in substantial compliance with the law is not a sufficient ground for setting aside a judgment entered by default; in this case the plaintiff, when signing the complaint, took the oath with uplifted hand rather than upon the Bible. *Fellos v. Allen*, 375.

f Procedure

1. Where service by publication is based on fraudulent affidavit the judgment may be set aside by motion in the cause. *Hatley v. Hatley*, 577.

2. A consent judgment may not be collaterally attacked, the remedy in such case being by independent action to set the judgment

JUDGMENTS K *f—Continued.*

aside, and where the judgment is collaterally attacked in an action involving the same cause of action covered by the consent judgment it is not error for the court to refuse to consider evidence tending to impeach the consent judgment. *LaLonde v. Hubbard*, 771.

g Rights of Parties upon Setting Aside Judgment

1. Where the defendants have paid a judgment rendered against them in an action involving the question of their actionable negligence in injuring another, and later this judgment is set aside for fraud or as being contrary to the course and practice of the courts, the order vacating the judgment should provide for an accounting of the moneys paid by the defendant under the judgment so vacated. *Patrick v. Bryan*, 62.

L Operation of Judgment as Bar to Subsequent Action (Estoppel by judgment see Estoppel B a; operation of award as bar see Arbitration and Award E b).

b Matters Concluded or Embraced in Pleadings of Former Action

1. A judgment recovered against a person negligently causing a personal injury to the plaintiff will not bar an action by the plaintiff against a physician or his executrix for damages caused by the negligent treatment of such injuries by the physician, the two causes of action being separate and distinct, and the second action not arising out of the negligence alleged in the first. *Gosnell v. R. R.*, 234.

2. A consent judgment purporting to settle all matters in controversy in an action involving liability for damages sustained in a collsion of two automobiles in which the defendant sets up a cross-action upon allegations of negligence on the part of the plaintiff, is a bar to an action by the defendant in the prior action against the plaintiff therein to recover for the identical negligence alleged in the cross-action. *LaLonde v. Hubbard*, 771.

3. The doctrine of *res judicata* does not apply to ordinary motions incidental to the progress of the trial but only to those involving substantial rights. *Revis v. Ramsey*, 815.

M Conclusiveness of Adjudication.

b Persons Concluded

1. Where under the terms of a will the testator's wife and children are made the beneficiaries of a trust estate with limitation over to the children when the youngest shall attain the age of forty, or, if not living at the date specified, to their issue, and in a suit regarding the management of the trust estate the trustee and the testator's wife and children are parties and the one living grandchild is made a party defendant and is represented by a guardian *ad litem*, who also represents as a class the other grandchildren not *in esse: Held*, all parties having an interest in the estate are properly represented, and the judgment of the court is binding as to all interests. C. S., 1744. *Spencer v. McCleneghan*, 662.

JURY (Compensation Act does not violate right to jury trial see Master and Servant F a 1; polling jury see Trial G d, Criminal Law I k).

A Competency of Jurors, Challenges and Objections.

b Competency in General and Grounds for Challenge for Cause

1. Where a special venire has been ordered by the court for the trial of a capital felony, C. S., 2338, such venire, being selected by the sheriff in his discretion and not from the jury box, are subject to the same challenges for causes as tales jurors, C. S., 4635, and among such challenges for cause is that the proposed juror is not a freeholder. *S. v. Arant*, 680.

2. The ownership of property by the wife of a proposed juror selected by the sheriff in a special venire does not constitute him a freeholder within the intent of the statute when there have been no children born of the marriage, and where the defendant challenges such juror for cause on the ground that he was not a freeholder it is error for the trial court to refuse to allow the challenge, and where the defendant properly presents his exception thereto by exhausting his peremptory challenges and excepting to the court's refusal to allow the challenge for cause, a new trial will be awarded. *Ibid.*

B Jury Boxes and Special Venires.

b Selection of Jury from Another County

1. The granting of the solicitor's motion that the jury be drawn from the body of another county held within court's discretion. C. S., 473 as amended by chapter 308, Public Laws of 1931. *S. v. Shipman*, 518.

JUSTICES OF THE PEACE—Jurisdiction of assault see Criminal Law D b 1, power to bind defendant over see Indictment A a 2.

JUVENILE COURTS see Courts A a 1.

LABORERS' AND MATERIALMEN'S LIENS (Contractors' bonds see Principal and Surety).

B Procedure to Perfect and Form of Claim of Lien.

a Time of Filing Notice of Claim of Lien

1. Although the statutory time for filing a laborer's or materialman's lien will not be extended where labor is done or material furnished of a trivial nature after substantial completion of the work, where the contract for the erection of a hotel building specifies the installation of a heavy screen, requiring factory fabrication, over a sky-light, and the work under the contract is substantially completed, and the building turned over to the owner for occupancy, and thereafter, upon demand of the owner, the screen is installed by the contractor as a part of the original contract at a cost of $1,157 and a lien filed against the building within six months thereafter: *Held*, whether the work was completed when the building was turned over to the owner or when the screen was installed is for the jury under the evidence on the question of whether the claim was filed within the statutory time, C. S., 2470, and a peremptory instruction thereon is error. *Beaman v. Hotel Corp.*, 418.

LABORERS' AND MATERIALMEN'S LIENS B—*Continued.*

c Notice and Lien of Sub-contractors and Materialmen

1. Where the lessee of a hotel corporation purchases a refrigerating plant and installs it in the hotel building, and sells it to the hotel corporation, the lessee's vendor may not claim a lien against the hotel building for the balance of the purchase price where he has not given the hotel corporation notice of the balance due him before the hotel corporation has paid the full purchase price to the lessee. C. S., 2438. *Brown v. Hotel Corp.*, 82.

LANDLORD AND TENANT (Liability for injuries from condition or use of land or buildings see Negligence A c).

G Breach of Lease Contract.

c Liability of Lessee and Sub-lessees

1. In this case there were several successive leases of real estate with the obligation resting on each lessee to pay a stipulated rental for a certain number of years, and a judgment was rendered that the original lessor recover the unpaid balance for the term against the original lessee, and that each of the lessees recover in turn from his sublessee: *Held*, the judgment was supported by the verdict and is affirmed on appeal. *Guy v. Gould*, 727.

LARCENY.

A Offenses and Responsibility.

a Elements of the Crime

1. Physical presence at time of commission of larceny is not necessary to conviction of party aiding and abetting therein, nor is division of proceeds of theft among the parties an element of the offense. *S. v. Whitehurst*, 631.

c Parties and Offenses

1. Physical presence at the scene of larceny is not absolutely essential to a conviction, and where a party actually procures the commission of the crime by others or aids or abets the commission thereof by them he is guilty as a principal. *S. v. Whitehurst*, 631.

LIBEL AND SLANDER.

A Requisites and Essentials of Cause of Action.

c Publication

1. In order to constitute a publication such as will support an action for libel there must be a communication of the defamatory matter to some third person or persons. *McKeel v. Latham*, 318.

D Actions.

c Pleadings

1. Where the complaint in an action for libel alleges that the defendant sent the plaintiff an open post card through the mails containing libelous matter, without an allegation that such matter was read by some third person, the allegation of publication is insufficient, and the defendant's demurrer should be sustained, with the right of the plaintiff to move to amend, C. S., 515, it not being presumed that the contents of the post card were necessarily communicated to the clerks through whose hands it passed, and presumptions

LIBEL AND SLANDER D c—*Continued.*

of evidence not being available to supply defects of allegation. Although a general allegation of publication might have been sufficient under C. S., 542, its provisions cannot aid the plaintiff in this action in view of the specific allegations in the complaint. *McKeel v. Latham*, 318.

LICENSEES—Liability of lessee for injuries to, see Negligence A c 2, 3.

LICENSES—Right of counties to allocation of gasoline tax see Counties E c 1; license taxes see Taxation B c.

LOST OR DESTROYED INSTRUMENTS.

B Right to Recover Thereon.

a Provisions in Instrument for its Production and Return

1. The provisions of a certificate of deposit that it should be payable upon demand and return of the certificate will not prevent a recovery thereon against the bank where the certificate has been lost, the issuance and contents of the certificate not being in dispute, nor does the failure of the plaintiff to tender bond for the defendant's protection prevent such recovery when the defendant has made no request therefor, and in this case the evidence of the loss of the instrument was sufficient to be submitted to the jury. *Lee v. Bank*, 636.

MASTER AND SERVANT (After hours employee on premises held licensee see Negligence A c 3).

C Master's Liability for Injuries to Servant (Duties and liabilities in employing physician for injured employee see hereunder F b 6, Physician and Surgeon D b 1.

a In General

1. The duty of an employer to exercise due care to provide his employee a reasonably safe place to work and reasonably safe and suitable tools and appliances is absolute and may not be delegated to another so as to relieve the employer of liability, and the employer is ordinarily liable for the negligence of his *alter ego* which causes injury to an employee. *Smith v. Granite Co.*, 305.

2. Although the relationship of master and servant does not exist in the strict sense of the term between State convicts and one hiring their labor from the State, the one hiring such labor owes certain duties to the convicts incident to the relationship, and in this case the evidence of the failure of the one hiring such convicts to exercise due care to provide a reasonably safe place to work and the negligence of his *alter ego* causing injury to a prisoner was properly submitted to the jury. *Ibid.*

b Tools, Machinery and Appliances and Safe Place to Work

1. Where, in an action against an employer to recover damages caused by his alleged negligence in failing to exercise proper care to furnish the plaintiff a reasonably safe place to work and reasonably safe and suitable tools therefor, the evidence tends to show that the employee had to operate a comb in a cotton mill while the machinery was running, and that the comb fell on his hand causing the injury in suit, that, if the comb had been properly fixed, its

MASTER AND SERVANT C *b—Continued.*

own weight would have held it back and prevented its so falling, that the comb under unchanged circumstances had thereafter fallen while other operatives were at work at the machine, and that it was not the employee's duty to repair machinery, but the duty of a superintendent: *Held*, the evidence is sufficient to take the case to the jury on the issue of the employer's negligence, and the granting of its motion as of nonsuit was error. *Almond v. Oceola Mills*, 97.

2. Evidence that the plaintiff's injury was caused by his stepping on a small dowel pin swept up with other odds and ends on the floor of the manufacturing plant where he was engaged at work tends to show an injury from an accident which could not have been reasonably foreseen by his employer, and a judgment as of nonsuit will be sustained on appeal. *Miller v. Mfg. Co.*, 254.

3. Where the plaintiff's evidence tends to show that the defendant hired State convicts to work in his rock quarry and had control of the convicts to the extent of indicating the work to be done by them, that the plaintiff, one of the convicts so hired out, was told by the defendant to shovel rock from a pile so that it could be taken out by a drag pan which was pulled backward and forward by a cable operated by a steam engine, that the cable was frayed and that the plaintiff had repeatedly told the engineer, the defendant's *alter ego*, of its dangerous condition, that at the time of the injury the plaintiff was not actually under the control of the prison authorities, and that the plaintiff, in the performance of his duties, told the engineer to pull the drag pan forward, but the engineer pulled it back and that the plaintiff's clothes caught in the frayed cable, causing the injury in suit, is *Held*, sufficient to be submitted to the jury on the issue of the defendant's failure to exercise due care to provide the plaintiff a reasonably safe place to work. *Smith v. Granite Co.*, 305.

4. In this case *held:* evidence of employer's negligence was insufficient to be submitted to the jury in action by foreman to recover for injuries sustained when workman moving heavy barrels under his direction stepped on his foot. *Poole v. R. R.*, 839.

e Negligence of Fellow-servant

1. Under the facts and circumstances of this case an engineer in charge of a hoisting engine was an *alter ego* of the defendant and the refusal of instructions requested by the defendant relating to the fellow-servant doctrine was not error. *Smith v. Granite Co.*, 305.

g Contributory Negligence of Employee

1. Where the evidence in an action by a chauffeur against his employer tends to show that the employer several times ordered the plaintiff to drive faster, and that the plaintiff attempted to take a curve at an excessive rate of speed, and ran through a barrier and down an embankment where the road on which he was driving ended and was cut through by a new road: *Held*, the defendant's motion as of nonsuit was properly granted. *Scott v. Telegraph Co.*, 198 N. C., 795. *Shipes v. Poag*, 844.

MASTER AND SERVANT—*Continued.*

D Master's Liability for Injury to Third Parties.

b Scope of Employment

1. Where death of a third person is caused by the negligence of an employee while acting within the scope of his authority the employer may be joined as a defendant under the doctrine of *respondeat superior. Brown v. R. R.*, 256.

F North Carolina Workmen's Compensation Act.

a Validity, Nature, Construction and Application

1. While the Industrial Commission in the exercise of its statutory authority performs certain duties that are judicial in their nature it is primarily an administrative agency of the State in the administration of the Compensation Act and its judicial powers are but incidental thereto, and the administration of the powers conferred by the statute is not in contravention of Art. IV, secs, 2 and 12 of the Constitution of North Carolina, nor of any other part of our organic law, and objection that the act destroys the ancient right of trial by jury or violates the Due-Process Clause or is an unlawful discrimination among employees cannot be sustained. *Heavner v. Lincolnton*, 400.

2. Where, in an action instituted in the Superior Court to recover damages for the negligent injury, the defendant sets up the defense that the plaintiff was an employee and that his exclusive remedy was under the Workmen's Compensation Act: *Held*, the issue may be determined in the Superior Court, its jurisdiction not being ousted by the Compensation Act, and upon conflicting evidence it is properly submitted to the jury. *Charnock v. Refrigerating Co.*, 105.

3. The remedy under the Workmen's Compensation Act is exclusive and under the express terms of the statute an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, C. S., 160, the motion of the defendants that the deceased's employer be made a party as a joint *tort-feasor* with them should be denied. N. C. Code of 1931, sec. 8081(r). *Brown v. R. R.*, 256.

4. Where the administrator of a deceased employee sues an engineer of a train and the railroad company for the deceased's wrongful death, the defendants may not set up the defense that compensation for the employee's death had been paid by his employer under the provisions of the Workmen's Compensation Act since the Compensation Act provides that upon the payment of compensation thereunder for an injury to an employee caused by the negligence of a third person the employer or the insurance carrier shall have the right to maintain an action in the name of the employee and shall be entitled to subrogation of the employee's rights to the extent of the compensation paid him, the balance of the recovery to be paid to the employee or his representative, and C. S., 160 provides that an action for wrongful death can be maintained only by the deceased's personal representative, the *tort-feasors* being liable for their negligence and having no interest in the distribution of the recovery under the provisions of the statute. *Ibid.*

MASTER AND SERVANT F *a—Continued.*

5. Although the administratrix of a deceased employee who has received compensation for the employee's death under the provisions of the Workmen's Compensation Act is thereby barred from prosecuting any other remedy for the injury, she may, pending the hearing before the Industrial Commission, institute an action against a third person whose negligent acts caused the death of the intestate, C. S., 160, and where the insurance carrier has paid the compensation later awarded, it is subrogated to the rights of the employer and may by the express terms of the Compensation Act maintain the action against such third person in the name of the administratrix, N. C. Code of 1931, sec. 8081(r), the right of action not abating by the insurance carrier's subrogation to the plaintiff's interest *pendente lite*, C. S., 446, 461, and where in such action it is alleged that the action was being prosecuted by the insurance carrier for its benefit the defendant's demurrer entered on the ground that the action was barred by the award under the Compensation Act is properly overruled. *Phifer v. Berry*, 388.

6. The North Carolina Workmen's Compensation Act provides that it shall not apply to employers and employees where there are less than five employees regularly employed in the business within this State unless the employer and employees shall elect to be bound by the act. N. C., Code of 1931, 8081(u). *Aycock v. Cooper*, 500.

7. Where, in a proceeding under the Workmen's Compensation Act to recover compensation for the death of a deceased employee, the evidence fails to show an election by the employer and employees to be bound by the act, and upon appeal to the Superior Court from an award by the Industrial Commission, the court finds from the evidence that the employer owned a planing mill and a wood or wagon shop, on adjoining land, one operated by steam and the other by electricity, but that they were operated as separate and distinct businesses, each with a distinct patronage, and without connection with each other, that the deceased employee was employed in the planing mill only, and that there were less than five employees regularly in service in the planing mill: *Held*, the evidence is insufficient to support the jurisdictional finding of the Industrial Commission that the employer had as many as five employees in the same business, and there is no error in the judgment of the Superior Court dismissing the proceeding on the ground that the Industrial Commission was without jurisdiction. *Ibid.*

8. As to whether a deputy sheriff is an employee within the meaning of the Compensation Act, N. C. Code, 8081(i), *quære? Starling v. Morris*, 564.

9. The rights and remedies of an employee under the Workmen's Compensation Act exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin against the employer, N. C. Code, 8081(r). *Hoover v. Indemnity Co.*, 655.

10. An award under the Workmen's Compensation Act as contemplated by section 58 thereof is a present determination of a claim of an employee after a hearing, and the award must be in writing and

MASTER AND SERVANT F *a—Continued.*

be accompanied by a statement of the findings of fact and rulings of law and other matters pertinent to the question at issue, and must be filed in the record of the proceedings before the Industrial Commission, and an alleged agreement between the insurer and an injured employee for compensation, which agreement has not been passed upon by the Industrial Commission, is not an award under the act, and the insurer executing the agreement is not entitled to subrogation under section 11 of the act and may not intervene as a party plaintiff in the employee's action against a third person. *Alford v. R. R.*, 719.

b Injuries Compensable

1. In a proceeding for compensation under the provisions of the Workmen's Compensation Act the evidence tended to show that the deceased was employed to run a gas dinkey engine for the removal of muck from a tunnel, that the gasoline engine was left running in the tunnel and generated deadly carbon monoxide gas, that blasts of dynamite were frequently set off in the tunnel which generated deadly nitrous oxide gas, that the tunnel had just been bored through and that, before the time of the injury, certain appliances for ventilating the tunnel had been removed, and that the gases would collect in pockets in the muck and drift to and fro in the tunnel, with further testimony of physicians who had attended the deceased and who had qualified as experts, that the deceased had died from poisonous gas, is *Held*, sufficient to sustain the finding of the Industrial Commission that the death of the deceased was directly caused by carbon monoxide or nitrous oxide gas, and that his death was compensable as arising out of and in the course of the employment of the deceased. *Cabe v. Parker-Graham-Sexton, Inc.*, 176.

2. Evidence introduced before the Industrial Commission that the applicant for compensation under the provisions of the Workmen's Compensation Act was employed to deliver milk and to solicit customers during a price war, or competition, and whose duty it was to return the delivery truck at times after regular hours owing to the effort to retain the employer's customers, and that the employee on the occasion in question was working after the usual time of returning the truck and incidentally ate his supper, played pool for a short time, and while engaged in his duty of returning the truck to the employer's premises met with the accident in question, is *Held*, sufficient to sustain the finding of the full Commission that the accident occurred during the course of the applicant's employment and arose out of it, and the judgment of the Superior Court sustaining the award will be sustained on appeal. *Jackson v. Creamery*, 196.

3. The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession whiskey contrary to our statutes, 3 C. S., 3411(b) does not alone prevent the recovery of compensation, it appearing that the whiskey had remained untouched and that such possession had no connection with the accident or in any manner was a contributing cause. *Ibid.*

MASTER AND SERVANT F *b—Continued.*

4. In order that the death of an employee may be compensable under the provisions of the Workmen's Compensation Act it is necessary that it should have resulted from an accident sustained not only in the course of the employment but also arising out of the employment or within the scope of the employee's duties under a reasonable consideration of the circumstances surrounding the death, and where the evidence tends to show that it was the duty of the deceased employee to arrive at the employer's planing mill in the early morning an hour before the other employees in order to fire the engine to run the machinery, and that the mill was at an isolated place where hoboes and others of like character frequently passed, and that the employee was killed and robbed by some unknown person, it is sufficient to support a finding by the Industrial Commission that the death resulted from an accident arising out of the employment and to sustain an award of compensation, and it will not be declared otherwise by the court as a matter of law. *Goodwin v. Bright*, 481.

5. Where the evidence in a proceeding under the Workmen's Compensation Act tends to show that the sheriff of a county duly deputized the deceased solely for the purpose of serving such process as should be delivered to him for that purpose and should receive as his compensation the fees allowed therefor by law, but that the deceased was not regularly employed as a regular deputy sheriff with authority to act generally for the sheriff, and that the deceased, with other deputies, attempted to apprehend the driver of a truck transporting intoxicating liquor, acting upon information by third persons, but without warrants and without personal knowledge that the driver of the truck was engaged in a violation of the law, and that his death was caused by being shot in the attempt to stop the driver of a mail truck: *Held*, the deceased was acting upon his own initiative and not in behalf of the sheriff, and the evidence is insufficient to support the finding of the Industrial Commission that the deceased was killed in an accident arising out of and in the course of his employment, and the judgment of the Superior Court vacating the award to his dependents is affirmed. *Starling v. Morris*, 564.

6. Malpractice of a physician or surgeon furnished by the employer or insurer to treat an injured employee is deemed part of the injury and is compensable as such, N. C. Code, 8081(hh). *Hoover v. Indemnity Co.*, 655.

c Preliminary Procedure and Proceedings

1. The provisions of the Workmen's Compensation Act that an autopsy may be had under certain circumstances at the expense of the party demanding it does not contemplate that a party should have such right absolutely after the body has been interred for a long time, and the refusal of the Industrial Commission in its discretion to allow a motion therefor, first made formally at the hearing, will not be held for error when the condition of the body would not reveal the information sought under the facts and conditions of the case. Ordinarily after the body has been buried it is a matter

MASTER AND SERVANT F *c—Continued.*

within the court's discretion whether disinterment will be ordered, the body then being *in custodia legis. Cabe v. Parker-Graham, Sexton, Inc.*, 176.

g Persons Entitled to Payment of Award

1. The law regulating the distribution of personal property by descent is purely statutory, C. S., 137, and the Workmen's Compensation Act giving the award of compensation for an injury resulting in death of the wife of the employee exclusive of his mother (sec. 77) is also statutory and is valid, being a change made by a later statute of the provisions of a former statute which falls within the power of the Legislature to enact. *Hearner v. Lincolnton*, 400.

i Appeal and Review

1. The findings of fact by the Industrial Commission are conclusive on the courts when supported by any sufficient competent evidence. *Cabe v. Parker-Graham-Sexton, Inc.*, 176; *Greer v. Laundry*, 729; *Webb v. Tomlinson*, 860.

2. The findings of fact of the Industrial Commission in a hearing before it are conclusive on the courts only when there is evidence in support thereof, and on appeal to the Superior Court it has jurisdiction to review the evidence in order to ascertain whether the findings of the Industrial Commission are supported thereby. *Dependents of Poole v. Sigmon*, 172.

3. Where the findings of fact of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five workers, N. C. Code of 1931, sec. 8081(u), are not supported by any evidence in the hearing before it, the findings are jurisdictional, and upon appeal to the Superior Court the award should be set aside and vacated. *Ibid.*

4. Where the Industrial Commission has jurisdiction of a proceeding for compensation under the Workmen's Compensation Act, its findings of fact supported by any sufficient evidence, with respect to whether an injured employee is entitled to compensation and, if so, the amount, are conclusive upon the parties and upon the Superior Court on appeal, but the findings of fact of the Industrial Commission upon which its jurisdiction is based are not conclusive on the Superior Court, and upon appeal to it the court has the power to approve, modify or set aside such findings in accordance with the findings of the court from all the evidence appearing in the record. N. C. Code, 8081(pp). *Aycock v. Cooper*, 500.

5. In this case *Held:* the evidence as to whether the accident resulting in the death of an employee arose out of and in the course of his employment was conflicting, and the finding of the full Industrial Commission in a hearing before it that the accident did not arise out of and in the course of the employment is binding and conclusive on the courts upon appeal. *Wimbish v. Detective Co.*, 800.

MECHANICS' LIENS see Laborer's and Materialmen's Liens.

MENTAL CAPACITY see Insane Persons, Criminal Law G i.

MINERALS.

B Ownership and Conveyance of Mineral Rights.

b Conveyance by Deed

1. Mineral substances beneath the surface of the earth may be conveyed by deed distinct from the title to the surface itself. *Banks v. Mineral Corp.*, 408.

C Mining Operations.

c Damage to Land Mined

1. Where the grantor has acquired by deed the right to the feldspar beneath the surface of the ground with the right of ingress, egress and regress, together with the privileges necessary to the mining of the ore, he may not be held liable for damage to the surface of the ground in extracting the ore when the method used by him was the customary and approved method of mining this particular mineral, and his deed, by a proper construction, gave him the right to work the mine by the method used. *Banks v. Mineral Corp.*, 408.

2. Where the plaintiff in his action to recover damages against the operator of a feldspar mine for the destruction of a fence upon the surface of the land owned by him, in order to recover therefor he must show that the fence was destroyed by the defendant or with his consent, knowledge or procurement. *Ibid.*

MORTGAGES (Negotiability of bonds secured by, see Bills and Notes B c; rights of mortgagee under loss payable clause see Insurance N c; chattel mortgages see Chattel Mortgages).

A Requisites and Validity.

c Acknowledgment

1. Where a husband and wife execute a mortgage on the equity in her lands in order to secure endorsers on his note against loss and the note is discounted at a bank: *Held*, the contract to secure the endorsers against loss is a collateral agreement between the makers and endorsers to which the bank is not a party, and the wife's acknowledgment to the mortgage taken by an official of the bank is valid. N. C. Code of 1931, sec. 3301(a). *Watkins v. Simonds*, 746.

B Nature and Incidents of Mortgages.

a Construction of Instruments as Mortgages

1. Instrument in this case is construed to be a deed of trust and not an assignment for benefit of creditors. *Comr. of Banks v. Turnage*, 485.

2. Where there is evidence that a deed to lands and a contract to reconvey were executed at the same time, the question being as to whether the deed was in effect a mortgage to secure borrowed money, a directed instruction upon the issue in the grantee's favor is erroneous which is based upon the admissions of the parties but leaves out reference to the evidence tending to show that the effect of the transaction was a mortgage for the loan, and, also, as to the legal effect of the papers under the evidence introduced. *Simpson v. Jones*, 516.

MORTGAGES B *a—Continued.*

3. Where the wife signs an instrument given to secure endorsers on her husband's note, and the instrument recites that she signed it for the purpose of incumbering her equity of redemption, and the endorsers are therein given the power of selling the property if they should sustain "any loss or damage on account of signing the note," and the instrument is properly acknowledged by the wife and her private examination taken: *Held*, construing the instrument liberally with a view to effectuating the intent of the parties, it is a mortgage on the wife's equity of redemption in the property. *Watkins v. Simonds*, 746.

C Construction, Operation and Priorities.

a In General

1. The execution of a mortgage does not merge the personal liability of the mortgagor on his note secured thereby, and the mortgagee, upon default, may sue either *in personam* on the note *in rem* by foreclosure, or may unite both remedies in one action. *Brown v. Turner*, 227.

c Registration and Priorities

1. A mortgage is not registered until it has been properly indexed and cross-indexed as required by statute, and a mortgage that has not been properly indexed does not have priority of lien over a subsequent instrument that has been properly registered. *Watkins v. Simonds*, 746.

d Property Mortgaged and Liable for Debt

1. As between the original parties a release of part of the land mortgaged from the mortgage lien does not affect the mortgagee's lien on the remainder, which is security for the whole debt. *Brown v. Turner*, 227.

e Conditions and Covenants

1. Where according to the terms of the instrument the mortgagor is required to take out insurance on the property covered thereby and in case of destruction by fire to apply the proceeds to the notes secured by the mortgage under the regulations of the Federal Farm Loan Board or to rebuild under certain regulations: *Held*, there being no provision in the mortgage that the funds realized under the fire insurance policy could be applied to delinquent taxes and the regulations of the Farm Loan Board stipulating that it could be applied only to the unmatured principal, an order restraining the foreclosure upon the ground that the mortgagor had a right to apply it to the payment of delinquent taxes and to the matured notes is erroneous. *Coats v. Bank*, 403.

F Transfer of Equity of Redemption.

a Liability of Mortgagor after Transfer

1. Where land subject to a mortgage is sold successively by deeds in which the grantees assume the mortgage indebtedness, and thereafter the mortgagee releases a part of the land from the mortgage lien by agreement with a subsequent purchaser without the knowledge or consent of the mortgagor: *Held*, the primary liability of

MORTGAGES F *a—Continued.*

the mortgagor to the mortgagee is not affected by the release, and the mortgagee may recover against the mortgagor on a note executed by him and secured by the mortgage. *Brown v. Turner*, 227.

G Payment, Satisfaction and Cancellation.

a Payment in General

1. Payment of amount of mortgage debt to clerk is not payment to the mortgagee, there being no statutory authority therefor. *Mackay v. Meredith*, 639.

H Foreclosure.

b Right to Foreclosure and Defenses

1. Where land embraced in a deed of trust has been ordered sold by final judgment the fact that it was under lease will not prevent the dissolution of a restraining order, the sale being subject to confirmance by the court, the remedy of the plaintiffs, if they are entitled to any, being by order in the original cause. *Smith v. Barnhardt*, 106.

2. Mortgagor held not entitled to restrain foreclosure on ground that proceeds of fire insurance policy on property should be applied to matured notes. *Coats v. Bank*, 403.

3. Mere allegations of general financial depression, stagnation of the real estate market and scarcity of money for ordinary business transactions are not sufficient for a court of equity to enjoin the foreclosure of a deed of trust according to its tenor, the courts of equity usually exercising their power to enjoin foreclosure upon allegations of fraud, restraint, oppression, usury, mistake, etc. *Bolick v. Ins. Co.*, 789.

4. Where a mortgagor has transferred his equity of redemption to a holding corporation, and thereafter the holding corporation becomes insolvent and is placed in the hands of a receiver, the property is in *custodia legis*, but a court of equity has the power, in its discretion, to order the land sold, it not being required to retain control of the property when it would be inequitable to do so, and an order vacating an injunction restraining the sale under the mortgage is equivalent to leave to proceed in the exercise of the power of sale contained therein. *Ibid.*

5. Where the grantee executes a deed of trust to secure the balance of the purchase price due his grantor, the grantee, in an action against the trustee, is not entitled to injunctive relief against the foreclosure of the deed of trust according to its terms merely upon allegations that his grantor's predecessor in title had reserved the mineral rights in the land, there being no allegations of ouster, eviction or adverse claim giving the grantee a right of action of the covenant of quiet enjoyment, or that the grantor was unable to respond in damages, or that there was no adequate remedy at law. *Guy v. Bank*, 803.

o Deposits and Resales

1. Where a mortgagor pays the sum necessary for an advance bid on property sold under a mortgage, and the sheriff attempts to levy

MORTGAGES H *o—Continued.*

thereon under an execution against the mortgagor, but it appears that the attempted levy was void, the mortgagor has the right to use the money as an advance bid and it is the duty of the clerk to order a resale, and a judgment that no advance bid had been made and ordering the trustee to make deed to the purchaser at the sale will be reversed. *In re Phipps*, 642.

MUNICIPAL CORPORATIONS (Acquisition of prescriptive rights by, see Adverse Possession I); right to issue bonds see Taxation A).

A Creation, Alteration and Dissolution.

b Territorial Extent and Annexation

1. There are no constitutional limitations on the power of the General Assembly to provide by statute for the extension of the corporate limits of a municipal corporation or for the repeal of a statute under which a municipal corporation was organized, and a statute providing for the revocation of the charters of two towns, and the extension of the limits of a city to take in the contiguous territory formerly included within the limits of the towns is valid. *Highlands v. Hickory*, 167; *Hasty v. Southern Pines*, 169.

E Torts of Municipal Corporations.

c Defects or Obstructions in Streets

1. *Held:* owner of adjacent land had easement in street and could recover special damage caused by obstruction. *Elizabeth City v. Gregory*, 759.

f Injuries to Land by Sewer Systems

1. In an action against a city for damages caused the plaintiff's land by its sewage disposal plant, exclusion of evidence as to the value of the plaintiff's land without the plant will not be held for error, the proposed testimony being to the value of the land under conditions which did not exist, and the jury being specially instructed that the defendant had a right to erect and operate the plant at the location chosen. *Jones v. High Point*, 721.

2. In an action against a city to recover damages caused by its sewage disposal plant an instruction that the jury might take into consideration the decreased market value of the plaintiff's land which was caused by the erection, maintenance and operation of the plant will be taken in connection with the explanatory instructions that the specific question was whether the plaintiff's land had been damaged by reason of odors emanating from the plant, and that the defendant had a right to erect and operate the plant at that site as a governmental function, and the charge will not be held for error and is not subject to the criticism that it is impossible to say upon what part of the charge the verdict was based. *Ibid.*

G Public Improvements.

b Preliminary Proceedings and Levy of Assessments

1. Where, in constructing a highway through a city, the State Highway Commission contracts with the city to construct the highway through the city with a width of five feet on each side in excess of the width of the highway beyond the city limits, the town to pay the cost of the extra five feet on each side, and the city

MORTGAGES G *b—Continued.*

levies a special assessment against the abutting owners to pay for the additional five-foot strip without a petition of the owners: *Held*, the statute under which the contract was made, sec. 3846(ff), N. C. Code of 1931 (Michie), applies only where the width of the street and the regular highway are the same, and the assessment is invalid, the provisions of C. S., 2707, requiring a petition of the majority of the abutting owners to be filed, not having been complied with. *Sechriest v. Thomasville*, 108.

c Validity of and Right to Levy Assessments

1. The ownership of the property is a prerequisite to the right of a city to levy assessments for public improvements under the statute against abutting owners, and the ownership of the property as affecting the validity of the assessment against an abutting owner may be raised in the assessment proceedings, and where it appears that the city does not own the land sought to be improved the land should be condemned and its value deducted from the amount of the assessments. *R. R. v. Ahoskie*, 585.

e Charter Provisions and Restrictions on Assessments

1. Where the charter of a city expressly provides that a second assessment of property for permanent improvements shall not be made within ten years from a prior assessment on the same property for that purpose: *Held*, a second assessment of a lot within ten years is void, and a later statute validating prior assessments and proceedings therefor but which does not repeal the charter restrictions or purport to authorize assessments does not affect this result, the later statute being an enabling statute affecting defects or omissions in procedure only. *Houck v. Hickory*, 712.

H Police Powers and Regulations.

a Delegation and Extent of Power in General and Construction of Ordinances

1. In construing an ordinance the language used will be interpreted in the light of surrounding circumstances and the words employed will be given their ordinary meaning and significance, and in this case involving the interpretation of a clause in a zoning ordinance exempting from its operation buildings started within ninety days under permits previously granted, the word "started" is held to mean "commenced" or "begun." *In re Appeal of Supply Co.*, 496.

b Zoning Ordinances and Building Permits

1. Where a municipal zoning ordinance divides a city into zones and prescribes uniform regulations as to buildings in the respective zones, but provides that it shall not affect buildings for which permits had been issued prior to its enactment if work under such permits was started within ninety days after the operative date of the ordinance: *Held*, where a permit for a filling station is granted prior to the enactment of the ordinance and the owner, in good faith, before the expiration of the ninety days, places filling station equipment and supplies on the premises with the intention of operating the station in conformity with the authority previously given: *Held*, whether the filling station had been started as contemplated in the exemptive clause of the ordinance is a

MORTGAGES H *b—Continued.*

question for the jury, and it may not be decided as a matter of law, and the fact that the city board of adjustment was clothed with certain discretionary powers does not affect the owner's rights under the ordinance. *In re Appeal of Supply Co.*, 496.

2. Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner. *Ibid.*

c Ordinances Relating to Public Morals

1. A municipal ordinance which makes it a misdemeanor for any lewd woman, regardless of her purpose, to appear upon the public streets of the city, or in any public buildings, store, shop, or any other place of business, imposing a punishment for its violation, is an unlawful use of the police power and a discrimination which is unreasonable in contraventfon of common right, and will be held invalid. *S. v. Ashe*, 75.

I Regulation of Public Places and Rights of Public Therein.

a Streets

1. Where the owner of land subdivides a portion thereof into lots and plats the same showing streets thereon, and reserves an unsubdivided and unplatted portion, and the dedication of the streets to the public is accepted by the city, and one of the streets so dedicated constitutes the only reasonable access to the land reserved by the owner: *Held*, the use of the street is an easement belonging to and appurtenant to the property reserved by the owner, and upon the closing of such street to such reserved land the owner has suffered damage different, not only in degree but also in kind from that sustained by the public generally, and may recover the damages caused his land by reason of such wrongful obstruction of the street by the city or a third person. *Elizabeth City v. Gregory*, 759.

2. Although the measure of damages recoverable by the owner of land having an easement over an adjacent street for the wrongful obstruction of the street is the difference in the fair market value before and after the wrongful obstruction, the admission of testimony that the plaintiff's land was damaged by one-half its value will not be held for reversible error, there being other evidence as to the value of the land and the court having correctly instructed the jury as to the measure of damages. *Ibid.*

MURDER see Homicide.

NAMES see Indictment B c.

NEGLIGENCE (Actions for wrongful death see Death; negligence of persons in particular relations see Master and Servant C, F, Physicians and Surgeons, Hospitals; negligence in particular circumstances see Railroads D, Highways B, Minerals C c).

A Acts and Omissions Constituting Negligence.

a In General

1. Violation of safety statute is negligence *per se* and question of proximate cause is ordinarily for jury. *King v. Pope*, 554.

NEGLIGENCE A *a—Continued.*

2. Act of driver in swerving car to avoid collision with truck held not negligent. *Patterson v. Ritchie*, 725.

c Condition and Use of Lands and Buildings and Liability of Owner and Lessees

1. The lessee of a building being repaired for his use is liable in damages for injuries caused to another whom he has employed to remove the debris from one of the floors where the latter is injured by falling through an opening left in the floor which ordinary care on his part would not have discovered and of which the lessee gave no notice or warning and of which the lessee is charged with express or implied notice in the exercise of ordinary care. *Pearson v. Sales Co.*, 14.

2. A building formerly leased to a laundry had been equipped with a trap door on one of its floors, and the evidence tended to show that the present lessee, the defendant, had contracted with the plaintiff to remove from the building the waste lumber, trash, etc., upon consideration of the plaintiff's having it for doing the work of its removal, and that the defendant's *alter ego* showed the plaintiff through the building and failed to warn him of the hole in one of the floors left open by the removal of the trap door, and that the defendant knew or, in the exercise of ordinary care, should have known of the dangerous condition, and that the hole was covered by waste lumber and trash so that the plaintiff could not have discovered it in the exercise of reasonable care, and that the personal injury in suit was caused by his stepping upon the top of the trash which gave way with him and precipitated him to the concrete floor below: *Held*, the evidence was sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. The question of whether the plaintiff was an independent contractor or an employee is immaterial, the plaintiff being rightfully on the premises as an invitee or licensee. *Ibid.*

3. Where an employer owns a railroad track in connection with his mining operations, and an employee, after working hours, uses the track for his own pleasure by riding on a hand-car owned by the employees and used on the track under an implied gratuitous permission of the employer: *Held*, the employee is a licensee in such use of the track, and the employer is not liable for an injury to the employee in such circumstances where he has not increased the hazard or is not guilty of wilful or wanton negligence, and where in the employee's action there is no evidence tending to show facts constituting these elements a nonsuit should be entered. *Murphy v. Murphy*, 394.

4. Where in an action to recover property damages alleged to have been caused by the act of the defendant or his employees or agents in intentionally setting out fire on his own land without giving notice to adjoining landowners as required by statute, N. C. Code of 1931, C. S., 4309, the evidence tends only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there is neither direct nor circumstantial

NEGLIGENCE A *c—Continued.*

evidence tending to show the fire had been started either by the defendant or his employees under his authority: *Held*, a judgment as of nonsuit was properly entered. *Sutton v. Herrin*, 599.

5. The general rule is that a person entering upon the premises of another solely for his own pleasure with the implied permission of the owner is a licensee and not an invitee, and where the owner of land constructs and maintains a lake thereon and does not prohibit the public from using the lake but derives no pecuniary benefit therefrom and exercises no control or supervision over the bathers therein, a member of the public so using the lake is a mere licensee, and the rule of liability of the operators of bathing resorts or beaches does not apply to such owner. *Adams v. Enka Corp.*, 767.

6. A manufacturing corporation which constructs and maintains a lake for manufacturing purposes, and which permits and allows employees and the public generally to swim therein, without charge, compensation or control is not liable in damages for the drowning of a visitor while swimming in the lake in the absence of some negligent act on its part, and, the public using the lake being mere licensees, the corporation is not required to keep life guards or life-saving equipment at the lake, and the rule of liability of proprietors of bathing resorts is not applicable to it although it provided a diving board at the lake and covered the edge of the water with sand to form a kind of beach, and where an action against it to recover damages for the drowning of a member of the public is brought solely on the basis of its failure to provide life guards or life-saving equipment the action is properly nonsuited. *Ibid.*

e Res Ipsa Loquitur

1. The mere fact of a collision on a street or highway raises no presumption that either party was negligent. *Swaincy v. Tea Co.*, 272.

2. Where all the facts causing an injury are known and testified to by the witness the doctrine of *res ipsa loquitur* does not apply. *Byrd v. Hospital*, 337.

B Proximate Cause.

a As Essential Element of Actionable Negligence

1. Where one who is rightfully upon a leased premises and is injured by a concealed menace without contributory negligence on his part, but of which the lessee knew or, in the exercise of ordinary care, should have known, and gave no timely warning, the negligence of the lessee in this respect will not entitle the licensee or invitee upon the premises to recover damages unless such damages were proximately caused by such negligence. The charge of the court upon the evidence in this case is approved. *Pearson v. Sales Co.*, 14.

b Doctrine of Last Clear Chance

1. Demurrer in this case held properly overruled since defendant might be found liable on doctrine of last clear chance. *Caudle v. R. R.*, 404.

NEGLIGENCE B—*Continued.*

c Intervening Negligence

1. Where the intervening act of a third person could not have been foreseen by the defendant in the exercise of due care, such intervening act breaks the sequence of events and insulates the prior negligence of the defendant, and in this case *held:* the allegations of the complaint permitted of but the one inference that the acts of a third person could not have been reasonably foreseen by the defenddant, and the defendant's demurrer to the complaint in an action for damages should have been sustained. *Hinnant v. R. R.*, 489.

e Proximate Cause as Question of Law or Fact

1. Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the facts admitted, only one inference can be drawn it is for the court to declare whether a given act or series of acts is the proximate cause of the injury in suit. *Hinnant v. R. R.*, 489.

C Contributory Negligence.

a Of Persons Injured in General

1. The driver of an automobile, in an effort to avoid an accident at a railroad crossing, turned the car and drove it down the tracks in front of an approaching train, and a guest in the car jumped therefrom and was killed by being hit by the engine: *Held*, the act of the guest in jumping from the car under the circumstances will not bar the right of her administrator to recover damages against the railroad company for its negligence which proximately caused the injury, although the driver and other passengers in the car who remained therein escaped injury. *Nash v. R. R.*, 30.

b Of Minors

1. While an eleven-year-old boy is not chargeable with the exercise of that degree of caution before crossing a railroad track as a person of mature years, he is required to exercise that degree of care as is reasonably within his capacity and which the evidence shows that he should have exercised for his own safety. *Tart v. R. R.*, 52.

2. Whether fourteen-year-old-boy, injured by being struck by automobile on highway, was guilty of contributory negligence *held* question for jury. *Dotson v. Early*, 8.

3. A twelve-year-old boy is prima facie presumed to be incapable of contributory negligence, but the presumption is rebuttable by proper evidence upon the trial. *Caudle v. R. R.*, 404.

c Imputed Negligence

1. Where guest has no control over driver and is not engaged in joint enterprise, negligence of driver will not ordinarily be imputed to him. *Nash v. R. R.*, 30; *Hinnant v. R. R.*, 489.

2. And where joint enterprise is relied on guest must have such control over car as to be substantially in joint possession of it in order for driver's negligence to be imputed to him. *Chanock v. Refrigerating Co.*, 105.

3. But where negligence of driver is sole proximate cause of collision a guest may not recover of third person. *Hinnant v. R. R.*, 489.

NEGLIGENCE C—*Continued.*

d Comparative Negligence

1. Where the cause of action does not fall within the provisions of the Federal Employers' Liability Act or C. S., 3467, but is an action by an individual not an employee, to recover damages for a negligent injury, the doctrine of comparative negligence is not applicable, and an instruction for the jury to answer the issue as to contributory negligence in the negative if they found from the evidence that defendant's negligence was the proximate cause of the injury when compared with the negligence of the plaintiff is reversible error. *Cashatt v. Seed Co.*, 383.

D Actions.

b Aiding Injured Person as Admission of Negligence

1. One driving an automobile upon the highway who hits and injures a pedestrian thereon does not impliedly admit his liability by stopping and rendering aid in procuring a physician for the injured person and arranging for his immediate necessary attention at a hospital, and doing such other acts as are dictated by humanity under the circumstances. *Patrick v. Bryan*, 62.

c Nonsuit

1. Where, in an action to recover damages sustained in an automobile collision, a judgment as of nonsuit is entered on the plaintiff's action, and on the defendant's cross-action the jury answers the issue as to the plaintiff's negligence "yes," and finds that the defendant was not guilty of negligence and awards damages: *Held*, upon the plaintiff's appeal from the judgment as of nonsuit on his action the finding of the jury that the plaintiff was negligent would bar his recovery, and the judgment will be sustained. *Mangum v. Winstead*, 252.

2. Evidence tending to show that the owner of an automobile when changing a tire upon the highway offered to pay a colored boy to help him and told the boy to get under the car and jack it up at the axle, that the jack used was defective and that when the owner pulled off the tire sought to be changed the jack under the car slipped, causing the automobile to fall on the colored boy to his injury is *Held*, sufficient upon the issue of actionable negligence of the owner of the car. *Miles v. McIver*, 285.

d Instructions

1. Instructions in this case held to be erroneous as submitting doctrine of comparative negligence. *Cashatt v. Seed Co.*, 383.

NEW TRIAL—Motions for, in trial court see Criminal Law J f.

NONSUIT see Trial D a.

NORTH CAROLINA WORKMEN'S COMPENSATION ACT see Master and Servant F.

NURSES see Hospitals D.

OPTIONS see Principal and Agent A b 1.

ORDINANCES see Municipal Corporations H.

PARENT AND CHILD (Fact that purchase price notes were payable to grantor's son held no evidence of fraud see Fraud C c 1; deed from parent to child as fraudulent see Fraudulent Conveyances C e 1; child's right of action against bond securing deed of separation see Husband and Wife C c 1, 2).

A Rights and Liabilities of Parents (Right to sue for mutilation of child's dead body see Dead Bodies).

c Custody and Control of Child

1. The father of a minor child is its natural guardian, and his rights of control over the child is superior to that of the mother. *Patrick v. Bryan*, 62.

2. It is the moral and legal duty of a father to support and educate his children, and, as a general rule, he is the natural guardian of his children and is entitled to the custody and control of his children against all the world. *In re TenHoopen*, 223.

3. Where a minor child is left in the care of its maternal grandmother by its mother while she went to another state in order to establish residence for bringing divorce proceedings, and the father of the child brings a writ of *habeas corpus* against the grandmother for the custody of the child: *Held*, the contest is to all intents and purposes between the husband and wife for the custody of the child and the writ comes within the spirit and letter of C. S., 2241, giving the Superior Court jurisdiction to award the custody of the child under the provisions of the statute. *Ibid.*

PARTIES—Demurrer for defect of, see Pleadings D b; who may sue for wrongful death see Death B c; who may sue on contract see Contracts F a; Commissioner of Banks must sue in own name see Banks and Banking H e 7; persons not *in esse* concluded by judgment when represented by guardian see Judgments M b.

PARTNERSHIP.

G Criminal Liability of Partners.

a Appropriation of Partnership Funds

1. N. C. Code of 1931, sec. 4274(a), relating to appropriation of partnership funds by one of the partners, provides that fraudulent intent to deprive his copartners of the use of the funds is an ingredient of the offense, and such fraudulent intent is an essential element of the crime and must be proved by the State, and in a prosecution under the statute an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence. *S. v. Rawls*, 397.

PAYMENT.

C Acts Constituting Payment (Compromise operating as full payment see Compromise and Settlement).

a Payment by Note, Check or Draft

1. The effect of taking a promissory note from the husband for the separate obligation of the wife due on open account is to postpone the maturity of the wife's debt to the due date of the note, but if

PAYMENT C *a—Continued.*

the note is not paid at maturity the rights of the creditor on the open account are revived and he may sue either on the note or the account. *Supply Co. v. Davis*, 56.

2. Acceptance of draft by contractor does not ordinarily bar action on surety bond for materials for which draft was drawn. *Bank v. Surety Co.*, 148.

3. A check is only conditional payment, but where check is not paid because of negligence of payee in presenting it, the payee must suffer the loss. *Chevrolet Co. v. Ingle*, 158.

4. *Held:* endorsers paid note by executing their individual note and could recover on maker's indemnity contract. *Watkins v. Simonds*, 746.

5. Where bank charges drawer's account and credits payee's account with amount of check on day before bank's insolvency it operates as payment by drawer. *Kelley v. Clark Co.*, 750.

b Payment to Agent of Payee

1. Evidence of payment of note to payee's collecting agent held sufficient. *Acceptance Corp. v. Fletcher*, 170; *Edmundson v. Wooten*, 304.

2. Where in a suit to restrain the foreclosure of a mortgage a controversy arises between the mortgagor and the mortgagee as to the amount due thereunder, and the mortgagor deposits the amount claimed to be due by him with the clerk of the Superior Court and has notice to be served on the mortgagee that the amount would be paid to him upon surrender and cancellation of the note and mortgage, and the issue as to the amount of the debt is answered in favor of the mortgagor: *Held*, a judgment ordering the cancellation of the note and mortgage and permanently enjoining the foreclosure of the instrument is erroneous, the payment to the clerk not being payment to the mortgagee, the clerk being the agent of the mortgagor and not the mortgagee and there being no statutory authority for such payment to the clerk. *Mackay v. Meredith*, 639.

PEACE BONDS see Breach of the Peace B.

PHYSICIANS AND SURGEONS (Liability of Hospitals see Hospitals).

D Liability of Third Person Employing Physician to Treat Injured Party.

b Duties and Liabilities of Third Person to Patient

1. Where an employer, in recognition of his legal or moral duty, employs a physician or surgeon to attend an injured employee, the only duty which the employer owes the employee in this respect is to exercise reasonable care in the selection of the physician or surgeon, and where, in an action by the employee against the employer to recover damages for the negligent treatment of the employee by the physician selected by the employer, there is no allegation that employer failed to exercise reasonable care in the selection of the physician, a judgment dismissing the action as to such employer is correct. *Gosnell v. R. R.*, 234.

PHYSICIANS AND SURGEONS D *b—Continued.*

2. Malpractice of physician selected by employer is part of injury and compensable under the Workmen's Compensation Act. *Hoover v. Indemnity Co.*, 655.

PLEADINGS (In particular actions see particular titles of actions).

A Complaint.

a Contents, Form and Requisites and Joinder of Causes

1. Where the complaint alleges a series of connected transactions constituting one general scheme, participated in by the defendants, resulting in damage to the plaintiff for which he is entitled to recover of the defendants jointly and severally, the defendants' demurrer for misjoinder of parties and causes is properly overruled. *Newberry v. Fertilizer Co.*, 416.

D Demurrer.

b For Misjoinder of Parties and Causes of Action

1. A defect of material parties appearing upon the face of the complaint may be taken advantage of by demurrer, and when not appearing upon the face of the complaint, such defect must be taken advantage of by answer, or the objection will be deemed waived, C. S., 511. The distinction is noted between necessary and proper parties. *Sims v. Dalton*, 249.

2. Demurrer in this case for misjoinder of parties and causes held properly overruled. *Newberry v. Fertilizer Co.*, 416.

d When Demurrer May Be Pleaded

1. A demurrer to the complaint on the ground that the complaint does not state a cause of action may be interposed at any time, even on appeal to the Supreme Court, but the demurrer is overruled in this case, the complaint sufficiently alleging a cause of action for actionable negligence. *Staley v. Park*, 155.

e Effect of Demurrer

1. A demurrer to a complaint admits the facts therein properly alleged but not conclusions or inferences of law therefrom, and where the demurrer sets up the defense that the plaintiff had accepted an award under the Workmen's Compensation Act and was therefore barred from maintaining the action the plaintiff's right to maintain the action will be determined as a matter of law by a construction of the Compensation Act. *Phifer v. Berry*, 388.

E Amendment of Pleadings.

a Right to Amend in General

1. Where the purchaser of lands under a foreclosure sale of a mortgage brings ejectment against the mortgagors in possession who deny the validity of the mortgage under which the lands were sold, it is within the discretion of the trial court to permit the plaintiff to amend his complaint to allege that the defendants had given other mortgages on the same land and ask that if the mortgage under which he claims be declared void that he be subrogated to the liens of the prior mortgages and that the lands be sold to enforce the same, there being no substantial departure by the amendment from the cause originally alleged, and the pleadings not being inconsistent. C. S., 547, 507. *Edwards v. Turner*, 628.

PLEADINGS E *a—Continued.*

2. Where an action has been dismissed for misjoinder of parties and causes the action is not pending and the court has no power to allow a motion to amend the pleadings under the provisions of C. S., 515. *Grady v. Warren*, 638.

I Motions.

b Motions for Judgment on Pleadings

1. Where pleadings do not raise any determinative issues court may render judgment on the pleadings. *Jeffreys v. Ins. Co.*, 368.

2. Answer denying plaintiff's title to notes sued on raises issue of fact and judgment on pleadings is error. *Comr. of Banks v. Johnson*, 387.

PLEDGES.

A Nature and Essentials.

a In General

1. In order to a valid pledge of property the possession thereof must be given the pledgee, and if possession is returned to the pledgor it must be kept separate and distinct from other property and the pledgor must hold it as agent of the pledgee, and where the property consists of notes which are returned to the pledgor for collection, the proceeds must be kept separate, distinct and intact. *Bundy v. Credit Co.*, 604.

d Transactions Operating as Pledges

1. Where, under an agreement between a business concern and a credit company, the former sends notes made to it by its customers to the credit company, which immediately remits a certain per cent of their face value and returns the notes to the business concern for collection upon maturity, and the credit company requires that the proceeds from collection be kept separate and intact and sent to it for its check and approval and requires the business concern to "buy the notes back" if not paid within a certain time: *Held*, the transaction is in effect a pledge of security for borrowed money, and is not a chattel mortgage requiring registration as against creditors and third persons, C. S., 3311, and the pledgee has a lien on the notes in the hands of the business concern or its receiver, the latter's possession being as agent for the credit company, and the fact that the makers of the collateral notes were not notified of the collateral pledge is not important. *Bundy v. Credit Co.*, 604.

POLICE POWERS see Municipal Corporations H.

PRESUMPTIONS see Death A a, Homicide G b, Criminal Law G a, Receiving Stolen Goods D b 1; presumptions on appeal see Appeal and Error J d.

PRINCIPAL AND AGENT (Real estate agents see Brokers, insurance agents see Insurance).

A The Relation.

a Creation and Existence

1. Where there is evidence that an alleged agent has repeatedly collected money owed to the alleged principal, and that the alleged principal has received the money and applied it to the debts, it is sufficient to make out a prima facie case of agency, and where, in

PRINCIPAL AND AGENT A *a—Continued.*

an action by a credit company on a note transferred to it, the defendant offers evidence of payment to the automobile dealer who had transferred the note to the plaintiff, together with such evidence of agency, and the jury finds the fact of agency in favor of the defendant: *Held*, a judgment entered thereon that the plaintiff recover nothing on the note is correct. *Acceptance Corp. v. Fletcher*, 170.

2. Evidence that the maker of a note paid the amount thereof to the payee's agent, that the agent had possession of the note and delivered it to the maker marked paid, that the agent deposited the amount in a bank to the payee's credit and sent the payee a deposit slip in accordance with his instructions, and that thereafter the bank of deposit became insolvent and the payee filed a claim for the amount against the receiver thereof, is *held*, sufficient to be submitted to the jury on the issue of payment to the duly authorized agent of the payee. *Edmundson v. Wooten*, 304.

b Distinction Between Agency and Other Relationships

1. A contract between an owner of land and a real estate company whereby the former agrees to sell certain land to the latter upon the payment of a certain sum within a specified time, with a further agreement that the real estate company might sell the land at public or private sale within the time specified upon the expenditure of a certain sum for improvements, and that the owner should receive a specified per cent realized from the sale over and above the sum named is *Held* an option on the land binding upon the owner upon receipt of the purchase price, and did not create an agency for the sale of the land. *Strowd v. Whitfield*, 732.

2. Where the evidence discloses that an automobile dealer allowed a prospective purchaser to drive a car to show it to his wife, and that there was no agent or employee of the dealer in the car with the prospective purchaser, and that the dealer exercised no control over the car or driver, and there is no evidence that the prospective purchaser was an incompetent or careless driver or that the car was defective in any particular or that the approval of the wife was an essential element of the sale or that the prospective purchaser was contemplating buying the car for her: *Held*, a judgment as of nonsuit in an action against the dealer brought by a third person injured by the alleged negligence of the prospective purchaser while so driving the car is correctly entered, the prospective purchaser being a bailee and not an agent of the owner under such circumstances. *Harts v. Chevrolet Co.*, 807.

d Termination

1. Although, ordinarily, death terminates the relationship of principal and agent, where the agent after the death of the principal executes notes, the proceeds of which are used for the exclusive benefit of the estate, the estate is liable therefor upon the principle that where the principal receives the benefits of an unauthorized act of the agent he will be deemed to have ratified the act as he will not be allowed to accept the benefits without bearing the burdens, the executors and trustees retaining the benefit of the notes for the estate having had the authority to make and execute the notes in the first instance. *Bank v. Grove*, 144.

PRINCIPAL AND AGENT—*Continued.*

C Rights and Liabilities as to Third Persons.

b Powers of Agent

1. Evidence that payee had authorized payment of note to agent, discharging payer's liability, held sufficient. *Acceptance Corp. v. Fletcher*, 170; *Edmundson v. Wooten*, 304.

2. Agent for sale of real estate does not have the power to rescind sale or cancel notes therefor. *Stroud v. Whitfield*, 732.

3. A party paying the local office of a company by check is not affected by the local office's lack of authority to cash the check when such limitation of authority was not known to him, and exception to the exclusion of evidence of secret limitations of the local office's authority will not be sustained. *Kelley v. Clark Co.*, 750.

4. Where the principal instructs his agent by telegram to sit in on a creditors' meeting and "plug for us," the words of the authorization are ambiguous, and where the agent and the debtor, in good faith interpret and act on it as authorization to the agent to execute in the principal's name a compromise agreement with other creditors whereby claims were settled on a percentage basis: *Held*, in the absence of repudiation of the agreement by the principal upon notification thereof, he may not contend that the agent exceeded his authority and that he was not bound by the agreement. *Mahogany Co. v. Mfg. Co.*, 814.

PRINCIPAL AND SURETY.

A Requisites and Validity of Surety Bonds.

b Statutory Conditions and Covenants of Bonds

1. A local public law applicable to one county only which provides that where it is agreed that a contractor for private construction should give bond, the bond should be written with the same provisions for the protection of laborers and materialmen as are required in bonds for municipal construction under C. S., 2445, and that such provisions should be conclusively presumed to be written therein and should be given with a corporate surety licensed to do business in this State, is *Held* unconstitutional and void, it being in contravention of Art. I, secs. 7 and 31 of our State Constitution prohibiting exclusive emoluments or privileges except in consideration of public service and prohibiting monopolies, the statute failing to operate uniformly and equally in giving special privilege to the residents of the particular county and imposing heavier burdens on certain sureties. C. S., 2445 is constitutional being an exercise of the police power and applying equally to all governmental agencies of the State. *Plott Co. v. Ferguson*, 446.

B Nature and Extent of Liability on Surety Bonds and Rights of Parties Thereunder (Surety's right of action against principal's indemnity contract see Indemnity B a 1).

b Bonds for Public Construction

1. While the provisions of C. S., 2445, requiring a bond to be executed by a contractor for work on public buildings for the benefit of laborers and materialmen, are as binding as if written into the bond, and the express requirements of the statute may not be

PRINCIPAL AND SURETY B *b—Continued.*

varied, the statute does not forbid an agreement to be written into the bond requiring that any action thereon be brought within a reasonable time, and in this case *Held:* it appearing from the complaint that the bond stipulated that any action thereon must be brought within twelve months from the date the last installment was due the contractor and that the action was not begun within the time prescribed, the demurrer of the surety on the contractor's bond should have been sustained. *Horne-Wilson, Inc., v. Surety Co.*, 73.

2. The laborers and materialmen for a public school building take their rights under the contractor's indemnity bond as it is written, and are bound by a valid provision therein that any action thereon should be brought within a stated, reasonable time. *Ibid.*

3. Where the complaint in an action on the bond given by a contractor for construction of a highway alleges that a statement of the claim against the surety on the bond was filed with the defendant surety company within six months after the project was completed, it is a sufficient allegation of compliance with the provisions of N. C. Code, 3846(v) requiring such notice be filed with the general agent of the surety in this State, and the defendant surety's demurrer on the ground that the complaint failed to state a cause of action because it failed to sufficiently allege compliance with the statute cannot be sustained. *Bank v. Surety Co.*, 148.

4. Where a materialman furnishes crushed stone used by a contractor in the construction of a highway, and draws drafts on the contractor with the bill of lading attached for the amount thereof, and the contractor accepts the drafts, but fails to pay the drafts upon maturity: *Held*, the acceptance of the drafts by the contractor will not bar an action by the materialman or his assignee on the bond of the contractor filed with the State Highway Commission as provided by statute, where there is no agreement between the contractor and the drawer that acceptance should constitute payment. *Ibid.*

5. The assignment of a debt carries with it the security the assignor has for the payment of the debt, and where a materialman furnishes material to a contractor which is used in the construction of a public highway, and draws drafts on the contractor for the amount due therefor which are assigned and negotiated to a bank, and the contractor accepts the drafts but fails to pay them at their maturity: *Held*, the bank may maintain an action on the contractor's bond for the amount due thereon, and the surety's demurrer on the ground that the complaint failed to allege that, at the time of the assignment and negotiation of the drafts, the accounts of the materialman were also assigned cannot be sustained. *Ibid.*

6. Where a county board of education fails to retain the full percentage of the contract price of a school building as required by the surety bond of the contractor, and thereafter the contractor defaults and fails to complete the building, and, upon the surety's waiver of its option to do so, the county board completes the building with money in its hands applicable to the contract price: *Held*,

PRINCIPAL AND SURETY B *b—Continued.*

the surety is entitled to recover against the county board of education the loss sustained by reason of the board's failure to retain the required percentage, but the county board of education had the right to complete the building with the money on hand, and the surety is entitled to recover only the difference between the amount the board would have had on hand if the required percentage had been retained and the amount necessary to complete the building, and the fact that the board had paid a certain sum to the contractor after notice of outstanding claims against the contractor imposes no further liability upon the board upon the facts disclosed by the record. *Fidelity Co. v. Board of Education*, 354.

7. A surety on the bond of a contractor in the erection of a school building who has suffered loss by reason of the failure of the county board of education to retain the required percentage of the contract price may not recover against the individual members of the board for such failure. *Ibid.*

d Bonds of Private or Corporate Officers or Agents

1. Where in an action by a bank against the surety on the cashier's bond the evidence tends only to show that the cashier, acting in good faith and in his judgment for the benefit of the bank, had credited the account of a depositor with drafts drawn by the depositor on others, and permitted the depositor to check against the drafts before they were collected and paid, causing an overdraft of the depositor's account when the drafts were returned, there is not sufficient evidence to support an allegation of fraud and collusion between the depositor and the cashier who had credited the depositor's account, and a recovery may not be had by the bank against the surety on the cashier's bond which provided for liability only in the event of fraud, dishonesty, larceny, theft, etc., or some dishonest or criminal act on the part of the cashier, and the defendant's surety's motion as of nonsuit should have been allowed. *Bank v. Fairley*, 136.

PROCESS.

B Service of Process (In tax foreclosure proceedings see Taxation H b 2).

f Proof of Service

1. A sheriff's return noted on a summons in a civil action that the summons had been properly served prima facie establishes such service, and the burden is on the party claiming that service had not in fact been made to prove want of service by clear and unequivocal evidence. *Hooker v. Forbes*, 364.

C Defective Service.

c Defects Remedial by Amendment

1. Under the provisions of C. S., 476 that process must be signed by the clerk of the Superior Court having jurisdiction of the action construed with the provisions of C. S., 547, the negligent failure of the clerk to sign his name to the summons in a civil action is a formal defect and one that would be waived by a general appearance, and it is within the authority of the trial judge to permit a correction by amendment *nunc pro tunc*. *Hooker v. Forbes*, 364.

PUBLIC OFFICERS—Jurisdiction of grand jury to find indictment against see Indictment A b 2; embezzlement of, see Embezzlement.

PUBLIC SERVICE CORPORATIONS see *Telephone Companies.*

RAILROADS (Acquisition of prescriptive rights against see Adverse Possession D a).

D Operation (Liability of owner of private railroad for injuries see Negligence A c 3).

b Accidents at Crossings

1. In an action for damages resulting in a collision at a grade crossing the evidence tended to show that two tracks of the defendant crossed the road, that the plaintiff was thoroughly familiar with the crossing, and that before attempting to cross he stopped 45 or 50 feet therefrom where his vision was obstructed by trees growing off the right of way, and looked and listened without discovering defendant's approaching train, that he did not again stop although at fifteen feet from the crossing his vision was unobstructed in the direction from which the train was coming for two hundred yards, that he saw the train when his front wheels were upon the first track and went on across although the train was coming upon the second track: *Held*, the evidence was insufficient to be submitted to the jury and the railroad company's motion as of nonsuit was properly allowed. The evidence as to rough places in the crossing is immaterial as nothing indicated that such was a cause of the injury in suit. *Godwin v. R. R.*, 1.

2. The plaintiff's intestate was killed in an accident at a grade crossing of a railroad company while the intestate was riding as a guest in an automobile owned and operated by another. In an action by her administratrix against the railroad company the evidence tended to show that the intestate had no control over the driver of the car, and was not engaged in a joint enterprise at the time of the accident, that no signal was given by the approaching train, that the view at the crossing was partially obstructed by a loading platform and trees upon the right of way, and by other cars parked near the tracks, that the crossing was in an incorporated town and was much used, that the accident occurred at five o'clock in the afternoon when traffic was heaviest, and that the railroad company kept no watchman or signaling device at the crossing: *Held*, the evidence was sufficient to be submitted to the jury, and the defendant's motion as of nonsuit was properly denied. *Nash v. R. R.*, 30.

3. Where in an action by an eleven-year-old boy, brought by his next friend, to recover for an injury received by the plaintiff in an accident at a railroad crossing, the plaintiff introduces some evidence of the defendant's negligence in failing to give the proper signals and warnings of its approaching train, etc., but considering only the evidence most favorable to the plaintiff, it tends to show that he attempted to walk across the defendant's tracks at a grade crossing, that there was an open space of about twenty feet between a track on which some box cars were standing and the track on which the train was approaching, that the track was straight for some distance and that the defendant's train could have been seen and

RAILROADS D *b—Continued.*

heard, that the plaintiff failed to see the train until it was almost upon him, when he started to run, fell, and was struck and injured, but that he was normally alert and intelligent for his age: *Held*, the evidence discloses contributory negligence barring recovery as a matter of law, and the defendant's motion as of nonsuit should have been allowed, the law not extending its protection to those who can see and hear and will not do so. *Tart v. R. R.*, 52.

4. Where the complaint in an action to recover damages against a railroad company alleges that the plaintiff's intestate was twelve years old, and that, while attempting to cross the defendant's tracks at a path habitually used by the public, his attention was attracted by a rapidly moving freight train on one of the tracks, and that while watching the freight train he was struck by the defendant's engine on another track, and that the defendant failed to keep a proper lookout and failed to give any warning of the approach of the said engine: *Held*, a demurrer to the complaint was properly overruled, since the defendant would be liable on the doctrine of the last clear chance if the jury should answer that issue in his favor upon proper evidence. *Caudle v. R. R.*, 404.

5. Where the evidence tends to show that the view of the defendant's tracks at a grade crossing in a city was obstructed on the left, as the plaintiff approached the crossing, by a curve and embankment, and that the plaintiff upon approaching the crossing looked to the right where the view was unobstructed for about 200 feet and did not see the defendant's engine, and then looked to the left, and that when he again looked to the right the wheels of his automobile were upon the rails of the first track and that he saw the defendant's train almost upon him approaching from the right on the second track, and that in attempting to speed up and get across the crossing the plaintiff was struck and injured: *Held*, the plaintiff's act in giving more attention to the direction where the probability of danger was greatest and his attempt to get across the crossing in front of the train will not bar his recovery as a matter of law, and the defendant's motion as of nonsuit on the ground of contributory negligence should have been overruled, the question of contributory negligence being for the jury under the standard of reasonable prudence. *Baker v. R. R.*, 478.

6. Where, in an action against the driver of an automobile and a railroad company to recover damages received by the plaintiff in a collision at a grade crossing, the complaint alleges that the plaintiff was a guest in the automobile and that he had no control over the driver of the car, and that the accident was caused by the negligence of the railroad company in failing to give any warning of the approach of its train at an obstructed grade crossing, and the negligence of the driver of the car in failing to keep his car under control so that he could observe the law in regard to the speed limit at fifty feet of the crossing and the requirement that the driver should be able to stop the car before attempting to cross, C. S., 2621(46), under the conditions of the road at the time, and that the train came into view when the car was within 69 feet of the crossing but that the driver could not stop the car and that it

RAILROADS D *b—Continued.*

hit the first or second box car after the engine, causing injury to the plaintiff: *Held*, upon the allegation of the complaint the negligence of the driver of the car could not have been reasonably foreseen by the engineer of the train and such negligence on the part of the driver was an intervening, proximate cause of the accident insulating the negligence of the railroad company as a matter of law, and the railroad company's demurrer should have been sustained. *Hinnant v. R. R.*, 489.

c Injuries to Persons on or Near Tracks

1. Where in an action against a railroad company there is evidence that the plaintiff was hit in the eye by a loose rock thrown by the wheels of a truck while crossing the right of way of the defendant railroad company at a public crossing, that the loose rock at the crossing had been put there by an independent contractor of the defendant railroad company, a charge presenting for the determination of the jury the questions of intervening negligence and whether the injury could have been anticipated and correctly giving the law arising upon the liability of the defendant for the acts of the independent contractor who had completed the work before the occurrence of the injury, is *Held* not to be erroneous under the facts of this case. *Stewart v. R. R.*, 288.

REAL ESTATE AGENTS see Brokers.

RECEIVERS (Commissioner of Banks as receiver see Banks and Banking H; court may order foreclosure of property in *custodia legis* see Mortgages H b 4).

F Actions.

b Suits Against, Parties and Process

1. Joinder of receivers as parties defendant held proper where receivers were appointed after institution of action. *Alford v. R. R.*, 719.

RECEIVING STOLEN GOODS.

D Trial.

b Evidence and Presumptions

1. Recent possession of stolen property, without more, is insufficient to raise a presumption that those in whose possession the property was found immediately after the larceny were guilty of receiving stolen property knowing at the time of the receiving that it was stolen, and where, in a prosecution for larceny and receiving, the judge charges that the State contended that such recent possession ought to satisfy the jury that the defendants either stole the goods or received them knowing them to have been stolen, whereupon the jury brings in a verdict of guilty on the second count only, a new trial will be awarded. C. S., 4250. *S. v. Best*, 9.

REFERENCE.

C Report and Findings.

b Exceptions to Report

1. Where a party in an action which has been referred to a referee makes no exception to the referee's report he is entitled to judgment

REFERENCE C *b—Continued.*

only in accordance with the report, and a correct judgment entered thereon will be affirmed, and he may not contend that he is entitled to a relief which is not supported by the findings of fact or the conclusions of law of the referee. *Lumber Co. v. Abernathy*, 219.

REGISTERS OF DEEDS.

B Rights, Powers, Duties and Liabilities.

b Registration of Instruments

1. It is the duty of the register of deeds to register all instruments required or authorized to be registered and to keep full and complete alphabetical indexes of the names of the parties thereto, and no instrument is deemed registered until indexed as the statute requires, N. C. Code of 1931, secs. 3553, 3561, and the register of deeds and his bondsman are liable for loss sustained by reason of his negligent failure to perform his duties in this respect. *Watkins v. Simonds*, 746.

e Liabilities

1. Where a mortgage on the wife's lands is indexed by the register of deeds only in the name of the husband, the mortgage is not properly indexed and is not superior to a subsequent deed to the lands executed by the husband and wife, and where the mortgagee suffers loss by reason of such improper registration he may recover therefor in an action against the register of deeds and the surety on his bond. *Watkins v. Simonds*, 746.

REMOVAL OF CAUSES.

C Citizenship of Parties.

b Separable Controversy and Fraudulent Joinder

1. A life insurance company had several local physicians acceptable to it to make medical examinations of applicants for insurance taken through the soliciting agent, and the applicant in the present case was injured by trying to sit in a defective chair in the physician's office, and brings action for damages against the insurer, a nonresident corporation, its soliciting agent and the local medical examiner whom the insurer paid only a fee for each examination: *Held*, the case should have been removed from the State to the Federal Court upon proper motion of the nonresident insurer for fraudulent joinder of the resident defendants for the purpose of defeating the jurisdiction of the latter court. *Culp v. Ins. Co.*, 87.

2. Upon a petition for the removal of a cause from the State to the Federal Court on the ground of separable controversy the allegations of the complaint are controlling, and where the complaint alleges a joint tort committed by the defendants the petition is properly denied. *Newberry v. Fertilizer Co.*, 416.

3. Where an action is brought against the resident Commissioner of Banks and a nonresident insurance company to recover on the amount deposited by a county in an insolvent bank and to recover on the depository bond executed by the insurance company, and the complaint fails to state a cause of action against the Commissioner because of its failure to allege a filing of the claim with him and his refusal thereof, the Commissioner's demurrer is properly sus-

REMOVAL OF CAUSES C *b—Continued.*

tained, and the motion of the nonresident defendant for removal to the Federal Court is properly allowed. *Buncombe County v. Comr. of Banks*, 792, 793.

RES GESTAE see Evidence D a.

RES IPSA LOQUITUR see Negligence A c.

RESTRICTIVE COVENANTS see Deeds C g.

RULE IN SHELLEY'S CASE see Deeds and Conveyances C c 1.

SALES.

D Performance or Tender of Performance.

d Breach by Buyer as Excuse for Failure of Further Performance or Tender by Seller

1. Where the purchaser wrongfully refuses to receive shipment of goods under a written contract the seller is not bound to tender further performance if he is able, ready and willing to make delivery, and where the evidence is conflicting as to whether the refusal was wrongful, an issue of fact is raised for the determination of the jury. *Cotton Mills v. Goldberg*, 506.

G Remedies of Seller.

c Resale of Goods Refused by Buyer

1. Where the purchaser wrongfully refuses to accept a shipment of goods under a written contract, the seller, as agent for the purchaser, may, in good faith resell the goods on the open market at a fair sale and apply the proceeds to the payment of the contract price in diminution of his loss, and recover of the purchaser the difference between the contract price and the amount obtained from the sale on the open market when the latter is less than the former. *Cotton Mills v. Goldberg*, 506.

2. Where the purchaser of goods under a contract wrongfully refuses to accept them, and the seller resells the goods on the open market to diminish the damages, and the purchaser alleges that the seller failed to use due diligence to obtain a fair price for the goods in the resale: *Held*, the burden is on the purchaser to prove the seller's failure to use due diligence when relied on by him. *Ibid.*

I Conditional Sales (Priority of chattel mortgage over, see Chattel Mortgages B a 1).

b Rights of Subsequent Purchasers

1. Where, in an action against a hotel corporation to recover the balance due on a refrigerating plant or to recover possession thereof, the evidence discloses that the plant was sold to the hotel corporation's lessee under a title-retaining contract, and that the hotel corporation had purchased it from its lessee, giving a certain number of shares of its capital stock in payment, and that at the time of the purchase by the hotel corporation from its lessee the conditional sales contract had not been registered, C. S., 3312: *Held*, no notice however full and formal can supply notice by registration, and evidence of knowledge of the hotel corporation that the full purchase price had not been paid is immaterial, and the hotel

SALES I *b—Continued.*

corporation acquired the title to the property by its purchase from its lessee free from the lien of the conditional sales contract, and its motion as of nonsuit should have been allowed. *Brown v. Hotel Corp.*, 82.

SCHOOLS AND SCHOOL DISTRICTS—Contractor's bond see Principal and Surety B b 1, 2; bonds for see Taxation A a 1.

SEDUCTION.

B Prosecution and Punishment.

c Subsequent Marriage as Defense

1. A *nolo contendere* partakes of a confession of the offense charged in a criminal action, and where in a prosecution for seduction under promise of marriage the defendant enters a plea of *nolo contendere*, and a judgment is entered under agreement between the prosecutrix, the defendant, and the solicitor, which provides for the payment of a certain amount to the prosecutrix in monthly installments to be secured by bond, etc., and the defendant thereafter pays the amount agreed upon to the date of making a motion to discharge the bond on the ground that his subsequent marriage to the prosecutrix discharged the judgment: *Held*, marriage after verdict of guilty does not affect a judgment in a prosecution for seduction, and the defendant's motion should be overruled. C. S., 4339. *S. v. McKay*, 470.

SERVICE see Process B.

SET-OFFS—Against receiver of insolvent bank see Banks and Banking H e.

SEWERS see Municipal Corporations E f.

SHERIFFS—Embezzlement by see Embezzlement A a 1, B c 1; whether deputy is employee under compensation act see Master and Servant F a 8, F b 5.

SLANDER see Libel and Slander.

SPECIFIC PERFORMANCE.

B Contracts Specifically Enforceable.

a In General

1. Where a contract does not relate to the transfer of property, and damages for its breach would be sufficient compensation, and it does not come within any exceptions to the general rule, specific performance may not be maintained thereon. *Supply Co. v. Whitehurst*, 413.

STATES.

A Relation Between States.

a Law of the Forum and Conflict of Laws

1. In an action involving the question as to whether a contract was made in another state in bad faith to avoid the usury statute of North Carolina: *Held*, the definition of the words "bad faith" depends largely upon the facts of each particular case and is not capable of definite definition, and a charge in this case is not erroneous which substantially instructs the jury that "bad faith"

STATES A *a—Continued.*

as used in the issue imports an intent to deceive the other party to the transaction and that the transaction was dishonestly conceived and consummated with knowledge of a fraudulent purpose to evade the usury laws of North Carolina. *Bundy v. Credit Co.*, 604.

2. A note for money borrowed from a bank in another state and executed and delivered there, bearing a rate of interest that was there legal, will not be held as usurious in an action brought in the courts of this State. *Bank v. Ward*, 691.

STATUTES (Statutes construed see Consolidated Statutes; Statute of Frauds see Frauds, Statute of).

B Construction of Statutes.

a General Rules

1. The statute giving the State and municipal authorities the right and authority to take private lands or burden it for public purposes should be strictly construed. *Sechriest v. Thomasville*, 108.

2. Where particular words in a statute are followed by general words the latter will be confined, ordinarily, to acts and things of the same kind, under the rule that the meaning of doubtful words may be ascertained by reference to the meaning of words with which it is associated. *Morecock v. Hood, Comr. of Banks*, 321.

3. In construing a statute when there is substantial ground for doubt whether its terms were meant to apply to particular facts, the intention of the Legislature may generally be determined from a consideration of the purposes for which the act was passed, and also in proper instances, statutes are to be construed with reference to the common law in existence at the time of their enactment. *S. v. Mitchell*, 439.

4. Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive, the application of the statute is not limited to cases falling within both clauses, but it will apply to cases falling within either one of them. *Patrick v. Beatty*, 454.

SUBMISSION OF CONTROVERSY see Controversy Without Action.

SUBROGATION see Indemnity B b.

SUBSCRIPTIONS—Agreement of stockholders to pay proportionate part of corporation's note see Corporations E d.

SUMMONS see *Process.*

SUPPLEMENTAL PROCEEDINGS see Execution J.

SURETY BONDS see Principal and Surety.

TAXATION (Allocation of gasoline tax to counties see Counties E c 1).

A Validity of Levy and Constitutional Requirements and Restrictions.

a Necessity of Vote to Issuance of Bonds

1. Where the school committee of a special charter school district brings a proceeding to test the validity of certain bonds proposed

TAXATION A *a—Continued.*

to be issued without a vote of the qualified electors of the district under chapter 180, Public Laws 1931, and an agreed statement of facts is drawn up and submitted, signed by answering defendants and by defendants making a special appearance and moving to dismiss because they were not properly served with summons: *Held*, whether the plaintiff is a local municipal corporation organized expressly for the purpose of operating and maintaining schools in the district or whether it is an administrative agency of the State for the purpose of providing the constitutional six-months school, Constitution, Art. IX, is a determinig factor, and where the record is silent on this point a judgment sustaining the validity of the bonds is erroneous. As to whether a judgment rendered in such proceedings would be binding on all taxpayers in the district, all the taxpayers not having agreed to the facts submitted, *quære? School Committee v. Taxpayers*, 297.

2. Whether a local school district is an administrative agency of the State for the purpose of providing the constitutional six months term of school, Art. IX, or whether it is a local municipal corporation organized for the purpose of operating and maintaining public schools within the district is a determinative factor of its right to issue bonds for school purposes without a vote of the people, and where, in an action brought by the local district to declare a proposed bond issue to be valid, it does not appear from a construction of the statutes creating it that it was an administrative agency of the State, a judgment in its favor is erroneous. *School Committee v. Taxpayers*, 382.

3. A municipal platform for the loading, unloading and selling of cotton and for the storage of truck under certain conditions, but from which no truck is sold to consumers, is not a public market, a public market being generally defined as a place for the sale of products for human consumption, and such platform erected for the purpose of obtaining revenue for the town by the imposition of a fee for the sale of cotton therefrom is not a necessary municipal expense, Art. VII, sec. 7, and the town may not issue its notes for the purchase price of such platform without a vote of its electors. *Walker v. Faison*, 694.

4. It is not necessary that an ordinance authorizing the issuance of refunding bonds should be submitted to the voters of the municipality issuing them when the bonds to be refunded are valid and enforceable obligations of the city which mature within one year from the date of the ordinance authorizing the refunding bonds, and the bonds to be refunded were issued prior to 1 July, 1931, N. C. Code of 1931, secs. 2937(2), 2938(2), and the city does not contract a debt within the meaning of Art. VII, sec. 7, by issuing such refunding bonds, and it is not necessary that the bonds to be refunded should have been issued solely for necessary expenses, it being sufficient if the bonds to be refunded are valid and enforceable obligations of the city. *Bolich v. Winston-Salem*, 786.

5. Where refunding bonds proposed to be issued by a city are valid, bond anticipation notes proposed to be issued by it will also be

TAXATION A *a—Continued.*

valid, but the proceeds of the bonds and bond anticipation notes must be used exclusively to the payment of the bonds to be refunded thereby. *Ibid.*

f Form, Interest, Maturity and Denominations of Bond Issues

1. It is not necessary that refunding bonds issued in accordance with the Municipal Finance Act, as amended, should not bear a greater rate of interest than the bonds to be refunded so long as the refunding bonds do not bear a greater rate of interest than the statutory limitation of six per cent, N. C. Code of 1931, sec. 2951, the rate of interest within the statutory limitation being within the discretion of the governing body of the city issuing them. *Bolich v. Winston-Salem*, 786.

2. It is not required that the period for maturity of refunding bonds issued in accordance with the Municipal Finance Act, as amended, should not exceed the maximum statutory period for maturity of the bonds to be refunded, N. C. Code of 1931, sec. 2942(1b) the period for maturity of the refunding bonds being in the discretion of the governing body of the city issuing them. *Ibid.*

B Liability of Persons and Property.

c License Taxes

1. A person engaged in the operation of an automobile for the transportation of persons for hire within the State comes within general provisions of chapter 116, Public Laws of 1931, and he may not be required to offer evidence of ability to respond in damages for future accidents before granting him a license when he has tendered the correct fee therefor, and has never had a judgment docketed against him for negligence in the operation of such motor vehicle, and the provisions of the last paragraph of section three of the act, requiring proof of ability to respond in damages before the issuance of a license to owners of passenger vehicles operated for hire who are not embraced in the provision of the "present law," are not applicable to him, he being embraced in the provisions of the "present law" as set forth in section one of the act. *Nichols v. Maxwell*, 38; *Kirk v. Maxwell*, 41.

C Levy and Assessment.

c Assessment of Value of Corporate Excess

1. The statutory method by which the valuation of the corporate excess of a corporation is fixed for taxation, with the procedure for appeal by the corporation to the courts of the State, must be strictly followed, and where the State Board of Assessment has passed upon the statement of a bank and fixed the value of its corporate excess and later has reduced the assessment thereof, to which the bank makes no exception, the Commissioner of Revenue is without authority upon the subsequent failure and receivership of the bank to cancel the assessment fixed by the board, and the tax thereon may be recovered by the county. Public Laws of 1929, chap. 344, secs. 600, 603. *Chowan County v. Comr. of Banks*, 672.

2. Under the provisions of chapter 344, Public Laws of 1929, secs. 600, 603, the valuation of the corporate excess of a corporation for the

TAXATION C *c—Continued.*

purpose of taxation by the counties is fixed as of 1 April, and taxes must be paid by the corporation upon the valuation then so fixed unless modified by the State Board of Assessment in accordance with the prescribed statutory procedure, and where the assessment of a banking corporation is regularly made by the State board from which no appeal is taken, the subsequent insolvency of the bank cannot affect the assessment made in accordance with the statutory procedure. *Ibid.*

E Collection and Remedies for Wrongful Collection or Levy.

b Enjoining Levy, Collection or Enforcement

1. Where, in a suit by a taxpayer to restrain the collection of taxes on his land by a county, it appears that the commissioners sitting as a Board of Equalization and Review pursuant to statute passed upon plaintiff's petition for a reduction of valuation assessed on his lands along with others and found the value fixed a proper one, and the values of the property were equalized and upon appeal to the State Board of Assessments the valuation was upheld, and later the value thus assessed was reduced with that of other property in the county by 10 per cent, the tax so levied being within the constitutional limitation: *Held*, the plaintiff had no equitable right that would entitle him to an injunction. The remedy suggested in *Power Co. v. Burke County*, 201 N. C., 318, was not followed in this case. *Hooker v. Pitt County*, 4.

H Tax Sales and Foreclosures.

a In General

1. It is the duty of the sheriff to collect all taxes on property that are due and unpaid and, when necessary, to sell the land for delinquent taxes after due advertisement, and to issue a certificate of purchase, which certificate is presumptive evidence of the regularity of all prior proceedings incident to the sale and purchase, and of the performance of all things essential to the validity of the proceedings. N. C. Code, 1931, secs. 7992, 8010, 8012, 8014, 8026, 8027. *Orange County v. Jenkins*, 424.

b Foreclosures of Tax Certificate

1. The purchaser of a certificate at a sheriff's sale of lands for taxes is given a lien for the amount paid with interest and costs, etc., and is subrogated to the rights of the county for the taxes, and has the sole remedy of proceedings *in rem* by civil action to foreclose his certificate as nearly as may be as in case of foreclosure of a mortgage, and the purchaser at the sale in conformity with the statutory proceedings is entitled to a deed conveying the fee-simple title to the *locus in quo*. N. C. Code, 1931, secs. 8028, 8036. *Orange County v. Wilson*, 424.

2. In a suit to foreclose lands to enforce the lien acquired by a purchaser of a tax certificate the only parties upon whom service of summons is necessary are those in whose name the real estate is listed, and, in case they are married, upon their wives or husbands, and service on those otherwise interested may be had by publication as prescribed by the statute, N. C. Code, sec. 8037, and such publication is sufficient notice to constitute due process of law, the pro-

TAXATION H *b—Continued.*

ceedings being *in rem* in which the State seeks, directly or by authorization, to sell land for taxes by the enforcement of the statutory lien. *Ibid.*

c Attack and Setting Aside Foreclosure of Tax Certificate

1. Where service of summons had been made on the listed owners of the property and service on others interested in the land has been made by publication as the statute provides in proceedings to foreclose a tax certificate, interveners who claim an interest in the land by virtue of being *cestuis que trustents* under a deed of trust may not set aside the sale on the ground that they had not been served with summons, personal service on them not being required by the statute, and it appearing that the trustees in their deed of trust had been personally served, and that they could have protected their rights by paying the taxes and thus acquiring a lien therefor superior to all other liens. *Orange County v. Wilson*, 424.

f Sale of Personalty for Taxes

1. The requirements of our statute C. S., 7986 that the sheriff of the county give the mortgagee of personal property ten days notice of a sale of the mortgaged property for taxes under a levy is mandatory and not merely directory, and where no notice of the tax sale has been given the mortgagee of a duly registered mortgage, his right to the possession of the property is superior to that of the purchaser at the tax sale, but his possession is solely for the purpose of foreclosing the mortgage by sale of the property, and: *Semble*, the proceeds from the foreclosure sale should be applied to reimburse the purchaser at the tax sale for the amount of taxes paid by him before they are applied on the mortgage debt. *Machine Works v. Hubbard*, 723.

TELEPHONE COMPANIES (Admissibility of testimony of telephone conversations see Evidence D d).

A Regulation and Operation.

a In General

1. A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay, and having facilities for knowing which of its customers make long distance calls and for collecting the tolls from them on its own responsibility, etc., is a public-service corporation and comes within the provisions of C. S., 1035(2) giving jurisdiction over it to the Corporation Commission, and such company may not discriminate among its subscribers as to the conditions upon which it will render service to them. *Horton c. Tel. Co.*, 610.

d Service and Regulations Relating Thereto

1. Where a person applies to a local telephone company for service and pays the usual installation fee and complies with the general requirements of the company for the installation of such service, and the telephone company, after giving its receipt for the installation charges, demands that the applicant make a deposit in a certain amount as a guarantee for payment of future service, and it appears that the demand for such deposit was made under a rule

TELEPHONE COMPANIES A *d—Continued.*

of the management that the deposit should be required of those considered bad credit risks, and that the rule had never been authorized by the directors of the corporation, and was made without the knowledge or consent of the Corporation Commission, and that it had been enforced against only a few individuals out of the company's many subscribers: *Held*, the rule is an unlawful discrimination among its customers by a public-service corporation, and mandamus will lie to compel the company to install its service without the payment of such deposit. *Horton v. Tel. Co.*, 610.

TORTS (Of Municipal Corporations see Municipal Corporations E; particular torts see Negligence, Railroads, Physicians and Surgeons, and particular titles of torts).

B Joint Torts.

b Liability of Parties and Right to Contribution

1. Liability of employer under Compensation Act is exclusive and he may not be held liable as joint *tort-feasor*. *Brown v. R. R.*, 256.

2. Where the personal representative of a deceased employee sues the insurance carrier for injuries alleged to have been caused by the malpractice of a physician furnished by the insurer to treat the employee after his injury, and the physician is made a party defendant and the insurer in its cross-complaint contends that if the physician was negligent such negligence was primary and that the insurer was secondarily liable only and would be entitled to contribution: *Held*, the physician's demurrer to the cross-complaint of the insurer was properly sustained, the employer and insurer being primarily liable for such malpractice under the Compensation Act, and the physician and insurer not being joint *tort-feasors* within the meaning of C. S., 618. *Hoover v. Indemnity Co.*, 655.

TRAINED NURSES see Hospitals D.

TRESPASS—by firing adjacent land see Negligence A c 4.

TRIAL (Of particular actions see Particular Titles of Actions).

A Time of Trial, Notice and Preliminary Proceedings.

b Continuance

1. Upon proper, uncontradicted affidavits and certificates the trial court may grant continuance for illness. *Abernethy v. Trust Co.*, 46.

2. But court's refusal of motion for continuance is final in absence of gross abuse of discretion. *S. v. Rhodes*, 101.

3. Upon the exercise of the trial judge of his discretionary power of withdrawing a juror and continuing the case, his order that the defendant pay into court an amount in excess of the plaintiff's demand affects a substantial right and is erroneous, and in this case the judgment is modified and affirmed. *Greer v. Bank*, 220.

B Reception of Evidence.

f Admission of Evidence for Restricted Purpose

1. Exception to corroborative testimony will not be sustained when no request that it be restricted is made. *Smith v. Granite Co.*, 305.

TRIAL—*Continued.*

D Taking Case or Question from Jury.

a Nonsuit (In action for injuries in accident at crossing see Railroads D b 1; in action for damages from automobile collision see Highways B o; in criminal Law I j; in negligence actions see Negligence D c)

1. 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. *Pearson v. Sales Co.*, 14; *Almond v. Occola Mills, Inc.*, 97; *Sutton v. Herrin*, 599.

2. On motion of nonsuit only evidence favorable to the plaintiff will be considered. *Smith v. Granite Co.*, 305.

3. Where the evidence raises only a mere suspicion or conjecture of the issue to be proved it is insufficient to be submitted to the jury. C. S., 567. *Sutton v. Herrin*, 599.

4. The principle upon which a party may not take a voluntary nonsuit where a counterclaim has been filed does not arise under the facts of this case. *Killian v. Chair Co.*, 23.

5. Where on the admissions in the pleadings the plaintiff is entitled to recover any amount it is error for the trial court to dismiss the action as in case of nonsuit, and the fact that the defendant had tendered the amount admitted to be due with interest and cost to the time of filing answer, C. S., 896, and had paid it into court subject to the plaintiff's order does not vary this result. *Penn v. King*, 174.

6. Where the defendant moves for judgment as of nonsuit at the close of the plaintiff's evidence and at the close of all the evidence, and the court reserves his rulings on the motions until after verdict, upon the rendition of a verdict in the plaintiff's favor the court is without authority to set aside the verdict for insufficiency of the evidence as a matter of law, and grant the motion for judgment as of nonsuit made at the close of all the evidence. C. S., 567. *Batson v. Laundry*, 560.

7. Where the defendant in a civil action does not comply with the provisions of C. S., 567, in making a motion for judgment as of nonsuit he waives the question of the sufficiency of the evidence. *Harris v. Buie*, 634.

b Directed Verdict

1. Where the evidence is conflicting the court may not direct a verdict in favor of the party having the burden of proof, but where the facts are admitted or established, and only one inference can be drawn therefrom, a directed verdict may be given. *Somersette v. Stanaland*, 685.

c Issues of Fact in General

1. Where the identity of an automobile in a collision as the one covered by an accident indemnity policy is the determinative question involved at the trial, the issue is for the jury under conflicting evidence, and its verdict thereon is determinative. *Rudd v. Casualty Co.*, 779.

TRIAL—*Continued.*

E Instructions.

b Expression of Opinion by the Court

1. Where, in an action by a married woman to set aside a deed of trust on the ground that her private examination had not been taken to the deed, the trial court instructs the jury that the statute requiring her private examination "should be abolished, because it is not necessary now. A woman would not do anything she did not want to do": *Held*, the instruction contains such an expression of opinion by the court as to an essential fact involved as to be condemned by C. S., 564, and a new trial will be granted. *Abernethy v. Trust Co.*, 46.

c Form, Requisites and Sufficiency of Instructions

1. Where the charge of the trial court fails to state the evidence of a party relative to a material point and which directly bears on the amount recoverable, a new trial will be awarded when prejudice is shown for the failure of the charge to comply with the provisions of C. S., 564, requiring that the trial court shall state in a plain and correct manner the evidence given in the case. *Myers v. Foreman*, 246.

2. Where, in an action by an employee for a negligent personal injury, the trial court has correctly charged the law applicable to the facts on the issues of negligence, contributory negligence, and has fully charged the law relating to the question of proximate cause, the defendant's exception to the failure of the court to repeat in other parts of the charge the law of proximate cause will not be held for error, the charge being correct when taken as a whole. *Smith v. Granite Co.*, 305.

3. Where the trial court in his charge to the jury explains the law applicable and gives the contention of the parties, but fails to instruct the jury as to the application of the law to the substantial features of the case, the charge is insufficient to meet the requirements of C. S., 564, and a new trial will be awarded. *Comr. of Banks v. Mills*, 569.

F Issues.

a Form and Sufficiency in General

1. Error will not be found on appeal to issues submitted to the jury by the trial court when they present to the jury proper inquiries as to all the essential or determinative matters in dispute, and where a party contends that the issues submitted were improper he should tender other issues for the consideration of the trial court. *Ingle v. Green*, 116.

2. Only issues of fact arising upon the pleadings which are determinative of the rights of the parties must be submitted to the jury, C. S., 519, and where the only controverted fact has no bearing on the rights of the parties, judgment may be rendered on the pleadings upon the facts admitted. *Jeffreys v. Ins. Co.*, 368.

TRIAL—*Continued.*

G Verdict (In criminal cases see Criminal Law I k).

a Setting Aside Verdict

1. After reserving rulings on motions of nonsuit court may not set aside verdict for insufficiency of evidence as a matter of law. *Batson v. Laundry*, 560.

b Form and Sufficiency of Answers to Issues

1. A verdict will be liberally construed in connection with the pleadings, the evidence and the charge of the court with a view of sustaining it if this can be done by a reasonable interpretation. *Guy v. Gould*, 727.

d Polling Jury

1. It is the duty of the trial judge to receive the verdict of the jury duly returned into court and to grant a motion aptly made to poll the jury, but the jury must be polled by the judge himself or the clerk under his supervision, and the only questions that may be asked are whether each juror assented to the verdict and still assented thereto, and where an attorney has been allowed to poll the jury and to ask questions beyond the proper scope of such inquiry a motion for judgment according to the verdict which had been duly returned into court as a unanimous verdict should be allowed. *Oil Co. v. Moore*, 708.

TRUSTS (Trust estate not subject to execution see Execution B c; trust estates created by will see Wills E h).

E Execution of Trusts.

a In General, Supervision of Courts

1. Where a trustee under a will is in doubt as to the proper method of managing the trust estate, and the question is of present or imminent urgency, he may apply to the courts for aid and direction in the execution of the trust. *Spencer v. McCleneghan*, 662.

UNIFORM DECLARATORY JUDGMENT ACT see Actions B c.

USURY—Contracts within usury laws of state in which executed see States A a 1.

VENDOR AND PURCHASER.

A Options in General.

b Agreements Constituting "Option"

1. Contract in this case held an option and did not create relationship of principal and agent. *Strowd v. Whitfield*, 732.

VERDICT see Trial G, Criminal Law I k.

WAREHOUSEMEN.

B Duties and Liabilities.

a Delivery Upon Demand

1. Where, in an action against a warehouse company to recover the value of cotton stored therein by the plaintiff which the defendant had refused to give up on demand, there is evidence that a third person had a lien thereon and that the warehouse receipt was issued

WAREHOUSEMEN B *a—Continued.*

in the name of and delivered to the lienor, the plaintiff contending that the receipt should have been issued in his name and delivered to the lienor for safe-keeping: *Held*, the exclusion of the warehouse receipt tendered in evidence by the defendant was error, the receipts being competent to show plaintiff's inability to obtain the cotton upon demand, chapter 168, Public Laws of 1919, and it would seem in the instant case that should the plaintiff recover the amount of damages should be reduced by the amount credited to his account by the lienor. *Northcutt v. Warehouse Co.*, 657.

WILLS.

C Requisites and Validity.

d Holographic Wills

1. A paper-writing in the testator's handwriting, dispositive on its face, with the name of the testator inserted therein in his own handwriting followed by the words "this being my will" is sufficient in form to constitute a holographic will, C. S., 4131. *In re Will of Rowland*, 373.

D Probate and Caveat.

a Probate and Caveat in General

1. Citation to those in interest is not necessary to the probate of a will in common form, the proceeding being *ex parte*, C. S., 4139 *et seq.*, and when probated the paper-writing is valid and operative as a will and may not be attacked collaterally, but any person interested in the estate or entitled under the will may institute caveat proceedings to declare the paper-writing invalid. C. S., 4158 *et seq.*, and where a paper-writing is offered for probate and is sufficient in form to constitute a will it is error for the clerk to refuse to admit it to probate on that ground. *In re Will of Rowland*, 373.

c Burden of Proof

1. In a caveat proceeding the trial court instructed the jury that if they should find by the greater weight of the evidence that the testator had sufficient mental capacity at the time of executing the paper-writing to understand the nature and character of the property disposed of, who were the objects of his bounty, etc., they should answer the issue in the affirmative, but if they found from the greater weight of the evidence that the contrary was true that they should answer the issue in the negative: *Held*, the instruction placed the burden of proof on the one issue on both parties simultaneously, and a new trial is ordered. The advisability of separating the issues when undue influence and mental incapacity are alleged is pointed out. *In re Will of Stallcup*, 6.

h Evidence

1. Where the validity of a will is attacked on the grounds of undue influence and fraud such grounds may be established by circumstantial evidence, and although the unnatural disposition of his property by the testator is not alone sufficient evidence of fraud and undue influence to be submitted to the jury, where there is other sufficient circumstantial evidence, it is a competent circumstance to be considered by the jury, the probative force being for them. *In re Will of Beale*, 618.

WILLS D *h—Continued.*

2. Where the testatrix, being married, devised all her property to her mother and brother to the exclusion of her husband and daughter, evidence tending to show that the brother employed a lawyer to draft the paper-writing, that she thought she was signing papers relating to paving assessments, that he claimed she had conveyed the property to him which she denied, and stated several times that she wanted her daughter to have her property at her death, that her husband, named as executor in the will, did not know of such instrument until after her death, and that the brother offered the will for probate without his knowledge: is *Held*, sufficient evidence to take the case to the jury on the issue of fraud and undue influence. *Ibid.*

3. Where the propounder and beneficiary of a will is charged with fraud and undue influence in its procurement, the fact that he did not take the stand as a witness may be regarded by the jury as a "pregnant circumstance" in considering the issue. *Ibid.*

i Instructions

1. Where upon the trial of a caveat to a will the court states the evidence in the case in a plain and correct manner and explains the law arising thereon, the instruction is a sufficient compliance with C. S., 564, and a party desiring subordinate elaboration in the charge should tender a request for special instructions. *In re Will of Beale*, 618.

E Construction and Operation.

b Estates and Interests Created

1. Where a testator devises certain lands to his son for life and then to the lawful heirs of his body, if any, and if none to C. and J., and their heirs equally, and the son has no children at the date of the probate of the will but afterwards has living children, and also thereafter purchases all the title and interest of C. and J.: *Held*, the son can convey the fee-simple absolute title. *Glenn v. Ashby, ante*, 244, *Williams v. R. R.*, 200 N. C., 771. *Hooker v. Forbes*, 364.

f Designation of Devisees and Legatees

1. Whether a clause is a residuary clause is not dependent upon any particular form of expression but upon the intention of the testator, and where a will provides that after the termination of a life estate that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among a specific class: *Held*, where the legacy of one of the class lapses by the death of the legatee prior to the testator's death, the amount of such legacy is thrown into the fund for distribution among the class named, and it does not go to the next of kin of the legatee. C. S., 4166. *Stevenson v. Trust Co.*, 92.

2. Where a testator provides that after the termination of a life estate that the whole estate be reduced to cash and, after the payment of certain specific legacies, divided among his brothers and sisters and the brothers and sisters of his wife, if living, and if not living to their legal representatives: *Held*, construing the context of the entire instrument, the meaning of the words "legal representatives" is "children" or "issue," and where one of the class is presumed

WILLS E *f—Continued.*

to be dead after absence of seven years, and leaves no children, the legacy to her lapses, and the amount thereof is thrown into the fund for distribution among the members of the class specified. *Ibid.*

h Estates in Trust

1. Where a will creates a trust for the benefit of the testator's wife and directs that the trustee shall pay her during her life a certain sum per month out of the rents and profits, or if the rents and profits are insufficient therefor that he sell so much of the estate as is necessary to make such monthly payments, and directs that after her death the rents and profits be paid to his children equally until the youngest shall attain the age of forty, and then the estate to be equally divided between them, or if not living at that time, to their issue, and the rents and profits are not sufficient for the monthly payments, and in a suit thereunder all persons interested in the estate are made parties, and the contingent remaindermen not *in esse* are properly represented by a guardian *ad litem: Held*, the court has jurisdiction to pass upon the question of the acceptance by the trustee of a contract tendered by the widow in which she agrees to accept a monthly payment in a sum less than that stipulated in the will upon the payment of a certain sum in cash, and its judgment directing the trustee to accept the contract to preserve the corpus of the estate for the administration of the trust is affirmed on appeal. *Spencer v. McCleneghan*, 662.

F Rights and Liabilities of Devisees and Legatees.

a General and Specific Bequests

1. A general legacy is one which is chargeable generally upon the testator's personal estate and which does not amount to a bequest of any specific part of the estate, while a specific legacy is a bequest of a particular thing or money specified and distinguished from all of the same kind, it being necessary to a specific bequest that the testator described the property as belonging to him. *Bost v. Morris*, 34.

2. The will of the testator bequeathed to a named legatee "ten thousand dollars in stocks in an incorporated company or companies to be selected by her, at its then par value" and a later item referred to the "rest and residue of my estate" etc.: *Held*, construing the will as a whole the testator unequivocally indicated his ownership of all the property, and manifested his intention that the stock should be selected out of those owned by him and not to be purchased on the open market "at their market value," and upon the exercise of the power of selection of the stock by the legatee the bequest was rendered specific and the legatee was entitled to all dividends declared thereon from the date of the testator's death, and *held further*, the amount of the dividends in the executor's hands being in excess of the inheritance tax, his assent to the legacy need not be postponed until the tax is paid by the legatee. *Ibid.*

b Nature of Rights and Titles in General

1. Action by bondholder to impress legacy with trust for payment of bond held properly dismissed, executor not being a party. *Sims v. Dalton*, 249.

WILLS F—*Continued.*

c Right of Devisee to Convey Property

1. Where a will devises all the testator's property to a trustee to be held by her until his youngest child should attain the age of twenty-one, and directs that the property should then be divided one-third to each of his two children in fee and one-third to his wife for life with remainder over to the children and another devisee: *Held*, the testator's children take a vested interest in the lands devised which they could convey by their deed under our rule that any interest in land may be conveyed including contingent interests and executory devises as distinguished from mere rights, expectancies or possibilities. *Patrick v. Beatty*, 454.

h Lapsed and Void Legacies

1. Where a testator leaves all his property real and personal to his wife for life, and directs that after her death that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among his brothers and sisters and the brothers and sisters of his wife, if living, and if not living, to their legal representatives: *Held*, where one of the brothers and the wife of such brother die prior to the death of the testator, and leave no children them surviving, the legacy as to them lapses they having acquired no interest under the will. *Stevenson v. Trust Co.*, 92.

WITNESSES (Character evidence see Criminal Law G c; impeaching and corroborating see Evidence D f).

B Examination.

a In General

1. It is a matter within the discretion of the trial court in a criminal prosecution to permit the State to call and examine witnesses subpœnaed by the defendant. *S. v. Lancaster*, 204.

WORKMEN'S COMPENSATION ACT see Master and Servant F.

WRONGFUL DEATH see Death B.

ZONING ORDINANCES see Municipal Corporations H b.